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RECONCILING CULTURES: FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT IN THE MIDDLE EAST & NORTH AFRICA

I. Introduction: Cultural Look at Corruption

The Foreign Corrupt Practices Act (FCPA) was written in 1977 to punish bribery of foreign officials.¹ While the law's basis has noble intentions, it can make day-to-day business practices in some regions of the world difficult. For example, in the Middle East bribery is commonplace and not always considered a corrupt or immoral practice.² Culturally, bribes are seen as part of the cost of doing business.³ Ernst & Young conducted the first *Middle East Bribery, Corruption and Fraud Survey* in which fifty-two percent of respondents said their company did not have a policy in place to report bribery or any other form of corruption.⁴ Corruption is so prevalent in the Middle East that even where a problem may not exist for a private corporation, one will be created and then be miraculously resolved by a government official.⁵

“Corruption is behavior of public officials, which deviates from accepted norms in order to serve private ends.”⁶ Corrupt and quasi-corrupt practices are accepted business customs in the MENA region because of the mere prevalence and necessity of bribery.⁷ Due to its commonality, it can be difficult to differentiate between what constitutes a gift as opposed to a bribe.⁸ In many Middle Eastern cultures, it is offensive to refuse a gift, and it is culturally expected to receive a

¹ See Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. LEE. L. REV. 229, 230 (1997).

² See Ernst & Young, *First Middle East Bribery, Corruption and Fraud Survey, Bribery Corruption and Fraud in the Middle East*, 4-5.

³ See *id.* at 4.

⁴ See *id.*

⁵ See *id.* at 5.

⁶ Agnieszka Klich, *Bribery in Economies in Transition: The Foreign Corrupt Practices Act*, 32 STAN. J. INT'L L. 121, 128 (1996).

⁷ See *id.* at 3.

⁸ See *id.*

gift in celebratory nature when it is time to award a contract.⁹ Due partially to culture and partially to lack of understanding, the line between a gift and bribe can be difficult to discern. Which leads to customs and cultural norms being misused to explain that the bribe was actually a gift.¹⁰

Throughout this paper I will discuss the origins of the FCPA, elements of the law, exceptions and affirmative defenses, and illustrate the notable aspects of the FCPA through SEC and DOJ enforcement actions arising in the Middle East. I will then offer possible explanations for corruption in the region and its links to conflict and instability. In conclusion of my analysis I will illustrate why the FCPA's mission is misplaced and anti-corruption coalitions or programs would better serve the region than extraterritorial laws, which do not hit at the root of the matter.

II. Definitions

The FCPA's objective is to monitor issuers (any entity that has a class of securities registered under Section 12),¹¹ domestic concerns, and "other persons who take any act in furtherance of the corrupt payment while within the territory of the United States" for corrupt practices regarding their international activities.¹² The law is invasive because it gives the federal government very broad jurisdiction over not just American companies, but also any company with securities registered on an American exchange, "domestic concerns," and companies required to report under Section 15(d).¹³

⁹ See Ernst & Young *supra* note 2 at 3.

¹⁰ See *id.*

¹¹ See *id.* at 239.

¹² See Robert W. Tarun, BASICS OF THE FOREIGN CORRUPT PRACTICES ACT: WHAT EVERY GENERAL COUNSEL, TRANSACTIONAL LAWYER AND WHITE COLLAR CRIMINAL LAWYER SHOULD KNOW 2 *available at* https://www.lw.com/upload/pubContent/_pdf/pub1287_1.pdf.

¹³ See *id.* at 1.

The law makes a strong moral statement to foreign and domestic audiences, condemning corrupt practices as morally blameworthy no matter where they may occur.¹⁴ On one side, America is acting as the world's watchdog by imposing its moral values on others.¹⁵ On the other, the law embraces the idea that it allows American companies to save face while working with foreign governments by giving them a scapegoat if they do not want to pay a bribe.

III. Where did the FCPA Come From?

Congress passed the FCPA in 1977 based on findings from the Securities and Exchange Commission (SEC) that the FCPA provisions would not hinder American participation in and with foreign business markets.¹⁶ The current draft of the FCPA includes amendments made in 1998 that expand the scope of personal jurisdiction to include “foreign firms and persons who cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the United States.”¹⁷

The FCPA is the result of an accumulation of corruption scandals that began to come to light at the beginning of the 1970s. Most notoriously was the Watergate Scandal in 1972; investigation into the Nixon Administration yielded evidence of their involvement in other illegal activities.¹⁸ The one that prompted the creation of the FCPA was overseas accounts the Nixon Administration created, which were used to fund illegal contributions to his political campaign and bribe foreign officials.¹⁹ This precipitated a crusade to combat corruption on American soil

¹⁴ See Kevin E. Davis, *Why Does the United States Regulate Foreign Bribery: Moralism, Self-interest, or Altruism*, 67 N.Y.U. ANN. SURV. AM. L. 497, 497 (2011-2012);

¹⁵ See Charles F. Smith & Brittany D. Parling, “*American Imperialism*”: A Practitioner’s Experience with Extraterritorial Enforcement of the FCPA, U. CHI. LEGAL F. 237, 253 (2012).

¹⁶ See Davis *supra* note 14 at 501 & 504.

¹⁷ *Foreign Corrupt Practices Act: An Overview*, DEPARTMENT OF JUSTICE, <http://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act> (last visited Nov. 29 2015).

¹⁸ See Travis Albea, *The Foreign Corrupt Practices Act: The Evolution of Enforcement*, CAMPBELL LAW OBSERVER (January 15, 2015), <http://campbelllawobserver.com/the-foreign-corrupt-practices-act-the-evolution-of-enforcement/>.

¹⁹ See Davis *supra* note 14 at 498.

by regulating American citizens' and foreign firms' interactions with international enterprises and governments. The SEC went so far as to say that the law would have a positive economic effect for the United States.²⁰

The FCPA was not stringently enforced for the first thirty years.²¹ In 2004, the SEC and Department of Justice (DOJ) started to enforce the FCPA more systematically.²² Between 2004 and 2006, enforcement of the FCPA increased with the SEC and DOJ filing thirty-two cases.²³ The sharp upward and ever-increasing trend in enforcement of the FCPA continued, and in the period between 2007 and 2009, the SEC and DOJ filed 111 FCPA enforcement actions.²⁴ This is "almost twice as many [actions,] as the first twenty-eight years the statute was in force."²⁵ It was not just the enforcement rate that increased, but so too did the penalties. In 2008, the federal government brought \$885 million worth of penalties in FCPA enforcement actions.²⁶ The House has found that the FCPA's anti-corruption agenda embodied domestic values and fostered economic development, trade liberation, and achieved a level playing field for businesses internationally.²⁷

IV. What is the FCPA?

The FCPA consists of two provisions: the anti-bribery provision and the accounting provision, also referred to as the books and records provision.²⁸ These provisions are the crux of the FCPA and are enforced by different agencies, the SEC and DOJ. An issuer is defined as any

²⁰ *See id.* at 501.

²¹ *See Smith & Parling supra* note 15 at 237.

²² *See Albea supra* note 18.

²³ *See id.*

²⁴ *See id.*

²⁵ *Id.*

²⁶ *See id.*

²⁷ *See Davis supra* note 14 at 504.

²⁸ *See Smith & Parling supra* note 15 at 238-39.

entity that has a class of securities registered under Section 12.²⁹ Section 12 encompasses all the companies that have debt or equity securities listed on an exchange, like the New York Stock Exchange or the NASDAQ, or a company that is required to file reports under Section 15(d) of the Securities Exchange Act of 1934.³⁰ Section 15(d) encompasses companies who have issued debt or equity securities in a registered offering, but are not listed on a securities exchange or do not meet the size requirement under section 12(g).³¹

The scope of an issuer under the FCPA does not only apply to American companies. A foreign company can be an issuer if they have filed securities on an American exchange or are required to report under Section 15(d).³² Nor does a company need to violate both provisions of the FCPA because charges under the FCPA can be brought for violating only one provision. How the penalties are applied depend on the provisions that were violated.³³ The accounting provision or the “books and records” provision applies to all issuers, foreign and domestic, but the anti-bribery provision applies to only “[American] persons and certain foreign issuers of securities.”³⁴ Defining who is a “certain foreign issuer” is within the broad powers granted to the DOJ and is elusive.³⁵ With the 1998 amendments, the FCPA now more broadly encompasses “foreign firms and persons” who further a corrupt payment in America.³⁶ The FCPA is made up of two provisions: the anti-bribery provision and the books and record provision.

1. The Anti-Bribery Provision

The anti-bribery provision prohibits

²⁹ *See id.* at 239.

³⁰ *See* Smith & Parling *supra* note 15 at 239.

³¹ *See* Section 15(d) Filer *supra* note 29.

³² *See* Smith & Parling *supra* note 15 at 239.

³³ *See generally id.*

³⁴ *See id.*

³⁵ *Accessing the U.S. Capital Markets: A Brief Overview for Foreign Private Issuers*, SECURITIES AND EXCHANGE COMMISSION <https://www.sec.gov/divisions/corpfin/internatl/foreign-private-issuers-overview.shtml> (last visited March 1, 2015).

³⁶ *Id.* at 239.

“any [1] offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, [2] while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, [3] to a foreign official in his or her official capacity, [4] induce the foreign official to do or omit to do an act in violation of his or her lawful duty, [5] or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to any person.”³⁷

The basis of the anti-bribery provision is to “prohibit corrupt payments to foreign officials [from a company with securities registered in America, in order to] obtain or retain business.”³⁸ The anti-bribery provision is broad in scope and has many ambiguous elements from which a violation can be realized.³⁹ Where the code does not define the ambiguous terms, courts have taken to clarify the ambiguities.⁴⁰ However, the courts have interpreted the rule in such a way that leaves broad discretion in interpretation and application to the SEC and DOJ.

a. A Corrupt Act

The payment to the foreign official must be corrupt to constitute a FCPA violation.⁴¹ A corrupt act is voluntary and intentional “with the [] purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.”⁴² Legislative history shows that a corrupt payment is “one that induces a foreign official to misuse his office” through assisting the company to unfairly advance its business.⁴³ The definition for a foreign official within the meaning of the FCPA is any officer or employee of a foreign government or

³⁷ DEPARTMENT OF JUSTICE *supra* note 17.

³⁸ Michael E. Clark, *Evaluating and Minimizing the FCPA Risks When Conducting Business in Emerging Markets*, 54 PRAC. LAW. 59, 59 (2008).

³⁹ *See generally* 15 U.S.C. §§ 78dd-1.

⁴⁰ *See U.S. v. Kay infra* note 45.

⁴¹ *See Tarun supra* note 12 at 3.

⁴² *Id.*

⁴³ 15 U.S.C. § 78dd-1.

international government, agency, department, or instrumentality thereof, as well as, any political party or party official.⁴⁴

b. To Obtain or Retain Business

The meaning of “obtain or retain business” is not explicitly defined in the statute.⁴⁵ It is clear that the definition includes the payment of a bribe to secure a government contract.⁴⁶ The Fifth Circuit has expanded the scope of “obtain or retain business” by holding that even payments outside of directly securing a government contract can qualify as an FCPA violation.⁴⁷ The court noted that it should be assessed on a case-by-case basis, this is likely because payments outside of directly securing a government contract will sometimes qualify as facilitation payments.⁴⁸ The necessity to have facilitation payments assessed on a case by case basis shows a new skeptical trend towards exceptions to the ridged rules of the FCPA. Typically, if a payment would lower a company’s cost of doing business in the country, it can prove unfairly “obtain[ing] or retain[ing] business.”⁴⁹

While “anything of value” includes cash and cash equivalents, the definition reaches tangible and intangible property, like scholarships, intellectual property, promises of employment contracts, and loans.⁵⁰ Actual knowledge that a corrupt payment is being made is not required because constructive knowledge is enough to create liability under the FCPA.⁵¹ Constructive knowledge is where one should reasonably know that a corrupt payment is being

⁴⁴ See Veronica Foley & Catina Haynes, *The FCPA and its Impact in Latin America*, 17 CURRENTS INT’L TRADE L.J. 27, 29 (2009).

⁴⁵ See 15 U.S.C. § 78dd-1.

⁴⁶ See *id.*

⁴⁷ See *U.S. v. Kay*, 359 F.3d 738, 748 (5th Cir. 2004).

⁴⁸ See *U.S. v. Kay*, 359 F.3d 738, 748 (5th Cir. 2004).

⁴⁹ See *id.* at 747-49.

⁵⁰ See Tarun *supra* note 12 at 4.

⁵¹ See Foley & Haynes *supra* note 44 at 29.

made, which includes a person who is “willfully blind or deliberately ignorant” that a payment is being made.⁵²

2. The Books and Records Provision

The “books and records” or accounting provision applies to all issuers and can reach to their subsidiaries.⁵³ The accounting provision’s purpose is to ensure that a company’s books, records, and accounts are kept in reasonable detail that “accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”⁵⁴ It is the threshold that a company’s financial officer must meet for FCPA compliance.⁵⁵ Companies comply through the use of expensive mandatory internal controls to maintain integrity in financial reporting.⁵⁶ American exchanges are losing listings from foreign companies because FCPA compliance is costly and companies do not want to take on the burden.⁵⁷ Delisting does not necessarily imply that a company intends to pay bribes; it just means that they do not want the risk of liability or the regulatory cost of compliance.⁵⁸

a. Example:

i. Weatherford International- Failing to implement internal controls.

Weatherford is a Swiss company traded on the New York Stock Exchange, thus subject to FCPA jurisdiction.⁵⁹ The company was charged for failing to establish effective internal

⁵² *Id.*

⁵³ *See* THE FCPA: ACCOUNTING PROVISIONS, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT ACT 42-43 (2012).

⁵⁴ *Id.* at 39.

⁵⁵ *See id.* at 39-40.

⁵⁶ *See id.* at 40; Smith & Parling *supra* note 15 at 239.

⁵⁷ *See* Smith & Parling *supra* note 15 at 254.

⁵⁸ *See id.*

⁵⁹ *See Three Subsidiaries of Weatherford International Limited Agree to Plead Guilty to FCPA and Export Control Violations* DEPARTMENT OF JUSTICE <https://www.justice.gov/opa/pr/three-subsidiaries-weatherford-international-limited-agree-plead-guilty-fcpa-and-export> (released Nov. 26, 2013).

controls that “detect and prevent corruption” and the resulting corrupt practices.⁶⁰ Without the proper internal oversight, its subsidiary, Weatherford Oil Tools Middle East Ltd. (WOTME) granted volume discounts to a distributor who supplied the nationalized oil company.⁶¹ The DOJ suspected that \$15 million in discounts had been applied to the distributor and the difference went to a fund to pay kickbacks to officials in the national oil company.⁶²

WOTME also engaged in corrupt conduct in relation to the United Nations’ Oil for Food Program where WOTME paid about \$1.5 million in kickbacks to the Iraqi government in exchange for nine contracts to provide the equipment necessary for drilling and refining oil.⁶³ The company concealed these kickbacks by falsely recording them as various costs and fees and by inflating contract prices by 10%.⁶⁴ It is estimated that Weatherford earned about \$55.5 million in profits from their corrupt behavior in Iraq as well as other schemes in Africa.⁶⁵ The Weatherford investigation started off rocky because the company essentially thumbed its nose at the DOJ and SEC, but when they started to see how pervasive the corruption was then they began to comply.⁶⁶ The Company’s conduct cost it \$252.6 million.⁶⁷

b. The SEC and DOJ enforce the FCPA.

The SEC and DOJ are responsible for enforcing different provisions and penalties of the FCPA.⁶⁸ The SEC can bring civil suits over violations of the anti-bribery provision and the record keeping provision.⁶⁹ The SEC has jurisdiction over issuers, including an issuer’s

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² *See id.*

⁶³ *See id.*

⁶⁴ *See id.*

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ *See* FCPA PROFESSOR, *FCPA 101*, <http://www.fcprofessor.com/fcpa-101#q12> (last visited Dec. 2, 2015).

⁶⁹ *See id.*

employees and agents.⁷⁰ The DOJ is responsible for the criminal enforcement of the anti-bribery provision and willful violations of the “books and records” provision.⁷¹ The DOJ has jurisdiction over issuers, domestic concerns, and “persons other than issuers and domestic concerns.”⁷² Alternatively, the U.S. could defer to that country’s anti-bribery enforcement process wherever the violation took place.⁷³

V. Liability under the FCPA is broad.

Liability under the FCPA is broad. A parent company with fifty percent or less control of a subsidiary or an affiliate can still be held accountable for its actions. As such the parent company is not exempted from applying a good-faith effort to maintain internal accounting controls of its subsidiary because the parent company can be penalized if the subsidiary engages in corrupt practices.⁷⁴ This broad liability for parent companies has severe implications because they can be held liable for its subsidiary’s misconduct despite having a very small stake in the operations of the subsidiary or affiliate.⁷⁵ Resultantly, the parent company has an incentive to utilize expensive controls for greater oversight of its subsidiaries and affiliates to ensure they are in compliance with the FCPA, just as the parent is.

FCPA violations are punished criminally, civilly, or both. Both companies and individuals, who violate the FCPA’s provisions, can face criminal sanctions.⁷⁶ The criminal penalty for a company is a maximum fine of \$2 million per violation of the anti-bribery provision or the statutory maximum fine, which is “the greater of twice the gross gain or twice

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *See id.*

⁷³ *See Smith & Parling supra* note 15 at 257.

⁷⁴ *See FCPA Resource Guide supra* note 53 at 43- 45.

⁷⁵ *See id.* at 43.

⁷⁶ *See Foley & Haynes supra* note 44 at 30.

the gross loss.”⁷⁷ Individually, a willful FCPA violation of the anti-bribery provision warrants up to a \$250,000 fine per violation or “up to twice the amount of the gross gain or loss derived from the offense and imprisonment for up to five years.”⁷⁸

If a company willfully violates “the FCPA’s accounting provision[,] they can be fined up to \$25 million or twice the amount of the gross gain or loss derived from the offense.”⁷⁹ Individuals who willfully violate the accounting provisions of the FCPA can be subject to fines of \$5 million and up to twenty years of imprisonment.⁸⁰ Further, criminal fines imposed on individuals must be paid by the individual and cannot be paid by his company or principal.⁸¹ The FCPA is written in such a way to encourage, not only corporations, but individuals who possess decision-making capabilities to avoid behaviors that would constitute corrupt practices.

Companies and individuals can also be held civilly liable for FCPA violations.⁸² Civil penalties include: “monetary penalties, disgorgement of fees, and injunctive relief.”⁸³ Fines are imposed if a company, or any officer, director, employee, agent or stockholder acting on behalf of the firm has at least constructive knowledge of the violation under the FCPA anti-bribery provision.⁸⁴ Civil fines are not more than \$10,000.⁸⁵ Constructive knowledge (something that a reasonable person would have known based on the facts) is enough to violate the FCPA. For example, an individual can violate the books and records provisions if they sign quarterly and/or annual statements that contain falsified information to cover up corrupt payments, even if he

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *See id.*

⁸¹ *See id.*

⁸² *See id.* at 30-31.

⁸³ *Id.*

⁸⁴ *See id.* at 31.

⁸⁵ *See id.*

does not have actual knowledge of the corrupt payments appearing in the books.⁸⁶ If the CFO or other executive should have realized, due to their experience, that the numbers were off, they have constructive knowledge and thus could be charged with an FCPA violation. The court has discretion to impose additional fines in an SEC enforcement action.⁸⁷ For individuals, this fine can range from \$5,000 to \$100,000 and for a company, the fine can range from \$50,000 to \$100,000.⁸⁸

1. Examples: Alcoa & PBSJ

a. Alcoa World Alumina LLC- Liability for a subsidiary's actions.

Alcoa World Alumina LLC (Alcoa World), an Australian subsidiary of Alcoa, Inc. hired a London-based *wasta*⁸⁹ who had close ties to the Bahraini royal family.⁹⁰ With the purpose to use him as a money launderer and to “negotiate” a new contract with the Bahraini national aluminum extraction company, Alba.⁹¹ Alba was a nationalized company and some of the royal family had a stake in Alba and other Alba employees are considered foreign officials.⁹² Alba was one of Alcoa World’s largest customers making up 77% of their sales.⁹³ The new agreement marked up the aluminum sales from Alcoa World to Alba by \$188 million within four years.⁹⁴ The money from the mark up was used to pay the Bahraini royal family and government

⁸⁶ See U.S. DEPARTMENT OF JUSTICE & THE U.S. SECURITIES AND EXCHANGE COMMISSION, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 44 *available at* <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>

⁸⁷ See Foley & Haynes *supra* note 44 at 31.

⁸⁸ See *id.*

⁸⁹ *Wasta* is the Arabic term for connections and typically includes agents, brokers, or officials. This concept is discussed *infra* part VII.

⁹⁰ See U.S. DEPARTMENT OF JUSTICE, *World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay \$223 Million in Fines and Forfeiture*, <https://www.justice.gov/opa/pr/alcoa-world-alumina-agrees-plead-guilty-foreign-bribery-and-pay-223-million-fines-and> (Jan. 9, 2014).

⁹¹ See *id.*

⁹² See SECURITIES AND EXCHANGE COMMISSION, *SEC Charges Alcoa with FCPA Violations*, <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936> (March 2014).

⁹³ See U.S. DEPARTMENT OF JUSTICE *supra* note 90.

⁹⁴ See *id.*

officials.⁹⁵ The *wasta* and the royal family used foreign bank accounts traced back to Switzerland, Luxembourg, and Liechtenstein to help muddy the trail of the bribes paid to the *wasta* and later the royal family.⁹⁶

Alba turned on Alcoa World in 2008 and sued Alcoa World for bribing Alba officials and overcharging for raw materials.⁹⁷ The SEC began to investigate Alcoa after Alba's allegations filed in a lawsuit regarding Alcoa's conduct in Bahrain.⁹⁸ Alcoa settled with Alba without admitting liability; however, the SEC and DOJ did not let their investigation go. Alcoa World Alumina LLC made the fifth largest settlement and third largest disgorgement of all FCPA cases to date.⁹⁹ Alcoa World paid a \$209 million criminal fine and "forfeited" \$14 million to settle the DOJ's charges.¹⁰⁰ The parent of Alcoa World, Alcoa, Inc. paid a disgorgement of \$175 million.¹⁰¹ Alcoa, Inc. had more than a fifty-percent stake in Alcoa World hence their vicarious liability for its subsidiary's actions in Bahrain.

b. PBSJ International Corporation- Leniency for self-reporting corrupt payments.

Cooperating with the investigation or self-reporting a violation can yield more lenient charges from the SEC and DOJ.¹⁰² PBSJ Corporation discovered corrupt payments on its books and self-reported the violations and worked with the SEC during discovery to remedy the situation.¹⁰³ Taking responsibility for a lapse in oversight pays off when working with the

⁹⁵ See SECURITIES AND EXCHANGE COMMISSION *supra* note 91.

⁹⁶ See U.S. DEPARTMENT OF JUSTICE *supra* note 90.

⁹⁷ See Julie DiMauro, *Alcoa settles FCPA charge, pays \$384 million to DOJ, SEC*, FCPA BLOG, <http://www.fcablog.com/blog/2014/1/9/alcoa-settles-fcpa-charge-pays-384-million-to-doj-sec.html> (Jan. 9, 2014).

⁹⁸ See *id.*

⁹⁹ See SECURITIES AND EXCHANGE COMMISSION *supra* note 91.

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² See SECURITIES AND EXCHANGE COMMISSION, *SEC Charges Former Executive at Tampa-Based Engineering Firm with FCPA Violations*, <https://www.sec.gov/news/pressrelease/2015-13.html> (Jan. 22 2015).

¹⁰³ See *id.*

government because they save resources when investigating claims and thus are more likely to show a degree of mercy when deciding what charges they want to bring.

An employee of the PBSJ International (PBSJ Int'l), an engineering firm, arranged to bid on two Qatari projects through a partnership with a local subcontractor.¹⁰⁴ PBSJ discovered that the local subcontractor was owned by a Qatari official. The purpose of the local contractor was to funnel funds to the foreign official.¹⁰⁵ The local subcontractor would pay the Qatari official 40% of the projects profits, as well as, half the salary of the Qatari official's wife, as she worked for the local subcontractor.¹⁰⁶ In return, the Qatari official gave PBSJ confidential information that would allow PBSJ to succeed in winning bids on contracts with the government of Qatar.¹⁰⁷

Self-reporting violations does not let the company off the hook, though it does lessen the penalties incurred.¹⁰⁸ The SEC and DOJ want companies to recognize that they must be responsible for their internal controls, but they also want to encourage companies to step forward if there is a snafu. In line with this reasoning, the SEC asserted that PBSJ should have noted the "significant red-flags, including the fact that PBSJ Int'l was being given confidential bid information; the fact that Hatoum [the *wasta*] described the [Qatari] Official as a good friend; and the fact that one official was aware that one of the employees of the local [subcontractor] was the [Qatari] official."¹⁰⁹ As a result of vicarious liability, the corporate parent of PBSJ Int'l, WS Atkins, paid \$3,407,875.¹¹⁰ The SEC also charged the *wasta*, Hatoum, individually for

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ See FCPA PROFESSOR, *SEC Gets Creative in Brining its First FCPA Enforcement Action of 2015*, <http://fcpaprofessor.com/category/qatar/> (last visited Dec. 2, 2015).

¹⁰⁷ See SECURITIES AND EXCHANGE COMMISSION *supra* note 102.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

violating the books-and-records, and internal controls provisions of the FCPA, for which he was responsible for paying \$50,000.¹¹¹

VI. Exception to the Rule: Facilitation Payments or “Grease Payments”

In the Middle East, bribes are an accepted practice of doing business.¹¹² They are so common that American firms would be at an unfair advantage if they were not able to use alternative means to incentivize officials to expedite the bureaucratic processes a business faces in the Middle East.¹¹³ Paying bribes to speed up and secure documents, such as certificates, licenses, and other authorizations that you would have received anyways, are called facilitation payments and the practice is prevalent in the Arab World.¹¹⁴ The FCPA recognizes this competitive necessity for foreign businesses in the Middle East and an exception for facilitation payments or “grease payments” has been accommodated under the FCPA.¹¹⁵

The exception defines facilitation payments as a payment to a foreign official, political party, or party official that expedites or secures performance of a routine government action of the foreign official, political party, or party official.¹¹⁶ The key to this exception is “routine government action,” which means a course of action that the government official would be taking anyways, where the official is not taking any discretionary action; but the payment moves the process more quickly.¹¹⁷ This exception is an important attempt to reconcile the stringent application of the FCPA with the stark reality that bribery can be the only way to get things done efficiently in some parts of the world, including the Middle East and North Africa (MENA).¹¹⁸

¹¹¹ *See id.*

¹¹² *See* Ernst & Young *supra* note 2 at 2.

¹¹³ *See* Klich *supra* note 6 at 129 (discussing the bureaucratic roadblock in Russia leading to the use of bribery).

¹¹⁴ *See* Ernst & Young *supra* note 2 at 4.

¹¹⁵ *See* Foley & Haynes *supra* note 44 at 30.

¹¹⁶ *See* Klich *supra* note 6 at 125.

¹¹⁷ *See* Tarun *supra* note 12 at 6.

¹¹⁸ *See* Klich *supra* note 6 at 125.

Without the facilitation payment exception, FCPA-regulated companies would be disadvantaged when applying for permits and contracts or getting the electricity turned on in the MENA region.¹¹⁹ If facilitation payments were not excepted under the FCPA there would be greater consequences, not only for the regulated companies, but such a measure would also stunt development and economic growth in a region that relied on foreign investment to provide many local jobs and economic support. Facilitation payments are necessary in the Middle East to bypass bureaucratic red tape, which severely impedes processing times and makes applications, licenses, and other permits for a business nearly impossible to secure without a payment.¹²⁰ This is not to say a company can pay a bribe and get a permit they would not have otherwise gotten without the bribe, but that the company would have eventually received the permit but by paying the bribe they just get it more quickly.

Facilitation payments are so prevalent and widely accepted, seventy-one percent of respondents in the Middle East survey did not know if facilitation payments even constituted bribery and thought the payments were not illegal.¹²¹ Because of their frequency, facilitation payments have become an expected and accepted business practice.¹²² Business culture in MENA has become so adept to facilitation payment that many companies think some things cannot be done without a facilitation payment.¹²³ Facilitation payments are frequently used when registering land to speed up processing times.¹²⁴ This process is very cheap across much of MENA, but processing times can be notoriously long.¹²⁵ In Egypt registering land can take a

¹¹⁹ *See id.*

¹²⁰ *See id.* at 129.

¹²¹ *See* Ernst & Young *supra* note 2 at 4.

¹²² *See id.* at 5.

¹²³ *See id.*

¹²⁴ Registering Property, DOING BUSINESS, <http://www.doingbusiness.org/data/exploretopics/registering-property> (last visited Dec. 4, 2015).

¹²⁵ *id*

minimum of sixty-three days, which is more than twice as long as the MENA regional average.¹²⁶

Many of the processes required to start and sustain a business are cumbersome and inefficient in the Middle East.¹²⁷ It is because of this inefficiency that it is easier to make a facilitation payment than it is to manipulate the continuous bureaucratic confusion of securing governmental approvals and licenses.¹²⁸ Often it is not even the processing times that are most frustrating, it is the disjointed organizational structure of government offices and the lack of communication between them. In Egypt, you would have to go to three different buildings in different parts of Cairo to obtain the necessary stamps, forms, or other approvals before you get to the building where you submit the final form the Ministry requires. But it is not even that easy. Building 1 may not have anymore stamps that day, so they tell you to come back tomorrow. Or Building 2 does not like where the person at building 1 stamped your form for verification, so he has to talk to his supervisor to make sure it is ok, come back in a few hours and it may be done or maybe it will be done tomorrow.

The process is so disjointed that facilitation payments create efficiency for many businesses that have to work with governmental departments to obtain approvals in the import/export process, to secure construction permits, and to get electricity and water turned on in an efficient time. Egyptian citizens find it difficult to manage the bureaucracy without paying bribes.¹²⁹ It follows that a foreign entity that can more easily afford to pay a bribe and lacks the

¹²⁶ See Egyptian Land Administration, BUSINESS ANTI-CORRUPTION PORTAL, <http://www.business-anti-corruption.com/country-profiles/middle-east-north-africa/egypt/land-administration.aspx> (last visited Dec. 4, 2015); Registering Property, DOING BUSINESS, <http://www.doingbusiness.org/data/exploretopics/registering-property> (last visited Dec. 4, 2015).

¹²⁷ See Egyptian Customs Administration, BUSINESS ANTI-CORRUPTION PORTAL, <http://www.business-anti-corruption.com/country-profiles/middle-east-north-africa/egypt/customs-administration.aspx> (last visited Dec. 2, 2015).

¹²⁸ See *id.*

¹²⁹ See Ernst & Young *supra* note 2 at 4.

patience needed to deal with the burdensome bureaucracy is more likely to make a facilitation payment out of frustration simply due to its ease.¹³⁰

VII. Affirmative Defenses

The FCPA allows for an affirmative defense in two circumstances: the first being when the payment, gift, offer, or promise of anything of value is lawful under the written laws and regulations of the foreign official's country; the other being when the payment, gift, offer, or promise of anything of value is a bona fide business expense.¹³¹ While in theory these circumstances should allow for the use of an affirmative defense, "affirmative defenses [are]... useless in practice" due to how seldom they relieve a company of its obligations to comply with the FCPA¹³²

1. Affirmative defense when the payment is legal under the other country's laws.

The first circumstance in which an affirmative defense may apply is when the payment is legal under the written laws of the other country.¹³³ A company may not rely on the customs, local practice, or unwritten policies of a country to determine if a payment, gift, offer, or anything of value is legal.¹³⁴ The SEC stipulates that the payment must be allowed in writing under the other country's law or the affirmative defense is null.¹³⁵

2. Affirmative defense for a bona fide business expense.

¹³⁰ See THE WORLD BANK, *Egypt: Too Many Regulations Breed Corruption*, (Dec. 11, 2014), <http://www.worldbank.org/en/news/feature/2014/12/09/egypt-bureaucracy-regulations-and-lack-of-accountability-inspire-corruption>.

¹³¹ See Office of Investor Education and Advocacy, *Investor Bulletin: The Foreign Corrupt Practices Act-Prohibition of the Payment of Bribes to Foreign Officials*, 2 SECURITIES AND EXCHANGE COMMISSION, (Oct. 2011) <http://www.sec.gov/investor/alerts/fcpa.pdf>.

¹³² KYLE P. SHEAHEN, I'M NOT GOING TO DISNEYLAND: ILLUSORY AFFIRMATIVE DEFENSES UNDER THE FOREIGN CORRUPT PRACTICES ACT 3 *available at* <http://ssrn.com/abstract=1657675>.

¹³³ See Office of Investor Education and Advocacy *supra* note 131 at 2.

¹³⁴ See *id.*

¹³⁵ See *id.*

Another circumstance in which a a payment, gift, offer, or anything of value can be justified with an affirmative defense is when the company can show that it was a reasonable, bona fide business expense and its purpose was to specifically promote the business or product.¹³⁶ The SEC and DOJ have a narrow interpretation of the affirmative defenses. There is no hard line for what behavior may or may not be perceived as a bona fide business expense to the SEC, but paying for an official's flight directly to and lodging, for a period which is reasonable to conduct business in, expressly for the purpose of promoting the business or product, is typically considered a bona fide business expense.¹³⁷ However, a "round-the-world-trip" on the way to the company's facilities does not qualify as an affirmative defense.¹³⁸

3. An Example- *In re FLIR Systems, Inc.*

In re FLIR Systems, Inc. was a case that included corrupt payments in which the sales agreement included a "Factory Acceptance Test."¹³⁹ The supply agreement between FLIR and the Kingdom of Saudi Arabia (KSA) was for thermal binoculars and was worth about \$12.9 million.¹⁴⁰ The "Factory Acceptance Test" provided that KSA Ministry of Interior officials a trip to Massachusetts to see the product and the workings of FLIR's plant.¹⁴¹ The provision of the contract that is questioned as a bonafide business expense is that for the KSA officials to get to Massachusetts, FLIR planned a 20-night trip with stops in Casablanca, Paris, Boston, New York, Beirut, and Dubai.¹⁴² The SEC asserts there is no bona fide expense to the extended trip the KSA

¹³⁶ See *id.*; Klich *supra* note 6 at 125.

¹³⁷ See Office of Investor Education and Advocacy *supra* note 131 at 2; *In re FLIR Systems, Inc.*, Admin. Proc. File No. 3-16478 (April 8, 2015), <https://www.sec.gov/litigation/admin/2015/34-74673.pdf> (finding that a 20- night trip with stops in Casablanca, Paris, Boston, New York, Beirut, and Dubai did not serve a bona fide business expense outside the stop in Boston).

¹³⁸ See *id.*

¹³⁹ See *In re FLIR Systems, Inc.*, Admin. Pro. File No. 3-16478.

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² See *id.*

officials took.¹⁴³ The luxurious trip resulted in the Kingdom re-upping their contract with FLIR for another \$1.2 million worth of binoculars and FILR's profits over the span of its relationship with KSA Ministry of the Interior yielded \$7 million in profits.¹⁴⁴

FLIR Systems also violated FCPA provisions when working with the Egyptian Ministry of Defense.¹⁴⁵ The trip FLIR planned for Egyptian officials to FILR's Stockholm factory was much less lavish, but included a side trip to Paris.¹⁴⁶ This "extended layover" was considered a non-essential business expense, for which FLIR paid about \$ 43,000.¹⁴⁷ The Egyptian ministry officials traveled for fourteen days, but only engaged in business for four of those days.¹⁴⁸

With the implementation of the FCPA and the upswing in enforcement, companies were encouraged to implement their own internal controls and enforcement.¹⁴⁹ FLIR had provided its employees with training, but had little oversight of the planning of the travel and gifts.¹⁵⁰ The lenient internal controls led to the gap that allowed the extravagant gift to the Saudis to make it through the internal controls and the meager, but still illegal, bribe to the Egyptian government also fell through the compliance controls.¹⁵¹

As a result of the bribes, FLIR made about \$7 million in revenues from profits with its deal with Saudi Officials alone.¹⁵² However, their misstep cost them \$9,504,584 in disgorgement fees, prejudgment interest, and civil penalties.¹⁵³ \$7 million in revenues from a single contract is impressive, but getting caught undoes the benefit and the penalties cost the company more. As

¹⁴³ *See id.*

¹⁴⁴ *See id.*

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

¹⁵¹ *See id.*

¹⁵² *See id.*

¹⁵³ *See id.*

the SEC increases enforcement of the FCPA we will likely see a proportional increase in penalties. Companies will have to start making cost-benefit judgments to determine if being traded on the US stock exchange is worth extra-territorial subjection to the FCPA and the expensive internal controls it commands.

4. Looking at the affirmative defenses under Egyptian and Lebanese Law.

The first affirmative defense can allow the payment to the foreign official if the payment is legal under the country's own laws. This affirmative defense is ineffective in Egypt where the Egyptian Penal Code criminalizes active and passive bribery, attempted corruption, gifts with the intention to influence, abuse of office, and the use of public resources for private gain.¹⁵⁴ Under Egypt's laws, routine facilitation payments are technically illegal despite its prevalence because it constitutes passive bribery.¹⁵⁵ However, extortion is not a crime under Egyptian law, so a company could extort an Egyptian official to obtain the license or contract and try to employ an affirmative defense that the act is not illegal under the laws of the official's country.¹⁵⁶ However, the Egyptian system is so rife with corruption that the oversight entities that should be enforcing the anti-corruption laws are being bribed to look away while civil service officers continue to engage in bribery so there is a disconnect between what the law allows and what happens in practice.

Contrastingly, companies working within Lebanon are not subject to any Lebanese anti-bribery laws because they do not exist.¹⁵⁷ There has not yet been an investigated case that the SEC has brought against an issuer for violating the FCPA in Lebanon. It would be interesting to

¹⁵⁴ See Law No. 37 of 1937 (Criminal Code) al-Waqa'i' al-Misriyah, vol. 2, sec. 2 Art. 103-11 (Egypt) (official law not available in English).

¹⁵⁵ See Mohamad Talaat & Sherif Makram, *Anti-Corruption in Egypt*, GLOBAL COMPLIANCE NEWS, (2014), <http://globalcompliancenews.com/anti-corruption/anti-corruption-laws-around-the-world/anti-corruption-egypt/>.

¹⁵⁶ See *id.*

¹⁵⁷ Sofia Wickberg, *Overview of Corruption and Anti-Corruption in Lebanon, No. 350*, TRANSPARENCY INTERNATIONAL (Oct. 15, 2012), http://www.transparency.org/files/content/corruptionqas/Country_profile_Lebanon_2012.pdf.

see if they could use the first affirmative defense successfully as there are no formal laws that punish bribery in Lebanon. The DOJ and SEC have not set limits, and little precedent shows how lenient they are in accepting the affirmative defenses, although spectators have noted that more often than not a firm's affirmative defense claim will not hold.¹⁵⁸

VIII. *Wasta*

Wasta is the Arabic term that embodies the concept of connection. *Wasta* can include anyone from an agent or broker to someone who can get you past customs without paying full import taxes or bringing in illegal imports, essentially, it's the person you call when you are in trouble. The use of *wasta* to pay bribes and secure contracts is a common practice in the Middle East.¹⁵⁹ However, this practice is illegal under the FCPA, even if the agent is making a facilitation payment for the company.¹⁶⁰ At most, a company could only claim it is conforming to a country's cultural practices and customs which is not enough for defense under the FCPA.¹⁶¹ Despite its illegality, *wasta* are frequently used throughout MENA because anti-bribery provisions are haphazardly enforced and it is a customary cultural practice.¹⁶²

Using *wasta* is also illegal under the Egyptian Penal Code and thus cannot be argued as an affirmative defense.¹⁶³ In Egypt, the use of a *wasta* is considered benign, much like making a facilitation payment.¹⁶⁴ It is seen as a way of creating jobs and helping someone put food on the table. It is also how society is structured. Information is not readily available, so for the most reliable information, it helps to know people and those people will be the connections when information is hard to come by; it is power and power can yield wealth. The importance of

¹⁵⁸ See generally Sheahen *supra* note 132.

¹⁵⁹ See Ernst & Young *supra* note 2 at 4.

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² See Ernst & Young *supra* note 2 at 9.

¹⁶³ See Office of Investor Education and Advocacy *supra* note 131 at 2.

¹⁶⁴ See *id.*

personal connections and “who you know” can be seen across the Middle East regardless of the poverty level of the country.

In an interview with an Egyptian business owner discussing *wasta*, he stated, “we pay agents a fixed percentage, which we apply rigidly as a matter of public policy.”¹⁶⁵ The business owner explained that the very purpose of employing *wasta* is to put a buffer between the company and the bribe being paid to the official.¹⁶⁶ It distances the company from directly paying the bribe and positions it so that they are paying a third party scapegoat and if that third party happens to pay an official that will use his discretion to issue a contract or license, then it absolves the company from liability.¹⁶⁷ *Wasta* are essential personnel for businesses in the Middle East because they are well connected and allow the business to enjoy privileged treatment because of these connections.¹⁶⁸ The *wasta* understand the business of corruption and can easily navigate the legal and social hoops necessary to make bribes.¹⁶⁹

a. Examples:

i. Egyptian Civil Service

In Egypt, the majority of Cairenes believe that paying a bribe or tipping for a public service virtually guarantees delivery of the service or resolves a problem with the government.¹⁷⁰ The sense of necessity to pay these bribes is partly due to the country’s cultural expectation that a bribe will get you a permit or a document processed more quickly.¹⁷¹ About half of the Egyptians surveyed in the *First Middle East Bribery, Corruption and Fraud survey* said they

¹⁶⁵ *Id.* at 3-4.

¹⁶⁶ *See id.*

¹⁶⁷ *See id.*

¹⁶⁸ *See Business Corruption in Egypt*, BUSINESS ANTI-CORRUPTION PORTAL, <http://www.business-anti-corruption.com/country-profiles/middle-east-north-africa/egypt/snapshot.aspx>. (last visited Dec. 2, 2015).

¹⁶⁹ *See id.*

¹⁷⁰ *See* Ernst & Young *supra* note 2 at 3.

¹⁷¹ *See id.*

have had to pay a bribe for a permit or to process a document.¹⁷² The problem is compounded by the significant size of Egyptian civil service, which is about 7.2 million people.¹⁷³ Between the significant size of the civil service and its many and often unclear regulations, there is no accountability, leaving room for broad discretion.¹⁷⁴

ii. Innospec, Inc.- Implications of using *wasta*.

Innospec, Inc. paid or promised to pay over \$9.1 million in bribes through Ousama Naaman to the Iraqi Ministry of Oil in order to secure contracts, some of the contracts pertained to the UN Oil for Food Program, to sell Iraq a lead composite for oil production.¹⁷⁵ Naaman is facing his own charges for acting as an agent and violating the FCPA on Innospec's behalf.¹⁷⁶ Some of the methods of bribery included: paying a bribe to ensure that the field test of Innospec's competitor would fail, paying for a honeymoon to Thailand for one Iraqi official, and gave other officials pocket money for their trips.¹⁷⁷ Even after the Oil for Food Program ended, Innospec continued to work with Naaman to pay kickbacks to the Iraqi government in exchange for other contracts with the Ministry of Oil.¹⁷⁸ In the end, Innospec's use of *wasta* cost Innospec \$40.2 million in penalties and the *wasta* was charged with FCPA violations, conspiracy, and the DOJ is seeking his extradition from Germany.¹⁷⁹

IX. Potential Causes of Bribery

a. Lack of Oversight

¹⁷² See *id.* at 4.

¹⁷³ See THE WORLD BANK *supra* note 130.

¹⁷⁴ See *id.*

¹⁷⁵ See *SEC Charges Innospec for Illegal Bribes to Iraqi and Indonesian*, SECURITIES AND EXCHANGE COMMISSION (March 18, 2010), <https://www.sec.gov/news/press/2010/2010-40.htm>.

¹⁷⁶ See *Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the UN; Admits to Violating the U.S. Embargo Against Cuba*, DEPARTMENT OF JUSTICE (March 18, 2010), <https://www.justice.gov/opa/pr/innospec-inc-pleads-guilty-fcpa-charges-and-defrauding-united-nations-admits-violating-us>.

¹⁷⁷ See *Innospec, Inc.*, Exchange Act Release No. 21454 (March 18, 2010) available at <https://www.sec.gov/litigation/litreleases/2010/lr21454.htm>.

¹⁷⁸ See DEPARTMENT OF JUSTICE *supra* note 176.

¹⁷⁹ See SECURITIES AND EXCHANGE COMMISSION *supra* note 178.

Bribery in the Middle East is pervasive for many reasons that go beyond culture. Namely, it is economically efficient to bribe officials in the MENA region, it is relatively low in cost and a company secures its end goal more quickly than wading through the bureaucratic red tape.¹⁸⁰ In the MENA region, if a country does have anti-corruption rules it is unlikely they are uniformly enforced, if at all.¹⁸¹ As is the case in Egypt.¹⁸² The large size of the civil service in many MENA countries makes it difficult to monitor workers' compliance because they do not have an effective internal regulatory body and ombudsmen are virtually unheard of.¹⁸³

More than a third of businesses in Egypt have either lost business or new contracts because competitors are not restrained by the FCPA or similar anti-bribery legislation of other nations, who can actively bribe an official in order to secure a contract.¹⁸⁴ Active bribery is illegal under Egyptian law, and the prescribed punishment is to be excluded from future bidding on contracts.¹⁸⁵ Further, inconsistent enforcement and low wages gives many government officials the idea that they are entitled to extra income or are not adding to the problem by causing harm in accepting a bribe.¹⁸⁶

However, by accepting bribes, officials are perpetuating corruption. Its effects become cyclical because officials are rarely punished for accepting bribes and the payoff is large, so it is worth the risk.¹⁸⁷ The World Justice Project has noted that Egypt has regulations in place to combat corruption, but lacked the means to enforce its regulations.¹⁸⁸ When government officials get away with accepting bribes more than sixty percent of the time, it becomes clear where

¹⁸⁰ See Klich *supra* note 6 at 129.

¹⁸¹ See THE WORLD BANK *supra* note 130.

¹⁸² See THE WORLD BANK *supra* note 130.

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*

¹⁸⁷ See Klich *supra* note 6 at 132.

¹⁸⁸ See THE WORLD BANK *supra* note 130.

enforcement should start.¹⁸⁹ Still, how do you eliminate corruption, when its very practices increase people's salaries and create jobs in a region rife with poverty and unpredictability?

b. Political Instability

Political instability in the MENA region is a major challenge in combating corruption because instability creates gaps in authority allowing corruption to creep in and trickle down through the civil service system.¹⁹⁰ Government officials at all levels in the region use their authority to operate with a great deal of discretion in their official capacity.¹⁹¹ The volatility of regimes and the security situations in the MENA region make it difficult to know which laws apply when leadership changes and situations evolve.¹⁹²

When the government's actions are not transparent, citizens do not trust their government, the effect on the ground is confused and bleak, which furthers the corruption cycle because there is no obvious authority.¹⁹³ Combating corruption becomes more difficult when there is no black letter law that applies to governmental, civil, and business practices.¹⁹⁴ Further, the way laws are created in some countries can add to the confusion. In Egypt, President Sisi would make a decree and a law would now exist, but it was unclear when it would go into effect and be enforced because enforcement would be haphazard, creating confusion about the parameters and application of a law.¹⁹⁵ For example, Sisi can go on national television and decree that the next day would be a national holiday to memorialize the state prosecutor who

¹⁸⁹ *See id.*

¹⁹⁰ *See* Ghada Zughayar, *The Middle East and North Africa: A Region in Turmoil* (Dec. 2014), <http://blog.transparency.org/2014/12/03/middle-east-and-north-africa-a-region-in-turmoil/>.

¹⁹¹ *See id.*

¹⁹² *See id.*

¹⁹³ *See id.*

¹⁹⁴ *See id.*

¹⁹⁵ *Cf.* Ismael El- Kholy, *Will Egypt's Luxury Tax Hurt Everyday Citizens?* (Feb. 17 2016), <http://www.al-monitor.com/pulse/originals/2016/02/egypt-luxury-tax-increase-sisi-impact-economy.html> (exemplifying Sisi's use of decrees).

died in a car bombing that day, so now there is a new national holiday every year until further notice, but businesses do not treat it as a holiday.

c. Regional Security and Peace

There is a policy argument to be made for establishing peace and security in the region because of the correlations between peace and stability and corruption. According to *Transparency International*, five of the top ten most corrupt countries are also in the ten least peaceful places in the world rankings.¹⁹⁶ Some of the countries facing the worst conflict and corruption include: South Sudan, Sudan, Afghanistan, and Somalia.¹⁹⁷ This is exemplified when looking at the peace and corruption indexes side-by-side.¹⁹⁸ Afghanistan's new U.S. backed democratic government is rife with corruption, which is widely known amongst the citizens and as a result, they do not support the government. This distrust prompted by the corrupt government is allowing the Taliban to regain prominence in the country again.¹⁹⁹ Somalia is one of the most notoriously corrupt regimes in the world. The country functions based on a patronage system stemming from gang activity, which has allowed al-Shabaab to establish itself and gain power, further entrenching the country in corrupt ways.

America's enforcement of the FCPA in the MENA region follows the trend of the growing number of FCPA enforcement actions in recent years.²⁰⁰ At first glance, it may seem difficult to reconcile the differences between culture in the MENA region and the Western ideals embodied in the FCPA. Many countries in the Middle East are starting to implement their own

¹⁹⁶ *Corruption Perceptions Index 2015*, TRANSPARENCY INTERNATIONAL, <http://www.transparency.org/cpi2015> (last visited Jan. 9, 2016).

¹⁹⁷ *See id.*

¹⁹⁸ *See id.*; *Global Peace Index*, VISION OF HUMANITY, <http://www.visionofhumanity.org/#/page/indexes/global-peace-index/2015> (last visited Jan. 9, 2016).

¹⁹⁹ Ryan Grim, *Afghanistan is Going to Fall to the Taliban Again. It's Not Why You Think*, HUFFINGTON POST, (Oct. 3, 2015), http://www.huffingtonpost.com/entry/sarah-chayes-kunduz_us_56103348e4b0768127024d1b.

²⁰⁰ *See e.g., In re FLIR Systems, Inc.* (2015); *SEC v. PBSJ Corporation* (2015); *U.S. v. Alcoa World Alumina LLC* (2014).

anti-corruption provisions; however, their effectiveness remains to be seen, especially in the new, post-Arab Spring governments.²⁰¹ The Arab-Spring has reinforced the “idea that corruption can destabilize countries” which affects American interests and can seemingly make anti-corruption provisions like the FCPA necessary.²⁰²

X. MENA’s Battle to Change the Corruption Norm

It may be time to respect other countries’ sovereignty and allow them to combat bribery within their own jurisdictions, instead of relying on a law that has extra-territorial reach with little effect on ending corruption.²⁰³ Imperialistic ideals must end at some point and allow leaders to govern their sovereigns without the imposition of a commandeering country who “can do it better.” Many countries in the MENA region are starting to implement their own anti-corruption provisions, accordingly.

a. Egypt’s Anti-Corruption Laws

Egypt has the laws necessary to prosecute public and private entities for corruption within its territory; it is just a matter of reporting and monitoring offenses.²⁰⁴ Egypt’s domestic anti-bribery law is as broad as the FCPA.²⁰⁵ Egyptian Penal Code, Articles 103 to 111, lay out what bribery is and the elements of “an act of bribery.”²⁰⁶ Under the law, “any questionable activity or a payment or promise of payment or benefit to a public official” is a bribe.²⁰⁷ The three elements necessary for an act of bribery are: “(1) recipient must be a public official, (2) there must be a “gift,” a “benefit,” or a “promise” that will constitute the material/physical

²⁰¹ See Davis *supra* note 14 at 507.

²⁰² See *id.*

²⁰³ See Foley & Haynes *supra* note 44 at 252.

²⁰⁴ See Talaat & Makram *supra* note 155.

²⁰⁵ Compare 15 U.S.C. § 78dd-1 with Law No. 37 of 1937 (Criminal Code) vol. 2, sec. 2 Art. 103-11.

²⁰⁶ See Talaat & Makram *supra* note 155.

²⁰⁷ *Id.*

element of the crime, (3) there must be requisite criminal intent.”²⁰⁸ The Egyptian law punishes the briber, the public officer, and the *wasta*, if one was involved.²⁰⁹

To make business-related laws more accessible, the Egyptian government has created the “Business Services Portal.”²¹⁰ While the initial page is available in English, the linked laws are primarily Arabic and without translation.²¹¹ It may be that foreign businesses must obtain certified translations of the law to ensure compliance, but as of now, there has not been an incentive to do so. By targeting both, those giving and accepting bribes, Egypt would be able to combat corruption within its territory and, maintain its sovereignty and increase government revenue from anti-corruption penalties.

i. How Egypt has been trying to apply its anti-corruption laws.

Egypt penalizes both active and passive bribery in its penal code but lacks the necessary oversight to consistently enforce its laws.²¹² President Sisi promised to fight corruption from the top when he took over from President Morsi.²¹³ Sisi is prioritizing the fight against corruption because corruption costs “at least LE50 billion [USD6.4 million] annually.”²¹⁴ He encouraged the immediate resignation of his Minister of Agriculture, Salah Helal, and other Ministry of Agriculture officials, who were subsequently arrested and are being investigated for accepting

²⁰⁸ *Id.*

²⁰⁹ *See id.*

²¹⁰ *See* Business Services Portal, EGYPTIAN GOVERNMENT, available at <http://www.egypt.gov.eg/english/laws/default.aspx> (last visited Dec. 5, 2015); *see also* Egyptian Legislation, BUSINESS ANTI-CORRUPTION PORTAL, <http://www.business-anti-corruption.com/country-profiles/middle-east-north-africa/egypt/legislation.aspx> (last visited Dec. 5, 2015).

²¹¹ *See id.*

²¹² *See* Ahmed A. Fayed, *Sweeping Real Corruption Under the Rug*, MADA MASR, (March 11, 2015), available at <http://www.madamasr.com/opinion/economy/sweeping-real-corruption-under-rug>; Law No. 37 of 1937 (Criminal Code) vol. 2, sec. 2 Art. 103-11.

²¹³ *See Update: Former Agriculture Minister Referred to Court on Corruption Charges*, MADA MASR, (Oct. 24, 2015) <http://www.madamasr.com/news/politics/update-former-agriculture-minister-referred-court-corruption-charges>.

²¹⁴ *See* Fayed *supra* note 212. Currency conversion as of Dec. 13, 2015.

bribes for granting licenses of state land.²¹⁵ Helal and his office director, Mohieddin Saeed, are being prosecuted and facing jail time.²¹⁶ Ministry officials are not the only ones being prosecuted in this case; a prominent businessman and the *wasta* are also being charged for offering the bribes and facilitating the payment, respectively.²¹⁷

Helal and Saeed are being prosecuted for charges that the FCPA would similarly prosecute. The two men did not accept cash bribes, but they received many “things of value” in return for their discretion for granting a license of state land.²¹⁸ Some of these bribes included: a sporting club membership, boutique clothing, cellphones, a Ramadan iftar²¹⁹ dinner, a pilgrimage to Mecca for sixteen people, and a house in the very well off suburb of 6th of October City.²²⁰ The total cost of these bribes is approximately LE2.7 million or \$349,000.²²¹ While \$349,000 may not seem substantial from a Western perspective, the value in light of what it bought the Minister of Agriculture proves otherwise. The men are being prosecuted for the act of accepting bribes; under the FCPA, they would be prosecuted for the more specific “accepting something of value.”²²²

b. Regional Alliances to Fight Corruption

MENA countries are looking to conventions and programs at the regional and international level from entities like the African Union and the United Nations to implement anti-bribery/anti-corruption framework. Egypt has signed on to the United Nations Convention

²¹⁵ See MADA MASR *supra* note 213.

²¹⁶ See *id.*

²¹⁷ See *id.*

²¹⁸ See *id.*

²¹⁹ The meal at sundown to break fast during Ramadan.

²²⁰ MADA MASR *supra* note 213.

²²¹ See *id.* (“Helal and Saeed are accused of illegally accepting an Ahly Sporting Club membership valued at LE140,000, expensive clothing from upscale boutiques worth LE230,000, two cellphones priced at LE11,000, the hosting of a Ramadan iftar dinner in a hotel for LE14,500, a pilgrimage to Mecca for 16 people at 70,000 riyals per person, and a housing unit in 6th of October City valued at LE8.25 million.”); Currency conversion as of 13 December 2015.

²²² See 15 U.S.C. § 78dd-1.

Against Corruption, which came into force in Egypt on December 14, 2005.²²³ The Convention Against Corruption focuses on international cooperation where signatories lay out a framework that combats corruption by starting at the preventative level and then implementing the convention's framework that increases to imposing criminal provisions for corruption.²²⁴ However, compliance with this convention has been irregular since the 2011 Revolution.²²⁵ Nor has Egypt ratified the African Union's Convention on Preventing and Combating Corruption, due to a priority shift in policy after the Arab Spring.²²⁶

Anti-Corruption and Integrity in the Arab Countries (ACIAC) is an initiative between MENA states focusing on eradicating corruption in the MENA region.²²⁷ The goal of the ACIAC is to strengthen cooperation and take collective action against corruption by developing national capacities that prevent and combat bribery, embezzlement, trade in influence, abuse of authority, and illicit enrichment.²²⁸ This comprehensive program works by creating collaborative relationships across the region between governments, policymakers, civil society, and non-governmental entities to work as the main partner of the Arab Anti-Corruption and Integrity Network (ACINET) to facilitate policy and development discussion in the region.²²⁹

Part of the framework includes how to address the culture of impunity, which is pervasive in the Middle East.²³⁰ Implementing an initiative tailored to a region to acknowledge cultural similarities is more likely to be successful at combating corruption than an extra-

²²³ See IBRAHIM MAMDOUH FOUDA, CORRUPTION AND MONEY LAUNDERING IN EGYPT 25 (2010).

²²⁴ See African Union Convention on Preventing and Combating Corruption, BUSINESS ANTI-CORRUPTION PORTAL, <http://www.business-anti-corruption.com/about/about-corruption/african-union-convention-on-preventing-and-combating-corruption.aspx> (last visited Dec. 10, 2015).

²²⁵ See *id.*

²²⁶ See *id.*

²²⁷ UNITED NATIONS DEVELOPMENT PROGRAM, *Anti-Corruption and Integrity in the Arab Countries*, <http://www.undp-aciac.org/governance/anticorruption.aspx> (last visited Dec. 10, 2015).

²²⁸ See *id.*

²²⁹ See *id.*

²³⁰ See *id.*

territorial law that does not take cultural intricacies into account.²³¹ Even the UN Convention Against Corruption does not take into account cultural nuances that can influence effectiveness of an initiative that is written for a universal audience. The ACIAC focuses on the problems of corruption and its cultural roots and provides a framework that addresses these issues when implementing anti-corruption policies within the region.²³²

j. Dealing with Corruption Going Forward

So then, what can the region do to combat corruption and foster integrity in the public sector where bribes from foreign companies to a government official will not be tolerated? The FCPA has noble intentions and is right in punishing Western companies for taking advantage of and furthering corruption. However, its application in reality is perceived as condescending. Countries struggling to develop, modernize, or rebuild after years of conflict stand to benefit more from support like helping establish an oversight office and Ombudsman or training staff for a civil service anti-corruption program.

Fostering an anti-corruption program in the region or supporting ones that already exist would be more effective in the long run and significantly less imperialistic. The extrajudicial reaches of the FCPA evoke memories of colonialism, where the U.S. has and is imposing its moral views on the MENA region. Congress, when passing the law, noted that they were doing it for ethical purposes to hold American issuers accountable for their corrupt behaviors. While the law is well meaning, it is important to maintain respect for other sovereigns, as all states are equal under international law. This respect will encourage and reinforce stability internationally because as it stands now, FCPA does not take into account that different cultures can have different values and customs. Business is no different. This is a significant distinction when

²³¹ *See id.*

²³² *See id.*

viewed in light of the customs in the MENA region compared to those of the West. The ultimate goal of eradicating corruption may be better served by helping developing countries stabilize and overcome corruption through economic and political development.²³³

Instability in the region is closely correlated to corruption and is ultimately necessary to target to successfully fight corruption. It is cyclical. Instability breeds corruption and corruption breeds instability, opening power vacuums that allow organizations like al-Qaeda in Afghanistan, al-Shabaab in Somalia, ISIS in Iraq and Syria to flourish.²³⁴ These terrorist groups create a secondary state which exists within the sovereign state and serve to further divide the country and create room for corruption to enter the political structure that will remain even after the country finds peace. Thus, by fostering peace, countries torn apart by conflict will stand a better chance at stability, which will prevent power vacuums and will create less need for corruption.

Countries that are not engaged in conflict still experience corruption, but the threat of a power vacuum creating room for a terrorist organization to gain legitimacy are significantly reduced. Syria, Iraq, and Afghanistan all have experienced traumatic upheavals in the last decade and are accordingly some of the most corrupt countries. This is because the governments that took power were not stable. The people did not support them and there were no oversight bodies like Ombudsmen to monitor corruption internally. Thus, distrust in the new governments was sown and it was, and in some cases, just a matter of time before the government crumbled, creating a space to fill; which in modern history has been filled by terrorist organizations.²³⁵ If the US was concerned about corruption and not monetary payouts, they would find that the MENA region would be better served by programs for peace and mediation to create and

²³³ See Davis *supra* note 14 at 504.

²³⁴ THE RISE OF ISIS (Frontline Oct. 28, 2014) (discussing power vacuums and how they create terrorist orgs).

²³⁵ See Grim *supra* note 199.

continue to build support for stable governments who could enforce anti-corruption measures, than by exercising extraterritorial jurisdiction to enforce corruption laws.

k. Conclusion

Corruption is a universal affliction that America has gone to great extraterritorial lengths to try to combat through the use of its FCPA legislation. The FCPA's effect on combating bribery remains to be seen; however, the law has been successful in bringing in hefty payouts from the severe penalties it imposes on issuers, domestic concerns, and "other persons."²³⁶

Bribery can be an easy way to increase competitiveness in international business. To create fairer competition, it is logical to ban bribery, which is what the FCPA attempted to do in order to even the playing field.²³⁷ However, in regions where bureaucracy and inefficiency are rife, developing the means to circumvent the system will naturally develop. In Egypt, the use of facilitation payments and *wasta* are frequent because these are the most profitable ways to streamline the system.²³⁸

It may be time for America to defer regulating corruption to sovereigns within their own territories. The U.S. should still provide incentives for its own businesses to not engage in corrupt practices internationally, but not to the extent of its current extra-territorial reach. Efforts to fight corruption in the Middle East would be better spent on helping the country implement an oversight framework like the ACIAC and encourage enforcement of its pre-existing rules through defense and economic incentives. While this would take time, it would ensure a lasting cultural shift toward anti-corruption and allow the country to regulate problems within its territory that would more effectively maintain sovereignty.

²³⁶ See *supra* discussion of Alcoa World Alumina; PBSJ Int'l Corp.; FLIR Systems, Inc.; and Innospec Inc.

²³⁷ See Davis *supra* note 14 at 501.

²³⁸ See Ernst & Young *supra* note 2 at 4.

The FCPA may be better focused on dissuading U.S. companies and issuers doing business overseas from engaging in corrupt practices while allowing greater leniency in the use of the exception for facilitation payments and the circumstances allowing for use of the affirmative defenses to account for the globalization of businesses.²³⁹ There is no conclusive evidence that the FCPA has reduced the frequency of corruption despite increased enforcement of the law. The law's objective is reasonable for American companies and should continue to incentivize American companies from engaging in corrupt practices. To truly fight corruption, the American government would be better off worrying about other cultures values and helping the government of a partner nation implement an anti-corruption framework that is sensitive to the region's culture. Until that day comes, however, America will maintain its imperialistic ways and subject companies that have a jurisdictional nexus to the United States to its moral values through the FCPA despite cultural norms of the region in which the company is doing business in.²⁴⁰

²³⁹ See *supra* part VII.

²⁴⁰ See *generally* Smith & Parling *supra* note 15.