The Other Foreign Corrupt Practice: Bribery of Indigenous Peoples' Representatives and the Neglected Options for Combating It

George K. Foster
Lewis & Clark Law School
foster@lclark.edu

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GEORGE K. FOSTER*

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

* Associate Professor of Law, Lewis & Clark Law School.

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I. INTRODUCTION

Federal law enforcement agencies have been combating corrupt practices by American companies in overseas business operations for decades, but in recent years their efforts have increased in both breadth and intensity.[1] The U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) have dramatically expanded the number of investigations and enforcement proceedings under the Foreign Corrupt Practices Act (FCPA),[2] a federal statute that prohibits giving or offering anything of value to an official of a foreign government, in a corrupt manner, for a business purpose.[3] They have achieved this spike in enforcement in part by developing novel legal theories of liability, which have allowed them to reach previously-overlooked forms of corruption.[4] Most notably, they have extended the statute beyond bribery of governmental officeholders to bribery of individuals working for state-owned businesses.[5] They have also recently begun harnessing other legislation, beyond the FCPA, to combat a foreign corrupt

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

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

3 Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3, 78ff, 78m(b), (d)(1), (g)-(h) (2006 & Supp. 2010)) [hereinafter FCPA], amended by Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415 (1988) (codified at §§ 78dd-1 to 78dd-3, 78ff (2006)), and the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at §§ 78dd-1 to 78dd-3, 78ff (2012)).

4 *See* Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act–1977 to 2010*, 12 SAN DIEGO INT'L L. J. 89, 104 (2010) ("Not only are these agencies bringing many more cases, but the DOJ is also starting to utilize novel theories of liability to prevent corrupt corporations from avoiding prosecution.").

5 Mike Koehler, *A Foreign Corrupt Practices Act Narrative*, 22 MICH. ST. J. INT'L L. 961, 1044 (2013) ("In this new era of FCPA enforcement, a prominent enforcement agency theory has been that employees of alleged state-owned or state-controlled enterprises (SOEs) are 'foreign officials' under the FCPA and thus occupy a status equal to traditional bona fide government officials such as a president or prime minister.").

practice not covered by that statute even under an aggressive interpretation: bribery of officers or employees of foreign private-sector companies.[6]

Remarkably, however, in the midst of this concerted drive to detect and punish corruption in international business, there is another foreign corrupt practice that seems to have escaped the attention of U.S. law enforcement agencies: bribery of indigenous peoples'[7] representatives to secure their support for business activities impacting their communities.[8] The apparent absence of any attempt to punish *this* type of corruption is striking, considering that the phenomenon is quite common (if widespread reports by the media, NGOs, and scholars are to be believed[9]), and every bit as harmful as the types of corruption that these agencies routinely target, if not more so.

The risk of corruption of this nature arises from the fact that business entities often seek to undertake development projects on or near the lands of indigenous peoples. These projects can involve any number of economic activities, but common examples are the extraction of minerals or other natural resources;[10] the damming of rivers to produce hydroelectric power;[11]

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

[7] There is no universally-accepted definition of "indigenous peoples," but the term generally connotes culturally-distinct communities or groups that have a longstanding connection to a particular territory that predates that of other, more dominant elements of society. *See* Kristen A. Carpenter, Sonia K. Katyal, & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1034-35 (2009).

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

[9] Allegations in this regard are summarized in Part II, *infra*.

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

[11] *See generally* Marcus T. Pearson, David Aronofsky & Emily Royer, *Chile's Environmental Laws and the HidroAysen Northern Patagonia Dams Megaproject: How is This Project Sustainable*

the construction of highways, pipelines, and other infrastructure;[12] and agroforestry.[13] Projects like these typically need approval from formal governmental authorities in the countries hosting them, but may also require the consent or cooperation of local landowners or communities.[14] At a minimum, project developers may be reluctant to proceed with any large-scale project without the support of local stakeholders, given the risk of protests or other forms of resistance that will hinder operations.[15] In addition, the domestic laws of many countries, as well as various international human rights instruments, now give one particular category of stakeholder—indigenous peoples—special legal rights in connection with development projects.[16] Notably, these laws and instruments generally recognize a right on the part of indigenous peoples to be consulted in relation to any project

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Development?, 41 DENV. J. INT'L L. & POL'Y 515 (discussing dam projects in Chile that have adversely impacted indigenous and other local communities).

12 *See* Lorenzo Pellegrini & Marco Octavio Ribera Arismendi, *Consultation, Compensation and Extraction in Bolivia after the 'Left Turn': The Case of Oil Exploration in the North of La Paz Department*, 11 J. LATIN AMERICAN GEOGRAPHY 101, 107-08 (2012) (discussing plans to build a highway through an ecological preserve occupied by indigenous peoples in Bolivia); Clifford Krauss & Ian Austen, *Rocky Road for Canadian Oil*, N.Y. TIMES (May 13, 2014), B1 (discussing oil pipeline projects in Canada opposed by some First Nations in that country).

13 *See, e.g.*, Colin Filer, *Why green grabs don't work in Papua New Guinea*, 39 J. PEASANT STUD. 599, 600 (2012) (discussing foreign investment in agroforestry in Papua New Guinea).

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

15 *See* Patricia O'Brien, *The Politics of Mines and Indigenous Rights: A Case Study of the Grasberg Mine in Indonesia's Papua Province*, 11 GEO. J. INT'L AFF. 47, 47-49 (2010) (discussing acts of violence and protest by indigenous groups in Indonesia against mining activity); Martí Orta-Martínez & Matt Finer, *Oil Frontiers and Indigenous Resistance in the Peruvian Amazon*, 70 ECOLOGICAL ECON. 207, 215 (2010) (describing protests by indigenous communities in Peru against extractive operations and the resulting disruption of operations).

16 Siegfried Wiessner, *Indigenous Self-Determination, Culture, and Land: A Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples*, *in* INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION 31, 38-56 (Elvira Pulitano, ed., 2012) (summarizing achievements of the indigenous rights movement at the domestic and international levels); Lorenzo Pellegrini & Ribera Arismendi, *supra* note 12, at 106-07 (discussing human rights instruments that confer special protections on indigenous peoples, and recent amendments to the Bolivian Constitution designed to implement the same); Cathal M. Doyle & Andrew Whitmore, *Indigenous Peoples and the Extractive Sector: Towards a Rights-Respecting Engagement* 36-38 (2014), http://www.tebtebba.org/index.php/content/322-indigenous-peoples-a-the-extractive-sector-towards-a-rights-respecting-engagement (discussing indigenous rights legislation in Bolivia, the Philippines, Greenland, Venezuela, Colombia, El Salvador, Liberia, Benin, and India).

affecting them, and some even require that their consent be obtained.[17] What is more, any development project for which funding is sought from the International Finance Corporation ("IFC")—an arm of the World Bank—is likewise now subject to a "free, prior and informed consent" requirement with respect to indigenous stakeholders.[18] Similarly, many private financial institutions will no longer lend funds for high-impact projects unless the borrower has consulted with local stakeholders.[19]

The foregoing laws and standards reflect growing awareness of the unique social, cultural, and environmental costs that development projects can entail for indigenous peoples. These can include displacement from their lands, deforestation and loss of traditional food sources, depletion or contamination of water supplies, and erosion of culture and social cohesion.[20] While it may be possible to mitigate impacts like these if adequate safeguards are taken,[21]

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[17] *See* DERRICK HINDERY, FROM ENRON TO EVO: PIPELINE POLITICS, GLOBAL ENVIRONMENTALISM, AND INDIGENOUS RIGHTS IN BOLIVIA 165-70 (2013) (describing consultation and consent requirements); PATRICIA I. VÁSQUEZ, OIL SPARKS IN THE AMAZON: LOCAL CONFLICTS, INDIGENOUS POPULATIONS, AND NATURAL RESOURCES 40-45 (2014) (same); George K. Foster, *Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium between Economic Development and Indigenous Rights*, 33 MICH. J. INT'L L. 627, 664-68 (2012) (summarizing the key features of the United Nations Declaration on the Rights of Indigenous Peoples, including its requirement that states consult and cooperate in good faith with indigenous peoples in order to obtain their free, prior and informed consent in connection with any project affecting their lands or territories and other resources).

[18] *See* Int'l Fin. Corp., Performance Standard 7, Indigenous Peoples 3 (2012) available at http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/performance+standards/performance+standards+-+2012.

[19] *See* Joshua A. Lance, *Note & Comment: Equator Principles III: A Hard Look at Soft Law*,17 N.C. BANKING INST. 175, 192-93 (2014) (summarizing the stakeholder engagement requirements of the latest version of the Equator Principles, a set of voluntary guidelines for international project finance). Equator Principles Ass'n, The Equator Principles III, June 2013, Principle 5, http://www.equator-principles.com/resources/equator_principles_III.pdf.

[20] Special Rapporteur on the rights of indigenous peoples, Extractive industries operating within or near indigenous territories, Human Rights Council, 18th Sess., ¶ 30, U.N. Doc. A/HRC/18/35 (July 11, 2011) [hereinafter Special Rapporteur 2011 Report] (summarizing reported impacts of extractive projects on indigenous peoples); Pellegrini & Ribera Arismendi, *supra* note 12, at 105 (same); Orta-Martínez & Finer, *supra* note 15, at 208-13 (same); Doyle & Whitmore, *supra* note 16, at 21 (same).

[21] Special Rapporteur on the rights of indigenous peoples, Extractive industries and indigenous peoples, Human Rights Council, 24th Sess., ¶ 73, U.N. Doc. A/HRC/24/41 (July 1, 2013) [hereinafter Special Rapporteur 2013 Report] (discussing the importance of safeguards against "potential impacts on health conditions, subsistence activities and places of cultural or

and while they may be offset to some degree by benefits flowing from the project,[22] these are often secured only through a lengthy and good-faith consultation process and may reduce the project developer's profits.[23] Accordingly, developers may be tempted to bribe the people's designated representatives to induce them to support the project and allow it proceed sooner and with fewer safeguards and community benefits.[24]

Several practitioners have identified the possibility that law enforcement agencies could begin to target bribery of indigenous or other traditional leaders under the FCPA.[25] Yet no published literature seems to have

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religious significance."); Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, 35 AM. INDIAN L. REV. 263, 426-29 (2010/2011) (discussing elements of an adequate environmental and social impact assessment and impact mitigation).

[22] Special Rapporteur 2013 Report, *supra* note 21, at ¶ 77 (noting that in some cases "indigenous peoples are guaranteed a percentage of profits from the extractive operation or other income stream" or "a minority ownership interest in the extractive operation."); Orta-Martínez & Finer, *supra* note 15, at 213 (summarizing benefits that indigenous communities in Peru have derived from extractive projects, including employment as wage laborers, wells for drinking water, health care services, electric generators, and improved transportation options).

[23] Almut Schilling-Vacaflor, *Democratizing Resource Governance through Prior Consultations? Lessons from Bolivia's Hydrocarbon Sector*, German Institute of Global and Area Studies (GIGA), GIGA Research Programme: Violence and Security, No. 184 13-15 (Jan. 2012) (describing a series of recent consultations between project developers and indigenous communities in Bolivia, and asserting that the optimal compensation and environmental precautions were achieved when lengthy, corruption-free negotiations took place); Inter-American Commission on Human Rights, *supra* note 21, at 430 (explaining that cooperation with and input by impacted indigenous communities is critical for successful impact mitigation).

[24] Schilling-Vacaflor, *supra* note 23, at 13-14 (distinguishing the results of negotiations that were reportedly corruption-free from those in which indigenous leaders were allegedly corrupted or pressured).

[25] *See, e.g.*, Cohen & Funk, *supra* note 8, at 3 ("One of the many definitional challenges facing Foreign Corrupt Practices Act practitioners worldwide is whether and under what circumstances traditional authorities, such as tribal leaders, qualify as 'foreign officials' under the FCPA."); Brian Pinkowski, *Tales From The Wild: Traditional Law and Foreign Officials*, HOW TO FIGHT CORRUPTION (Nov. 30, 2013), http://brianpinkowski.wordpress.com/2013/11/30/tales-from-the-wild-traditional-law-and-foreign-officials/ ("While the U.S. Department of Justice has not yet turned its eye to agreements involving [tribal] officials, it seems such individuals are more clearly 'foreign officials' than many of the medical personnel at the heart of so many FCPA actions in the past few years."); Sharie Brown, *When Is A Nigerian Local Tribal Leader A Foreign Official Under the FCPA?*, TRACE BLOG (July 27, 2009), http://traceblog.org/2009/07/27/when-is-a-nigerian-local-tribal-leader-a-foreign-official-under-the-fcpa/ (asserting that a tribal chief might qualify as a "foreign official" for purposes of the FCPA, and identifying factors relevant to the analysis).

considered the wide variation in the nature of dealings between project developers and indigenous leaders, or examined in detail how the FCPA and other anti-corruption statutes could be applied under diverse circumstances. Nor has any considered *why* this form of corruption has been overlooked to date, or how any factors inhibiting enforcement might be overcome.

This Article will undertake each of those tasks. In doing so, it will demonstrate that the FCPA and other anti-corruption legislation could indeed be applied to bribery of indigenous peoples' representatives, but that there are distinct limits to the conduct that enforcement agencies could and should target. In particular, this Article will show that indigenous peoples' representatives will often qualify as "foreign officials" within the meaning of the FCPA because they occupy positions in the state apparatus or otherwise carry out governmental functions. They may also qualify as fiduciaries within the meaning of other laws, because they have assumed positions of trust and confidence vis-à-vis their communities.[26] Moreover, benefits conferred on indigenous leaders by project developers may qualify as corrupt if they were conferred to influence the leader in the performance of his or her duties.[27] Nevertheless, in some cases the benefits may have been offered for purposes that are legitimate and non-actionable,[28] or the project developer or its conduct may lack a sufficient territorial connection to the United States.[29]

This Article will also show that several factors may have deterred law enforcement agencies from taking action in some cases arguably within their jurisdiction, but that these could potentially be overcome in the future. To begin with, in some cases investigators may have lacked any concrete proof of violations, notwithstanding reports of bribery in the media or scholarly publications. Enforcement action will be more likely, therefore, if local stakeholders and corporate insiders begin taking advantage of newly-available whistleblower bounties and present investigators with actionable evidence of

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[26] See Part III.B.3, *infra* (discussing the FCPA's definition of "foreign official" and its application to indigenous peoples' representatives). See also Part III.C.1, *infra* (explaining when indigenous leaders would qualify as an employee, agent or fiduciary within the meaning of state private-sector bribery statutes and the Travel Act).

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

[28] *Id.*

[29] See Part III.B, *infra* (discussing the categories of persons covered under the FCPA and required territorial connections). See also Part III.C, *infra* (same with regard to the Travel Act and mail and wire fraud statutes).

misconduct.[30] In addition, law enforcement agencies may begin assigning this form of corruption a higher priority as more is written on the subject and they come to better understand the roles of indigenous leaders, and the threats posed by this type of corruption—not only to local communities, but also to important U.S. national interests.[31]

The discussion proceeds as follows. Following this Introduction, Part II highlights a number of cases in which project developers have been accused of corrupting indigenous leaders. Part III examines U.S. anti-corruption laws and explains when various types of transactions could potentially violate them, while outlining considerations and principles that should guide project developers, indigenous representatives, and law enforcement authorities when navigating and applying the statutory requirements. The discussion is confined to U.S. law, but a number of other countries have enacted similar legislation so many observations in Part III are relevant to other countries' laws as well.[32] Part IV explores factors that may have inhibited enforcement efforts in this context and prospects for overcoming them. Part V concludes.

II. CORRUPTION IN THE VILLAGE, ON A GLOBAL SCALE: ALLEGED ATTEMPTS TO "BRIBE" OR "CO-OPT" INDIGENOUS PEOPLES' REPRESENTATIVES

Like any other leaders, indigenous peoples' representatives are sometimes accused of corruption. Some allegations involve misappropriation of community funds or other misdeeds distinct from bribery.[33] Yet the focus of

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

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

[32] Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 459 (2009) (explaining that "anti-bribery laws have now gained worldwide acceptance, as reflected in numerous international agreements and domestic laws modeled after the FCPA").

[33] *See, e.g.*, Rob Shaw & Peter O'Neil, *Harper government outraged that B.C. chief of tiny Coquitlam First Nation received $900K+ in latest fiscal year*, VANCOUVER SUN (Aug. 5, 2014) (Canada) (discussing concerns that a bonus paid by a First Nation to its chief in connection with a contract he helped secure represented an improper form of self-enrichment); Schilling-

this Article is bribery, and in particular situations in which a project developer has allegedly given something to indigenous leaders to induce them to approve or facilitate a project. The sections that follow provide non-exhaustive examples of the types of accusations that are sometimes made. They focus on allegations directed at private-sector companies, rather than at governments or state-owned enterprises (SOEs), because the former are more likely to be covered by U.S. anti-corruption legislation.[34]

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

A. Projects in Latin America

Latin America has experienced a boom in natural resource extraction and infrastructure development in recent years, often on the lands of indigenous peoples.[35] Many of these projects have resulted in bribery allegations.

For example, the Massachusetts-based NGO Cultural Survival recently reported that a local subsidiary of U.S. Capital Energy, a Texas-based oil company, has offered money, vehicles, and other benefits to the leaders of Maya communities in Belize, in an effort to convince them to drop legal proceedings that they initiated to block the company's operations.[36] Cultural Survival names one Maya leader who allegedly accepted a new truck and

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Vacaflor, *supra* note 23, at 13 (discussing allegations that the leaders of an indigenous people misappropriated funds received from a hydrocarbon project in Bolivia).

[34] See Part III.B.2, *infra*.

[35] VÁSQUEZ, *supra* note 17, at 28-35.

[36] *See* Cultural Survival, *Campaign Update–Belize: Oil Company Attempts Bribery, Corruption of Traditional Leaders*, (Feb. 14, 2013), available at https://www.culturalsurvival.org/news/campaign-update-belize-oil-company-attempts-bribery-corruption-traditional-leaders.

thereafter began "campaigning for the company," and another who "has repeatedly been the target of US Capital's bribery attempts to accept and promote oil drilling, which he has declined."[37] Another NGO, Minority Rights Group International, has similarly reported that this subsidiary has given cash or jobs to leaders who support the company's activities, while "marginaliz[ing] critics by denying them jobs and other benefits."[38]

Foreign oil companies operating on lands claimed by Achuar indigenous communities in the Amazon have likewise drawn similar bribery allegations, including U.S.-based Occidental Petroleum[39] and Argentina-based Pluspetrol.[40] Among the benefits allegedly offered to Achuar leaders are money, houses, and tuition for their children's education.[41]

German sociologist-anthropologist Almut Schilling-Vacaflor has asserted that a subsidiary of French energy company Total improperly influenced representatives of the Guaraní indigenous people during recent consultations over planned explorations in Bolivia's Ipati-Aquio Block.[42] She cites a report by a Peruvian NGO that quotes allegations by members of the Guaraní community that the leaders involved in the consultations were given lucrative jobs in exchange for their support.[43]

Professor Derrick Hindery has reported allegations that the energy companies Enron and Shell bribed representatives of the Chiquitano

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37 *Id.*

38 Chelsea Purvis, *Suddenly we have no more power': Oil drilling on Maya and Garifuna land in Belize*, Minority Rights Group International (Sept. 2013), available at http://www.minorityrights.org/download.php@id=1291.

39 AmazonWatch, *The Right to Decide: The Importance of Respecting Free, Prior and Informed Consent* 6 (Feb. 2011), available at http://amazonwatch.org/news/2011/0202-fpic-the-right-to-decide ("Achuar leaders in Peru attest they have been offered houses in Lima, education for their children and substantial amounts of cash by representatives of Occidental Petroleum, in exchange for persuading their community to permit oil or gas operations in their territory.").

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

41 AmazonWatch, *supra* note 39.

42 Schilling Vacaflor, *supra* note 23, at 13 ("Some months after the agreements had been signed, the consultation was declared invalid by the regional and national Guaraní organizations. They argued that indigenous authorities had been 'bought' by the corporations.").

43 Schilling Vacaflor, *supra* note 23, at 13.

indigenous people during consultations over the construction of oil pipeline in the Bolivian Amazon during the late 1990s.[44]

Newstex Web Blog has asserted that the Canadian mining company Goldcorp has "divided indigenous communities through gifts, benefits, and violence," in order to facilitate the company's operation of the Marla Mina mine in Guatemala.[45] Newstex cites assertions by a former mayor of the town that "the company offers presents, money, and infrastructure projects to the local authorities in order to gain their support."[46]

ABColombia, an advocacy project of a group of five British and Irish NGOs, contends that "[g]ross irregularities are reported in the consultation processes carried out by companies interested in exploiting indigenous lands" in that country, including "bribery" and "co-opting of leaders."[47] A newsletter of another NGO, Peace Brigades International, names certain companies that have been accused of "buying off" indigenous leaders in Colombia, including BHP Billiton, Anglo-American, and Xstrata[48] (now Glencore[49]).

B. Projects in the Asia-Pacific Region

Development projects in the Asia-Pacific region are also often carried out on the lands of indigenous communities by private companies. As in Latin

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44 HINDERY, *supra* note 17, at 99 (citing allegations by certain Chiquitano organizations that Enron and Shell corrupted "uninformed community authorities by paying them $100 in exchange for signing agreements that transferred the communities' easement rights to the company."); *id.* at 122 (noting suspicions that the companies "influenced" leaders of one of the Chiquitano representative bodies involved in subsequent negotiations over supplemental compensation to be provided to impacted communities.).

45 *See, e.g.*, *Guatemala: Divide And Rule In The Land Of Gold, Indigenous Peoples Issues and Resources*, Newstex Web Blog, July 25, 2012 ("In San Miguel Ixtahaucán, Guatemala, the Mina Marlin gold mine, operated by [Canadian company] Goldcorp, has divided indigenous communities through gifts, benefits, and violence. ... Bámaca, who was an indigenous mayor for a year, asserts that the company offers presents, money, and infrastructure projects to the local authorities in order to gain their support.").

46 *Id.*

47 *See, e.g.*, ABColombia, *Caught in the Crossfire: Colombia's Indigenous Peoples* (Oct. 2010), http://www.abcolombia.org.uk/subpage.asp?subid=380&.

48 Peace Brigades International Colombia, *Mining in Colombia: At What Cost?*, Newsletter no 18, 35 (Nov. 2011), http://www.pbi-colombia.org/los-proyectos/pbi-colombia/publicaciones/?L=1.

49 Javier Blas, *Glencore finishes takeover of Xstrata*, FIN. TIMES (U.K.) (May 2, 2013), http://www.ft.com/intl/cms/s/0/9d355d82-b31a-11e2-95b3-00144feabdc0.html#axzz3H0wpZcaf.

America, these projects are sometimes accompanied by allegations that the company undertaking it bribed the representatives of the impacted communities to secure their support.

Many of these allegations emanate from the Philippines. For example, a 2009 submission to the U.N. Committee on the Elimination of All Forms of Racial Discrimination by several Philippine NGOs asserted that "[r]eports of explicit bribery of individuals in indigenous and other communities are common,"[50] and cataloged a host of alleged incidents, involving such companies as OceanaGold of Australia and TVI Pacific of Canada.[51] The benefits said to have been conferred on indigenous leaders included cash, land, and vehicles.[52] The director of the NGO Forest Peoples Programme, Joji Cariño, has also reported allegations of bribery by TVI Pacific.[53]

Cariño has further alleged bribery by Australia-based Western Mining Corporation ("WMC"), a company since acquired by BHP Billiton.[54] In particular, Cariño reports that WMC placed relatives of traditional leaders known as *datus* on its payroll for services as "community liaison officers," while "[s]ome *datus* have been taken to Manila and, according to reports, given lavish hospitality and taken to night clubs."[55] Other commentators

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50 Philippines Indigenous Peoples ICERD Shadow Report, Submission to the Committee on the Elimination of All Forms of Racial Discrimination 52 (Aug. 2009), available at http://www2.ohchr.org/english/bodies/cerd/docs/ngos/PIP_Philippines75.pdf [hereinafter ICERD Shadow Report]. A Philippine Congressman has likewise reported that bribery of indigenous representatives is a widespread phenomenon in the country. *See* Teddy Brawner Baguilat, Jr., Representative of the Lone District of Ifugao, *Mining And Its Impacts To Indigenous Communities* (Aug. 25, 2011), FACEBOOK, available at https://www.facebook.com/note.php?note_id=251074264926161 ("Bribery and cooptation of tribal leaders … are just some of the methods employed to push mining projects in the ancestral domains of indigenous peoples.").

51 ICERD Shadow Report, *supra* note 50, at 52-53.

52 *Id.*

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

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

55 *Id.*

have provided further detail regarding alleged attempts by WMC to corrupt indigenous leaders in the Philippines.[56]

Project developers on the island of New Guinea have also been the subject of bribery allegations. By way of example, Professor John Braithewaite has reported bribery of traditional leaders by companies engaged in palm oil production and logging on the Indonesian side of the island.[57] Similarly, Forest Peoples Programme contends that Wilmar International Group, a company headquartered in Singapore, has improperly influenced traditional leaders on the Indonesian side in order to secure access to land for growing sugar cane.[58] That NGO asserts that the company "often co-opt[s] tribal leaders, paying them a salary to convince the other villagers to sell their land …"[59] Various scholars similarly maintain that leaders of landowner groups in Papua New Guinea are sometimes corrupted by plantation owners.[60]

C. Projects in Africa

Africa also hosts development projects that have given rise to bribery allegations. For example, in 2009, a local publication accused a subsidiary of

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[56] Raymundo D. Rovillos, Salvador B. Ramos, & Catalino Corpuz, Jr., *When the 'Isles of Gold' Turn into Isles of Dissent: A Case Study on the Philippine Mining Act of 1995*, *in* Extracting Promises: Indigenous Peoples, Extractive Industries and the World Bank 185, 196 (Tebtebba Foundation, 2nd ed., 2005), available at http://www.waterculture.org/uploads/Extracting_Promises_2nd_Edition_1_.pdf (describing an alleged incident in which WMC offered a B'laan chief a house, and other cases in which indigenous leaders were entertained at nightclubs); Marina Wetzlmaier, *Cultural Impacts of Mining in Indigenous Peoples' Ancestral Domains in the Philippines*, 5 AUSTRIAN J. SOUTH-EAST ASIAN STUD. 335, 339-40 (2012) (describing consultations "conducted with selected village leaders who were offered incentives by the mining company[.]").

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

[58] *Conflict in Indonesia's Papua Region*, IRIN ASIA SERVICE, Mar. 28, 2014, http://www.irinnews.org/report/99856/conflict-in-indonesia-s-papua-region.

[59] *Id.*

[60] *See, e.g.*, Marcus Colchester & Sophie Chao, *Oil Palm Expansion in South East Asia*, *in* OIL PALM EXPANSION IN SOUTH EAST ASIA: TRENDS AND IMPLICATIONS FOR LOCAL COMMUNITIES AND INDIGENOUS PEOPLES 1, 9-10 (Marcus Colchester & Sophie Chao, eds., 2011), available at http://www.forestpeoples.org/sites/fpp/files/publication/2011/11/oil-palm-expansion-southeast-asia-2011-low-res.pdf; Jim Fingleton, *A Legal Regime for Issuing Group Title to Customary Land: Lessons From the East Sepik*, *in* CUSTOMARY LAND TENURE AND REGISTRATION IN AUSTRALIA AND PAPUA NEW GUINEA: ANTHROPOLOGICAL PERSPECTIVES 15, 31-32 (James F. Weiner & Katie Glaskin, eds., 2007).

U.S.-based gold mining company Newmont of paying bribes to chiefs of Ghana's Akyem people, to secure support for the company's bid to mine in a local forest reserve.[61] Prior to the alleged bribes, the project had been the subject of protests by local stakeholders.[62] In addition, several U.N. Special Rapporteurs had sent letters to Newmont and the government of Ghana raising concerns about potential impacts of the mine on local communities.[63] The subsidiary allegedly gave these bribes to induce Akyem chiefs to append their signatures to a letter sent by the company in response, in order to generate the appearance of community support.[64] Newmont has acknowledged payments to Akyem traditional councils, but denies that they were improper.[65] The company asserts that the payments were intended as compensation for burdens imposed on the leaders as a result of the mining project, including the need to "attend many meetings and manage issues that come up due to Newmont Ghana's presence."[66]

Other reports concern dealings between an unnamed Chinese company and traditional leaders of the Himba people of Namibia. Notably, the *Windhoek Observer* recently reported that an intermediary gave benefits to leaders of that country's Himba people to secure support for the company's bid to construct a dam that would impact local communities.[67] According to

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61 Justice Lee Adoboe, *Bribery Scandal Rocks Newmont*, FINANCIAL INTELLIGENCE (Ghana) (Aug. 26, 2009), http://wwwmyfinancialintelligence.blogspot.com/2009/08/bribery-scandal-rocks-newmont.html.

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

63 *Id.*; The Special Rapporteur on the Right to Food, Report of the Special Rapporteur on the Right to Food, Addendum, Summary of Communications Sent and Replies Received From Governments and Other Actors, ¶¶ 16-20, 74-75, delivered to the Human Rights Council and the General Assembly, A/HRC/13/33/Add.1 (Feb. 26, 2010).

64 Adoboe, *supra* note 61.

65 Newmont Mining Corporation, *Newmont provides facts about payments to Traditional Councils and the Ajenjua Bepo Production Forest*, http://www.newmont.com/features/our-communities-features/traditionalcouncils.

66 *Id.*

67 Diana Ndimbira, *Graft suspects flirt with chief*, WINDHOEK OBSERVER (Namibia) (Feb. 6, 2014), available at http://observer24.com.na/8-latest-news/2913-graft-suspects-flirt-with-chief. *See also* Sidney L. Harring, *"God Gave Us This Land": The OvaHimba, the Proposed Epupa Dam, the Independent Namibian State, and Law and Development in Africa*, 14 GEO. INT'L ENVTL. L. REV. 35,

the article, the company took eight leaders on a trip to China to tour a dam built by the company there, and bought a car for a prominent chief.[68] Other reports indicate that an intermediary promised cash payments to a prominent chief's associates "should they convince him to sign his consent for the dam's construction."[69] At one time that chief was at the forefront of opposition to the dam,[70] but he has since reportedly "softened his attitude."[71]

Other allegations involve the multinational energy company Shell. Notably, German anthropologist Tobias Haller has written that Shell improperly influenced traditional leaders among the Ogoni people of Nigeria, to win support for the company's operations.[72] Shell reportedly had a practice of giving gifts to Ogoni chiefs and entering into contracts with businesses they controlled.[73] The London-based policy institute Chatham House has further asserted that Shell used an intermediary to bribe an Ogoni chief with a view to avoiding accountability for the failure to properly clean up a large oil spill.[74] The benefits reportedly given to influence the chief included cash payments, improvements to his residence, as well as "a wider local development programme in areas such as education and health."[75]

III. HARNESSING ANTI-CORRUPTION LAWS TO COMBAT THE PHENOMENON

As the foregoing summary indicates, allegations of impropriety in consultations between project developers and indigenous peoples'

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61 (2001) (describing Chief Kapika as "one of fifteen Himba chiefs, and one of four whose lands border the Kunene River as it courses through Kaokoland.").

68 Ndimbira, *supra* note 67.

69 *Namibia Himba protest March against hydro power dam Orokawe Baynes Mountains*, Earth Peoples (Mar. 29, 2014), http://earthpeoples.org/blog/?tag=namibia-himba-protest-march-against-hydro-power-dam-orokawe-baynes-mountains-29-march-2014 [hereinafter Earth Peoples].

70 Ndimbira, *supra* note 67. *See also* Harring, *supra* note 67, at 61.

71 Ndimbira, *supra* note 67; Earth Peoples, *supra* note 69.

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

73 *Id.*

74 Michael Peel, Chatham House, *Crisis in the Niger Delta: How Failures of Transparency and Accountability Are Destroying the Region* 14 (July 2005), available at http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/bpnigerdelta.pdf.

75 *Id.*

representatives are quite common, although the precise nature and context of the impugned conduct varies. The sections immediately below explore whether and when U.S. anti-corruption legislation could be properly applied to dealings between project developers and indigenous leaders.[76]

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

U.S. law enforcement agencies have many legislative tools at their disposal to combat corruption, whether it occurs domestically or abroad. These include state and federal legislation criminalizing bribery of public officials in the United States,[77] state statutes criminalizing private-sector bribery,[78] as well as the FCPA, which targets bribery of foreign public officials. Moreover, the Travel Act[79] and the mail and wire fraud statutes[80] criminalize certain bribery schemes that cross state or national borders.

On the domestic front, the DOJ has long employed the latter statutes to prosecute bribery of public officials or private fiduciaries, including Native American tribal officials. For example, in *United States v. Boots*, the government successfully prosecuted individuals under the Travel Act and wire fraud statute for their attempted bribery of the chief of police of the Passamaquoddy Tribe, in an effort to secure his participation in a scheme to smuggle tobacco into Canada through the tribe's reservation.[81] In upholding the conviction, the United States Court of Appeals for the First Circuit determined that the police chief qualified as a "public servant" within the meaning of Maine's bribery statute, thereby satisfying one of the elements of the Travel Act—namely, that the defendant had crossed state or national borders in furtherance of a bribery scheme that violated state or federal law.[82]

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

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

[78] *See* Jeffrey Boles, *Examining the Lax Treatment of Commercial Bribery in the United States: A Prescription for Reform*, 51 AM. BUS. L.J. 119, 132-33 (2014).

[79] 18 U.S.C.S. § 1952 (2014).

[80] 18 U.S.C.S. §§ 1341, 1343 & 1346 (2014).

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

[82] Boots, 80 F. 3d at 590-92. The elements of a Travel Act violation are discussed in greater detail in Part III.C.1, *infra*.

On the international front, the DOJ and SEC have been extremely aggressive in applying the FCPA to bribery of conventional public officials in foreign countries and the employees of foreign SOEs.[83] In addition, the DOJ has recently begun employing the Travel Act and mail and wire fraud statutes to combat bribery of foreign private-sector employees.[84] As demonstrated below, these statutes could likewise be applied to bribery of indigenous peoples' representatives abroad under some circumstances.

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

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

1. Elements and Defenses

The FCPA is a federal statute that prohibits covered persons from using instrumentalities of interstate or international commerce to "corruptly" give or offer anything of value to a foreign official, political party, party official, or candidate, for a business purpose.[85] It also prohibits offers or payments via an intermediary, if made with a covered person's knowledge.[86] In addition, the statute subjects companies whose securities are publicly traded in the United States to significant accounting requirements.[87]

The sanctions for violating the FCPA can be severe.[88] Of particular relevance to project developers, corporate defendants who commit willful violations of the anti-bribery provisions can incur a maximum fine of $2 million per violation under the FCPA's penalty provisions.[89] Or they can

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83 See Part I, *supra*.

84 *Id.*

85 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

86 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3).

87 15 U.S.C. § 78m(b). For an overview of the FCPA's accounting provisions, see U.S. Dep't of Justice, Criminal Div. & U.S. Sec. & Exch. Comm'n, Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 38-41 (2012) [hereinafter FCPA Resource Guide], available at http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

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

89 15 U.S.C. §§ 78dd-2(g)(l)(A), 78dd-3(e)(l)(A), 78ff(c)(l)(A)-(2)(A) (2006).

incur a penalty of up to twice the gain obtained by reason of the offense, or twice the loss to any other person, under the Alternative Fines Act.[90] Because of this alternative fine option, the penalties imposed routinely exceed the FCPA's statutory maximums, and on several occasions have amounted to hundreds of millions of dollars.[91]

In evaluating whether offers or payments to an indigenous leader violate the FCPA, the most important issues would likely be whether (*i*) the person who made them was covered by the statute, (*ii*) the recipient qualified as a "foreign official," and (*iii*) the offers or payments were made "corruptly." The other elements should be relatively straightforward to satisfy if these had been established. In particular, the instrumentality of interstate commerce element is nearly always satisfied, because the defendant will have traveled, sent an e-mail, or made a phone call when planning or carrying out the bribery scheme.[92] The "business purpose" element would likewise be readily satisfied if a project developer has bribed an indigenous people's representatives to influence their decision-making. That element requires only that bribe be intended to obtain an advantage for the payer's business,[93] and securing support for the project would plainly benefit the developer's business. Finally, while the statute recognizes certain exceptions and affirmative defenses, each of these is either unlikely to apply in this context,[94] or relates to

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[90] 18 U.S.C. § 3571.

[91] Sarah Bartle et al., *Foreign Corrupt Practices Act*, 51 AM. CRIM. L. REV. 1265, 1280 (2014) (highlighting the frequency with which penalties exceed the statutory maximums by virtue of the Alternative Fines Act, and noting criminal fines of $450 million against Siemens AG and its foreign subsidiaries in 2008, of $402 million against Kellog, Brown & Root in 2009 and of $398.2 against Total, S.A. in 2013).

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

[93] *See* FCPA Resource Guide, *supra* note 87, at 12-13 (explaining that this element requires only that the bribe be given "in the conduct of business or to gain a business advantage.").

[94] An exception exists for payments intended "expedite or to secure the performance of a routine governmental action." 15 USCS §§ 78dd-1(b), -2(b), -3(b). Yet if a payment is made to influence an indigenous leader in connection with matters over which he or she has discretion, then this exception would not be available. *See* FCPA Resource Guide, *supra* note 87, at 25 ("The facilitating payments exception applies only when a payment is made to further 'routine governmental action' that involves non-discretionary acts."). The FCPA also provides an affirmative defense for offers or payments that are "lawful under the written laws" of the foreign country. 15 U.S.C. §§ 78dd-1(c)(1), -2(c)(1), -3(c)(1). But this defense, too, is unlikely to

whether the offer or payment was made "corruptly," and can therefore appropriately be considered in connection with that element.[95]

The sections that follow explore each of the elements on which the analysis would likely turn.

2. When Project Developers Are Covered by the FCPA

The FCPA covers several different categories of persons.

One such category is "issuers" and their representatives.[96] The term "issuer" for purposes of the FCPA refers to a company that has issued securities that are publicly traded in the United States.[97] An issuer need not be actively conducting business in the United States, so many foreign companies qualify.[98] Of the companies mentioned in Part II's summary of bribery allegations, those that constitute issuers include American companies Occidental Petroleum, Newmont, and Enron (prior to its bankruptcy), as well as foreign companies Glencore, Total, Shell, and Goldcorp.[99]

A second category of covered person is "domestic concerns" and their representatives.[100] "Domestic concern" is defined to include any U.S. citizen or resident, or any company incorporated in or having its principal place of business in the United States.[101] An example of a domestic concern (not

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be available. *See* FCPA Resource Guide, *supra* note 87, at 23 ("In practice, the local law defense arises infrequently, as the written laws and regulations of countries rarely, if ever, permit corrupt payments.").

95 These exceptions and affirmative defenses are discussed *infra* Part III.B.4 in connection with the "corruptly" element.

96 15 U.S.C.S. § 78dd-1 (2014).

97 15 U.S.C.S. § 78dd-1(a) (2014).

98 FCPA Resource Guide, *supra* note 87, at 11 ("A company thus need not be a U.S. company to be an issuer. Foreign companies with American Depository Receipts that are listed on a U.S. exchange are also issuers. As of December 31, 2011, 965 foreign companies were registered with SEC.").

99 All of these companies have securities listed on the New York Stock Exchange. *See* New York Stock Exchange, Listings Directory, available at https://www.nyse.com/listings_directory/stock. Enron's stock was previously so listed. *See* John R. Kroger, *Fraud Enron and Multi-jurisdictional Fraud*, 28 CARDOZO L. REV. 1657, 1657 (2007).

100 15 U.S.C.S. § 78dd-2(a).

101 15 U.S.C.S. § 78dd-2(h)(1).

already mentioned as constituting an issuer) would be U.S. Capital Energy, the Texas company whose conduct Cultural Survival has questioned.[102]

A third category is foreign persons not otherwise covered that commit an act in furtherance of an FCPA violation in the United States,[103] or aid and abet a violation by a covered person.[104] Although foreign subsidiaries of covered companies generally are *not* covered under the FCPA, they can be liable if they commit proscribed acts in the United States or aid and abet violations by their parent companies. Moreover, covered parent companies can be liable for corrupt conduct of a foreign subsidiary if they direct or authorize the conduct, or know about it and fail to prevent it.[105] In addition, issuers may be liable for FCPA book-keeping or accounting violations by subsidiaries they control.[106]

Based on the foregoing, a number of the entities that have been accused of improper dealings with indigenous representatives are potentially covered by the statute, while others are not, at least insofar as they refrain from issuing

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[102] Cultural Survival, *supra* note 36.

[103] *See* 15 U.S.C.S. § 78dd-3(a) (2014); FCPA Resource Guide, *supra* note 87, at 11-12 ("Those who are not issuers or domestic concerns may be prosecuted under the FCPA if they directly, or through an agent, engage in any act in furtherance of a corrupt payment while in the territory of the United States, regardless of whether they utilize the U.S. mails or a means or instrumentality of interstate commerce.").

[104] *See* FCPA Resource Guide, *supra* note 87, at 12 ("A foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States.").

[105] *See* Miller Chevalier, *Joint DOJ-SEC Guidance On FCPA Clarifies And Confirms Agency Enforcement Attitudes And Policies* (Nov. 10, 2012), http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=91808 (asserting that a parent company may properly be held liable under the FCPA for misconduct by a foreign subsidiary if the parent "directed, authorized, or was actively involved in the subsidiary's action," or "the foreign subsidiary was acting at the behest of its parent and serving as its parent's agent."); Mike Koehler, *The Unique FCPA Compliance Challenges of Doing Business in China*, 25 WIS. INT'L L.J. 397, 427 (2007) ("[I]f a company controls a foreign entity and has actual or constructive knowledge that the entity is engaging in improper activity, a parent company may be considered to be a participant in those actions and subject to prosecution under the FCPA.").

[106] FCPA Resource Guide, *supra* note 87, at 43 ("Although the FCPA's accounting requirements are directed at 'issuers,' an issuer's books and records include those of its consolidated subsidiaries and affiliates. An issuer's responsibility thus extends to ensuring that subsidiaries or affiliates under its control, including foreign subsidiaries and joint ventures, comply with the accounting provisions.").

publicly traded securities or committing proscribed acts in the United States. Among those outside the FCPA's scope would be most sovereign entities, because foreign states proper are not included among the categories of covered persons, and relatively few SOEs have securities that are publicly traded in the United States.[107] Accordingly, unless a particular SOE qualified as an issuer, engaged in prohibited conduct in the United States, or aided and abetted a violation by a covered person, it would not be covered.

3. When Indigenous Leaders Qualify as "Foreign Officials"

The FCPA defines the term "foreign official" to mean

> any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.[108]

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

a. Indigenous Leaders as "Officers or Employees of a Foreign Government"

The FCPA does not define the term "foreign government." It may be significant, however, that the statute uses "government" rather than "state," the term employed by certain other federal statutes concerning foreign sovereigns.[109] This may leave room for the notion of "government" to encompass governments in foreign countries that are not affiliated with the formal state apparatus—including, notably, unrecognized tribal governments. It does not appear that any court or enforcement authority has yet addressed

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[107] *See* U.S. Sec. & Exch. Comm'n, Foreign Companies Registered and Reporting with the U.S. Securities and Exchange Commission (Dec. 31, 2013), available at http://www.sec.gov/divisions/corpfin/internatl/foreigngeographic2013.pdf.

[108] 15 U.S.C.S. § 78dd-1(h)(2)(A) (2014); 15 U.S.C.S. § 78dd-2(h)(2)(A) (2014); 15 U.S.C.S. § 78dd-3(f)(2)(A) (2014).

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

that possibility, and the statute's legislative history sheds little light on the matter. Although a proposed amendment to a Senate draft of the FCPA would have defined the term "foreign government" as the government of a foreign *country* or a subdivision thereof,[110] no such definition was included in the statute as adopted in 1977.[111]

In any event, the FCPA's definition of "foreign official" certainly includes individuals at *any* level of the state apparatus in a foreign country, from the highest to the lowest, as well as others acting in an official capacity.[112]

Some indigenous peoples' representatives in foreign countries will readily qualify as "foreign officials" within this definition, because they have formal positions within the state apparatus of the country in which they reside. In the Nunavut territory of Canada, for example, the Inuit people constitute a majority of the population, and therefore are able to determine the outcome of territorial elections.[113] In fact, the Inuit form a majority in the entire country of Greenland, which has been granted broad self-rule within the Kingdom of Denmark.[114] Consequently, elected Inuit leaders in Nunavut or Greenland are indisputably part of the state apparatus in their respective countries. Furthermore, in Australia, aboriginal groups comprise the majority of the population in some areas, and their representative institutions serve as municipal governments, receiving funding from provincial governments to

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[110] See 122 CONG. REC. 15,792 (1976) (proposing an amendment to S. 3664 that would have defined "foreign government" as "the government *of a country* other than the United States" or any political subdivisions or instrumentalities of such a government) (emphasis added). *See also* Susan Rose Ackermann & Sinead Hunt, *Transparency and Business Advantage: The Impact of International Anti-Corruptoin Policies on the United States National Interest*, 67 N.Y.U. ANN. SURV. AM. L. 433, 436-37 (explaining that S. 3664 was the Senate version of a bill that ultimately became the FCPA).

[111] *See* P.L. 95-213, 91 Stat. 1494 (1977) (containing no definition of "foreign government").

[112] FCPA Resource Guide, *supra* note 87, at 20 ("[T]he FCPA broadly applies to corrupt payments to 'any' officer or employee of a foreign government and to those acting on the foreign government's behalf. The FCPA thus covers corrupt payments to low-ranking employees and high-level officials alike.").

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

[114] GARTH NETTHEIM, GARY D. MEYERS, & DONNA CRAIG, INDIGENOUS PEOPLES AND GOVERNANCE STRUCTURES: A COMPARATIVE ANALYSIS OF LAND AND RESOURCE MANAGEMENT RIGHTS 255-56 (2002).

cover local government functions, and in some cases having the authority to enact ordinances and levy taxes.[115]

A similar official status is enjoyed by indigenous representatives in countries where bribery allegations have been made, as highlighted in Part II. For example, Maya leaders in Belize are appointed by the government and have a recognized place in the state apparatus.[116] Known as *alcaldes*, these leaders serve as judicial officers or magistrates for their village, adjudicating disputes and imposing punishment for minor offenses.[117] They also have the authority to decide who can live in the village, oversee management of communal land, and organize community work projects.[118]

Other allegations discussed in Part II concern projects in Bolivia, where most hydrocarbon resources are found in areas occupied by indigenous communities organized into official indigenous territories.[119] The Bolivian state has devolved some of its governmental powers to these territories, including those previously exercised by municipal or regional authorities.[120]

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115 *Id.* at 31.

116 *See* Government of Belize, The Official Government Portal, Local Government, http://www.belize.gov.bz/index.php/our-governance/how-we-are-governed/local-government (noting that "[t]he *alcalde* system is part of the local government structure of Belize" and that "[t]he government appoints *alcaldes* every two years.") (italics added).

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

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

119 Pellegrini & Ribera Arismendi, *supra* note 12, at 107. *See also* Laurent Lacroix, Indigenous Territoriality and Political Agenda in Bolivia (1970-2010), http://www.sogip.ehess.fr/IMG/pdf/llacroix_indigenous_territoriality.pdf (noting that the Bolivian Constitution calls for "the establishment of autonomous [indigenous] territories integrated into the political administrative organization of the Bolivian State.").

120 Pellegrini & Ribera Arismendi, *supra* note 12, at 107. *See also* Alexandra Tomaselli, *Autonomía Indígena Originaria Campesina in Bolivia: Realizing the Indigenous Autonomy?*, European Diversity and Autonomy Papers 01/2012 28-31, http://www.eurac.edu/en/research/institutes/imr/activities/Bookseries/edap/Documents/2012_edap01.pdf (explaining that newly established indigenous territories absorb the powers of the municipality or region that existed previously, and have the power to enact certain types of laws or implementing regulations).

In addition, some communities outside these indigenous territories have majority indigenous populations.[121]

Philippine law likewise formally recognizes an official role for certain indigenous representative institutions. Specifically, the Philippines' Indigenous Peoples Rights Act gives indigenous peoples or communities the right to create their own municipal governments,[122] and mandates that the state give them "representation in policy-making bodies and other local legislative councils."[123] Moreover, in some areas traditional representative institutions have been recognized by the state as responsible for regulating local land and water use.[124]

Other allegations highlighted in Part II concern projects in Africa, where many traditional leaders similarly have an official status. For example, chiefs of the Himba people of Namibia perform duties on behalf of the national state and receive a government salary.[125] Their responsibilities include adjudicating disputes about customary land or grazing rights, and their judgment is final and ordinarily not reviewable by Namibian courts.[126] Government-appointed chiefs likewise perform administrative functions on behalf of the national state among the Ogoni people in Nigeria.[127] In fact, some commentators have identified a pattern across sub-Saharan Africa

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

122 The Indigenous Peoples' Rights Act, RA No. 8371 (1997), sec. 19.

123 *Id.*, sec. 16.

124 *See, e.g.*, David E. De Vera, *Indigenous Peoples in the Philippines: A Country Case Study*, Philippine Association for Intercultural Development, 13 (2007), http://www.iapad.org/publications/ppgis/devera_ip_phl.pdf (discussing an indigenous community that was "able to convince the Government to recognize the local traditional leadership as an 'interim Protected Area Management Board,'" which has since been working to regulate "the utilization and management of the land and seas."). *See also* Wetzlmaier, *supra* note 56, at 338 ("Village leaders or the council of elders act as guardians of values and practices and are in charge of ensuring the 'protection of watersheds, water sources, and acceptable uses of forests and resources.'").

125 Harring, *supra* note 67, *at* 44.

126 *Id.*

127 HALLER ET AL., *supra* note 72, at 55.

whereby states increasingly give formal recognition to traditional leaders and incorporate them into the nation's governmental framework.[128]

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

As noted above, the FCPA's definition of "foreign official" recognizes that an individual can act in an official capacity even if he or she does not hold a formal position in the state apparatus. The statute does not clarify when this would be the case, but the DOJ, SEC, and federal courts have explained in a number of contexts how someone without such a position can act in an official capacity. In addition, the distinction between private and official conduct is addressed in the International Law Commission's Articles of State Responsibility (ILC Articles).[129]

i. FCPA Interpretive Guidance

One important source of guidance is an opinion issued by the DOJ on September 18, 2012, which sought to identify the circumstances under which a member of a foreign country's royal family could qualify as a "foreign official," despite having no formal position in government.[130] The DOJ issued this opinion in response to a request for guidance by a U.S. company that was seeking to hire a royal family member to provide consulting services in connection with efforts to secure lobbying work from the foreign state.[131] The DOJ identified a number of non-exclusive factors that were relevant to the analysis, including, *inter alia*, the likelihood that the royal family member

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

[129] Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001) [hereinafter ILC Articles].

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

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

could someday hold a position in government (such as by royal succession);[132] his ability, directly or indirectly, to affect governmental decision-making;[133] whether the foreign government characterized him as having governmental power;[134] and whether he could act on behalf of the foreign government.[135]

The DOJ concluded that, based on the information provided by the company requesting the opinion, this particular royal family member did not constitute a foreign official, so long as he did not "directly or indirectly represent that he [was] acting on behalf of the Royal Family or in his capacity as a member of the Royal Family."[136] The DOJ emphasized that this royal family member had no direct or indirect power to award any business sought by the company from the foreign government.[137] Moreover, there were no factors suggesting that the decision-makers who *were* in a position to award business would be influenced by any benefits given to him.[138]

Of the various factors identified in that opinion, perhaps the one most likely to result in an indigenous leader's characterization as a "foreign official" would be his or her ability, directly or indirectly, to affect governmental decision-making relating to a development project. Indigenous leaders should have at least some such ability considering that many countries' domestic laws, as well as international human rights instruments, require governments to take the views of indigenous peoples' representatives into account, or even mandate that the government obtain their consent.[139] Accordingly, unless it could be shown that the indigenous people would not be impacted by the project, or that the individuals in question did not actually represent the people, then this factor could weigh strongly in favor of treating these leaders as "foreign officials."

Further insight into how an otherwise private actor can operate in an official capacity can be derived from authority interpreting the concept of an "instrumentality" of a foreign government. As noted previously, the FCPA defines "foreign official" to include not only officers or employees of foreign

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132 Opinion Procedure Release No. 12-01, *supra* note 130, at 5.

133 *Id.*

134 *Id.* at 6.

135 *Id.* at 6-7.

136 *Id.* at 7.

137 *Id.*

138 *Id.*

139 *See* HINDERY, *supra* note 17; VÁSQUEZ, *supra* note 17; Foster, *supra* note 17.

governments, but also officers or employees of "any department, agency, or *instrumentality* thereof," as well as anyone acting on behalf of such an entity.[140] The FCPA does not define the term "instrumentality," but in recent years the DOJ and the SEC have argued that the term can encompass a state-owned business entity, and courts have agreed.[141] Case law indicates that, to qualify as an instrumentality for purposes of the FCPA, the entity must be owned or controlled by a foreign government, and must carry out some policy or function of the foreign government.[142] Factors relevant to whether or not the entity is acting on behalf of the government include whether: it has a monopoly over the activity it exists to carry out; the government subsidizes its activities; it provides services to the public at large; and it is generally perceived to be acting on behalf of the government.[143] Notably, however, to be an instrumentality the entity need not be engaged in activity that is an exclusive preserve of the government. Courts and enforcement authorities have repeatedly characterized entities as instrumentalities for purposes of the FCPA even though they engage in commercial activities, so long as they carry out those activities on behalf of the state and for the public benefit.[144] Examples of SOEs treated as "instrumentalities" in this regard include state-owned telecommunications,[145] electricity,[146] and oil[147] companies.

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[140] 15 U.S.C.S. § 78dd-1(h)(2)(A); 15 U.S.C.S. § 78dd-2(h)(2)(A); 15 U.S.C.S. § 78dd-3(f)(2)(A) (emphasis added).

[141] *See* FCPA Resource Guide, *supra* note 87, at 20-21.

[142] *See, e.g.,* United States v. Carson, 2011 U.S. Dist. LEXIS 88853 (C.D. Cal. May 18, 2011) (noting the Justice Department view that an "instrumentality" for purposes of the FCPA is "an entity through which a government achieves an end or purpose or carries out the functions or policies of the government."); *id.* at 11-12, 16 (identifying state ownership or control as a factor in characterizing an entity as an "instrumentality," but asserting that, in addition, the entity must "carry out governmental functions or objectives."); United States v. Esquenazi, 752 F.3d 912, 925 (11th Cir. 2014) (defining the term as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.").

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

[144] *See* Esquenazi, 752 F. 3d at 926-27 (noting that a governmental function can potentially include any activity in the public interest delegated by the government, and that even seemingly private behavior may be treated as that of the state itself).

[145] *Id.* at 928-29 (affirming sufficiency of evidence supporting jury verdict that Haitian state-owned telecommunication was an instrumentality).

[146] *See, e.g.,* Aguilar, 783 F. Supp. 2d 1108 (denying motion to dismiss charges involving alleged bribes to executives of Mexican state-owned electricity company based on conclusion that the entity could qualify as an instrumentality).

By analogy, an indigenous people's representatives could qualify as "foreign officials" even if they are private actors in other contexts, so long as they (or the representative body to which they belong) are acting on the state's behalf in some way when they receive an offer or payment. Moreover, it has been argued that a tribal government might be treated as an instrumentality for purposes of the FCPA if the tribe was *subsidized* by that government, based on language in the case law that makes subsidization a factor in the analysis.[148] Put another way, if the foreign state employs a tribal government as the vehicle for negotiating or delivering the compensation due to an indigenous people for a project, or otherwise for delivering social services to that people, then this would tend to support treating its members as "foreign officials."

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

Further insight into how one who lacks a formal position in the state apparatus can be deemed a state actor can be gleaned from other sources. One is case law concerning 28 U.S.C. Section 1983, which provides remedies for deprivations of federal rights committed "under color of law."[149] Another is the ILC Articles, which identifies when conduct may be attributed to a state under public international law.[150] Both recognize that private individuals or entities can be treated as state actors if they were (*i*) performing a traditionally public function, or (*ii*) encouraged, directed or controlled by the state.

1. Public Function Tests

The public function test under federal case law asks whether the challenged action is a traditional and exclusive function of the state.[151] Courts

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147 *See* FCPA Resource Guide, *supra* note 87, at 20-21 (describing a case in which a California company that paid bribes to executives of a Mexican state-owned oil company); Carson, 2011 U.S. Dist. LEXIS 88853 (denying motion to dismiss charges involving alleged bribes to executives of Chinese state-owned oil companies based on conclusion that the entities could qualify as instrumentalities).

148 Cohen & Funk, *supra* note 8, at 4.

149 42 U.S.C.S. § 1983. *See also* Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1139 (9th Cir. 2012) (explaining that although Section 1983 makes liable only those who act under color of law, a private entity can be subject to liability under that provision if the conduct allegedly causing the deprivation of a federal right was fairly attributable to the state).

150 ILC Articles, *supra* note 129.

151 Estades-Negroni v. CPC Hosp. San Juan Capestrano,412 F.3d 1, 5 (1st Cir. 2005) ("[I]n accordance with the public function test, a private party is viewed as a state actor if the plaintiff

have found that the following conduct, *inter alia*, qualifies as functions of that nature: arresting or imprisoning individuals as punishment for crimes;[152] taking private property under the eminent domain power;[153] regulating access to, or speech in, public property;[154] setting eligibility criteria for political elections;[155] and sterilizing animals without their owners' consent under authority delegated by state law.[156]

Similarly, the ILC Articles provide that conduct may be attributed to a state if the the person or body has exercised "elements of governmental authority," whether under powers granted by law[157] or "in the absence or default of the official authorities."[158] The Commentary provides examples that are similar to activity deemed traditional public functions under federal case law, including situations in which a private firm supplies prison guards,[159] and a private airline is tasked with immigration control.[160]

As will be seen, indigenous peoples' leaders and representative institutions often perform roles comparable to those treated as traditional public functions under federal case law and the ILC Articles, even if they have not been formally integrated into the state apparatus. This may result from self-

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establishes that, in engaging in the challenged conduct, the private party performed a public function that has been 'traditionally the exclusive prerogative of the State.') *quoting* Blum v. Yaretsky, 457 U.S. 991, 1005, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982).

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

153 Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-53 (U.S. 1974); Romanski v. Detroit Entm't, L.L.C., 428 F.3d 629, 636 (6th Cir. 2005).

154 Lee v. Katz, 276 F.3d 550, 555-56 (9th Cir. 2002) (regulation of free speech within a public forum) Watchtower Bible & Tract Soc'y of N.Y., Inc v. Jesus, 634 F.3d 3, 10 (1st Cir. 2011) ("Regulating access to and controlling behavior on public streets and property is a classic government function.").

155 Terry v. Adams, 345 U.S. 461, 469-70, 73 S. Ct. 809, 97 L. Ed. 1152 (1953).

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

157 ILC Articles, *supra* note 129, art. 5, 44.

158 *Id.* at art. 9, 45.

159 *Id.*

160 *Id.*

government arrangements that the people in question has negotiated with the state, or from the simple fact that, in many areas occupied by indigenous peoples, the formal state apparatus has little or no presence.[161]

For example, certain aboriginal groups in Canada have negotiated agreements with the federal and provincial governments that give their representative institutions primary authority over such matters as property rights, use of community lands, child and family services, education, and cultural property, including the power to make laws with respect to these matters.[162] Whether these arrangements are characterized as delegations of state authority or recognition of the aboriginal groups' inherent sovereignty,[163] the relevant representative institutions are plainly exercising governmental functions at the local level.

Leaders of the Achuar people of South America provide another example. They are responsible for organizing communal work projects, resolving disputes, and imposing punishments on community members who commit offenses.[164] These functions appear quite similar to those performed by *alcaldes* among the Maya of Belize, who—as previously noted—are treated as formal government officials under that country's law. Moreover, responsibility for law enforcement is explicitly identified as a public function in U.S. case law and the Commentary to the ILC Articles. Indeed, in the *Boots* case discussed *supra* Part III.A, the First Circuit held that the police chief of the Passamaquoddy Tribe qualified as a "public servant" within the meaning of Maine's public bribery statute because—as someone responsible for "enforcing state laws and tribal ordinances within the reservation"—he was

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[161] *See* Imai, *supra* note 113, at 295-96 (discussing self-government agreements between the Canadian government and various First Nations); VÁSQUEZ, *supra* note 17, at 65 ("One of the main complaints of local communities affected by hydrocarbons projects is the lack of state presence in their territories, which are usually remote or neglected areas far from the capital city, where most decisions are made.").

[162] Imai, *supra* note 113, at 295-96; Lisa Dufraimont, *Continuity and Modification of Aboriginal Rights in the Nisga'a Treaty*, 35 U.B.C. L. REV. 455, 469-71 (2002) (describing one such agreement involving the Nisga'a First Nation, and noting that, among other things, it "recognizes the law-making power of Nisga'a government").

[163] Dufraimont, *supra* note 162 at 469-71 (explaining that the self-government provisions of the agreement with the Nisga'a First Nation can be seen as a delegation of powers from the federal and provincial governments, but arguing that "these rights find their source in the pre-existing rights of the Aboriginal nation").

[164] DON KRAFT, VOICES FROM THE FOREST: LEADERSHIP REVEALED THROUGH CARE, SHARED UNDERSTANDING, AND IMAGINATION 86-87 (2009).

performing a "governmental function."[165] Finally, if Achuar leaders have the power to resolve disputes *without* party agreement to their jurisdiction, then this is arguably a public function as well.[166] Although there are private forms of dispute resolution, these require party consent.[167]

In Africa, even traditional leaders not yet formally integrated into the state apparatus are sometimes responsible for performing roles analogous to those treated as public functions under the above authorities. These roles may include adjudicating disputes and maintaining law and order,[168] as well as allocating communal lands and regulating land use.[169]

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

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

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

168 Logan, *supra* note 128, at 360-61 (describing functions typically performed by traditional chiefs in sub-Saharan Africa); Stephen B. Kendie & Bernard Y. Guri, *Indigenous Institutions and Contemporary Development in Ghana: Potentials and Challenges*, *in* TRADITIONAL KNOWLEDGE IN POLICY AND PRACTICE: APPROACHES TO DEVELOPMENT AND HUMAN WELL-BEING 52, 60 (Suneetha M. Subramanian and Balakrishna Pisupati, eds., 2010) (explaining that the roles of traditional chiefs in Ghana include "making and enforcing rules in the community," "providing traditional judicial services," and "conflict resolution and settlement of disputes"); MAHMOOD MAMDANI, CITIZENS AND SUBJECTS: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM 280 (1996) (explaining that in South Africa a primary function of traditional chiefs is "to ensure 'the security of the area," and quoting one chief as saying that his main duty was to "sort things out when there is fighting.").

169 Logan, *supra* note 128, at 360-61 (asserting that chiefs dominate the role of allocating public land in Ghana, Malawi, and Zimbabwe, to the exclusion of central and local governments); Kendie & Guri, *supra* note 168, at 60-61 (asserting that one of the most important roles of traditional leaders in Ghana is the "custodianship of land and resources"); Ailey Kaiser Hughes, Anna Knox & Kelsey Jones-Casey, *Customary Leaders and Conflicts of Interest Over Land in Ghana*, FOCUS ON LAND IN AFRICA, http://www.focusonland.com/countries/abuse-of-customary-authority-over-land-in-ghana/ ("In Ghana, customary authorities—namely chiefs and

Similar roles are played by traditional leaders in Papua New Guinea. In particular, the vast majority of the country's land is held communally and administered by clan leaders.[170] These leaders are sometimes empowered to make decisions on behalf of the clan regarding land use, although they may operate autonomously from state institutions and policies.[171] Clan leaders and community elders also play a key role in resolving land disputes and otherwise maintaining security in their communities.[172] As noted above, land use management and keeping the peace are classic public functions, and dispute resolution can be as well.

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

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earth priests (*tendamba*) in the north and family heads in the south—are responsible for protecting and administering rights to land for the benefit of the communities that they govern.").

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

171 *See* Gina Koczberski, George N. Curry & Jesse Anjen, *Changing Land Tenure and Informal Land Markets in the Oil Palm Frontier Regions of Papua New Guinea: The Challenge for Land Reform*, 43 AUSTRALIAN GEOGRAPHER 181, 182 (2012) (noting land use management in Papua New Guinea takes place in a void created by ineffective government institutions and that "government efforts in land reform often lag behind what is happening informally as customary landowners and migrants develop their own systems of tenure for land transactions regardless of state policies"); *id.* at 190 (noting that particular individuals or families are typically "authorised and identified by the community to deal in land matters.").

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

2. Direction or Control Tests

U.S. case law further recognizes that a private person may be treated as a state actor if the state has given significant encouragement to the person's conduct, the person has operated as a willful participant in joint activity with the state, or the state is entwined in the person's management or control.[173] The ILC Articles similarly provide that conduct of a person or body lacking any formal governmental position can be attributed to the state if the person or body was acting on the instructions of—or under the direction or control of—the state in carrying out the conduct.[174]

These tests suggest that an indigenous people's representatives or institutions should be treated as a state actor if, for example, they work with the state to regulate or facilitate a development project, or the state appoints them to represent their people in consultations. Notably, states are sometimes reported to intervene in the selection of indigenous peoples' representatives for such purposes, albeit controversially.[175] Whether the state is justified in making such an appointment or not, if it does so then the designated body or person is arguably acting on the state's behalf when exercising that role, and any benefits that a project developer might offer them in that capacity could potentially violate the FCPA.

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

As the above discussion has demonstrated, there are a number of circumstances under which an indigenous people's representatives could qualify as "foreign officials" for purposes of the FCPA. The possibility exists, however, that there could be competing groups or factions within any given indigenous community, each of which holds itself out as representing the

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

[174] ILC Articles, *supra* note 129, art. 8, 45.

[175] *See* Wetzlmaier, *supra* note 56, at 338 ("Village leaders report that conflicts have been provoked by local government officials who, following their own business interests, assigned an 'alternative' council of elders that—in opposition to the traditional leaders—acts in favour of mining."); Schilling-Vacaflor, *supra* note 23, at 14 (asserting that the Bolivian government excluded one indigenous representative body from consultations over a proposed project "and instead a parallel organization that was more supportive of the planned project, composed of the communities directly affected by the seismic tests, was given an important role.").

people or having an entitlement to choose its representatives.[176] This may make it difficult for project developers or enforcement authorities to ascertain who constitutes an indigenous people's representatives for purposes of consultations,[177] and consequently whether or not individuals with whom they deal might constitute "foreign officials."

In these situations, the question should not be whether the putative representatives enjoy universal recognition, but simply whether they meet the criteria for official status with respect to at least a *portion* of the community. It should be sufficient, for example, if the leader or body performs a public function for particular clans, or has some degree of influence over the foreign state's decision-making in relation to the project, even if others have competing claims to leadership. As noted above, the FCPA's definition of "foreign official" requires only that the person be an officer or employee of the government or otherwise act in an official capacity—it does not require that he or she hold office at any particular level or exercise public functions with respect to any minimum percentage of society.

4. When Benefits Are Given or Offered "Corruptly"

For a payment or offer to violate the FCPA, it must not only have been made to a proscribed recipient, it must also have been made "corruptly."[178] Although the FCPA does not define that term, the statutory text indicates that offers or payments violate the FCPA if made to influence any official act,

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[176] *See* Hartmut Holzknecht, *Problems of articulation and representation in resource development: the case of forestry in Papua New Guinea*, 7 ANTHROPOLOGICAL FORUM 549, 564 (1998) (observing that indigenous landowner groups in Papua New Guinea are sometimes divided, and that "as in all human societies, there are factions within groups, opportunists and entrepreneurs, conservatives and avant-garde elements, leaders and followers."); Roper, *supra* note 121, at 150 (noting that many indigenous communities in Bolivia have been hampered by "hostilities within and between communities, distrust between communities and representative organizations and leaders, factionalism within indigenous organizations, and power struggles between indigenous organizations.").

[177] *See* Shalanda H. Baker, *Why the IFC's Free, Prior and Informed Consent Policy Does Not Matter (Yet) to Indigenous Communities Affected by Development Projects*, 30 WIS. INT'L L.J. 668 (2012) (noting the risk of corruption during the consultation process, and the difficulty that project developers could encounter in seeking to "identify the appropriate voices in the community in order to obtain their consent[.]"); Special Rapporteur 2013 Report, *supra* note 21, at ¶ 71 ("It may be that in some circumstances ambiguity exists about which indigenous representatives are to be engaged [in consultations], in the light of the multiple spheres of indigenous community and organization that may be affected by particular extractive projects, and also that in some instances indigenous representative institutions may be weakened by historical factors.").

[178] 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

decision or omission of a foreign official or governmental entity, or otherwise to secure an improper advantage.[179] Courts and enforcement agencies have interpreted this to mean that offers or payments are made "corruptly" if given for one of those purposes.[180] By contrast, offers or payments are not corrupt if given to a genuine charitable cause[181] or to the state itself (rather than an individual official).[182]

Applying this standard to the allegations discussed above in Part II, certain of the reported payments or offers to indigenous leaders might qualify as corrupt (assuming, for purposes of discussion, that they were attributable to a covered person and could be proven in a court of law). An example would be the alleged offer of money and vehicles to Maya *alcaldes* in an effort to induce them to drop the community's lawsuit and authorize the use of lands claimed by the community.[183] As noted above, allocating access to community lands is arguably a public function.

Certain other alleged benefits reported in the media or scholarly literature arguably would not qualify as corrupt because they were reportedly given for the benefit of the community as a whole. An example would be the alleged payments by Shell to Ogoni chiefs to finance "a local development programme in areas such as education and health."[184] It bears noting, however, that covered persons must use due diligence and employ appropriate controls to mitigate the risk that charitable or community benefits could be used by leaders for corrupt purposes.[185]

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179 *Id.*

180 *See* FCPA Resource Guide, *supra* note 87, at 107-08 n. 75, *quoting* S. Rep. No. 95-114, at 10 and H.R. Rep. No. 95-640, at 7.

181 *See* FCPA Resource Guide, *supra* note 87, at 17 ("Companies often engage in charitable giving as part of legitimate local outreach. The FCPA does not prohibit charitable contributions or prevent corporations from acting as good corporate citizens. Companies, however, cannot use the pretense of charitable contributions as a way to funnel bribes to government officials.").

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

183 *See* Part II.A, *supra*.

184 Peel, *supra* note 74, at 14.

185 *See* FCPA Resource Guide, *supra* note 87, at 19 (discussing the need for due diligence and controls and describing procedures that have been deemed adequate).

Another important feature of the FCPA is that it treats as *per se* non-corrupt any payments made to a proscribed recipient to cover a legitimate business expense.[186] Specifically, it creates an affirmative defense for payments that represent a "reasonable and bona fide expenditure … incurred by or on behalf of" a proscribed recipient, provided the payment is directly related to "the promotion, demonstration, or explanation of products or services," or "the execution or performance of a contract with a foreign government or agency thereof."[187] Certain of the transactions described in Part II could potentially fall within this defense. An example would be the alleged payments by a subsidiary of the gold mining company Newmont to Akyem chiefs in Ghana, if the payments were reasonable in amount and directly related to responsibilities the chiefs were obliged to perform in connection with a contract or its negotiation. Another would a Chinese company's alleged financing of a trip by Namibian tribal leaders to tour a dam constructed by the company in China. [188] The DOJ and SEC have emphasized, however, that application of this affirmative defense requires a highly fact specific analysis, and that no expenditures will qualify for the defense if they are "designed to corruptly curry favor with the foreign government officials."[189]

Another scenario that would likely require a highly fact specific analysis is when benefits are purportedly given to an indigenous people's representatives in their *personal or private* capacities, such as in exchange for their agreement to assign or lease their individual property rights, or in payment for services they have performed in connection with a project separately from their official duties. The FCPA does not cover benefits or offers made for purely

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[186] *See id.* at 17 (noting that if a payment falls within the reasonable and bona fide expenditure defense, "[t]here is nothing to suggest corrupt intent"); Cort Malmberg & Alison B. Miller, *Foreign Corrupt Practices Act*, 50 AM. CRIM. L. REV. 1077, 1097 (2013) ("This defense is only available if the defendant can show that the bona fide expenditures lack a corrupt purpose."); H.R. Rep. No. 100-576, at 922, *reprinted in* 1988 U.S.C.C.A.N. 1952 (noting that if a payment or gift is corruptly made in return for an official act or omission, then it cannot be bona fide).

[187] 15 U.S.C. § 78dd-1(c)(2); 15 U.S.C. § 78dd-2(c)(2); 15 U.S.C. § 78dd-3(c)(2).

[188] *See* FCPA Resource Guide, *supra* note 87, at 24 (noting that "travel and expenses to visit company facilities or operations" generally would not violate the FCPA, so long as they are reasonable and bona fide and certain safeguards are employed, such as "[p]rovid[ing] no additional compensation, stipends, or spending money beyond what is necessary to pay for actual expenses incurred.").

[189] *See id.* at 18.

personal matters,[190] but it can be difficult to distinguish between personal and official conduct, and benefits purportedly given for personal matters could influence the leader in his official role.[191] For example, if a project developer offers a leader (or a company he controls) a lucrative job or contract in connection with the project, then this could incentivize him to support it in his official capacity.[192] Indeed, several of the allegations highlighted in Part II involve attempts to "co-opt" indigenous leaders in this manner.[193]

It would be useful if the DOJ and the SEC would promulgate guidance in this area that would give project developers some flexibility to enter into transactions with prominent members of indigenous communities, provided appropriate safeguards are employed. It cannot be denied that project developers may have legitimate reasons for entering into transactions with community members who hold leadership positions. Notably, these individuals may be the best suited to provide services that the company needs for the project, and requiring the developer to employ outsiders instead could defeat the goal of maximizing community benefits.[194] Indeed, the utilization

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

[191] O'BRIEN & DAVIDIAN, *supra* note 190 ("It is often difficult to distinguish an individual's 'official capacity' from his or her business or personal capacity. In many foreign countries officials can continue to operate private ventures while holding public office …").

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

[193] *See, e.g.*, Schilling Vacaflor, *supra* note 23, at 13 (discussing allegations that a subsidiary of French energy company Total gave lucrative jobs to community leaders during consultations over a project to secure their support).

[194] *See* Andrés Liebenthal, Roland Michelitsch & Ethel Tarazona, *Extractive Industries and Sustainable Development: An Evaluation of World Bank Group Experience*, WORLD BANK GROUP, 200 (2005), available at http://documents.worldbank.org/curated/en/2005/01/5876430/extractive-industries-sustainable-development-evaluation-world-bank-group-experience (asserting that the best development projects seek "to maximize economic opportunities for the local community."); International Finance Corporation, *Investing in People: Sustaining Communities through Improved Business Practice* 18 (2000), available at http://www.ifc.org/wps/wcm/connect/1dc2e10048865811b3fef36a6515bb18/CommunityG

of outsiders to perform services (rather than local individuals or companies) can be a source of considerable tension with local stakeholders.[195] And even if there are other community members who are capable of performing the services in question, it may not be in the community's best interest to disqualify leaders from consideration. Among other things, such a requirement could deter the most effective leaders from serving.

In an effort to strike a balance between these competing considerations, some Native American tribes in the United States and First Nations in Canada have developed internal conflict-of-interest policies that allow leaders to enter into transactions or provide services to companies with which the tribe or group is dealing, provided certain criteria are satisfied. These typically allow conflict-of-interest transactions to go forward so long as all material facts are disclosed and disinterested members of the tribal government, or the tribe as a whole, votes to approve it.[196] Were the DOJ and SEC minded to develop guidelines for dealing with transactions between project developers and indigenous leaders, they might draw on these policies.

Another potential source of inspiration is state law governing corporate conflict-of-interest transactions, which likely informed the above-referenced tribal policies. For example, under Delaware law, a transaction in which a corporate fiduciary has an interest is generally permissible provided it (*i*) was approved, after full disclosure, by a majority of disinterested and independent board members or shareholders, or (*ii*) is substantively and procedurally fair to the corporation.[197] Factors treated as relevant to fairness include whether the price paid meets arm's length market standards; whether competitive bidding was employed; and whether there was anything about the timing or structure of the transaction that disadvantaged the corporation.[198]

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uide.pdf?MOD=AJPERES ("One way to maximize the local employment impact of a project is to give preference to people from the local area for all open jobs.").

195 *See, e.g.*, Norimitsu Onishi, *In One of World's Poorest Corners, a Flood of Wealth and Worry*, N.Y. TIMES (Oct. 26, 2010), A1 (reporting that Exxon-Mobil has encountered demands by local communities in Papua New Guinea that it employ local companies for construction and waste management services, or risk acts of violence).

196 *See, e.g.*, Attawapiskat First Nation Conflict of Interest Policy, available at http://www.attawapiskat.org/documents/; Confederated Tribes of the Umatilla Indian Reservation, Advisory Committee Code, available at http://ctuir.org/advisory-committee-code.

197 *See* Steven M. Haas, *Legal Duties and Responsibilities of the Board*, *in* CORPORATE GOVERNANCE: LAW AND PRACTICE § 4.05 (Amy L. Goodman & Steven M. Haas, eds. 2014); DAVID A. DREXLER ET AL., DELAWARE CORPORATION LAW AND PRACTICE § 15.05 (2014).

198 *See* Hass, *supra* note 197; DREXLER, *supra* note 197.

If similar criteria were considered in evaluating a transaction between a project developer and an indigenous people's representative, any inference of corrupt intent might be negated by a showing that the transaction was approved after full disclosure by a majority of disinterested and independent community leaders or by a majority of disinterested voting members of the community overall. Liability might also be avoided if the transaction satisfied arm's length standards and was otherwise fair to the community under the circumstances. One factor that could be relevant to fairness is whether the contract or transaction was unusual in type or amount as compared to benefits offered by the project developer to *other* community members. For example, if the project developer offered employment or service contracts to numerous community members and companies—most of which were not leaders or controlled by them—and the amounts offered to the leaders or their companies were commensurate with those offered to non-leaders, then this arguably would weigh against treating the transactions as corrupt. By contrast, if the project developer proposed to hire *only* leaders or their companies, or to award them disproportionately lucrative contracts, this could support an inference of corrupt intent.

C. Other Anti-Corruption Statutes and Their Potential Applicability

Because the FCPA covers only public corruption, law enforcement agencies would need to rely on other legislative resources to target bribery of any indigenous peoples' representatives who do not qualify as foreign officials. As explained in the sections that follow, the Travel Act and mail and wire fraud statutes could be useful in some such cases.[199]

1. The Travel Act

The Travel Act criminalizes certain unlawful activity that crosses state or national borders. Specifically, the elements of a Travel Act violation are: (*i*) travel in or use of the instrumentalities of interstate or foreign commerce, (*ii*) with intent to promote, direct, or manage a specified unlawful activity, and

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

(*iii*) a subsequent overt act in furtherance of the unlawful activity.[200] One of the unlawful activities covered by the Travel Act is "bribery … in violation of the laws of the State in which committed or of the United States."[201] Yet there is no federal law that specifically prohibits private-sector bribery, so the DOJ can target that form of corruption via the Travel Act only if it was committed in a state that has a statute prohibiting it.[202]

At least twenty-two states have statutes criminalizing private-sector bribery.[203] These vary in their wording, but the basic elements remain largely consistent from state to state.[204] One showing that always has to be made is that the bribe has violated a "duty of fidelity" owed by the bribe recipient toward another, typically an employer, principal, or beneficiary in a fiduciary relationship.[205] For this to be the case, however, the recipient generally need not be a formal or traditional employee, agent or fiduciary; he or she simply must owe a duty of trust and confidence to a third person, and violate that duty by accepting the bribe.[206] Consequently, bribes to an indigenous people's leaders could be covered by such a statute if the community or a subset thereof has entrusted the leader to represent it in dealings with the

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200 18 U.S.C.S. § 1952(a); United States v. Wander, 601 F.2d 1251, 1258 (3d Cir. 1979); United States v. Childress, 58 F.3d 693, 719 (D.C. Cir. 1995); United States v. Tragas, 727 F.3d 610, 618 (6th Cir. 2013).

201 18 U.S.C.S. § 1952(b).

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

203 *Id.*

204 *See* Corr & Lawler, *supra* note 199, at 1269-70 (state commercial bribery statutes "generally prohibit a person from conferring or agreeing to confer a benefit upon an employee, agent, or fiduciary without the consent of that person's employer, if such benefit is intended to influence the employee's conduct with respect to the employer's affairs."); Boles, *supra* note 78, at 132-33 (summarizing the standard elements of state commercial bribery statutes).

205 Boles, *supra* note 78, at 147-48 ("Legislatures and the judiciary have specified that the purpose of commercial bribery statutes is to criminalize conduct in relationships where a duty of fidelity is owed, and the statutes … typically indicate that a duty of fidelity violation is a principal element of the offense.") (internal quotation marks omitted).

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

project developer or related matters, and the bribe is given to influence the leader's conduct in that capacity.[207]

To be sure, these state statutes are usually applied to actual or attempted bribery of the employees or agents of private-sector *business enterprises*,[208] whereas indigenous peoples' representatives typically represent a community or an informally-organized collection of individuals or groups. Nevertheless, prosecutors have successfully applied these state statutes outside the typical business enterprise context on a number of occasions, including to bribery of attorneys,[209] union representatives,[210] and boxing federation officials.[211] Moreover, in some cases indigenous peoples' representatives may fit the pattern of a more conventional private-sector bribery case, because a number of indigenous groups have organized companies to hold their property interests or pursue development initiatives, and their leaders may serve as corporate officers or employees.[212]

In any event, a major potential obstacle to applying these statutes to an act of bribery involving a foreign indigenous leader would be the need to establish a territorial connection with the relevant U.S. state. The required nexus varies from state to state, but in general prosecutors would have to show that that the bribe or some significant act in furtherance of it took place within the relevant state. For example, in the recent *Carson* case, the DOJ was able to employ the Travel Act to prosecute the representatives of an American

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

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

[209] Ex parte Mattox, 683 S.W.2d 93 (Tex. App. 1984).

[210] United States v. Parise, 159 F.3d 790 (3d Cir. 1998).

[211] United States v. Lee, 359 F.3d 194 (3d Cir. 2004).

[212] *See* Special Rapporteur 2013 Report, *supra* note 21, at ¶ 10 ("There are several notable cases in North America, for example, in which indigenous nations or tribes own and operate companies that engage in oil and gas production, manage electric power assets, or invest in alternative energy. In many cases they have partnered with non-indigenous companies to develop extractive enterprises in which they have or eventually gain majority ownership interests.").

company for bribing private-sector employees in foreign countries because the defendants wired the bribes from bank accounts in California.[213]

2. The Mail and Wire Fraud Statutes

The mail and wire fraud statutes make it a crime to participate in a scheme to defraud or obtain money by means of false pretenses, representations, or promises effected through the United States mail or interstate wire, radio, or television communications.[214] Courts have treated bribery schemes as a form of fraud actionable under them. Their application to private-sector bribery is "based on the belief that the employer is the victim of a fraud when the employee has used her position to obtain illegal benefits in exchange for making or influencing certain decisions affecting the employer's business."[215] Moreover, Congress added a provision to the chapter of the United States Code in which the mail and wire fraud statutes are found to clarify that the statutes are not limited to schemes seeking to deprive someone of money or tangible rights, but also cover bribe or kick-back schemes that deprive someone of the intangible right to "honest services."[216]

The DOJ has invoked the mail and wire fraud statutes on several occasions to prosecute acts of bribery not covered by the FCPA, often in conjunction with the Travel Act. One notable example is the *Boots* case, discussed above in Part III.A, involving the attempted bribery of the police of chief of the Passamaquoddy Tribe.[217] And as with the Travel Act, the DOJ has recently

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[213] United States v. Carson, 2011 U.S. Dist. LEXIS 154145 *24-*31 (C.D. Cal., Sept. 20, 2011).

[214] Corr & Lawler, *supra* note 199, at 1269.

[215] *Id.* at 1269-70. *See also* United States v. Frost, 125 F.3d 346 (6th Cir. 1997) ("[P]rivate individuals … may commit mail fraud by breaching a fiduciary duty and thereby depriving the person or entity to which the duty is owed of the intangible right to the honest services of that individual.").

[216] 18 U.S.C.S. § 1346 (2014) ("For the purposes of this chapter [18 U.S.C.S. §§ 1341 et seq.], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."); Skilling v. United States, 561 U.S. 358, 400-02 (2010) (explaining that Congress enacted the "honest services" provision in response to an earlier U.S. Supreme Court case that had restricted application of the mail and wire fraud statutes to situations in which the person defrauded had suffered a loss of "tangible rights"). *But see id.* at 368 (holding that Section 1346 may not constitutionally be applied to loss of intangible rights beyond the context of bribes and kickbacks).

[217] United States v. Boots, 80 F.3d 580, 592-94 (1st Cir. 1996) (upholding convictions of several individuals based on their attempted bribery of the police chief of the Passamaquoddy

started using the mail and wire fraud statutes to combat bribery of private-sector employees overseas. For example, in one case the DOJ charged SSI International Far East ("SSIFE"), the foreign subsidiary of an Oregon company, with wire fraud in connection with bribes allegedly paid to officers of private and state-owned companies in China and South Korea.[218]

Although to date the DOJ's application of the mail and wire fraud statutes to private-sector bribery abroad has been limited to cases involving officers or employees of *business enterprises*, these statutes could also be applied to bribery of indigenous peoples' representatives.

To successfully prosecute a project developer under these statutes for bribery of this nature, the government would need to make several showings. In addition to establishing the defendant's intent to participate in a bribery scheme and use of an instrumentality of interstate commerce, it would have to show that the scheme caused or threatened some detriment to the victim, although courts differ in how they apply this element.[219] Some courts consider it sufficient if the defendant made a material misrepresentation or omission, such as merely failing to disclose the bribe.[220] In cases involving an indigenous people's representative, this test should readily be satisfied so long as the bribe was not disclosed to the community, and was large enough that the community would have considered it important to know about the benefit.[221] Other courts require a showing that the defendant could have reasonably foreseen that the bribery scheme could cause economic or

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Tribe), *overruled on other grounds*, Pasquantino v. United States, 544 U.S. 349, 354-55 (2005). (affirming conviction for wire fraud).

[218] *See* U.S. Dep't of Justice, FCPA and Related Enforcement Actions, United States v. SSI International Far East, Ltd., Court Docket Number: 06-CR-398, Information ¶ 15-19, available at http://www.justice.gov/criminal/fraud/fcpa/cases/ssi-intl.html [hereinafter SSIFE Information].

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

[220] Rybicki, 354 F.3d at 145-46 (adopting the "materiality" test); United States v. Milovanovic, 678 F.3d at 726-27 (same).

[221] Rybicki, 354 F.3d at 145-46 ("[The misrepresentation or omission at issue for an honest services fraud conviction must be 'material,' such that the misinformation or omission would naturally tend to lead or is capable of leading a reasonable employer to change its conduct."). In the case of an indigenous people's representative, the community itself is the "employer" or victim of the scheme.

pecuniary harm to the victim.[222] But even this test could potentially be satisfied in cases involving indigenous leaders. The developer may be able to foresee that a bribe to such a leader could result in economic or pecuniary harm to his or her community, because a corrupted leader might not be as aggressive in negotiating concessions and maximizing community benefits.

Significantly, however, the government would also have to show that the bribery scheme was effectuated at least in part in the United States.[223] For example, in the SSIFE case, the wire fraud conviction was based on alleged payment of the bribes via wire transfers from the United States.[224] Similarly, in a recent case against RJR Nabisco, the Second Circuit upheld application of the wire fraud statute to an international money laundering conspiracy because the company allegedly orchestrated the conspiracy from the United States via regular communications, orders, and payments sent from the United States.[225] In cases involving bribery of indigenous leaders in foreign countries, it is certainly possible that the project developer would send payments or communications in furtherance of the scheme from the United States, but the conduct might also take place entirely abroad.

In sum, both the Travel Act and the mail and wire fraud statutes could cover some bribery schemes involving indigenous peoples' representatives, but others would be outside their scope—particularly those implemented entirely outside the United States.

IV. FACTORS INHIBITING ENFORCEMENT IN THIS CONTEXT AND HOW THEY COULD BE OVERCOME

Given that the FCPA and other federal legislation clearly could cover some instances of bribery of foreign indigenous leaders, the question arises why law enforcement authorities have not yet targeted the phenomenon. As explained below, several factors may have contributed, but it is becoming more likely all

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

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

[224] *See* SSIFE Information, *supra* note 218, at ¶ 17.

[225] RJR Nabisco, Inc., 764 F.3d at 141-42.

the time that enforcement proceedings will be initiated if and when the statutory elements are satisfied in a particular case.

One possible explanation for the lack of enforcement to date is that many of the allegations recounted in Part II have been reported only in scholarly literature or foreign media, and might not have come to the attention of investigators. Or, if they have, investigators may not have recognized the leaders in question as the "foreign officials" or private fiduciaries that they may have been, due to a lack of familiarity with the roles played by indigenous leaders and their relationships to the state. If such an information deficit exists, it should shrink the more these issues are explored and publicized.

Investigators might also have felt that they did not have enough evidence of the alleged bribery, and that the costs and difficulty of pursuing such evidence would be prohibitive. Investigators would be more likely to act, therefore, if indigenous stakeholders or corporate insiders present them with concrete evidence of misconduct. Fortunately would-be informants now have a strong incentive to do precisely that, in light of newly-available whistleblower bounties. Specifically, pursuant to SEC rules adopted in 2011, informants who provide original information of securities law violations leading to a successful SEC enforcement action are entitled to a bounty ranging from ten to thirty percent of the amount collected, provided the sanctions exceed $1 million.[226] This program has not yet resulted in a flood of tips, but some commentators predict that to change as awareness of the program grows, especially overseas.[227]

Another possible explanation for the lack of enforcement action is that investigators may believe bribery of indigenous leaders does not threaten U.S. national interests to the same extent as bribery of more conventional foreign officials. Notably, one of the justifications for the FCPA is the risk that, if an American company bribes a foreign official, the foreign state or its citizenry will discover the corruption and be offended by it, and the reputation of the United States will be tarnished.[228] It might seem that this risk is not as acute

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[226] Kaiser, *supra* note 30, at 207.

[227] Max Stendahl, *FCPA Whistleblower Bounty May Turn Tide For SEC Program*, LAW 360 (Aug. 20, 2013), http://www.law360.com/articles/466008/fcpa-whistleblower-bounty-may-turn-tide-for-sec-program.

[228] *See* H.R.Rep. No. 95–640, at 5 (1977) ("Corporate bribery also creates severe foreign policy problems for the United States. The revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United

in cases involving indigenous leaders, because they typically do not hold positions of great power within the broader state apparatus, and their communities are often politically and economically marginalized.[229]

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

First, the United States—like all countries—has an interest in promoting respect for indigenous and other human rights.[230] President Obama explicitly acknowledged this with regard to indigenous rights in particular when he endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[231] an international instrument adopted by the U.N. General Assembly, which articulates a broad range of rights of indigenous peoples.[232] Among other things, UNDRIP calls for indigenous peoples to be

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States that American enterprises exert a corrupting influence on the political processes of their nations.").

229 VÁSQUEZ, *supra* note 17, at 36 ("Indigenous populations … [are] the poorest and most margionalized in Peru and Ecuador, and to a lesser extent in Colombia … Indigenous Peoples remain largely underrepresented in the domestic political and institutional life of all three countries."); *id.* at 47-50 (discussing particular ways in which indigenous populations in Latin America are economically and socially disadvantaged).

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

231 United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP]; The White House, Office of the Press Secretary, Remarks by the President at the White House Tribal Nations Conference (Dec. 16, 2010), available at http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference ("[T]oday I can announce that the United States is lending its support to this declaration … The aspirations it affirms—including the respect for the institutions and rich cultures of Native peoples—are one we must always seek to fulfill.").

232 *See* WALTER R. ECHO-HAWK, IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 3-4 (20134) ("Drawing directly on contemporary international human rights law, the Declaration comprehensively covers the full range of property, civil, political, economic, social, cultural, religious, and environmental rights of indigenous peoples. It compiles human rights form the corpus of international law and formulates them into minimum standards for protecting the survival, dignity, and well-being of indigenous peoples.").

consulted in good faith in connection with any projects affecting them,[233] and bribery is of course antithetical to that principle.

Second, if a project developer employs bribes to secure approval for a project, then it has not had to satisfy local stakeholders on the project's merits, and the market for the developer's services has been disabled from operating effectively. This undermines the U.S. government's goal of promoting economic efficiency and market integrity in international business: another key policy rationale for the FCPA.[234]

Third, bribery of indigenous leaders can undermine the stability and security of the host state's investment climate, to the detriment of U.S. business interests. In particular, if bribery enables a developer to undertake a project without the environmental and social controls and benefit-sharing that impacted communities would have demanded, this heightens the risk that it will generate social conflict.[235] And conflict of this sort can threaten *all* investments in the area—not only those that may have helped trigger it.[236] Such eventualities should be of concern to a government, like that of the

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[233] *See* UNDRIP, *supra* note 231, art. 32(2).

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

[235] VÁSQUEZ, *supra* note 17, at 11-35 (discussing social conflicts in several Andean countries triggered by natural resource projects, adverse environmental impacts, and inadequate benefit sharing); Chris Ballard & Glenn Banks, *Resource Wars: The Anthropology of Mining*, 32 ANN. REV. ANTHROPOLOGY 287, 295 (2003) ("Mining can become a source of conflict over the control of resources and resource territories, the right to participate in decision making and benefit sharing, social and environmental impacts, and the means used to secure access to resources … ."); Victoria E. Kalu, *State Monopoly and Indigenous Participation Rights in Nigeria*, 26 J. ENERGY & NAT. RESOURCES L. 418, 422-23 (2008) (describing a spiraling social conflict in Nigeria that began with protests over operations by foreign oil companies, their adverse environmental impacts, and inadequate benefit sharing).

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

United States, which has worked hard to promote stability and security for its nationals investing in the developing world.[237] While many of the U.S. government's efforts have focused on encouraging host states to uphold standards of conduct necessary for a favorable investment climate,[238] the same goal is served by deterring private-sector behavior that has a destabilizing effect—including corruption. It is in part for this reason that law enforcement agencies have aggressively applied U.S. law to bribery of more conventional foreign officials and business representatives;[239] the same reasoning applies to bribery of indigenous leaders.

V. CONCLUSION

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

At the same time, it is important to keep in mind that project developers may have legitimate reasons for conferring benefits on prominent members of indigenous communities, or entering into transactions with them. Leaders may be impacted by a project just as much as any other community member. They may bear unique burdens. And they may have as much or more to offer than others in the way of services required by the developer. In such cases, leaders should not necessarily have to go uncompensated or forego valuable

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[237] Among other things, the United States has negotiated a vast network of bilateral investment treaties, designed to encourage host states to open their economies to investment and mitigate risks associated with long-term investment projects. *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 7, 22 (2nd ed. 2012) (discussing the U.S. investment treaty program and explaining that "the purpose of investment treaties is to address the typical risks of a long-term investment project, and thereby to provide stability and predictability in the sense of an investment-friendly climate.").

[238] DOLZER & SCHREUER, *supra* note 237; George K. Foster, *Recovering "Protection and Security": The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, 45 VAND. J. TRANSNAT'L L. 1095, 1103 (2012) (discussing the "protection and security" standard typically set forth in U.S. investment treaties, which "obliges the host state to act with due diligence as reasonably necessary to protect foreigners' persons and property, as well as to possess and make available an adequate legal system, featuring such protections as appropriate remedial mechanisms, due process, and a right to compensation for expropriation.").

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

economic opportunities, and their community should not have to be deprived of their leadership. This Article has therefore identified a number of factors that can be used to distinguish between corrupt and legitimate exchanges, as well as procedural mechanisms that can be employed to vet, and potentially ratify, transactions that present possible conflicts of interest.

In navigating and applying the statutory requirements, project developers, indigenous leaders, and governmental authorities should be mindful at all times of the critical need to maintain the integrity of consultations between the developer or the state and impacted communities. The developer should be allowed and encouraged to make use of local expertise and human resources, but avoid any arrangements that present a heightened risk of influencing leaders in the performance of their duties.

While indigenous communities may often be politically and economically marginalized, their interests are just as deserving of protection as any other group of society, and, indeed, the costs of corruption can be greater for them than for any others. Accordingly, if and when a project developer crosses the line between legitimate and corrupt conduct, and the developer or its conduct falls within DOJ or SEC enforcement jurisdiction, these agencies should act with the same aggressiveness they now apply to bribery of more conventional foreign officials and corporate employees.