False Spring: Deep Corruption and Protecting the Regime

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What do a shrimp farm in Saudi Arabia, fish-luring buoys for local fishermen in ʻOman, and a domestic airline in Kazakhstan have in common?[1]

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1. *See* Carola Hoyos, *Offset Side Deals Spark Calls for Transparency*, Fin. Times (Oct. 9, 2013), https://www.ft.com/content/4c140b7a-251a-11e3-bcf7-00144feab7de [https://perma.cc/76DV-86ZQ].

Introduction

In 1976, the United States Supreme Court inaugurated an era of nearly unlimited political spending with *Buckley v. Valeo*. After the Watergate scandal cratered a popular presidency and sent shockwaves through the political establishment, Congress responded to the democratic malaise with the 1974 amendments to the Federal Election Campaign Act of 1971 (FECA).[2] *Buckley v. Valeo* held that limits on independent expenditures, as opposed to contribution limits, were unconstitutional infringements on the First Amendment right to freedom of speech.[3] *Buckley* ushered in a dual-track approach to campaign finance. On the one hand, limits on contributions must be "closely drawn" to a "sufficiently important" governmental interest.[4] The Court majority first referenced the governmental interest in preventing "the actuality and the appearance of corruption."[5] Despite its concern to categorize the free flow of money as a form of speech, the Court held that limits on contributions "do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties."[6] On the other hand, the Court analyzed limits on the so-called independent expenditures of politicians and political parties under a standard approximating strict scrutiny.[7] Ultimately, the Court concluded that concerns about corruption or its appearance did not justify limits on independent expenditures because these expenditures lack coordination and do not constitute *quid pro quo* corruption.[8]

This bifurcated analysis continued throughout the post-*Buckley* jurisprudence. In *McCutcheon v. FEC*, the Roberts Court reiterated that limits on

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2. Jonathan Bingham, *Democracy or Plutocracy*? *The Case for a Constitutional Amendment to Overturn Buckley v. Valeo*, 486 The Annals of the Am. Acad. of Pol. & Soc. Sci. 103, 104 (1986).

3. *Id.*

4. John J. Martin, *Self-Funded Campaigns and the Current* (*Lack of*?) *Limits on Candidate Contributions to Political Parties*, 120 Colum. L. Rev. 178, 181(2020).

5. *Id.*

6. *Id.* at 182, n. 25.

7. *See generally* M. Patrick Yingling, *Conventional and Unconventional Corruption*, 51 Duq. L. Rev. 263, 264 (2013) (explaining corruption in the United States and Kenya, two countries at different stages in their development, to provide solutions based on the specific forms of corruption that have thrived and continue to exist within each country.); ("Conventional corruption occurs when government officials illegally abuse public office for private gain. Illegal *quid pro quo*' transactions, including acts of bribery, are examples of conventional corruption. Modern institutions and academic scholars typically associate these kinds of activities with the concept of corruption. This is primarily because conventional corruption, as opposed to unconventional corruption, is illegal by definition.").

8. *Id.* at 267 ("Conventional corruption can be further broken down into two basic kinds: grand corruption and petty corruption. Grand corruption involves theft or misuse of vast amounts of public resources by government officials. This kind of corruption most of ten originates with high-level officials who recognize and exploit opportunities that are presented through government work. Unconventional corruption, which is unique to democratic forms of government, occurs when elected officials make decisions without regard for the public interest, but in lieu of an illegal *quid pro quo* transaction, in order to achieve re-election to public office. Thus, unconventional corruption is not necessarily illegal. The fundamental problem with this form of corruption, however, is not its legality; to the contrary, the problem is the incentive that elected officials have to engage in this form of corruption-an incentive that often goes unaddressed.").

contributions are "critical to our democratic system" so long as they are justified by preventing "a specific kind of corruption," namely *quid pro* quo corruption (this overt form of corruption is described as "shallow corruption.").[9] As of 2020, the Federal Election Commission allowed individuals to contribute a maximum of $35,500 annually to a national party committee, and $10,000 total to either state or local party committees.[10] While the federal minimum wage has not risen since 2009, the Federal Election Commission indexes the national party committee limit to increase in odd-numbered years to account for inflation.[11] As the Court upheld the McCain-Feingold Act, it admitted that the "idea that large contributions to a national party can corrupt or at least create the appearance of corruption is neither novel nor implausible."[12]

The Supreme Court regularly liberalizes campaign spending while hewing a harsh line regarding shallow corruption. In the much maligned *Citizens United v. Federal Election Commission*, the same Court recognized that contribution limits might be "preventative," meaning that there need not be extensive empirical evidence of shallow corruption to legitimate its prophylactic regulation.[13] Even before *Citizens United*, a corporation could spend infinite amounts of money through the PAC workaround so long as the advertisement did not explicitly endorse a candidate or urge voting.[14] Post—*Citizens United*, corporate campaign spending is still virtually limitless. The Court dismissed the dissenters' appeals for a "broader corruption theory" that "would have recognized the dangers inherent in a process where election outcomes depend on which candidate has access to the most money."[15]

Our conception of "deep corruption" refers to the implicit understanding of politicians and everyday citizens alike that "federal offices are bought and sold."[16] In the immediate aftermath of *Citizens United*, Professor Justin Levitt observed that:

> the exchange resembles quid pro quo corruption, except that it occurs over several time periods and without an express agreement . . . Although an agreement increases the certainty of mutual benefit, explicit coordination is not necessary for sophisticated repeat players to understand—albeit perhaps imperfectly—that their actions may be mutually beneficial.[17]

Justice White predicted the emergence of a campaign finance arms race in the *Buckley* dissent; an objection explicitly rejected in *Randall v. Sorrell*.[18] How can average citizens compete with the monied speech of their economic betters in a polity flush with cash? While direct empirical evidence is impossible to op-

9. Martin, *supra* note 4, at 181, n. 19.
10. *Id.* at 182, n. 28.
11. *Id.* at 187.
12. *Id.* at 183.
13. *Id.* at 182, n. 28 (citing 558 U.S. 310 (2010).
14. Justin Levitt, *Confronting the Impact of Citizens United*, 29 Yale L. & Pol'y Rev. 217, 220 (2010).
15. Kenneth Levit, *Campaign Finance Reform and the Return of Buckley v. Valeo*, 103 Yale L. J. 469, 473 (1993).
16. Bingham, *supra* note 2, at 104. (quoting Justice White's dissent in *Buckley v. Valeo*).
17. Levitt, *supra* note 14, at 230.
18. *Id.* at 219.

erationalize, if only given ethical constraints on experimental design, broader efforts reveal a breathtaking absence of democratic governance.[19]

Deep corruption reflects the empirical reality that the public possesses no measurable effect on national policy. Political scientists Martin Gilens and Benjamin Page conducted the most comprehensive review of opinion polling data and voting records, along with the publicly available positions of corporations and their lobbyists, to determine whether we live in a democratic polity.[20] Their conclusion was stark: "economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have

19. *See generally* Mark E. Warren, *What Does Corruption Mean in a Democracy*? 48 Am. J. of Pol. Sci. 328, (2004). ("Despite a growing interest in corruption, the topic has been absent from democratic theory. The reason is not a lack of normative issues, but rather missing links between the concepts of corruption and democracy. With few exceptions, political corruption has been conceived as departures by public officials from public rules, norms, and laws for the sake of private gain. Such a conception works well within bureaucratic contexts with well-defined offices, purposes, and norms of conduct. But it inadequately identifies corruption in political contexts, that is, the processes of contestation through which common purposes, norms, and rules are created. Corruption in a democracy, . . . involves duplicitous violations of the democratic norm of inclusion. Such a conception encompasses the standard conception while complementing it with attention to the dynamics of inclusion and exclusion within democratic politics. By distinguishing the meanings of inclusion and exclusion within the many institutions, spheres, and associations that constitute contemporary democracies, . . . a democratic conception of corruption with a number of implications. The most important of these is that corruption in a democracy usually indicates a deficit of democracy.").

20. *See*, *e.g.*, David Schultz, *The Case for a Democratic Theory of American Election Law*, 164 U. Pa. L. Rev. Online (2016) ("Election laws are the rules of democracy. They describe who gets to vote and run for office, how ballots are counted, the rights of political parties, and who gets to speak or give money to influence campaigns and elections. Election law rules are outcome determinative and impact who will be the winners and losers in American democracyFalse The Court's analysis failed to consider what role money should have in a broader theory of democracy regarding how elections, political institutions, and campaigns should operate. The opinion singularly concentrated on one issue—money and speech. Its analysis about the legitimacy of campaign-finance regulation was reduced to addressing one issue—abating quid pro quo corruption or its appearance—while ignoring how the use of money needs to be examined within a broader concept of democratic politics. The Court further ignored the power of corporations, raising questions about the responsiveness of the political process."); *see also* Burt Neuborne, *Making the Law Safe for Democracy*: *A Review of* "*The Law of Democracy Etc*.", 97 Mich. L. Rev. 1578 (1999) (". . .the law of democracy as an interrelated set of legal principles designed to serve a normative ideal, the quality of America democracy will remain hostage to the law governing its components."). In this regard, a democratic polity is one that offers all its adult, mentally competent citizens with full rights, duties, and responsibilities and a sense of belonging as an equal partner eligible to the benefits and burdens society provides. It is a political unit that consciously endeavors for human development, dignity, freedom with accountability, and justice for all open society grounded in action in which relations and active frameworks matter as well as people and groups. In the United States, this society needs to work within the context of the U.S. Constitution and a republican form of government. It is a society in which the individuals share, a body of mutual knowledge grounded in a share community of understanding with a degree of trust in each other and in the political system, of which the government is a significant but not the total part (material conditions, technological levels, and the nature of national goals). It should be noted that rules and rule-ordered relationships are public and accessible to all citizens. *See* Rita Mae Kelly, *An Inclusive Democratic Polity, Representative Bureaucracies, and the New Public Management*, 58 Pub. Admin. Rev. 3, 202–03 (1998).

little or no independent influence."[21] Based on their studies, "when a majority of citizens disagrees with economic elites or with organized interests, they generally lose. . . even when fairly large majorities of Americans favor policy change, they generally do not get it."[22]

Political scientist Thomas Ferguson further developed the investor theory of politics, which conceptualized donating and voting as investments.[23] Ferguson established the Golden Rule, that the candidate with access to the most financial resources typically wins their race.[24] According to Ferguson, "elections become contests between several oligarchic parties, whose major public policy proposals reflect the interests of large investors, and which minor investor-voters are virtually incapable of affecting."[25] Moreover, while campaign finance jurisprudence since *Buckley* allows virtually unlimited expenditure by candidates and parties alike, Ferguson identifies "the real market for political parties" as "major investors. . . Bloc[k]s of major investors define the core of political parties and are responsible for most of the signals the party sends the electorate."[26]

The campaign finance arms race, along with the monopoly on corporate wealth and isolated individuals, produces a field of deep corruption that does not require explicit mutuality to function. In the wake of the post-*Buckley* polity, several politicians were forced from the political sphere either out of principle or the inaccessibility of funding. Congressman Vanik retired with the observation that "every contribution carries some sort of lien which is an encumbrance on the legislative process."[27] Perhaps the only silver lining emergent from the present-day *Citizens United* status quo is the relatively thorough reporting requirements for recipients of political money. Even this obligation is only required by the Court where there is no evidence of "a reasonable probability of threats, harassment, or reprisals."[28] The notion that nonviolent opposition to the deep corruption of "pay to play" politics would invite reprisal is looked on with horror by the Court. But then, why the need for transparency?

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21. Martin Gilens and Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 Persp. on Pol. 564, 565 (Cambridge 2014).

22. *Id.* at 576.

23. *See generally*, Thomas Ferguson, Golden Rule: The Investment Theory of Party Competition and The Logic of Money-Driven Political Systems (Benjamin I. Page ed.) (1995).

24. *Id.*

25. *Id.* at 28. *See*, *e.g.*, Ben Freeman, *Meet the Senators Who Took Saudi Money*, The Am. Conservative (Dec. 7, 2018), https://www.theamericanconservative.com/articles/meet-the-senators-who-took-saudi-money/ [https://perma.cc/5X3F-UZEH] ("In fact, of the 37 senators who voted against the measure, 30 have received campaign contributions from lobbying firms working for the Saudis. In total, an analysis of Foreign Agents Registration Act (FARA) records reveals at least $226,182 in campaign contributions reported by firms registered to represent Saudi Arabia that went to these 30 senators . . . But the 37 senators that voted against punishing Saudi Arabia even after learning that the CIA concluded that the Saudi Crown Prince ordered Jamal Khashoggi's murder shows that the Saudi lobby's influence nonetheless remains strong. Campaign contributions have been, and will continue to be, a key weapon for the Saudis in trying to keep members of Congress in line.").

26. Ferguson, *supra* note 23, at 22.

27. Bingham, *supra* note 2, at 106.

28. Levitt, *supra* note 14, at 221.

If money is the equivalent of speech, why should the court force corporations to publicize their speech?[29]

In early 2011, following the Egyptian uprisings, several foreign governments opened investigations into offshore assets held by individuals and entities politically connected to the deposed regime of President Mohammad Hosni Mubarak.[30] In Switzerland, for example, the Office of the Attorney General of Switzerland began investigating alleged racketeering and money laundering activity involving fourteen suspects—two of whom happened to be Mubarak's sons—twenty-eight persons, forty-five legal entities, and 140 bank accounts.[31] The Swiss investigation was coordinated with the new Egyptian government, pursuant to a mutual legal assistance treaty (MLAT), and had the immediate effect of freezing more than 600 million dollars in assets.[32] Because of political and legal developments in Egypt, the Swiss authorities unfroze approximately 180 million dollars later that year, dropped criminal charges on many of the suspects in 2015, and released over 30 million dollars' worth of seized funds in 2018.[33] This result necessarily followed from the sluggish information partnership with the Egyptian government (and Egypt's concomitant dropping of corruption charges against the named defendants), as Swiss law—similar to

29. *Id.*; *see*, *e.g.*, Ammar al-Ashwal, *Yemen and the Curse of Geography*: *Bab al-Mandab Disputed by Great Power Rivalries*, Carnegie Endowment for Int'l. Peace (May 18, 2021), https://carnegieendowment.org/sada/84558 [https://perma.cc/44XM-53VB] ("This complicated set of circumstances requires a thorough examination of the role that geopolitics plays in the evolution of Yemen's regional relations, particularly with Saudi Arabia, the UAE, Iran, and Turkey.").

30. *See* Gerry Ferguson, Asset Recovery and Mutual Legal Assistance, *in* 5 Global Corruption: Law, Theory & Practice, 386, 484 (2018).

31. *See*, *e.g.*, Office of the Attorney General of Switzerland, *Arab Spring*: *Investigation related to the Egyptian Revolution Closed* (translated from French), https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-88008.html [https://perma.cc/JFA3-VRVE] ("Bern, 13.04.2022 - Since 2011, the Office of the Attorney General of Switzerland (OAG) has been conducting criminal proceedings related to the 2011 'Egyptian Revolution', its key case arising from the Arab Spring. Despite the numerous enquiries and having transferred CHF 32 million to Egypt in 2018, the OAG must now accept that the investigation has been unable to substantiate suspicions that would justify the indictment of anyone in Switzerland or any forfeiture of assets; the proceedings, currently being conducted against five suspects, are therefore to be abandoned, in accordance with Article 319 paragraph 1 letter b of the Criminal Procedure Code (CrimPC), and the assets still under seizure (amounting to around CHF 400 million) will be released.").

32. *Id.* ("Between 2012 and 2019, the OAG sent numerous requests to Egyptian authorities in order to obtain information on the status of prosecutions and judicial or criminal proceedings, primarily those being conducted against persons implicated in the Swiss proceedings.").

33. *Id.* ("To recap, on 11 February 2011, the Federal Council, as a precautionary measure, had ordered the freezing of assets held in Switzerland by the ousted President Mubarak and by politically exposed persons in his entourage. This freezing order was intended to support possible cooperation between Egypt and Switzerland in the context of mutual assistance . . . Although strict proof of a preceding felony is not required, there must be strong probability of criminal activity preliminary to an act of money laundering. In this particular case, the very thorough analyses of the bank transactions relating to funds located in Switzerland belonging to the suspects failed to reveal any suspicious transaction that might link the assets deposited in Switzerland with criminal acts, in particular those alleged by the Arab Republic of Egypt.").

most money laundering and RICO laws—requires felony predicate offenses in order to prosecute.[34]

In another case in April 2022, the General Court of the European Union upheld its prior decision to unfreeze other assets belonging to the Mubarak family and ordered the Council of the European Union (Council) to pay the family's legal costs.[35] The General Court held that the Council had infringed upon the Mubarak family's fundamental rights, pursuant to Articles six and forty-seven of the European Charter of Human Rights (ECHR), in its attempt to prosecute them for a panoply of financial crimes.[36]

These two cases demonstrate that, regardless of the supposed guide rails ensuring the legitimacy of the international monetary, banking, and finance system in the 21st century, it is practically impossible to ensure the return of allegedly ill-gotten assets once they are dispersed throughout the globe.[37] Prosecutions take years under the best circumstances, and outcomes are generally poor.[38] Therefore, prominent outward-facing laws—most famously, the United States Foreign Corrupt Practices Act (FCPA)—must pair with sufficient domestic banking regulations in developing countries to ensure that the government monitors and prevents politically exposed persons (PEPs) and entities from abusing their domestic economy and the global financial apparatus. Developing nations are especially vulnerable to graft and corruption; therefore, this Article will focus on how these countries—particularly Egypt—can model

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34. *Id*. It should be noted that on April 13th, 2022, the Swiss government closed its case entirely pursuant to an internal April 7th evidentiary decision and unfroze the remainder of the assets—over 400 million dollars.

35. Case T-335/18, Mubarak v. Council, 2022 E.C.R. General Court, Ninth Chamber, (Judgement of the General Court, 9th Chamber, Apr. 6, 2022); *see*, *e.g.*, MEE Staff, *Swiss Prosecutors Drop Money Laundering Case Against Mubarak's Sons*, Middle East Eye (Apr. 13, 2022) https://www.middleeasteye.net/news/egypt-mubarak-swiss-prosecutors-drop-probe-money-laundering [https://perma.cc/G4LY-RP24]. Notably, the named parties included Gamal Mubarak, 'Ala'a Mubarak, Heidy Mubarak, Khadiga elGammal, and Suzanne Thabet in the European Council proceedings, which stemmed from the original EU-wide asset freeze. ("Swiss federal prosecutors have dropped an 11-year investigation into suspected money laundering by Egyptians close to Hosni Mubarak during the Arab Spring uprisings, freeing up millions of dollars for the late strongman's family [. . .] The Swiss judgement follows a decision by the European Union's top court on 6 April to uphold a ruling deeming EU sanctions against Mubarak and his family unlawful and ordering the EU to pay legal costs incurred by the Mubaraks. '[T]. . . decision by the Swiss Federal Prosecutor's Office, after more than . . . intrusive investigations, sanctions and mutual legal assistance proceedings, validates the position . . .,' son Gamal Mubarak said . . . 'Our assets and activities were and are entirely legitimate and were fully declared to the relevant Egyptian authorities. The decision marks an important step in our efforts to assert our rights and prove our innocence from the flagrantly false allegations levelled against us over the past 11 years.'").

36. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as *amended by* Protocols Nos. 11 & 14, Nov. 4, 1950, ETS 5, https://www.refworld.org/docid/3ae6b3b04.html [https://perma.cc/LB3Z-UG49].

37. *See Lost Billions: Recovering Public Money in Egypt*, *Libya*, *Tunisia*, *and Yemen*, Transparency International (May 17, 2016), https://www.transparency.org/en/publications/lost-billions-recovering-public-money-in-egypt-libya-tunisia-and-yemen [https://perma.cc/WW8P-FMPW] (outlining the findings/lessons learned from asset recovery activities in Egypt, Libya, Tunisia, and Yemen. [This report's] results are based on interviews with local Transparency International chapters, partners in [these] nations, and experts from international organisations and research institutions . . .).

38. *Id*. at 3.

their legal enforcement strategies on tactics deployed by the United States to build a more transparent and robust system. To that end, Part I will discuss Egypt's laws and regulations and explain how the Mubarak regime was able to misappropriate much of the nation's wealth. Part II will cover the United States anti-money laundering and bank secrecy laws and discuss structural deficiencies, both realized and potentially inherent to AML schemes and the FATF guidance. Part III will discuss strategies for importing a comprehensive bank secrecy and anti-money laundering enforcement scheme to non-democratic nations like Egypt. Part IV will conclude by addressing potential pitfalls that legislation and enforcement alone are unlikely to remedy.

I. The Mubarak Administration's Misappropriation of the Nation's Wealth: Egypt's Anti-Corruption Laws and Regulations

In May 2002, Egypt passed its anti-money laundering law, Law No. 80 (AML law).[39] Ironically, the AML law was promulgated by none other than Hosni Mubarak in his capacity as President.[40] The law had a familiar structure: it required predicate criminal act(s), applied to a wide range of assets (similar to "anything of value"), specified mental element of the crime (*mens rea*: knowledge and free will), established a scienter requirement, and delegated authority for enforcement. The AML law also required banks and financial institutions to conduct customer due diligence through "know your customer" policies.[41] A

39. Anti-Money Laundering Law No. 80/2002 (Decree No.951, Executive Regulations of the Anti-Money Laundering Law), *as amended* per law no. 78/2003, law no. 181/2008, and Presidential Decree-Law no. 36/2014 (law criminalizes the laundering of funds from narcotics trafficking, prostitution, and other immoral acts, terrorism, antiquities theft, arms dealing, organized crime, etc.).

40. *Id.*

41. *Id.* at art. 2. ("[a]person shall be deemed a perpetrator of a money laundering offence, if he/she knows that the funds involved is the proceeds of a predicate offence and willfully does any of the following acts: (a) the conversion or transfer of proceeds, for the purpose of concealing the funds, disguising their true nature, source, location, ownership, any interest therein, altering their reality, or preventing the discovery thereof or impeding the identification of the perpetrator of the predicate offence; (b) Acquiring, holding, disposing of, managing, keeping, exchanging, depositing, guaranteeing, investing the proceeds, or tampering with their value, or concealing or disguising the true nature of these proceeds, their source, location, disposal, movement or ownership or rights associated therewithFalse On the other hand, Article 1 of the new decree defines the terms money, money laundering, and proceeds, among others. Additionally, it adds the term "anti-terrorism and money laundering unit," which refers to a government entity responsible for investigating financial accounts or suspicious monetary transactions related to money laundering. It defines financial institutions post offices, mortgage institutions, insurance companies, brokerages, and any financial entities working with stocks in the money market. Also, the executive order modifies article 4 of Law 80—2002 by expanding the powers and jurisdiction of the anti-money laundering unit of the Justice Ministry, that the unit now has jurisdiction over investigations not only of financial crimes but also of all acts of terrorism. Also, Article 7 was revised to require businessmen and individuals working in the financial sector, including in the institutions covered under Art. 1 of the new decree, to report any suspicious activities to the anti-terrorism and money laundering unit. It also requires employees of financial institutions to keep records of all accounts and files related to the monetary transactions to be reviewed by the unit's members.") *See*, *e.g.*, *Arab Republic of Egypt*: *Detailed Assessment Report on Anti-Money Laundering and Combatting the Financing of Terrorism* [hereinafter *MENAFATF, Mutual Evaluation Report Egypt*], World Bank (May 19, 2009).

key development was the creation of a new law enforcement agency. The AML law specified that the government was to create a new and independent unit within the Central Bank of Egypt, the Egyptian Money Laundering Combating Unit (EMCLU), tasked with enforcing Law 80's provisions in cooperation with financial institutions and other entities.[42] Further, the AML law obliged financial institutions to maintain documents and records of suspicious activity and required them to report such activity to the EMCLU in good faith.[43] The EMCLU would oversee AML efforts and refer appropriate cases to the Public Prosecutor's Office for investigation and prosecution.[44]

In the same vein, the EMCLU regulates banks—including the Central Bank of Egypt (CBE) by promulgating "*Know Your Customer*" rules and supplementary AML/CFT rules.[45] Recently, the banks have used the regulations issued by the EMCLU to tackle the increasing problem of regional and international terrorist financing.[46] The CBE, itself a bank monitor, supervises its branches for compliance. As such, its written policy (reflecting the AML Law's policy on whistleblower protections) is to protect "good faith" whistleblowers who report suspicious transactions internally. Problematically, neither the AML law nor the CBE's compliance materials define a "good faith" whistle-blower.[47] These bank monitors also run AML training for branch staff annually, with records kept of the trainings given.[48]

The AML law provided for asset forfeiture or, in the alternative, substantial fines and prison terms of up to seven years for those convicted.[49] Financial institutions got off lighter: their criminal fines were capped at 20k Egyptian pounds. Unsurprisingly, the AML law was poorly drafted; for example, corporate officer jail terms were provided for but not specifically fleshed out.[50] Perhaps partly because of this poor drafting, the Egyptian Court of Cassation—the highest court in the land—ruled that "legal entities [were] not criminally

42. Law No. 80/2002, at art. 2. These other entities were to be designated by presidential orders.

43. *Id.* at art. 13. ("Without prejudice to any severer penalty stipulated under the Penal Code or any other law, offences stated in the following Articles shall be punishable by the penalties stipulated therein.")

44. *Id.*

45. Ahmed Fayed, *The Current Status of Corruption in Egypt*, 4 Contemp. Arab Aff's. 510–21 (2017) ("Given that corruption was one of the primary reasons that pushed the Egyptian masses to rally in 2011, it is important to look at its current status to see whether the levels of corruption have increased, decreased or remained the same since. . . to explain why corruption remains prevalent in Egypt, the different anticorruption efforts accomplished by the state and non-governmental organizations after 2011."). *See* Internal Audit Sector, *CBE Compliance Policy for Anti-Money Laundering/Combatting Terrorist Financing*, Central Bank of Egypt, at 7.

46. Internal Audit Sector, *supra* note 45, at 7.

47. *Id.*

48. *Id.* at 9.

49. Law No. 80/2002, at art. 15 ("any person violating any of the provisions of Arts. 8, 9 and 11 of this law shall be penalized by jail and fined an amount not less than one hundred thousand Egyptian pounds and not more than five hundred thousand Egyptian pounds, or either penalties"). *See generally* Kathleen A. Lacey & Barbara Crutchfield George, *Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms*, 23 Nw. J. Int'l L. & Bus. 263 (2003).

50. Law No. 80/2002, at art. 15.

responsible for crimes committed by their representatives." This ruling prevented criminal liability from running against financial institutions for crimes their corporate officers and directors committed.[51] The law was also vague regarding what penalties financial institutions would face for underreporting or poor compliance.[52]

The AML law incorporated by reference to Egypt's anti-bribery and embezzlement penal code provisions as predicate acts, most notably the public official solicitation/acceptance of bribery prohibition.[53] While the President was never explicitly designated as a "public official," within the penal code subsection, the office was presumably swept in by the catch-all provision of "any person assigned a public service."[54] Further, the law designated most other prominent felonies as predicate offenses, including murder.[55] Notably, the law omitted organized criminal acts in its text and amendments, a glaring oversight.[56] This law supplemented the existing anti-corruption criminal framework, including Egypt's Illicit Gains Law of 1975 —which required government officials to fill out periodic asset disclosure forms, and law 47/1978—which prohibited state employees from accepting gifts.[57] Anti-money laundering efforts in Egypt during the tail end of the Mubarak era also included the 2005 ratification of the United Nations Convention against Corruption (UNCAC).[58]

President Mubarak issued several Executive proclamations (orders) to facilitate the law, including a number that dealt with the transactions of politically exposed persons. Article 32 bis-4 of the AML/CFT Executive Regulation required financial institutions to closely and continuously monitor politically

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51. *See generally* Mohamed 'Arafa, *Towards a New Anti-Corruption Law in Egypt After Mubarak*: *A Comparative Study Between the United States Foreign Corrupt Practices Act*, *Egyptian Anti-Bribery Law*, *and Islamic Law*, pp. 85–160 (2013); *see*, *e.g.*, Mohamad Talaat, *Anti-Corruption in Egypt*, Global Compliance News (2022) [hereinafter *Towards a New Anti-Corruption Law*] https://www.globalcompliancenews.com/anti-corruption/handbook/anti-corruption-in-egypt/ [https://perma.cc/7DS3-SSVY].

52. *See generally*, Talaat, *supra* note 51.

53. *Towards a New Anti-Corruption Law*, *supra* note 51, at 100–47.

54. Egypt Law No. 58/1937 Penal Code, Art. 106 bis. ("Whoever demands for himself or for a third party or accepts or takes a promise or donation . . . shall be considered practically as good as a bribe-taker.").

55. M. Patrick Yingling, & Mohamed A. Arafa, *After the Revolution*: *Egypt's Changing Forms of Corruption*, 2 U. of Baltimore J. Int'l L. J. 1, 38–39 (2013) ("One very problematic aspect of the increase in conventional corruption was the executive's willingness and ability to steal elections False Under Mubarak, many facets of society openly and comprehensively discussed conventional corruption. The general public was fully aware of the costs of conventional corruption for the country's political stability and the threat it posed to economic and social development. Despite such awareness, conventional corruption represented the ruling social law and a behavior that governed various aspects of Egyptian life.").

56. Ahmed Eldakak, *Approaching Rule of Law in Post-Revolution Egypt*: *Where We Were*, *Where We Are*, *and Where We Should Be*, 18 U.C. Davis J. Int'l L. & Pol'y 261, 278–79 (2012). *See also* MENAFATF, *Mutual Evaluation Report Egypt*, *supra* note 42.

57. Yingling & 'Arafa, *supra* note 55, at 53 ("Although the occurrence of unconventional corruption can thus be an indicator of progress, unconventional corruption is not a necessary evil for a democracy that has recently implemented measures to combat conventional corruption. As described below, there are solutions that can and should be implemented to combat unconventional corruption."). *See also* Transparency International, *National Integrity System Study*: *Egypt 2009* at 40–41, 54.

58. *UN General Assembly*, United Nations Convention Against Corruption, Oct.31, 2003, A/58/422, https://www.refworld.org/docid/4374b9524.html [https://perma.cc/8ELL-2Z2M].

exposed persons' accounts and transactions.[59] Further, the CBE and EMCLU required reporting institutions to "know their customers," with heightened reporting standards for PEPs.[60] However, the crucial loophole was that the requirements applied to PEPs by the AML law and the attendant proclamations did not extend to domestic PEPs.[61] Therefore, the money laundering provisions could not serve as an effective anticorruption tool, leaving only the fatally flawed Illicit Gains Law as any check on domestic corruption.[62]

After his February 11, 2011 ouster, the late President Mubarak was charged with several criminal offenses, including conspiracy to commit premeditated murder and attempted murder of the January 25th pro-democracy protestors.[63] Mubarak was also charged with financial crimes; specifically, he

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59. *Id.* ("Each Financial Institution shall periodically review and update rules, measures, and suspicion criteria, and whenever such reviewal and updating is required, to cope with the national and international policies and plans for combating money laundering."); *see* Art. 32 bis-4 of the AML/CFT Executive Regulation, https://www.gafi.gov.eg/English/StartaBusiness/Laws-and-Regulations/PublishingImages/Pages/FinancialLaws/19Anti-Money%20Laundering%20Combat%20Law%20No.%2080%20of%202002%20with%20Its%20Executive%20Regulations.pdf [https://perma.cc/3CBT-7DWS].

60. *See*, *e.g.*, Prime Minister Decree No.951 Promulgating the Executive Regulations of the Anti-Money Laundering Law (2002) https://www.imolin.org/doc/amlid/Egypt_Decree_951.pdf [https://perma.cc/6VCK-LBAL]. In Egyptian law, Know Your Customer (KYC) is a principle that states that "Every bank or broker-dealer shall use reasonable diligence, in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer." This norm is used to avoid fraud and ambiguity. Egyptian Minister of Supply and Internal Trade Decree No. 906/2001 stated that Know Your Customer requires the custodian to finish the registration of all personal data of the customer with whom he signed the securities account management contract on the database of the securities accounts management system. Also, Decree No. 120/2019 on the controls in battling money laundering and terrorist financing of entities working in non-bank financial activities. For instance, Art. 13 reads, "the controls in the field of combating money laundering and terrorist financing of entities operating in the field of non-bank financial activities. Refusing to fill the know your client application is considered one of the suspicious actions according to the law."

61. Gamal Essam El-din, *Egypt's Parliament to Amend Anti-Money Laundering Law*, *Review GERD Negotiations*, Ahram Online (Mar. 7, 2020), https://english.ahram.org.eg/NewsContent/1/64/364837/Egypt/Politics-/Egypts-parliament-to-amend-antimoney-laundering-la.aspx [https://perma.cc/3QGK-9YYK] ("aim to update the law in terms of widening the scope of the definition of money laundering to include the selling and smuggling of oil, natural resources, securities and cryptocurrency, among other assets. Article 16 . . . to give greater powers to the Anti-Money Laundering and Terrorism Funding Unit, with the objective of expediting the necessary measures in this respect, primarily freezing assets and cash of those suspected of funding terrorist crimes," Article 18 . . . make it compulsory for local authorities and the anti-money laundering unit to reinforce cooperation and exchange information with international organisations focused on fighting money laundering and the funding of terrorism. Article 9 . . . require(s) the anti-money laundering unit to publish up-to-date and comprehensive statistics and figures on its activities and operations in tracking the illegal funding of terrorist crimes.").

62. *Id.*

63. *See* Human Rights Watch, *Egypt: Q&A on the Trial of Hosni Mubarak* (May 28, 2012), https://www.hrw.org/news/2012/05/28/egypt-qa-trial-hosni-mubarak [https://perma.cc/N5J9-77F2] ("Article 40(2) establishes criminal liability for any person who agrees with another to commit a crime that takes place on the basis of such agreement. Article 45 defines "attempt" as the beginning of carrying out an act with the intent to commit a crime. Articles 230 and 231 provide that the death penalty is the punishment for premeditated murder. Article 235 specifies that the accomplices to premeditated murder shall be sentenced to death

was charged generally under the "financial corruption" provisions of the penal code, including the Penal Code Article 106 public services anti-bribery statute.[64] The allegations focused on Israeli oil sales kickbacks, corrupt arms deals, and the former President's acceptance of a bribe from Sharm al-Shaikh resort developer Hussein Salem.[65] Those close to Mubarak were also charged with financial crimes, including his sons—one of whom, Gamal, was alleged to have used his position on the Egyptian Central Bank's board to withdraw Egyptian gold assets illicitly.[66]

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or life in prison. That said, it should be noted that Penal Code article 17 gives the court discretion to substitute a prison sentence for a death sentence and a lesser sentence for a sentence of life in prison.").

64. *Id.* ("Mubarak is also charged with accepting a bribe from Hussein Salem, a resort developer who is his co-defendant, to exploit his influence and facilitate land concessions in Sharm al-Shaikh for a golf and tourism investment company Salem owns. The referral order charging Mubarak does not specify the Penal Code articles relevant to the bribery charge. Instead, the order clusters together all the Penal Code articles relevant to a range of corruption charges against Mubarak, his sons, and Salem—leaving uncertain which legal provisions apply to which defendants. The bribery charge against Mubarak appears to involve articles 103, 104, and 106 bis, which criminalize a public employee's demand or acceptance of a bribe to perform, or cease to perform, an act within the scope of his responsibility or to use his actual or alleged influence to secure a license, concession, or benefit from a public authority. In addition, Mubarak is charged with being an accomplice to the former petroleum minister, . . ., in improperly authorizing another Salem-controlled company, the East Mediterranean Gas Company, to export Egyptian natural gas to Israel for prices lower than those in the international markets, granting an illicit benefit to Salem's company and harming public coffers. This charge appears to involve Penal Code articles 40(2) and 40(3), which establish criminal liability for agreeing with another to commit a crime or to intentionally provide assistance to another to commit the crime, as well as article 116 bis, which prohibits any public employee from intentionally harming the funds and interests of a public authority.").

65. Mohamed 'Arafa, *The Unexpected Trials of Egyptian Leaders*: *Is It a Question of Law or Politics*? 12 US China L. Rev. 6, 475 (2015) [hereinafter *The Unexpected Trials*] https://pdfs.semanticscholar.org/06fb/f82873c2896c617a734fc12002056fd2c63e.pdf [https://perma.cc/B6TB-RA8J] ("In other words, the Egyptian Criminal Code does not include a general theory of criminal accountability and punishment for the act of omissions, unless specific (private) criminal intent (intending a definite criminal result) can be proven and established for the failure to act."); *see also* News Desk, *Billionaire Mubarak Made Fortune in Arms Deals with Israel, Minister Says*, Glob. Post (May 1, 2011), https://theworld.org/stories/2011-05-01/billionaire-mubarak-made-fortune-arms-deals-israel-minister-says [https://perma.cc/8SDQ-QY58] ("Egypt's ousted president Hosni Mubarak owes his vast fortune to corrupt arms deals, gas sales to Israel. . . [t]he committee should also pursue all legal measures to sequestrate the Mubarak's illegitimately gained properties, movable assets and offshore bank accounts." "The committee is also urged to obtain the warrants necessary to prevent Mubarak and his family from liquidating assets and to follow up on earlier freezing orders. The committee is entitled to seek the help of local or foreign lawyers to recover Mubarak's assets from abroad and is empowered to review all secret files and reports about the Mubarak's deposits and property.").

66. News Desk, *supra* note 65, at 476. ("On August 21, 2013, a Cairo criminal court ordered deposed President Mubarak released from detention in a corruption case that alleged he embezzled funds for the presidential palaces and for renovations in the palace. The court decided to put him in jail for three years imprisonment in connection with this criminal blame. As part of a criminal settlement for crimes against the public interest according to the Egyptian Penal Code and Criminal Procedural Code, Mubarak repaid the state general's budget several million dollars for the gifts (watches, belts, jewelry, etc.) received."); *see*, *e.g.*, *Egypt Penal Code*, arts. 112, 116, 40, 230, 235, 17, & 45; *see also* James Grimaldi & Robert O'Harrow, *Egypt Prosecutor Alleges Schemes by Mubarak*, Wash. Post (Apr. 9, 2011), https://www.washingtonpost.com/investigations/

Mubarak and his family were detained on April 13th, 2011, although Mubarak himself remained in medical custody. Mr. Salem and many similarly situated businessmen who fled the country were charged in *absentia*. The years that followed would reveal the full extent of (a) the impunity of former Egyptian officials and (b) the futility of asset recovery measures.[67] Indeed, Mubarak and every other oligarch were either acquitted (often on appeal following the 2013 military coup d'état) or served minor prison terms relative to their initial charges.[68] Mubarak died of natural causes in 2020, years after the military had reasserted power over the workings of the government. The financial corruption charges were settled in a piecemeal fashion; in some cases—including the illegal gas export kickback case—the defendants were acquitted entirely.[69]

How could this be? It was undisputed that Mubarak's relatives and business partners had become very wealthy, often in extraordinarily suspicious ways. The nature of the problem hinged on the fact that many of the officials in question had taken advantage of structural loopholes in the reporting and banking laws, and most of their wealth was located outside of Egypt's

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egypt-seeks-help-to-find-mubarak-family-assets-abroad/2011/04/07/AFCMkZ9C_story.html [https://perma.cc/9W5E-YQ9A] ("Egypt's top prosecutor has notified the United States and other governments around the world that former president Hosni Mubarak and his family may have hidden hundreds of billions of dollars' worth of cash, gold and other state-owned valuables,. . . that Mubarak and his sons, Gamal and Alaa, may have violated laws prohibiting the "seizing of public funds and profiteering and abuse of power," using complex business schemes to divert the assets to offshore companies and personal accounts False The sum of the assets alleged to be appropriated by the Mubarak family—more than $700 billion—far exceeds earlier estimates and might be wildly exaggerated. Previous figures for the amount allegedly stolen by the Mubaraks range from $1 billion to $70 billion . . . titled "Request for Judicial Assistance," is intended to provide the legal basis under civil law to recover assets belonging to the Egyptian people.").

67. *See generally* Mohamed 'Arafa, *Towards a Culture for Accountability*: *A New Dawn for Egypt*, 5 Ariz. Summit L. Rev. 1, 25–35 (2011) https://summitlawreview.org/phx_5-1.pdf [https://perma.cc/8Y2Z-P7GX] (offering an agenda on political, economic, and legal stances for a democratic transition). ("Whether there will be a better Egypt, which is where the new optimism is realized, remains to be seen. Much will depend upon how Egyptians take possession of the transition, define a common set of objectives for sustained reform, and maintain the impetus to get there. Besides a conciseness of themselves and momentum, they have one crucial advantage—the rulership has had to re-evaluate itself False Additionally, in every aspect of life the Egyptian people need to take responsibility for both changing their ways and becoming socially accountable. This will entail a change in the prevalent culture, "which has been in place for the entire period of the military rule regime in Egypt." . . . Before we dream about agendas for reform, we should worry whether it is realistic to expect much to change. Millions of people believe things have changed. This is the key point in which the collective self-perception of an enormous number of Egyptians has been transformed, False The question remains, what should Egypt switch or transition to? In this respect, we should take our paradigm from the revolutionaries' demands of bring the system down. A government and institutional economy should replace the current system, rather than individuals within an open political and social culture. It ought to be a justifiable and fair economic development strategy, well designed to create growth and progress."). *Id*. at 34.

68. *See generally* Mohamed 'Arafa, *Whither Egypt*? *Against Religious Fascism and Legal Authoritarianism*: *Pure Revolution*, *Popular Coup*, *or a Military Coup D'État*? 24 Ind. Int'l & Comp. L. Rev. 859, 862 (2014) https://journals.iupui.edu/index.php/iiclr/article/view/18263/18358 [https://perma.cc/VSQ7-2R5P].

69. M. Cherif Bassiouni, *The Accountability Gap*, in Chronicles of the Egyptian Revolution and its Aftermath: 2011–2016, 340, 346 (2016).

jurisdiction at the time prosecution.[70] For example, Gamal and 'Alaa Mubarak obtained a fifty percent beneficial financial interest in a Cyprus-registered shell company that owned thirty-five percent of a private equity investment bank registered in the British Virgin Islands (EFG Hermes Private Equity BVI).[71] This company reportedly paid Gamal $880,000 annually in dividends.[72] This elaborate ruse of shell companies and investment vehicles was easy to devise because Egypt's AML framework did not require financial institutions to consider domestic officials and their associates as PEPs.[73] Tragically, these shell corporations allowed many of the well-connected to take large stakes in Egypt's economy at below-market prices, robbing the people of the nation's wealth and casting a pallor over the free-market capitalist project.[74]

During the Mubarak era, the fox ran the henhouse. Corrupt officials and their friends/families became wealthy in the first instance through kickbacks, public procurement contracts, and other corrupt behavior.[75] Egypt's authoritarian system provided only a superficial form of checks and balances; there was weak public access to information channels, bureaucratic bloat was the norm, and a culture of nepotism and everyday corruption pervaded the entire country. The regulatory agencies—the Egyptian Central Bank, the Investment Authority, the Ministry of the Treasury, and the Association of Banks—all acted (and were structured) in a way that encouraged crony capitalism and corruption.[76] Ineffectual regulators had proliferated during the era of "privatization": the ACA, CAO, and APA were all tasked, in part, with combating corruption, yet few had any real success stories.[77] The ACA, for

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70. *Id.* at 358 ("[T]he Foreign Investment Authority did not look into the capital source or ownership of the capital of foreign investments[.]").

71. *See*, *e.g.*, Egyptian Initiative for Personal Rights, *A Call for Legal Action Against Gamal Mubarak's Assets in The British Virgin Islands* (Apr. 4, 2013), https://eipr.org/en/press/2013/04/call-legal-action-against-gamal-mubarak%E2%80%99s-assets-british-virgin-islands [https://perma.cc/DSQ4-EWRY] ("[P]resence of an asset in which Gamal Mubarak, the son of the former President of Egypt, has, or appears to have, a beneficial financial interest and/or an ownership stake.").

72. *Id.* ("[. . .] subject to potential freezing under the terms of the Freezing of Assets Held . . . Subject to the Egypt (Restrictive Measures) (Overseas Territories) Order 2011 ["the Freezing Order"], . . .").

73. Bassiouni, *supra* note 69, at 342-45.

74. *Id.* at 346-55.

75. *National Integrity System Study*: *Egypt 2009*, Transparency International 12 (Jan. 1, 2009) https://www.transparency.org/en/publications/national-integrity-system-study-egypt-2009 [https://perma.cc/ZGK6-W2R8] [hereinafter *National Integrity System Study*].

76. Bassiouni, *supra* note 69, at 389.

77. Rami Galal, *Egypt Fights for Mubarak's Millions*: *Egypt is Seeking to Repatriate $700 Million that Switzerland has Frozen in Accounts that Belong to Hosni Mubarak and his Family*, Al-Monitor (July 2, 2015), https://www.al-monitor.com/originals/2015/07/egypt-money-smuggling-switzerland-repatriate-funds-sisi.html [https://perma.cc/P4JK-ND47] ("In July 2012, Swiss public prosecutor . . . froze accounts with 700 million Swiss francs ($761 million) in Swiss banks. These funds are in the name of ousted President Hosni Mubarak and his two sons, Alaa and Gamal, and 31 of his aides, including former Prime Minister . . . and former Interior Minister False Following the Swiss decision, President al-Sisi issued a new law (No. 28/2015) on the establishment and organization of a national committee for reclaiming funds and assets abroad. The establishment of the committee will be presided over by the Egyptian public prosecutor. The committee will include the head of the Egyptian Illicit Gains Authority as its vice president and members representing various authorities, including the Intelligence Service, Interpol, the Public Funds Investigation Department and the Administrative Control

example, required presidential permission to arrest public officials under suspicion of corruption.[78] From 2005 to 2009, only four money laundering cases (based on STRs) went to trial, with only one conviction resulting.[79]

Further, even after Mubarak's rule had ended, the Supreme Council of the Armed Forces (SCAF) government and the Morsi and el-Sisi governments that followed had neither the political will nor the proper tools to act.[80] Indeed, many within the military government exercised political interference to block investigations, save face, and protect former political allies. On January 3, 2012, the SCAF issued decree No. 4/2012, allowing persons accused or convicted of corruption to settle with the government to avoid prosecution/imprisonment.[81] These settlements resulted in the dropping of predicate criminal prosecutions, leading foreign institutions to release frozen funds, with only a small fraction returned to the state treasury.[82] These presidential orders expanded further under President Fateh el-Sisi, including his Decree No. 16/2015, amending the Code of Criminal Procedure to allow the government to settle embezzlement cases.[83] In the words of Transparency International and the World Bank: "[W]hile the legislation does at times provide the framework necessary for the NIS, in reality institutions do not live up to the rules in place and

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Authority. The committee will be empowered to receive reconciliation requests submitted by people whose names are on asset-freeze lists abroad, or submitted by their attorneys. This may encourage people to repay the government in exchange for leniency on charges of illegally taking public money outside the country.").

78. *National Integrity System Study*, *supra* note 75, at 12.

79. Galal, *supra* note 77. ("[T]hat Egypt determine[s] the value of the funds and the banks where they are deposited and to prove that they are illegal funds, despite the fact that the US has accurate financial tracking systems. In this respect, the US was asked to assume its role in combating corruption in the developing world and to repatriate these funds without waiting for the Egyptian judicial decisions to prove that its war on corruption is serious.").

80. *See*, *e.g.*, *Lost Billions*: *Recovering Public Money in Egypt*, *Libya*, *Tunisia*, *and Yemen*, Transparency International 2 (May 17, 2016) https://www.transparency.org/en/publications/lost-billions-recovering-public-money-in-egypt-libya-tunisia-and-yemen [https://perma.cc/J9NN-4KKA] (noting that Egypt has "[n]o clear strategy" with respect to identification of assets).

81. Bassiouni, *supra* note 69, at 387.

82. *See*, *e.g.*, Egyptian Initiative for Personal Rights, *Repatriation of Mubarak Funds Stuck in Dead End* (Oct. 25, 2017), https://eipr.org/en/press/2017/10/repatriation-mubarak-funds-stuck-dead-end [https://perma.cc/M52E-DE7S] ("The . . . looks at how his Swiss (shell) companies were used to syphon off Egyptian public money and at the lack of sanctions on Swiss financial intermediaries—mainly banks—involved in those deals so far. Nevertheless, the illegal origins of the money could not be proven, and because the Egyptian justice system was unable to prove it, the funds could not be confiscated. In Hussein Salem's case, the Egyptian authorities decided for an out of court settlement, essentially granting amnesty to Salem and his entourage.").

83. *Id.* (noting that the report "provides a case study that should help to fill that gap, to understand better the challenges of asset recovery and to learn the lessons. In particular, it shows the inadequacy of the Swiss law for dealing with money from PEPs, failing to enable assets of dubious origin to be seized when international legal assistance breaks down"); *see also* Bassiouni, *supra* note 69, at 388; *see*, *e.g.*, Gen. Ct. of the E.U., Press Rel. No.182/18, Luxembourg, Nov. 22, 2018 [Judgments in Cases T-274/16 *Saleh Thabet v. Council* and T-275/16*Mubarak and Others v. Council*, https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-11/cp180182en.pdf [https://perma.cc/Q4JU-724S] (The General Court upholds the Council's decision to freeze the assets of members of the Mubarak family, on the basis of judicial proceedings relating to misappropriation of Egyptian State funds).

implementation of laws is generally weak."[84] As such, the post-revolution governments of Egypt had to resort to settlements with Mubarak's family members and associates for any hope of restitution.[85]

Under 'Abdel Fattah el-Sisi, the current regime does not look promising, as many of the structural deficiencies are as bad—or worse today—than they ever were. The legislation remains brittle, the government bureaucracy is rampant with nepotism (President el-Sisi's brother runs EMCLU, and his sons work in the ACA and General Intelligence), and any anti-corruption efforts are mainly a public front to build legitimacy both domestically and abroad.[86] While the el-Sisi regime has increased corruption prosecutions and promulgated a number of laudable goals in its "National Anti-Corruption Strategy 2019–2022," these goals remain aspirational and elusive so long as a comprehensive framework is not applied.[87]

A. Money Laundering of Corruption Attempts from Middle East Actors via Swiss Banking System (and Mechanisms)

To better understand the extent of money laundering, from corruption crimes committed in the Middle East, it is important to consider the proportion of these attempts, their evolution over the last few years, and the mechanisms used by Middle Eastern actors to launder money within Swiss banks. In 2017, only 10 denunciations for suspected money laundering related to corruption facts out of 1076 were related to domestic facts (0.92%).[88] This re-

84. *National Integrity System Study*, *supra* note 75, at 5.

85. *See* Heba Fahmy, *Experts Divided Over Settling with Defendants in Corruption Cases*, Daily News Egypt (March 14, 2012), www.dailynewsegypt.com/2012/03/14/experts-divided-over-settling-with-defendants-in-corruption-cases/ [https://perma.cc/6S93-WG5J] ("the law could be applied in cases of squandering public funds and making illegitimate gainsFalse The law is an adjustment to the Investments Guarantees and Incentives Law No. 7 of 1997, giving the government full authority to settle with investors in financial corruption probes even if they are referred to criminal courts or are subject to preliminary prison sentences.").

86. *See* Memo, *Sisi Appoints Sons in Key Roles to "Protect His Throne*," Middle East Monitor (July 23, 2018 1:21PM), https://www.middleeastmonitor.com/20180723-sisi-appoints-sons-in-key-roles-to-protect-his-throne/ [https://perma.cc/AQ9F-UECX]; *see also* Al-Masry Al-Youm , *Sisi's Brother To Head Unit Combating Terrorist Financing*, Egypt Indep. (Oct. 17, 2016), https://www.egyptindependent.com/sisi-s-brother-head-unit-combating-terrorist-financing/ [https://perma.cc/Q8BF-EMY3] ("experience in trade disputes, which relates to the unit's focus on banking and financial issues.").

87. *See* Sub-Coordinating Committee for the Prevention and Combating of Corruption, *Egyptian National Anti-Corruption Strategy 2019–2022*, https://sherloc.unodc.org/cld/fr/treaties/strategies/egypt/egy0001s.html [https://perma.cc/4EH9-GXZ2]; *see generally,* Jessica Noll, *Fighting Corruption or Protecting the Regime*? *Egypt's Administrative Control Agency*, POMED 1, 5 (Feb. 2019) https://pomed.org/wp-content/uploads/2019/02/POMED_ACAreport_FINAL.pdf [https://perma.cc/JK3M-UFJS] (noting that foreign investment in Egypt's bureaucracy is often used to consolidate autocratic power under an anti-corruption guise).

88. This percentage has only varied slightly in recent years: only 0,6% in 2016 and 1,9% for cases of money laundering resulting from alleged internal corruption in Switzerland. *See generally* Herbert V. Morais, *Fighting International Crime and Its Financing*: *The Importance of following a Coherent Global Strategy Based on the Rule of Law*, 50 Vill. L. Rev. 583 (2005); *see*, *e.g.*, BIS, *Statement on Prevention of Criminal Use of the Banking System*, https://www.bis.org/publ/bcbsc137.htm [https://perma.cc/3D85-T2L7]; BIS, *Customer Due Diligence for Banks* (Oct. 2001), http://www.bis.org/publ/bcbs85.pdf [https://perma.cc/MVQ3-3UPG]; *see*

flects Switzerland's relatively good position in the global transparency ranking. So, where does most of the corruption for money laundering reported in Switzerland come from? The peak in denunciations reached its highest level in the wake of the Arab Spring between 2010 and 2012.[89]

Traditionally, money laundering occurs in three distinct steps. First, the doctrine speaks about the "placement phase."[90] In this phase, criminals place their illegal benefits within the financial system. Criminals usually compete with ingenuity to break up a large amount of cash into smaller sums that are "deposited directly into a bank account, or by purchasing a series of monetary instruments. . . that are then collected and deposited into accounts at another location."[91]

Once the money of corruption has been inserted into the financial system, the criminal must blur the origins of the corrupted funds. The doctrine refers to it as the "repartition phase" or "layering."[92] At this stage, the criminal performs multiple conversions of funds by moving them through multiple transactions and between multiple financial intermediaries.[93] Funds may be transferred through the purchase or sale of investment instruments or to other accounts, particularly in countries with less stringent anti-money laundering rules.[94] The launderer may also use the funds to pay for goods or services in a way that makes them appear legitimate.[95] Finally, after they have "successfully" processed through the first two phases, the launderer has to re-insert the criminal profits into the economy, whether into "real estate, luxury assets, or business ventures."[96] The "integration" phase, according to the Swiss Government, is the less problematic one within Switzerland, where the criminal may try to introduce money from corruption into the financial system by acquiring real estate, luxury goods, or life insurance.[97]

Thus, a launderer from Middle Eastern countries usually uses one or more domiciliary companies allowing the origin of funds derived from corruption to be blurred. Reportedly, these intermediary societies are rarely headquartered in

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International Organization of Securities Commissions (ISOCO) (President's Committee), *A Resolution on Money Laundering* (1992) https://www.iosco.org/library/resolutions/pdf/IOSCORES5.pdf [https://perma.cc/9CGE-VVCH].

89. Between 2015 and 2017, the main threats came from South America, in particular following the problematic Petrobras/Lava Jato, which generated more than 600 denunciations in three years (39.52% of the whole denunciations). During these same years, the number of denunciations for suspicion of money laundering from the Middle East was established at 7.03%, i.e. in 5th position overall. *See* Secrétariat d'Etat aux questions financières internationals, *Rapport sur la corruption comme infraction préalable au blanchiment d'argent* (2019) 11-33, https://www.sif.admin.ch/sif/fr/home/dokumentation/medienmitteilungen/medienmitteilungen.msg-id-75816.html [https://perma.cc/C3FL-79RE] (In 2021, Switzerland has ranked the 7th/180 countries on the transparency scale by the TI).

90. *Id.* at 16.

91. *Id.* at 12.

92. *Id.* at 27.

93. *Id.*

94. *Id.* at 14.

95. *Id.*

96. *Id.* at 54–57.

97. *Id.* Swiss authorities are more vulnerable regarding the first two phases (the placement and repartition phases).

the Middle East.[98] Only six percent of suspicious relationships originating from the Middle East concern intermediary companies directly located in the Middle East.[99] This situation makes the investigative work of the Swiss authorities more complex as many countries may be involved in the request for mutual assistance. Not only do the complex operations aim to blur the origin of the funds, but the nature of the crime from which the proceeds of corruption originate increases the difficulty for Swiss investigators.[100] The money laundering generated by active bribery is usually more challenging to discover than those from passive bribery. The first case involves funds usually derived from the criminal misappropriation of mostly legal and public income sources, as in the fraudulent procurement of real public contracts.[101] The laundering of funds from such corrupt activities can hardly be identified based on the money inflow alone. The main element that raises suspicion is their connection with other sources of information on their possible criminal origin.[102]

B. Detection of the Proceeds of Corruption

Banking secrecy is the duty of all bodies, agents, or liquidators of a bank (secrecy holders) to keep confidential all information given to them by the client in the context of the business relationship (or which comes to their knowledge).[103] Swiss banking secrecy is neither codified nor contained in a

98. *Id*. Integrating financial intermediaries in such a direct way (with penal consequences) in case of non-cooperation is controversial.

99. *See*, *e.g.*, Ben Hubbard, *Arab Rulers and Spy Chiefs Stashed Millions in Swiss Bank*, The N.Y. Times (Feb 21, 2022) https://www.nytimes.com/2022/02/21/world/middleeast/arab-rulers-credit-suisse.html [https://perma.cc/VPG9-3L7R] ("The king and queen of Jordan had secret Swiss bank accounts worth hundreds of millions of dollars, according to a major data leak from one of Switzerland's largest banks.").

100. *Id*. The Swiss Criminal Code distinguishes between active and passive corruption. Simply put, a person who attempts or obtains an advantage from an authority is guilty of active bribery (*see* art. 322ter Swiss Criminal Code). In contrast, in the case of passive bribery, the person who accepts the advantage is guilty of passive corruption (*see* art. 322quater Swiss Criminal Code). *See* Pieth Mark, *Die Praxis der Geldwäscherei*, in: Trechsel Stefan (edit.), Geldwäscherei. Prävention und Massnahmen zu Bekämpfung (Zurich 1997), at 9.

101. *Id*. *La corruption comme infraction préalable*, at 31. *See*, *e.g.*, Swiss Criminal Code; AS 54 757. Art. 322 SCC ("Any person who offers, promises or gives a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces an undue advantage, or offers, promises or gives such an advantage to a third party in order to cause the public official to carry out or to fail to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion, shall be liable to a custodial sentence not exceeding five years or to a monetary penalty."); *see*, *e.g.*, Federal Office of Police fedpol, *Money Laundering Reporting Office Switzerland* (MROS), FEDPOL (2020), https://www.fedpol.admin.ch/fedpol/en/home/kriminalitaet/geldwaescherei.html [https://perma.cc/44GQ-THN6] (Switzerland's central money laundering office and functions as a relay and filtration point between financial intermediaries and law enforcement agencies).

102. *Id*. at art. 322 SCC ("Any person who as a member of a judicial or other authority, as a public official, officially-appointed expert, translator or interpreter, or as an arbitrator demands, secures the promise of or accepts an undue advantage for that person or for a third party in order that he carries out or fails to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion, shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.")

103. Banking secrecy protects the contractual relationship with a bank, knowledge arising from the business relationship between the bank and the customer, bank contracts,

law designed for this purpose. Banking secrecy result from civil principles intended to protect an individual's personality and regulate an agent's duties in the context of an agency contract.[104] The following example demonstrates the banks' difficulty in detecting money laundering that originates from active corruption. Several large payments arrived in a Swiss bank account of a foreign public works company, triggering a thorough investigation by the bank into the payments.[105] The Money Laundering Reporting Office (MROS) determined that the contracts were forgeries, that the construction activities for which the payments were made did not exist, and that they were, in fact, acts of bribery of foreign public officials.[106] The fact that the contracts emanate from the public authorities makes it extremely difficult for the banks to uncover the crime

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applications, offers for banking relationships, all transactions, and operations, whether or not they are of a banking nature. *See generally* Michael Levi, *Regulating Money Laundering: The Death of Bank Secrecy in the UK*, 31 British J. Crim. 2 (1991), 109–25 (examining surveillance procedures over those bank accounts belonging to people who may be involved in 'serious crime'); *see also* Ray Flores, *Lifting Bank Secrecy: A Comparative Look at the Philippines, Switzerland, and Global Transparency*, 14 Wash. U. Global Stud. L. Rev. 779 (2015) (discussing the history of banking in Switzerland). ("The foundations of modern private banking come from the landmark Swiss Banking Act of 1934. Swiss adherence to protecting bank information has received much international criticism and pressure for its tendency to perpetuate black market activity and offshore tax evasion by non-domestic parties. However, in response to pressure from the United States and increasing international outcry against the use of Swiss banks as tax evasion vehicles, Switzerland has in the past decade begun to chip away at the country's legacy of bank secrecy. Facing threat of punishment, its largest private banks have been forced to reveal the fraudulent practices of individuals and companies holding Swiss bank accounts, and its government has moved towards compliance with global standards of transparency.").

104. *See*, *e.g.*, OECD, *The Detection of Foreign Bribery* (2017) 87 http://www.oecd.org/fr/corruption/the-detection-of-foreign-bribery.htm [https://perma.cc/9Y7J-JPUN] (roundtable on 20 years of the Anti-Bribery Convention).

105. The client presented the bank with proper contracts from the authorities in the country where the company was operating. It turned out that the company had been hired to build a gas pipeline between two cities in that country. *See generally* Flores, *supra* note 103; *see*, *e.g.*, Patrick Emmenegger, *The Politics of Financial Intransparency: The Case of Swiss Banking Secrecy*, 20 Swiss Pol. Sci. Rev., 146, 164 https://onlinelibrary.wiley.com/doi/pdf/10.1111/spsr.12092 [https://perma.cc/W49C-DHGY] (discussing the dilemma of financial intransparency in a globalized economy highlighting the central role Switzerland plays as an offshore financial center, and reviewing the literature on the origins of Swiss banking secrecy shows how struggles for interpretive dominance shape the politics of financial intransparency) (". . .while Swiss-style banking secrecy is an important example of financial intransparency, possible tax evaders also have other instruments at their disposal.").

106. The leading Swiss authority fighting against money laundering in the context of banking institutions is the Money Laundering Reporting Office (MROS). MROS is "Switzerland's central money laundering office and functions a relay and filtration point between financial intermediaries and law enforcement agencies." "Under the provisions of the Anti-Money Laundering Act, it receives and analyses suspicious activity reports in connection with money laundering, terrorist financing, money of criminal origin or criminal organizations and, where necessary, forwards them to the law enforcement agencies for follow-up action." But Swiss banks (and other financial intermediaries) play a central role in the fight against money laundering. These private actors have a broad obligation to collaborate with the MROS: "A financial intermediary must immediately file a report with the Money Laundering Reporting Office Switzerland (the Reporting Office) . . . if it: knows or has reasonable grounds to suspect that assets involved in the business relationship: are connected to [money laundering." Once MROS receives a communication, it will analyze the suspicious activity and decide whether to forward it to the law enforcement agencies for follow-up action." *See*, *e.g.*, art. 305bis SCC & art. 9 al. 1 let. a ch. 1 AMLA.

of active corruption without the support of MROS. Also, the Swiss Financial Market Supervisory Authority (FINMA) has a regulatory and supervisory role of the financial intermediaries in Switzerland.[107] Among its many powers, it can conduct inspections directly at banks and verify whether the banks establish sufficient criteria to allow the reporting of money laundering suspicions to the MROS.[108]

It should be noted that banking secrecy has two distinct judicial sources: the protection of personal rights and the duties of diligence and care of the agent in the Agency Contract.[109] The extent of bank secrecy and the criminal consequences of its violation must be put in perspective with the crime of corruption (the authorities/or foreign competent authorities can circumvent banking secrecy to fight money laundering).[110] Swiss laws provide several tools to fight money laundering effectively: (a) the provisional measures are available to the Swiss authorities to allow them to react quickly, which can be ordered immediately by the authorities (the execution of the request) for mutual assistance and their preservation for an extended period of time (several years) allow the foreign investigation to continue until a decision is made on the fate of the seized funds; (b) is the possibility of direct delivery, without exequatur, of funds seized on the basis of a request for judicial assistance once the requesting State has proceeded to confiscate these assets.[111] Finally, the use of

107. *See*, *e.g.*, Swiss Civil Code (SCC); AS 24 233.

108. If FINMA finds a violation of the duty to report to MROS, it will report the financial institution to the Federal Department of Finance (FDF), which is responsible for prosecution under administrative criminal law. Philippe Gugler, *The Integrated Supervision of Financial Markets*: *The Case of Switzerland*, 30 Geneva Papers on Risk & Ins.: Issues & Prac. 1 (2005) 128–43; *see*, *e.g.*, John Revill, *Swiss Regulator Investigates 12 Banks in Lebanese Central Banker Corruption Case*, Reuters (Feb. 27, 2023) https://www.reuters.com/business/swiss-regulator-investigates-12-banks-lebanese-central-banker-corruption-case-2023-02-27/ [https://perma.cc/KRQ7-553Y] ("The Swiss Financial Market Supervisory Authority (FINMA). . . has investigated 12 banks in relation to allegations of money laundering linked to the case . . . FINMA carried out investigations at approximately a dozen banks," . . . opened enforcement proceedings." Enforcement proceedings occur when FINMA detects failures at a bank and works to establish what has gone wrong and what measures need to be taken to prevent breaches of money laundering regulations in future. In serious cases FINMA can impose measures on banks and also refer matters to the Swiss federal prosecutors if criminal breaches are suspected.").

109. Arts. 28 al. 1 SCC & 398 al. 2 SCO ("Any person whose personality rights are unlawfully infringed may petition the court for protection against all those causing the infringement. An infringement is unlawful unless it is justified by the consent of the person whose rights are infringed or by an overriding private or public interest or by law."); art. 398 al. 2 of the Swiss Code of Obligations ("The agent is liable to the principal for the diligent and faithful performance of the business entrusted to him.").

110. With the influence of the OECD, Switzerland is now part of the automatic financial data exchange network. As of January 1, 2021, the Swiss Parliament has authorized the exchange of automatic financial data to more than 108 countries. *See* Département fédéral des finances DFF Secrétariat d'État aux questions financières internationales SFI, *Introduction de l'*échange automatique de renseignements relatifs aux comptes financiers avec d'*autres Etats partenraires à partir de 2023/2024—Rapport explicative pour la procedure de consultation*, Federal Department of Finance (Dec. 3, 2021) https://www.newsd.admin.ch/newsd/message/attachments/69364.pdf [https://perma.cc/YL85-GUB8].

111. This is a very effective tool in view of the sums handed over by Switzerland in this respect, above all in cases involving politically exposed persons (PEPs). *See generally* Gugler, *supra* note 108; Revill, *supra* note 108.

spontaneous transmission allows Swiss authorities to transmit information or evidence in their investigation to their foreign neighbours to allow the opening of a procedure abroad or to advance an already opened investigation.[112]

On June 3, 2011, following a communication to the MROS, the Office of the Public Prosecutor of the Confederation (Prosecutor) opened a criminal proceeding targeting several people allegedly close to the entourage of former Egyptian President Hosni Mubarak.[113] The Prosecutor considered that it was likely that this regime and the networks linked to it may have constituted a criminal organization aiming to divert public funds for private purposes and to profit from large-scale corruption operations. The Prosecutor ordered the seizure of the account belonging to the wife of a former minister of the Mubarak regime.[114] In an argument before the Federal Court, the Appellant contended that the Prosecutor lacked evidence to support a suspicion of money laundering and that such a measure was unjustified.[115] The Federal Court upheld the Prosecutor's decision and determined that such a measure was based on probability and that a mere probability is sufficient, considering that the seizure relates to unestablished facts or claims.[116] In its ruling, the Federal Court explained that the Prosecutor must be able to decide quickly on the provisional sequestration; it need not resolve all complex legal questions or wait for exact and complete information on the facts before acting.[117]

II. The Constant of Shallow: The United States Approach

The United States' anti-money laundering, financial regulation, and honest services bribery federal criminal toolkit is very significant in battling corruption and fighting fraudulent activities, as the U.S. has a comprehensive regime of laws and enforcement tools to ensure compliance and redress corruption. In this domain, the approach is to suggest a targeted remedy for an identified limited problem; it is likely most helpful to look at the United States PEP financial institution reporting schema.

Much like Egypt, the United States has federal AML legislation, codified at 18 USC § 1956 and 18 USC § 1957.[118] However, this legislation has grown considerably: first, in the early '90s, following a period of perceived corporate malfeasance, then again in 2001 (the Patriot Act) following the 9/11 terrorist attacks on the World Trade Center and Pentagon. Both the Bank Secrecy Act (BSA) and the Patriot Act contain strict AML procedures.[119] Further, the Treasury and other affiliated state and federal regulatory bodies cooperate ex-

112. *See* Federal Act on the Amendment of the Swiss Civil Code (SCO); AS 27 317 & Federal Act on Banks &Savings Banks (BSB); AS 51 121.
113. *See generally* Swiss Federal Court Decision, Sep. 5, 2012, 1B_175/2012, par. A.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *See* 18 U.S.C. § 1956–1957.
119. *See* 1st Commercial Credit, *How Does the Patriot Act Affect My Bank*? (2020), https://www.1stcommercialcredit.com/blog/how-patriot-act-affects-bank [https://perma.cc/8Q7S-C7XL].

tensively to identify, investigate, and prosecute financial crimes (e.g., Federal Deposit Insurance Corporation (FDIC), Consumer Financial Protection Bureau (CFPB), Civilian Conservation Corps (CCC)).[120] Further, unlike in Egypt, corporate liability can attach to financial institutions for the crimes and failures of their agents, namely, corporate directors.[121]

The United States has broad federal jurisdiction over the regulation of banks and uses this jurisdiction to license and monitor them.[122] Unsurprisingly, the United States domestic bank regulations often implement the same internationalized goals, such as the UNCAC goals and FATF Recommendations 12 and 22.[123] FATF guidance defines domestic PEPs as high-risk individuals located in the same country as the financial institution of which it is a client and has a domestically located position. The United States applies its PEP-identification framework based on this definition.[124] As most financial institutions have at least one branch in the United States (or make use of its wires), nearly any domestic official that makes a suspicious transaction is liable to be reported.[125]

Originally, bank reporting was done automatically regardless of the nature/identity of the customer (according to traditional notions of strict bank secrecy and the unamended Bank Secrecy Act) through routine currency transaction reports (CTRs).[126] However, soon the need for heightened scrutiny became obvious, and CTR forms were updated to reflect the growing need for management by including a suspicious activity report (SAR) section.[127] Unlike the procedures in Egypt, U.S. banks and regulated entities do not have much discretion in whether to submit a SAR.[128] Moreover, whistleblowers that report suspicious activity are entitled to immunity regardless of whether they can a priori make a good faith basis for their claim.[129]

The frequency in which U.S. corrupt parties are unintentionally exposed demonstrates the success of domestic bank reporting. Perhaps a no better

120. *See generally* Charles W. Blau and H. Lowell Brown, *U.S. Money Laundering Laws* (2002) (providing a comprehensive desk reference for White Collar practitioners, banking lawyers, accountants, and officers and directors of financial institutions or other regulated institutions that face the risk of money laundering).

121. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001.

122. Blau & Brown, *supra* note 120.

123. *Id.*; *see also*, *e.g.*, J.B. Maverick, *What Agencies Oversee U.S. Financial Institutions*, Investopedia, (Feb. 2, 2022), https://www.investopedia.com/ask/answers/063015/what-are-some-major-regulatory-agencies-responsible-overseeing-financial-institutions-us.asp [https://perma.cc/L6X8-YGTU].

124. *See*, *e.g.*, CFPB, *Institutions Subject to CFPB Supervisory Authority* (Sept. 2021), https://www.consumerfinance.gov/compliance/supervision-examinations/institutions/ [https://perma.cc/3P6D-7WAT].

125. *See*, *e.g.*, FATF, *Members and Observers*, https://www.fatf-gafi.org/about/membersandobservers/ [https://perma.cc/4EDY-EC2W].

126. *See* FinCEN, Frequently Asked Questions Regarding the FinCEN Currency Transaction Report (CTR) (Oct. 3, 2019).

127. CFR § 1020.320 (Reports by Banks of Suspicious Transactions).

128. CFR § 21.21 *Procedures for Monitoring Bank Secrecy Act* (BSA) *Compliance*; *see also* 61 FR 4337, Feb. 5, 1996, as amended at 75 FR 75583, Dec. 3, 2010; 87 FR 15332, Mar. 18, 2022.

129. Blau & Brown, *supra* note 120; *see. e.g.*, Fred S. McChesney, *International Justice: Ever the Twain Shall Meet*, 99 Mich. L. Rev. 1348, 1354–55 (2001).

example of this is former Governor of New York Eliot Spitzer's tawdry scandal: the basis for the entire criminal investigation was an automatically generated CTR, and because the Governor had a political position, the SAR label attached.[130] Additionally, because the Governor was neither immunized from the reporting/prosecution process nor involved in any way (via, for example, influence), the regulators had nothing to fear by examining his financial dealings.[131] Most importantly, the United States has radically improved bureaucratic compliance as recently as two years ago.[132] Now, disclosure for beneficial ownership interests is uniform across all financial institutions. Additionally, further cooperation among regulatory agencies is expected.

However, the United States is not always interested in careful scrutiny, especially when the foreign money is in the hands of individuals and entities it considers partners. In the initial months after the revolution, Egyptian authorities accused the United States of dragging its heels on freezing Mubarak's assets, even after Swiss and EU authorities had done so.[133] The U.S.'s response was tepid: the Treasury said it sent notices to banks reminding them to "apply enhanced scrutiny for private banking accounts held by or on behalf of senior foreign political figures."[134] Indeed, the U.S. is not perfect, and it can continue to make strides toward transparency and AML through further enforcement and more systematic legislation.

A. Insufficient Measures: The United States as a Tax Haven

The reaching arm of the Internal Revenue Service (IRS) has long sought to prevent Americans from evading taxes by stashing their wealth in Swiss banks or Cayman Island accounts. In 2010, the United States enacted a new crackdown on American tax dodgers by passing the Foreign Account Tax Compliance Act (FATCA), which requires all non-U.S. foreign financial institutions to report assets and identities of any customers with a connection to the United States to

130. Isabel Vincent, *How Eliot Spitzer's Penchant for Illicit Sex Caused his Downfall*, N. Y. Post (Mar. 10, 2018) https://nypost.com/2018/03/10/how-eliot-spitzers-penchant-for-illicit-sex-caused-his-downfall/ [https://perma.cc/C72X-8A5G].

131. *Id.* ("As . . . state Attorney General, between 1999 and 2006, saw him take on big banks and brokerage houses—cracking down on securities fraud and other white-collar crime.").

132. Blau & Brown, *supra* note 120.

133. *See* Jones Day Insights, *Congress Passes Major U.S. Anti-Money Laundering Reforms* (Dec. 2020).

134. William Wan & James Grimaldi, *Egypt Says U.S. Dragging Its Feet on Freezing Mubarak Assets*, Wash. Post, (Mar. 30, 2011), https://www.washingtonpost.com/world/egypt-says-us-dragging-its-feet-on-freezing-mubarak-assets/2011/03/28/AFdCA35B_story.html ("[A]fter the fall of Egyptian President Hosni Mubarak, the United States has yet to respond to a request by Cairo to freeze his assets. Many Egyptians are convinced that Mubarak and his top officials took in millions through kickbacks and corruption during his three-decade rule. Estimates . . . have ranged from $1 billion to $70 billion. But where that money may be is not known, and experts say finding such assets can be difficult and time-consuming because they are often hidden in shell companies. The U.S. Treasury said it sent notices to banks. . .after Mubarak's ouster to remind them of federal laws that require monitoring for evidence or suspicion of corruption, bribery or other illegal payments. The notice said banks must apply enhanced scrutiny for private banking accounts held by or on behalf of senior foreign political figures.").

the Department of the Treasury.[135] Failure to comply can result in a thirty percent withholding fee.[136] This hefty bill and clear intolerance for American tax evaders sparked worldwide fear in the financial sector. Nonetheless, the United States' existence as a global financial powerhouse meant that countries signed on, over the balking of their financial institutions. It also inspired a new wave of global legislation and hope that the international community then had the momentum to truly restrict the super-wealthy's ability to avoid paying their fair share.[137] However, the United States' interest in preventing tax evasion began and ended with ensuring Americans paid their taxes.[138]

When the Automatic Exchange of Information (AEOI) agreement was produced and ready for ratification, the United States refused to sign on, declaring that other countries' ability to collect taxes on their own citizens was not an American problem.[139] Rather than assist in leading an international effort to end tax dodging, the United States has permitted itself to become a black hole of financial information. For example, some state financial laws are so lax that they function as "onshore" accounts, meaning that American corporations and individuals looking to evade their taxes no longer need Luxembourg or Barbados; Delaware will serve just fine.[140] The United States both cripples its ability to collect taxes within its borders and stymies the efforts of developing economies to tax their own citizens or recover funds from ousted despots and grifters by failing to effectively regulate federally and failing to join in on an international effort. The international standard for tax regulation has progressed, and the United States is behind. This lapse has resulted in the United States becoming a more attractive tax haven than many historic havens, with a reputation as a prime destination for money laundering funds in anonymous bank accounts. It is important to address the specifics of the United States' shortcomings in tax law and to lay out the effect on developing countries.

1. Legal Shortcomings of the United States

The United States' shortcomings in tax law are evident both in its failure to commit to international tax regimes and in its domestic law that makes tax fraud easy for foreigners to commit. The United States' refusal to sign on to a growing international approach to tax evasion and its usual business-friendly

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135. Rachel E. Brinson, *Is the United States Becoming the "New Switzerland"? Why the United States' Failure to Adopt the OECD's Common Reporting Standards is Helping it Become a Tax Haven*, 23 N.C. Banking Inst. 231, 237 (2019) (providing background information on the U.S. crackdown on offshore tax evasion and the international standards relating to tax transparency; argues that the only way for the AEOI to be successful is through global, and thus U.S., adoption, and implementation.).

136. *Id.*

137. *Id.* at 238.

138. *Id.*

139. *See* J. Richard (Dick) Harvey, Jr., *Offshore Accounts: Insider's Summary of FATCA and its Potential Future*, 57 Vill. L. Rev. 471, 473 (2012) (arguing that the IRS has historically had little success pursuing hidden income).

140. *See generally* Leslie Wayne, *How Delaware Thrives as a Corporate Tax Haven*, N.Y. Times (June 30, 2012) https://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html#:~:text=In%20tax%20circles%2C%20the%20arrangement,by%20an%20estimated%20%249.5%20billion [https://perma.cc/7R4Y-K65Z].

willingness not to dig into corporate activity make it a particularly appealing place to launder or store funds away from the taxing arm of a foreign government.[141] Besides the United States' evasive attitude towards international efforts to restrict tax dodging, it is also a very easy place to purchase expensive property or establish a limited liability company, both tools of choice for money laundering and stowing wealth.[142]

121 countries have pledged to partake in the Global Forum on Transparency and Exchange of Information for Tax Purposes' AEOI by 2024, but the United States is not one of them.[143] Signatories to the AEOI agree to automatically, without the need for filing a request, exchange the financial account information of non-resident account holders with the tax authorities of that individual or company's resident country.[144] They also agree to the "systematic and periodic transmission of 'bulk' tax-payer information by the source country to the resident country concerning various categories of income (e.g. dividends, interests, royalties, salaries, pensions, etc.)."[145] The United States argues that FATCA serves the same function, so it does not need to partake in AEOI, but it is not providing through FATCA the information that it would be required to provide if it were a party to AEOI.[146] FATCA contains no provision requiring the United States to reciprocate the information provided to it.[147] The United States negotiated agreements with other countries to provide some tax information, but this information is far more limited in scope than AEOI requires.[148] In fact, much of the information provided through AEOI is

141. *See* Stephen Troiano, *The U.S. Assault on Swiss Bank Secrecy and the Impact on Tax Havens*, 17 New Eng. J. Int'l & Comp. L. 317, 333–346 (2011) (explaining the U.S. case against UBS and Swiss banking secrecy).

142. *See* Conor Clarke, *What Are Tax Havens and Why Are They Bad*?, 95 Tex. L. Rev. 59, 67 (2016) (reviewing Gabriel Zucman, The Hidden Wealth of Nations: The Scourge of Tax Havens (2015)) (illustrating that there is no worldwide accepted concept of tax haven).

143. *See* OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, *Automatic Exchange of Information* (AEOI): *Status of Commitments* (May 18, 2022) https://www.oecd.org/tax/transparency/AEOI-commitments.pdf [https://perma.cc/U6YC-BJXR].

144. Rachel E. Brinson, *Is the United States Becoming the* "*New Switzerland*"? *Why the United States*' *Failure to Adopt the OECD's Common Reporting Standards is Helping it Become a Tax Haven*, 23 N.C. Banking Inst. 236; *see* Zhiyuan Chen, Jin Xin, & Xu Xu, *Is a Corruption Crackdown Really Good for the Economy*? *Firm-Level Evidence from China*, 37 J. L. Econ. & Organization 2 (2020) 314–15.

145. Ana Swanson, *How the US Became One of the World's Biggest Tax Havens*, The WashingtonPost (Apr.5,2016) ¶ 23 https://www.washingtonpost.com/news/wonk/wp/2016/04/05/how-the-u-s-became-one-of-the-worlds-biggest-tax-havens/ [https://perma.cc/H5JH-36KN] ("The United States argues that since its program is similar to Europe's, it doesn't need to join it—instead, the United States plans to sign bilateral agreements with other countries. But in the interim, the United States is not providing European countries with the kind of data it is requesting from them—creating an incentive for financial firms to move their business to the United States.").

146. *See* OECD, *Automatic Exchange of Information What It Is*, *How It Works, Benefits*, *What Remains to Be Done* (2012), https://www.oecd.org/tax/exchange-of-tax-information/automaticexchange.htm [https://perma.cc/5DWY-864Z].

147. Brinson, *supra* note 144, at 240.

148. *Id.* ("Generally, the IRS does not give its reciprocal FATCA partners information about depository accounts held by entities, non-cash accounts unless the account earns U.S. source income, or information about the controlling person of any entity even if the entity is controlled by a resident of a reciprocal country.").

not information the United States government collects, even from American taxpayers.[149] Therefore, firms and individuals have reason to park their wealth in the United States, knowing the information will not return to their home country.[150] However, even the United States' characteristic refusal to commit itself to an international regime would not necessarily make it a target for tax evaders if it had sufficient domestic law to discourage this behavior.[151] It does not. Legislation and jurisprudence combine to make the United States a very attractive location to store and launder funds.[152]

While the United States broadly recognizes foreign judgments within its borders, there are exceptions, including the revenue rule.[153] "Under the 'revenue rule,' the courts of the United States are under no obligation to recognize or enforce a foreign tax judgment."[154] For example, a ruling in a foreign court that the assets of a deposed ruler, stored in American accounts, must be turned over to that state does not compel compliance from the United States. This rule has been perpetuated over time: in 2006, the Model Income Tax Convention eschewed any provisions permitting enforcement of foreign tax judgments.[155] Of the eighty-six income tax treaties in force in the United States, only five permit enforcement of foreign tax judgements.[156] When the United States refuses to enforce foreign tax judgments, it becomes easier for foreigners to avoid taxation laws in their own countries. Foreigners can stow their wealth in the United States, knowing that it is unlikely that the country will turn over the funds in the event of an adverse judgment against the individual.[157] Even if

149. Peter A. Cotorceanu, *Hiding in Plain Sight: How Non-US Persons Can Legally Avoid Reporting Under both FATCA and GATCA*, 21 Trusts and Trustees 1, 4 (2015) https://www.gatcaandtrusts.com/wordpress2/wp-content/uploads/2017/03/Trusts-Trustees-2015-tandt_ttv178.pdf [https://perma.cc/K69P-PARA].

150. *Id.* at 5 ("[M]ost of the data that [F]ATCA requires to be exchanged is not currently reported to the IRS by US financial institutions.").

151. *See*, *e.g.*, *The Problem Child: A Tax Haven Professes to Stand on Principle*, *Risking Pariah Status*, The Economist (Feb. 18, 2016) https://www.economist.com/international/2016/02/18/the-problem-child [https://perma.cc/5HDP-GX3E] (explaining Panama's view that "[s]mall financial centers . . . are being bullied into accepting competitiveness-sapping rules shunned by. . .America.").

152. *See*, *e.g.*, Craig Rose, *The EU's Tax Haven Blacklist – Will the U.S. Eventually be Added*?, Bloomberg Law: Int'l Tax Blog (Dec. 6, 2017) https://www.bna.com/eus-tax-havenb73014472806/ [https://perma.cc/3RNB-VVAX] ("the OECD . . . is unlikely to pick a fight with its most important member, the U.S."); *see generally* Rachel E. Brinson, *Is the United States Becoming the "New Switzerland"?: Why the United States' Failure to Adopt the OECD's Common Reporting Standard is Helping it Become a Tax Haven*, 23 N.C. Banking Inst. 231 (2019).

153. *See generally* Hilton v. Guyot, 159 U.S. 113 (1895) (finding that the United States should and will recognize foreign judgments within its borders); *see also* Her Majesty the Queen ex rel. British Columbia v. Gilbertson, 597 F.2d 1161 (9th Cir. 1979).

154. William J. Kovatch, Jr., *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, 22 Hous J. Int'l L. 265, 266 (2000).

155. Samuel D. Brunsen, *The U.S. as Tax Haven? Aiding Developing Countries by Revoking the Revenue Rule*, 5 Colum. J. Tax L. (2014) 172, 184.

156. *Id.* at 184–85.

157. Cotorceanu, *supra* note 149; *see* Shrabani Saha & Sen Kunal, *The Corruption–Growth Relationship: Does the Political Regime Matter*? 17 J. Institutional Economics 2 (2021) (maintaining that countries with authoritarian governments often can benefit from corrupt activities that fill roles in the economy necessitated by the lack of governmental action).

their government catches them tax-dodging, any funds they may have in the United States are safe.

Furthermore, the legislation of the United States makes it an easy place to secret the funds away. The United States system allows for variation in the tax laws of individual states, and the federal government has shown little appetite for uttering to states who make themselves appealing tax havens. Nevada, Wyoming, South Dakota, and especially Delaware have become sought-after locations to stow foreign funds, in large part due to the quick and easy formation of shell companies in these states.[158] The painless formation of limited liability companies in these states makes them ideal locations to store or launder foreign funds.[159] Many do not require a form of identification such as a driver's license, passport, or other government ID, leading to the not-entirely-joking assertion that it is "easier to incorporate a company than it is to get a library card" in the United States.[160] In Delaware, there is one address—1209 North Orange Street—which is the legal street address of some 285,000 businesses.[161]

The other method favored by foreign nationals looking to stow wealth in the United States, out of reach of their own governments, is through real estate purchases. A dusty Clinton-era effort to restrict the flow of illicit foreign funds was unexpectedly revived in the 2001 PATRIOT Act in the wake of 9/11—with one glaring loophole.[162] The housing industry pleaded an exemption on the grounds of undue hardship and was thus given a reprieve from having to monitor "dubious foreign transactions."[163] That temporary exemption was never revoked. Therefore, despite Congressional success in shutting down shell banks through the PATRIOT Act, foreign nationals can still hide money in the United States and maintain their anonymity by purchasing penthouses, estates, and other high-end real estate through shell corporations formed in states like Delaware and Nevada.[164] Combining the United States' refusal to partake in

158. Peter D. Hardy, Scott Michel, and Fred Murray, *Is the United States Still a Tax Haven? The Government Acts on Tax Compliance and Money Laundering Risks*, 18 CCH's J. Tax Prac. & Proc., 25, 26 ¶ 1 (2016); *see generally* Kevin G. Hall & Marissa Taylor, *Wyoming, Nevada Outed as Tax Havens*, Lewiston Trib. (Apr. 6, 2016) https://lmtribune.com/editors_pick/wyoming-nevada-outed-as-tax-havens/article_27685e38-b964-56e0-b611-d859d29452ec.html [https://perma.cc/AR5M-JGEY] ("The U.S. government has publicly and privately pressured countries that act as offshore havens for hiding money, while this barren, sparsely populated state offers the same secrecy.").

159. Hardy, *supra* note 158, at 26. In many cases, these states do not require disclosure of the "beneficial owner" or the "real" owner of the alleged business. *Id.*

160. Swanson, *supra* note 145, ¶ 12–13.

161. Wayne, *supra* note 140, ¶ 2. Nor does Delaware show any interest in putting a stop to the clandestine activities of its many incorporated businesses—rather, the chief deputy secretary of state of Delaware trumpets the state as business-friendly, and Delaware's Senators and Representatives have resisted federal legislation to tighten the reporting requirements for companies based in Delaware. All this despite reports from the Justice Department that shell companies are the vehicle of choice for anyone looking to launder money. *See generally id.* ¶ 2 & ¶ 6.

162. Franklin Foer, *Russian-Style Kleptocracy Is Infiltrating America*, The Atlantic, ¶ 12-13 (March 2019) https://www.theatlantic.com/magazine/archive/2019/03/how-kleptocracy-came-to-america/580471/ [https://perma.cc/3WU2-K7YE].

163. *Id.* ¶ 12.

164. *Id.* ¶ 18; *see also* Raymond Baker, *Transparency First*, *The American Interest*, ¶ 4–5 (July 1, 2010) https://www.the-american-interest.com/2010/07/01/transparency-first/ [https://perma.cc/PL5J-QNVH]. *See* Tower of Secrecy: *A Summary*: *The Hidden Money Buying Condos at*

international tax regulation schemes and failure to properly legislate at home to prevent individual states from operating as tax havens makes the country a desirable destination for foreign tax evaders. Tackling either of these issues alone would necessarily cut down on the degree to which the United States is used as a tax haven, but addressing both would be a great boon to the rest of the world in their efforts to ensure fair payment of taxes.

2. Global Impact

So, what of the impact of the United States' lackadaisical attitude towards tax collection in other countries? What difficulties does a lack of transparency in tax havens cause abroad?[165] It is an impact felt most strongly in developing countries, often still struggling with a legacy of colonialism, in the greatest need of properly-collected taxes to fund much-needed infrastructure and welfare programs and lift their people out of poverty.[166] Funds from would-be taxpayers in these countries are slid under the door into the United States where they cannot be taxed, depriving the government—and thereby its citizens—of a much-needed cashflow. Furthermore, it is extremely difficult for a state to recover ill-gotten gains from deposed despots and ousted government officials once those gains have been moved offshore.[167]

Loss of funding through tax evasion represents a very real problem to developing and emerging economies. Global Financial Integrity estimates that developing economies lost approximately $6.6 trillion in illicit cash outflows between 2003-2012.[168] The World Bank's Stolen Asset Recovery Initiative

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the Time Warner Center, NYT (Feb. 7, 2015) https://www.nytimes.com/2015/02/08/nyregion/the-hidden-money-buying-up-new-york-real-estate.html?_r=1 [https://perma.cc/22UQ-ZYSQ]. In this regard, of homes valued at over $5 million, the New York Times reporters have found that almost half were purchased using shell companies. Teodorin Obiang, son of dictator Teodoro Obiang Nguema Mbasogo of Equatorial Guinea, pursued this strategy by parking over $30 million in a Malibu mansion. Reluctant to irritate an ally—United States energy companies have vast amounts invested in oil-rich Equatorial Guinea—and equally reluctant to stop the flow of foreign funds, the United States has been slow to take action against Mr. Obiang and those like him. Foer *supra* note 162, ¶ 15; *see* Ken Silverstein, *Keep the Dictators Out of Malibu*, NYT ¶ 3 (July 2, 2012) https://www.nytimes.com/2012/07/03/opinion/throw-out-the-money-launderers.html?searchResultPosition=17 [https://perma.cc/T35D-8HUL].

165. Foer, *supra* note 162, ¶ 18. While the United States obviously lacks where it allows its own citizens to secret away IRS taxation in South Dakota and Wyoming shell companies, the ripple effect of the American government's choices spread far beyond its own borders.

166. Antonio Guterres, General Secretary, United Nations, 15th Anniversary of the Adoption of the UN Convention Against Corruption (May 23, 2018) https://www.un.org/press/en/2018/sgsm19048.doc.htm [https://perma.cc/QE2T-JZ92].

167. *See* OECD, Towards Global Tax Co-operation, 1, 10 n.4 (2000) (defining the OECD's tax haven criteria); *but see* Clarke, *supra* note 142, at 67 (discussing the various definitions of tax haven).

168. Dev Kar and Sarah Freitas, *Global Financial Integrity Illicit Financial Flows from Developing Countries*: 2003–2012, at vii (*see* Table XI), https://secureservercdn.net/50.62.198.97/34n.8bd.myftpupload.com/wp-content/uploads/2014/12/Illicit-Financial-Flows-from-Developing-Countries-2003-2012.pdf [https://perma.cc/RZK3-4SWR]. For comparison, the total official development assistance (ODA) provided to the same developing countries over that same period was $809 billion. If these countries could tax their citizens and companies the full amount on the books, they could receive no ODA and still be better off in terms of cash reserves than they are now. To put it further in perspective, the

(STAR) estimates that the top countries for hiding wealth are the United States, Switzerland, the United Kingdom, France, Germany, and Singapore.[169] Countries must decide the best method to combat wealthy citizens and corporations who move funds abroad to avoid paying taxes to their home country. On the one hand, the government can implement higher taxes on a narrower tax base. However, this solution squeezes the citizens who lack the wealth or connections to hide their taxes from the government (usually the poor and middle class). On the other hand, they could run the government on less money, likely resulting in decreased number, breadth, and quality of government programs.[170] Either way, the ability of individuals and corporations to avoid paying their fair share of taxes puts additional stressors on the government, weighing most heavily on those least equipped to take on more pressure.[171]

Sometimes a country will try to recover assets moved abroad, especially if that money belonged to a corrupt government official who has since been removed from office. However, this is an onerous process, which generally results in only a fraction of the funds being returned.[172] The Late Hosni Mubarak, the deposed dictator of Egypt, had a store of wealth offshore, estimates of which vary wildly depending on who is reporting. Regardless of the actual figure, very little from his thirty-year reign has been recovered.[173] The Gaddafi family of Libya is alleged to have taken billions out of the country, but have recovered equally little.[174] Tunisia has gotten a few planes back from its ousted kleptocrat, along with $29 million from a Lebanese bank account of the former president's

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combined ODA and foreign direct investment (FDI) to those countries between 2003–2012 is approximately $6.5 trillion—still less than was lost in illicit cash outflows.

169. Idris M. Shiite and M. Mustafa, *Asset Recovery Policy Strategy of Corruption Proceeds Placed Abroad within the Perspective of the State as a Victim*, 19 Technium Soc. Sci. J. 15, 16 (2021).

170. *Id.*; *see* Alan Bacarese, *Advancing International Understanding and Cooperation in Combating Fraud and Corruption: Recovering Stolen Assets, A New Issue*? ERA Forum 421, 434 (2009) https://link.springer.com/article/10.1007/s12027-009-0124-5#citeas [https://perma.cc/38KM-KKE6].

171. Peter Leasure, *Asset Recovery in Corruption Cases*, 19 J. of Money Laundering Control 1, 4–20 (2016).

172. For example, Indonesia struggles with corrupt practices in its government and trying to recover assets moved out of its reach by those corrupt officials. Estimates are that some Rp 29 trillion in Indonesian assets had been moved abroad by 2019, and those returned less than Rp 1 trillion. *See* Shiite & Mustafa, *supra* note 169. In an effort to combat the corruption taking its taxable assets abroad, Indonesia has ratified the UNCAC. It has also cooperated with MLA (mutual legal assistance) in Singapore, Australia, China, Switzerland, and others, to search for assets inappropriately taken abroad. *See*, *e.g.*, Anastasia Suhartati Lukito, *Revealing the Unexplained Wealth in Indonesian Corporation: A Revolutionary Pattern in Non-Conviction Based Asset Forfeiture*, 27 J. of Financial Crime 1 (2020).

173. Anita Ramasastry, *Is There a Right to Freedom from Corruption*?, 49 U.C. Davis L. Rev. 703, 711 (2015) ("High-level corruption undermines economic development and renders important issues, such as the fight against poverty, ineffective.").

174. *See* Tom Bawden & John Hooper, *Gaddafis' Hidden Billions: Dubai Banks, Plush London Pads and Italian Water*, The Guardian (Feb. 22, 2011, 4:28 PM EST) http://www.theguardian.com/world/2011/feb/22/gaddafi-libya-oil-wealth-portfolio [https://perma.cc/446K-YURB] ("Most of the state's investments are made by the Libyan Investment Authority (LIA), a "sovereign wealth fund" set up . . . to spend the country's oil money, which has an estimated $70bn of assets.").

wife.[175] The funds pursued could make an enormous difference in the countries they have been looted from, particularly in countries struggling with the social and economic shock of regime change.[176]

Return of looted assets is possible. The international community has struggled to foster better cooperation in the return of assets removed from one state by the corrupt activities of an individual or a government, but not entirely in vain.[177] The struggle with asset recovery leads to an obvious conclusion: preventing tax avoidance in the first place is far more effective than trying to recover the assets later. Western governments are often reluctant to dig into the financials of dictators and corrupt foreign officials until after those officials have been removed from office. Even then, the process moves slowly. The more complicated the mechanisms used to hide the assets, the longer it will take to unravel the web and resolve the legal issues attached.[178] These processes can be protracted. For example, assets looted by Ferdinand Marcos of the Philippines in 1986 were not turned over to the Philippine government until 2002. The more efficient route is to prevent these officials from being able to shift their wealth to accounts or property in the United States or elsewhere to begin with, thereby preventing the need for asset recovery. Tighter laws and better cooperation from the United States would further close the net around corrupt governments and other tax dodgers. It would not stop all of them, but the equation remains simple: the harder it is to evade taxes, the fewer people will do it or do it successfully. Greater transparency requirements on the front

175. *Making a Hash of Finding the Cash*, The Economist (May 11, 2013) ¶ 6 https://www.economist.com/international/2013/05/11/making-a-hash-of-finding-the-cash [https://perma.cc/C52X-HKS5]; *see also* Mohamed 'Arafa, *Dreams without Illusions*: *The Bureaucratic Cholesterol*, *Administrative Corruption and the Future of a Real Democratic Middle East*, 53 New England L. Rev. (2021) [hereinafter *Dreams without Illusions*] https://www.newenglrev.com/forum-53/dreams-without-illusions-the-bureaucratic-cholesterol-administrative-corruption-and-the-future-of-a-real-democratic-middle-east [https://perma.cc/HX29-FTJA] ("Despite this progress, young Tunisians, concerned that the uprising will present yet another chance for corrupt political and top- government officials to misuse their power, remain cautious about politics and the current elite. Corruption—especially financial and political—is of such concern to Tunisian youths that, in a recent focus group survey shown by the National Democratic Institute, their primary advice for the government did not concern constitutional reform, but rather corruption and unemployment False Despite such advances in the fight against corruption in Tunisia, much remains to be done at policy level. Critics fear that the current government lacks the capacity and authority needed to tackle corruption vigorously and effectively. Moreover, the national anti-corruption strategy adopted by the Tunisian government has not been put into practice. Also, the judiciary still suffers from poor financial and personnel resources and non-independence which, in turn, confines its abilities to contest corruption professionally.").

176. *Making a Hash Finding the Cash*, *supra* note 175.

177. In 2017, $321 million was returned to Nigeria by Switzerland in accordance with the memorandum of understanding between them. However, the gap between funds looted and funds returned still yawns. "Between 2006 and mid–2012, OECD members returned $423.5 million, compared to the estimated $20–$40 billion stolen each year." *See*, *e.g.*, *UN Secretary-General António Guterres highlights importance of returning*, World Bank Blog (May 1, 2018) https://star.worldbank.org/blog/un-secretary-general-antonio-guterres-highlights-importance-returning-stolen-assets [https://perma.cc/2R7P-HWPL]; Ramasastry, *supra* note 173, at 710.

178. *See id.*, *Making a Hash of Finding the Cash*, *supra* note 175, ¶ 6.

end would mean fewer asset recovery actions on the back end, saving time and effort in both countries.

III. *Qui Tam* Crackdown: How a US Fraud-Fighting Blueprint Can Succeed Globally?

The metastatic nature of corruption challenges all institutions in society. Knowledge of actual or likely corrupt practices among corporations, non-profit entities, and governmental agents produces damaging downstream effects for the proper function of society's most advanced institutions.[179] The fight against corrupt practices is often limited by material constraints of government resources and the reluctance of individuals to report corrupt acts due to potential fallout.[180] To transcend these limitations of government-led prosecutions to curtain corruption, the United States has utilized qui tam actions. These actions allow private citizens to file actions on behalf of the government and receive a portion of the award in the event of a successful recovery.[181]

Although the reason for utilizing this *qui tam* framework initially was the Civil War and concern regarding dishonest military contractors, the international community can utilize this framework in a broader sense to allow more robust enforcement against self-dealing in the business and governmental spheres.[182] As such, the international community should broadly adopt these measures to ensure their empirical sovereignty and climate of trust in human enterprises. Though implementing such a system would require some level change to many countries' legal regimes, the benefit offered to the public.[183]

Corruption can be difficult to define broadly enough to encompass its entire meaning. However, the definition generally includes (1) an individual, (2) in a position of authority, (3) utilizing their authority in a method or manner benefitting themself.[184] Corrupt individuals ostensibly act as an agent for

179. *See generally* Sarah Chayes, *On Corruption in America*: *And What Is at Stake* (2020) (showing signs similar to some of the most corrupt countries in the world, argues, [that corruption] is an operating system of sophisticated networks in which government officials, key private-sector interests, and out-and-out criminals interweave. Their main objective: not to serve the public but to maximize returns for network members).

180. *Id.*

181. *See generally* Seth Abramson, Proof of Conspiracy: How Trump's International Collusion is Threatening American Democracy, (2019) (providing an unforgettable depiction of the dangers US and the globe now face).

182. Paul D. Carrington, *Qui Tam*: *Is False Claims Law a Model for International Law*? Univ. of Chi. Legal Forum (2012) 27 [hereinafter *Qui Tam*] ("Benjamin Franklin observed that '[t] here is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the government.'").

183. *Id.* Additionally, these adjustments to the state's justice system could be contained to only corruption cases by creating a separate tribunal.

184. *Dreams without Illusions*, *supra* note 175 ("These two scholars differ in their perspective on corruption. Both recognize that corruption has a slightly unusual double meaning. The first definition in many dictionaries is purely ethical, referring to any conduct or individual that is debauched, perverted, or debased ethically. The second concept is often more closely associated with fraudulent or, more narrowly, with the improper use of a position of trust for personal benefit (dishonesty). Klitgaard is most concerned with the practical values of betrayal of the trust that has been placed in an individual in giving him a specific

another, but they secretly serve their own interests. Individuals or organizations deemed "corrupt" through consensus often become completely devoid of trust.[185] A root condition of corruption is the act of dishonesty: outward presentation of selfless service with the actor shrouding their self-interest in a façade of altruism.[186]

Qui tam actions are a peculiar species of the law. In essence, a *qui tam* action is a special type of whistleblower statute. In a *qui tam* action, a private individual, a relator, files an action on behalf of the government against an organization or business defrauding the government.[187] The relator stands in place of the government in pursuing the claim.[188] The government has the option to intervene, but it may decline to do so. The relator acts as an agent of the government with statutory standing to pursue a party who did not wrong the relator directly but instead harmed society and the finances of the public through mischief and fraud.[189] *Qui tam* actions have been enshrined in the English common law tradition for centuries.[190] Though the utilization of *qui tam* actions has varied over time, the common return to the private attorney general model has been a recurring theme in certain advanced democracies, namely the United States.[191] As a result, the *qui tam* model achieved its intended purpose: to extend the state by incentivizing people to uphold the law and report others who fail to do so.[192] As such, more advanced societies have

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position in business or government. Noonan highlights the far broader, moral meaning of being relatively corrupt."). *See also Corruption definition & meaning*, Merriam-Webster, https://www.merriamwebster.com/dictionary/corruption [https://perma.cc/6KBE-BXPS].

185. *Dreams without Illusions*, *supra* note 175 ("From the perspective of Professor Robert Klitgaard, the purposes of an organization that placed trust in a dishonest agent are defeated by that dishonesty. Corruption is not unreliable with rapid growth as major nations in Asia, Latin America, and Europe have established, as businesses can come to recognize a corrupt regime. But corruption is inconsistent with carrying out purposes of an administration and good governance, which may conflict with the needs of wealthy players in the private sector.").

186. *See generally*, Andrew Stark, Conflict of interest in American Public Life, 152–77 (Harv. Univ. Press, 2000); *see also Caperton v A.T Massey Coal Co*, 556 US 868,890 (2009) (holding that due process of law requires disqualification of a judge receiving from a litigant millions of dollars in campaign contributions).

187. *See generally* Citizens United v. Federal Election Commission, 130 S. Ct. 876, 882(2010) (reflecting the view of the Court that campaign contributions are free speech, not bribery, even when made by business firms to advance business interests).

188. Stark, *supra* note 186.

189. *See* Saul M. Froomkin, *Money Laundering and Crime Management*: *Money Laundering, Corruption and the Proceeds of Crime-An International Reality Check*, 4 Asper. Rev. Int'l Bus. & Trade L. 155, 164 (2004).

190. J. R. Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 539 (2000) (In terms of the history of the Private Attorney General, though existing as an effective mechanism still in service, the origins of the practice come from the early Middle Ages. The roots of qui tam actions can be traced back to both Roman and Anglo-Saxon statutes from the seventh century. In Latin, this practice was referred to as "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," translating approximately to "he who brings an action for the king as well as for himself.").

191. *Id.*

192. *Id.* (This category of action was created out of necessity: these more primitive societies lacked access to a robust state-led prosecutorial system. Additionally, due to occasional conflicts of interest between the wishes of local officials and the interests of the king, this system was used to create a broader class of authorities who would honor the king's wishes.).

subsequently utilized the private attorney general *qui tam* action mechanism to guard against abuse in a complex and chaotic system of mass scale.[193]

A. *Qui Tam*: U.S. Practice

The United States began employing *qui tam* statutes during the American Civil War in 1863 by passing the False Claims Act (FCA).[194] The FCA was advanced largely through active advocacy by President Abraham Lincoln, resulting in the coining of the FCA's alias: Lincoln's Law.[195] The Union utilized a significant number of private contractors for various military weapons and other supplies.[196] Amid concern regarding the honesty of these contractors and substantiated concerns about fraud, Congress enacted this legislation to protect the Union army's assets of the fragile state.[197] The FCA created civil liability for governmental contractors who: (1) knowingly submit a false claim to the government; (2) cause another to submit a false claim to the government; (3) make a false statement to receive payment for a false claim; or (4) do any of the previous actions to avoid paying the government money duly owed (reverse false claims).[198] As expected, the FCA empowers the United States Justice Department to pursue FCA violations as the Justice Department routinely does for other statutory offenses.[199] However, this is only part of the full extent of the enforcement regime. The FCA also "deputizes" the civilian populace and permits them to file claims on behalf of the government. In doing so, the FCA created a *qui tam* enforcement action.[200]

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193. *Id.*

194. *See generally The History and Development of Qui Tam*, WASH U. L. REV. 081(1972) (traces the origin and English development of *qui tam* together with the adoption, development and subsequent demise of *qui tam* in America, and also delineates the current status of qui tam and provides a guide for its future use).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id; see*, *e.g.*, Evan H. Caminker, *State Immunity Waivers for Suits by the United States*, 98 MICH. L. REV. 92, 132–36 (1999) (arguing that states should be deemed to have waived sovereign immunity with respect to qui tam actions under the FCA); Edward A. Hartnett, *The Standing of the United States*: *How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2243–45 (1999) (discussing the relevance of *qui tam* provisions such as those in the FCA to debates about Article III standing requirements).

199. *See*, *e.g.*, Gadley v. Whitecot, 78 Eng. Rep. 790, Cro. Eliz. 544 (Q.B. 1596). *Compare* Gabriel Widow v. Clerke, 78 Eng. Rep. 336, Cro. Eliz. 76 (Q.B. 1587) (holding that the restriction applied to all penal actions); *also* Johnson v. Pays, 78 Eng. Rep. 675, Cro. Eliz. 435 (Q.B. 1595), (holding that aggrieved parties were not covered by the restriction.) (It should be noted that a relator filing an allegation of an FCA violation first drafts a civil complaint, submitted to the U.S. District Court where the alleged violation occurred. Concurrently, the U.S. Attorney of the respective U.S. District Court receives a copy of the complaint. The complaint remains under seal for sixty days while the U.S. Attorney conducts an investigation. After such time, the U.S. Attorney decides whether the United States shall intervene in the case and prosecute using government resources. Should the U.S. Attorney decline to intervene, the relator may nevertheless privately prosecute on behalf of the government.)

200. *See* Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L. J. 341 (1989); *see also* Sean Hamer, *Lincoln's Law*: *Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*, 6 KAN. J. L. & PUB. POL'Y (1997) 89; James T. Blanch,

In recent years, *qui tam* actions under the FCA have often involved either medical fraud against the government through its Medicare and Medicaid programs or military defense contracting with the U.S. Department of Defense.[201] Given the success with *qui tam* FCA recoveries, the United States decided to integrate *qui tam* whistleblower rewards for other acts of dishonesty costing the U.S. Treasury.[202] Governmental recoveries and tax-payer savings are often the focus to determine whether the initiative resulted in a positive outcome. However, citizen policing ensures greater conformity with the law, boosts the state's perceived competence and strength, and bolsters confidence in the consistent and fair operation of society's institutions.[203]

1. Universal Implementations of Anti-Corruption Qui Tam: Global Approaches to Curbing Corrupt Acts

Although the United States is the primary jurisdiction utilizing *qui tam* suits today, the values of fair play, honesty, and accountability are nearly universal. The United States may be the only major jurisdiction in the world where *qui tam* whistleblower regimes exist as commonplace, but that has not precluded foreign nationals abroad from participating as a relator in *qui tam* actions under United States law. In fact, thousands of foreign relators have blown the whistle under the FCA and other manifestations of the private attorney general

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Note, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 Harv. J. L. & Pub. Pol'y 701 (1993) (Successful prosecution and recovery results in a sizeable commission to the relator: between fifteen percent and twenty-five percent, depending on the detail of the relator's assistance and whether the government decided to intervene. The relator is only entitled to an award where they furnish new information about a fraud on the government. If the government was already in possession of the information necessary to prosecute the violation, the relator does not receive a reward. The FCA initially set forth a harsh penalty: each violation of a provision of the FCA left contractors liable for double the government's damage or loss plus a statutory penalty of two-thousand dollars. In the century and a quarter following passage amid allegations of contractor fraud during the Cold War, the FCA was amended to increase the statutory penalty and damages multiplier from double to treble damages.). Qui Tam: The False Claims Act and Related Federal Statutes, (2021), https://sgp.fas.org/crs/misc/R40785.pdf [https://perma.cc/C9LL-3MP7].

201. Frank A. Edgar, Jr., Comment, "*Missing the Analytical Boat*": *The Unconstitutionality of the Qui Tam Provisions of the False Claims Act*, 27 Idaho L. Rev. 319 (1990); Robert E. Johnston, Note, *1001 Attorneys General*: *Executive-Employee Qui Tam Suits and the Constitution*, 62 Geo. Wash. L. Rev. 609 (1994) (These recoveries are often in the millions, between seven figures and nine figures. Though no recent official figure is available, between 1986 and 1995, the United States recovered more than one billion dollars. Of this figure, more than one hundred eighty million dollars had been awarded to such whistleblowers during this period.); *see*, *e.g.*, Justice Department Recovers Over $1 Billion in Qui Tam Awards and Settlements (1995), https://www.justice.gov/archive/opa/pr/Pre_96/October95/542.txt.html [https://perma.cc/N6JH-E4S9].

202. *See e.g.*, Thomas R. Lee, Comment, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. Chi. L. Rev. 543 (1990) (In 2006, Congress amended the Internal Revenue Code to include qui tam whistleblower rewards for information leading to successful tax fraud prosecutions and recoveries.); *see also* Ara Lovitt, Note *Fight for Your Right to Litigate*: *Qui Tam*, *Article II*, *and the President*, 49 Stan. L. Rev. 853 (1997).

203. John P. Robertson, Comment, *The False Claims Act*, 26 Ariz. St. L. J. 899 (1994); *see also False Claims Act - FAQ Guide for Qui Tam Whistleblowers*, National Whistleblower Ctr. (2021), https://www.whistleblowers.org/faq/false-claims-act-qui-tam/#:~:text=Sections%203729%20through%203733)%20is,law%20in%20the%20United%20States [https://perma.cc/4YH2-4TWW].

model.[204] Foreign citizens have utilized the machinery of *qui tam* for mutual state and self-benefit, which suggests that these citizens would respond in their own domestic settings similarly.[205] Despite a hodgepodge of legal regimes across the globe incorporating various regional nuances and embracing different legal traditions, no state decisionmaker who values empirical statehood desires bastions of corruption in their community. Because corruption erodes public confidence in institutions and the leadership's grip on power, it is in their best interest to find the most robust system of rooting out unscrupulousness.[206]

A diverse array of countries, such as China, Egypt, Venezuela, and Hungary, have robust and significantly punitive laws currently on their books to deter public and private officials from engaging in corruption.[207] Regardless of regional customs and varying degrees of liberalism, all states punish corruption with criminal and civil penalties.[208] Certain codes, such as Egypt's anti-corruption law, are particularly punitive.[209] Under Egyptian law, individuals guilty of receiving bribes can be sentenced to life in prison, and those who are found guilty of offering bribes can receive life imprisonment or jail and heavy fines, whether it's a felony or a misdemeanor.[210] Despite the substantial theoretical deterrent effect one may expect this policy would have on the prevalence of corruption; the empirical reality is not so.[211] In 2021, Transparency International's Corruption Perceptions Index ranked China 117th out of 180 countries.[212] Public fury about a perceived culture of corruption is likely at least partially responsible for social unrest in Egypt.[213]

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204. Stephen M. Kohn, *United States*: *The Rise of International Whistleblowers*: *Qui Tam Rewards For Non-U.S. Citizens*, Mondaq (Feb. 3, 2020) https://www.mondaq.com/unitedstates/employment-and-hr/889468/the-rise-of-international-whistleblowers-qui-tam-rewards-for-non-us-citizens [https://perma.cc/XRG7-54WC].

205. *See* Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 Mich. J. Int'l L. 129, 160 (2010).

206. *See generally,* David Kennedy, *The International Anti-Corruption Campaign*, 14 Conn. J. Int'l L. 455 (1999).

207. Iman R. Kamel, Samir Abd El Wahab, and Iman Ashmawy, *Public Attitude as a Determinant of Petty Corruption in Egypt*: *A Survey Study*, 4 J. of Humanities & Applied Social Sciences (2021) (examining the effect of public attitude on petty corruption).

208. Mohammad Fadel, *Public Corruption and the Egyptian Revolution of January 25*: *Can Emerging International Anti-Corruption Norms Assist Egypt Recover Misappropriated Public Fund*, 52 Harv. Int'l L. J. (2011) ("The widely held view that the corruption of the Mubarak regime was debilitating Egypt's ability to compete internationally also reinforced the deep desire for a genuine system of democratic accountability: Egyptian law already prohibited financial corruption of public officials, but Mubarak's presidential powers effectively insulated himself and others from the reach of Egypt's otherwise broad set of anti-corruption Laws.").

209. *Id.*

210. *See*, *e.g.*, *Egypt Penal Code*, arts. 103–111. In Egyptian law, the foundation of an act of bribery requires the following three elements to be present: (i) the recipient must be a public official; (ii) there must be a "gift," a "benefit," or a "promise" that will constitute the material/physical element of the crime, and (iii) there must be requisite criminal intent (*mens rea.*).

211. *See*, *e.g.*, *Anti-corruption Laws around the World*, Glob. Compliance News (2017), https://www.globalcompliancenews.com/anti-corruption/anti-corruption-laws-around-the-world/ [https://perma.cc/PY88-ACC3].

212. *See*, *e.g.*, *2021 Corruption Perceptions Index—Explore Egypt's Results*, Transparency Int'l (2021), https://www.transparency.org/en/cpi/2021/index/chn [https://perma.cc/JY92-RNVQ].

213. *Id.*

Though a country's sociopolitical ecosystem cannot be reduced to a single, isolated variable, a corrupt culture cannot be effectively reformed unless it employs an empirically functional accountability system. Altruistic or otherwise non-corrupt government officials hope that the state's enforcement mechanism is competent to detect, prosecute, and convict instances of corruption.[214] Where government officials do not know the facts of corruption, these same leaders trust that the honest factions of society will report allegations of corruption.[215] However, these assumptions have some fatal problems. First, trust in internal investigations presupposes that the officials entrusted to investigate and prosecute are not themselves complicit in corruption. Deeply embedded cultures of tolerating corruption among justice officials will render government-led enforcement impotent.[216] Second, trust in unincentivized civilian whistleblowers is often misplaced for a multitude of reasons. Whistleblowing is not without risk; informing on the criminal conduct of another potentially places the safety of the whistleblower in question.[217] Additionally, while law-abiding citizens generally detest corruption, a state's government is a faceless machine of senior officials and their lower subordinates.[218] As such, a system driven by governmental enforcement augmented with Good Samaritan whistleblowing is ineffective at curtailing corruption. To remedy this, nations with cultures of corruption should create regimes to incentivize the public to engage with the enforcement process.[219]

The concept of *qui tam* can be applied far beyond the geographic and legal boundaries currently applied. Though the chief use of *qui tam* actions contemporarily is the defense against fraudulent billing and contractor malfeasance at the government's expense, the core mechanism is curtailing the practice of dishonesty and self-service by officials with responsibilities toward the maintenance of public trust.[220] Due to the international nature of business and

214. Yingling & 'Arafa, *supra* note 55, at 49. ("Unfortunately, unlike the judiciary's mechanisms, the legislature's mechanisms were rarely exercised in full. There was a wide gap between de jure and de facto accountability in Egypt, especially with regard to the legislature's checks on the executive.").

215. *Id.*

216. Walid ElGammal, Abdul-Nasser El-Kassar, & Leila Canaan Messarra, *Corporate Ethics, Governance and Social Responsibility in MENA Countries*, 56 Mgmt. Decision 1 (2018).

217. *Dreams without Illusions*, *supra* note 175 ("In terms of improving accountability and fostering the fight against administrative corruption, some countries have enacted legislation to establish a right whereby an individual may make a protected 'public interest disclosure' of any suspected or actual corruption or misconduct by a public official. The main task of the "whistleblower" protection provisions are to sustain a reasonable and effective balance regarding the desirable disclosure of official wrongdoing by protecting those who make disclosures against acts of retaliation or revenge.").

218. *Id.* The state government is far more abstract than an individual person. Thus, it may be difficult for civilians to feel sufficient anger to involve themselves without an emotional connection with a discernible victim face who was wronged.

219. *See* Ahmed Feteha, *The Best Democracy Money Can Buy: Funding Egypt's Presidential Campaigns*, Ahram Online (Mar. 31, 2012), http://english.ahram.org.eg/NewsContent/3/12/38063/Business/Economy/The-best-democracy-money-can-buy-Funding-Egypts-pr.aspx [https://perma.cc/2X3V-GU5R] ("According to [Professor] Abdel Aziz, campaign activities fall into two categories: promotion in the mass media, and round-level activities including popular conferences and drives to provinces. Though the latter is relatively inexpensive, both require large amounts of funding.").

220. Kennedy, *supra* note 206.

governmental entanglement through international accords and arrangements, regional practices hardly have only regional consequences.[221] Scandals involving respected governments abroad can impact the aggregate faith members of the public have in their institutions, thus impacting the stability of the whole globe.

Although the American system and most prevailing legal regimes have differences, states without staples of the American system could make minor adjustments without total system disruption. The American system differs from most legal regimes in the world in offering contingent billing for representation, access to robust discovery tools, and the American Rule of a party bearing their own costs regardless of the outcome.[222] These aspects of the American system invite private litigation and allow small, less sophisticated parties to participate in the process.[223] These countries could create a judicial body with subject matter jurisdiction to only hear cases of breaches of the public trust.[224] This change would result in minimal impact on traditions and customs while embracing a western solution to the problem of rampant corruption.[225] Empowering the public with the right to sue on behalf of the state and vesting them with the tools necessary to conduct litigation.[226]

2. *Offsets in Defense Trade: A Corruption Source Here to Stay*

What do a shrimp farm in Saudi Arabia, fish-luring buoys for local fishermen in Oman, and a domestic airline in Kazakhstan have in common? They were all financed by defense contractors (Sellers)—in the business of making weapons—as "sweeteners" to make the main defense trade agreements' exorbitant price tags more palatable for the procuring governments (Buyers).[227] These side deals, known as "offsets," are creative *quid pro quos* that can be entirely unrelated to the military equipment being traded.[228] It is unsurprising

221. Corporate and governmental practices abroad affect the market in very tangible ways. Loss of confidence in an industry stakeholder abroad due to unscrupulous practices can disrupt that industry across multiple markets.

222. *Qui Tam*, *supra* note 182.

223. However, these elements could easily be implemented in states without this tradition in a standalone tribunal.

224. *See* Ethan S. Burger & Mary S. Holland, *Why the Private Sector Is Likely to Lead the Next Stage in the Global Fight Against Corruption*, 30 Fordham Int'l L. J. 45, 45–7 (2006) (detailing effects of corruption); *see also* J.S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 Am. Pol. Sci. Rev. 417, 419 (1967).

225. *See generally* Jeffrey R. Boles, *The Two Faces of Bribery: International Corruption Pathways Meet Conflicting Legislative Regimes*, 35 Mich J. Int'l L. 637 (2014).

226. *See generally* Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 Ariz. J. Int'l & Compar. L.793, 858–65 (2001).

227. More examples of offsets abound, this time from U.S. Sellers: they include agreements to market Dutch yarn, Finnish rail ferries, Swiss ball bearings, Danish hams, Brazilian Shoes, Turkish marble, and Canadian furniture. *See* Leslie Wayne, *A Well-Kept Military Secret*, N.Y. Times (Feb. 16, 2003), https://www.nytimes.com/2003/02/16/business/a-well-kept-military-secret.html?searchResultPosition=1 [https://perma.cc/Y5A9-H23W].

228. Offset agreements are generally understood as "compensation agreements where a Seller promises to do specific future business in a country in exchange for the award of a government procurement contract." *See* Ryan J. Lanbrecht, *The Big Payback: How Corruption Taints Offset Agreements in International Defense Trade*, 70 A. F. L. Rev. 73, 75 (2013)

that the Stockholm International Peace Research Institute reported that forty percent of all corruption in cross-border transactions occur in the realm of defense trade.[229] As depicted in the popular media, government officials as buyers wield colossal purchasing power, eager defense contractors as sellers compete fiercely, and shady middlemen connect the two.[230] In addition, national secrecy concerns shroud the trade—corrupt or not—in state secrecy. Even when corrupt deals come to light, the military equipment's highly technical nature and the complex transactional structure of its trade make it difficult for the citizens to discern whether the transaction was tainted by corruption.[231]

Governments worldwide thus countenance against offsets through domestic rules and regulations, and even by international agreements.[232] Internationally, the WTO's Agreement of Government Procurement (GPA), covering forty-eight WTO members, prohibits parties from imposing, seeking, or considering offsets.[233] Surprisingly, despite the negative regulatory mood in the U.S. and the WTO, offsets are largely unregulated. The U.S. does not prohibit American Sellers from entering into offset agreements, and the WTO GPA exempts offsets in defense procurements from its general prohibition on offsets. As of the national and international regulatory regimes that frown upon but refuse to outright ban offsets, Daniel Schoeni—a legal scholar and a U.S. Air Force Judge Advocate—laments that perhaps offsets are second best. He contends that "[o]urs is a fallen world: Men are not angels, geometry not Euclidian, particulars not their Platonic forms."[234] It should be noted that offsets matter for the Sellers because they can be decisive in a bid for a procurement program and also matter because they are massive in dollar value.[235]

[hereinafter *The Big Payback*]. Offsets can be "direct" or "indirect." Direct offsets are side deals that are directly related to the main deal, and often involve the Seller agreeing to (1) purchase components and parts from the buyer country, (2) to subcontract or co-produce with the buyer country, or (3) to transfer technology. *See* Daniel E. Schoeni, *Defense Offsets and Public Policy*: *Beyond Economic Efficiency*, 76 A. F. L. Rev. 95, 101–103, n.17, n.29 (2016) [hereinafter *Beyond Economic Efficiency*]. Indirect offsets, as mentioned in the example, involve Sellers that agree to purchase and market goods completely unrelated to the underlying defense articles being traded, and frequently involve civil, as opposed to military, goods and services. *Id.*

229. *See* The Stockholm International Peace Research Institute, SIPRI Yearbook 2011: Armaments, Disarmament and International Security, 13 (2011), https://www.sipri.org/sites/default/files/2016-03/SIPRIYB11summary.pdf [https://perma.cc/QD8A-SGZ7].

230. *Id.* at 17–18.

231. *Id.* at 17. Thus, defense trade deals—already opaque as they are—are often accompanied by substantial offsets that are even more insulated from scrutiny. Not surprisingly, offsets raise corruption concerns in two ways: motivating bribes and enabling the delivery of such bribes. Perhaps more importantly, even offsets not tainted by corruption are criticized as economically inefficient and distortive. *Id.*

232. In the United States, the U.S. Department of Commerce's Bureau of Industrial Security (BIS) discourages U.S. Sellers from entering into offset agreements. U.S. Dep't of Commerce, Offsets in Defense Trade: Eighteenth Study 1 (2013) [hereinafter BIS Offsets 2013].

233. Lanbrecht, *supra* note 228, at 89.

234. Schoeni, *supra* note 228, at 112–13.

235. Take, for example, South Africa's training jet procurement program marred by offset-related corruption. South Africa awarded a training jet procurement contract to a British seller, even though its jets ranked lowest in South Africa's cost and technical parameters. South African public officials grossly inflated the perceived value of the British offset proposal, that—if true—would have lowered the actual cost of overall procurement. Unfortunately, an

Notwithstanding the potential for abuse, Buyers can demand offsets for legitimate reasons. For example, where the Buyer lacks manufacturing experience for producing certain military equipment, the Buyer can seek an indirect technology transfer offset by obligating the Seller to co-produce with Buyer's domestic defense industry.[236] In such cases, the Buyer can amass experience in its own defense industry so that it will be less reliant on Sellers later down the road. The difficulty lies, however, in valuing offsets. How does the Buyer know how much economic value there is to acquiring know-how of manufacturing a piece of a fighter jet wing? What about obtaining an early missile-warning system? Calculating economic value will depend on a myriad of perfectly legitimate factors, such as the Buyer's perceived time pressure to acquire such technology, the probability of successfully developing it through indigenous research and development, and the likelihood that new inventions render the technology obsolete, among others. The standard practice is for the Buyers to assign a "multiplier" to the cost of an offset program.[237]

B. A Case Against Offsets: Motivator of Corruption, Creating Economic Inefficiencies, and a Vehicle for Delivering Bribes

Offsets can motivate corruption in three principal ways: Sellers may bribe public officials to (a) generate offset requirements where none are needed; (b)

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independent South African investigation found that South African officials overvalued the offset proposal by almost $1.3 billion, making the actual cost to South African taxpayers that much higher. One must wonder—why did the officials inflate the valuation by so much? Also, the U.S. Department of Commerce Bureau of Industrial Security reported that between 1993 and 2010, 52 U.S. Sellers entered into 763 offset agreements with governments across 47 countries valued at $75.08 billion. Almost a decade later, offsets remain massive and prevalent. Lanbrecht, *supra* note 228, at 77, 103. In 2019 alone, 9 U.S. Sellers reported entering into 31 offset contracts with 11 countries valued at $8.2 billion, amounting to 62.5% of the value of the $13.1 billion defense contracts. Of the $8.2 billion of offset contracts, 70.64% was attributable to "indirect offsets"—side deals that involve goods entirely unrelated to the relatively more scrutinized defense trade undergirding the transaction. U.S. Dep't of Commerce, Offsets in Defense Trade: Twenty-Fifth Study *ii*, 7 (2021) [hereinafter BIS Offsets 2021].

236. Ted Tatos & Hal Singer, *The Abuse of Offsets as Procompetitive Justification: Restoring the Proper Role of Efficiencies After Ohio v. American Express and NCAA v. Alston*, 38 Ga. St. U. L. Rev. (2022); Ward S. Bowman, Jr., *Toward Less Monopoly*, 101 U. Pa. L. Rev. 577, 640 (1953); C. Scott Hemphill & Nancy L. Rose, *Mergers That Harm Sellers*, 127 Yale L.J. 2078, 2100 (2018). Ariel Porat, *Offsetting Risks*, 106 Mich. L. Rev. 243 (2016) ("Failing to take into account the offsetting risks makes the injurer liable for risks that not only exceed the risks created by his negligence but, more importantly, risks that are higher than the risks created by his activity.").

237. For example, if it would cost $200,000 for the Seller to transfer a certain technology to the Buyer, and, if the Buyer has prioritized that technology by awarding it a multiple of 6, the Seller can satisfy $1,200,000 of offset obligations by transferring it to Buyer. Correctly used, the multiplier system can incentivize the Seller to transfer technology deemed to be a great need by the Buyer. Incorrectly used, however, it can produce seemingly absurd results. For example, in South Africa's award of a submarine contract to a German Seller, the Buyer granted multiples so great that the Seller's technology transfer offset was valued at four times the main contract price. In other words, South Africa's offset calculation essentially evinced its determination that for every dollar it paid to the German Seller, it received four dollars back. Lanbrecht, *supra* note 228, at 86–7.

win offset business; and (c) illegitimately satisfy offset obligations.[238] First, where offsets are otherwise unwarranted, a Seller may bribe to generate such unwarranted offset requirement if it knows it can be selected among competing Sellers to best satisfy that offset.[239] Second, where the Buyer already expressed some offset need, a Seller may bribe to be selected among its competitors to meet that need.[240] Note that the multiplier system, as previously discussed, can heighten a Sellers' temptation to bribe a public official in each of the three scenarios. By magnifying the value of the offset requirement through a higher multiplier, the Seller can magnify the upside to being selected in order to fulfill the offset requirement, or be treated as fulfilling an offset obligation already incurred.[241]

In addition to corruption concerns, offsets are also widely criticized for being economically inefficient and distortive. The first two types of corruption motivated by offsets are economically inefficient.[242] Improperly created offset agreements divert valuable economic resources away from more deserving projects, and away from more appropriate bidders, that may be willing to offer lower prices.[243] Such improperly created offset agreements might obligate the bid-winning Seller to undertake business activities outside its core competencies and create economic inefficiencies that way.[244] Such was the case of Raytheon—a missile manufacturer—agreeing to build a shrimp farm in Saudi Arabia.[245] In a similar vein, offsets can be economically distortive. Many argue that offsets result in resource misallocation because, *inter alia*, they force Sellers

238. *Id.* at 76–77. It should be noted that corrupt public officials may extort bribes from otherwise innocent Sellers by leveraging their power to manipulate offsets. Such officials can easily incentivize a bribe payment by improperly exercising discretion to give the Seller a lower value multiplier, or otherwise assigning a lower offset value. Such an incentive is greater where the offset contains a difficult-to-satisfy offset criterion that leaves the Seller with little choice. Lanbrecht, *supra* note 228, at 106.

239. *Id.* at 77.

240. *Id.* at 78. That way, the Seller can use the improperly created offset value to "offset" the cost of its bid for the Buyer and ultimately win the contract. Second, where the Buyer already expressed some offset need, a Seller may bribe to be selected among its competitors to meet that need. Lastly, if a Seller has previously incurred offset obligations but cannot presently satisfy them, it may be tempted to bribe, so the Buyer will improperly treat it as satisfied. *See generally*, Lanbrecht, *supra* note 228.

241. Complementing the use of multipliers is the practice of denominating the value of offsets in "credits", not in denominated currency. Transparency International, Defense Offsets: Addressing the Risk of Corruption & Raising Transparency 17 (2010). Because the multiplier system can be abused to enlarge the payoff of corruption, Buyers that allow multiplies higher than those generally used by other Buyers have been criticized. For example, Norway has been criticized for its multiplier system that can go as high as 10 to 30 times the actual value. This means that the Seller may have up to thirty times less burden by satisfying a particular subset of an offset agreement. Conversely, its failure to offer to satisfy that subset means it may be at a severe disadvantage relative to its competition—once again heightening the corruption motivation. *See* U.S. Dep't of Commerce, Offsets in Defense Trade: Twelfth Report to Congress, iii, Table 4-1, Table 5-2, Appendix F (2007).

242. By generating unnecessary offset requirements, a bribed Buyer obligates the Seller to engage in certain business activities instead of focusing on lowering the purchase price. Lanbrecht, *supra* note 228, at 79–80.

243. *Id.* at 78–80.

244. *See* Hoyos, *supra* note 1.

245. *Id.*

to handle multifarious investments or obligations.[246] Further, Sellers must act outside their core competency of developing and producing defense articles.[247]

Consistent with the negative treatment by academics, the U.S. Department of Commerce Bureau of Industry and Security (BIS) considers offsets to be "economically inefficient and trade distorting."[248] The strongest economic case against offsets is that while it may seem like the agreeing Buyers are providing "freebies," the reality is that offsets are not free at all.[249] There are several ways the Seller can pass the costs of offsets back to the Buyer by inflating their prices to "cover" the cost of the offset. Just as a "freebie" is not free because its cost is already included in the price of another good, the cost of an offset for the Seller is already included in the Buyer's purchase price. While there is no empirical data to prove this claim, there is scholarly support.[250] At the current paucity of available data, there seems to be virtually no economic theory to counter those against using offsets.

Recall that Sellers can bribe Buyers to satisfy offset obligations illegitimately. Offsets, the subject of bribes, can be used as vehicles to deliver bribes by having a private party submit fraudulent invoices for the sham transaction.[251] Illegitimately satisfying offset agreements—the third type of corruption motivator—is the most pernicious.[252] In a striking illustration of the third type,

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246. *See*, *e.g.*, Ariel Porat & Eric Posner, *Offsetting Benefits*, 100 Virginia L. Rev. 1165 (2014) ("Courts should calculate damages by subtracting benefits from the loss when those benefits are social rather than private. Benefits are social rather than private when they are themselves not canceled out by a loss to a third person [. . .] benefits should be deducted only when their likelihood of realization is increased by the wrongdoing."); *see*, *e.g.*, Beverley Earle, *The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14 Penn St. Int'l L. Rev. 2 (1996) ("The legislation represented efforts to enforce a concept of morality and to "level the playing field" in forbidding the use of corrupt payments offered to foreign officials to obtain or retain business.").

247. Abdulmajeed Alshalan, *Corrupt Practices in Saudi Arabia: An Analysis of the Legal Provisions and the Influence of Social Factors* (2017), Theses and Dissertations 45, at 60–62, 158–60, & 264 (2017).

248. *See* U.S. Dep't of Commerce, Offsets in Defense Trade: Twenty-Fifth Study 1 (2008) [hereinafter BIS Offsets 2008] https://www.bis.doc.gov/index.php/documents/pdfs/2788-twenty-fifth-report-to-congress-7-21/file [https://perma.cc/2LYG-YESP].

249. Offsets are not costless and the Buyer bears most of the costs at premiums that range from, "3% to 60% with a typical range of 5% to almost 15%." *See Andres Eriksson* et al., Study on the effects of offsets on the development of a European Defense Industry and Market 40 (2007).

250. In *Beyond Economic Efficiency*, Schoeni summarized other economic theories against offsets, in part citing Brauer and Dunne, who said the following: "To summarize the evidence, it is now quite clear that offsets do not result in arms acquisition cost reductions, that offsets do not stimulate broad-based civilian economic development, that neither substantial nor sustained job creation occurs, not even within the military sector, that almost no successful technology transfer into the civilian sector is observed, and that only limited technology transfer into the military sector occurs, often over decades and at high cost." Schoeni, *supra* note 228, at 111–12. Moreover, what technology is transferred is quickly outpaced by continuous technology advances in the main developed countries. *See* Jurgen Brauer & J. Paul Dunne, *Arms Trade Offsets: What Do We Know?*, *in*, The Handbook on the Political Economy of War, 243, 259 (Christopher J. Coyne & Rachel L. Mathers eds., 2011).

251. Lanbrecht, *supra* note 228, at 77.

252. Whereas the other two types still produce substantive value-generating economic activities—albeit at a lowered economic efficiency—this third type is entirely a sham. *Id.*at 104.

BAE, a British Seller, allegedly paid an estimated $9.7 billion in bribes over the course of twenty years to Saudi Arabian officials from funds created by inflating bills to be paid to Saudi subcontractors working with BAE.[253] Moreover, because the contract was between governments, BAE allegedly charged the bribery costs to the U.K. government, which sought reimbursement from the Saudi government.[254] The BAE case also shows how difficult it is to prosecute corruption even when it is detected. When the U.K. Serious Fraud Office continued investigating the case, Saudi officials threatened to stop cooperating with the U.K. on intelligence and security issues; the SFO terminated the investigation and refused to re-open it.[255]

C. Domestic, Foreign, and International Offset Regulations (and Reactions)

Despite the magnitude of offsets and corruption concerns, offsets in defense trade are largely unregulated.[256] Moreover, while the BIS criticizes offsets, it does not prohibit U.S. Sellers from initiating or agreeing to offset agreements. And while the Foreign Corrupt Practices Act (FCPA) of 1977 broadly prohibits corruption and fraud, it does not outlaw offsets.[257] There are two notable international regulations: WTO's Agreement on Government Procurement (GPA) and OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention).[258] For instance, the GPA, signed by the United States in 1996, prohibits signatories from engaging in most forms of offsets, but exempts defense offsets.[259]

1. U.S. Regulatory Mood

Officially, the U.S. government countenances against offsets. The BIS considers offsets "economically inefficient and trade distorting."[260] It thus prohibits its U.S. agencies from "encouraging, entering directly into, or committing U.S.

253. *Id.* at 104–05.
254. *Id.* at 105.
255. *Id.*
256. "Offsets are an unregulated part of defense export sales. U.S. contractors consider offsets an unavoidable cost of doing business overseas. These officials have indicated that if they did not offer offsets, export sales would be reduced and the positive effects of those exports on the U.S. economy and defense industrial base would be lost." *See* U.S. Gen. Accounting Office, GAO-04-954T, Defense Trade: Issues Concerning the Use of Offsets in International Defense Sales 2 (2005) [hereinafter GAO: Issues Concerning the Use of Offsets].
257. Lanbrecht, *supra* note 228, at 94; *see generally* Douglas A. Houston, *Can Corruption Ever Improve and Economy*? 27 Cato J. 325, 341 (2007) (arguing that governments should at least evaluate whether corruption provides more benefits than cons in certain circumstances and consider enacting policies accordingly).
258. However, these international legal frameworks do little to curb corruption in offsets. Lanbrecht, *supra* note 228, at 89, 94.
259. *See* Agreement on Government Procurement, art. XVI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4, 1867 U.N.T.S. 154.
260. BIS Offsets 2008, *supra* note 248. But given the size of U.S. defense exports, the dominance of U.S. Sellers in the international defense market, and the number of offsets such Sellers engage in, the U.S. offset regulation is 'light.' *See generally* BIS Offsets 2013, *supra* note 232, at 1–3.

firms to any offset arrangement. . . ."[261] The biggest reason why the U.S. leaves offsets largely unregulated is that directly curbing its use would conflict with its role as a facilitator in the realm of U.S. defense exports. Defense trade is often a large and complex undertaking, and cooperation on a national level is required. As such, the U.S. government employs a special transactional structure called Foreign Military Sales (FMS), wherein it underwrites the transaction by becoming an intermediary between American Sellers and foreign Buyers.[262] In this role, the U.S. government's economic desire to facilitate U.S. defense exports conflicts with its anti-bribery desire to discourage offsets.[263] Striking a balance, the U.S. government takes a middle ground: it will scrutinize only the main defense sales agreement. When it comes to offsets, it simply asks that the Seller only charge costs that are "reasonable and allocable" to the main defense agreement—a low bar.[264]

A legal regime is in place in the U.S. to address corruption concerns. The FCPA—although it does not regulate offsets *per se*—combats bribery by criminalizing payments to foreign officials to obtain or retain business.[265] Moreover, to address corruption through third-party agents, the FCPA reaches payments made not only by the Seller or its subsidiaries but also by third-party agents who can be the conduits to funnel bribes.[266] How confident can we be in the DOJ's ability to detect malfeasance in offset agreements in transnational sales when these agreements amounted to $13.1 billion in 2019 alone?[267]

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261. Bureau of Indust. & Sec., U.S. Dep't of Commerce, *Offsets in Defense Trade*: *Eighteenth Study* (*Conducted Pursuant to Section 723 of the Defense Production Act of 1950*, *as Amended*) (Dec. 2013), https://www.bis.doc.gov/index.php/documents/other-areas/strategic-industries-and-economic-security/offsets-in-defense-trade/877-eighteenth-report-to-congress-12-13/file [https://perma.cc/28FS-4QVU].

262. GAO: Issues Concerning the Use of Offsets, *supra* note 256, at 3. The primary way the U.S. exports defense equipment is through Foreign Military Sales (FMS), which involves a direct contract between the U.S. government and the foreign government (Buyer). In FMS programs, the U.S. government is merely an intermediary and an underwriter of the transaction. The Seller, the U.S. government, and the foreign government Buyer negotiate together, and the two governments come to an agreement known as a Letter of Offer and Acceptance (LOA). Then, the U.S. government procures the negotiated defense articles, as it would for its own military use from the Seller, and sells them to the foreign government Buyer. *See* Lanbrecht, *supra* note 228, at 92–94; *see*, *e.g.*, 15 U.S.C. § 78dd–1(a).

263. In the FMS context, Sellers "bake-in" the cost of offsets agreeing with Buyers in the price the U.S. government pays for them. Of course, it is the foreign Buyer which ultimately pays, but this transactional structure uncomfortably implicates the U.S. as an enabler of offset agreements. Lanbrecht, *supra* note 228, at 96.

264. *Id*. at 93; *see also* Defense Production Act Amendments of 1992, Pub. L. No. 102-558, §123, 106 Stat. 4198 (1992).

265. Lanbrecht, *supra* note 228, at 94.

266. Latham & Watkins, *Understanding FCPA Enforcement Trends in the Aerospace and Defense Industry*: *A Launch Pad to Effective Management of Anticorruption Risks,* Latham & Watkins (2013) 1 https://www.lexology.com/library/detail.aspx?g=e21068ff-a782-45b4-a1b4-ee6cf0463e3a [https://perma.cc/85GY-RPPL]. The anti-bribery provisions "prohibit the use of the mail or any instrumentality of interstate commerce in furtherance of a corrupt payment, promise to pay, or authorization to pay money to any foreign official for the purpose of influencing the official in his or her official capacity, inducing the official to violate his or her lawful duty, or securing an improper business advantage." *Id.*

267. BIS Offsets 2021, *supra* note 235 at *ii*; *see*, *e.g.*, Daniel C. K. Chow, *Cultural Barriers to Effective Enforcement of the Foreign Corrupt Practices Act in China*, 48 U.of Tol. L. Rev. 551, 551–60, 552 (2017).

D. International: WTO's Agreement of Government Procurement (GPA) and OECD Anti-Bribery Convention

The WTO's GPA generally prohibits signatories from imposing, seeking, or considering offsets.[268] There is a catch, however. Article III of GPA excepts from the general prohibition offsets the signatory "considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes," and thereby essentially exempts any and all defense-related offsets from the GPA.[269] Even if Article III was amended to close the loophole, Article V might work to exempt defense procurements because of the article's ambiguous language. Article V states that "developing countries" will be allowed to "adopt or maintain," *inter alia*, an offset; it does not define what countries are "developing." Because any country can arguably be "developing," the GPA leaves defense offsets practically untouched.[270]

On the other hand, the OECD Anti-Bribery Convention, entered into force in 1999, requires its 38 OECD and six non-OECD countries to criminalize the bribery of foreign officials in international transactions.[271] The Convention prohibits the "bribery of foreign officials"—which it defines as any intentional offer, promise, or give "any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official . . . in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."[272] In practical terms, the Convention combats corruption primarily by requiring the parties to (1) make it illegal under their domestic laws for someone to bribe its official to win an international contract, and (2) provide "prompt legal assistance to other countries investigating foreign bribery allegations."[273] Unlike the GPA, the OECD Convention has the potential to combat offset-related corruption. For example, the inclusion of the "improper advantage" language allows it to encompass bribery to receive offset credit from a foreign government.[274]

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268. Lanbrecht, *supra* note 228, at 89, n.137; F. Joseph Warin; Michael S. Diamant; Jill M. Penning, FCPA Compliance in China and the Gifts and Hospitality Challenge, 5 Va. L. & Bus. Rev. 33, 59 (2010).

269. Revised Agreement on Government Procurement, art. III (Mar. 30, 2012) Marrakesh Agreement Establishing the World Trade Organization, Annex 4, 1915 U.N.T.S. 103, https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf [https://perma.cc/YY8Q-QTE8].

270. *See Id.* at article V; International Chamber of Commerce, ICC-ECCO Guide to International Offset Contracts (2019), https://iccwbo.org/news-publications/policies-reports/icc-ecco-guide-international-offset-contracts-2019/#:~:text=The%20joint%20International%20Chamber%20of,concluded%20and%20what%20legal%20risks [https://perma.cc/T2QH-A69L].

271. It should be noted that of the 44 total parties to the Convention, Turkey is the only Middle Eastern country.

272. *See* The Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2nd ed. 2020) 7, https://www.justice.gov/criminal-fraud/file/1292051/download [https://perma.cc/DWJ8-E6C8]

273. *ICC-ECCO Guide to International Offset Contracts*, *supra* note 270, at art. I.

274. *See* OECD Ant-Bribery Convention and the Working Group on Bribery, https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Anti-Bribery_Convention_and_Working_Group_Brief_ENG.pdf [https://perma.cc/KC2S-5VP5]; Lambrescht, *supra* note 226, at 96.

Nevertheless, the Convention only requires the parties to criminalize those that give bribes, not the recipients; it only regulates the supply side of bribery.[275] The limitation is fatal to establishing a robust anti-bribery framework because, in international defense transactions, the side with the leverage to extract bribery from foreign Sellers is the government officials of the purchasing government—the recipient.[276] Not only did the U.K., a party to the Convention and the Working Group, terminate the investigation, it refused to re-open it despite OECD requests.[277] Recognizing the inherent difficulties in requiring parties to criminalize their own conduct, Lambrescht wrote that OECD should disclose more information regarding the offset's solicitation, offer, and award phases.[278] He urged government publication of the formulas used to assess offset proposals as it would "show whether a purchasing government is using reliable and relevant criteria to calculate an offset's value, or is using a method at risk for overstating projected benefits."[279] However, it is doubtful that governments would disclose their valuation formula to the Working Group. Offset valuation is often—if not always—a military secret; it is derived from the government's self-assessment of its own military and national security interests.[280] Furthermore, recall that there are forty parties to the Working Group, with some having adversarial security interests. For a party to disclose its offset valuation formula is to provide military secrets to an adversary.[281]

E. Status Quo Unlikely to Change

International agreements to curb offsets in defense trade have yet to be successful, and the WTO GPA expressly carves out such offsets from its general prohibition. Even the more promising OECD Anti-Bribery Convention prohibits a party from paying a bribe and fails to regulate those who receive it. Such limitation is natural, however, because the Convention cannot impose a criminal penalty for misfeasance by the purchasing government without conflicting with the *jus cogens* norms of sovereignty and international comity.

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275. "This Convention deals with what, in the law of some countries, is called "active corruption" or "active bribery," meaning the offence committed by the person who promises or gives the bribe, as contrasted with "passive bribery," the offence committed by the official who receives the bribe. The Convention does not utilise the term "active bribery" simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active." See *OECD Anti-Bribery Convention Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 11, https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [https://perma.cc/5UYJ-4VCT].

276. In addition, the Convention cannot practically prevent a party from improperly ending its corruption investigation. *Id.* Recall the BAE—Saudi Arabia corruption case, wherein the U.K. SFO terminated its investigation without prosecution nor BAE admission of bribery.

277. *See*, *e.g.*, United Kingdom's Phase 3 Monitoring Report 15, https://www.oecd.org/unitedkingdom/unitedkingdom-oecdanti-briberyconvention.htm [https://perma.cc/ZH7D-YT66] (vertical evaluations).

278. Lambrescht, *supra* note 226, at 108.

279. *Id.*

280. *Id.*

281. *Id.*

Domestic laws, such as the FCPA, are uniquely positioned to prevent Sellers—at least those in the U.S.—from making corrupt payments to Buyers, the discovery of which can interfere with U.S. foreign policy.[282] In fact, the statute was enacted partially in response to high-profile corruption cases that implicated governments of important U.S. allies like Japan, the Netherlands, and Italy.[283] Yet, such foreign policy considerations that lead to the enactment of FCPA might be the very force that leads the DOJ or the SEC to decline to enforce it against deals struck with an especially important U.S. ally. Such concern is heightened in the context of defense trade given that America tends to sell more weapons to its closest allies.[284] If, for example, the U.S. Department of Justice initiated an enforcement action against Lockheed Martin for bribing Saudi Arabian officials in connection with an offset agreement, it would be tantamount to accusing Saudi Arabia—a key U.S. ally—of being corrupt. Such an action would be considered as a diplomatic affront that Saudi Arabia had previously refused to tolerate when the U.K. investigated the Raytheon-Saudi Arabia deal.[285]

Thus, regulating defense trade, especially the more opaque offset agreements, is exceedingly difficult. Therefore, perhaps this "fallen world" is the second best we can hope for where practical considerations hamstring governments worldwide from directly regulating offsets. Alternatively, perhaps sometime in the future, a case of especially egregious offset-related corruption scandal will spur lawmakers to action. Another possibility exists. Sellers, often public corporations, may be incentivized not to use offsets as a vehicle of corruption with the appropriate message from the shareholders.[286] Suggesting that the ESG investment trend may one day become such a force so as to change Sellers' attitude towards using offsets in defense trade may be wishful thinking—a mere hope for the "fallen world." Nevertheless, just as the politicians and legal scholars that drafted many of the agreements, such as the FCPA, the GPA, and the Anti-Corruption Convention, no doubt made progress, their progeny may one day accomplish what they were unable to.

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282. The 1977 legislative history of FCPA reads, in part: "Corporate bribery also creates severe foreign policy problems for the United States. The revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations." H.R. Rep. No. 95-640, pt. 1 at 2 (1977).

283. *Id. See*, *e.g.*, 15 U.S.C. § 78dd–1(a)(1)(B); 15 U.S.C § 78dd-1(f)(1); 15 U.S.C. § 78dd–1(b), & 15 U.S.C. § 78dd–1(c). Kevin E. Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (2019) (discussing the issue in my book review—Mohamed Arafa, *Between Impunity and Imperialism: The Regulation of Transnational Bribery*, 10 Laws 3, 53 (2021)).

284. The U.S. only sells defense articles to its allies, especially sensitive articles that are often more expensive and require congressional approval. *See generally* Paul K. Kerr, *Arms Sales: Congressional Review Process*, Congressional Research Service, CRS Report (June 2022) https://sgp.fas.org/crs/weapons/RL31675.pdf [https://perma.cc/2QKS-UXDM].

285. *Id.*; *see also* Lambrescht, *supra* note 226, at 105.

286. Environmental, Social, and Governance (ESG) criteria is becoming more important to an investor's decision on whether they want to be a corporation's shareholder. *See generally* Kevin Y. Wang, *Valuable Nepotism: The FCPA and Hiring Risks in China*, 49 Colum. J. L. & Soc. Probs. 459, 473 (2016).

IV. Persistent Obstacles to Implementation: Building a Better Financial System through Law

The General Court of the European Union dismissed the application by Mr. Muhammad Hosni Mubarak's wife, Ms. Saleh Thabet, their two sons, and their son's wives to terminate the renewal of freezing their assets. The family argued that there was no legal basis for the freezing, and the Court should maintain the presumption of innocence and the right to an effective remedy.[287] The General Court dismissed the application and upheld the Council of the European Union's decision to freeze the parties' assets whilst judicial proceedings are in progress. The Court held that the decision was lawful under Article 29 of the Treaty of the European Union, given its relation to foreign and security policies of the EU.[288] The Court also held that the restrictions do not infringe on the presumption of innocence or right to an effective remedy as it aims to uphold the rule of law by ensuring restrictive measures remain in place for the effectiveness of judicial proceedings to be carried out in Egypt.[289]

Additionally, the Court held that it was not for the Council to determine the authenticity of evidence and acts merely as a safeguard to ensure the judicial proceedings are carried out effectively. The decision to uphold the freezing of assets was held to be "necessary and proportional" to supporting the rule of law.[290] Mubarak was the first Arab head of state to be tried in an ordinary court of law, not a military court and appeared personally since the trials of Zine el-Abidine Ben 'Ali in 2011 and Saddam Hussein in 2006.

For a democratic transition, it is critical to promote legislating (and implementing via international watchdogs) a uniform, semi-automated, and publicly accessible (and comprehensible) system of suspicious transaction reports (STRs) in Egypt's financial institutions. These financial institutions would be obligated to file their reports with the appropriate regulatory ministry or FIU.[291] Further, Egypt's financial institutions should be required to identify beneficial owners of legal entities before processing international transactions. Once a beneficial owner is identified, the financial institution would be mandated to verify that that individual is not a PEP before processing the transaction.[292] Most importantly, domestic PEPs should be brought within the scope of every enabling act, including the AML law.[293] These legal changes would require only

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287. *See* Judgments in Cases T-274/16 Saleh Thabet v. Council and T-275/16Mubarak and Others v. Council.

288. *Id.*

289. *Id.*

290. *Id.*

291. FATF Guidance, *Politically Exposed Persons Recommendations 12 and 22*, FATF 7 (June 2013).

292. *Id.* at 10.

293. Mohamed Abdelsalam, *The Limits of Fighting Corruption in Egypt*, Carnegie Endowment for Int'l Peace (Oct. 13, 2016) https://carnegieendowment.org/sada/64852 [https://perma.cc/T4TR-B7VC] ("The agency's authority covers the state's administrative units as well as local governments, public sector companies, joint public-private companies with at least 25 percent state ownership, labor unions and professional syndicates, political parties, state- or party-owned media conglomerates, and other agencies whose regulations stipulate CAO oversight. This means that CAO's reports give insight into the state's administrative performance and the level of corruption . . .").

incremental changes to the existing legislation. Indeed, the success or failure of any legal regime rests solely on a more efficient and transparent enforcement and reporting system.[294]

One core pillar of this approach focuses on increasing the volume of STR reporting. Prior to the revolution, Egypt saw a steady decline in money laundering cases being investigated.[295] This made little intuitive sense, as Egypt was still transitioning from a primarily cash-based society (with its inherent corruption risks) to an increasingly credit-based banking service economy.[296] The same was true for EMCLU referrals to the Public Prosecutor: year over year, they decreased, always in the single digits.[297] The legislature can deal with this structural problem by: (a) setting clearly defined parameters for what constitutes suspicious activity, (b) requiring automated reporting systems from the financial institutions to the EMCLU, and (c) requiring more frequent audits of the cases the EMCLU chose not to refer for prosecution, and the reasons why. This way, the legislation is self-executing and subject to a much lesser extent of political interference or heel-dragging.[298]

Egyptian law does not require corporations, including large financial institutions, to have compliance programs.[299] This absence means that even powerful financial institutions can be subject to institutional capture by the very same PEPs they were supposed to monitor.[300] One such example is Gamal Mubarak's stake in Egypt's Central Bank, where he allegedly transferred much of "his" wealth to the Caribbean.[301] This behavior has continued to the current bureaucratic regime.[302] If financial institutions offer wholesale banking services to a government, it is vital to monitor the relatives of government officials when they use that bank's services.[303]

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294. Bassiouni, *supra* note 69, 344, 390.

295. *See* MENAFATF, *Mutual Evaluation Report Egypt*, World Bank 1, 24 (May 19, 2009).

296. *Id.*

297. *Id. See generally* Stephen S. Laudone, *The Foreign Corrupt Practices Act: Unbridled Enforcement and Flawed Culpability Standards Deter SMEs from Entering the Global Marketplace*, 106 J. Crim. L. & Criminology 2, (2016). On the FCPA condemnations, *see* Steven R. Salbu, *Mitigating the Harshness of FCPA Enforcement through a Qualifying Good-Faith Compliance Defense*, 55 Amr. Bus. L. J. 475, 484 (2018).

298. Bassiouni, *supra* note 69.

299. Talaat, *supra* note 51.

300. FATF Guidance, *Politically Exposed Persons Recommendations 12 and 22*, FATF at 22 (June 2013).

301. *See* Daily News Egypt, *Mubarak Son Says Family Clear of Corruption Charges, Won't Tolerate 'Defamatory Reporting'* (May 18, 2022) https://dailynewsegypt.com/2022/05/18/mubarak-son-corruption-charges/ [https://perma.cc/C26A-QZCU] (". . . the recent ruling of the EU General Court which acknowledged once again that restrictive measures imposed on the family by the EU Council were unlawful from the outset and following the decision of the Swiss Federal Prosecutor's office fully exonerating Alaa and Gamal Mubarak after their 11-year criminal investigation was concluded. "So, in conclusion, no illicit assets, no concealed assets, and no unexplained sources of assets have been attributed to any member of the Mubarak family by such authorities."").

302. Bassiouni, *supra* note 69.

303. Leila Fadel, *Acquittals of Mubarak Ministers Anger Egyptians*, The Washington Post (Jul. 5, 2011) https://www.washingtonpost.com/world/acquittals-of-mubarak-ministers-angeregyptians/2011/07/05/gHQA7lF9yH_story.html [https://perma.cc/XDY3-R2GD] (". . . minister of foreign trade and industry under Mubarak, was sentenced in *absentia* to five years for squandering public funds. . ., had already been sentenced to five years in prison for

Additionally, Egyptian banks are reluctant to disclose the financial information of their wealthiest clients on personal privacy grounds. However, one comparative law article noted that the objectives of customer privacy and anticorruption enforcement in Egypt do not have to be mutually exclusive.[304] Indeed, Egypt already makes exceptions for customer financial privacy and bank secrecy within its tax law to prevent tax evasion.[305] Calling for greater financial transparency in Egypt is not a novel idea. Calls have already been made for more frequent public official asset declarations, increased oversight of capital-market insider-trading positions, and more cooperation among domestic and international public prosecution offices.[306]

Egypt lacks the resources to implement monitoring with the breadth and scale necessary to prevent institutionalized corruption.[307] Therefore, it is difficult to identify which individuals qualify as PEPs, as only those who fulfill a "prominent public function" traditionally qualify. Further, the legal standard of "family members and close associates" is also challenging to define, as families are highly individualized, and it is often difficult to discern a PEP's "close associates."[308] There are ways to mitigate the increased burden on financial institutions. First, PEPs could be required to self-disclose, by law, their political status and financial portfolio when opening new accounts or moving funds. Customer due diligence is nothing new in theory, and institutions will acclimate as they grow and regularize.[309] Additionally, financial institutions

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embezzlement. . . housing minister . . . in prison after being convicted of illegally acquiring public property and wasting public funds, was also acquitted . . .").

304. Jouda Ibrahim M. Alnour, *The Limits and Exceptions of the Banks' Secrecy: A Comparative Analytical Legal Study*, 5 Mijlat Al-Dersat Al-Qanounia wa Al-Iqtsadia [Sadat U. J. Eco. & Legal Studs] 2, 11 (2021) https://jdl.journals.ekb.eg/article_179602_9b168d71f41b0def2813f2f7664732dd.pdf [https://perma.cc/QEA5-WUVJ] ("Banking secrecy is the obligation placed on the banks to preserve the economic, financial and personal issues related to customers and other persons, . . . , which may have fallen into their work during the exercise of their professions or in the course of this practice, while acknowledging that there is an evidence to preserve secrecy in the interest of these customers. [This paper] aims to present the concepts of bank secrecy, to draw the scope of this commitment and the extent it occupies in banking dealings with customers by setting a set of determinants, and to highlight the conditions that necessary for the implementation.")

305. *Id.* at 28.

306. Transparency International, *Asset Declarations in Egypt Illicit Enrichment and Conflicts of Interest of Public Officials* (June 2015) (Calling for increased regularity of public asset disclosures for high-ranking Egyptian officials pursuant to the 2014 Constitution); *see also* Radwa S. Elsaman & Ahmed A. Alshorbagy, *Doing Business in Egypt After the January Revolution: Capital Market and Investment Laws*, 11 Rich. J. Global L. & Bus. 43, 51 (2011) (discussing decree No. 30 of 2002 of the former Capital Market Authority's Board of Directors).

307. *Towards a New Anti-Corruption Law*, *supra* note 51.

308. Yingling & 'Arafa, *supra* note 55, at 59–61 ("The first step towards combating unconventional corruption is to establish rules that require elected officials to periodically disclose information pertaining to campaign contributions. Disclosure rules, although necessary, are not sufficient for eliminating unconventional corruption."); *see generally*, *e.g.*, Gerry Ferguson, *China's Deliberate Non–Enforcement of Foreign Corruption: A Practice That Needs to End*, 50 Int'l Lawyer 3 (2017).

309. Mohamed 'Arafa, *Corruption and Bribery in Islamic Law: Are Islamic Ideals Being Met in Practice?* 18 Annl. Survey Int'l. & Comp. L. 171, 236–37 (2012) ("Gellner observes that, "a certain kind of separation of powers was built into Muslim society from the beginning, or very nearly from the start." While Gellner is talking about the separation of the executive and

in Egypt should be given access—at discount rates—to existing commercial databases outlining PEP-related positions in government.[310] Finally, the government should regularly promulgate a list of PEP positions in the executive, legislative (including *Shoura* [consultation] council), and judicial branches, as well as lists of prominent businessmen who have or have had, at some point, government procurement contracts.[311]

Egypt does not have a culture of accountability that it expects from its public officials. Thus, if a PEP were to retaliate against a financial institution for filing an STR, it is unlikely that the financial institution would have adequate recourse without considerable risk.[312] It makes no difference that under the AML law, persons and entities that report suspicious transactions are technically immunized, as retaliation can come in different forms.[313] The structure of the Egyptian executive power allows military officials and high-level politicians to immunize themselves and their allies from oversight and prosecution.[314] An Egyptian legislative trend has been to rely heavily upon executive regulations rather than statutes when regulating capital markets. Indeed, some positions in Egypt (e.g., the President) are effectively immune from criminal prosecution while they remain in office. Although a politician may lose this immunity after leaving office (if they do leave office, which is another story), the vested interests in the military and executive make future criminal investigations based on past financial reporting unlikely.[315]

Conclusion

Corruption is a concern around the globe, as it influences the growth and well-being of nations. Studying corruption is complex since every single aspect, whether cultural, economic, political, or legal, plays a critical role in its development and flourishing. It is therefore unsurprising that detecting the

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legislative branches, another distinction between the executive and judiciary also evolved quite early in the history of Islam. By rooting legislation in a handful of transcendent rules that can be expanded only through analogy ("*Qiyyas*"), the very structure of Islamic law has historically created a class of jurists that were not necessarily under the control of the state. On the other hand, Babeair illustrates the other side of the coin by elucidating the role that traditional jurists have played in learning and spreading moral education, and by acting as a force for moderation through mediating between the rulers and the masses. All three of these pillars for curbing the roots of corruption were achieved under Islamic public administration.").

310. Noll, *supra* note 87.

311. *Id.*

312. *Towards a New Anti-Corruption Law*, *supra* note 66. ("In the right spirit, political, economic, and cultural reforms—cultural being the greatest—strengthen one another. As a consequence, the most important reform priority and the ground on which a new Egypt will or will not be built is cultural. Indeed, the most significant issues are how the Egyptian people will come to metabolize what has happened and whether they are able to consolidate their revolution into habits of engagement and debate, the right to know, and routines of tolerance and freedom. Only then can we expect a development policy to remake economic life or a rearrangement of constitutional powers to re-create the culture of Egyptian politics. Only then will the revolution have been won by reform.").

313. Noll, *supra* note 87.

314. Bassiouni, *supra* note 69.

315. *Id.*

root causes of corruption is an essential precursor to successfully battling it. An accurate diagnosis of its roots will sketch the roadmap for combating it and establish the priority of each step.

Influenced by recent studies and surveys highlighting the issues related to nepotism and the demand for legal reforms, this article has shed light on corruption in Egypt by exploring the social and legal factors behind it. Egypt established its legal system based on the Napoleonic French legal system (code) and *Sharie'a* (Islamic) law. A legal examination of corruption and bribery was necessary, as it shows that the Egyptian legal rules and principles undoubtedly mandate against classical orthodox corrupt practices, embezzlement, and bribery. Undoubtedly, the Egyptian legal system's prohibition of bribery, or its ban on the contemporaneously practiced form of favoritism and nepotism, gets confused with the concept of permissible intercession in Islamic legal thinking to justify the practice. *Wasta* (nepotism) is a social factor in corruption since it is rooted in and influenced by the society *per se*, which creates problems in fighting it. The negative role of nepotism has been misjudged compared to bribery. However, such assessments do not consider the extensiveness and divisiveness of the practice. They, therefore, fail to grasp the total number of individuals affected and the holistic costs of it. Since it is rooted in and influenced by Egyptian society, nepotism also establishes a challenge to the Egyptian legal system. In essence, the limitations of each Egyptian legal provision that can be implemented to those practicing that corrupt act creates a grey area where it can be practiced legitimately. The lack of other provisions depressing acts of favoritism and discrimination, which are the core of *wasta*, exacerbates the challenge involved in battling the practice. Egyptian legal and institutional structures bear accountability for the prevalence of nepotism, as the procedural complexity, regulatory executions, and weaknesses of the legal structures influence entities' and persons' decisions to rely on it to overcome these challenges and find solutions to their problems.

This Article has sought to highlight a number of legal factors considered crucial in battling corruption by examining the provisions of the anti-money laundering law and related aspects within both the Egyptian and U.S. legal systems. Since the Egyptian legal system lacks an inclusive penological policy regarding corruption, it was necessary to cover the impact of other legal provisions beyond the penal code (anti-bribery provisions). It was argued that certain solutions could be proposed to decline common corrupt practices and nepotism. Since it is a socially influenced practice, corruption can be diminished by implementing nudges that increase the condemnation of nepotistic practices. Ultimately, the cognitive dissonance of those involved increases, in turn, deteriorates the self-justification process.

On the one hand, this process will facilitate the passing of legal means to outlaw corruption. On the other hand, it increases its social refusal along with other corrupt practices on the other. Further, the enhancement and simplification of government processes would discourage corrupt practices. Among the potential solutions, the development of e-government can be recommended to improve the efficiency of procedures. Although several Egyptian governmental agencies/organizations have taken steps in implementing e-government, certain aspects need to be more developed to battle the corruption.

Regarding anti-bribery law, reforming its jurisdiction is necessary to expand the application of its provisions to protecting the integrity of public office. In its current form, it is insufficient, especially when considering the role of the private sector, to say nothing of its erratic position on corrupt acts in the public sector *vs*. the private sector. Also, the role of criminal law is fundamental in building a robust attitude against corruption by sending a message internally and externally that corrupt deeds will not be tolerated. The existence of such criminal provisions will reflect the willingness to implement them to corrupt activities that pose grave harm to the health and well-being of the community in which they occur.

Legal transplant in this area is possible and is necessary for the flourishing of free markets and human progress in developing countries.[316] While underlying issues, such as pervasive cultures of corruption, need to be addressed before legislation and enforcement mechanisms can truly work on behalf of the people, a flawed domestic anti-corruption toolkit will inevitably lead to bad actors offshoring their gains. Small changes in regulatory systems can have massive ripple effects if properly implemented, and—without disregard for the challenges Egypt has and will continue to face—the adoption of stringent AML practices is one of the best ways forward. This issue has been on the back burner for two decades, and it cannot wait. Although Switzerland ranks high on the list of least corrupt countries, it is constantly exposed to criminal attempts to launder the proceeds of corruption abroad. History explains that one of the factors increasing these attempts is the change of the regime of a state. The increase in the number of reports from banks to MROS since 2011 confirms this. For some, the increased reporting by Swiss banks to MROS also demonstrates that the system works. Proponents of this system argue that the obligation to report suspicions by banks is sound, as it can reduce corruption in some countries. Others claim that it is not the role of the banks to arbitrate between respecting banking secrecy and therefore respecting the client's personality and denouncing him without being equipped with the means of a criminal investigation.

Offsets in the defense trade have been duly criticized as being prone to corruption and economically distortive. However, the prevailing sentiment among those in the defense trade is that offsets are here to stay. Notable country-specific anti-corruption regimes—such as the FCPA—do not directly regulate offsets. At least the U.S. government only seems to pay lip service to its official position against offsets. Although international legal frameworks such as WTO's Agreement of Government Procurement and OECD's Anti-Bribery Convention seek to curb the use of offsets, they explicitly fail to regulate their use in international defense trade. Such failures are understandable and rational, however, owing to each country's desire to not disadvantage its own Sellers in the competitive enterprise of defense trade, unique state secret implications, and sovereignty issues. Nonetheless, we can hope that especially unconscionable bribery involving offset agreements may be discovered in the near future to spur action by lawmakers around the world.

316. Ahmad A. Alshorbagy, *On the Failure of a Legal Transplant*: *The Case of Egyptian Takeover Law*, 22 Ind. Int'l & Comp. L. Rev. 237, 254 (2012).

This Article has demonstrated that the American Empire is corrosive to democracy and is, therefore, a corrupt enterprise. I argued that the imperial presidency, defined by a concentration of power in the executive branch, relies on secrecy and unchecked power to maintain an empire. The concentration of power necessarily restricts the democratic process, resulting in democratic deficits which enable the president to act in the interest of the empire, not the American people. Meanwhile, the imposition of empire on foreign companies and states, as demonstrated by the discussion of FCPA enforcement and neoliberal economic reform, diverts those entities from acting in the interest of their constituencies in favor of the imperial interest. The widespread concentration and manipulation of power away from the people's control results in actions unreflective of the people's will. In this way, the various institutions governed by the American Empire are rendered institutionally corrupt.

This Article calls into question the ability of empire and democracy to cohabitate. Is there such a thing as an imperial democracy or a democracy under an imperial rule? Suppose the purpose of democratic institutions is to represent the will of the constituency, and institutions are corrupt when influenced by an improper purpose. In that case, a noncorrupt democracy or empire can cohabitate only when the imperial project agrees with the will of the constituency. Unfortunately, the American Empire is shrouded in secrecy and often gives no opportunity for the democratic input of those affected by its power.