



FIGHTING CORRUPTION IN MOZAMBIQUE'S EXTRACTIVE SECTOR:

Can Foreign Laws Work where Mozambique's Laws Fail?

There is no evidence that Mozambique's anti-corruption system is capable of constraining the economic and political elites who seek to enrich themselves at the country's expense. Fortunately anti-corruption laws do not end at the border. Dozens of countries have made it a criminal offence to bribe foreign public officials. There is no doubt that some Mozambicans will seek to extract bribes. There is a small chance, however, that some foreign companies will be too scared to pay them.

Introduction

Transparency is increasing in Mozambique's extractive sector. But transparency alone does not generate accountability. There is a serious risk that in the coming years we will simply know in even greater detail the scale on which the political and economic elite in Mozambique is stealing the extractive sector wealth on which the future of all our citizens depends.

Anti-corruption laws in Mozambique are weak. Enforcement of those laws is weaker still. The more serious the corruption, the more senior the offender, the more money is involved, the less likely that state institutions will investigate and prosecute.

Legal liability for corruption however does not end at the borders of Mozambique. There are laws against corruption in other countries that can be used to limit the scale of abuse here at home. Specifically, a growing number of countries make it a crime in their own jurisdiction even if the corrupt act takes place entirely outside of their borders.

While these laws do not normally create legal risks for Mozambicans, they do create very direct legal risks for foreign companies that are involved in corrupt transactions. In the pages that follow, we explain the scope of these foreign laws and provide guidance on how to provide evidence of wrongdoing to foreign authorities.

Mozambique and Corruption

The pervasiveness of corruption is widely recognized. Mozambique's international rankings on the main corruption indexes have not improved significantly over the past decade. Nearly half of Mozambicans believe that corruption is a serious problem and one third believe that the situation has become worse over the past two years. Specifically on the extractive sector, Mozambique received a "failing" score on the 2013 Resource Governance Index. Given the lack of effective anti-corruption institutions, increasing inward investment is undoubtedly making the problem worse.

Furthermore, the risks of corruption in the extractive sector have significantly increased as a result of the sector laws on Mining and Petroleum passed by Parliament in 2014. In both cases, these laws expand what are known as “local content” obligations. Specifically, companies providing services to extractive sector operations must be associated with Mozambican companies (Article 41 of Petroleum Law and Article 34 of Mining Law).

The objective of expanding benefits to Mozambicans from the extractive sector is obviously appropriate. Mozambique’s natural resources must not enrich only foreign companies. However, three factors must be present for local content obligations to have the desired effect – appropriate policies, appropriate institutions and local industry capacity. Where all three of these conditions do not exist, creating local content obligations does more harm than good. According to the Revenue Watch Institute, “national or subnational legislations requiring specific targets to be met in areas with small or weak industrial bases and a limited number of skilled workers may lead to economic inefficiency and *increased corruption*.”

These concerns have certainly been confirmed in countries like Nigeria and Angola where local content obligations have resulted in the creation of “post-box companies” that provide no real value-added (See Text Box on Cobalt in Angola below). Unfortunately little attention has been paid to these risks in Mozambique. For example, a 30-page report entitled the Mozambique Business Linkages Review, funded by USAID, makes no mention at all of the increased risks of corruption.

Anti Corruption Laws Beyond Borders

The starting point for anti-corruption laws extending beyond the boundaries of a single country is the US Foreign Corrupt Practices Act of 1977. In the wake of the Watergate scandal, the US Securities and Exchange Commission – the body responsible for regulating the country’s

Conduct Prohibited by the Foreign Corrupt Practices Act - FCPA

Payment, or the promise of anything of value to a Mozambique official by a company listed on a US stock exchange for any of the following, would be illegal under the FCPA:

- winning a contract,
- influencing the procurement process,
- circumventing the rules for importation of products,
- gaining access to non-public bid tender information,
- evading taxes or penalties,
- influencing the adjudication of lawsuits or enforcement actions, and
- obtaining exceptions to regulations.

stock exchanges – investigated the foreign practices of US companies. They uncovered more than 400 US companies that bribed foreign government officials to secure business opportunities and then used secret “slush funds” to make illegal campaign contributions in the United States. The response was the enactment of a law making the bribery of foreign public officials outside the United States a criminal offence in the United States.

The Foreign Corrupt Practices Act prohibits offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business.

The prohibition on bribery applies to corrupt payments made to any foreign official, any foreign political party or party official, any candidate for political office; or any person who will transfer the money to an individual in one of these categories.

Cobalt Energy in Angola

Cobalt Energy is a US-based oil company. In 2008 the company began exploration in Angolan offshore waters, in partnership with the state-owned oil company Sonangol and two local companies, Alper Oil and Nazaki Oil. In 2010, the investigative journalist, Rafael Marques de Morais, reported that the secret owners of Nazaki were actually three government officials, and this was confirmed in 2012.

The three officials are: Manuel Vicente (formerly CEO of Sonangol and currently Vice President); General Manuel Helder Vieira Dias Junior (Director of the National Reconstruction Office and one of the President's closest confidants) and General Leopoldino Fragoso do Nascimento (chief adviser to the Minister of State and the head of the Intelligence Bureau at the Presidency).

These business relationships would appear to have directly violated Angolan law. While beneficial ownership by friends and family of Angola politicians is not itself prohibited, direct ownership of state enterprises is banned. The three individuals listed here however are clearly above the law – at least in Angola.

Cobalt Energy however is not above the law. The US Securities and Exchange Commission commenced a preliminary investigation into Cobalt's Angolan operations in 2011 for potential violations under the US Foreign Corrupt Practices Act.

When the company informed its shareholders in August 2014 that the SEC had launched a formal investigation that could lead to enforcement action, the share price fell by more than 10%. US-based investors have also launched a civil lawsuit seeking to recover losses on their investments in Cobalt securities.

It is often thought that anti-corruption laws look good in theory, but have no impact in practice. There can be no doubt that the vast majority of corruption goes uninvestigated and unprosecuted. But there are important exceptions. The Securities and Exchange Commission has taken enforcement action against more than 120 companies listed on US stock exchanges for corrupt activities abroad. Importantly, parent companies can be held liable even when the corrupt act was committed by a subsidiary.

The companies at risk are not only American. These laws apply to all companies listed on US stock exchanges, even if they are incorporated in other countries. In 2011, nearly three quarters of the financial penalties in FCPA cases were assessed against non-US companies. Nine of the top ten largest penalties ever imposed under the FCPA were assessed against non-US companies. The list of enforcement actions taken against international extractive companies includes: the Italian oil company ENI for bribery in Nigeria; and the French company Total and the Norwegian company Statoil both for bribery in Iran.

The Global Fight Against Corruption

The international fight against corruption has extended well beyond the United States. Two agreements have been most significant: the OECD Anti-bribery Convention (1997) and the broader UN Convention Against Corruption (2003). Both conventions require all signatories to criminalize offering or giving a bribe to a foreign public official.

The reach of these laws is broad. In addition to all of the 34 members of the OECD, seven non-members have also signed the Anti-bribery Convention (e.g. Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia, and South Africa). The reach of the UN Convention is nearly universal with 170 UN members having signed. Below are examples of the national legislation relevant countries have put in place to implement these international obligations.

Investigation into ENI Corruption in Nigeria

The CEO of the Italian oil company ENI and one of his top lieutenants are currently under investigation for international bribery over the company's acquisition of an offshore oil block in Nigeria.

The massive oil concession encompasses two deep-water fields estimated to hold up to 9.23 billion barrels of crude oil – the equivalent to nearly one quarter of Nigeria's total proven reserves. In 1998, the then-Nigerian oil minister awarded OPL 245 to Malabu Oil for a reported \$2 million. In fact, the Oil Minister himself was a part owner of Malibu Oil.

In 2011, Shell and ENI paid \$1.1 billion, plus a signature bonus of \$200 million, to the Nigerian government for the concession. In a back-to-back deal negotiated by the Attorney General of Nigeria, the Nigerian government transferred \$1.1 billion to Malabu Oil and Gas.

Following a lawsuit initiated in the United Kingdom, \$215 million in proceeds from the sale were seized in the UK and Switzerland. The asset seizure led authorities in Italy to launch a criminal investigation. Included in the investigation are the current CEO Claudio Descalzi who was then the company's head of exploration and production, and Roberto Casula, then the head of Africa operations.

The investigation is focused on why Malibu (a private company) was present during the negotiations between Shell, ENI and the Nigerian government. ENI claims that it entered into agreements to buy the block "only with the government of Nigeria and Shell." Investigators are examining whether ENI was aware, or should have been aware, that the payment to the Nigeria authorities was being immediately transferred to a private company.

ENI shares fell by 2% when news of the criminal investigation into the activities of its CEO became public.

The United Kingdom: The bribing of foreign public officials outside of the boundaries of the United Kingdom is prohibited under the *Bribery Act* of 2010. The scope of this UK law is broader than even the US FCPA. For example, there is a new corporate offence for "the failure of a commercial organization to prevent bribery on its behalf." Since entry-into-force in 2011, UK prosecutors are aggressively pursuing international investigations. The reach of the law includes British citizens, the citizens of British overseas territories, companies incorporated in the UK and any company that carries on part of its business in the UK (regardless of where it is incorporated).

South Africa: The *Prevention & Combating of Corrupt Activities Act* (2004) gives South African courts jurisdiction over corrupt activities committed by South African individuals and companies outside the borders of the country. Section 34 creates a legal obligation to knowledge or suspicion of corrupt activity to the South African police.

Australia: Unlike the United Kingdom and the United States, Australia does not have dedicated anti-bribery legislation. In Australia, the act of bribing a foreign public official is proscribed under Section 70 of the *Criminal Code Act 1995*. Australian diplomats (and trade and development representatives) have a legal obligation to report to the Australian Federal Police any instance where an Australian individual or company could reasonably be suspected to have bribed a foreign public official.

Brazil: The *Clean Companies Act* of 2013 is Brazil's response to the expansion of anti-corruption efforts. The law has broad reach, applying to illicit activity involving Brazilian or foreign public bodies by Brazilian corporate entities, regardless of whether the offense is committed in Brazil or abroad.

China: As a signatory to the United Nations Convention on Corruption, in 2011 China updated its existing criminal law to include a prohibition on bribes to "foreign officials" and "officials of international public organizations." Bribery

is defined as payments made for the purpose of seeking an improper commercial benefit. The law applies to Chinese nationals both within and outside China, and all companies incorporated in China (and their managers) that carry on business overseas.

Canada: The relevant Canadian law is the *Corruption of Foreign Public Officials Act* of 1998, including far-reaching amendments passed in 2013. The law applies to Canadian corporations, citizens and permanent residents. Even where the act of bribery takes place outside of Canada, the law deems the offence to have been committed inside of Canada. Canadian officials abroad have a duty to report allegations of bribery by Canadians and Canadian companies.

Bribery by Griffiths Energy for Chad Oil Contracts

In 2008, Canadian oil company Griffiths Energy began seeking oil contracts from the Government of Chad. Company executives established contacts with the Chadian Ambassador to Canada, based in Washington DC. The Embassy facilitated contact with the Chadian Minister of Petroleum and Energy, and Griffiths was invited to negotiate a contract for the Doseo, Borogop and Lake Chad blocks.

In 2009, in order to secure agreement on the contract, Griffiths sought the assistance of a consulting company called Ambassade du Tchad LLC – a company wholly owned by the Chadian Ambassador to Canada. On receiving legal advice that Griffiths could not provide direct payment to a government official, the identical contract for \$2 million was subsequently signed with Chad Oil Consulting LLC – a company wholly owned by the Ms. Nouracham Niam, the wife of the Ambassador. Ms Niam also personally received 1,600,000 “founders” shares for \$0.001 per share.

On 19 January 2011 Griffiths signed three production-sharing agreements with the Government of Chad. On 7 February 2011, Griffiths transferred \$2 million to Chad Oil Consulting LLC, using banking instructions provided by the Deputy Chief of the Chadian Embassy.

A new management team took over Griffiths in late 2011. In advance of an Initial Public Offering (IPO), a due diligence review uncovered the contracts with Chad Oil Consulting. Recognizing that these payments constituted a criminal offense, Griffiths alerted the Public Prosecution Service of Canada. Griffiths internal review process involved reviewing hundreds of thousands of pages of documents and costs more than \$5 million in legal and accounting fees.

In 2013, Griffiths Energy formally admitted that they had violated Canada’s *Corruption of Foreign Public Officials Act*. The resulting fine was reduced to take into account the fact that an entirely new management team was in place, that the company self-reported the offense and had subsequently cooperated fully with Canadian authorities. Nevertheless, at more than \$10 million, it is the largest penalty ever imposed under Canada’s anti-corruption act.

Seizing the Assets of Corrupt Foreign Elites

Mozambican elites are also vulnerable when they move illegal money offshore. For example, the son of the President of Equatorial Guinea, Teodorin Obiang, has had assets seized, and is under criminal investigation, in both the United States and France.

Teodorin served as Minister of Forestry and Agriculture, with a salary of about \$6,800 per month. He is estimated to have a net worth of more than \$300 million. In an attempt to secure foreign “immunity,” his father appointed Teodorin Ambassador to UNESCO, “second” Vice President and a member of the Senate.

In 2011, the US Government seized \$71 million in assets under its Kleptocracy Asset Recovery Initiative. The United States Department of Justice concluded an out-of-court settlement involving the forfeiture of \$30 million in October 2014.

In 2012, France issued an arrest warrant for Teodorin, though he had already fled back home. French authorities seized his Paris mansion and several of his luxury cars. In March 2014, France formally indicted Teodorin, issuing an arrest warrant for money laundering.

Making International Anti-Corruption Laws Work

Everything starts with credible evidence. Law enforcement officials in foreign countries will normally take credible allegations seriously. And embassy personnel from most countries are legally obligated to notify home authorities if individuals or companies from their countries are allegedly engaged in wrongdoing.

The fight against corruption in Mozambique therefore depends on the efforts of individuals with integrity holding positions in government, political parties, private companies, and foreign embassies.

If You Want to Report Corruption / Bribery

- **Verify and document.** Secure electronic or hard copies of all relevant documents.
- **Do not tell anyone.** If you want to speak to someone for advice ensure they are trustworthy.
- **Do not use work email or telephones.** Create a gmail account with no indication of your identity.
- **Convert files to PDFs.** Word documents contain information that could reveal your identity.
- **Do not change your behavior.** React to events as if you are an outsider.

afriLeaks – A Service for African Whistleblowers

afriLeaks (<https://afrileaks.org/>) allows you to leak confidential documents of public interest. They have designed a system that helps you to share materials while protecting your own identity, making it very hard to identify you as the source of the leak.

afriLeaks is run by an alliance of African news organisations that are committed to speaking truth to power. Unlike Wikileaks Afrileaks does not publish any information itself. It acts only as a facilitator, a “highly secure mailbox”.

You can send files to the site securely and nominate the media organisation they want to want to receive the leaks. The site also allows you to stay in contact and ask questions without revealing your name or contact information.

Annex: Contact Information for Anti-Corruption Institutions

Mozambique / Africa

Central Office for Combating Corruption (Gabinete Central de Combate à Corrupção, GCCC)	Avenida 10 de Novembro, n.º 293 Maputo - Moçambique Tel: 21 310 693 Fax: 21 36 08 50 Linha Verde: 82 34 04/ 84 34 04/ 86 34 04 000
Centre for Public Integrity	Rua B n.º 79, Bairro da Coop CP 3266, Maputo Tel: +258 21 416616 Fax: +258 21 416625 cipleaks@cip.org.mz
afriLeaks	For questions about afriLeaks you can send a message to: info@afriLeaks.org. For documents and leaks use: https://secure.afriLeaks.org/#/

International

United States	U.S. Department of Justice Criminal Division / Fraud Section ATTN: FCPA Coordinator Bond Building, 4th Floor 10th and Constitution Ave. NW Washington, DC 20530-0001 Facsimile - +1 202-514-7021 E-Mail FCPA.Fraud@usdoj.gov
United Kingdom	SFO Confidential Serious Fraud Office 2-4 Cockspur Street London, SW1Y 5BS confidential@sfo.gsi.gov.uk (secure online reporting form)
Canada	RCMP Anti-Corruption Unit A Division - Federal Investigation Unit 155 McArthur Avenue, Room 523 Ottawa, Ontario, Canada K1A 0R4 Telephone: (613) 993-6884 Fax: (613) 998-2906

Australia	Australian Federal Police GPO Box 401 Canberra City ACT 2601 Australia www.afp.gov.au
South Africa	DPCI: Anti-Corruption Desk A5 Promat Building 1 Cresswell Road Silverton, Pretoria 0186 Phone: 012 846 4202 Fax: 086 546 1400 E-mail: CorruptionReports@saps.gov.za

(Endnotes)

- 1 Maira Martini, "Local content policies and corruption in the oil and gas industry," Transparency International, 2014.
- 2 Emphasis added. See Ana Maria Esteves, Bruce Coyne, Ana Moreno, Enhancing the subnational benefits of the oil, gas and mining sectors, Revenue Watch Institute, 2013, p. 23.
- 3 See Peter Mwanza, Mozambique Business Linkages Review, SPEED/USAID, 2012.

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Department for
International
Development



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ROYAL NORWEGIAN EMBASSY

ROYAL DANISH EMBASSY IN MAPUTO