

Modern Slavery and Corruption



**Legal Analysis of
Relevant Laws and
Their Application**

Contents

3	Analysis
3	I. FCPA: Enforcement Priority, Global Reach, and Expansive Liability
7	II. Elements of an FCPA Violation
13	III. The FCPA's Extensive Reach
18	IV. The Trafficking Victims Protection Act
23	V. FCPA and Human Trafficking Compliance Programs
28	VI. Conclusion
29	Appendix A: Local Anti- Corruption and Trafficking Laws
105	Appendix B: Trafficking Scenarios

I. FCPA: ENFORCEMENT PRIORITY, GLOBAL REACH, AND EXPANSIVE LIABILITY

Over the last two decades, United States regulators have had incredible success using the Foreign Corrupt Practices Act (“FCPA”) as a tool to combat foreign corporate corruption. Because corruption is a critical part of the human trafficking chain, the FCPA can potentially be used as a tool to combat human trafficking as well.

From its inception, the Foreign Corrupt Practices Act (“FCPA”) has been a pioneering statute with the potential to disrupt corrupt networks around the globe. When Congress passed the FCPA in 1977, it became “the first-ever law governing the conduct of domestic companies in their interactions with *foreign* government officials in *foreign* markets.”¹ Since then, and particularly in the past two decades, the FCPA has had an unprecedented effect in regulating corporate corruption, with ripple effects reaching to board rooms in the United States and remote regions across the globe.

Three key characteristics of the FCPA have been crucial to its effectiveness at addressing foreign corporate corruption. First, U.S. prosecutors have made FCPA enforcement a top priority. In turn, compliance departments of multinational corporations have responded by similarly prioritizing their global FCPA compliance programs. Second, the FCPA regulates global conduct of many international corporations, including those listed on U.S. exchanges via its provisions for “extraterritorial jurisdiction.”² Third, the FCPA provides for expansive liability, including conduct where companies and individuals do not engage in direct bribery,

or where senior management fails to maintain reasonable internal accounting controls necessary to detect and prevent bribery and other unauthorized payments.

These three characteristics make the FCPA an attractive enforcement tool for combatting international criminal activity tied to corruption, including human trafficking in ASEAN nations. Corruption fosters the human trafficking chain,³ and bribes paid to facilitate human trafficking in these countries, or false entries entered in a company’s books and records may constitute FCPA violations. Thus, although the FCPA has never been applied in the human trafficking context, initiating FCPA enforcement actions against these bribes could potentially disrupt the human trafficking chain and encourage a rise in human trafficking compliance efforts. Indeed, as commentators have noted, “the U.S. government can and should do more, including using the Foreign Corrupt Practices Act and other federal statutes to clamp down on all companies that turn a blind eye to trafficking by their subcontractors and other agents.”⁴

However, as discussed in Section III., *infra*, U.S. enforcement authorities may not be able to prosecute multinational corporations under the FCPA based upon tenuous links to corrupt payments, and may not be willing (or may jurisdictionally be unable) to dedicate enforcement resources to prosecuting individual traffickers in foreign countries. In those instances, U.S. statutes specifically criminalizing human trafficking may prove to be a more effective enforcement tool. As discussed in Section IV., *infra*, the Trafficking Victims’ Protection Act (“TVPA”) is a U.S. statute specifically designed to combat human trafficking. Because the TVPA shares some of the FCPA’s key characteristics—both apply to conduct outside the United States and impose liability on corporations and individuals who do not directly engage in the misconduct—an increased focus on TVPA prosecutions, informed and supported by successful FCPA enforcement efforts, may ultimately prove to

1 Mike Koehler, *The Foreign Corrupt Practices Act In A New Era*, at x (2014) (emphases in original).

2 A law is extraterritorial when a court applies a domestic law to conduct occurring beyond the territorial borders of the nation-state in which the court sits. The extraterritorial application of domestic law is referred to as the exercise of legislative jurisdiction. Restatement (Third) of Foreign Relations Law of the United States § 402 (Am. Law Inst. 1987); see also Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217, 1218 n.3 (1992) (A case “involves extraterritoriality when at least one relevant act occurs in another nation.”).

3 U.S. Dep’t of State, *Trafficking in Persons Report 18* (2015) [hereinafter *State Dep’t Trafficking Report*], <http://www.state.gov/j/tip/rls/tiprpt/2015/index.htm>.

4 Daphne Eviator, *New Trafficking Ambassador Addresses U.S. Mission to the United Nations, Human Rights First* (Nov. 6, 2015), <http://www.humanrightsfirst.org/blog/new-trafficking-ambassador-addresses-us-mission-united-nations>.

be a successful combination for combatting human trafficking. There are also local anti-corruption and Anti-Trafficking Laws⁵ that can be used by foreign authorities to fight against these harms on their own soil. Appendix A catalogues these local laws by country, and also offers an analysis of how these local anti-corruption laws could be used as a tool against human trafficking.

The U.S. government's prioritization of FCPA enforcement has been crucial to its success in combatting global corruption. Like many federal regulatory statutes, the FCPA does not grant a cause of action to private litigants.⁶ Rather, the United States Department of Justice ("DOJ") enforces the criminal provisions of the FCPA and the United States Securities and Exchange Commission ("SEC") enforces the civil provisions. The DOJ and SEC are given substantial discretion in how to use their enforcement resources and, for many years, both agencies have enforced the FCPA as a top "priority."⁷ In prioritizing FCPA enforcement, the DOJ and SEC have each dedicated significant resources,

including specialized prosecution "units" and investigators, to enforce the FCPA.⁸

The DOJ and SEC have brought at least twenty successful FCPA enforcement actions every year since 2007, and since that time corporations have paid over \$6 billion dollars to resolve FCPA charges.⁹ Substantial resolutions, such as Siemens' \$800 million settlement in 2008, or Alstom's \$772 million resolution in 2014, have mobilized corporations to ensure that their business practices comply with the FCPA.¹⁰ Similarly, the risk of significant jail sentences, highlighted most recently by the Eleventh Circuit's affirmance of a fifteen year prison term for an executive convicted of FCPA offenses for bribing Haiti's state-owned telecommunications company,¹¹ have raised the stakes for FCPA enforcement.

Given the current enforcement focus on the FCPA, this paper will first discuss the potential effectiveness of the FCPA as a tool for combatting human trafficking before turning to the TVPA and other enforcement statutes and strategies.

5 Many of the local anti-trafficking laws may have been prompted by the passage of the U.N. Protocols known as the Palermo Protocols in November 2000. It included three Protocols, one of which is known as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the "Trafficking Protocol"). Article 5 of the Trafficking Protocol requires each State Party to establish anti-trafficking criminal offenses. G.A. Res. 55/25, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Nov. 15, 2000), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>. As of November 2015, it has been ratified by over 160 parties. U.N. Treaty Collection, Status of Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en.

6 The FCPA does not provide a private right of action, although shareholders may bring civil suits based on false securities disclosures connected to the FCPA's accounting provisions discussed *infra*, Section II. Violations of the FCPA do often provide grounds for civil shareholder suits alleging breaches of fiduciary duty by corporate officers and directors.

7 Mythili Raman, Acting Assistant Att'y Gen., Criminal Div., U.S. Dep't of Justice, Remarks at the Global Anti-Corruption Compliance Congress (Mar. 20, 2014), <http://www.justice.gov/opa/speech/acting-assistant-attorney-general-mythili-raman-speaks-global-anti-corruption-compliance>; Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Interview with Brian Lamb, Q&A, C-Span (Feb. 12, 2014), <http://www.c-span.org/video/?317755-1/qa-mary-jo-white>.

8 The DOJ's Fraud Division, which is responsible for enforcing the FCPA, has a specialized FCPA Unit. The SEC's Division of Enforcement also has an FCPA Unit. In 2015, the Federal Bureau of Investigation, which investigates cases on behalf of the DOJ, also announced "the establishment of three dedicated international corruption squads, based in New York City, Los Angeles, and Washington, D.C." Press Release, Fed. Bureau of Investigation, FBI Establishes International Corruption Squads (Mar. 30, 2015), <https://www.fbi.gov/news/stories/2015/march/fbi-establishes-international-corruption-squads/fbi-establishes-international-corruption-squads>.

9 Notably, this number does not include the additional liability these companies face from litigation and remediation costs, fines and resolutions with regulators in other countries, and liability for private civil suits. See Mike Koehler, Foreign Corrupt Practices Act Ripples, 3 Am. U. Bus. L. Rev. 291, 293 (2014). For example, Wal-Mart has reported in public filings that it has spent over \$600 million in pre-enforcement professional fees and expenses in connection with an ongoing FCPA investigation. See Friday Roundup, FCPA Professor (Aug. 21, 2015), <http://www.fcpaprofessor.com/friday-roundup-172>.

10 As discussed below in Section V, *infra*, multinational corporations now regularly conduct FCPA due diligence on their financial transactions, business relationships, and interactions with foreign officials to police for FCPA risk.

11 United States v. Esquenazi, 752 F.3d 912 (11th Cir. 2014).

II. ELEMENTS OF AN FCPA VIOLATION

Because the overwhelming majority of FCPA defendants settle charges with the government, the government has been able to interpret the statute broadly, with only minimal judicial oversight. As a result, the law that has emerged around the FCPA, favoring a broad scope of liability, is sometimes referred to as “prosecutorial common law.” A key source of this prosecutorial common law is the DOJ’s and the SEC’s *Resource Guide to the U.S. Foreign Corrupt Practices Act* (“Resource Guide”). Many FCPA practitioners have cautioned against excessive reliance on the Resource Guide and other sources of prosecutorial common law, suggesting that the expansive reading of the statute in DOJ and SEC enforcement actions will not withstand judicial scrutiny if and when defendants challenge the government in court.¹² Nonetheless, settled enforcement actions and the Resource Guide often remain the best sources of authority for understanding the current state of the FCPA’s elements and jurisdictional scope as enforced by the DOJ and SEC.

The FCPA defines three offenses: (1) the core “Anti-Bribery” offense, which prohibits individuals and businesses from bribing foreign government officials in order to obtain or retain business; (2) the “Books and Records” offense, which prohibits individuals and companies from knowingly falsifying a company’s books and records; and (3) the “Internal Controls” offense, which requires companies to implement an effective system of internal accounting controls. The last two offenses, known as the “Accounting Provisions,” apply to non-bribery offenses as well. The FCPA provides for civil and criminal penalties against corporations and individuals, including sanctions, fines, disgorgement, and imprisonment. In particular, and as discussed in section III, *infra*, a key aspect of the FCPA is that it covers all “issuers” of securities on a U.S. stock exchange as well as officers, directors,

12 See, e.g., Koehler, *supra* note 2, at 70 (viewing prosecutorial common law espoused in the Resource Guide, which primarily cites to FCPA settlements, “as a source of FCPA legal authority is not warranted” because settlements “do not necessarily reflect the triumph of one party’s legal position,” and because courts have given FCPA settlements no precedential weight).

employees, or agents acting on behalf of those issuers. This is a broad category that covers many multinational corporations operating in Southeast Asia and other locations where human trafficking is present.

1. Elements of the Anti-Bribery Offense

The Anti-Bribery provisions form the core of the FCPA’s prohibition against foreign bribery. The FCPA’s definition of the Anti-Bribery Offense contains four primary elements. Specifically, it is unlawful for any person or corporation subject to FCPA jurisdiction,¹³ or any “officer, director, employee, or agent” of a corporation subject to FCPA jurisdiction:

- (i) to “corruptly;”¹⁴
- (ii) give “anything of value;”
- (iii) to a “foreign official;”
- (iv) to assist in “obtaining or retaining business.”¹⁵

Each of these elements is discussed below.

(i.) Corruptly

To violate the FCPA’s Anti-Bribery Provisions, a payment must be made “corruptly.” The legislative history indicates that “corruptly” means that the payment must be “intended to induce the recipient to misuse his official position; for example, wrongfully to direct business to the payor or his client, to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function.”¹⁶

Where a payment is made with corrupt intent, the FCPA does not require that the corrupt payment actually succeed. For example, the SEC successfully brought an enforcement

13 FCPA jurisdiction is discussed in Section III.1, *infra*.

14 Depending on the circumstances, the requisite intent may be either “corruptly,” “knowingly,” or “willfully,” as discussed below.

15 15 U.S.C. § 78dd-1.

16 See Criminal Div., U.S. Dep’t of Justice & Enf’t Div., U.S. Sec. & Exch. Comm’n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 14 (2012) [hereinafter Resource Guide] (citing H.R. Rep. No. 95-640, at 7 (1977); S. Rep. No. 95-114, at 10 (1977)), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>.

action against a multinational agrochemical and agricultural biotechnology corporation for its payment of a \$50,000 bribe intended to influence an Indonesian official to repeal an unfavorable law, even though the law was never repealed.¹⁷ Similarly, a foreign official need not accept the corrupt payment for the bribe payor to be liable under the FCPA. In an enforcement action against a global specialty chemical company, the company promised to pay approximately \$850,000 in bribes to Iraqi government officials in exchange for obtaining government contracts.¹⁸ Although the company did not ultimately make the payment because the scheme was interrupted by a U.S. government investigation, the company was still held liable under the FCPA.

Takeaway: Where a corporation or individual “corruptly” makes a payment to facilitate human trafficking, an enforcement action can succeed even where the act of trafficking itself has not taken place or where the evidence to show such trafficking is lacking.

(ii.) Give Anything of Value

The term “anything of value” has been broadly interpreted under the FCPA and can include nearly any conceivable benefit. While many FCPA cases have involved direct cash payments (sometimes in suitcases¹⁹) to government officials or disbursements

disguised as legitimate “consulting fees” or “commissions,” other cases have involved:²⁰

- Lavish travel accommodations for business trips, such as first-class plane tickets.
- Payments for government officials to attend sightseeing trips to popular locations such as New York, Hawaii, and Disney World, disguised as business trips.
- Gifts such as expensive cars, country club memberships, lavish dinners, wine tastings, and other luxury items.
- Charitable contributions to organizations with close ties to government officials.
- Similar gifts to friends and family members of government officials.

The recent BNY Mellon enforcement action highlights the DOJ and SEC’s expansive reading of the term “anything of value.”²¹ In that action, the government alleged that BNY Mellon violated the FCPA by providing valuable student internships to family members of foreign government officials affiliated with a Middle Eastern sovereign wealth fund. Similar cases have been brought involving jobs and opportunities provided to relatives of Chinese government officials.²²

While most items can satisfy the FCPA’s requirements, the Resource Guide explains that small items of minimal value are unlikely to meet the threshold, because such items are likely given without corrupt intent:

Regardless of size, for a gift or other payment to violate the statute, the payor must have corrupt intent—that is, the intent to improperly influence the government official. The corrupt intent requirement protects companies that engage in the ordinary and legitimate promotion of their businesses while targeting conduct that seeks to improperly induce officials into misusing their positions. Thus, it

17 Complaint, SEC v. Monsanto Co., No. 05-cv-14 (D.D.C. Jan. 6, 2005), <http://www.sec.gov/litigation/complaints/comp19023.pdf>; Criminal Information, United States v. Monsanto Co., No. 05-cr-8 (D.D.C. Jan. 6, 2005), <http://www.justice.gov/criminal/fraud/fcpa/cases/monsanto-co/01-06-05monsanto-info.pdf>.

18 See Complaint, SEC v. Innospec, Inc., No. 10-cv-448 (D.D.C. Mar. 18, 2010), <http://www.sec.gov/litigation/complaints/2010/comp21454.pdf>; Criminal Information at 8, United States v. Innospec, Inc., No. 10-cr-61 (D.D.C. Mar. 17, 2010), <http://www.justice.gov/criminal/fraud/fcpa/cases/innospec-inc/03-17-10innospec-info.pdf>.

19 See, e.g., Complaint, SEC v. Halliburton Co., No. 09-cv-399 (S.D. Tex. Feb. 11, 2009), <http://www.sec.gov/litigation/complaints/2009/comp20897.pdf>; Criminal Information, United States v. Kellogg Brown & Root LLC, No. 09-cr-71 (S.D. Tex. Feb. 6, 2009), <http://www.justice.gov/criminal/fraud/fcpa/cases/kelloggb/02-06-09kbr-info.pdf>.

20 See Resource Guide, *supra* note 17, at 14-17; Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges BNY Mellon with FCPA Violations (Aug. 18, 2015) [hereinafter BNY Mellon Press Release], <http://www.sec.gov/news/pressrelease/2015-170.html>.

21 See BNY Mellon Press Release, *supra* note 21.

22 See Emily Glazer & Dan Fitzpatrick, J.P. Morgan Discussed Pitfalls to ‘Princeling’ China Hiring in 2006, *Wall St. J.* (Oct. 23, 2014), <http://blogs.wsj.com/moneybeat/2014/10/23/j-p-morgan-discussed-pitfalls-to-princeling-china-hiring-in-2006/>.

is difficult to envision any scenario in which the provision of cups of coffee, taxi fare, or company promotional items of nominal value would ever evidence corrupt intent, and neither DOJ nor SEC has ever pursued an investigation on the basis of such conduct. Moreover, as in all areas of federal law enforcement, DOJ and SEC exercise discretion in deciding which cases promote law enforcement priorities and justify investigation. Certain patterns, however, have emerged: DOJ's and SEC's anti-bribery enforcement actions have focused on small payments and gifts only when they comprise part of a systemic or long-standing course of conduct that evidences a scheme to corruptly pay foreign officials to obtain or retain business. These assessments are necessarily fact specific.²³

Takeaway: While bribery may take the form of cash payments made in suitcases, the item of value given to a foreign official need not be cash, and, in fact, need not be given to the foreign official himself if the benefit is conferred on someone close to the foreign official. Numerous FCPA enforcement actions have been premised on the systematic payment of small bribes to individual customs officials. Because well-established trafficking routes often rely upon small bribes paid to border officials, these bribes could constitute "anything of value" and give rise to FCPA liability.

(iii.) To a Foreign Official

The FCPA's anti-bribery provisions apply to corrupt payments made to (1) "any foreign official;" (2) "any foreign political party or official thereof;" (3) "any candidate for foreign political office;" or (4) any person, while knowing that all or a portion of the payment will be given to an individual in the first three categories.²⁴ The "foreign official" requirement is met when bribes are paid to governing members of, or candidates for, the offices of the executive, legislative, and judicial

branches of foreign governments that are organized similarly to the U.S. government. For example, in the case of bribes paid to a judge to dismiss or delay a human trafficking case, the judge is a "foreign official" under the FCPA.

The FCPA defines "foreign official," however, to also include high-ranking officials and low-level government employees "acting in an official capacity for or on behalf of any such [foreign] government or department, agency, or instrumentality."²⁵ For example, in addition to secretaries or ministers of foreign affairs that set policy, lower level administrative employees that issue visas and passports are also considered "foreign officials" under the FCPA.

Additionally, in foreign governments that operate through wide-reaching state-owned entities, including the healthcare, finance, manufacturing, energy, and transportation sectors, the definition of "foreign official" can have a vast scope.²⁶ The DOJ and SEC have pursued FCPA prosecutions against the following "foreign officials":²⁷

- Legislators
- Argentinian Customs Officials
- Employees of the Nigerian Customs Service
- The Mexican Social Security Administration
- Ukrainian Tax Officials
- The Captain of the Mexican Federal Police and a Colonel

²⁵ Securities Exchange Act of 1934 § 30A(f)(1)(A), 15 U.S.C. § 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A).

²⁶ In determining whether employees of a state-owned entity are foreign officials, the Resource Guide focuses on the following factors: the foreign state's extent of ownership of the entity; the foreign state's degree of control over the entity (including whether key officers and directors of the entity are, or are appointed by, government officials); the foreign state's characterization of the entity and its employees; the circumstances surrounding the entity's creation; the purpose of the entity's activities; the entity's obligations and privileges under the foreign state's law; the exclusive or controlling power vested in the entity to administer its designated functions; the level of financial support by the foreign state (including subsidies, special tax treatment, government-mandated fees, and loans); the entity's provision of services to the jurisdiction's residents; whether the governmental end or purpose sought to be achieved is expressed in the policies of the foreign government; and the general perception that the entity is performing official or governmental functions.

²⁷ See Resource Guide, supra note 17, at 19-22.

²³ Resource Guide, supra note 17, at 15.

²⁴ See Securities Exchange Act of 1934 § 30A(a)(1)-(3), 15 U.S.C. § 78dd-1(a)(1)-(3), -2(a)(1)-(3), -3(a)(1)-(3). Although not discussed herein, the FCPA also prohibits corrupt payments to any "Public International Organization," defined in 22 U.S.C. § 288, such as the World Bank, the International Monetary Fund, the World Trade Organization, and others.

in the Mexican Air Force

- Public officials of Polish healthcare facilities
- Chairman of a state-owned Iranian engineering company
- Employees of Chinese state-owned banks
- Physicians and other health care professionals in countries with nationalized healthcare
- Employees of Nigeria's National Petroleum Corporation

In 2014, the Eleventh Circuit issued the first-ever appellate court decision regarding the "foreign official" element under the FCPA, and determined that employees of Haiti's state-owned telecommunications company were government officials under the FCPA.²⁸ The Eleventh Circuit's decision supports the DOJ and SEC's expansive view of the FCPA's "foreign official" requirement.

Takeaway: The most common recipients of bribes in the human trafficking chain likely qualify as foreign officials under the FCPA, including labor officers that grant work permits, immigration officials that issue visas and passports, and law enforcement personnel that police trafficking. In addition to these government officials, bribes paid to state-owned entities that employ or otherwise facilitate human trafficking may also fall within the scope of the FCPA.

(iv.) To Obtain or Retain Business

Also interpreted broadly under the FCPA is the "business purpose test," which requires that a payment assist in obtaining or retaining business.²⁹ For example, the Fifth Circuit has held that "Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person, and that bribes paid to foreign tax officials to secure illegally reduced customs

and tax liability constitute a type of payment that can fall within this broad coverage."³⁰

The DOJ and SEC have interpreted the following actions taken by government officials as assisting FCPA defendants in obtaining or retaining business:³¹

- Winning a contract
- Avoiding contract termination
- Influencing the public procurement process
- Gaining access to non-public bid tender information
- Evading taxes or penalties
- Obtaining exceptions to regulations
- Influencing the adjudication of lawsuits or enforcement actions

Customs officials are often the recipients of bribes in FCPA enforcement actions. Though bribing a custom official does not always lead to a direct business advantage, the DOJ and SEC see the corollary effect of these bribes as a business advantage. For example, in a 2010 enforcement action against a global freight forwarder, the DOJ alleged that the company's bribes to customs officials allowed it to obtain a business advantage by allowing it to:³²

- Circumvent the rules for importation of products
- Evade customs duties on imported goods
- Improperly expedite the importation of goods and equipment
- Obtain false documentation related to temporary import permits
- Enable the release of goods and other equipment from customs officials

Ultimately, "while the FCPA does not cover every type of bribe paid around the world for every purpose, it does apply broadly to bribes paid to help obtain or retain business,

30 United States v. Kay, 359 F.3d 738, 755 (5th Cir. 2004).

31 See Resource Guide, *supra* note 17, at 13.

32 See *id.*; Press Release, U.S. Dep't of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties (Nov. 4, 2010), <http://www.justice.gov/opa/pr/oil-services-companies-and-freight-forwarding-company-agree-resolve-foreign-bribery>.

28 Esquenazi, *supra*, 752 F.3d at 932.

29 See H.R. Rep. No. 95-831, at 12 (1977) (referring to "business purpose" test).

which can include payments made to secure a wide variety of unfair business advantages.”³³

Takeaway: Bribes paid to secure the availability of forced labor in most situations could constitute a business advantage under the FCPA. This includes bribes paid to facilitate trafficking individuals across borders, and could also include bribes paid to officials to ignore violations of labor laws and health and safety laws while trafficked individuals are subjected to forced labor.

(v.) Anti-Bribery Provisions Applied to Human Trafficking Transactions

Putting these concepts together, the following hypothetical bribes used to facilitate human trafficking for a company subject to FCPA jurisdiction might constitute an FCPA violation:

- Cash payments, gifts or entertainment to secure government approvals and business contracts.
- Contracts to local businesses without tendering or RFPs as part of government approvals and larger transactions.
- Cash payments given to consular officers or other government officials to obtain false identification documents, visas, or passports for human trafficking victims.
- Providing expensive meals to immigration or customs officials who permit trafficked individuals to cross borders without adequate documentation.
- Providing first-class plane tickets and lavish hotel accommodation to the families of permitting agency officials who obtain false work permits for trafficked individuals.
- Providing prostitutes and drugs to local labor inspectors who ignore evidence of human trafficking, look the other way while workers are exploited and forced to work in unsafe conditions, and/or provide tip-offs about inspection raids on businesses.
- Providing free domestic workers to officials of state-owned entities in order to win government tenders or business licenses.

Each of these human trafficking scenarios is potentially an FCPA violation if the government could establish that the bribery of a foreign official was done by or at the behest of a person or entity subject to U.S. jurisdiction, the bribe was paid with corrupt intent, and the bribe assisted the corporation in obtaining or retaining business. In any particular scenario, the determination of whether the FCPA was violated is highly fact-specific. In Appendix B, a chart of hypothetical fact patterns is presented, highlighting areas where the risk of FCPA liability is highest and lowest. The chart also highlights other criminal statutes that may be used to disrupt human trafficking even where the elements of the FCPA might not be met.

(vi.) Exception and Affirmative Defenses to Anti-Bribery Offenses

In contrast to the government’s expansive reading of the FCPA’s elements and scope of liability in settled enforcement actions, defendants have had few opportunities to develop the scope of the FCPA’s exception and affirmative defenses. These provisions have yet to deter the government’s aggressive enforcement of the FCPA. Nevertheless, the FCPA does specifically enumerate one exception and two affirmative defenses: the “Facilitation Payment Exception;” the “Local Law Defense;” and the “Reasonable and Bona Fide Business Expenditure Defense.”

(a.) Facilitation Payment Exception

The “Facilitation Payment Exception” provides that the Anti-Bribery Offense “shall not apply to any facilitating or expediting payment to a foreign official . . . the purpose of which is to expedite or to secure the performance of a routine government action by a foreign official.”³⁴ Although there is little case law on this exception, at least one court has ruled that the government bears the burden of proving the inapplicability of the facilitating payment exception.³⁵ The DOJ and SEC guidance provides that this exception is “narrow” and that it is applicable in limited actions: “Examples of ‘routine government action’ include processing visas, providing police protection or mail service, and supplying utilities like phone service, power,

³⁴ See 15 U.S.C. § 78dd-1(b).

³⁵ See SEC v. Jackson, 908 F. Supp. 2d 834 (S.D. Tex. 2012).

33 Resource Guide, *supra* note 17, at 14.

and water. Routine government action does not include a decision to award new business or to continue business with a particular party. Nor does it include acts that are within an official's discretion or that would constitute misuse of an official's office."³⁶ In practice, only government fees that are publicly available, routinely paid, and provided for in law or regulation fall squarely within the exception. Given the limited scope of this exception, the DOJ and SEC still routinely prosecute cases based on excessive payments made to improperly secure visas, import permits, licenses and other documents necessary to conduct business in foreign countries. Note also that some local laws may prohibit facilitation payments.

Takeaway: Fees paid to expedite legal processing of visas, work permits, and other government approvals may not constitute bribes, but most other payments made to a government official to secure a benefit conferred outside of that official's duties could be subject to FCPA prosecution.

(b.) Local Law Defense

The Local Law Defense provides that it shall be an affirmative defense that the alleged payment "was lawful under the written laws and regulations" of the foreign official's country.³⁷ As with the Facilitation Payment Exception, this provision has not been extensively litigated and likely provides only a narrow defense. The Local Law Defense requires that the local law be "written." Thus, payments that may be routine as a matter of local custom or practice may still violate the FCPA if those practices are not formally memorialized. One of the few cases to address the Local Law Defense limited its applicability by finding that a foreign law granting immunity for publicly disclosed bribes did not render the disclosed bribes "lawful" under local law.³⁸ Moreover, with the success of the FCPA, foreign jurisdictions are increasingly criminalizing bribery and consequently limiting the applicability

of the FCPA's Local Law Defense.

Takeaway: If their actions are illegal under local law, corporations cannot defend against FCPA charges by pointing to lax enforcement and arguing that bribery and trafficking are part of the culture in the countries where they operate.

(c.) Reasonable and Bona Fide Business Expenditure Defense

Finally, the Reasonable and Bona Fide Business Expenditure Defense provides that it shall be an affirmative defense to an Anti-Bribery Offense that the alleged payment "was a reasonable and bona fide expenditure, such as travel and lodging expenses" related to the provision of goods or services or performance of a contract.³⁹ Though this defense has never been addressed by a court, the DOJ and SEC have issued several opinions through a procedure that permits companies to seek FCPA "Opinion Releases." Summarizing these opinions, the formal Guidance provides that expenses subject to this defense must be "reasonable," "bona fide," and "directly related" to the provision of products or services—for example, routine travel and expenses for training, promotional activities, and meetings.⁴⁰ This defense has not deterred the DOJ and SEC from bringing enforcement actions based on the provision of business travel, meals, entertainment, or other expenses deemed to be unreasonably expensive or unnecessary for business purposes. For example, a global telecommunications company was successfully prosecuted for FCPA violations based on payments for business trips made by employees of state-owned telecommunications firms in China despite the fact that the company's management believed the trips were necessary to perform on contracts with the Chinese firm.⁴¹

Takeaway: Travel or other benefits conferred upon government officials as an inducement to provide work permits, visas, or other improper benefits likely do not constitute bona fide business expenditures, and will

36 Resource Guide, *supra* note 17, at 25 (internal citations omitted).

37 15 U.S.C. § 78dd-2(c)(1).

38 *United States v. Bourke*, 582

F. Supp. 2d 535 (S.D.N.Y. 2008).

39 15 U.S.C. § 78dd-2(c)(2).

40 Resource Guide, *supra* note 17, at 24.

41 See Complaint, *SEC v. UTStarcom, Inc.*, No. 09-cv-6094 (N.D. Cal. Dec. 31, 2009), <http://www.sec.gov/litigation/complaints/2009/comp21357.pdf>.

still be subject to FCPA prosecution.

2. Elements of the FCPA's Accounting Provisions

In addition to the FCPA's core Anti-Bribery Offense, the FCPA's Accounting Provisions enumerate two additional offenses that do not require proof of foreign bribery.⁴² First, the FCPA's Books and Records Offense requires public corporations or "issuers" to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."⁴³ Second, the Internal Controls Offense requires issuers to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances" that transactions are executed in accordance with authorization from management, recorded appropriately, and audited at reasonable intervals.⁴⁴ The Accounting Provisions are typically enforced by the SEC in civil actions, but criminal penalties are provided for any person who knowingly falsifies any book, record, or account, or who knowingly fails to implement a system of internal accounting controls. In theory, the Accounting Provisions could provide an enforcement mechanism for U.S. regulators to broadly prosecute human trafficking on the theory that corporations have falsely recorded "forced labor" costs as "legitimate" labor costs.

The DOJ and SEC have charged defendants under the Accounting Provisions in most cases where an Anti-Bribery Offense is also charged, generally under the theory that the bribes were not accurately recorded as "bribes" in the company's books and records and that the company's system of internal controls was insufficient to prevent the bribes from being paid. Examples of cases litigating the elements of the FCPA's Accounting Provisions are rare. In one of the litigated cases, *SEC v. World-Wide Coin Investments*,⁴⁵ the court explained the limited requirements of the

Accounting Provisions, which are only that a company implements "reasonable," not absolute, accounting controls. The court explained that "reasonableness" may vary depending on the circumstances.⁴⁶

Because the hallmark of the Accounting Provisions is "reasonableness," various courts, in the context of civil derivative suits brought against company management for breaches of fiduciary duty stemming from FCPA Books and Records and Internal Controls Offenses, have held that the mere fact that improper conduct occurred did not mean that internal controls were necessarily deficient.⁴⁷ Nonetheless, in recent FCPA enforcement actions, the DOJ and SEC have vastly extended the scope of liability under the Accounting Provisions such that they may sweep broadly enough to encompass virtually any misconduct, including human trafficking, that is incorrectly accounted for in a company's books.

The 2012 Oracle enforcement action exemplifies the potentially expansive scope of the Accounting Provisions. In that case, the SEC charged Oracle's U.S. parent corporation with Books and Records and Internal Controls offenses for not auditing local distributors hired by its Indian subsidiary, without alleging that the distributors (or anyone else) had made any improper payments to any foreign government official. The sole allegation was that the company's subsidiary had not accurately recorded certain cash funds. The Oracle case illustrates that corporations are expected to police for, identify, and respond to compliance red flags in their organization.

Specifically, in Oracle the SEC alleged that by failing to audit distributor margins, Oracle allowed its Indian subsidiary to "secretly 'park[]' a portion of the proceeds from certain sales to the Indian government and put the money to unauthorized use, creating [the potential for bribery or embezzlement](#)."⁴⁸ In

42 Indeed, over 1,200 cases have been brought under the FCPA's Accounting Provisions that do not involve allegations of foreign bribery. See Koehler, *supra* note 2, at 136.

43 15 U.S.C. § 78m(b)(2)(A).

44 15 U.S.C. § 78m(b)(2)(B).

45 *SEC v. World-Wide Coin Invs., LTD*, 567 F. Supp. 724 (N.D. Ga. 1983).

46 *Id.* at 751. Specifically, the court found that "The definition of accounting controls does comprehend reasonable, but not absolute, assurances that the objectives expressed in it will be accomplished The size of the business, diversity of operations, degree of centralization of financial and operational management . . . and numerous other circumstances are factors which management must consider." *Id.*

47 See, e.g., *Freuler v. Parker*, 803 F. Supp. 2d 630 (S.D. Tex. 2011).

48 Complaint, *SEC v. Oracle Corp.*, No. CV1204310 (N.D. Cal. Aug. 16, 2012) (emphases

its press release announcing the settlement, the SEC stated “[t]hrough its subsidiary’s use of secret cash cushions, Oracle exposed itself to the risk that these hidden funds would be put to illegal use. It is important for U.S. companies to proactively establish policies and procedures to minimize the potential for payments to foreign officials or other unauthorized uses of company funds.”⁴⁹

The allegations against Oracle were that it failed to audit distributor margins against end-user prices and that it failed to audit third-party payments made by distributors. The SEC did not identify any red flags that Oracle should have realized were indicative of improper conduct. In fact, to the contrary, the SEC alleged that Oracle’s subsidiary “concealed” and kept “secret” the conduct from Oracle.⁵⁰ This case exemplifies the SEC’s willingness and ability to bring enforcement actions against virtually any companies that do not record any payment properly, by simply alleging that some aspect of the company’s internal controls was insufficient, regardless of whether anyone knew of the weakness at the time. U.S. regulators have similarly used “control person” liability to reach corporate executives who have no knowledge whatsoever of the alleged FCPA violations that exist within the corporation, yet can be held accountable due to their status within the corporation.⁵¹

Takeaway: As discussed in Section III below, because U.S. enforcement authorities have advocated such an expansive theory of corporate liability, the FCPA’s Accounting Provisions may provide fertile ground for organizations interested in disrupting the human trafficking chain.

added), <https://www.sec.gov/litigation/complaints/2012/comp-pr2012-158.pdf>.

49 Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Oracle Corporation with FCPA Violations Related to Secret Side Funds in India (Aug. 16, 2012) (emphasis added), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171483848>.

50 Id.

51 “Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.” 15 U.S.C. § 78m(t). See, e.g., Complaint, SEC v. Nature’s Sunshine Products, Inc., No. 09CV672 (D. Utah July 31, 2009), <http://www.sec.gov/litigation/complaints/2009/comp21162.pdf>. In Nature’s Sunshine Products, the SEC alleged that during 2000 and 2001, Nature’s Sunshine Product’s Brazilian subsidiary (“NSP Brazil”) made over \$1 million in cash payments to Brazilian customs brokers to facilitate the importation of various NSP products without having to register the products as medicine in accordance with new Brazilian laws. The SEC never alleged that the CFO and COO had

any knowledge of NSP Brazil’s illegal conduct or that the company’s books and records had failed to accurately reflect the cash payments to Brazilian officials. Rather, the SEC complaint alleged that these executives failed to adequately supervise the employees responsible for making and keeping the books and records and maintaining a system of internal controls sufficient to provide reasonable assurance that the registration of NSP products sold in Brazil was adequately monitored.

III. THE FCPA'S EXTENSIVE REACH

1. FCPA and Extraterritorial Jurisdiction

A unique aspect of the FCPA is its provisions for extraterritorial jurisdiction.⁵² As will be discussed in Section IV, *infra*, the U.S. anti-trafficking statutes have a similar provision. It is rare for countries to dedicate prosecutorial resources and provide for jurisdiction over activity occurring outside that country's borders. Typically, U.S. criminal statutes can only be applied for conduct within the U.S., but the FCPA is unique in that it can be applied to the conduct of U.S. companies and persons outside of the U.S. Specifically, the FCPA applies to the conduct of: (i) U.S. "issuers" acting anywhere in the world; (ii) U.S. "domestic concerns" acting anywhere in the world; and (iii) foreign persons acting in the U.S.⁵³ Each of these bases for liability is described below.

(i.) Issuers

Generally speaking, "issuers" include all companies that list securities traded on a U.S. stock exchange.⁵⁴ Additionally, the DOJ and SEC have noted that "officers, directors, employees, agents or stockholders acting on behalf of an issuer (whether U.S. or foreign nationals)" can also be prosecuted under the FCPA.⁵⁵

52 See Brilmayer & Norchi, *supra* note 3, at 1218 n.3 (A case "involves extraterritoriality when at least one relevant act occurs in another nation.").

53 See 15 U.S.C. § 78dd-1, -2, -3.

54 More specifically, an "issuer" is any company that has a class of securities (including American Depositary Receipts ("ADRs")) traded on a U.S. exchange or is otherwise required to file periodic reports with the SEC, regardless of whether the company is U.S. or foreign. See 15 U.S.C. § 78l, 15 U.S.C. § 78o(d). An ADR is a negotiable security, denominated in U.S. dollars, that represents securities of a non-U.S. company that trades in the U.S. financial markets. In 2014, the SEC reported that nearly 1,000 non-U.S. corporations were registered and reporting to the SEC. See U.S. Sec. & Exch. Comm'n, Number of Foreign Companies Registered and Reporting with the U.S. Securities and Exchange Commission (Dec. 31, 2014), <http://www.sec.gov/divisions/corpfin/internatl/foreignsummary2014.pdf>.

55 Resource Guide, *supra* note 17, at 11.

(ii.) Domestic Concern

A "domestic concern" includes any individual who is a citizen, national, or resident of the U.S. or any form of business (e.g., limited liability companies, partnerships, or even private corporations) that is organized under U.S. law or with a principal place of business in the United States.⁵⁶ As with "issuers", any officers, directors, employees, agents or stockholders acting on behalf of a domestic concern are also subject to the FCPA.

(iii.) Foreign Persons Acting in the U.S.

The final basis for FCPA jurisdiction encompasses any person who takes an action within the United States that violates the FCPA. This basis of jurisdiction is described in the Resource Guide as applying to any person that "either directly or through an agent, engages in any act in furtherance of a corrupt payment . . . while in the territory of the United States, regardless of whether they utilize the U.S. mails or a means or instrumentality of interstate commerce."⁵⁷ And as with any other criminal statute, FCPA enforcement actions may be brought against foreign individuals based on their ties or actions in the United States as part of a conspiracy,⁵⁸ as an accomplice who aids or abets an FCPA violation,⁵⁹ or as an accessory after the fact.⁶⁰

Takeaway: Most multinational corporations operating around the world are subject to FCPA jurisdiction, and many other individuals and organizations may also be subject to FCPA jurisdiction.

56 15 U.S.C. § 78dd-2(h)(1).

57 15 U.S.C. § 78dd-3(a); Resource Guide, *supra* note 17, at 11-12.

58 See 18 U.S.C. § 371. As the Resource Guide makes explicit, enforcement actions have been brought against foreign nationals have been based on theories of aiding and abetting, or conspiring with an issuer or domestic concern, "regardless of whether the foreign national or company itself takes any action in the United States." Resource Guide, *supra* note 17, at 12. For example, in *United States v. JGC Corp.*, one of the two cases cited in the Resource Guide, DOJ asserted jurisdiction over JGC for its role in conspiring with domestic concerns to violate the FCPA. See Criminal Information, *United States v. JGC Corp.*, No. 11-cr-260 (S.D. Tex. Apr. 6, 2011), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/04/27/04-6-11jgc-corp-info.pdf>.

59 See 18 U.S.C. § 2.

60 See 18 U.S.C. § 3.

2. Corporate and Subsidiary Liability

Of course, there are some limits to the jurisdictional reach of all U.S. statutes. For example, in the civil context, the U.S. Supreme Court has stated that the U.S. Constitution's Due Process Clause requires that if a defendant is "not present within the territory of the forum, he [must] have certain **minimum contacts** with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."⁶¹

In the context of the FCPA, the minimum contacts necessary for U.S. jurisdiction may be established where the SEC shows that the defendant "purposefully availed himself of the privilege of doing business in the forum and could foresee being haled into court there."⁶² At least one court has dismissed FCPA charges for lack of jurisdiction. In *SEC v. Sharef*, the court granted a motion to dismiss for lack of jurisdiction in an FCPA prosecution, finding that:

[T]he exercise of jurisdiction over foreign defendants based on the effect of their conduct on SEC filings is in need of a limiting principle. If this Court were to hold that [defendant]'s support for the bribery scheme satisfied the minimum contacts analysis, even though he neither authorized the bribe, nor directed the cover up, much less played any role in the falsified filings, minimum contacts would be boundless.⁶³

Nonetheless, the scope of U.S. jurisdiction is vast, and the DOJ and SEC's broad view of jurisdiction generally prevails. The broad extraterritorial jurisdiction provided by the FCPA has permitted U.S. regulators to reach corrupt conduct occurring across the globe, including conduct with limited ties to the United States. For these reasons, the FCPA may be well-suited to combatting human trafficking that occurs around the world and beyond the territory of the United States.

With the possible exception of anti-trust criminal statutes, the FCPA has been used against corporations more than any other criminal statute. This is because of some of the unique features of the FCPA statute and the way the DOJ and SEC have applied the statute. As with most criminal statutes, under the *respondeat superior* doctrine, corporations may be held liable for FCPA violations committed by their officers, directors, and employees acting within the scope of their employment.⁶⁴ Similarly, as with other criminal statutes, under theories of agency, corporations can be liable for FCPA violations carried out by their subsidiaries. In the FCPA context, the DOJ and the SEC have interpreted the term "agent" broadly to include corporate subsidiaries in most cases. Because human trafficking is often facilitated through various layers of corporate ownership, agents, and third-parties, this aspect of the FCPA may prove particularly useful in combatting human trafficking.

The DOJ and SEC Resource Guide states that parent-subsidiary liability under the FCPA is based on traditional agency principles – essentially, whether the parent controlled or directed the actions of its subsidiary.⁶⁵ As

64 *Respondeat superior* liability is a common law principle that was incorporated into U.S. criminal law by the Supreme Court in *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909). The jury instructions in a recent case against Lindsey Manufacturing Company, "the only time in FCPA history that a corporate FCPA charge was presented to a jury," included instructions on *respondeat superior* liability for the company if "the offense charged was committed by one or more agents or employees of Lindsey." See Koehler, *supra* note 2, at 48-49 (citing *United States v. Enrique Fausto Aguilar Noriega*, Case 2:10-cr-01031-AHM (C.D. Cal. 2010)).

65 "There are two ways in which a parent company may be liable for bribes paid by its subsidiary. First, a parent may have participated sufficiently in the activity to be directly liable for the conduct—as, for example, when it directed its subsidiary's misconduct or otherwise directly participated in the bribe scheme. Second, a parent may be liable for its subsidiary's conduct under traditional agency principles. The fundamental characteristic of agency is control. Accordingly, DOJ and SEC evaluate the parent's control—including the parent's knowledge and direction of the subsidiary's actions, both generally and in the context of the specific transaction—when evaluating whether a subsidiary is an agent of the parent." Resource Guide, *supra* note 17, at 27 (internal citations omitted).

61 *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (emphasis added) (citations omitted).

62 See *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 127 (2d Cir. 2002).

63 *SEC v. Sharef*, 924 F. Supp. 2d 539, 547 (S.D.N.Y. 2013).

an example, the Resource Guide cites to a proceeding against an investment holding corporation⁶⁶ for bribes paid by the president of its indirect, wholly-owned foreign subsidiary. In that proceeding, the SEC alleged an agency relationship in which the parent corporation had sufficient control of its subsidiary to be liable under the FCPA because:⁶⁷

- The subsidiary's president reported directly to the CEO of the parent.
- The parent routinely identified the subsidiary's president as a member of its senior management in its annual filing with SEC and in annual reports.
- The Parent's legal department approved the retention of the third-party agent through whom the bribes were arranged, despite an agency agreement that violated corporate policy and a lack of documented due diligence.
- An official of the parent approved one of the payments to the third-party agent.

In more recent enforcement actions, the DOJ and SEC have approached a strict liability theory (*i.e.*, imposing liability even where direction and control over the subsidiary have not been alleged) for corporate parents based on the acts of their foreign subsidiaries. For example, in a recent enforcement action against an apparel company for bribes paid to customs officials by the customs broker of its Argentinian subsidiary, the DOJ charged the parent company without alleging any involvement by the parent in the subsidiary's misconduct.⁶⁸

Takeaway: The expansive interpretation the DOJ and SEC have given to the standard theories of corporate liability in the FCPA context could apply with

equal force in other contexts including human trafficking prosecutions.

3. Liability for Third Parties

In addition to these general principals of corporate liability, the FCPA has a unique provision that expressly creates liability for the acts of a third party. As will be discussed in Section IV, *infra*, the U.S. anti-trafficking statutes have a similar provision. Under the FCPA, it is unlawful to pay money to a party "while knowing" that a portion of such payment will be offered to a government official to assist that person in obtaining or retaining business.⁶⁹ The FCPA's definition of "knowledge" has given this provision a wide scope. Under the FCPA, knowledge that a payment is to be used as a bribe can be shown by establishing that a person is aware of a "high probability" that the payment is to be used as a bribe.⁷⁰

The "high probability" provision was added as part of a 1988 amendment to the FCPA. When drafting this language Congress explained:

In clarifying the existing foreign anti-bribery standard of liability under the Act as passed in 1977, the Conferees agreed that "simple negligence" or "mere foolishness" should not be the basis for liability. However, the Conferees also agreed that the so-called "head-in-the-sand" problem—variously described in the pertinent authorities as "conscious disregard," "willful blindness" or "deliberate ignorance"—should be covered so that management officials could not take refuge from the act's prohibitions by their unwarranted obliviousness to any action (or inaction), language or other "signaling device" that should

66 Admin. Proceeding Order, United Industrial Corp., Exchange Act Release No. 60005 (May 29, 2009), <http://www.sec.gov/litigation/admin/2009/34-60005.pdf>; see also Lit. Release No. 21063, SEC v. Worzel, No. 09-Civ-01005 (May 29, 2009), <http://www.sec.gov/litigation/litreleases/2009/lr21063.htm>.

67 Resource Guide, *supra* note 17, at 27-28.

68 This approach has been criticized by former DOJ enforcement attorneys, and may not withstand judicial scrutiny. See Philip Urofsky, *The Ralph Lauren FCPA Case: Are There Any Limits to Parent Corporation Liability?*, Bloomberg BNA (May 13, 2013), <http://www.bna.com/the-ralph-lauren-fcpa-case-are-there-any-limits-to-parent-corporation-liability/>.

69 See Securities Exchange Act of 1934 § 30A(a)(3), 15 U.S.C. § 78dd-1(a)(3), -2(a)(3), -3(a)(3).

70 See Securities Exchange Act of 1934 § 30A(f)(2)(B), 15 U.S.C. § 78dd-1(f)(2)(B), -2(h)(3)(B), -3(f)(3)(B).

reasonably alert them of the “high probability” of an FCPA violation.⁷¹

The DOJ and SEC Resource Guide picks up on this legislative history and notes that:

Because Congress anticipated the use of third-party agents in bribery schemes—for example, to avoid actual knowledge of a bribe—it defined the term “knowing” in a way that prevents individuals and businesses from avoiding liability by putting “any person” between themselves and the foreign officials. . . . As Congress made clear, it meant to impose liability not only on those with actual knowledge of wrongdoing, but also on those who purposefully avoid actual knowledge[.]⁷²

A recent high-profile case, *United States v. Kozeny*, though not directly interpreting this provision, illustrates this principal. In *Kozeny*, the defendant, Bourke, made a two-percent investment in a venture led by Viktor Kozeny to purchase Azerbaijan’s state-owned oil company. Kozeny used a portion of the investments to bribe Azeri officials. Though the jury found that Bourke lacked any concrete knowledge of the bribes, he was nevertheless convicted of conspiring to violate the FCPA under a conscious avoidance theory. He was sentenced to one year and one day in prison and ordered to pay a \$1 million fine.

By upholding the conviction in *Kozeny*, the Second Circuit demonstrated its willingness to adopt a low threshold for the FCPA’s knowledge requirement.⁷³ Ultimately, the Second Circuit found that “a rational juror could conclude that Bourke deliberately avoided confirming his suspicions that [co-defendant] and his cohorts may be paying

bribes.”⁷⁴ The key facts that the Second Circuit relied upon in *Kozeny* included:

- Bourke knew that the leader of the investment, Victor Kozeny, had a history of participating in suspicious business practices.
- Bourke knew about Azerbaijan’s pervasively corrupt business environment.
- Other investors were suspicious of the legitimacy of the venture after exposure to the same information as Bourke and, as a result, declined to participate in the venture.
- Bourke created advisement companies to attempt to shield himself and other American investors from potential liability.

While this “circumstantial” and “reputational” evidence is far removed from evidence of direct knowledge that bribes were made, it was still sufficient to show that Bourke actively avoided learning about such improper payments. Thus, to use the FCPA’s terms, he made investments (“payments”) in a business “while knowing” that some of those payments would be used to bribe foreign officials.

Takeaway: Under the FCPA’s unique provisions regarding liability for third parties, bribes that are several layers removed from the corporations benefitting from them may nonetheless provide a hook for FCPA prosecution. As discussed in Section V., *infra*, this is particularly true in cases similar to *Kozeny*, where the corporation has reason to believe that bribes and human trafficking may be facilitating the availability of cheap labor. For example, the use of labor recruiters to secure seasonal labor and low-skilled labor, as well as the use of products whose supply chain is known to utilize human trafficking, are all warning signs that might give rise to FCPA liability if companies do not conduct proper due diligence.

4. Other Foreign Bribery Statutes

In recent years, other countries have begun to pass anti-corruption statutes with broad jurisdictional reach including, most notably,

71 H.R. Rep. No. 100-576, at 920 (1988) (Conf. Rep.), <http://www.usdoj.gov/criminal/fraud/fcpa/history/1988/tradeact-100-418.pdf>.

72 Resource Guide, *supra* note 17, at 22.

73 A former Deputy Attorney General recently remarked: “Aggressive use of the concept of ‘willful blindness’ as a basis for criminal liability is clearly at the forefront of enforcement officials’ intentions.” Gregory M. Lipper, *Foreign Corrupt Practices Act and the Elusive Question of Intent*, 47 Am. Crim. L. Rev. 1463, 1466 (2010).

74 *United States v. Kozeny*, 667 F.3d 122, 133 (2d Cir. 2011).

the United Kingdom's Bribery Act ("UKBA"). Because these statutes have not, thus far, been enforced as robustly as the FCPA, the precise contours of these statutes are not discussed in this Analysis. However, a brief overview of the UKBA is provided below as a guide to practitioners for cases where an FCPA enforcement action may not be viable. In addition, Appendix A provides a country-by-country list of local laws governing human trafficking and corruption.

(i.) U.K. Bribery Act 2010

The UKBA is similar to the FCPA insofar as it criminalizes bribery and has extraterritorial reach. But because there are key differences between the two statutes, the UKBA may or may not be a more effective tool in fighting human trafficking (or corrupt acts correlating with human trafficking), depending on the specific fact pattern in question. The key provisions of the UKBA are set out below, with important differences *vis-à-vis* the FCPA noted where relevant.

- *Commercial bribery.* In addition to prohibiting the bribery of foreign public officials,⁷⁵ the UKBA also prohibits private commercial bribery where no public official is involved.⁷⁶
- *Passive bribery.* The recipient of a bribe is also subject to liability under the UKBA,⁷⁷ whereas the FCPA only punishes the person making the corrupt payment.
- *Corporate and officer liability.* Like the FCPA, the UKBA can subject companies and their senior officers to criminal liability where they failed to prevent bribery from occurring in certain circumstances.⁷⁸ The company is guilty of an offense if a person associated with the company bribes another person, intending to obtain or retain business or a business advantage for the company (the "Corporate Offense"). Although this is a strict liability offense,

75 U.K. Bribery Act 2010, c. 23, § 6.

76 See U.K. Bribery Act 2010, c. 23, §§ 1-2.

77 U.K. Bribery Act 2010, c. 23, § 2.

78 UKBA Section 7 subjects a company to liability for failing to prevent bribery by persons "associated with" the company in certain circumstances. UKBA Section 14 subjects a senior officer to liability if an offense by a body corporate was committed with the "consent or connivance" of such senior officer.

the company does have a defense if it can show that it had in place "adequate procedures" designed to prevent bribery. Companies can also commit the primary bribery offences identified above.⁷⁹

- *No accounting requirements.* In contrast to the books and records provision of the FCPA, the UKBA has no explicit accounting requirements. However, the adequate procedures defense noted above (along with other legislation criminalizing accounting malpractice) does lead to companies adopting accounting procedures similar to those mandated by the FCPA.
- *Motive.* The motive requirements under the UKBA depend on the underlying offense. Offenses under the general anti-bribery provision require intent to induce or reward improper performance of a relevant function or activity or knowledge or belief that receipt of the financial or other advantage would itself constitute improper performance.⁸⁰ An offense under the prohibition on bribing foreign public officials merely requires the person to intend to influence the foreign public official in his or her capacity as such, to obtain or retain business or a business advantage, with no requirement of intent to induce him or her to act improperly.⁸¹
- *Territorial scope.* The UKBA, save in respect of the Corporate Offense, applies to offenses committed within the U.K.⁸² or anywhere in the world by those with a "close connection" to the U.K. (which generally includes, *inter alia*, U.K. citizens, U.K. residents and companies incorporated in the U.K., which, as noted above, can commit a primary bribery offense as well as the Corporate Offense).⁸³ The territorial scope for the Corporate Offense is wider. It applies to offenses by any company that carries on business (or part of a business) in the U.K., whether the underlying act of bribery took place in

79 See, e.g., U.K. Bribery Act 2010, c. 23, §§ 1, 2, 6; Ministry of Justice, The Bribery Act 2010: Quick Start Guide 3, <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-quick-start-guide.pdf>.

80 U.K. Bribery Act 2010, c. 23, § 1(2)(b), (3)(b).

81 U.K. Bribery Act 2010, c. 23, § 6(1)-(2).

82 U.K. Bribery Act 2010, c. 23, § 12(1).

83 U.K. Bribery Act 2010, c. 23, § 12(2).

the U.K. or not.⁸⁴ As with the FCPA, the UKBA does not directly cover slavery or human trafficking offenses, and neither have been used in the human trafficking context. But to the extent bribes were paid in connection with slavery or human trafficking, then the UKBA could be a potential tool to prosecute the relevant companies or individuals, subject to satisfaction of the jurisdictional and other requirements summarized above.

IV. THE TRAFFICKING VICTIMS PROTECTION ACT

The FCPA is a statute designed to regulate foreign corruption and bribery. To the extent the statute can be used to fight human trafficking by holding perpetrators accountable for bribes paid to facilitate trafficking, it is an imperfect tool. The good news is that the United States has adopted a criminal statute designed to combat human trafficking—the Trafficking Victims Protection Act (the “TVPA”).⁸⁵ The TVPA is a unique statute and shares two key characteristics of the FCPA: extraterritorial application and broad liability for the acts of third parties. Indeed, the TVPA has an even lower “reckless disregard” standard of liability that may impose potential liability on individuals and corporations that fail to self-police for human trafficking risks. Because of the challenges in using the FCPA to combat trafficking, the TVPA should be considered as an alternative mechanism for addressing corruption in those contexts. If U.S. regulators were to focus enforcement resources on the TVPA, it could be as successful as the FCPA in combatting criminal activity abroad and reforming corporate compliance cultures to police for and eliminate human trafficking in their supply chains.

The TVPA is a relatively new statute that was first passed in 2000 and has been reauthorized four times.⁸⁶ The TVPA’s stated purpose is to “combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”⁸⁷ When drafting the TVPA, Congress was concerned, among other things, that “[n]o comprehensive law

⁸⁵ Trafficking Victims Protection Act of 2000, 18 U.S.C. §§ 1581-97.

⁸⁶ The reauthorization acts of 2003, 2005, 2008 and 2013 authorized appropriations to carry out the legislation’s objectives. The Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875; the Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558; and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, respectively. In 2013, the Trafficking Victims Protection Reauthorization Act of 2013 was added, in its entirety, as an amendment to the Violence Against Women Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

⁸⁷ Pub. L. No. 106-386, § 102(a), 114 Stat. 1464, 1466 (codified at 22 U.S.C. § 7101(a)).

⁸⁴ U.K. Bribery Act 2010, c. 23, §§ 7, 12(5).

exist[ed] in the United States that penalize[d] the range of offenses involved in the trafficking scheme” and traffickers “typically escape[d] deserved punishment.”⁸⁸ The Supreme Court had “narrowly interpreted” the then-existing statutes to “criminalize only servitude that is brought about through use or threatened use of physical or legal coercion, and to exclude other conduct that can have the same purpose and effect.”⁸⁹ Thus, among other things, the TVPA provided stronger and more focused anti-trafficking criminal statutes that recognized other forms of coercion. Below is a summary of the key provisions of the TVPA statutes.

1. The TVPA’s Forced Labor Provision (18 U.S.C. § 1589(a))

The centerpiece of the TVPA criminal provisions is the forced labor provision in which Congress addressed “the increasingly subtle methods of traffickers who place their victims in modern-day slavery, such as where traffickers . . . restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence.”⁹⁰ As such, the TVPA criminalizes four types of forced labor, only one of which involves physical force:

- by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
- by means of serious harm or threats of serious harm to that person or another person;
- by means of the abuse or threatened abuse of law or legal process; or
- by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.⁹¹

88 22 U.S.C. § 7101(b)(14).

89 22 U.S.C. § 7101(b)(13) (citing *United States v. Kozminski*, 487 U.S. 931 (1988)).

90 H.R. Rep. No. 106-939, at 101 (2000) (Conf. Rep.). In enacting the TVPA, Congress sought to override the Supreme Court’s narrow interpretation of involuntary servitude statutes in *United States v. Kozminski*, 487 U.S. 931 (1988). Pub. L. No. 106-386, § 102(b)(13), 114 Stat. 1464, 1467.

91 18 U.S.C. § 1589(a).

Takeaway: Under the TVPA, labor can be “forced” in a variety of ways beyond actual physical harm, including threats, abuses of the legal process and other nonviolent coercive tactics.

2. Other TVPA Provisions - Trafficking and Documents (18 U.S.C. §§ 1590 and 1592)

Because forced labor is dependent on a chain of traffickers, the TVPA criminalizes recruiting, harboring, transporting, providing or obtaining a person for the purpose of forced labor, as outlined above.⁹² Similarly, to deter traffickers, the TVPA criminalizes destroying, concealing, removing, confiscating, or possessing actual or purported travel and identification documents.⁹³ This is intended to address circumstances in which, although the end goals of trafficking were not achieved, “there is evidence that a trafficker intended to commit such a crime and withheld or destroyed immigration or identification documents for the purpose of preventing the trafficking victim from escaping.”⁹⁴ By punishing the different aspects of trafficking, these provisions seek to remedy prior laws, which were “inadequate to deter trafficking and bring traffickers to justice.”⁹⁵

Takeaway: The TVPA holds accountable the entire trafficking chain from the recruiter to the person confiscating travel documents. Under standard principles of U.S. criminal liability, and the general provisions of the TVPA,⁹⁶ persons who aid, abet, conspire with, conceal after the fact, or otherwise facilitate a TVPA offense may also be held criminally liable.

92 18 U.S.C. § 1590 was enacted as part of the original statute in 2000. For example, in *David v. Signal International, LLC*, 37 F. Supp. 3d 822, 832 (E.D. La. 2014), discussed *infra*, the court also held that plaintiffs had sufficiently stated a claim against defendant Burnett under § 1590 because Burnett had recruited plaintiffs for labor in violation of § 1589.

93 18 U.S.C. § 1592.

94 H.R. Rep. No. 106-939, at 102.

95 22 U.S.C. § 7101(b)(14).

96 18 U.S.C. § 1594.

3. Criminal Enforcement of the TVPA

In 2007, the U.S. Department of Justice Civil Rights Division created the Human Trafficking Prosecution Unit (“HTPU”).⁹⁷ This specialized unit has increased national human trafficking prosecutions and enhanced the DOJ’s ability to bring significant human trafficking cases, particularly novel, complex, multi-jurisdictional, and multi-agency cases and those involving transnational organized crime and financial crimes.⁹⁸

To date, the DOJ has primarily focused TVPA enforcement on individual perpetrators, primarily sex offenders, who have committed acts within the United States.⁹⁹ However, government prosecution of human trafficking cases is accelerating. Labor trafficking in particular has surged with successful recent prosecutions in agricultural fields, sweatshops, and bars, among other places.¹⁰⁰ During fiscal years 2009 through 2012, U.S. government prosecutions increased 39% (sex and labor trafficking combined) over the prior four-year period, with labor trafficking increasing at a more dramatic 118% for the same time period.¹⁰¹ Prosecution beyond U.S. borders may also soon increase. At a Human Trafficking Prevention Month event in January 2015, then U.S. Attorney General Eric Holder remarked that the government will “continue to reinforce key relationships both within, and beyond, America’s borders—because it’s only by rallying a broad coalition of international partners that we can combat human trafficking on a truly global scale.”¹⁰²

97 See U.S. Dep’t of Justice, Attorney General’s Annual Report to Congress and Assessment of U.S. Government Activities to Combat Trafficking in Persons 47 (Fiscal Year 2012) [hereinafter Att’y Gen.’s Trafficking Report], <http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/10/28/agreporhumantrafficking2012.pdf>.

98 *Id.*

99 *Id.* at 47-48.

100 See Human Trafficking Prosecution Unit, U.S. Dep’t of Justice (last updated Nov. 20, 2015), <http://www.justice.gov/crt/human-trafficking-prosecution-unit-htpu>.

101 Att’y Gen.’s Trafficking Report, *supra* note 98, at 47-48. Human trafficking prosecutions totaled 194 from FY 2009-2012. Specifically with respect to forced labor cases, DOJ brought 22 cases, charged 38 defendants and secured 33 convictions. *Id.* at 47.

102 See Eric H. Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, Remarks at Justice Department Event Marking National Slavery & Human Trafficking Prevention

Takeaway: Prosecutorial interest in enforcing the TVPA is building steadily in the United States, and U.S. regulators have indicated an interest in working with governments across the globe to disrupt the human trafficking chain. This multinational enforcement strategy that has proven to be effective in numerous FCPA prosecutions could provide a model for multinational enforcement against human trafficking.¹⁰³

4. Private Enforcement of the TVPA

In 2003, Congress reauthorized the TVPA and added a provision allowing victims to bring a civil action for violation of the criminal TVPA provisions.¹⁰⁴ Unlike the FCPA, where an action can only be brought by DOJ or the SEC, the TVPA allows for a private civil action to be brought against a perpetrator or whoever knowingly benefited from participation in a venture where that person “knew or should have known” that the venture had engaged in a violation of the TVPA.¹⁰⁵

To date there have been a handful of private civil actions. In these actions courts have found a variety of methods sufficient to state a forced labor claim under § 1589(a), such as forcing laborers to assume debt with an inability to repay, threatening laborers with deportation, or nonviolently coercing them to remain as laborers.¹⁰⁶ For example, in *David v. Signal International, LLC*, twelve Indian citizens filed a civil suit, alleging that defendants lured them with false promises of permanent residency to work at defendant Signal’s shipyard in the

Month (Jan. 29, 2015), <http://www.justice.gov/opa/speech/attorney-general-eric-h-holder-jr-delivers-remarks-justice-department-event-marking>.

103 For example, in a recent enforcement action the SEC praised the assistance it received from the Anti-Corruption Department of the African Development Bank and the South African Financial Services Board. See Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Hitachi with FCPA Violations (Sep. 28, 2015), <http://www.sec.gov/news/pressrelease/2015-212.html>.

104 18 U.S.C. § 1595.

105 18 U.S.C. § 1595(a)

106 See, e.g., *Panwar v. Access Therapies, Inc.*, 975 F. Supp. 2d 948, 957-58 (S.D. Ind. 2013) (holding that threats of non-physical coercion related to immigration status and threats of financial harm that force plaintiff to continue working are sufficient to state claim under § 1589(a)); *Kiwanuka v. Bakilana*, 844 F. Supp. 2d 107, 115-16 (D.D.C. 2012) (holding that the abuse or threatened abuse of law or legal process includes threats of deportation).

aftermath of Hurricane Katrina. The hope of green cards, fear of deportation, and the requirement that they pay exorbitant travel, recruitment, and other expenses compelled their continued employment. Defendant Burnett—an immigration attorney—filed a motion to dismiss, arguing that plaintiffs had not alleged that he had ever forced plaintiffs to work or ever threatened them with deportation. Plaintiffs alleged that Burnett entered into a joint venture with other defendants to recruit Indian workers for Signal, promising green cards in the United States even though they were ineligible for such residency.¹⁰⁷ Plaintiffs further alleged that Burnett threatened that plaintiffs would lose their visa status if they took legal action against Signal.¹⁰⁸ The court denied the motion to dismiss, asserting that plaintiffs had stated a claim against Burnett under § 1589 because threats of being in debt and being unable to repay constitutes “serious harm” under § 1589(c)(2).¹⁰⁹ In February 2015, a jury awarded plaintiffs \$14.1 million in compensatory and punitive damages.¹¹⁰

Takeaway: Under the TVPA, victims may bring a civil lawsuit and collect punitive damages. In this sense, the TVPA is even broader than the FCPA, as the TVPA’s civil remedy creates an avenue to privately combat human trafficking.

Similarities between the TVPA and the FCPA

As discussed above, the TVPA shares two unique provisions with the FCPA: extraterritoriality and the ability to prosecute

principals for the acts of third parties. This section discusses the provisions in the TVPA to show how U.S. regulators can support robust international enforcement against human trafficking through the use of the TVPA.

(i.) Extraterritoriality

In the 2008 reauthorization, Congress added an extraterritorial provision to the TVPA. The provision applies to certain sections of the TVPA, including the forced labor and trafficking provisions. It allows DOJ to assert jurisdiction for activity that happened abroad when the perpetrator is a U.S. national, an alien lawfully admitted for permanent residence or currently in the United States.¹¹¹ Though the DOJ has yet to prosecute a U.S. company under this provision, it arguably allows for TVPA prosecution of U.S. companies for actions abroad.¹¹²

Takeaway: The broad extraterritorial jurisdictional reach of the TVPA permits the U.S. to reach conduct occurring abroad, just like the FCPA.

(ii.) Liability for Acts of Third Parties

The forced labor provision of the TVPA has a special provision—also added during the 2008 reauthorization—allowing for the prosecution of a party who “knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged [forced labor].”¹¹³ The statute defines knowing as “knowing or **in reckless disregard** of the fact that the venture has engaged in [forced labor].”¹¹⁴

The TVPA’s “reckless disregard” provision is similar to, though different from, the FCPA’s provision regarding third-party liability. As discussed above in depth, the FCPA prohibits making payments to third-party intermediaries if they are made “while knowing” that some or all of the payment will be offered to a government official to assist that person

107 David, *supra*, 37 F. Supp. 3d at 831. As guest workers brought in under H-2B visas, they were ineligible for permanent residency.

108 *Id.* at 832.

109 *Id.*

110 See Press Release, Am. Civ. Liberties Union, Federal Jury Awards \$14 Million to Indian Guest Workers Victimized in Labor Trafficking Scheme by Gulf Coast Shipyard and Its Agents (Feb. 18, 2015), <https://www.aclu.org/news/federal-jury-awards-14-million-indian-guest-workers-victimized-labor-trafficking-scheme-gulf>; see also *Francisco v. Susano*, 525 F. App’x 828, 835 (10th Cir. 2013) (“We . . . agree with the only other circuit to address the matter and hold punitive damages to be available under § 1595.”); *Ditullio v. Boehm*, 662 F.3d 1091, 1098 (9th Cir. 2011) (“We . . . hold that punitive damages are available under 18 U.S.C. § 1595.”); *Carazani v. Zegarra*, 972 F. Supp. 2d 1, 26 (D.D.C. 2013) (“Punitive damages are . . . available under the TVPA.”); *Doe v. Howard*, No. 1:11-cv-1105, 2012 WL 3834867, at *4 (E.D. Va. Sept. 4, 2012) (“Punitive damages are available under the TVPA . . .”).

111 18 U.S.C § 1596.

112 See *Adhikari v. Daoud & Partners*, 994 F. Supp. 2d 831 (S.D. Tex. 2014) (denying defendant corporation’s motion to dismiss TVPA claim based on extraterritorial jurisdiction, only later to find that extraterritoriality provision does not apply retroactively).

113 18 U.S.C § 1589(b).

114 *Id.* (emphasis added).

in obtaining or retaining business.¹¹⁵ Knowledge” can be shown by establishing that a person is aware of a “high probability” that the payment will be used as a bribe. The DOJ and the SEC have interpreted this provision to mean that under the FCPA, liability can attach if a person “purposely avoid[s] actual knowledge.”¹¹⁶ The FCPA knowledge standard is a slightly higher standard than the TVPA standard in which liability can attach if a person recklessly disregards actual knowledge. Similarly, under the FCPA, before liability attaches, a person or a corporate entity needs to affirmatively transfer money or something of value to the third party that makes a corrupt payment; **under the TVPA, liability can attach if a person or corporate entity merely benefits from a venture that engages in forced labor.** Ultimately, this means that it may be easier to establish criminal liability for the acts of third parties under the TVPA than under the FCPA, which has already proven to be a low bar in settled enforcement actions.

A recent case illustrates how the TVPA’s reckless disregard standard works. In *United States v. Rivera*, Antonio and Jasmin Rivera owned and operated two bars on Long Island.¹¹⁷ Together with defendant John Whaley, they conspired to bring Latin American women to the United States (without proper visas) under the guise that they would be waitresses.¹¹⁸ Once in the United States, defendants compelled the women “through deception, coercion and threats of harm” to engage in sexual acts with patrons of the bars and to give a portion of their proceeds from those acts to defendants.¹¹⁹ All three were indicted and convicted on forced labor and sex trafficking charges.¹²⁰ Whaley later argued that the evidence was insufficient to convict him of forced labor because he had not hired the women, withheld their wages, threatened them, forced them to remain, or knew that they were being forced to work at the bars.¹²¹ The court disagreed, finding sufficient evidence that Whaley had benefited from their

forced labor and either knew or recklessly disregarded the fact that the bars were forcing the women to work.¹²² Specifically, among other things, Whaley knew the women were in the United States illegally; was paid to transport the women to and from the bars; kept an eye on the women who tried to quit so that Rivera could get them back; was paid by bar customers to take the women home for sex at the end of their shift; was referred to as Rivera’s “right-hand man”; and reminded any woman who wanted to quit that she was in the United States illegally.¹²³ Thus, the court found that there was sufficient evidence to establish that Whaley benefitted from his participation in the operation of the bars and either “he knew of, or recklessly disregarded, the persistent threats of deportation made to the victims working at the bars.”¹²⁴

Takeaway: U.S. companies that benefit from trafficked labor, even if they only “recklessly disregard” their use of such labor, might be prosecuted under the TVPA. This is a lower standard for liability than the FCPA, which has been commonly and effectively used to prosecute corporations who pay third parties “while knowing” that there is a “high probability” that a portion of such payment will be used to bribe government officials.

115 See Securities Exchange Act of 1934 § 30A(a)(3), 15 U.S.C. § 78dd-1(a)(3), -2(a)(3), -3(a)(3).

116 Resource Guide, *supra* note 17, at 22.

117 Indictment, *United States v. Rivera*, No. 09CR00619, 2009 WL 8234493, ¶ 2 (E.D.N.Y. Sept. 8, 2009).

118 *Id.* at ¶ 3.

119 *Id.*

120 *United States v. Rivera*, No. 09-CR-619 (SJF), 2012 WL 2339318 (E.D.N.Y. June 19, 2012).

121 *Id.* at *4.

122 *Id.* at *5-6.

123 *Id.* at *5.

124 *Id.*

V. FCPA AND HUMAN TRAFFICKING COMPLIANCE PROGRAMS

The DOJ and SEC's ability to extract substantial penalties against companies that violate the FCPA has encouraged multinational corporations to develop robust anti-corruption compliance programs. Generally, DOJ and SEC encourage companies to have an effective ethics and compliance plan.¹²⁵ The United States Sentencing Guidelines provide for a reduction in criminal penalties and fines if a corporation has implemented an "effective compliance and ethics program,"¹²⁶ and recently the DOJ hired a compliance expert to provide guidance to the DOJ's prosecutors.¹²⁷ In addition, DOJ and SEC encourage corporations to self-police and voluntarily disclose potential enforcement issues, including FCPA and forced labor issues.¹²⁸ Consequently, another potentially fertile overlap in FCPA and human trafficking enforcement is the emphasis on prevention through compliance programs.

1. FCPA Compliance Programs

The emphasis on compliance and self-disclosure combined with robust enforcement has had a huge impact on FCPA compliance. In the last two decades, multinational corporations have developed extensive programs to prevent, detect, and remediate FCPA compliance issues. Moreover, voluntary disclosures are the largest source

of corporate FCPA enforcement actions.¹²⁹ In 2012, for example, 50 percent of all corporate FCPA enforcement actions were the result of voluntary disclosures.¹³⁰

- A typical FCPA compliance program comprises the following components:
- Company-wide adoption and support from senior management, also known as having the appropriate anti-corruption "Tone at the Top";
- Robust written policies describing the types of activities prohibited by the FCPA;
- Employee training and testing through the organization;
- Creation and development of well-resourced and experienced legal and compliance departments;
- Financial controls, including procedures setting out approvals for payments and reporting, especially in connection with payments to government agencies, gifts, entertainment, travel and charitable contributions;
- Contractual requirements that third parties comply with the FCPA;
- Due diligence of third parties (both individuals and organizations);
- Regular auditing of payments and third-party relationships; and
- Internal whistleblowing mechanisms and procedures to investigate and remediate any substantiated allegations.

In addition to internal controls at the company, most companies that regularly purchase equity shares (private equity firms, certain hedge funds, banks, and corporations that regularly engage in mergers and acquisitions) have also adopted due diligence processes to examine FCPA risk at the acquired company. Under the corporate doctrine of "successor liability," the acquiring corporation may be charged with FCPA violations previously committed by the acquired corporation.¹³¹ Because the acquiring company does not have all the

125 See Marshall L. Miller, Principal Deputy Assistant Att'y Gen., Criminal Div., U.S. Dep't of Justice, Remarks at the Advanced Compliance and Ethics Workshop (Oct. 7, 2014), <http://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller-0>.

126 U.S. Sentencing Guidelines Manual § 8B2.1 (U.S. Sentencing Comm'n 2015), <http://www.ussc.gov/guidelines-manual/2015/2015-ussc-guidelines-manual>.

127 See U.S. Dep't of Justice, New Compliance Counsel Expert Retained by the DOJ Fraud Section (last visited Dec. 4, 2015), <http://www.justice.gov/criminal-fraud/file/790236/download>.

128 See U.S. Dep't of Justice, U.S. Attorneys' Manual 9-28.300 (2015), <http://www.justice.gov/usam/united-states-attorneys-manual> (promoting "timely and voluntary disclosure" and "willingness to cooperate" as factors in charging decisions); U.S. Sec. & Exch. Comm'n, Enforcement Manual 76 (2015), <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf> (noting "timely disclosure" and cooperation are considered).

129 Koehler, *supra* note 2, at 173.

130 *Id.*

131 Although beyond the scope of this whitepaper, the FCPA may impose successor liability on the acquiring corporation for the violations of the acquired corporation in many cases. See, e.g., Resource Guide, *supra* note 17, at 28.

information it might need to understand FCPA risk, an entire industry of FCPA compliance professionals and organizations has developed to audit third parties and quantify risk. In addition, organizations such as Transparency International publish the “Corruption Perceptions Index,” indicating which countries around the world are perceived as the most corrupt; and the U.S. government publishes databases of sanctioned parties around the world. This entire system of controls has helped detect and prevent bribery on a massive scale.

2. Human Trafficking Compliance Programs

Whereas FCPA compliance programs are fairly mature, human trafficking compliance programs are relatively new. Recently, in an effort to encourage companies to adopt robust human trafficking compliance programs, California and the U.K. have passed laws requiring companies that meet certain criteria to disclose on their website specifics about their human trafficking compliance programs. These programs do not dictate that a company adopt any particular measure as they are meant to “provide[] consumers with critical information about the efforts that companies are undertaking to prevent and root out human trafficking and slavery in their product supply chains.”¹³²

On October 29, 2015, Part 6 of the U.K. Modern Slavery Act of 2015 (“MSA 2015”) came into force. Part 6 of the MSA 2015 requires suppliers of goods or services with an annual turnover of £36 million (approximately \$54 million) or more who carry on all or part of their business in the U.K. to prepare a statement detailing the steps they have taken during the fiscal year to ensure that human trafficking and slavery are not taking place in their supply chains or in their own businesses, or a statement setting out that no such steps have been taken.¹³³ Companies with a website must publish their statement on their

website and include a link to the statement in a prominent place on their home page.¹³⁴

Part 6 of MSA 2015 is similar to the California Transparency in Supply Chains Act, (the “California Act”), which went into effect in 2012.¹³⁵ The California Act requires retail sellers or manufacturers with worldwide gross receipts of more than \$100 million and doing business in California to issue a disclosure regarding their efforts to combat human trafficking and slavery. The disclosure must be posted on the retailer’s or seller’s website with a conspicuous and easily understood link on their home page.

While the MSA 2015 does not dictate the layout or content of a company’s disclosure, save to suggest topics that may be included, the California Act requires specific disclosures. Under the California Act, companies must disclose to what extent they:

- Engage in verification of product supply chains to evaluate and address risks of human trafficking and slavery;
- Audit suppliers to evaluate their compliance with company standards regarding human trafficking and slavery;
- Require direct suppliers to certify that materials incorporated into the product comply with local laws regarding human trafficking and slavery;
- Maintain internal accountability standards and procedures for employees or contractors failing to meet company standards regarding human trafficking and slavery; and
- Provide training on human trafficking and slavery to company employees and management who have direct responsibility for supply chain management.

132 Kamala D. Harris, Att’y Gen., Cal. Dep’t of Justice, The California Transparency in Supply Chains Act - A Resource Guide, at i (2015), <https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf>.

133 U.K. Modern Slavery Act 2015, c. 30, pt. 6.

134 Companies whose fiscal year ends before March 31, 2016 will not have to comply with Part 6 of the MSA 2015 for that fiscal year. The first Part 6 disclosures will be due for companies with a fiscal year ending on or after March 31, 2016. While the MSA 2015 contains no prescribed deadline for disclosures, the guidance from the Home Secretary states that companies should seek to publish their statement “as soon as reasonably practicable” following the relevant fiscal year end, and are encouraged to do so within six months of this date.

135 See Cal. Civ. Code § 1714.43.

Unlike the California Act, the MSA 2015 requires that the statement be approved and signed by an appropriate senior person and/or management body within the business. For corporations this means a director and/or the board of directors (or equivalent).

For both the California Act and the MSA 2015, enforcement is limited to an injunction for specific performance. However, in recent months, U.S. consumer class action suits have been filed against several companies alleging that human trafficking and slavery are present in their supply chains and that their disclosures under the California Act are misleading.¹³⁶ Given the disclosure obligations, the risk of private civil suits, and the enhanced attention from prosecutors, qualifying companies should consider reviewing and updating their supply chain anti-trafficking measures.

In addition to the California Act, a federal human trafficking act, which would apply nationally within the United States, has been proposed but has not yet passed.¹³⁷ The Netherlands, Australia, Spain, Sweden and France are also considering similar legislation, and an EU Directive formalizing this disclosure requirement at an EU level is also expected next year.

These disclosure statutes dovetail with advice from the U.S. State Department in their Annual Report on Human Trafficking. The report encourages corporations to create anti-trafficking policies and police for human trafficking risks:

[B]usiness leaders can create anti-trafficking policies that address the common risks in their operations and supply chains, ensure workers have the right to fair compensation and redress, train staff to understand the indicators of human trafficking, and put remediation plans in place before any allegations arise to allow for appropriate corrective action. Businesses should also work with government officials, NGOs, and recruiters in the countries where they source to gain a better understanding of workers' vulnerabilities and commit

to making improvements. A company can demonstrate its commitment to responsibly source goods and services by creating a clear and comprehensive anti-trafficking policy, which includes an enforcement mechanism that is applied throughout the company's supply chain. High-level executives should approve and promote such a policy and build it into company operations so supplier consideration goes beyond price and reliability, to include an assessment of labor practices. Among other things, an effective policy:

- prohibits human trafficking and those activities that facilitate it—including charging workers recruitment fees, contract fraud, and document retention;
- responds to industry- or region-specific risks;
- requires freedom of movement for workers;
- pays all employees at least the minimum wage in all countries of operation, preferably a living wage;
- includes a grievance mechanism and whistleblower protections; and
- applies to direct employees, as well as subcontractors, labor recruiters, and other business partners.¹³⁸

The Report continues:

Such a policy sends a clear message to employees, business partners, investors, and consumers that human trafficking will not be tolerated. Coupled with effective risk assessments, monitoring, and serious remediation efforts, it can promote good labor practices throughout the supply chain. Understanding how supply chains operate, where key suppliers are located, and what working conditions exist in those locations and sectors is vital to help a company gain control. By fully mapping its supply chain, down to the level of raw materials, a company can gain a better understanding of gaps in transparency. Companies can then create a plan to target

¹³⁶ See, e.g., Class Action Complaint, *Sud v. Costco Wholesale Corp.*, 3:15-cv-03783 (N.D. Cal. Aug. 19, 2015).
¹³⁷ See H.R. 3226, 114th Cong. (2015).

¹³⁸ State Dep't Trafficking Report, *supra* note 4, at 32-33.





those areas where high levels of spending overlap with industries or locations with high risks for human trafficking. Once a risk assessment is completed, companies must begin to address problem areas, implement corrective measures, and monitor and enforce anti-trafficking policies. Monitoring often takes the form of social auditing, which—when done properly—can help to detect violations of company policies, including worker abuse. Yet, human trafficking is frequently difficult for auditors to detect. Companies that are serious about addressing forced labor in their supply chains should make sure that auditors are properly trained and equipped to look for known indicators of human trafficking, including the fraudulent recruitment practices discussed in this Report. Audits should be thorough, comprehensive, and periodic.¹³⁹

3. Synergy Between FCPA and Human Trafficking Compliance Programs

While FCPA compliance tends to be focused on the distribution chain, and anti-human trafficking compliance tends to focus on the supply chain, both compliance programs rely on the same tools: Tone at the Top committed to compliance, formal policies, employee training, auditing, due diligence, investigations, and proper remediation of potential issues. In addition, widely available resources such as Transparency International's Corruption Perceptions Index ("CPI"),¹⁴⁰ and the Global Slavery Index¹⁴¹ are available to

139 Id.

140 Corruption Perceptions Index, Transparency International, <http://www.transparency.org/research/cpi/overview> (last visited Dec. 4, 2015).

141 See, e.g., Global Slavery Index, <http://www.globalslaveryindex.org> (last visited Dec. 4, 2015); List of Goods Produced by Child Labor or Forced Labor, U.S. Dep't of Labor, <http://www.dol.gov/ilab/reports/child-labor/list-of-goods/> (last visited Dec. 4, 2015); List of Products Produced by Forced or Indentured Child Labor, U.S. Dep't of Labor, <http://www.dol.gov/ilab/reports/child-labor/list-of-products/index-country.htm> (last visited Dec. 4, 2015); see also Apparel Industry Report, Free2Work, <http://www.free2work.org> (last visited Dec. 4, 2015); Harry Bradford, Here Are over One Hundred Products Made from Child or Slave Labor, Huffington Post (May 10, 2012), http://www.huffingtonpost.com/2012/05/10/worldwide-products-slave-labor_n_1505811.html; Know the Chain, <https://www.knowthechain.org>

VI. CONCLUSION

As John Kerry states in introduction to the U.S. State Department 2015 Trafficking in Persons Report: “[m]odern slavery doesn’t exist in a vacuum. It’s connected to a host of 21st century challenges, including the persistence of extreme poverty, discrimination against women and minorities, corruption and other failures of governance, the abuse of social media, and the power and reach of transnational organized crime.”¹⁴³

The FCPA provides a strong enforcement mechanism to police global corruption and disrupt the links in the human trafficking chain that depend upon corruption for three reasons: its status as an enforcement priority of the U.S. DOJ and SEC, its broad liability provisions including liability for the acts of third parties, and its extraterritorial scope. Moreover, because the U.S. also has adopted the TVPA, a statute that specifically criminalizes trafficking and, like the FCPA, applies extraterritorially and imposes liability for “reckless disregard” of the acts of third parties, this white paper proposes that robust enforcement of the TVPA may also prove to be a game-changer in combatting human trafficking. Whatever the mechanism, human trafficking is an injustice and a threat to human liberty and dignity that merits further attention from U.S. and other global regulators.

143 State Dep’t Trafficking Report, *supra* note 4, at 2.

Appendix A: Local Anti-Corruption and Trafficking Laws

Kingdom of Cambodia ("Cambodia")

I. JURISDICTION SUMMARY: CAMBODIA

Cambodia is a country located in the southern portion of the Indochina Peninsula in Southeast Asia with a population of over 15 million. Notably for human trafficking, it is bordered by Thailand, Laos, Vietnam, and has coast line on the Gulf of Thailand. The Cambodian government is a constitutional monarchy with an appointed monarch and an elected parliamentary government. Cambodia has historically had significant corruption and trafficking problems and is a country in dire need of change in these areas. Cambodia is a signatory to ASEAN. Transparency International ranked Cambodia as 156 in its global Corruption Perception Index for 2014.¹

1. Human Trafficking Risk Levels

The 2015 Trafficking in Persons Report categorizes Cambodia as part of the Tier 2 Watch List. Cambodia is a source, transit, and destination country for men, women, and children subjected to forced labor and sex trafficking.² Cambodian adults and children migrate within Cambodia and to other countries for work.³ Cambodian people are trafficked out of Cambodia to work, frequently to Thai fishing boats or to China under the guise of arranged marriages that sometimes result in forced factory labor or prostitution.⁴ Within Cambodia, Cambodian and ethnic Vietnamese women and girls are moved from rural areas to cities and tourist areas where they are subjected to sex trafficking.⁵

Poverty is a major contributing factor to the trafficking problem in Cambodia. The country's economy is slow and large amounts of people live struggle to meet their basic needs. The people of Cambodia frequently fall victim to trafficking in search of employment or a more stable life. People must find employment by any means necessary and risk terrible labor conditions on a Thai fishing vessel or being caught up in the sex trade.⁶

The profile of trafficking in Cambodia is complex and broad. As a general matter, there are the economically downtrodden victims who are exploited by labor brokers or sex traffickers. These labor brokers provide cheap or slave labor to companies and, in so doing,

1 Transparency International, 2014 Corruption Perceptions Index, (Nov. 23, 2015), <http://www.transparency.org/cpi2014/results#myAnchor1>.

2 Trafficking in Persons Report, US Department of State, 110 (2015).

3 Id.

4 Id.

5 Id.

6 Id.

government officials may either directly assist or do nothing to hinder the trafficking activities. The US Department of State 2015 Trafficking in Persons Report states:

Corrupt officials in Cambodia, Thailand, and Malaysia cooperate with labor brokers to facilitate the transport of victims across the border. Local observers report corrupt officials often thwart progress in cases where the perpetrators are believed to have political, criminal, or economic ties to government officials. . . . Endemic corruption at all levels of the Cambodian government severely limited the ability of individual officials to make progress in holding traffickers accountable. Local experts reported one successful case in which authorities prosecuted and convicted six sex traffickers known to have previously received protection from arrest by military police leaders. The government investigated allegations of corruption against one police officer and dismissed him from his position; it did not prosecute or convict any government employees complicit in trafficking.⁷

II. ANTI-TRAFFICKING AND ANTI-CORRUPTION LEGAL FRAMEWORK

1. Anti-Trafficking Law

Cambodia has three primary laws which target human trafficking: the Law on Suppression of Human Trafficking and Sexual Exploitation (2007); the Law on Suppression of the Kidnapping and Trafficking of Human Persons and the Exploitation of Human Persons (1996); and, the Labor Law (1997).

(i.) Legal Requirements

Unlawful removal is defined as:

- "1) Removing a person from his/her current place of residence to a place under the actor's or a third person's control by means of force, threat, deception, abuse of power, or enticement, or
- 2) Without legal authority or any other legal justification to do so, taking a minor or a person under general custody or curatorship or legal custody away from the legal custody of the parents, care taker or guardian."⁸

⁷ Id.

⁸ Law on Suppression of Human Trafficking and Sexual Exploitation, National Assembly, effective on December 20, 2009, http://www.no-trafficking.org/content/Laws_Agreement/cambodia_tip_2008.pdf

(ii.) Penalties and Punishments

“A person who unlawfully removes another for the purpose of profit making, sexual aggression, production of pornography, marriage against will of the victim, adoption, or any form of exploitation shall be punished with imprisonment for 7 years to 15 years.⁹

- The offence stipulated in this article shall be punished with imprisonment for 15 to 20 years when:
- The victim is a minor
- The offence is committed by a public official who abuses his/her authority over the victim,
- The offence is committed by an organized group.”

(iii.) Examples, Case Studies, and Enforcement Trends

The Cambodian government does not keep comprehensive data on its law enforcement efforts, but the 2015 Trafficking in Persons Report indicates that Cambodia has made “modest progress in prosecutions and convictions” for trafficking offenses.¹⁰ The Cambodian government reported twenty-one trafficking prosecutions, but other sources indicate the number to be much higher.¹¹ A compilation of sources shows that in 2014, twenty-two sex traffickers and seven labor traffickers were convicted, which is an increase from the prior year.¹²

2. Anti-Corruption Enforcement Agency

Cambodia implemented its Anti-Corruption Law in 2010, which established Cambodia’s Anti-Corruption Unit (“ACU”) as the enforcement body.¹³ The Anti-Corruption Law grants the ACU the authority to conduct anti-corruption investigations.¹⁴ However, the Anti-Corruption Law specifically limits the ACU’s authority to only investigations of corruption.¹⁵ Therefore, it is possible that some violations, if falling under both the scope of corruption and trafficking laws, would not trigger the ACU’s authority to investigate.

Since its inception, the ACU has not yet made significant publically acknowledged large-scale arrests or increases in enforcement. As of 2012, it had made only four arrests for corruption in a country with a high corruption profile.¹⁶ In

9 Id.

10 Trafficking in Persons Report, US Department of State, 111 (2015).

11 Id.

12 Id.

13 Cambodia Anti-Corruption Law, Article 5 & 11.

14 Cambodia Anti-Corruption Law, Article 13.

15 Cambodia Anti-Corruption Law, Article 25.

16 Vong Sokheng, Cambodia’s Anti-Corruption Unit Confirms Two Arrests, The Phnom Penh Post (Nov. 23, 2012), <http://www.phnompenhpost>.

September 2014, the ACU arrested three local journalists for extortion, using the Anti-Corruption Law to investigate and prosecute individuals in the private sector.¹⁷

3. Anti-Corruption Law

Cambodia's anti-corruption legal framework is found in the Cambodia Criminal Law and the Cambodia Anti-Corruption Law. The long-awaited Cambodia Anti-Corruption Law has an extremely limited scope. It specifically addresses only bribery of foreign public officials and international organizations.¹⁸

The broader prohibitions on corruption as it relates to local Cambodian affairs and Cambodian officials are found in the Cambodia Criminal Law. The Criminal Law prohibits corruption,¹⁹ misappropriations,²⁰ bribery,²¹ extortion,²² influencing the award of government benefits,²³ favoritism,²⁴ intentional destruction or embezzlement,²⁵ and also prohibits bribery of numerous specified individuals: those with powers to issue documents, translators, and health officials.²⁶

(i.) Legal Requirements

Under the Anti-Corruption Law, for a person to be guilty of bribery they must give some benefit to a foreign official or an official of a public international organization.²⁷ A foreign public official or official of a public international organization would also be guilty of receiving the bribe.²⁸

Under the Cambodia Criminal Law, a "public official/servant" means the person holding office in legislative, executive institutions, or judicial institution who is appointed by legal standard letter, whether permanent or temporary, whether paid or unpaid, regardless of his or her status or age. Beside, other persons holding a public office, including public agency or public enterprise as well as other public institutions can also be recognized as the public official.²⁹

com/national/cambodias-anti-corruption-unit-confirms-two-arrests.

17 Sen David & Charles Rollet, Anti-Corruption Unit Makes First Arrests of Journalists in Kampot, The Phnom Penh Post (Sept. 15, 2014), <http://www.phnompenhpost.com/national/anti-corruption-unit-makes-first-arrests-journalists-kampot>

18 Cambodia Anti-Corruption Law, Articles 33 & 34.

19 Cambodia Criminal Law, Article 278.

20 Cambodia Criminal Law, Article 616.

21 Cambodia Criminal Law, Article 279, 618.

22 Cambodia Criminal Law, Article 366.

23 Cambodia Criminal Law, Article 619.

24 Cambodia Criminal Law, Article 624.

25 Cambodia Criminal Law, Article 626.

26 See Cambodia Criminal Law, Articles 663 to 666.

27 Cambodia Anti-Corruption Law, Article 32.

28 Id.

29 Cambodia Anti-Corruption Law, Article 4.2.

A civil servant or an elected official is guilty of “misappropriation” when they demand or receive funds through entitlement, tax, or excise with knowledge it is not due; or, to grant an exemption or immunity from taxes or excises that are illegal.³⁰

“Bribery” occurs when a civil servant or elected official, directly or indirectly solicits or accepts a donation, gift, promise, or any interest in order to perform or not perform duties.³¹

“Illegally influencing a deal” occurs when an official directly or indirectly solicits or accepts without authorization a donation, gift, promise, or any interest to help obtain from the government any contract, insignia, or other benefit.³²

“Favoritism” occurs when an official unlawfully gives advantages to others while making a public contract.³³ Intentional destruction and embezzlement occur when an official destroys or embezzles funds, notes, bonds, or any other object.³⁴

“Extortion” is “the act of obtaining, by violence, threat of violence or coercion (1) a signature; (2) a commitment or a renunciation; (3) a disclosure of a secret; (4) a delivery of funds, assets, or of any property.”³⁵

(ii.) Penalties and Punishments

Under the Cambodia Anti-Corruption Act, a foreign official guilty of accepting a bribe will receive a sentence between 7 and 15 years.³⁶ The bribe giver may be sentenced between 5 and 10 years.³⁷

Under the Cambodia Criminal Code, a person guilty of misappropriation may be sentenced to prison from 2 to 5 years and a fine between KHR 4 million to KHR 10 million.³⁸ An official who accepts a bribe may be imprisoned for a term between 7 and 15 years.³⁹ An official who unlawfully influences a deal may be sentenced to imprisonment for a term between 5 and 10 years.⁴⁰ An official committing favoritism may be imprisoned for a term between 1 and 2 years and a fine between KHR 2 million and KHR 4 million.⁴¹ Officials guilty of destruction or embezzlement may be imprisoned for a term of 5 to 10 years.⁴²

30 Cambodia Criminal Law, Article 617.

31 Cambodia Criminal Law, Article 618.

32 Cambodia Criminal Law, Article 619.

33 Cambodia Criminal Law, Article 624.

34 Cambodia Criminal Law, Article 626.

35 Cambodia Criminal Law, Article 366.

36 Cambodia Anti-Corruption Law, Article 33.

37 Cambodia Anti-Corruption Law, Article 34.

38 Cambodia Criminal Law, Article 617.

39 Cambodia Criminal Law, Article 618.

40 Cambodia Criminal Law, Article 620.

41 Cambodia Criminal Law, Article 625.

42 Cambodia Criminal Law, Article 626.

A person guilty of extortion may be imprisoned for 2 to 5 years and pay a fine from KHR 4 million to KHR 10 million.⁴³

(iii.) Examples, Case Studies, and Enforcement Trends

Cambodia has become a source for women trafficked for marriage to men in China who are otherwise unable to wed. In previous years, South Korea was the most frequent destination. Now, China is becoming the most frequent destination because China's economy has improved so that the people are better off economically than Cambodia and China has a gender imbalance, which can create difficulties for men to find spouses in some areas.

Many of the women transported for marriage are initially under the belief that they were coming to China to work, only to find that there was no job. Many women who come for marriage are forced into prostitution. The police and immigration officials may provide corrupt assistance with the trade and keeping the women in China. In one example, a young Cambodian woman was kidnapped in Phnom Penh and agreed to go to China to work in a factory, but she found herself working for a man as a prisoner. She was frequently raped and when she would run to police, they would send her back to the home and her captor.⁴⁴

43 Cambodia Criminal Law, Article 367.

44 Lan Fang, Chinese Town does brisk trade in Cambodian Wives, MarketWatch (Aug. 14, 2014), <http://www.marketwatch.com/story/chinese-town-does-brisk-trade-in-cambodian-wives-2014-08-14>

III. ANALYSIS OF ANTI-CORRUPTION LAW AS A TOOL AGAINST HUMAN TRAFFICKING

Theoretically, the Cambodian Anti-Trafficking Laws leave a gap for those who provide government assistance to not be implicated in a trafficking scheme. Thus, the anti-corruption laws could increase the anti-corruption effort because the laws are broad enough to encompass many officials directly or indirectly involved in trafficking.

Research did not uncover any instances where an official was prosecuted or investigated in this manner. The ACU is viewed as a weak enforcement agency, it is legally limited to corruption investigations, and the Anti-Trafficking Laws provide stronger anti-trafficking support than are available under the corruption laws. The ACU's history is probative. Since its formation, the ACU has prosecuted very few corrupt government officials in a society renowned for its corruption. Most recently, the ACU has begun prosecuting reporters. The ACU's investigation and prosecution of private individuals, three reporters, may be looked at from two perspectives. First, it may be preferable that the ACU focuses on high level government officials to improve the situation, and that the ACU may be acting as another tool of the powerful to hinder their enemies. On the other hand, it may be positive that the ACU is, at least theoretically, able to assert its authority over corrupt private individuals.

There may be legal impediments for any of the ACU's investigation activities that may be more properly considered as anti-trafficking cases because of the ACU's limited legal authority. In addition, Cambodia's reputation as a country with trafficking issues has led to significant international media attention which has brought resources to Cambodia to combat trafficking matters. Given this background and recent developments, the current local anti-corruption laws may have limited practical effectiveness against human traffickers. Because the Cambodian Anti-Trafficking Laws is a more direct way to combat human trafficking in a country with multiple serious trafficking issues, and because the anti-corruption agency is less effective and enforcement has been minimal, it is advisable to focus resources in this area of law until the ACU obtains more power.

Therefore, even though it is theoretically possible to use the anti-corruption laws to implicate officials who assist in trafficking, in practice this method may be inefficient and have limited favorable results.

I. JURISDICTION SUMMARY: MAINLAND CHINA

The People's Republic of China ("Mainland China" or "China") is the world's second largest economy and most populous country in the world. Mainland China is both a source and destination country for human trafficking, and trafficking occurs mainly in the context of large-scale migration within the country, which has been increasing steadily in recent years.⁴⁵ According to the 2015 US Trafficking in Persons Report, Mainland China was listed in the Tier 2 Watch List, which generally means that the government of Mainland China does not fully comply with the minimum standards for the elimination of trafficking, but it is making significant efforts to do so.⁴⁶ Mainland China is not a signatory to ASEAN. Transparency International ranked Mainland China as 100 in its global Corruption Perception Index for 2014.⁴⁷

1. Human Trafficking Risk Levels

According to the 2015 US Trafficking in Persons Report:

China is a source, destination, and transit country for men, women, and children subjected to forced labor and sex trafficking. Instances of trafficking are reported among China's internal migrant population, estimated to exceed 236 million people, with Chinese men, women, and children subjected to forced labor in brick kilns, coal mines, and factories, some of which operate illegally and take advantage of lax government supervision. Forced begging by adults and children was reported throughout China. There are reports traffickers are increasingly targeting deaf and mute individuals for forced labor. Limited media reports indicate children in some work-study programs supported by local governments and schools are forced to work in factories.⁴⁸

Chinese women and girls are subjected to sex trafficking within Mainland China, and are typically recruited from rural areas then taken to urban centers.⁴⁹ In recent years, organized crime has played a key role in the trafficking of Chinese women and girls in Mainland China.⁵⁰ Following patterns for many countries in the

45 The Trafficking Situation in China, United Nations Inter-agency Project on Human Trafficking, (Nov. 2, 2015), <http://www.no-trafficking.org/china.html>.

46 Trafficking in Persons Report, US Department of State, 121 (2015).

47 Transparency International, 2014 Corruption Perceptions Index, (Nov. 23, 2015), <http://www.transparency.org/cpi2014/results#myAnchor1>.

48 Trafficking in Persons Report, US Department of State, 121 (2015).

49 Id.

50 Id.

region, victims are recruited with fraudulent employment opportunities and subsequently forced into prostitution.⁵¹

According to the 2015 US Trafficking in Persons Report:

Chinese men, women, and children are also subjected to forced labor and sex trafficking across borders into other countries. Traffickers recruit girls and young women, often from rural areas of China, using a combination of fraudulent job offers and coercion; traffickers impose large travel fees, confiscate passports, confine, or physically and financially threaten victims to compel their engagement in prostitution. Chinese men and women are forced to labor in service sectors, such as restaurants, shops, agriculture, and factories in overseas Chinese communities.⁵²

Chinese children are also vulnerable to forced labor in countries receiving significant outbound investment from Mainland China, such as Angola.⁵³

II. ANTI-TRAFFICKING AND ANTI-CORRUPTION LEGAL FRAMEWORK

1. Anti-Trafficking Law

In Mainland China, the anti-trafficking legislation is not limited to one law or regulation. Instead, the provisions against human trafficking are spread amongst several different pieces of legislation that have been built up over time. The key anti-trafficking rules are primarily found in the Criminal Law of the People's Republic of China (the "Criminal Law") as well as various interpretations and regulations promulgated by the Supreme People's Court, the Supreme People's Procuratorate, and other related government departments such as the Ministry of Public Security and the Ministry of Justice.

(i.) Legal Requirements

Article 240 of the Criminal Law defines trafficking as the "abducting, kidnapping, buying, trafficking in, fetching, sending, or transferring of women and children, for the purpose of selling".⁵⁴

The Advice from the Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, and

51 Id.

52 Id.

53 Id.

54 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the National People's Congress, March 14, 1997, effective October 1, 1997). (Translations provided by Westlaw China) art. 240.

Ministry of Justice regarding Punishments for the Crime of Trafficking in Women and Children According to the Law, (the “2010 Advice”) stipulates several circumstances that should result in a conviction for the crime of attempting to “purchase” trafficked women or children.⁵⁵

The Law of the PRC on the Protection of Women’s Rights and Interests (the “Law on Women’s Rights”) also criminalizes prostitution by making it illegal to pay for (but not provide) prostitution.⁵⁶

The Law of the PRC on the Protections of Minors (the “Law on Minors”) prohibits abducting, trafficking, kidnapping, maltreating, or sexually harassing minors; or coercing or luring minors into begging or using them in begging; or organizing minors for performances which are harmful to their physical or mental health.⁵⁷ A similar piece of legislation, the Provisions on the Prohibition of Child Labor (the “Provisions Prohibiting Child Labor”), specifically prohibits employment under the age of 16 unless it falls within a list of special exceptions.⁵⁸

The Labor Law of the PRC (the “Labor Law”)⁵⁹ prohibits employers from recruiting minors who have not reached the age of 16 except under a narrow set of performance-based circumstances similar to the Provisions Prohibiting Child Labor.

55 最高人民法院、最高人民检察院、公安部、司法部印发《关于依法惩治拐卖妇女儿童犯罪的意见》的通知 [Advice from the Supreme People’s Court, Supreme People’s Procuratorate, Ministry of Public Security, and Ministry of Justice regarding Punishment for the Crime of Trafficking in Women and Children According to the Law] (promulgated by the Supreme People’s Court, Supreme People’s Procuratorate, Ministry of Public Security, and Ministry of Justice, March 15, 2010, effective March 15, 2010). (Translations provided by Westlaw China).

56 中华人民共和国妇女权益保障法 [Law on Protection of Women’s Rights and Interests of the People’s Republic of China] (promulgated by the Standing Committee of the National People’s Congress, August 28, 2005, effective December 1, 2005) paragraph 3 art. 23. (Translations provided by Westlaw China).

57 中华人民共和国未成年人保护法 [Law of the People’s Republic of China on the Protection of Minors] (promulgated by the Standing Committee of the National People’s Congress, October 26, 2012, effective January 1, 2013). (Translations provided by Westlaw China).

58 禁止使用童工规定 [Provisions on Prohibition of Child Labor] (promulgated by the State Council, October 1, 2002, effective December 1, 1999) at art. 13. (Translations provided by Westlaw China).

59 中华人民共和国劳动法 [Labor Law of the People’s Republic of China] (promulgated by the Standing Committee of the National People’s Congress, July 5, 1994, effective January 1, 1995) at art. 15. (Translations provided by Westlaw China). Employers shall be forbidden to recruit minors that have not reached the age of 16. When recruiting minors that have not reached the age of 16, Employers engaged in literature and art, sports and special arts and crafts shall, in accordance with the relevant provisions of the State, go through the formalities for examination and approval and safeguard their right to receive compulsory education.

(ii.) Penalties and Punishments

Article 240 of Criminal Law provides that whoever abducts and traffics in a woman or child shall be sentenced to fixed-term imprisonment of between 5 and 10 years and be fined; if the crime has certain aggravating factors, he may be sentenced to fixed-term imprisonment of between ten years and life imprisonment, with a possibility of death, and also be fined.⁶⁰ Article 241 of the Criminal Law also targets the demand for trafficking by stipulating that anyone who attempts to “purchase” trafficked women or children may face up to three years of imprisonment.⁶¹ In addition, Article 416 of the Criminal Law stipulates that anyone who is legally responsible, due to their role or position, for rescuing trafficked women and children but fails that responsibility or hinders the rescue will face up to seven years of imprisonment.⁶²

(iii.) Examples, Case Studies, and Enforcement Trends

In one widely discussed trafficking example, a man named Lan Shushan and his accomplices abducted an adult woman and 33 minor boys aged from 3 to 10 and sold them for over RMB 500,000 during a period from 1998 to 2008. He was convicted of trafficking of women and children and sentenced to death.

2. Anti-Corruption Enforcement Agency

Mainland China has multiple entities that enforce the anti-corruption laws. The Administration of Industry and Commerce, National Development and Reform Commission, Public Safety Bureau, and other minor departments have different roles in the enforcement landscape. In addition, there are both national and local bodies for most of these entities, creating a complex system throughout the country.

3. Anti-Corruption Law

Mainland China’s anti-corruption laws are primarily focused in the Criminal Law, with supporting legislation and additional prohibitions in several other areas, including the Administrative Licensing Law, Criminal

60 中华人民共和国刑法 [Criminal Law of the People’s Republic of China] (promulgated by the National People’s Congress, March 14, 1997, effective October 1, 1997). (Translations provided by Westlaw China).

61 Id.

62 Id.

Procedure Law, Law Against Unfair Competition, and Interim Commercial Bribery Provisions.

Corruption and human trafficking are two separate charges under the Criminal Law. If a government officer has accepted bribes arising out of human trafficking activities, that official could be accused of both a crime of acceptance of bribes and a crime of abducting and trafficking in women or children. In general, the two crimes are separately addressed in all relevant laws and regulations.

(i.) Legal Requirement

The Criminal Law specifically addresses officials' duty to protect those who are trafficked. It stipulates that any functionary of a state organization who is given the role and responsibilities to rescue a woman or children who are abducted, sold, or kidnapped and fails to do so upon receiving a request for rescue by the victim or by his or her family members or upon receiving a report thereon made by any other person, thus causing serious consequences, shall be sentenced to a fixed-term imprisonment of not more than five years of criminal detention.⁶³ In addition, any functionary of a state organization given those roles and responsibilities who, by taking advantage of his office, hinders a rescue effort shall be sentenced to fixed-term imprisonment of not less than two years but not more than seven years; if the circumstances are relatively minor, he shall be sentenced to fixed-term imprisonment of not more than two years or criminal detention.⁶⁴

Moreover, the Criminal Law addresses those concepts typically associated with corruption. A bribe under Criminal Law refers to money or property in-kind provided in return for any "inappropriate interest". It also refers to money or property in-kind received or requested by the relevant individuals or entities for the purpose of securing or providing an illegitimate benefit by taking advantage of their position.⁶⁵

In addition, the Criminal Law sets out the criminal threshold for investigation. A criminal investigation shall be commenced when the bribe offered to a public official by an individual is at least RMB 10,000 (approx. USD1,600) or by an entity that is at least RMB 200,000 (approx. USD32,000); for a bribe offered to a state organ, state-owned enterprise, public institution, or association, the amounts required for a criminal

63 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the National People's Congress, March 14, 1997, effective October 1, 1997) at art. 416.

64 Id.

65 A Guide to Anti-corruption Legislation in Asia Pacific, Clifford Chance, 4th Edition.

investigation are RMB 100,000 (approx. USD16,000) by an individual or RMB 200,000 (approx. USD32,000) by an entity.

However, the aforementioned thresholds do not apply to the crime of offering a bribe to a governmental official or an entity (i) if the purpose of the bribe is to secure an illegitimate benefit; (ii) if bribes were paid to three or more public officials or entities; (iii) if the bribe was paid to a government leader, judicial official, or similar level official; or (iv) if the bribe caused severe damage to national or social interests.⁶⁶

(ii.) Penalties and Punishments

In the Criminal Law, the possible punishments for bribing public officials or public entities are criminal detention, up to life imprisonment, and confiscation of property. For bribing non-public officials to possible punishments are criminal detention, imprisonment of up to 10 years, and criminal fines. When a non-public official accepts bribes, the possible punishments are criminal detention, imprisonment, and confiscation of property.⁶⁷

Under the administrative laws and regulations, the penalty for bribery is a fine ranging from RMB 10,000 to RMB 200,000 and confiscation of any illegal income.

There is no limitation to the amount of the fine in the criminal area, but according to PRC Anti-Unfair Competition Law, the company will be charged a fine ranging from RMB 10,000 to RMB 200,000 and have all illegal income confiscated.

(iii.) Examples, Case Studies, and Enforcement Trends

According to the then head of Khabarovsk's Border Patrol Unit, Chinese police officers are directly involved in the trafficking of Russian women.⁶⁸ A Russian official alleged in 2000 that there were cases of Russian women trying to escape from Chinese brothels by approaching the Chinese police, only to find that the latter either returned them to their brothels or else sold them to other brothels. However, despite on one level fulfilling public promises to deal firmly with corruption generally, by both prosecuting and convicting large numbers of officials, the

⁶⁶ Id.

⁶⁷ 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the National People's Congress, March 14, 1997, effective October 1, 1997) at art. 163.

⁶⁸ L. Erokhina, "Trafficking in Women in the Russian Far East: A Real or Imaginary Phenomenon?" in *Human Traffic and Transnational Crime: Eurasian and American Perspectives*, ed. S. Stoecker and L. Shelley, (Lanham MD: Rowman and Littlefield, 2005), 91-2.

Chinese authorities appear to seldom if ever to prosecute officials for corruption relating directly to trafficking.

The PRC government is strengthening their investigation and prosecution of corruption cases, especially for commercial bribery. Starting from 2013, the PRC government has been actively pursuing commercial bribery in the medical and healthcare industry. As a result, multinationals are treating local investigations much more seriously, both in reaction to the significant fines being imposed by PRC authorities, but also given the likelihood of triggering extraterritorial investigations by US and UK authorities.⁶⁹ This trend has also continued in 2015.

III. ANALYSIS OF ANTI-CORRUPTION LAW AS A TOOL AGAINST HUMAN TRAFFICKING

Mainland China's anti-corruption laws have been steadily improving and becoming more specific in recent years. In addition, the anti-corruption campaign launched by the current President, Xi Jinping, has gained wide-spread attention and support for its targeting and enforcement against both high-level and low-level government officials.

There is both a theoretical and practical nexus between the anti-corruption laws and anti-trafficking violations. Mainland China's anti-corruption laws are broad enough in scope that they overlap with many specific activities typically carried out by traffickers, including customs and immigration documentation-based bribes as well as commercial bribes for staffing and placement of trafficking victims. In addition, Mainland China's Anti-Trafficking Laws are also unique in that they have provisions targeting officials who do not help victims of trafficking, which gives Mainland China's Anti-Trafficking Laws a wider scope.

Realistically, Mainland China has been aggressively combatting corruption, both large scale and small scale corruption. It has opened up pathways to anonymous reporting and officially spoken out about corruption. The Anti-Trafficking Laws, however, do cover more of the officials who are involved in some way than the laws of other jurisdictions. Based on these reasons, Mainland China would be a good place to attempt to use the anti-corruption laws to combat human trafficking.

⁶⁹ A Guide to Anti-corruption Legislation in Asia Pacific, Clifford Chance, 4th Edition.

Hong Kong Special Administrative Region (“Hong Kong”)

I. JURISDICTION SUMMARY: HONG KONG

Hong Kong is an autonomous territory of the People’s Republic of China (the “PRC”) located on the southern coast of Mainland China. Hong Kong is one of the world’s most densely populated metropolises in the world. It has a total area of approximately 1,100 square kilometers within which over 7 million people of various nationalities reside.

In recent history, Hong Kong has been governed by various foreign countries. After 1842, the British governed Hong Kong until it was occupied by Japan during World War II. After the end of World War II, the British resumed control until June 30, 1997 when it was transferred to the PRC. Since 1997, the PRC has treated Hong Kong as a Special Administrative Region which gives it a degree of autonomy to create and enforce its own laws. Hong Kong is not a member of ASEAN. Transparency International ranked Hong Kong as 17 in its global Corruption Perception Index for 2014.⁷⁰

1. Human Trafficking Risk Levels

According to the 2015 US Trafficking in Persons Report, Hong Kong was listed in Tier 2, which means that the government does not fully comply with the US Trafficking Victims Protection Act of 2000’s minimum standards for the elimination of trafficking, but the government is making significant efforts to do so.⁷¹ As detailed in the 2015 TIP report, Hong Kong is a destination, transit, and source territory for men, women, and children subjected to sex trafficking and forced labor.⁷² Victims include citizens from the PRC, the Philippines, Indonesia, Thailand, Vietnam, Nepal, Cambodia, other Southeast Asian countries, Colombia, Chad, and Uganda.⁷³

70 Transparency International, 2014 Corruption Perceptions Index, (Nov. 23, 2015), <http://www.transparency.org/cpi2014/results#myAnchor1>.

71 Trafficking in Persons Report, US Department of State, 179-81 (2015).

72 Id.

73 Id.

II. ANTI-TRAFFICKING AND ANTI-CORRUPTION LEGAL FRAMEWORKS

1. Anti-Trafficking Law

Hong Kong does not have one law focused specifically on human trafficking. The Crimes Ordinance has the most direct prohibition of human trafficking, but it only addresses human trafficking for prostitution.⁷⁴ The Immigration Ordinance could be used to indirectly deter trafficking as it prohibits individuals from employing or assisting those who are unauthorized to work.⁷⁵ In addition, the Employment Ordinance establishes minimum employment conditions but does not specifically address trafficking or forced labor.

(i.) Legal Requirements

The Crimes Ordinance section 129 makes it unlawful to bring any person into or take any person out of Hong Kong for the purpose of prostitution.⁷⁶ The trafficked person's consent to prostitution or knowledge that prostitution would occur is not a defense.⁷⁷ Section 130 makes it unlawful to retain control of a person's location for the purposes of sex.⁷⁸ Section 131 extends the reach by prohibiting such activities on behalf of another person.⁷⁹ Section 153P grants extraterritorial jurisdiction for the Hong Kong government over Hong Kong residents or those who regularly reside in Hong Kong for activities abroad, and it grants jurisdiction over non-residents whose acts abroad have a territorial or personal nexus to Hong Kong.⁸⁰

The Immigration Ordinance section 17I makes it unlawful to employ an individual who is not authorized for employment.⁸¹ Section 37 prohibits unauthorized entry into Hong Kong.⁸² Section 37C provides jurisdiction over a ship and its crew for transporting to Hong Kong people unauthorized to enter.⁸³ Section 37D makes it unlawful to assist in arranging for an unauthorized person to be transported to Hong Kong.⁸⁴ Section 37DA

74 Hong Kong Crimes Ordinance, section 129.

75 Hong Kong Immigration Ordinance, section 17I.

76 Hong Kong Crimes Ordinance, section 129.

77 Id.

78 Hong Kong Crimes Ordinance, section 130.

79 Hong Kong Crimes Ordinance, section 131.

80 Hong Kong Crimes Ordinance, section 153P.

81 Hong Kong Immigration Ordinance, section 17I.

82 Hong Kong Immigration Ordinance, section 37.

83 Hong Kong Immigration Ordinance, section 37C.

84 Hong Kong Immigration Ordinance, section 37D.

makes it unlawful to assist an unauthorized entrant to remain in Hong Kong.⁸⁵ **Penalties and Punishments**

A conviction under Section 129 of the Crime Ordinance requires 10 years of imprisonment.⁸⁶

(ii.) Examples, Case Studies, and Enforcement Trends

According to the 2015 US TIP report, Hong Kong authorities made modest progress in Anti-Trafficking Law enforcement efforts. Authorities continue to define trafficking as the movement of people for prostitution, and Hong Kong laws lack specific criminal prohibition of forced labor.⁸⁷ According to the same report, authorities have never prosecuted or convicted traffickers for subjecting victims to forced labor, despite numerous reports of forced labor abuses perpetrated against migrant domestic workers.⁸⁸ In 2013, Hong Kong authorities trained more than 540 police officers and newly recruited immigration officers on trafficking. Hong Kong authorities did not report any investigations, prosecutions, or convictions of government officials complicit in trafficking offenses.⁸⁹

2. Anti-Corruption Enforcement Agency

Hong Kong has taken substantial steps in its fight against corruption. In the early 1970s, Hong Kong was generally regarded as one of the most problematic cities in the world for corruption issues. In 1974, Hong Kong created a special agency to fight corruption: the Independent Commission Against Corruption (the "ICAC"). Today, the ICAC still operates as one of the best resourced and funded anti-corruption agencies in the world. It has a staff of over 1,300 employees and an annual budget of nearly USD 100 million. It handles approximately 3,000 complaints a year with two-thirds of the reports regarding private sector corruption. The majority of the ICAC's work involves enforcement activities and it has been granted the power to arrest, detain, search and seize, and the power to subpoena information.⁹⁰

85 Hong Kong Immigration Ordinance, section 37DA.

86 Hong Kong Crimes Ordinance, section 129.

87 Trafficking in Persons Report, US Department of State, 182 (2015).

88 Id.

89 Id.

90 ICAC Brief History, ICAC, http://www.icac.org.hk/en/about_icac/bh/index.html

3. Anti-Corruption Law

Hong Kong's anti-corruption law is known as the Prevention of Bribery Ordinance (the "POBO"). In general, the POBO prohibits the offering, giving, or receiving of an "advantage" in both the public and private sectors. In section 2, "advantage" is broadly defined to cover the wide range of potential valuable consideration that could be exchanged.⁹¹

(i.) Legal Requirements

In sections 3, 4, 5, and 10, the POBO prohibits corruption by officials. Section 3 makes it an offence for any officer, also defined in section 2, to solicit or accept any advantage without the Chief Executive's general or special permission.⁹² Section 4 prohibits both the offering to and accepting of bribes by officers.⁹³ Section 5 makes it an offence to offer or accept advantages in exchange for assistance from an officer.⁹⁴ Section 10 prohibits officers from having unexplained property beyond what their income could provide.⁹⁵

The POBO also prohibits some forms of private sector corruption. Section 9 of the POBO makes it an offense for a private individual acting as an agent for a principal to accept an advantage for doing or forbearing to do the agents duty.⁹⁶ It is also an offense for an individual to offer an advantage to such an agent.⁹⁷

(ii.) Penalties and Punishments

There is a broad range of penalties for a conviction under POBO, depending on the specific section of conviction and whether the person received a summary conviction or was convicted on indictment, which is more severe. The monetary penalties range from HKD 100,000 to HKD 500,000 and the punishments range from 3 to 10 years.⁹⁸

(iii.) Examples, Case Studies, and Enforcement Trends

Hong Kong has had a strong anti-corruption enforcement policy for many years and has used in ways that could combat trafficking. In 2003, an owner of nightclubs, which were actually fronts for prostitution, and a Senior Superintendent of the Hong Kong Police Force were tried

91 POBO of 1996, Section 2.

92 See POBO of 1996, Section 3.

93 See POBO of 1996, Section 4.

94 Id.

95 See POBO of 1996, Section 10.

96 See POBO of 1996, Section 9.

97 Id.

98 See POBO of 1996, Section 12.

and convicted on multiple charges.⁹⁹ The police officer was charged with misconduct in public office and the nightclub owner was charged with “offering an advantage to a Government servant”. The police officer had authority over the district where the nightclubs operated and on more than one occasion, the owner sent her girls to have dinner and sleep with the police officer as the owner’s expense.¹⁰⁰ Because of these events, both the owner and police officer were convicted and sentenced to prison.

III. ANALYSIS OF ANTI-CORRUPTION LAW AS A TOOL AGAINST HUMAN TRAFFICKING

Hong Kong’s Anti-Trafficking Laws and enforcement are limited. The Anti-Trafficking Laws do not sufficiently recognize and punish forced labor and there is a total absence of enforcement. Thus, there is a large gap in the Anti-Trafficking Law.

The anti-corruption laws are available wherever corruption takes place as those laws target the fundamental acts of offering, soliciting, or accepting of advantages, regardless of the specific subject matter. The laws are therefore broad enough to capture human trafficking-related corruption in principle, and records show that, since 1997, there have been cases in which prosecutions were brought for corruption that were connected with or facilitated criminal activities that potentially relate to human trafficking.

Realistically, Hong Kong’s human trafficking involves cross-border human smuggling from the PRC or other countries. Customs and border officials are likely aware of the use of these transport routes for human trafficking. The ICAC has pursued and prosecuted government officials and smugglers for illegal transport of goods, and the ICAC has prosecuted government officials for their indirect connection to prostitution. Therefore, based on the ICAC’s past activities, upon a credible report from a complainant, the ICAC may investigate the possibility of corruption through these transport channels.

Thus, the combination of Hong Kong’s insufficient Anti-Trafficking Laws and strong anti-corruption enforcement agency and laws makes the use of anti-corruption laws a potential success as a tool against trafficking.

⁹⁹ Sim Kam Wah and Lam Chuen Ip v. HKSAR, No. 14 of 2004 (Criminal) (May 26, 2005); Criminal Appeal No. 520 of 2003 (June 11, 2004).

¹⁰⁰ Id.

I. JURISDICTION SUMMARY: INDONESIA

Indonesia is the largest economy in Southeast Asia and a member of the G-20 major economies. Indonesia's history has been turbulent since World War II, with challenges posed by natural disasters, mass killings, corruption, separatism, a democratization process, and periods of rapid economic change. The population is around 255 million as estimated in 2015. Indonesia is a member of ASEAN. Transparency International ranked Indonesia as 107 in its global Corruption Perception Index for 2014.¹⁰¹

1. Human Trafficking Risk Levels

According to the 2015 US Trafficking in Persons Report, Indonesia was listed in Tier 2, which means that the government does not fully comply with the US Trafficking Victims Protection Act of 2000's minimum standards for the elimination of trafficking, but the government is making significant efforts to do so.¹⁰² According to the 2015 US Trafficking in Persons Report, Indonesia is a "major source country and, to a much lesser extent, destination and transit country for women, children, and men subjected to sex trafficking and forced labor."¹⁰³

Within Indonesia, large numbers of women and girls move from the rural areas to bigger cities in search of opportunities.¹⁰⁴ Many of these women find themselves in debt and are forced to work as sex workers.¹⁰⁵ An alarming trend is that a growing number of Indonesian teenagers are involved in running the sex trade.

Internal trafficking is a significant problem in Indonesia with women and children exploited in domestic servitude, commercial sexual exploitation, rural agriculture, mining, fishing, and cottage industries.

II. ANTI-TRAFFICKING AND ANTI-CORRUPTION LEGAL FRAMEWORK

1. Anti-Trafficking Law

A comprehensive Anti-Trafficking Law, passed in 2007 and implemented in 2009, prohibits all forms of human trafficking and prescribes penalties of 3 to 15 years of

101 Transparency International, 2014 Corruption Perceptions Index, (Nov. 23, 2015), <http://www.transparency.org/cpi2014/results#myAnchor1>.

102 Trafficking in Persons Report, US Department of State, 187-89 (2015).

103 Id.

104 Id.

105 Id.

imprisonment for offenses.¹⁰⁶ The Indonesian government has recently been increasing its efforts to protect victims of trafficking, though the level of available support for victims varied greatly across regions.¹⁰⁷ However, the government relies significantly on international organizations and NGOs for the provision of services to victims.¹⁰⁸

The Indonesian government has recently made some progress in preventing human trafficking, particularly through issuing additional guidelines for the oversight of labor migrants and the registered recruiters and licensed recruiting agencies sending them abroad.

The enforcement of anti-trafficking efforts is largely carried out by the Indonesian National Police, which is mainly responsible for anti-trafficking in persons, while other departments also bear certain duties, including: State Ministry of Women Empowerment, the Coordinating Ministry on People's Welfare, the Department of Social Affairs, the Department of Manpower and Transmigration, and the Directorate General of Immigration.

(i.) Legal Requirements

Trafficking violations involve the following elements:

(a) The action of recruiting, transporting between regions and countries, transferring, sending, receiving and temporary placement or placement at their destination of people;

(b) by using threats, verbal and physical abuse, abduction, fraud, deception, misuse of vulnerability, giving or receiving payments or profits in cases in which a person is used for prostitution and sexual exploitation, legal or illegal migrant workers, child adoptions, fishing platform work, mail order brides, domestic helpers, begging, pornography, drug dealing, selling of body organs as well as other forms of exploitation.¹⁰⁹

In March of 2011, Indonesia's parliament passed a new immigration law that provides punishments of up to two years' imprisonment for officials found guilty of aiding and abetting human trafficking or people smuggling. The new law also links human

106 Id.

107 Id.

108 Id.

109 National Plan of Action on the Elimination of Trafficking in Women and Children, formulated by

Presidential Decree No: 88 Year 2002.

trafficking and people smuggling, allowing traffickers to be prosecuted for the crime of smuggling.

(ii.) Penalties and Punishments

The Anti-Trafficking Law in Indonesia prescribes penalties of 3 to 15 years imprisonment for violations, which match punishments for other serious crimes in the legal system. For trafficking crimes involving children, the punishment is a maximum of 15 years of imprisonment.

(iii.) Examples, Case Studies, and Enforcement Trends

As discussed in the 2015 US TIP Report, in September of 2013, three convicted offenders were ordered to pay restitution to victims. In January of 2014, two defendants were convicted of subjecting 56 men to forced labor and debt bondage on a fishing vessel operating in international waters.¹¹⁰

The Indonesian government made some progress in preventing human trafficking, particularly through issuing additional guidelines for the oversight of labor migrants and the registered recruiters and licensed recruiting agencies sending them abroad.

According to the TIP Report, there is a continued increase in the number of undocumented Indonesian workers travelling abroad. Undocumented workers are at a higher risk of becoming trafficking victims than documented workers because of governmental restrictions on legal migration channels for low-skilled workers.

2. Anti-Corruption Enforcement Agency

Indonesian police and the Corruption Eradication Commission (the “KPK”) are both responsible for tackling the country’s endemic corruption. However, there are reports that these two departments have overlapping jurisdiction and scope of efforts, which maybe causing inefficiencies and internal territorial struggles instead of increased enforcement.

3. Anti-Corruption Law

The key anti-corruption legislation is Law No. 31 of 1999 on the Eradication of Corruption Crimes as amended by Law No. 20 of 2001 (the “Anti-Corruption Law”) and the Law No. 11 of 1980 on Bribery that amended the Criminal Code of Indonesia (the “Indonesia Criminal Code”). Additionally,

110 Trafficking in Persons Report, US Department of State, 179-81 (2015).

there is a series of ancillary legislation that also attempts to help detect corruption and prosecute offenders.

(i.) Legal Requirements

The Anti-Corruption Law prohibits some activities, such as acts similar to embezzlement,¹¹¹ abuse of power,¹¹² giving gifts or paying bribes to officials,¹¹³ and anything considered “corruption” in another law.¹¹⁴ The majority of legal prohibitions, however, are found in other laws.

The Criminal Code prohibits paying a bribe to an official¹¹⁵ or judge¹¹⁶, acceptance of the bribe by the official¹¹⁷ or judge¹¹⁸, embezzlement by an official¹¹⁹, and extortion¹²⁰

(ii.) Penalties and Punishments

Generally, the articles in the Indonesia Criminal Code prescribe specific penalties for violations. However, for crimes that can be considered corruption, which are cited above, the penalties are enhanced under the Anti-Corruption Law.¹²¹ For example, paying a bribe to a public official is punishable by a maximum imprisonment of 2 years under the Indonesia Criminal Code,¹²² but because this action falls under the Anti-Corruption Law the maximum term of imprisonment is 3 years and a possible fine of up to IDR 150 million. The penalties in the Anti-Corruption Law are determined based on the seriousness of the crime and may include imprisonment from 1 to 20 years and fines ranging from IDR 50 million (approx. USD 4,300) up to IDR 1 billion (approx. USD 86,000) or life imprisonment.

(iii.) Examples, Case Studies, and Enforcement Trends

The KPK is reportedly extremely aggressive enforcement efforts against large profile corruption cases, utilizing all the special investigation powers it is legally authorized to assert. For example, a KPK investigation caused the Indonesian Sports Minister to resign in 2012.¹²³ Because of the KPK’s aggressive stance, it has made some enemies with significant

111 Indonesia Anti-Corruption Law, Article 2(1).

112 Indonesia Anti-Corruption Law, Article 3.

113 Indonesia Anti-Corruption Law, Article 13.

114 Indonesia Anti-Corruption Law, Article 14.

115 Indonesia Criminal Code, Article 209(1).

116 Indonesia Criminal Code, Article 210(1).

117 Indonesia Criminal Code, Article 419.

118 Indonesia Criminal Code, Article 420.

119 Indonesia Criminal Code, Article 415.

120 Indonesia Criminal Code, Article 425.

121 Indonesia Anti-Corruption Law, Article 14.

122 Indonesia Criminal Code, Article 209.

123 Indonesian Minister Andi Mallarangeng Resigns over Graft Charges, BBC News (Dec. 7, 2012), <http://www.bbc.com/news/world-asia-20638970>.

political power, including a feud with the Indonesian police and the attorney general.¹²⁴ The KPK has significant struggles with a limited resources and a significant backlog.¹²⁵

A significant amount of Indonesia's human trafficking involves human trafficking out of Indonesia undocumented workers primarily for the purposes of labor. In recognition of this problem, Indonesia modified regulations and oversight over labor recruiters.

III. ANALYSIS OF ANTI-CORRUPTION LAW AS A TOOL AGAINST HUMAN TRAFFICKING

Indonesia has anti-trafficking and anti-corruption laws. The Anti-Trafficking Laws have limited application to anyone who is not a direct actor, i.e. a trafficker. Thus, the Anti-Trafficking Laws do not cover government officials who assist or allow the trafficking activities.

Indonesia's anti-corruption law is broad enough to cover those government officials who assist or allow trafficking activities. Thus, it is theoretically possible to combat human trafficking in Indonesia using anti-corruption laws.

Realistically, a major hindrance to using the Anti-Corruption Laws, however, is that the KPK does not have enough resources to investigate all of the cases it receives. Moreover, the KPK's past enforcement activities focus on high-level cases of corruption. The corruption that would be involved in the trafficking cases may not be substantial enough for the KPK to investigate until it has greater resources, which will require greater support from the government. Therefore, it would be necessary for the Indonesian police, who also have jurisdiction to investigate the case as a corruption case. However, the Indonesian police do not have the same special investigation powers as the KPK and, if the police are unwilling to investigate the case under the Anti-Trafficking Law, then they are probably unwilling to investigate under the Anti-Corruption Law as well.

124 The Gecko Bites Back, *The Economist* (Nov. 5, 2009), <http://www.economist.com/node/14816720>.

125 Ni Komang Erviani, KPK Backlog Reaches More than 16,000 Cases, *The Jakarta Post* (Dec. 3, 2009), <http://www.thejakartapost.com/news/2008/12/03/kpk-backlog-reaches-more-16000-cases.html>.

Lao People's Democratic Republic ("Laos")

I. JURISDICTION SUMMARY: LAOS

Laos is a landlocked country in Southeast Asia, bordered by Myanmar and China to the northwest, Vietnam to the east, Cambodia to the south, and Thailand to the west. Since 1975, it has been ruled by a Marxist and communist government.¹²⁶ Due to the long history of migration to neighboring countries and its landlocked location, Laos has significant trafficking problems. Laos is a member of ASEAN. Transparency International ranked Laos as 145 in its global Corruption Perception Index for 2014.¹²⁷

1. Human Trafficking Risk Levels

The 2015 Trafficking in Persons Report categorizes Laos as part of the Tier 2 Watch List. Laos is a source, and to a lesser extent, a transit and destination country for women, children, and men subjected to sex trafficking and forced labor.¹²⁸ Trafficking victims often are migrants seeking work outside the country often with the assistance of brokers who charge high fees. As these migrants arrive overseas, they often encounter conditions of labor or sexual exploitation after arriving in destination countries. The most frequent destination for trafficking victims is Thailand.¹²⁹

Many female victims are exploited in Thailand's commercial sex trade and in forced labor in domestic service, factories, or agricultural industries.¹³⁰ Men and boys are victims of forced labor in Thailand in the fishing, construction, and agricultural industries.¹³¹ Laos is reportedly a transit country for some Vietnamese and Chinese women and girls who are subjected to sex trafficking and forced labor in neighboring countries, particularly Thailand.¹³² There were reports that child sex tourists from the United Kingdom, Australia, and the United States have traveled to Laos intending to exploit children in the sex trade.¹³³

126 See Lao PDR, Wikipedia (Retrieved Dec. 3, 2015), <https://en.wikipedia.org/wiki/Laos>

127 Transparency International, 2014 Corruption Perceptions Index, (Nov. 23, 2015), <http://www.transparency.org/cpi2014/results#myAnchor1>.

128 Trafficking in Persons Report, US Department of State, 217 (2015).

129 Id.

130 Id.

131 Id.

132 Id.

133 Id.

II. ANTI-TRAFFICKING AND ANTI-CORRUPTION LEGAL FRAMEWORK

1. Anti-Trafficking Law

Laos does not have a law specifically targeting human trafficking, but there are separate provisions in the Penal Code (2006) (the “Penal Code”), Labor Law (2013) (the “Labor Law”), and other miscellaneous provisions. In 2007, Laos enacted the Law on the Protection of the Rights and Interests of Children (2007), a law specifically protecting children from trafficking, forced labor, and sexual exploitation.

The Penal Code has been revised three times from 1990 to 2005, and now it is treated as Laos’s most comprehensive legislation against trafficking. Article 134 of the Penal Code is the strongest prohibitions against human trafficking.

2. Legal Requirements

Human trafficking is defined as:

- “1) Recruiting, moving, transferring, harboring, or receiving of any person within or across national borders by means of deception, threats, use of force, debt bondage, or any other means [and using such person in] forced labor, prostitution, pornography, organ removal, or for other unlawful purposes.

- 2) Any of the above-mentioned acts committed against children under 18 years of age shall be considered as human trafficking even though there is no deception, threat, use of force, or debt bondage.”¹³⁴

The Penal Code forbids the “Trade and Abduction of Human Beings,” which is defined as “engaging in the trade and abduction of human beings for ransom, sale or other purposes”¹³⁵

The Labor Law makes criminal using a person as forced labor, but makes the following exceptions: (1) for national defense, or for national security; (2) in emergencies, including fires, natural disasters, or disease epidemics; (3) based on a court decision to require such labor under the administration of relevant government officials; (4) for group work in accordance with the decision of local authorities, organizations, or associations to which the employee is attached or is a member.¹³⁶

134 Laos Penal Code (2006), Article 134.

135 Laos Penal Code (2006), Article 100.

136 Laos Labor Law (2013), Article 59.

The Labor Law allows employers to recruit employees under eighteen years old, but not younger than fourteen years; however, they are prohibited from working overtime.¹³⁷

(i.) Penalties and Punishments

A conviction for trafficking under the Penal Code may be punished by five years to fifteen years imprisonment and a fine between LAK 10 million to LAK 100 million. But, where the human trafficking is a regular profession or a collective enterprise, where the victims are children, where there are two or more victims, where any victim is a close relative of the offender, or where any victim suffers serious injury or becomes an invalid or insane, the offender may be punished by fifteen to twenty years of imprisonment, a fine between LAK 100 million to LAK 500 million, and his property will be confiscated pursuant to Article 34 of the Penal Code.¹³⁸ If the trafficking causes the victim to be a lifetime invalid, to be infected with HIV, or to die, the offender will receive life imprisonment, fined between LAK 500 million to LAK 1 billion, and his property will be confiscated pursuant to Article 34 of the Penal Code.¹³⁹

A conviction for trade and abduction of human beings requires imprisonment for five to fifteen years and a fine between LAK 5 million and LAK 50 million.¹⁴⁰

(ii.) Examples, Case Studies, and Enforcement Trends

The majority of trafficked Laotians are trafficked to Thailand where their living conditions are often dangerous. On Aug 22, 2015, Thai police and military officers rescued thirteen migrant Laotian workers from a pig farm outside Bangkok. At that farm they were kept in animal cages and lived in slave-like conditions. They had illegally obtained jobs at the pig farm through a job broker, whom they paid, but never received a salary for their work.¹⁴¹

137 See Laos Labor Law (2013), Article 101.

138 See Laos Penal Code (2006), Article 34" confiscation is taken by the State of part or all of an offender's property without any compensation. In the event that the confiscation of all of the offender's property is imposed, exception must be made for property necessary for the livelihood of the offender and his family according to the list attached to this law."

139 Laos Penal Code (2006), Article 134.

140 See Laos Penal Code (2006), Article 100.

141 See <http://www.rfa.org/english/news/laos/lao-migrants-to-be-witnesses-in-thai-human-trafficking-case-08282015130327.html>

3. Anti-Corruption Enforcement Agency

In Laos, the main agencies involved in anti-corruption prevention, investigation, and enforcement is the State Inspection Authority and Party Central Control Committee. Meanwhile, the Supreme Audit Authority, the National Police, the People's Prosecutor, and other government departments all share authority in Laos' complex anti-corruption system.¹⁴²

Laos implemented its Anti-Corruption Law in 2005, which established the Laos Counter-Corruption Organization (the "CCO").¹⁴³ The CCO is organized into two levels: a centralized national level and a provincial level.¹⁴⁴ There are eighteen provinces in Laos and each province has its own CCO.

4. Anti-Corruption Law

Laos' anti-corruption legal framework is found in the Laos Anti-Corruption Law (the "Anti-Corruption Law") and Penal Code. The Anti-Corruption Law was promulgated on May 25, 2005, which moved Laos toward full compliance with the 2003 United Nations Convention against Corruption. Laos signed the Convention in December of 2003.¹⁴⁵ The Anti-Corruption Law specifically called for an end to nepotism, senior official asset declarations, and the establishment of a national anti-corruption organization.¹⁴⁶ It was reported the Anti-Corruption Law was renewed in 2012.¹⁴⁷

(i.) Legal Requirements

Under the Anti-Corruption Law, corruption is defined as "[t]he act of an official who opportunistically uses his position, powers, and duties to embezzle, swindle, or receive bribes or any other act provided for in Article 10 of this law, to benefit himself or his family, relatives, friends, clan, or group, and causes damage to the interests of the State and society or to the rights and interests of citizens."¹⁴⁸

Under the Penal Law, corruption is defined as "[a]ny civil servant claiming, requesting, accepting, or

142 See <https://www.unodc.org/laopdr/en/resources.html>.

143 Laos Anti-corruption Law (2005), Article 5.

144 Phongsavanh Phommahaxay, Effective Mechanisms to Prevent Corruption, Instances of Successful And Unsuccessful Implementation of Anti-Corruption Prevention Measures in Lao PDR, 2 (2012). http://www.unafei.or.jp/english/pdf/PDF_GG5_Seminar/GG5_LaoPDR2.pdf

145 See <http://www.globalsecurity.org/military/world/laos/corruption.htm>

146 Id.

147 At this time, there is no English version of any revisions to the Anti-Corruption Law in 2012. For this reason, this section references the 2005 version of the Anti-Corruption Law.

148 Laos Anti-corruption Law (2005), Article 2.

agreeing to accept a bribe in exchange for using the civil servant's position for the bribing party's interest."¹⁴⁹

(ii.) Penalties and Punishments

In accordance with the Penal Code, Article 157, both the bribe taker and the bribe receiver will be punished as follows:

"(1) The bribe taker will be punished by imprisonment for one to three years and a fine equal to the amount or value of the bribe;

(2) The bribe giver will be punished by imprisonment for six months to two years and a fine equal to the amount or value of the bribe;

(3) If the bribe is substantial, then all parties may be punished by imprisonment for three to five years of imprisonment and a fine equal to twice the amount or value of the bribe;

(4) People facilitating or assisting in the bribery will be punished by imprisonment for six months to two years and a fine equal to the amount or value of the bribe."¹⁵⁰

The Anti-Corruption Law also prohibits many specific forms of corruption, such as forging or delaying documents.¹⁵¹ The law also establishes severe penalties, ranging up to twenty years imprisonment for serious violations.¹⁵² These enforcement provisions are in addition to existing laws that cover some but not all of the violations listed in the new statute.

(iii.) Examples, Case Studies, and Enforcement Trends

There is very little information available regarding actual anti-corruption activities in Laos. There are no reports or statistics for the specific number of the investigated cases or officials.

Generally, the government tends to deal with serious corruption problems by forcing corrupt officials to retire or move to a new position. Besides bribes to low-level officials for the purpose of expediting time-sensitive applications, such as business licenses, importation of perishable items, and customs, the anecdotal evidence of more pervasive corruption is growing.

Laos has made some attempts to decrease corruption. In March 2006, the government requested UNDP to assist

149 Laos Penal Code (2006), Article 157.

150 See Laos Penal Code (2006), Article 157.

151 See Laos Anti-corruption Law (2005), Article 10.

152 See Laos Anti-corruption Law (2005), Article 42-50.

them in developing a national anti-corruption strategy that would support the implementation of the Anti-Corruption Law.¹⁵³ Because there are not statistics, it is difficult to determine whether there has been any progress.

III. ANALYSIS OF ANTI-CORRUPTION AS A TOOL AGAINST HUMAN TRAFFICKING

There is limited theoretical possibility to use the Anti-Corruption Law to combat trafficking in Laos. The Anti-Trafficking Laws are relatively narrow and do not cover the government officials who assist, acquiesce, or do nothing. Moreover, those who traffic in adults do not commit a trafficking offense if the adult consents because the law requires some act of force or deception. Nonetheless, the anti-corruption laws cannot fill these gaps because they are also overly narrow.

The Anti-Corruption Law has at least three specific requirements for a conviction: (1) some sort of corrupt act, i.e. bribery; (2) for the benefit of the official or an associate; and (3) harm to the nation or the rights of people. It is a realistic difficulty to prove a corrupt act in any circumstance; it will be even more difficult to show that an official's non-action, i.e. letting someone out of the country so that they can work rises to the level of injuring the nation or rights of people. For those trafficked into Laos, the injury cannot be to them because the injury must be to the rights of citizens and they would not be citizens. Thus, there is little theoretical basis for using anti-corruption laws to combat trafficking.

Realistically, it is unlikely that the Anti-Corruption Law is a feasible way to fight trafficking in Laos. The majority of trafficking from Laos is outbound into other nations, and often with a labor recruiter who may or may not be operating legally. The Anti-Corruption Law and Anti-Trafficking Laws do not have extraterritorial jurisdiction. Thus, when the Laotian people are trafficked abroad, the Laos law no longer has force. Moreover, there is no evidence that the CCO currently has any authority to investigate or prosecute. Thus, the Anti-Corruption Law is insufficient to cover the typical acts of trafficking and the enforcement of the law is also inadequate. Therefore, the current state of the anti-corruption laws makes them neither a theoretical or realistic possibility to help with corruption enforcement.

153 See <https://www.unodc.org/laopdr/en/resources.html>

Malaysia

I. JURISDICTION SUMMARY: MALAYSIA

Malaysia is a federal constitutional monarchy located in Southeast Asia with a population of over 30 million in 2015. Malaysia has a newly industrialized market economy, ranked third largest in Southeast Asia and 29th largest in the world. Malaysia is a member of ASEAN. Transparency International ranked Malaysia as 50 in its global Corruption Perception Index for 2014.¹⁵⁴

1. Human Trafficking Risk Levels

According to the 2015 US Trafficking in Persons Report, Malaysia was listed on the Tier 2 watch list, meaning that the government does not comply with the minimum standards for the elimination of trafficking, but it is making significant efforts to do so.¹⁵⁵ According to the same report, Malaysia is mainly a destination country for human trafficking; however, it is also, to a lesser extent, a source and transit country for men, women, and children subjected to forced labor and women and children subjected to sex trafficking.¹⁵⁶ The victims of human trafficking are among the 4 million documented and undocumented workers in Malaysia.¹⁵⁷ These workers primarily come from Indonesia, Bangladesh, the Philippines, Nepal, Myanmar, and other Southeast Asian countries.¹⁵⁸

The migrant workers to Malaysia tend to travel there voluntarily then become subject to forced labor or debt bondage by their employers, agents, or labor recruiters.¹⁵⁹ Most of the foreign workers are employed by recruiting or outsourcing companies rather than by direct hiring which increases the workers' vulnerability.¹⁶⁰

II. ANTI-TRAFFICKING AND ANTI-CORRUPTION LEGAL FRAMEWORK

1. Anti-Trafficking Law

Malaysia's Anti-Trafficking in Persons Act contains comprehensive prohibitions against human trafficking. The law was amended in 2010 to broaden the definition of trafficking to include all actions

154 Transparency International, 2014 Corruption Perceptions Index, (Nov. 23, 2015), <http://www.transparency.org/cpi2014/results#myAnchor1>.

155 Trafficking in Persons Report, US Department of State, 234 (2015).

156 Id. at 233.

157 Id.

158 Id.

159 Id.

160 Id.

involved in acquiring or maintaining the labor or services of a person through coercion.¹⁶¹

(i.) Legal Requirements

A trafficking violation consists of the following types and elements:

Article 12 makes any person guilty of a trafficking offense who traffics in people, not including children, for the purpose of exploitation. Trafficking requires a threat or force.¹⁶²

Article 13 makes guilty any person who traffics in people, not including children, for the purpose of exploitation by one or more of the following means: "(a) threat; (b) use of force or other forms of coercion; (c) abduction; (d) fraud; (e) deception; (f) abuse of power; (g) abuse of the position of vulnerability of a person to an act of trafficking in persons; or (h) the giving or receiving of payments or benefits to obtain the consent of a person having control over the trafficked person."¹⁶³

Article 14 specifically addresses trafficking of children. It makes guilty any person who traffics in children for the purpose of exploitation.¹⁶⁴

(ii.) Penalties and Punishments

A trafficking conviction under article 12 may be punished with imprisonment for a term not exceeding fifteen years and a fine.¹⁶⁵

A trafficking conviction under article 13 may be punished with imprisonment for a term not less than three years but not exceeding twenty years, and also a fine.¹⁶⁶

A trafficking conviction under article 14 may be punished with imprisonment for a term not less than three years but not exceeding twenty years and a fine.¹⁶⁷

Article 63 provides that any person who commits an offence under this Act for which no penalty is expressly provided shall be liable to a fine not

161 Malaysia Anti-Trafficking in Persons (Amendment) 2010, Article 4(g), Section 2.

162 Malaysia Anti-Trafficking in Persons (2007) Article 12.

163 Malaysia Anti-Trafficking in Persons (2007) Article 13.

164 Malaysia Anti-Trafficking in Persons (2007) Article 14.

165 Malaysia Anti-Trafficking in Persons (2007) Article 12.

166 Malaysia Anti-Trafficking in Persons (2007) Article 13.

167 Malaysia Anti-Trafficking in Persons (2007) Article 14.

exceeding MYR 150 thousand or to imprisonment for a term not exceeding three years or to both.¹⁶⁸

(iii.) Examples, Case Studies, and Enforcement Trends

There are several recent accounts of human trafficking cases in Malaysia. Notably, in 2014 there were a series of reports about trafficking of groups of Rohingya Muslims from Myanmar. During this time and continuing into 2015 a series of mass graves have been found in Northern Malaysia believed to be related to these trafficking channels, which primarily exist along the border between Thailand and Malaysia. Most recent news says the Malaysia police have found mass graves of 24 suspected human trafficking victims, which shows the continuing of serious human trafficking situation in Malaysia.¹⁶⁹

In 2014, the government consulted with civil society stakeholders to draft and propose amendments strengthening the existing Anti-Trafficking Law and addressing concerns raised in previous Trafficking in Persons Reports, including by allowing trafficking victims to move freely and work, and for NGOs to run the facilities. In February 2015, Malaysian and Indonesian officials announced the creation of an “official channel” for domestic worker recruitment, which aims to expedite recruitment and minimize the number of migrants who seek work illegally.¹⁷⁰

The government is increasing efforts to prevent trafficking. In 2014, the TIP report categorized Malaysia in Tier 3, but in 2015 Malaysia is ranked Tier 2. Recently, Malaysia more than doubled the number of trafficking investigations and also increased the amount of prosecutions; however, there was a decrease in convictions from 2013. The year of 2015 is the last year of Malaysia’s Five-Year Plan on Combating Human Trafficking launched in 2010 by the government.¹⁷¹

2. Anti-Corruption Enforcement Agency

Malaysia has an anti-corruption enforcement department called the Anti-Corruption Commission (the “MACC”), which is responsible for investigating and prosecuting corruption in the public and private sectors.¹⁷² While the

168 Malaysia Anti-Trafficking in Persons (2007) Article 63.

169 Malaysia Finds Mass Graves of 24 Suspected Human Trafficking Victims (Aug. 23, 2015), <http://www.theguardian.com/world/2015/aug/23/malaysia-finds-mass-graves-of-24-suspected-human-trafficking-victims>.

170 Trafficking in Persons Report, US Department of State, 234-236 (2015).

171 A. Nayyer Shamsi, Malaysia Launches National Anti-Trafficking in Persons Action Plan (April 2, 2010) (Blog), <http://newsdawn.blogspot.hk/2010/04/malaysia-launches-national-anti.html>

172 Malaysia Anti-Corruption Commission Act 2009, Article 4 and Article 7.

MACC does not have a prosecution mandate, it does not have independent prosecutorial powers – only the Attorney General has independent prosecutorial power.¹⁷³

3. Anti-Corruption Law

The primary statute governing corruption is the Malaysian Anti-Corruption Commission Act 2009 (the “MACCA”). The MACCA prohibits a number of corrupt activities, including bribery in both the public and private sectors¹⁷⁴, deceiving a principal by an agent¹⁷⁵, corruption in procurements¹⁷⁶, and abuse of power.¹⁷⁷

(i.) Legal Requirements

The provisions of the MACCA forbid the giving, in any circumstance, of any gratification, which is defined broadly to include most tangible or intangible benefits.¹⁷⁸ The MACCA also forbids any person to solicit, receive, give, promise, or offer a gratification.¹⁷⁹ This prohibition is expanded to include bribing a government official,¹⁸⁰ a foreign government official,¹⁸¹ and officials accepting gratifications.¹⁸²

(ii.) Penalties and Punishments

For all corruption convictions, except for deceiving a principal, the penalty is imprisonment for up to twenty years and a fine that is at least five times the gratification or MYR 10,000, whichever is higher.¹⁸³ For a conviction under section 18 (Deceiving a Principal), the penalty is imprisonment for up to twenty years and a fine five times the sum or value of the deception or MYR 10,000, whichever is higher.¹⁸⁴

(iii.) Examples, Case Studies, and Enforcement Trends

Indonesia’s former Immigration Department Director-General, Datuk Wahid Md Don, was investigated by the MACC and prosecuted for receiving a bribe of approximately MYR 60,000 in exchange for expediting and approving the visa applications for 4,337

173 Give MACC Prosecution Power, Transparency International Malaysia, <http://transparency.org.my/media-and-publications/give-macc-prosecution-power/>

174 Malaysian Anti-Corruption Commission Act, Section 16-17, 21, 22.

175 Malaysian Anti-Corruption Commission Act, Section 18.

176 Malaysian Anti-Corruption Commission Act, Section 20.

177 Malaysian Anti-Corruption Commission Act, Section 23.

178 Malaysian Anti-Corruption Commission Act, Section 2.

179 Malaysian Anti-Corruption Commission Act, Section 16-17

180 Malaysian Anti-Corruption Commission Act, Section 21.

181 Malaysian Anti-Corruption Commission Act, Section 22.

182 Malaysian Anti-Corruption Commission Act, Section 23.

183 Malaysian Anti-Corruption Commission Act, Section 24.

184 Id.

Bangladeshi workers. He was sentenced to six years in prison and to pay a fine of MYR 300,000.¹⁸⁵

In 2015, the MACC's cases included the prosecution of six enforcement officers for taking MYR 30,000 in bribes.

III. ANALYSIS OF ANTI-CORRUPTION LAW AS A TOOL AGAINST HUMAN TRAFFICKING

Malaysia has comprehensive anti-corruption laws and Anti-Trafficking Laws. The trafficking laws, however, are sufficiently narrow and potentially exclude those who assist trafficking along the way. Thus, the trafficking laws may not encompass the activities of officials who merely allow entry to Malaysia or turn a blind eye to the activities. The MACC can use the Anti-Corruption Law to include government officials who assist or turn a blind eye to trafficking in exchange for gratification.

The Anti-Corruption Law's broad scope creates both theoretical and practical opportunities for use as a tool against human trafficking in a variety of situations, including targeting corruption of border officials and commercial bribery. As cited above, the MACC has already investigated and prosecuted one such case against the Immigration Director General.

185 Ex-Immigration Director-General Jailed for Graft, AsiaOne (Oct, 30, 2013), <http://news.asiaone.com/news/crime/ex-immigration-director-general-jailed-graft?page=0%2C1>.

I. JURISDICTION SUMMARY: MYANMAR

Myanmar, also known as Burma, is a sovereign state in Southeast Asia with 51 million people. It is ranked at 68 of list of global GDP last year. Myanmar is a member of ASEAN. Transparency International ranked Myanmar as 156 in its global Corruption Perception Index for 2014.¹⁸⁶

1. Human Trafficking Risk Levels

According to the 2015 US Trafficking in Persons Report, Myanmar was listed on the Tier 2 watch list, meaning that the government does not comply with the minimum standards for the elimination of trafficking, but it is making significant efforts to do so.¹⁸⁷ Myanmar is a source and transit country for human trafficking.¹⁸⁸ Myanmar's military regime is the main perpetrator of human trafficking abuses both within the country and abroad.¹⁸⁹ While there are no reliable estimates on the number of Burmese who are trafficked, some observers believe that the number of victims is at least several thousand per year.¹⁹⁰

In Myanmar, men are subjected to forced labor in the fishing, manufacturing, forestry, and construction industries. Women and girls are primarily subjected to sex trafficking, domestic servitude, or forced labor in garment manufacturing,¹⁹¹ while male children are trafficked to become child soldiers. Traffickers target orphans and children alone on streets as well as those in railway stations and sometimes recruiters trick children into joining the army or threaten them with jail or physical abuse if they do not agree to join.¹⁹²

II. ANTI-TRAFFICKING AND ANTI-CORRUPTION LEGAL FRAMEWORK

1. Anti-Trafficking Law

Myanmar has been implementing anti-human trafficking programs since 1997,¹⁹³ and a special work committee for anti-human trafficking was formed in 2002. Myanmar has increased trafficking efforts and cooperation with ASEAN and 6 Mekong region countries and Australia such as Asia Regional Cooperation to Prevent People

186 Transparency International, 2014 Corruption Perceptions Index, (Nov. 23, 2015), <http://www.transparency.org/cpi2014/results#myAnchor1>.

187 Trafficking in Persons Report, US Department of State, 104-06 (2015).

188 Id.

189 Id.

190 Id.

191 Id.

192 Id.

193 See <http://myanmarhumantrafficking.gov.mm/>

Trafficking (ARCPPT; 2003-2006) and the Asia Regional Trafficking in Persons Project (ARTIP: 2006-2013).¹⁹⁴ Myanmar also formed the Central Body¹⁹⁵ for anti-human trafficking in 2006 for the prevention and protection of people, prosecution of traffickers, reintegrating into the society and rehabilitation of the victims.¹⁹⁶

On January 24, 2013, Myanmar formed the Anti-Trafficking in Persons Unit. This year is the fourth year of Myanmar's second five-year national plan for anti-human trafficking. According to that plan, there are 5 tasks such as policy and cooperation, prevention, prosecution, safeguarding the victims and capacity development and are being implemented. In the policy and cooperation sector, the tasks for sending victims back home and prosecution are being carrying out by networking with Thailand, China and Indonesia.¹⁹⁷

(i.) Legal Requirements

According to Myanmar's Anti-Trafficking in Person Law, the legal requirements are as follows:

Trafficking in Persons means the recruitment, transportation, transfer, sale, purchase, lending, hiring, harboring, or receipt of persons after committing, for the purpose of exploitation of a person, committing any of the following: (1) threat, use of force, or other form of coercion; (2) abduction; (3) fraud; (4) deception; (5) abuse of power or of position taking advantage of the vulnerability of a person; (5) giving or receiving of money or benefit to obtain the consent of the person having control over another person.¹⁹⁸

(ii.) Penalties and Punishments

The penalty for trafficking women, children, and youths is imprisonment from 10 years to life; the penalty for trafficking men is 5 to 10 years; the penalty for fraud used to traffic is 3 to 7 years; the penalty for trafficking victims for pornography is 5 to 10 years; the penalty for trafficking with an organized criminal group is 10 years to life; the penalty for serious crime involving trafficking is 10 years to life or death; and, the penalty for public officials who accept money related to

194 See [http://www.cardno.com/en-au/projects/Pages/Australia-Asia-Program-to-Combat-Trafficking-in-Persons-\(AAPTIP\).aspx](http://www.cardno.com/en-au/projects/Pages/Australia-Asia-Program-to-Combat-Trafficking-in-Persons-(AAPTIP).aspx)

195 Myanmar Anti-Trafficking in Persons Law, Article 8.

196 Trafficking in Person: VP Recounted Myanmar's Efforts for Combating the Issue, Myanmar International TV (Spt. 14, 2015), <http://www.myanmarinternational.tv/news/trafficking-person-vp-recounted-myanmars-efforts-combating-issue>

197 Id.

198 Myanmar Anti-Trafficking in Persons Law, Article 3.

an investigation of trafficking is 3 to 7 years imprisonment. All penalties also include the option of a fine.¹⁹⁹

(iii.) Examples, Case Studies, and Enforcement Trends

In one case, a young Myanmar woman named Shahidah Yunus was offered an opportunity of freedom from the smugglers on the condition of marriage. She later reported that, "I was allowed to call my parents and they said that if I was willing, it would be better for all the family," so "I understood what I must do." Accordingly she was sold into marriage to a man in Malaysia as the price of escaping violence and poverty in their homeland.²⁰⁰ The trafficking situation in Myanmar has been significantly affected by regional instability as well as internal violence and the persecution of the Rohingya Muslims, which has caused substantial outflows or refugee-related trafficking.

2. Anti-Corruption Enforcement Agency

Myanmar's Anti-Bribery Commission was formed in 2014 to be the primary body in charge of enforcing anti-corruption laws.²⁰¹ However, the 15-member commission is filled by appointment only and the people appointed to fill the positions are all retired government officials.²⁰² In fact, the Commission's only duty is to review complaint letters and forward them to an investigation agency, which may result in significant limitations on its effectiveness.²⁰³

3. Anti-Corruption Law

It has been common practice for the politicians to abuse anti-corruption laws for political gains, and the anti-corruption laws in general are thought to be in the early stages of development. In August of 2013, Myanmar enacted a new Anti-Corruption Law, which seeks to improve the elements and enforcement.

199 Anti-Trafficking in Persons Law, Articles 24-29.

200 Chris Buckley & Ellen Barry, *Rohingya Women Flee Violence Only to Be Sold into Marriage*, *The New York Times* (Aug. 2, 2015), http://www.nytimes.com/2015/08/03/world/asia/rohingya-women-flee-violence-only-to-be-sold-into-marriage.html?_r=0.

201 Myanmar Forms Anti-Bribery Commission to Fight Corruption, *Myanmar.com* (Feb 26, 2014) (Blog), <http://www.myanmar.com/politics/entry/myanmar-forms-anti-bribery-commission-to-fight-corruption.html>.

202 Ei Ei Toe Lwin, *Doubts Emerge over Anti-Graft Commission*, *Myanmar Times* (Mar. 3, 2014), <http://www.mmmtimes.com/index.php/national-news/9746-doubts-emerge-over-anti-graft-commission.html>.

203 Tim McLaughlin & Aung Shin, *Graft Scandal Sinks without Trace*, *Myanmar Times* (June 9, 2014), <http://www.mmmtimes.com/index.php/national-news/10636-graft-scandal-sinks-without-trace.html>.

(i.) Legal Requirements

The law makes guilty any person who promises, offers, discusses, or gives directly or indirectly in order for that official to act or refrain from acting in the exercise of his official duties, or in order to obtain or retain business or other undue advantage.²⁰⁴

The law has extra-territorial reach and subjects to penalties any person committing any offence which requires action to be taken in the country, or any citizen or any person residing in Myanmar permanently, or who commits any offence under this law in Myanmar or abroad.²⁰⁵

(ii.) Penalties and Punishments

The Penalties and Punishments vary along with the position and status of the person committing the offences. According to Chapter 10 of the law, if the offender is a Political Post Holder, he shall be punished with imprisonment for a term of not more than 15 years and with a fine.²⁰⁶ However, for the Authorized Person, the punishments would be imprisonment for a term of not more than 10 years and with a fine.²⁰⁷ In addition to these special identities, article 57 provides that if any person is convicted for committing bribery, he/she shall be punished with imprisonment for a term of not more than 7 years and with a fine.²⁰⁸

(iii.) Examples, Case Studies, and Enforcement Trends

There are no cases of successful enforcement of the Anti-Corruption Law in Myanmar. Shortly after the Commission was established, a case of possible corruption involving the Minister for Communications, Posts and Telegraphs was forwarded to the Commission, but no prosecution has yet come from the case.²⁰⁹

204 Myanmar Anti-Corruption Law, Article 3(a) and 3(b).

205 Myanmar Anti-Corruption Law, Article 2.

206 Myanmar Anti-Corruption Law, Article 55-63.

207 Myanmar Anti-Corruption Law, Article 61.

208 Myanmar Anti-Corruption Law, Article 57.

209 Tim McLaughlin & Aung Shin, Graft Scandal Sinks without Trace, Myanmar Times (June 9, 2014), <http://www.mmtimes.com/index.php/national-news/10636-graft-scandal-sinks-without-trace.html>.

III. ANALYSIS OF ANTI-CORRUPTION LAW AS A TOOL AGAINST HUMAN TRAFFICKING

Theoretically, Myanmar's Anti-Trafficking Law only subjects to liability those who are directly involved in trafficking. The anti-corruption laws are broad enough to cover government officials who are assisting or turning a blind eye to trafficking. Thus, it is theoretically possible to utilize the anti-corruption laws as a tool to combat human trafficking.

Realistically, it is unlikely that Myanmar's anti-corruption laws could be routinely used to investigate or prosecute any officials, those who assist in trafficking or otherwise. Myanmar's Anti-Trafficking Law is far more developed than its anti-corruption law and enforcement regime. Likewise, Myanmar is working together with neighboring countries to address the trafficking problem. Moreover, the Anti-Bribery Commission has little power to enforce the law as it only reviews complaints to determine whether to forward them on to an agency with the power to investigate. Thus, even in the event that a valid complaint is lodged, it will have to make its way through the Anti-Bribery Commission and to an agency with powers before it can be investigated.

New Zealand

I. JURISDICTION SUMMARY: NEW ZEALAND

New Zealand was considered the fourth most peaceful country in the world according to the 2015 Global Peace Index.²¹⁰ As of June 2015, the population of New Zealand is estimated at 4.597 million,²¹¹ and it is ranked 53 in the 2014 Global GDP Rankings.²¹² New Zealand is not a member of ASEAN. Transparency International ranked New Zealand as 2 in its global Corruption Perception Index for 2014.²¹³ According to the 2015 US TIP Report, New Zealand is a destination country for foreign men and women subjected to forced labor and sex trafficking and a source country for children subjected to sex trafficking within the country.²¹⁴

1. Human Trafficking Risk Levels

The 2015 US TIP Report classified New Zealand in Tier 1. Nevertheless, there are narrow areas of New Zealand's economy that create significant risks of trafficking violations. New Zealand has a fishing Quota Management System which allows Foreign Charter Vessels ("FCVs") to operate within New Zealand's Exclusive Economic Zone. Because these FCVs operate outside the jurisdiction of labor protections, employers have been able to exploit crew members and submit them to forced labor.²¹⁵

In addition, there are risks that women from surrounding countries, as well as children of minority groups within New Zealand, are at risk for sex trafficking and forced prostitution. New Zealand does not have a comprehensive Anti-Trafficking Law that prohibits all forms of trafficking, and the Parliament has yet to approve proposed amendments to conform the definition of trafficking to international law.

Furthermore, the government maintained its prevention efforts and victim protection efforts. The first anti-trafficking prosecution was initiated under the Crime Act of 1961, involving labor exploitation of Indian students, and convicted

210 Vision of Humanity, Global Peace Index 2015 (Nov. 25, 2015) <http://www.visionofhumanity.org/#page/indexes/global-peace-index/2015/NZL/OVER>

211 National Population Estimates, Statistics NZ (June 30, 2015) http://www.stats.govt.nz/browse_for_stats/population/estimates_and_projections/NationalPopulationEstimates_HOTPA30Jun15.aspx

212 2014 GDP Ranking, World Bank (September 18, 2015) <http://databank.worldbank.org/data/download/GDP.xls>

213 Transparency International, 2014 Corruption Perceptions Index, (Nov. 23, 2015), <http://www.transparency.org/cpi2014/results#myAnchor1>.

214 Trafficking in Persons Report, US Department of State, 260-62 (2015).

215 Human trafficking in New Zealand, Wikipedia (Retrieved Nov. 25, 2015) https://en.wikipedia.org/wiki/Human_trafficking_in_New_Zealand

two traffickers in two child sex trafficking cases.²¹⁶

II. ANTI-TRAFFICKING AND ANTI-CORRUPTION LEGAL FRAMEWORK

1. Anti-Trafficking Law

The Crimes Amendment Act 2002 regarding the offense of international trafficking added Sections 98C and 98D to the Crimes Act of 1961 prohibits the smuggling of unauthorized migrants for material benefit, and the trafficking of persons by coercion or deception. The Immigration Act of 1987 addresses employer responsibility and employer exploitation of those who are not legally entitled to work, while the Prostitution Reform Act makes it an offence to compel commercial sexual services.²¹⁷

In 2014, the Organized Crime and Anti-corruption Legislation Bill was introduced, which expands the definition of human trafficking to include domestic movement, and adds exploitation as an element to the offence.²¹⁸ In May 2015, the Parliament approved a second reading of the Bill. In addition, the Parliament passed the Fisheries Foreign Charter Vessels Amendments, which require all foreign charter vessels fishing in New Zealand waters to operate as New Zealand-flagged vessels and abide by New Zealand's health and labor laws.²¹⁹ The Immigration Act of 1987 addresses employer responsibility and employer exploitation of those who are not legally entitled to work, while the Prostitution Reform Act makes it an offence to compel commercial sexual services.²²⁰

The New Zealand Police department is primarily responsible for enforcing the Anti-Trafficking Laws and regulations.

(i.) Legal Requirements

The Crimes Act of 1961 defines human trafficking as the use of coercion or deception to arrange or attempt to arrange the entry of a person into New Zealand or another State.²²¹ However, the New Zealand legislation does not specifically recognize domestic or internal trafficking and does not include the purpose of the offence.²²²

216 Trafficking in Persons Report, US Department of State, 260-62 (2015).

217 Human trafficking in New Zealand, Wikipedia (Retrieved Nov. 25, 2015) https://en.wikipedia.org/wiki/Human_trafficking_in_New_Zealand

218 Human trafficking in New Zealand, Wikipedia (Retrieved Nov. 25, 2015) https://en.wikipedia.org/wiki/Human_trafficking_in_New_Zealand

219 Trafficking in Persons Report, US Department of State, 260-62 (2015).

220 Id.

221 Human trafficking in New Zealand, Wikipedia (Retrieved Nov. 25, 2015) https://en.wikipedia.org/wiki/Human_trafficking_in_New_Zealand

222 Protecting the Vulnerable, Justice Acts New Zealand (August 2014), P16

(ii.) Penalties and Punishments

As a crime against humanity, the penalties are comparable to rape and murder, with a maximum of 20 years imprisonment or a NZD 500,000 fine, or both, according to the Crime Act of 1961.²²³

(iii.) Examples, Case Studies, and Enforcement Trends

In a widely discussed 2011 case, more than a dozen Fijian farm laborers were scammed out of thousands of dollars for fake documentation as farm workers. The workers paid up to NZD 12 thousand each for the work visa and job, but after arriving found that the job and the visa they paid for did not exist. The defendant was convicted of forgery and misleading an Immigration Official.²²⁴

In August of 2014, two people were charged with human trafficking after 18 Indian men were found to have been illegally transported and exploited as farm laborers. This was the first time human trafficking charges have been used in New Zealand.²²⁵ In July 2015, Faroz Ali was charged for allegedly helping 16 people into the country unlawfully, charging them large sums of money for the opportunity to work in New Zealand.²²⁶

2. Anti-Corruption Enforcement Agency

The two main law enforcement agencies responsible for anti-corruption investigations and prosecutions are the New Zealand Serious Fraud Office (the "SFO") and the New Zealand Police (the "NZ Police"). The SFO responsible for complex or serious fraud investigations and prosecutions, including bribery and corruption matters, in co-operation

<http://www.communityresearch.org.nz/wp-content/uploads/formidable/Justice-Acts-NZ-Protecting-the-Vulnerable.pdf>

223 Human trafficking in New Zealand, Wikipedia (Retrieved Nov. 25, 2015)

https://en.wikipedia.org/wiki/Human_trafficking_in_New_Zealand

224 Protecting the Vulnerable, Justice Acts New Zealand (August 2014), P14

<http://www.communityresearch.org.nz/wp-content/uploads/formidable/Justice-Acts-NZ-Protecting-the-Vulnerable.pdf>

225 Modern day slavery and human trafficking, New Zealand Law Society (Retrieved Nov. 25, 2015) <https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-851/modern-day-slavery-and-human-trafficking>

226 Man faces 16 people trafficking charges, Immigration New Zealand (July 10, 2015)

<http://www.immigration.govt.nz/migrant/general/generalinformation/news/16traffickingcharges.htm>

with the NZ Police. This does not include more common dishonesty offences, which are a Police matter.²²⁷

3. Anti-Corruption Law

New Zealand has two anti-corruption laws: the Crime Acts of 1961 and the Secret Commissions Act 1910. The Crimes Act of 1961 forms a leading part of the criminal law in New Zealand. It repealed the Crimes Act 1908, and partially codified the criminal law in New Zealand. It provides provisions relating to bribery and corruption of government officials. The Secret Commissions Act 1910 provides provisions relating to bribery and corruption in the private sectors. Changes have been made to it according to the Criminal Procedure Act 2011.

(i.) Legal Requirements

Under the Crime Acts of 1961:

“Corruption and bribery of a law enforcement officer” occurs when a law enforcement officer corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in his or her official capacity; it is also an offence when anyone corruptly gives or offers or agrees to give any bribe to any person with intent to influence any law enforcement officer in respect of any act or omission by him or her in his or her official capacity.²²⁸

“Corruption and bribery of official” occurs when an official, whether within New Zealand or elsewhere, corruptly accepts or obtains, or agrees or offers to accept, or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in his or her official capacity; it is also an offence when anyone corruptly gives or offers or agrees to give any bribe to any person with intent to influence any official in respect of any act or omission by him or her in his or her official capacity.²²⁹

The offences of “Corruption and bribery of official” vary in several ways, including but not limiting to:

Bribery (outside New Zealand) of foreign public official occurs “when anyone corruptly gives or offers or agrees to give a bribe to a person with intent to influence a foreign public official in respect of any act or omission by that official in his or her official capacity (whether or not the act

227 Our Purpose and Role, Serious Fraud Office <https://www.sfo.govt.nz/about>

228 New Zealand Crimes Act of 1961, Article 104

229 New Zealand Crimes Act of 1961, Article 105

or omission is within the scope of the official's authority) in order to obtain or retain business; or to obtain any improper advantage in the conduct of business; or anyone commits an offence . . ." and is in some way subject to jurisdiction.²³⁰

Corruption of foreign public officials occurs when any specified official or citizen "corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, a bribe for that person or another person in respect of any act or omission by an official in the official's official capacity (whether or not the act or omission is within the scope of the official's authority)."²³¹

Under the Secret Commissions Act 1910, private sector bribery is also forbidden. Specifically, "[g]ifts to agent without consent of principal," which occurs when any person corruptly gives, or agrees or offers to give, to any agent any gift or other consideration as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to the principal's affairs or business . . ."²³² "Acceptance of gifts by agent" is also forbidden.²³³

(ii.) Penalties and Punishments

A person who commits the offences above under Crime Acts of 1961 or Secret Commissions Act 1910 is liable to imprisonment for a term not exceeding 7 years.²³⁴

(iii.) Examples, Case Studies, and Enforcement Trends

In the past few years, more charges against corruption have been raised within the country, which seems to overshadow its reputation, but also shows that the enforcement trend against corruption has trended towards increased enforcement.

One example involved Peter Meng Yam Lim, a senior Immigration New Zealand officer based at Auckland International Airport with the power to deport people at the border. His friend, Kooi Leng Pan, who met Lim when she worked at the airport, told two associates she could help them obtain visas. Soon the couple were left \$26,500 out of pocket after Lim offered to "pull some strings" from them. Eventually, Lim and Pan each pleaded

230 New Zealand Crimes Act of 1961, Article 105C and Article 105D

231 New Zealand Crimes Act of 1961, Article 105E

232 New Zealand Secret Commissions Act 1910, Article 3

233 New Zealand Secret Commissions Act 1910, Article 4

234 New Zealand Crimes Act of 1961, Article 104, Article 105C, Article 105D, and Article 105E;

Secret Commissions Act 1910, Article 13

guilty to four bribery and corruption charges laid by the SFO and were sentenced to home detention.²³⁵

In October 2014, a former West Auckland police officer, Peter Pakau, has pleaded guilty to numerous charges, including corruption, manufacturing methamphetamine, and conspiring to defeat the course of justice. He entered guilty pleas to 14 charges. Pakau and a number of co-accused were arrested in May 2013 in relation to a drug bust that followed what police called a "lengthy investigation".²³⁶

In May 2015, a prosecution began of three individuals accused of corruption allegedly involving more than NZD 1 million of Auckland government road construction contracts.²³⁷ In October 2015, two former freight employees admitted that they received kickbacks totaling more than NZD 350,000.²³⁸

A number of anti-bribery and corruption trends are driving greater compliance and creating increased accountability in New Zealand organizations when it comes to corrupt behavior, such as a visible increase in coordination between law enforcement agencies in different jurisdictions in the fight against cross-border corruption.²³⁹ Furthermore, a new anti-corruption bill was passed by the Parliament on November 4, 2015. The Justice Minister Amy Adams indicated that the bill will further protect the economy from organized crime.²⁴⁰

III. ANALYSIS OF ANTI-CORRUPTION LAW AS A TOOL AGAINST HUMAN TRAFFICKING

New Zealand's anti-trafficking and anti-corruption legislation are simple, but explicit. Notably, New Zealand's trafficking law does not openly recognize internal movements as trafficking. Theoretically, the anti-corruption law can be used

235 Rob Kidd: Immigration bribery probe: Pair 'lucky' not to be locked up, says judge, NZ Herald http://www.nzherald.co.nz/crime/news/article.cfm?c_id=30&objectid=11511004

236 New Zealand: Ex-cop pleads guilty to corruption, drug charges, Ethixbase (October 17, 2014) <http://ethixbase.com/new-zealand-ex-cop-pleads-guilty-to-corruption-drug-charges/>

237 Three facing corruption charges remanded, NZ Herald http://m.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11450558

238 Freight workers admit \$350k kickbacks, NZ Herald http://m.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11537063

239 Deloitte Bribery and Corruption Survey 2015 - Australia & New Zealand, P44

<http://www2.deloitte.com/content/dam/Deloitte/nz/Documents/finance/forensics/bribery-and-corruption-report-finalv1.pdf>

240 Government passes anti-corruption bill, Radio New Zealand (November 4, 2015) <http://www.radionz.co.nz/news/bites/288894/government-passes-anti-corruption-bill>

to fill that legislative gap as long as corruption has occurred. Moreover, with cross-border trafficking, the anti-corruption laws will implicate those officials who assist with trafficking.

Realistically, within the region New Zealand's rate of trafficking and corruption is low because of its enforcement priorities. The anti-corruption laws have been used against an immigration official who assisted with trafficking. New Zealand's punishments for these crimes tend to be more lenient than those in the FCPA or in other Asian countries; nonetheless, New Zealand actively enforces its laws. Thus, where corruption exists, enforcement is a real possibility.

I. JURISDICTION SUMMARY: THE PHILIPPINES

The Philippines, officially known as the Republic of the Philippines, is a sovereign island country in Southeast Asia situated in the western Pacific Ocean. It consists of 7,107 islands that are categorized broadly under three main geographical divisions: Luzon, Visayas, and Mindanao. The capital city of the Philippines is Manila and the most populous city is Quezon City; both are part of Metro Manila. The Philippines is a member of ASEAN. Transparency International ranked the Philippines as 85 in its global Corruption Perception Index for 2014.²⁴¹

1. Human Trafficking Risk Levels

The 2015 US TIP Report classified the Philippines in Tier Two, which means that the Government of the Philippines does not fully comply with the minimum standards for the elimination of trafficking; however, it is making significant efforts to do so.²⁴² According to the same report, the government nearly doubled its funding for the Inter-Agency Council Against Trafficking (IACAT) to the equivalent of approximately USD 2.4 million in 2013 and continued efforts to implement Anti-Trafficking Laws and policies at the national, regional, and provincial levels.²⁴³

The 2015 US TIP report describes the Philippines as a source country and, to a much lesser extent, a destination and transit country for men, women, and children subjected to sex trafficking and forced labor.²⁴⁴ A significant number of the estimated 10 million Filipino men, women, and children who migrate abroad for skilled and unskilled work are subsequently subjected to sex trafficking and forced labor, including through debt bondage, in factories, at construction sites, on fishing vessels, on agricultural plantations, as engineers or nurses, and in the shipping industry, as well as in domestic work, janitorial service, and other service sector jobs in Asia, throughout the Middle East, and increasingly in Europe.²⁴⁵ Many victims exploited overseas and domestically experience physical and sexual abuse, threats, inhumane living conditions, non-payment of salaries, and withholding of travel and identity documents.²⁴⁶

241 Transparency International, 2014 Corruption Perceptions Index, (Nov. 23, 2015), <http://www.transparency.org/cpi2014/results#myAnchor1>.

242 Trafficking in Persons Report, US Department of State, 279-81 (2015).

243 Id.

244 Id.

245 Id.

246 Id.

II. ANTI-TRAFFICKING AND ANTI-CORRUPTION LEGAL FRAMEWORK

1. Anti-Trafficking Law

The Philippines has enacted numerous laws to combat some of the various types of trafficking that occurs in the Philippines. These include: the Anti-Trafficking in Persons Act, Special Protection of Children against Child Abuse, Exploitation and Discrimination Act, Mail-Order Brides Act, and the Migrant Workers and Overseas Filipinos Act.

(i.) Legal Requirements

Republic Act 9208: Section 4, otherwise known as the "Anti-Trafficking in Persons Act of 2003", deems it unlawful for any person, natural or juridical, to commit any of the following acts:

"To recruit, transport, transfer, harbor, provide, or receive a person by any means, including those done under the pretext of domestic or overseas employment or training or apprenticeship, for the purpose of prostitution, pornography, sexual exploitation, forced labor, slavery, involuntary servitude or debt bondage;

To introduce or match for money, profit, or material, economic or other consideration, any person or, as provided for under Republic Act No. 6955, any Filipino women to a foreign national, for marriage for the purpose of acquiring, buying, offering, selling or trading him/her to engage in prostitution, pornography, sexual exploitation, forced labor, slavery, involuntary servitude or debt bondage;

To offer or contract marriage, real or simulated, for the purpose of acquiring, buying, offering, selling, or trading them to engage in prostitution, pornography, sexual exploitation, forced labor or slavery, involuntary servitude or debt bondage;

To undertake or organize tours and travel plans consisting of tourism packages or activities for

the purpose of utilizing and offering persons for prostitution, pornography or sexual exploitation;

To maintain or hire a person to engage in prostitution or pornography;

To adopt or facilitate the adoption of persons for the purpose of prostitution, pornography, sexual exploitation, forced labor, slavery, involuntary servitude or debt bondage;

To recruit, hire, adopt, transport or abduct a person, by means of threat or use of force, fraud deceit, violence, coercion, or intimidation for the purpose of removal or sale of organs of said person; and

To recruit, transport or adopt a child to engage in armed activities in the Philippines or abroad."

Republic Act 7610 - Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act: Section 5 prohibits child prostitution and other sexual abuse. The prohibitions are as follows:

“Children, whether male or female, who for money, profit, or any other consideration or due to the coercion or influence of any adult, syndicate or group, indulge in sexual intercourse or lascivious conduct, are deemed to be children exploited in prostitution and other sexual abuse.

Those who engage in or promote, facilitate or induce child prostitution which include, but are not limited to, the following:

Acting as a procurer of a child prostitute;

Inducing a person to be a client of a child prostitute by means of written or oral advertisements or other similar means;

Taking advantage of influence or relationship to procure a child as prostitute;

Threatening or using violence towards a child to engage him as a prostitute; or

Giving monetary consideration goods or other pecuniary benefit to a child with intent to engage such child in prostitution.

Those who commit the act of sexual intercourse of lascivious conduct with a child exploited in prostitution or subject to other sexual abuse; however, when the victims is under twelve years of age, the perpetrators shall be prosecuted for rape and for rape or lascivious conduct with enhanced penalties.

Those who derive profit or advantage therefrom, whether as manager or owner of the establishment where the prostitution takes place, or of the sauna, disco, bar, resort, place of entertainment or establishment serving as a cover or which engages in prostitution in addition to the activity for which the license has been issued to said establishment.”

Section 6 makes attempts to commit child prostitution unlawful and an attempt can be proven by any

situation that would lead a reasonable person to believe that such act was about to occur.

Republic Act 6955 - Mail-order brides Act: This act declares as unlawful “the practice of matching Filipino women for marriage to foreign nationals on a mail order basis.”

Republic Act 8042 - Migrant Workers and Overseas Filipinos Act: This act contains mostly regulations rather than prohibitions, and includes provisions which regulate the recruitment of overseas workers and mandates the establishment of a mechanism for free legal assistance for victims of illegal recruitment.

(ii.) Penalties and Punishments

Penalties for trafficking are similar to those for other severe crimes, ranging from heavy fines to up to 14 years for recruiting or obtaining illegal travel documents.²⁴⁷

(iii.) Examples, Case Studies, and Enforcement Trends

Human trafficking is a serious problem in the Philippines, whether for labor or sex, domestic or international, the issue is significant. As of 2012, only 72 traffickers had been convicted in the Philippines and 42 of those were in the term of current President Aquino.²⁴⁸ It is difficult to prosecute traffickers or abusers because many of them are outside of the Philippines.²⁴⁹ Around 22% of the working age population of the Philippines lives and works overseas, beyond the jurisdiction of their home country.²⁵⁰ The most common scheme for trafficking Filipinos overseas is recruitment for job placement, which is often done by parties outside of the Philippines.²⁵¹

The workers traveling overseas are left to the good graces of the recruiter and transport agents. For example, three male Filipinos were offered work in South Korea and were arrested on arrival for having fake visas and for carrying drugs that the recruiter had given them to provide to the employer.²⁵²

247 See Republic Act 8042, Section 4.

248 Lila Ramos Shahani, Not for Sale: Trafficking, Bondage and Broken Dreams, Philstar Global (Mar. 7, 2012), <http://www.philstar.com/letters-editor/784260/not-sale-trafficking-bondage-and-broken-dreams>.

249 Lila Ramos Shahani, Situating Human Trafficking in the Philippines: Global, National and Personal Contexts, http://www.law.washington.edu/asianlaw/humantrafficking/shahani_keynote.pdf.

250 Traffickers Prey on the Most Vulnerable, CNN (May 9, 2013), <http://edition.cnn.com/2013/05/08/world/asia/freedom-fighters-stats/>.

251 Lila Ramos Shahani, Situating Human Trafficking in the Philippines: Global, National and Personal Contexts, http://www.law.washington.edu/asianlaw/humantrafficking/shahani_keynote.pdf.

252 Id.

2. Anti-Corruption Law

The Philippines' anti-corruption laws are a complex web of laws which may cover the same crime in different statutes. Bribery is covered in multiple laws. However, different people are covered by different laws. For example, the Revised Penal Code and the Anti-Graft and Corrupt Practices Act both define public officials with slight differences in the definition which affects who may be subject to certain provisions. The Anti-Graft and Corrupt Practices Act is broader in that it covers anyone receiving compensation from the government.

The laws also have conflicting views of activities. For example, under the Anti-Graft and Corrupt Practices Act a gift is not punishable if it is unsolicited and given as a token of appreciation. However, the same gift is punishable under the Act Making Punishable for Public Officials and Employees to Receive and Private Persons to Five, Gifts on Any Occasion, Including Christmas. The scattered location of relevant provisions in Philippine law makes it necessary for a person to have a firm grasp of the details of prosecution practice to utilize the law in the Philippines to combat trafficking.

(i.) Legal Requirements

The elements of corruption violations are as follows:
A bribe includes any offer, promise, or gift received by or offered to a public official or employee in connection with the performance of official duties.

(ii.) Penalties and Punishments

Direct Bribery under the Revised Penal Code:
imprisonment of up to 10 years; fine of not less than three times the value of the gift; and disqualification from office, practice of profession/calling and/or the right to vote during the term of the sentence;

Indirect Bribery under the Revised Penal Code:
imprisonment of up to six years and public censure;

Qualified Bribery under the Revised Penal Code:
imprisonment of 20 to 40 years or death (the imposition of the death penalty is currently suspended.).

Violation of the Anti-Graft and Corrupt Practices Act: imprisonment of six years and one month to 15 years; perpetual disqualification from public office; disqualification from transacting business with the Philippine Government; and confiscation or forfeiture in favour of the Philippine Government of the gift or wealth acquired, subject to the right of the complaining

party to recover the amount or thing given to the offender under the circumstances provided by law.

Prohibited acts or transactions under the Code of Conduct and Ethical Standards for Public Officials and Employees: imprisonment of up to five years; fine not exceeding PHP 5,000.00 (approximately USD115); and/or disqualification to hold public office.

Plunder under the Anti-Plunder Act: imprisonment of 20 to 40 years or death (the imposition of the death penalty is currently suspended) and forfeiture of ill-gotten assets in favor of the Philippine Government.

Violation of An Act Making Punishable for Public Officials and Employees to Receive, and Private Persons to Give, Gifts on Any Occasion, Including Christmas: imprisonment of one year to five years and perpetual disqualification from public office.

(iii.) Examples, Case Studies, and Enforcement Trends

It is far simpler to find examples of alleged corruption with no investigation or prosecution and politicians who claim to be champions of the anti-corruption effort, than it is to find examples of a successful corruption conviction. Some view corruption as a contributor to the Philippines' endemic trafficking problems.²⁵³ The conclusion is simple - the Philippines' corruption problems run deep. For example, there are a number of prosecutors who are corrupt and take money in exchange for dismissing cases. In response to a sting operation that resulted in the arrest of a corrupt prosecutor, Prosecutor General of the Philippines Department of Justice, Claro Arellano, stated that "[t]he National Prosecution Service strongly condemns the ingrained practice of corruption that has permeated some of our members."²⁵⁴

The Philippines is constantly attempting to combat corruption. The current President of the Philippines, Benigno Aquino 3rd, has been vocal about his opposition to corruption. He entered into a Social Contract with the Filipino people to fight corruption and he made good governance a priority by suggesting increased investigation and enforcement in the Philippine Development Plan.²⁵⁵ In December 2015, a bill was introduced to

253 Traffickers Prey on the Most Vulnerable, CNN (May 9, 2013), <http://edition.cnn.com/2013/05/08/world/asia/freedom-fighters-stats/>.

254 Tarra Quismundo, 'Ingrained Corruption' among Prosecutors Condemned, Inquirer.net (Nov. 15, 2014), <http://newsinfo.inquirer.net/650902/ingrained-corruption-among-prosecutors-condemned>.

255 Earl G. Parreno, Aquino Govt Far Behind in Anti-Corruption Drive, The Manila Times (Aug. 19, 2015), <http://www.manilatimes>.

assist the government with obtaining government officials ill-gotten assets.²⁵⁶ Nonetheless, corruption remains a substantial problem in the Philippines.

III. ANALYSIS OF ANTI-CORRUPTION LAW AS A TOOL AGAINST HUMAN TRAFFICKING

The Philippines' anti-corruption and Anti-Trafficking Laws are both detailed and comprehensive, creating a significant theoretical overlap as well as opportunities for using the corruption laws against officials who profit from or allow traffickers to commit their crimes. The trafficking laws only cover those who directly engage in the trafficking activity and provide a limited basis for prosecuting those who, through assisting, acquiescing, or ignoring activities, which allow the trafficking to occur. The corruption laws could theoretically fill the gap where officials are involved.

While the anti-corruption laws technically cover most corrupt activities, the fact that they are scattered through a number of legislations is a burden. In the complex web of the Philippines anti-corruption prohibitions, most forms of benefits given to government officials are punished without a clear de minimus exception. While the law is broad enough to be of assistance, it is problematic that the Philippines does not have a specialized enforcement unit focused on anti-corruption. It is understandable, given that the Philippines also does not have one law focused on anti-corruption. Thus, the initial challenge will be to decide which statute and provision will (1) best cover the corrupt activities around which the trafficking is occurring, and (2) which provisions the police are most likely to investigate and enforce.

The complexity of the Philippines legal structure limits the likelihood of success for using the anti-corruption laws against human trafficking. However, a clear strategy in the region could make such a strategy feasible.

net/aquino-govt-far-behind-in-anti-corruption-drive/211114/.

256 Ben Rosario, Bill Seeks to Strengthen Gov't Power to Go after Ill-Gotten Wealth, Manila Bulletin (December 3, 2015), <http://www.mb.com.ph/bill-seeks-to-strengthen-govt-power-to-go-after-ill-gotten-wealth/>.

I. JURISDICTION SUMMARY: SOUTH KOREA

South Korea, officially the Republic of Korea and commonly referred to as South Korea, is a sovereign state in East Asia, constituting the southern part of the Korean Peninsula. South Korea is not a member of ASEAN. Transparency International ranked South Korea as 43 in its global Corruption Perception Index for 2014.²⁵⁷

1. Human Trafficking Risk Levels

The 2015 US TIP Report classified South Korea in Tier 1, which means that it fully complies with the minimum standards for the elimination of trafficking. According to the same report, South Korea is a source, transit, and destination country for men, women, and children subjected to sex trafficking and forced labor.²⁵⁸ South Korean women are subjected to forced prostitution in locally and abroad, including in the United States, Canada, Japan, Australia, Hong Kong, Dubai, Taiwan, Macau, and Chile.²⁵⁹

As a destination country, men and women from China, North Korea, the Philippines, Vietnam, Indonesia, and other countries in Asia, the Middle East, and South America are subjected to forced labor in South Korea; some women from these regions are subjected to forced prostitution.²⁶⁰ Approximately 500,000 low-skilled migrant workers, many employed under South Korea's government's Employment Permit System, work in the fishing, agriculture, livestock, restaurants, and manufacturing sectors.²⁶¹ Some of these workers face conditions indicative of forced labor.²⁶²

Some women from China, Vietnam, Thailand, the Philippines, and Cambodia who are recruited for marriage to South Korean men through international marriage brokers are subjected to forced prostitution or forced labor after their arrival.²⁶³ Family members or Korean criminal networks recruit children from Southeast Asian countries with false promises of employment and subsequently force them into prostitution in South Korea.²⁶⁴ South Korean men engage in child sex tourism in Vietnam, Cambodia, Mongolia, and the Philippines.²⁶⁵ Some Korean fishing crew members engage in commercial sex with children in Kiribati.²⁶⁶

257 Transparency International, 2014 Corruption Perceptions Index, (Nov. 23, 2015), <http://www.transparency.org/cpi2014/results#myAnchor1>.

258 Trafficking in Persons Report, US Department of State, 121 (2015).

259 Id.

260 Id.

261 Id.

262 Id.

263 Id.

264 Id.

265 Id.

266 Id.

II. ANTI-TRAFFICKING AND ANTI-CORRUPTION LEGAL FRAMEWORK

1. Anti-Trafficking Law

There are two primary pieces of legislation related to anti-trafficking: Act on the Punishment of Procuring Prostitution and Associated Acts (“Punishment Act”) and the Act on the Prevention of Prostitution and Protection of Victims Thereof (“Protection Act”).

(i.) Legal Requirements

There is no single law that specifically prohibits trafficking in persons; however, a combination of laws can be used to prosecute traffickers, including laws against kidnapping, inducement to prostitution, and laws protecting juveniles.²⁶⁷ These laws stipulate that proper security measures as well as financial assistance must be provided to trafficked victims when they report a trafficking crime.²⁶⁸

The Protection Act forbids:

“Transferring a person who is under control and management to a third party by fraud, force, or coercion for the purpose of some sexual or obscene act.

An act of transferring a subject under control and management to a third party providing and promising money, valuables, property benefits including advance payment to juveniles, a person with mental disorder, a person with serious disabilities, or a person who protects and supervises the subject for the some sexual or obscene act;

An act of receiving or reselling such person with the knowledge a subject with knowledge that some sexual or obscene act is intended.”²⁶⁹

(ii.) Penalties and Punishments

Under the Protection Act, a person who traffic persons for the purpose of prostitution shall be punished by imprisonment of a definite term of no less than 3 years. A person who commits the above crime as a member of an organization or group shall be punished by imprisonment of a definite term for no less than 5 years.²⁷⁰

267 South Korea Best Practices, Humantrafficking.org, http://www.humantrafficking.org/countries/south_korea/best_practices

268 Id.

269 The Act on the Prevention of Prostitution and Protection of Victims Thereof, Statutes of South Korea, Act No. 7212, Mar. 22, 2004.

270 Id.

(iii.) Examples, Case Studies, and Enforcement Trends

In 2013, the government obtained its first trafficking conviction under the revised criminal code's trafficking provisions. The case involved a Korean victim forced into prostitution in a major South Korean city. Six offenders were convicted; one was sentenced to 10 to 18 months' imprisonment and the others to two years of probation.²⁷¹

2. Anti-Corruption Enforcement Agency

The National Policy Agency and the Prosecutors' Offices are the primary enforcement agencies. Bribery and corruption are an enforcement priority of the Special Investigation Department of each Prosecutor's Office.

For investigations of violations of anti-corruption law in certain specific industries, such as the pharmaceutical industry, the prosecution may also form a joint task force with the relevant administrative agencies, such as the Ministry of Food and Drug Safety.²⁷²

3. Anti-Corruption Law

There are five key pieces of legislation related to anti-corruption in South Korea: The Act on the Aggravated Punishment of Specific Crimes ("Specific Crimes Act"), The Act on Aggravated Punishment of Specific Economic Crimes ("Specific Economic Crimes Act"), The Act on the Creation and Operation of the Anti-corruption and Civil Rights Commission and the Prevention of Corruption, Code of Conduct for Public Officials of Korea ("CoC") and The Act on Combating Bribery of Foreign Public Officials in International Business Transactions ("FBPA").

The Ministry of Gender Equality and Family ("MOGEF") operates hotlines in 13 languages accessible to trafficking victims, and the Ministry of Oceans and Fisheries ("MOF") continued to operate a hotline for foreign crew members. MOF trained 961 marine and ship staff on human rights protections and labor rights of foreign sailors. The government lacked a trafficking-specific national plan of action, but included proposed anti-trafficking efforts in its human rights national action plan.²⁷³

271 Trafficking in Persons Report, US Department of State, 2015.

272 Business Ethics and Anti-corruption Laws: South Korea, Norton Rose Fulbright, Sep. 2014, <http://www.nortonrosefulbright.com/knowledge/publications/121085/business-ethics-and-anti-corruption-laws-south-korea>.

273 Id.

(i.) Legal Requirement

A “bribe” is defined as any unjust benefit received in connection with one’s duties. This is interpreted broadly to cover any valuable advantages received by the recipient and, therefore, includes money as well as other types of tangible and intangible advantages such as gifts and acts of hospitality. Similarly, the requirement of a benefit being received in connection with one’s duties has been broadly construed by the South Korean courts.²⁷⁴

There is no minimum monetary threshold for a bribe under statutes or in case precedents. However, the CoC, provides that a public official is prohibited from receiving any cash, gifts, or entertainment from anyone who may directly or indirectly benefit from the performance of public duties. There are de minimus exceptions to this provision.²⁷⁵

(ii.) Penalties and Punishments

For public sector bribery, a recipient of a bribe will be subject to imprisonment of up to life and a fine of two to five times the value of the bribe, depending on the amount of the bribery.²⁷⁶ Bribing a domestic public official will be subject to imprisonment of up to five years or a fine up to KRW 20 million (approx. USD 19,500).²⁷⁷ Bribing a foreign public official will be subject to imprisonment of up to five years or a maximum fine of twice the pecuniary benefit of the bribe, depending on the amount of the bribery.²⁷⁸

For private sector bribery, a recipient of a bribe will be subject to imprisonment of up to life and a fine of two to five times the value of the bribe, depending on the amount of the bribery. An offeror of a bribe will be subject to imprisonment of up to 5 years and a fine of up to KRW 30 million (approx. USD 25,400).

If a company bribes a foreign public official, companies will be fined up to KRW1 billion (approx. USD 975,000); provided, if the value of the pecuniary benefit obtained by the bribe exceeds KRW 500 million (approx. USD 487, 000), a fine up to twice the benefit.²⁷⁹

274 A Guide to Anti-corruption Legislation in Asia Pacific, Clifford Chance, 4th Edition.

275 Id.

276 Id.

277 Business Ethics and Anti-corruption Laws: South Korea, Norton Rose Fulbright, Sep. 2014, <http://www.nortonrosefulbright.com/knowledge/publications/121085/business-ethics-and-anti-corruption-laws-south-korea>.

278 The Act on Combating Bribery of Foreign Public Officials in International Business Transactions, Statutes of South Korea, art.3, February, 2009.

279 A Guide to Anti-corruption Legislation in Asia Pacific, Clifford Chance, 4th Edition.

(iii.) Examples, Case Studies, and Enforcement Trends

In May 2011, the Incheon District Prosecutor charged the CEO of a logistics company and the CEO of a travel agency with making bribe payments totaling more than USD 6 million in order to receive favorable freight fees and additional tickets at a sale price from China Eastern Airlines. At trial, the district court found the individuals not guilty because the prosecution had not established that China Eastern Airlines was a state-owned enterprise.²⁸⁰

Research has not uncovered any successful anti-corruption enforcement actions related to trafficking in South Korea.

The South Korean government is serious about improving and enforcing its corruption laws. In March 2015, the South Korean legislature enacted the Graft Act, effective September 2016, which will make substantial changes for public sector bribery. It broadens the definition of a public official, removes a requirement for exchange of something of value and for a favor in return, increases penalties, covers both the bribe giver and the recipient, and provides exceptions for social custom.

III. ANALYSIS OF ANTI-CORRUPTION LAW AS A TOOL AGAINST HUMAN TRAFFICKING

The Anti-Trafficking Laws of South Korea are focused on sex trafficking and do not similarly address labor trafficking in a detailed or comprehensive manner, which is a significant problem in South Korea. The anti-corruption laws are broad enough to theoretically include the scope of those who assist or facilitate sex trafficking and those who engage in labor trafficking.

Realistically, it is also possible to use the anti-corruption laws as a tool against anti-trafficking; although, this might be difficult in practice. While the trends indicate that South Korea is motivated to limit corruption, the anti-corruption enforcement is focused mostly on commercial crimes, rather than on corruption generally. Moreover, as illustrated by the case above, it is necessary to prove that a government official was involved in the bribery.

280 Anti-Corruption Enforcement in Korea: Is an Old Law Coming of Age? New York Law Journal, Nov. 4 2013, https://www.cohengresser.com/assets/publications/11-4-2013_Anti-Corruption_Enforcement_in_Korea.pdf.

I. JURISDICTION SUMMARY: TAIWAN

Taiwan is located on the continental shelf southeast of Mainland China with a population of approximately 234 million people. It was ranked at the 26th in the global GDP ranking with per capita of USD 21,571. Taiwan is not a member of ASEAN. Transparency International ranked Taiwan as 35 in its global Corruption Perception Index for 2014.²⁸¹

1. Human Trafficking Risk Levels

The 2015 US TIP Report classified Taiwan in Tier 1, which means that it fully complies with the minimum standards for the elimination of trafficking.²⁸² According to the same report, Taiwan is a destination for men, women, and children subjected to forced labor and sex trafficking and, to a much lesser extent, a source of men and women subjected to forced labor and sex trafficking.²⁸³ Most trafficking victims are migrant workers from Indonesia, the Philippines, Thailand, Vietnam, and to a lesser extent, mainland China and Cambodia.²⁸⁴

In Taiwan, many trafficking victims are workers from rural areas of Vietnam, Thailand, Indonesia, and the Philippines, employed through recruitment agencies and brokers to perform low skilled work in Taiwan's construction, fishing, and manufacturing industries, or to work as domestic servants.²⁸⁵

281 Transparency International, 2014 Corruption Perceptions Index, (Nov. 23, 2015), <http://www.transparency.org/cpi2014/results#myAnchor1>.

282 Trafficking in Persons Report, US Department of State, 226-227 (2015).

283 Id.

284 Id.

285 Id.

II. ANTI-TRAFFICKING AND ANTI-CORRUPTION LEGAL FRAMEWORK

1. Anti-Trafficking Law

In 2009, Taiwan passed the Human Trafficking Prevention Act, which directly and specifically addresses legal prohibitions against trafficking.

(i.) Legal Requirements

According to the Human Trafficking Prevention Act, violations are defined as follows:

(a) "To recruit, trade, take into bondage, transport, deliver, receive, harbor, hide, broker, or accommodate a local or foreign person, by force, threat, intimidation, confinement, monitoring, drugs, hypnosis, fraud, purposeful concealment of important information, illegal debt bondage, withholding important documents, making use of the victim's inability, ignorance or helplessness, or by other means against his/her will, for the intention of subjecting him/her to sexual transactions, labor exploitation, or underpayment, organ harvesting; or to use the above-mentioned means to impose sexual transactions, labor exploitation, or underpayment, or organ harvesting on the victims.

(b) To recruit, trade, take into bondage, transport, deliver, receive, harbor, hide, broker, or accommodate anyone under 18 years of age for the purpose of subjecting him/her to sex transactions, labor exploitation or underpayment, or organ harvesting, or to subject people under 18 years of age to sexual transactions, labor exploitation or underpayment, or organ harvesting."

(ii.) Penalties and Punishments

According to article 33, anyone recruiting, transporting, delivering, receiving, harboring, hiding, brokering, or accommodating another person under 18 years of age in order to subject him/her to labor exploitation or underpayment for profit, shall be sentenced to imprisonment under seven years, and may be fined up to TWD 5 million. Any attempt to commit the crime stated in the preceding paragraph is punishable.

(iii.) Examples, Case Studies, and Enforcement Trends

Taiwan takes a strong stance against human trafficking. In September of 2015, Taiwan authorities arrested six suspects for possibly forcing migrant workers into prostitution.²⁸⁶ In October of 2015, the US and Taiwan began jointly investigating a global escort service for human trafficking violations.²⁸⁷ In 2015, Taiwanese authorities “cracked” 138 cases of labor and sex trafficking.²⁸⁸

2. Anti-Corruption Enforcement Agency

The Ministry of Justice has established the Department of Government Ethics, which is responsible for the promotion of Governmental ethics and integrity and the prevention of corruption; in addition, the Investigation Bureau is responsible for the prevention and investigation of corruption.

3. Anti-Corruption Law

The Anti-Corruption Statute and the Criminal Law are the main sources of anti-corruption legislation in Taiwan. The Anti-Corruption Statutes include The Anti-Corruption Informant Rewards and Protection Regulation, Regulations Governing the Establishment of the Control Yuan Committee on Anti-Corruption, and the Anti-Corruption Act.

(i.) Legal Requirements

Private sector bribery is not an offence under the Anti-Corruption Statute, but is provided in the Criminal Law under article 342 where a person is prohibited to manages the affairs of another for purpose to take an illegal benefit for himself or for a third person or to harm the interests of his principal and who acts contrary to his duties and thereby causes loss to the property or other interest of the principal.²⁸⁹ According to the Anti-Corruption Statute, a violation will occur when a person offers, promises, or gives a bribe or other improper

286 Huang Kou-fan & Evelyn Kao, Sex Suspects Arrested for Alleged Human Trafficking, Focus Taiwan (Sept. 20, 2015), <http://focustaiwan.tw/news/asoc/201509200014.aspx>.

287 Jason Pan, Taiwan and US Break Up Global Escort Service Ring, Taipei Times (Oct. 29, 2015), <http://www.taipeitimes.com/News/taiwan/archives/2015/10/29/2003631200>.

288 Taiwan: Anti-Human Trafficking Efforts Praised, Focus Taiwan (July 30, 2015), <http://unpo.org/article/18431>.

289 Criminal Law of the “Republic of China”, Article 342.

benefit to a public official to procure a breach of the public officer's official duties or to perform his duties.²⁹⁰

(ii.) Penalties and Punishments

A person who offers, promises, or gives a bribe or other improper benefit to a public official to procure a breach of his official duties may be punished by way of imprisonment for a period of between 1 and 7 years. Additionally, they may be ordered to pay a fine of up to TWD 3 million.²⁹¹ A person who offers, promises, or gives a bribe or other improper benefit to a public official to perform his official duties may be imprisoned up to 3 years and may be ordered to pay a fine of not more TWD 500,000.

(iii.) Examples, Case Studies, and Enforcement Trends

In 2010, former President Chen Shui-bian and his wife were convicted of bribery and money laundering and sentenced to 20 years in prison. A short time after that, three High Court judges were detained on charges of having accepted bribes for clearing a former KMT legislator from corruption charges. In April 2013, the former secretary general of the Executive Yuan was convicted for corruption.²⁹² In 2014, Ge Guangming, the former director of the Military Situation in Taiwan was prosecuted and sentenced to more than 2 years' prison.²⁹³

III. ANALYSIS OF ANTI-CORRUPTION LAW AS A TOOL AGAINST HUMAN TRAFFICKING

Taiwan's anti-trafficking legislation is broad and well-drafted so that the law can implicate those directly involved with trafficking in general. However, the Anti-Trafficking Law does appear to require direct involvement with the trafficking activities, such that it would not include government officials who assist or acquiesce. Thus, the anti-corruption laws may theoretically cover those involved with trafficking who are not covered in the anti-trafficking legislation.

Realistically, it is also possible to use the anti-corruption laws to fight human trafficking. Taiwan frequently prosecutes government officials for corruption, though the reported instances tend to be high level government officials. Moreover, Taiwan has shown a strong interest in having a

290 Anti-Corruption Act, Article 11.

291 Id.

292 Thomas Richter and Sabrina Maab (Eds.), Background Paper on Taiwan, Anti-Corruption Policies Revisited (Feb. 28, 2014), http://anticorrupt.eu/wp-content/uploads/2014/03/Taiwan-Background-Report_final.pdf

293 <http://news.sina.com.cn/c/2014-09-27/103930923676.shtml>.

reputation for a strong stance against anti-trafficking in the region. Thus, the Taiwan government may be motivated to use anti-corruption laws to punish government officials who in any way know and allow trafficking to occur. Therefore, there is a high possibility of using the anti-corruption laws in Taiwan to combat human trafficking.

I. JURISDICTION SUMMARY: THAILAND

Thailand is the 20th-most-populous country in the world, with around 66 million people. Thailand is the second largest economy in Southeast Asia. Although it is historically relatively stable, recent unrest has created some political issues and instability. Thailand is a member of ASEAN. Transparency International ranked Thailand as 85 in its global Corruption Perception Index for 2014.²⁹⁴

1. Human Trafficking Risk Levels

The 2015 US TIP Report classified Thailand in the lowest category, Tier 3.²⁹⁵ According to the same report, Thailand is a source, destination, and transit country for men, women, and children subjected to forced labor and sex trafficking.²⁹⁶ Many reports have documented the forced labor of trafficked workers in the Thai fishing industry since 2000.²⁹⁷ Thousands of migrants have been forced to work on fishing boats with no contracts or stable wages.²⁹⁸ Thailand's sex industry is also a human trafficking destination.²⁹⁹ Children of poor families are often the victims of human trafficking.³⁰⁰ Minorities and refugees also account for a large percentage of the total number of sex workers in Thailand.³⁰¹

II. ANTI-TRAFFICKING AND ANTI-CORRUPTION LEGAL FRAMEWORK

1. Anti-Trafficking Law

In November 2007, the Thai National Legislative Assembly passed the Anti-Trafficking in Persons Act, which took effect in 2008. The Thai government does provide significant protection to foreign victims of sex trafficking in Thailand as well as Thai citizens who have returned after facing labor or sex trafficking conditions abroad but protections offered to foreign victims of forced labor were considerably weaker, as male victims of trafficking are not included under victim protection provisions of Thai law.

294 Transparency International, 2014 Corruption Perceptions Index, (Nov. 23, 2015),

<http://www.transparency.org/cpi2014/results#myAnchor1>.

295 Trafficking in Persons Report, US Department of State, 330-34 (2015).

296 Id.

297 Id.

298 Id.

299 Id.

300 Id.

301 Id.

(i.) Legal Requirements

Under Thai law, a violation is defined as follows:

- (a) The action of procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving any person;
- (b) By means of the threat or use of force, abduction, fraud, deception, abuse of power, or of the giving of payments or benefits to achieve the consent of a person;
- (c) For the purpose of having control over another person for exploitation.

Where trafficking involves children (a person under the age of 18), the second element of the offence is not relevant because a child cannot provide consent.

(ii.) Penalties and Punishments

A person found guilty of an offence of trafficking in persons shall be liable to the punishment of a fine from THB 200,000 to THB 1 million for a group, and imprisonment from six to twelve years with a fine from THB 140,000 to THB 100,000 for individuals.

(iii.) Examples, Case Studies, and Enforcement Trends

In a widely discussed case from March of 2008, a team of labor ministry, immigration, police, and NGO representatives raided a shrimp processing factory in Samut Sakhon and found 300 Burmese migrant workers confined to the premises and working in exploitative conditions.³⁰² There are indications of increases in trafficking enforcement, and a total of 280 human trafficking cases were brought in 2014 alone.³⁰³

2. Anti-Corruption Enforcement Agency

The National Anti-Corruption Commission is an independent agency in Thailand tasked with investigating suspected cases of corruption, and positioned at the forefront of the country's anti-corruption efforts. In addition, the Office of Public Sector Anti-Corruption Commission was recently established to deal with corruption cases.

302 https://en.wikipedia.org/wiki/Human_trafficking_in_Thailand.

303 Thailand's Progress Report on Anti-Human Trafficking Efforts, Government of Thailand, 4 (2015).

3. Anti-Corruption Law

Thailand's anti-corruption legislation is largely covered by the Act of Penal Code, B.E. 2499 and 2502 (the "Penal Code") and the Anti-Corruption Act. The Penal Code deals with different types of corruption, including bribery. However, the regulations are limited to public corruption or other types of abuse of public office for personal gain. Amendments to Thailand's Anti-Corruption Act took effect on July 9, 2015. The new Act extends punishments to non-Thais working for foreign governments and international organizations. In addition, there are a series of other regulations that indirectly aim at the prevention of corrupt practices, such as the Management of Partnership Stakes and Shares of Ministers Act.

(i.) Legal Requirements

(ii.) Penalties and Punishments

The Penal Code stipulated a series of offences which create different Penalties and Punishments, among which the severest offence is "officials holding judicial posts who wrongfully demand, accept, or agree to accept a benefit for themselves or other persons in order to exercise or not exercise any of their functions, and the punishment is imprisonment of 5 to 20 years or imprisonment for life and fine of THB 2,000 to THB 40,000, or death.

(iii.) Examples, Case Studies, and Enforcement Trends

According to the 2015 US TIP Report, Thailand's efforts to address trafficking are being hampered by corruption at all levels and some corrupt officials have even protected brothels and food processing facilities from raids and inspections.³⁰⁴ Police officers at the local and national level, who had been assigned to regions notorious for trafficking, formed protective relationships with traffickers. In addition, there are reports that immigration officials and police have allegedly sold migrants who were unable to pay labor brokers and sex traffickers.

In the summer of 2015, a mass grave was found in southern Thailand. Thirty-three bodies, believed to be migrants from Myanmar and Bangladesh, were exhumed from various jungle camps. In conjunction with these findings, the Thai Police arrested the mayor of the district town and relieved 50 police officers of their duties.³⁰⁵

304 Trafficking in Persons Report, US Department of State, 330-34 (2015).

305 https://en.wikipedia.org/wiki/Royal_Thai_Police

III. ANALYSIS OF ANTI-CORRUPTION LAW AS A TOOL AGAINST HUMAN TRAFFICKING

Thailand's Anti-Trafficking Law is broad enough to encompass human trafficking for any reason. It does not, however, contain provisions that would implicate government officials who assist or acquiesce in the trafficking. The anti-corruption law is far narrower than the Anti-Trafficking Law, but theoretically the anti-corruption law could supplement the Anti-Trafficking Law to cover those government officials indirectly involved in human trafficking.

Realistically, the anti-corruption law is unlikely at this time to be much assistance in the fight against human trafficking. As stated in the 2015 Trafficking in Persons report, corruption at all levels has hindered the fight against trafficking. The news on anti-corruption enforcement indicates that anti-corruption is moving slowly and has some very high-profile cases to consider.³⁰⁶ Because corruption is hindering the application of Anti-Trafficking Law, it should follow that it will also hinder the application of the anti-corruption law as it relates to trafficking. Therefore, using anti-corruption laws as a tool against human trafficking in Thailand will face significant challenges.

³⁰⁶ Arevaamy, Thai Anti-Bribery: Selective Prosecution or Bureaucratic Backlog? IReport at CNN.com (Apr. 21, 2014), <http://ireport.cnn.com/docs/DOC-1123322>.

I. JURISDICTION SUMMARY: VIETNAM

Vietnam has a population of approximately 90 million people. The GDP of Vietnam was worth 186.20 billion US dollars in 2014. Vietnam is a member of ASEAN. Transparency International ranked Vietnam as 119 in its global Corruption Perception Index for 2014.³⁰⁷

1. Human Trafficking Risk Levels

The 2015 US TIP Report classified in Tier 2, which means that the government do not fully comply with the US Trafficking and Violence Protection Act minimum standards, but is making significant efforts to bring themselves into compliance with those standards.³⁰⁸ According to the same report, Vietnam is a source country for women and children trafficked for commercial sexual exploitation and forced labor.³⁰⁹

II. ANTI-TRAFFICKING AND ANTI-CORRUPTION LEGAL FRAMEWORK

1. Anti-Trafficking Law

Vietnam's legal system provides a variety of laws that, when combined together, create a legal framework to combat human trafficking. These laws include: Criminal Code; a 2013 Joint Circular³¹⁰; Labor Laws; Law on Vocational Training (2006); Law on Vietnamese Guest Workers (2006); Law of Social Insurance (2006); Law of Health Insurance (2008); Decree No. 69 (2007) to amend the previous Decree No. 68 on International Child Adoption and Marriage; Decision 17 on Reception and Reintegration Support of Trafficked Women and Children returned from Abroad (2007); Inter-Ministerial Circular 3 on Victim Identification and Reception (2008); National Circular on Policy Application for Victims of Trafficking (2008); National Plan of Action on Human Trafficking (2011-2015); and Anti Human Trafficking Law (effective as of Jan 1st 2012).³¹¹

In addition, there are a series of regulations and policies helping to combat trafficking, such as Decision 16 on

307 Transparency International, 2014 Corruption Perceptions Index, (Nov. 23, 2015), <http://www.transparency.org/cpi2014/results#myAnchor1>.

308 Trafficking in Persons Report, US Department of State, 362-64 (2015).

309 Id.

310 Joint Circular No. 01/2013/TTLT-TANDTC-VKSNDTC-BCA-BQP- BTP (2013).

311 Ref. to SIREN human trafficking data sheet, November 2008

http://www.no-trafficking.org/content/SIREN/SIREN_pdf/vietnam%20datasheet%20final%20november%202008.pdf

Strengthening Implementation of National Plan of Action to Combat Trafficking in Women and Children (2007).³¹²

There is a specialized counter-trafficking police unit under the Criminal Police Department that focuses primarily on human trafficking.

(i.) Legal Requirements

According to Section 119 of the Criminal Code:

“Trafficking in women is prohibited. If the offence is committed in any number of circumstances, the punishment would be even more severe. Such circumstances include trading women for prostitution, being part of an organization, a professional, to send women overseas, or trafficking in multiple people.”

Section 120 of the Criminal Code prohibits kidnapping, trading children, or fraudulently exchanging children and has similar sentence enhancements to the above.

(ii.) Penalties and Punishments

Trafficking of women and children will lead to an imprisonment from 2 years to 20 years under the Criminal Code, with a fine of between five million and fifty million VND and probation or residence ban for one to five years. In July 2013, the Supreme People’s Court issued a joint circular establishing criminal penalties for the trafficking crimes prohibited in the Anti-Trafficking Law. Anti-Trafficking Law now prescribes punishments of 2 to 7 years and 3 to 10 years imprisonment.

(iii.) Examples, Case Studies, and Enforcement Trends

In April of 2007, in Ho Chi Minh City, police disrupted a Korean trafficking ring that fraudulently recruited Vietnamese women for marriage. They rescued 118 women.³¹³ In another recent case, three separate traffickers were convicted and sentenced from 6 to 12 years for trafficking women to Macau to allegedly work as masseuses and then forced them into prostitution.

Recently, prosecutions have increased and there is strengthened cross-border cooperation on sex trafficking with Cambodia, China, and Thailand to rescue victims and arrest traffickers. In addition, Vietnam has recently collaborated with law enforcement from

312 Id.

313 Human trafficking in Vietnam, Wikipedia https://en.wikipedia.org/wiki/Human_trafficking_in_Vietnam

Cambodia, Mainland China, and Laos to rescue victims and arrest traffickers suspected of sex trafficking.

2. Anti-Corruption Enforcement Agency

The Central Committee for Internal Affairs of the Communist Party of Vietnam is responsible for directing and coordinating anti-corruption activities in Vietnam. The Ministry of Police, the Ministry of National Defense, and courts are responsible for the investigation, prosecution, and adjudication of corruption-related crimes. In addition, the Ministry of Foreign Affairs and the Ministry of Justice have been playing an active role in corruption cases involving foreign elements.³¹⁴

3. Anti-Corruption Law

The key legislation includes the Criminal Code, Anti-Corruption Law, Law on Cadres and Public Officials, Law on Public Employees; Decision 64 of the Prime Minister dated 10 May 2007 on giving, receipt and hand-over of gifts by state budget-funded organizations and cadres, public employees and public officials (“No. 64”); Decree 59 of the Government dated 17 June 2013 implementing the Law on Anti-corruption (“No. 59”), and a series of other relevant regulations.³¹⁵

(i.) Legal Requirements

“Receiving bribes” occurs when any persons abuse their positions or power, have accepted or will accept directly or through intermediaries money, property, or other material interests in any form valued between VND 500,000 and VND 10 million, or under VND 500,000, but in one of the following circumstances:³¹⁶

- (a) “Serious consequences are caused;
- (b) The offenders have already been disciplined for such acts but continue to commit them; or
- (c) The offenders have already been sentenced for one of the crimes relating to corruption, and

314 Business ethics and anti-corruption laws: Vietnam, Norton Rose Fulbright (September 2014) <http://www.nortonrosefulbright.com/knowledge/publications/121088/business-ethics-and-anti-corruption-laws-vietnam>

315 Business ethics and anti-corruption laws: Vietnam, Norton Rose Fullbright (September, 2014) <http://www.nortonrosefulbright.com/knowledge/publications/121088/business-ethics-and-anti-corruption-laws-vietnam>

316 Criminal Code of Vietnam, Article 279

are not yet entitled to criminal record remission, but continue to commit these crimes.”

“Abusing positions and/or powers while performing official duties” occurs when any persons, for self-seeking or other personal motivation, abuse their positions or powers to act contrarily to their official duties, causing damage to the interests of the State and the society or the legitimate rights and interests of citizens.³¹⁷

“Abusing powers while performing official duties” occurs when any persons, for self-seeking or other personal motivation, act beyond their powers contrarily to their official duties, causing damage to the interests of the State and the society, or to the legitimate rights and interests of citizens.³¹⁸

“Abusing positions or powers to influence other persons for personal profits” occurs when any persons abuse positions or powers, have accepted or will accept directly or through intermediaries money, property or other material interests in any form valued between VND 500,000 and under VND 10 million, or under VND 500,000 but under similar circumstances as above.³¹⁹

“Offering bribes” occurs when any person offers a bribe that has a value of between VND 500,000 and VND 10 million, or under VND 500,000 but causes serious consequences or commit it more than once.³²⁰

“Acting as intermediaries for bribery” occurs when any persons act as intermediaries for bribery and the bribe meets the above-stated other conditions.³²¹

“Taking advantage of one’s influence over persons with positions and powers to seek personal benefits” occurs when any persons directly or through intermediaries accept money, property or other material benefits in any form, and the circumstances meet the above-stated other conditions.³²²

(ii.) Penalties and Punishments

For “receiving bribes”, the penalties include imprisonment from two years to life imprisonment. The offenders shall also be banned from holding certain posts for one to five years, may be subject to a fine between

317 Criminal Code of Vietnam, Article 281

318 Criminal Code of Vietnam, Article 282

319 Criminal Code of Vietnam, Article 283

320 Criminal Code of Vietnam, Article 289

321 Criminal Code of Vietnam, Article 290

322 Criminal Code of Vietnam, Article 291

one and five times the value of the bribe, and/or the confiscation of part or whole of property.³²³

For “abusing positions or powers while performing official duties”, the penalties include non-custodial reform for up to three years, or imprisonment from two years to fifteen years. The offenders shall also be banned from holding certain posts for one to five years, may be subject to a fine of between VND 3 million and VND 30 million.³²⁴

For “abusing powers while performing official duties”, the penalties include imprisonment from one years to twenty years. The offenders shall also be banned from holding certain posts for one to five years, may be subject to a fine of between VND 3 million and VND 30 million.³²⁵

For “abusing positions or powers to influence other persons for personal profits”, the penalties include imprisonment from one year to life imprisonment. The offenders shall also be banned from holding certain posts for one to five years, may be subject to a fine of from 1 to 5 times the amount of money or the value of the property they have earned for their personal profits.³²⁶

For “offering bribes”, the penalties include imprisonment from six months to life imprisonment or capital punishment.³²⁷

For “acting as intermediaries for bribery”, the penalties include imprisonment from six months to twenty years. The offenders may also be subject to a fine of between 1 and 5 times the value of the bribe.³²⁸

For “taking advantage of one’s influence over persons with positions and powers to seek personal benefits”, the penalties include imprisonment from one year to ten years. The offenders may also be subject to a fine of from 1 to 5 times the amount of money or the value of property they have taken for personal profits.³²⁹

(iii.) Examples, Case Studies, and Enforcement Trends

According to a survey in 2012 conducted by the Vietnam Chamber of Commerce and Industry (“VCCI”), nearly half of Vietnam’s companies say they have had to bribe officials in order to do business.³³⁰ Another survey in 2015

323 Criminal Code of Vietnam, Article 279

324 Criminal Code of Vietnam, Article 281

325 Criminal Code of Vietnam, Article 282

326 Criminal Code of Vietnam, Article 283

327 Criminal Code of Vietnam, Article 289

328 Criminal Code of Vietnam, Article 290

329 Criminal Code of Vietnam, Article 291

330 Half of Companies Bribe Officials in Vietnam, VOA News (April 04, 2012) <http://www.voanews.com/content/half-of->

conducted by VCCI revealed that nearly a third of businesses in Vietnam have to bribe officials when paying tax.³³¹

While the Vietnamese government has repeatedly indicated its willingness to tackle corruption in many circumstances, corruption still remains widespread in Vietnam and the Vietnamese government's efforts have not resulted in substantive improvements. That being said, the number of corruption cases handled by the court has increased in recent years and we expect this trend to continue.³³²

III. ANALYSIS OF ANTI-CORRUPTION LAW AS A TOOL AGAINST HUMAN TRAFFICKING

The anti-trafficking and anti-corruption laws of Vietnam do not fully cover the various participants in any trafficking scheme. The Anti-Trafficking Laws are too specific and only mention trafficking in women or children, which theoretically limits significantly those who are potentially liable under the law. Likewise, the anti-corruption law is also overly specific in that it requires a threshold amount of money and requires a specific intent to either benefit oneself or another. Thus, the theoretical space for using the anti-corruption laws as a way to combat trafficking is limited.

The realistic situation is far more limited than the hypothetical situation. The corruption prosecution and success stories are unclear, but companies report frequently paying bribes, and sometimes those bribes are for benefits to which the company is entitled. In reality, the law and enforcement of anti-corruption is weak. Thus, both the theoretical and realistic probabilities of using anti-corruption laws to combat human trafficking are minimal.

companies-bribe-officials-in-vietnam-146528845/179573.html

331 One-third of businesses in Vietnam bribe officials when paying tax: Survey, Channel News (August 12, 2015) <http://www.channelnewsasia.com/news/business/one-third-of-businesses/2046256.html>

332 A Guide to Anti-Corruption Legislation in Asia Pacific 4th Edition, Clifford Chance, P67 (October 2015) http://globalmandatoolkit.cliffordchance.com/downloads/Anti_corruption_Guide_nov_2015.pdf

Appendix B: Trafficking Scenarios

Scenario 1: Construction Trafficking

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>A Laotian power company (the "Power Company" or "PC") receives approval from the Laos government by paying bribes to officials to construct a hydropower plant. To finance the construction project, the Power Company receives a loan from a foreign subsidiary of a European-based bank that also has subsidiaries operating in the U.S. (the "Euro Bank"). To win the deal to finance the project, the Euro Bank entertains and gives substantial gifts to certain directors of Power Company and to Laotian officials introduced to them by Power Company.</p>	<p>Jurisdiction: The receipt of a loan from a foreign bank with subsidiaries operating in the U.S. alone is likely not enough to establish jurisdiction over PC. Thus, U.S. regulators will likely not be able to hold PC liable for the bribes paid to win approval to construct the plant. However, Euro Bank's U.S. subsidiaries are likely issuers and/or domestic concerns, and U.S. regulators could hold Euro Bank itself liable for the acts of its subsidiaries based on traditional agency principles.</p> <p>Corrupt/Payment/GO/ Business Purpose: Euro Bank may be held liable for corruptly providing entertainment and gifts ("things of value") to Laotian officials for the business purpose of winning the deal.</p>	<p>Jurisdiction: Insufficient jurisdiction over PC.</p>	<p>For PC: Bribing or agreeing to bribe a civil servant. (Article 157 of Laos Penal Code) For the PC Director: If the Director is an official, he may have violated article 157 of Laos Penal Code and Article 2 of Laos Anti-Corruption Law. If the Director is not an official, he may have violated the Article 174 of Laos Penal Code. For the Officials : Accepting or agreeing to accept a bribe in exchange for using the civil servant's position for the bribing party's interest. (Article 157 of Laos Penal Code) For the Bank: If PC is a state-owned or collective owned enterprise, the director always shall be the official, and then the Bank violates the Article 157 of Penal Code. If PC is a private enterprise, there is no liability under Laos Law.</p>



EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>To finance the construction project, the Power Company also issues U.S. dollar-denominated bonds to international investors, with the initial purchasers (i.e. underwriters) being three investment banks with operations in the U.S.</p>	<p>Jurisdiction: The mere issuance of bonds purchased by investors operating in the U.S. is likely not enough for jurisdiction to attach; however, PC could be an "issuer" if PC had dollar-denominated securities traded on a U.S. stock exchange as ADRs.</p>	<p>Jurisdiction: Insufficient jurisdiction over PC.</p>	<p>No liability under Laos law.</p>
<p>The Laotian power company contracts a local Asia Pacific-based subsidiary of a U.S. construction company (the "Construction Company" or "CC") as the main contractor to build the hydropower plant. To win the contract, Construction Company promises the directors of Power Company that they will pay consultancy fees to a company run by certain relatives of a Power Company director.</p>	<p>Jurisdiction: CC's U.S. parent: There is likely jurisdiction here as CC's parent is likely to be either an issuer or domestic concern. CC: Similarly, there is likely jurisdiction here as it is the subsidiary of what is likely an issuer or domestic concern under the statute. Corrupt/Payment/GO/Business Purpose: The consultancy fees could constitute corrupt payments, depending on whether any consulting services are actually provided, made for the business purpose of winning the construction contract. Further, it is possible that this could constitute an FCPA violation if Power Company is state-owned.</p>	<p>Jurisdiction: Likely jurisdiction over CC and its U.S. parent in the event this venture engages in forced labor. Third Party Knowledge: Laos has high rates of human trafficking, a red flag for CC, increasing its "reckless disregard" risk under § 1589.</p>	<p>For PC Director: If the Director is an official, he violates the Article 157 of Laos Penal Code and Article 2 of Laos Anti-Corruption Law. If the Director is not an official, he violates the Article 174 of Laos Penal Code and also the liability of directors (Article 122 of Laos Enterprises Law).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The Construction Company is "recommended" a local Laotian project manager ("Project Manager") who hires an unlicensed Vietnamese subcontractor (the "Subcontractor") to staff the construction project.</p>	<p>Intent - Knowledge: CC and its U.S. parent could be liable for the acts of an agent (Subcontractor) of its agent (Project Manager), depending on whether they could be said to "know" (or "should have known") that all or a portion of their payments to Subcontractor could be provided to a government official.</p>	<p>Jurisdiction: Likely jurisdiction over CC and its U.S. parent, as they can be liable for actions by their agents, the Project Manager and the Subcontractor. Third Party Knowledge: Hiring a "recommended" local project manager and an unlicensed subcontractor from a foreign country in which trafficking is common may increase "reckless disregard" risk under § 1589.</p>	<p>The subcontractor should have known it was unqualified to execute the contract. Therefore, the subcontractor may be liable to compensate the contractor for damages. (Article 68,69 of Laos Contract and Tort Law)</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>A 16-year-old Cambodian boy (the “Cambodian Boy”) learns that the hydropower plant construction project in Laos is hiring workers. A middleman (the “Agent”) who is paid a fee by the Subcontractor (but is not an employee of the Subcontractor) tells the Cambodian Boy that he will work for an American construction company that pays well. The Cambodian Boy’s service on the construction project is subcontracted through the Subcontractor.</p>	<p>3rd Party Liability/Intent - Knowledge: It is possible that CC and its U.S. parent could be liable for Agent’s acts, but the connection between the parties is becoming much weaker here, making it less likely for CC and its parent to have any “knowledge” of any corrupt actions.</p> <p>Jurisdiction: It is possible, though unlikely, that U.S. regulators could exercise jurisdiction over Agent, perhaps pursuant to a theory of accomplice liability.</p>	<p>Jurisdiction: Jurisdiction weakening but still possible.</p> <p>Third Party Knowledge: Reckless disregard risk increases for Construction Company if it knew - or should have known - that its agent Subcontractor was going to hire a middleman to find young workers in Cambodia.</p>	<p>For the Perpetrator: Making false statement to a natural person by use of a false name or a fictitious capacity, by the abuse of a genuine capacity, or by means of unlawful maneuvers, in order to obtain from that person, to his or her prejudice or to prejudice of a third party (Article 377 of Cambodian Criminal Code dated 30 November 2009).</p> <p>Fraud based on Article 377 of Cambodian Criminal Code dated 30 November 2009.</p> <p>Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat” (Article S415 of Myanmar Penal Code 1860).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The Agent bribes a consular officer at the Laotian Embassy in Phnom Penh in order to obtain a work permit for the Cambodian Boy.</p>	<p>Corrupt/Payment/GO/Business Purpose: Here, there is a corrupt payment to a consular officer for a business purpose; corruptly obtaining a work permit to hide slave labor would reduce operating costs and thus increase profit margins, giving CC an edge over competitors and thereby giving CC a business advantage. Jurisdiction: See above.</p>	<p>Jurisdiction: Jurisdiction weakening but still possible. Third Party Knowledge: Reckless disregard risk also weakening here but the agent's hiring practices – if known or should have been known – are relevant.</p>	<p>For the Perpetrator: Offering advantage to public servant (Offences Against Public Administration by Individual, Corruption and Proffering Bribes, Article 605 of Cambodian Criminal Code dated 30 November 2009). Offering advantage to public servant in regard to a contract (Offences Against Public Administration by Individual, Corruption and Proffering Bribes, Article 605 of Cambodian Criminal Code dated 30 November 2009). Offering an advantage to an agent (Offences Against Public Administration by Individual, Corruption and Proffering Bribes, Article 605 of Cambodian Criminal Code dated 30 November 2009). For the Consular Officer: Soliciting or accepting advantage (Infringement of Public Administration by representative of public authority, acceptance of bribery, Article 594 of Cambodian Criminal Code dated 30 November 2009).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The Agent gives the Cambodian Boy a fake ID to conceal his real age.</p>		<p>Jurisdiction: Jurisdiction weakening but still possible. Third Party Knowledge: Reckless disregard risk also weakening here but the agent's hiring practices – if known or should have been known – are important.</p>	<p>For the Perpetrator: Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine (Penal Code of Myanmar 1860). Fraud based on Article 377 of Cambodian Criminal Code dated 30 November 2009.</p>
<p>The Subcontractor arranges for the Cambodian Boy's transportation from Cambodia to the construction site in Laos.</p>		<p>Jurisdiction: Jurisdiction over CC due to actions by its agent, Subcontractor. Trafficking: TVPA liability under § 1590: Subcontractor, as CC's agent, knowingly transported boy for forced labor. [No TVPA liability for subcontractor because no jurisdiction over that entity.]</p>	<p>For the Perpetrator: Unlawfully removes another for the purpose of profit making, sexual aggression, production of pornography, marriage against will of the victim, adoption or any form of exploitation (Article 10 of Law on Suppression of Human Trafficking and Sexual Exploitation Dated 15 February 2008).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>When the truck is stopped at the border and the Cambodian Boy and others are found to be without papers, the driver hands over a small envelope that includes money to the immigration officer.</p>	<p>Corrupt/Payment/GO/ Business Purpose: Here there is a payment to a government official for a business advantage as per the above analysis. 3rd Party Liability/Intent - Knowledge: It is unlikely that the U.S. could exercise jurisdiction over CC due to the actions of an agent given how weak the connection to CC has become.</p>	<p>Jurisdiction: CC likely has no control over this truck driver, so jurisdiction unlikely.</p>	<p>For the Perpetrator: Offering advantage to public servant (Offences Against Public Administration by Individual, Corruption and Proffering Bribes, Article 605 of Cambodian Criminal Code dated 30 November 2009). Offering advantage to public servant in regard to a contract (Offences Against Public Administration by Individual, Corruption and Proffering Bribes, Article 605 of Cambodian Criminal Code dated 30 November 2009) Offering an advantage to an agent (Offences Against Public Administration by Individual, Corruption and Proffering Bribes, Article 605 of Cambodian Criminal Code dated 30 November 2009). For the Immigration Officer: Soliciting or accepting advantage (Infringement of Public Administration by representative of public authority, acceptance of bribery, Article 594 of Cambodian Criminal Code dated 30 November 2009).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>After crossing over to Laos, the Cambodian Boy is picked up by an agent who takes away his identification documents.</p>		<p>Jurisdiction: Jurisdiction over CC is quite weak here. Documentation: But if jurisdiction is found, then CC could be held liable through a combination of § 1592 (takes away ID) and § 1593A (benefitting in reckless disregard of act in violation of 1592).</p>	<p>For the Perpetrator: Transfer any person within or across national borders by means of using such person in forced labor. (Article 134 of Laos Penal Code dated 9 Nov, 2005) Abusing any confidence in order to embezzle any property entrusted to him for keeping or for any other purpose. (Article 121 of Laos Penal Code dated 9 Nov, 2005)</p>
<p>The Cambodian Boy is driven to an apartment that is connected to the construction site. The apartment is shared by ten other men. The Cambodian Boy is told not to leave the apartment except to go to the work site. When he is not working, he is locked inside the apartment.</p>		<p>Third Party Knowledge/Forced Labor: Assuming CC is aware of or should have been aware of this apartment and its conditions, CC is arguably “recklessly disregarding” the fact that the venture from which it is benefitting is engaged in forced labor.</p>	<p>For the Perpetrator: Unlawfully arresting or detaining another person (Article 99 of Laos Penal Code dated 9 Nov, 2005) Failure to instill appropriate measures to ensure workplace health and safety for the employee working under its administration or do not pose a danger to the health of employees. (Article 119 of Laos Labor Law dated 24 Dec 2013) No matter in what form, the use of forced labor is not authorized in Laos. (Article 59 of Laos Labor Law dated 24 Dec 2013)</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>He is threatened with deportation and imprisonment if he does not follow instructions. His supervisor physically and verbally abuses him. He works 14 hours a day, seven days a week with no pay. He does not have protective equipment.</p>		<p>Third Party Knowledge/Forced Labor: Assuming CC is aware of or should have been aware of these threats and working conditions, CC is arguably “recklessly disregarding” the fact that the venture from which it is benefitting is engaged in forced labor.</p>	<p>For the Perpetrator: Exercising duress against another person by using force or threats to compel such other person to act according to the offender’s will but contrary to the compelled person’s will. (Article 97 of Laos Penal Code dated 9 Nov, 2005) Injuring the employees’ right of rest. Hours of work must not exceed six hours per day or thirty-six hours per week for Employees and workers have the right to at least one day’s rest within a week or four days per month. (Article 51-58 of Laos Labor Law dated 24 Dec 2013)</p>
<p>One day, immigration police visit the site and meet the foreman (a bribe is paid by the Subcontractor to the immigration police to arrest and deport the workers).</p>	<p>Corrupt/Payment/GO/Business Purpose: Here there is a bribe to a government official, but unclear whether payment is being made in order to obtain a business advantage. Jurisdiction: As above, it is possible (though unlikely) that CC and its parent could be held liable for Subcontractor’s actions.</p>	<p>Third Party Knowledge/ Forced Labor: Assuming CC is aware of or should have been aware of the immigration police visit, CC is arguably “recklessly disregarding” the fact that the venture from which it is benefitting is engaged in forced labor.</p>	<p>For the Perpetrator: Bribing or agreeing to bribe a civil servant. (Article 157 of Laos Penal Code dated 9 Nov, 2005) For the Immigration police: Accepting or agreeing to accept a bribe in exchange for using the civil servant’s position for the bribing party’s interest. (Article 157 of Laos Penal Code dated 9 Nov, 2005)</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>An hour later all of the men are arrested and brought to an immigration centre. The Cambodian Boy is deported with no payment of wages for his work on the construction site.</p>		<p>Third Party Knowledge/Forced Labor: Assuming CC recklessly disregarded the forced labor of these men, it can be held liable for forced labor under section 1589.</p>	<p>For the Perpetrator: Injuring the employee's right of receiving the salary and wages. The employer must pay the salary or wages to the employee at least once per month in accordance with the set time. (Article 110 of Laos Labor Law dated 24 Dec 2013)</p> <p>For the Immigration police: Abusing his authority, position, and duties for personal gain, thereby adversely affecting the interests of interests of citizens. (Article 153 of Laos Penal Code dated 9 Nov, 2005)</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The Project Manager and an accountant create management accounts and reporting to show that all payments have been properly made to workers and staffing agents.</p> <p>The Project Manager and the Subcontractor retain cash budgeted for workers for their own benefit.</p>	<p>Accounting Provisions: Individuals who knowingly falsify the books and records of an issuer could be held criminally liable for their actions. This provision is generally targeted towards officers and employees of the relevant issuer, and U.S. enforcement authorities may hesitate to prosecute distant third-parties like Project Manager and accountant here.</p>		<p>For the Project Manager and Accountant: Forging documents (Article 161 of Laos Penal Code).</p> <p>Intentional falsification and establishment of incorrect and unclear summaries of property (Article 24 of Laos Law on Enterprise Accounting).</p> <p>For the project Manager and Subcontractor: Abusing his Position to benefit himself while causing damage to the interest of citizens. (Article 174 of Laos Penal Code).</p>
<p>The Construction Company receives the management accounts and reporting and does not verify that payments were made to workers.</p> <p>The Construction Company provides accounts and reports to Euro Bank representing and warranting that they are true and accurate.</p>	<p>Accounting Provisions: It is possible that C.C. and its U.S. parent could be held liable for violating the Accounting Provisions if U.S. regulators determined that the company failed to reasonably implement a system of internal accounting controls.</p>		<p>For CC: Errors or Faults in Accounting leading to failure or unjustified delay in reporting to the relevant officers. (Article 26 of Laos Law on Enterprise Accounting).</p>

Scenario 2: Domestic Servitude

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
A single mother (the “ Indonesian Worker ”) decides to leave Indonesia to work in Malaysia in order to take care of her young daughter and her elderly mother.			
She reads a job advertisement by a recruitment agency in Indonesia (the “ Indonesian Agency ”) in a local paper and applies.			
The Indonesian Agency gives her a contract in her own language (Bahasa Indonesia) that she signs.			
The Indonesian Agency helps her to get a passport and a visa in exchange for a fee (US\$3,200).			
She does not have enough money to pay the fee.			
The recruitment agency refers her to an Indonesian illegal lending company (the “Lending Company”) where she signs a loan agreement with an extortionate interest rate. She does not understand the terms of the loan as she cannot read or write.			



EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The Lending Company is operational due to bribes paid to Indonesian government officials to obtain a money lender's license and to remain in operation.</p>	<p>Corrupt/Payment/GO/Business Purpose: Here, Lending Company is making a bribe to a government official in order to retain business. However, there are no facts indicating that the U.S. would have jurisdiction over Lending Company.</p>		<p>For the Lending Company: Giving something to a civil servant or state operator due to or in relation to something which the official has done or not done in his position and which contradicts with his obligation, shall be sentenced to a minimum of 1 (one) year and maximum of 5 (five) years imprisonment and or fined a minimum Rp. 50,000,000 (fifty million rupiah) and maximum of Rp. 250,000,000 (two hundred and fifty million rupiah) (Article 5, Law No. 31 of 1999 on the Eradication of the Criminal Act of Corruption).</p> <p>For the Government Officials: Any civil servant or state operator who receives presents or promises whereby it is known or can be suspected that such presents or promises were given due to the power and authority attaching to his position, or in the opinion of the person providing the presents or promises, such presents/promises are related to his position, shall be sentenced to a minimum of 1 (one) year and maximum of 5 (five) years of imprisonment and fined a minimum of Rp.50,000,000 (fifty million rupiah) and maximum of Rp.250,000,000 (two hundred and fifty million rupiah) (Article 11, Law No. 31 of 1999 on the Eradication of the Criminal Act of Corruption).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
			<p>Any civil servant or state operator receiving presents or promises, where it is known or can be suspected that such presents or promises were given to influence the civil servant or state operator to commit or not to commit something under his position, which contradicts with his obligations, shall be sentenced to life or a minimum of 4 (four) years and maximum of 20 (twenty) years of imprisonment and fined a minimum of Rp.200,000,000 (two hundred million rupiah) and maximum of Rp.1,000,000,000 (one billion rupiah) (Article 11, Law No. 31 of 1999 on the Eradication of the Criminal Act of Corruption).</p>
<p>She receives a cash advance from the Lending Company to pay the agency fee.</p>			
<p>The Indonesian Agency deposits the agency fee in its account at a local branch of an international bank that also has operations in the U.S.</p>	<p>Jurisdiction: The U.S. could possibly have jurisdiction over the international bank if it is an issuer.</p>	<p>Jurisdiction: Insufficient jurisdiction over the bank based merely on additional operations in U.S.</p>	

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The Indonesian Agency pays bribes to employees of the Malaysian government's accredited clinic in Indonesia to issue a medical report.</p>	<p>Corrupt/Payment/GO/Business Purpose: These are bribes to government officials, but it is unclear whether these are being made to obtain/retain business. Jurisdiction: There are no facts indicating that the U.S. could exercise jurisdiction over the Indonesian Agency.</p>		<p>For the Agency: Offering gratification to an agent (s11(b)); s16, Anti-Corruption Act 1997). Abetting a public servant in taking gratification (s109; s161, Penal Code). For the Employees in the Clinic: Accepting gratification (s11(a); s16, Anti-Corruption Act 1997). Taking gratification (s161, Penal Code).</p>
<p>The Indonesian Worker flies to Malaysia.</p>			
<p>She arrives in Malaysia.</p>			

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>Another woman who works for the Indonesian Agency picks her up at the Malaysian airport and her passport is taken away immediately.</p>			<p>For the Trafficker: Assist any person to enter into Malaysia (s12(1)(g)), Passport Act 1966). Involved directly or indirectly, in conveying a person to Malaysia contrary to the Immigration Act (s55A(1), Immigration Act). Offense of trafficking in persons for the purpose of exploitation by deception (s13, ATPA). Having a passport or internal travel document issued for the use of other person other than himself (s12(1)(f), Passport Act). Obtaining fraudulent travel or identity document for the purpose of trafficking in person (s18, ATPA). Possession of any Entry Permit, Pass without lawful authority (s56(1)(l), Immigration Act). Obtaining property by deception (s415; s417; s420, Penal Code). For the Victim: Unlawful entry/overstaying (s15, Immigration Act).</p>
<p>The woman takes her to an office of the Indonesian Agency where she is presented with a second contract that is in a foreign language (Malay).</p>			<p>For the Perpetrator: Profiting from exploitation of a trafficked person (s15, ATPA). Cheating (s415; s417, Penal Code).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>When she complains, she is threatened with deportation. As a result, she is forced to accept the job offer.</p>			<p>For the Perpetrator: Cheating (s415; s417, Penal Code). Criminal intimidation (s503; s506, Penal Code).</p>
<p>A middle-aged Malaysian couple comes to the office and takes her to a house.</p>			
<p>The couple owns a company (the "Malaysian Company") that manufactures and supplies parts of smartphones to multiple customers, some of which are based in the U.S.</p>	<p>Jurisdiction: There are no facts indicating that the U.S. could exercise jurisdiction over Malaysian Company.</p>	<p>Jurisdiction: Insufficient jurisdiction.</p>	
<p>The couple and employees of the Malaysian Company bribe customs officers to accept false documents in order to reduce customs duties owed on the shipments of smartphone parts to the U.S. and other countries.</p>	<p>Corrupt/Payment/GO/Business Purpose: Here, there is a bribe made to a government official for a business purpose. Jurisdiction: Likely no jurisdiction over Malaysian Company.</p>		<p>For the Perpetrator: Offering gratification to an agent (s11(b); s16, Anti-Corruption Act 1997). Abetting a public servant in taking gratification (s109; s161, Penal Code). For the Police Officer: Accepting gratification (s11(a); s16, Anti-Corruption Act 1997). Taking gratification (s161, Penal Code).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The Malaysian Company bribes customs officers to speed up customs clearance.</p>	<p>Corrupt/Payment/GO/Business Purpose: Here, there is a bribe made to a government official for a business purpose Jurisdiction: Likely no jurisdiction over Malaysian Company.</p>		<p>For the Perpetrator: Offering gratification to an agent (s11(b)); s16, Anti-Corruption Act 1997). Abetting a public servant in taking gratification (s109; s161, Penal Code). For the Officer: Accepting gratification (s11(a); s16, Anti-Corruption Act 1997). Taking gratification (s161, Penal Code).</p>
<p>The Malaysian Company deposits proceeds from its sales of parts to U.S. and other companies in its account with a Malaysian subsidiary of a U.S.-based financial institution.</p>			
<p>One of the minority shareholders of the Malaysian Company is a Singapore-based private equity fund that has some limited partners that are U.S. persons.</p>	<p>Jurisdiction: The minority ownership interest is likely too weak to trigger FCPA jurisdiction.</p>		
<p>The Indonesian Worker's duty extends beyond cleaning the house. She is required to clean the offices at the Malaysian Company's factory.</p>		<p>Jurisdiction: While it could be argued that Malaysian Company is benefitting from forced labor, the sale of parts to the U.S. and having limited partners in the U.S is not enough provide jurisdiction. Third Party Knowledge: Also, nothing in the facts indicates that the U.S. connections have recklessly disregarded the forced labor.</p>	<p>For the Perpetrator: Failure to furnish information on foreign employees (s60K(1));(5), Employment Act). Unlawful compulsory labour (s374, Penal Code).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>During the first six months, the Indonesian Worker is only paid RM60 a month because room, food, agency fee, and any other expenses are deducted from her monthly wages.</p>			<p>For the Perpetrator: Failure to pay wages (s19; s91, Employment Act). Failure to pay overtime work (s60A; s100, Employment Act).</p>
<p>She is not allowed to leave the apartment on her own.</p>			<p>For the Perpetrator: Wrongfully confining a person (s340; s342, Penal Code). False imprisonment (common law offence). Wrongful restraint (s339; s341, Penal Code).</p>
<p>Her living quarters are the size of a broom closet.</p>			<p>For the Perpetrator: Doing an act which endangers life (s336, Penal Code).</p>
<p>One day she reaches out to the maid next door to make a phone call to her family in Indonesia.</p>			
<p>Due to assistance from different Malaysian and Indonesian authorities, she safely returns to Indonesia.</p>			

Scenario 3: Tourism

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>A twenty-three year old woman from the Philippines (the “Filipino Worker”) is recruited by an agency (the “Recruitment Agency”) to work as a singer at a hotel lounge in Myanmar. An employee of the Recruitment Agency promises that she will be earning a high salary, and she signs an employment contract written in her own language (Tagalog).</p>	<p>Jurisdiction: There are no facts indicating that the U.S. has jurisdiction over Recruitment Agency.</p>	<p>Jurisdiction: There are no facts indicating that the U.S. has jurisdiction over Recruitment Agency.</p>	
<p>The new hotel is jointly owned and operated by a Burmese conglomerate and a U.S. hotel chain (the “Joint Venture” or “JV”).</p> <p>In order to win the deal, the U.S. Hotel Chain was required to fly senior management of the Burmese JV partner to the US for entertainment. This was described as “training.”</p>	<p>Jurisdiction: The U.S. hotel chain is likely an issuer and/or domestic concern; as such, the U.S. government has jurisdiction over the actions of JV.</p> <p>Corrupt/Payment/GO/Business Purpose: It is possible that JV could be held liable for corruptly providing travel and entertainment to the senior management of the Burmese JV partner for the business purpose of winning the deal. However, there are no facts indicating that the Burmese managers are government officials.</p>	<p>Jurisdiction: There is TVPA jurisdiction over U.S. Hotel as a U.S. company.</p> <p>Third Party Knowledge: Because there is jurisdiction, there is a risk that the U.S. Hotel would be liable under TVPA if it benefits from its participation in the JV with reckless disregard that the JV engaged in forced labor.</p>	



EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The Joint Venture pays bribes in order to secure lucrative government contracts in the capital of Naypyidaw.</p>	<p>Corrupt/Payment/GO/Business Purpose: Here is a bribe paid to a GO in order to obtain business. Jurisdiction: As above, the U.S. has jurisdiction.</p>		<p>For the Perpetrator: Taking gratification in order, by corrupt or illegal means, to influence public servant (s162 of the Penal Code). Taking gratification for exercise of personal influence with public servant (s163 of the Penal Code). For the Government Officials: Public servant taking gratification other than legal remuneration in respect of an official act (s161 of the Penal Code). Abetment by public servant of offences defined in section 162 and 163 (s164 of the Penal Code). Public servant obtaining valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant (s165 of the Penal Code). Bribery of Authority (s56 of Anti-Bribery Law, 2013).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The Joint Venture builds government buildings in Naypyidaw in exchange for a prime location for its brand new hotel in Yangon.</p>	<p>Corrupt/Payment/GO/Business Purpose: A corrupt payment can be things of value other than cash; government buildings would certainly qualify as a "thing of value," being provided to government officials, especially since this benefit is being provided "in exchange" for advancing JV's business interests by getting a prime location. Jurisdiction: As above, the U.S. has jurisdiction.</p>		<p>For the Perpetrator: Taking gratification in order, by corrupt or illegal means, to influence public servant (s162 of the Penal Code). Taking gratification for exercise of personal influence with public servant (s163 of the Penal Code). For the Police Officer: Public servant taking gratification other than legal remuneration in respect of an official act (s161 of the Penal Code). Abetment by public servant of offences defined in section 162 and 163 (s164 of the Penal Code). Public servant obtaining valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant (s165 of the Penal Code). Bribery of Authority (s56 of Anti-Bribery Law, 2013).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The Joint Venture has financed the construction of the hotel and other projects with loans from local branches of two international banks that also have operations in New York and London.</p>	<p>Jurisdiction: It is possible that the U.S. could have jurisdiction over the international banks if they are issuers; however the government would likely not pursue an action against the banks unless it could be shown that they knew, or should have known, that the proceeds of the loans were being used corruptly.</p>		

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The hotel operator (the “Hotel Operator”), which is an affiliate of the U.S. hotel chain, pays kickbacks and offers generous discounts on accommodation to a Burmese official for directing foreign officials to stay at their hotel in order to promote the new property.</p>	<p>Jurisdiction/3rd Party Liability: There could be jurisdiction over Hotel Operator due to its affiliation with the U.S. hotel chain. Further, the U.S. hotel chain is likely an issuer and/or domestic concern and could be held liable for the corrupt actions of the Hotel Operator as its agent.</p>	<p>Jurisdiction: In the event of a TVPA violation, there could be jurisdiction over Hotel Operator due to its affiliation with the U.S. hotel chain. Likewise, U.S. hotel could be held liable for actions of the Hotel Operator as its agent.</p>	<p>For the Perpetrator: Taking gratification in order, by corrupt or illegal means, to influence public servant (s162 of the Penal Code). Taking gratification for exercise of personal influence with public servant (s163 of the Penal Code). For the Government Official: Public servant taking gratification other than legal remuneration in respect of an official act (s161 of the Penal Code). Abetment by public servant of offences defined in section 162 and 163 (s164 of the Penal Code). Public servant obtaining valuable things, without consideration from person concerned in proceeding or business transacted by such public servant (s165 of the Penal Code). Bribery of Authority (s56 of Anti-Bribery Law, 2013).</p>
<p>The Hotel Operator has accounts with a revolving credit facility from one of the same international banks that has lent funds to the Joint Venture.</p>			

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The Filipino Worker pays the Recruitment Agency to get a passport and a visa in exchange for a fee (US\$3,500).</p>		<p>Third Party Knowledge: Reckless disregard risk increases for U.S. hotel if it knew - or should have known - that the JV was going to hire Recruitment Agency to hire hotel workers. Even greater risk if U.S. hotel recklessly disregarded Recruitment Agency's hiring tactics, including the use of high fees in exchange for visas.</p>	

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The Recruitment Agency bribes the consular officers at the Myanmar Embassy in the Philippines in order to obtain the Filipino Worker's business visa.</p>	<p>3rd Party Liability/ Corrupt/ Payment/GO/Business Purpose: Assuming Recruitment Agency was retained by JV and acting as its agent, JV could be liable for its conduct. This bribe to a government official in order to obtain visas necessary for its employees could certainly trigger the FCPA.</p>		<p>For the Perpetrator: Taking gratification in order, by corrupt or illegal means, to influence public servant (s162 of the Penal Code). Taking gratification for exercise of personal influence with public servant (s163 of the Penal Code). For the Consular Officer: Public servant taking gratification other than legal remuneration in respect of an official act (s161 of the Penal Code). Abetment by public servant of offences defined in section 162 and 163 (s164 of the Penal Code). Public servant obtaining valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant (s165 of the Penal Code). Bribery of Authority (s56 of Anti-Bribery Law, 2013).</p>
<p>The Filipino Worker borrows money from a local bank in the Philippines to cover the expenses.</p>			
<p>She flies to Myanmar.</p>			
<p>She arrives in Myanmar.</p>			

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>A woman who is an employee of the Recruitment Agency is waiting for the Filipino Worker at the airport in Yangon.</p>			<p>For the Trafficker: Criminal conspiracy for cheating (s420/s120A of the Penal Code). Abetment of cheating (s420/s107 of the Penal Code). Criminal conspiracy for trafficking in woman (s24 of the Anti-Trafficking in Persons Law 2005/s120A of the Penal Code). Abetment of trafficking in woman (s24 of the Anti-Trafficking in Persons Law/s107 of the Penal Code).</p>
<p>She is told that the hotel will make a copy of her travel documents and will return them to her, but her documents are not returned to her.</p>		<p>Documents Violation: U.S. hotel could be held liable though a combination of § 1592 (Recruitment Agency confiscating travel documents) and § 1593A (benefitting in reckless disregard of act in violation of § 1592).</p>	<p>For the Trafficker/Perpetrator: Theft (s378 of the Penal Code). Extortion (s383 of the Penal Code). Robbery (s390 of the Penal Code).</p>
<p>She is driven to another office of the Recruitment Agency where she is presented with a second contract that is in a foreign language.</p>		<p>Third Party Knowledge: Reckless disregard risk increases for U.S. hotel if it knew - or should have known - that Recruitment Agency used such hiring tactics.</p>	<p>For the Trafficker: Criminal conspiracy for cheating (s420/s120A of the Penal Code). Abetment of cheating (s420/s107 of the Penal Code). [Agreement void for uncertainty (s29 of the Contract Act)].</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>She is told to sign the contract and she does so.</p>			<p>For the Perpetrator: Criminal conspiracy for cheating (s420/s120A of the Penal Code). Abetment of cheating (s420/s107 of the Penal Code). (Voidability of agreement without free consent - s19 of the Contract Act).</p>
<p>A man comes to the office and drives her to the hotel.</p>			<p>For the Perpetrator: Failure to register visitors (s27 of Wards and Village Tracts Administration Act, 2012).</p>
<p>She is told that her job is to clean guest rooms.</p>			<p>For the Trafficker: Criminal conspiracy for cheating (s420/s120A of the Penal Code). Abetment of cheating (s420/s107 of the Penal Code).</p>
<p>Each day she is forced to wake up at 5am and work until 11pm and she does not have days off.</p>		<p>Third Party Knowledge: JV has now engaged in forced labor. U.S. hotel liable if it recklessly disregarded the use of forced labor. If U.S. hotel knew or should have known that workers were working such long, grueling hours, its risk increases.</p>	<p>For the Perpetrator: Hours of Work (s7 of the Shops and Establishments Act, 1951). Unlawful compulsory labour (s374 of the Penal Code).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>If she does something wrong, she is hit repeatedly and is threatened with deportation.</p>		<p>Third Party Knowledge: JV has now engaged in forced labor. Threats of deportation are sufficient to prove forced labor. If U.S. hotel recklessly disregarded such threats, then it is liable.</p>	<p>For the Perpetrator: Force (s349 of the Penal Code). Criminal force (s350 of the Penal Code). Assault (s351 of the Penal Code). Hurt (s319 of the Penal Code). Grievous hurt (320 of the Penal Code). Voluntarily causing hurt (s321 of the Penal Code). Voluntarily causing grievous hurt (S322 of the Penal Code).</p>
<p>She does not receive any payment because amounts are deducted from her salary to pay for her accommodation and food and to repay the agency fees that the Hotel Operator paid to the Recruitment Agency to secure her services.</p>		<p>Third Party Knowledge: JV has now engaged in forced labor. Incurring large debts with an inability to repay are sufficient to prove forced labor. If U.S. hotel recklessly disregarded these debt/repayment obligations, then it is liable.</p>	<p>For the Perpetrator: Deductions which may be made from wages (s7 of the Payment of Wages Act).</p>
<p>She is forced to sleep in a tiny room that is shared with 15 other maids.</p>		<p>Third Party Knowledge: If U.S. hotel was aware or should have been aware of such living conditions, it would go towards proving their reckless disregard of the forced labor.</p>	

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The Hotel Operator pays bribes to the labour inspector to turn the other way.</p>	<p>Corrupt/Payment/GO/ Business Purpose: This bribe to a government official appears intended to secure a business advantage, resulting in FCPA liability for Hotel Operator and/or its U.S. parent.</p>	<p>Third Party Knowledge: If U.S. hotel was aware or should have been aware of these inspection visits and the payment of bribes to look away, it would go towards proving their reckless disregard of the forced labor.</p>	<p>For the Perpetrator: Taking gratification in order, by corrupt or illegal means, to influence public servant (s162 of the Penal Code). Taking gratification for exercise of personal influence with public servant (s163 of the Penal Code). For the Government Officials: Bribery of governmental officials (s56 of the Anti-Bribery Law, 2013). Public servant taking gratification other than legal remuneration in respect of an official act (s161 of the Penal Code). Abetment by public servant of offences defined in section 162 or 163 (s164 of the Penal Code).</p>

Scenario 4: Forced Labor (Fishing Industry)

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>A 20-year-old male from Myanmar (the "Burmese Worker") hears of job opportunities at factories in Thailand.</p>	<p>Jurisdiction: There are no facts indicating that the U.S. could exercise jurisdiction over Broker.</p>	<p>Jurisdiction: There are no facts indicating that the U.S. could exercise jurisdiction over Broker.</p>	
<p>A broker (the "Broker") tells the Burmese Worker he can earn US\$150 per month.</p>	<p>Jurisdiction: There are no facts indicating that the U.S. could exercise jurisdiction over Broker.</p>		<p>For the Perpetrator: Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat." (Article s 415 of Penal Code 1860).</p>



EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The Broker helps him to come to Thailand in exchange of US\$1000.</p>			<p>For the Perpetrator: Myanmar Whoever is guilty of trafficking in persons especially women, children and youth shall, on conviction be punished with imprisonment for a term which may extend from a minimum of 10 years to a maximum of imprisonment for life and may also be liable to a fine. (Article s 24 of Anti-Trafficking in Persons Law 2005) .</p> <p>Thailand Trafficking in persons (despite committing the offence outside Thailand) (Anti-trafficking in Persons Act S6, S11 and S52). Bringing into Thailand in order to enslave a person or to cause a person to be in a position similar to a slave (committed outside Thailand but the consequence of the offence will occur within Thailand) (Penal Code S312, S5). Bringing or taking a foreigner into Thailand or does anything which helps, assists or facilitates a foreigner in making and entry into Thailand in contravention of the Immigration Act (committed outside Thailand but the consequence of the offence will occur within Thailand) (Immigration Act S63 and Penal Code S5).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The Broker bribes Thai border police in order to transport the Burmese Worker over the border into Thailand. The Burmese Worker arrives at a port near Samut Prakan where he is kept for two days by armed men in a room near the port.</p>	<p>Corrupt/Payment/GO/Business Purpose: Here there is a bribe made to a government official to retain business for the Broker, but as above, there are no facts indicating that the U.S. government would have jurisdiction here.</p>		<p>For the Broker: Putting a person in fear or in fright by threat (Penal Code S392). Confining a person and making such person to do any act (Penal Code S310bis). Confining a person in order to enslave a person or to cause such person to be in a position similar to a slave (Penal Code S312). Granting any benefit to any official with intent to persuade such person to wrongfully omit to discharge of any duty in his or her office (Penal Code S144).</p> <p>For the Police: An official accepting any benefit for himself or for any other person for omitting to discharge of any duty in his or her office (Penal Code S149). An official assisting the commission of trafficking in persons offence (Anti-trafficking in Persons S7, S6, S13, S52).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The Broker sells him to the captain of a Thai fishing trawler for about \$470.</p>			<p>For the Broker: Trafficking in persons (Anti-trafficking in Persons Act S6 and S52). Supporting the commission of the anti-human trafficking offence (Anti-trafficking in Persons Act S7, S6 and S52). Conspiring the commission of the anti-human trafficking offence (Anti-trafficking in Persons Act S9, S6 and S52). Receiving in order to enslave a person or to cause such person to be in a position similar to a slave (Penal Code S312).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>His seaman book is falsely obtained before he boards the trawler. The Thai Marine Police who inspects the seaman book is bribed by the captain to look the other way.</p>	<p>Corrupt/Payment/GO/Business Purpose: This bribe is made to a government official for what could be a business purpose. Jurisdiction/3rd Party Liability/ Knowledge - Intent: It does not appear that the U.S. could exercise jurisdiction over the trawler captain himself. However, a U.S. issuer and/or domestic concern <i>could</i> be held liable for the trawler captain's conduct depending on whether the U.S. company could be said to "know" that all or a portion of their payments to the trawler could be provided to a government official.</p>		<p>For the Employer: Engaging a foreigner to work for him other than the holder of a permit (Foreign Workers Act S27, S54). Granting any benefit to any official with intent to persuade such person to wrongfully omit to discharge of any duty in his or her office (Penal Code S144). For the Police: An official accepting any benefit for himself or for any other person for omitting to discharge of any duty in his or her office (Penal Code S149). An official assisting the commission of trafficking in persons offence (Anti-trafficking in Persons S7, S6, S13, S52).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The unlicensed trawler is among a fleet of boats owned by a canned seafood company that is a local Thai subsidiary (the "Thai Fishing Company") of a North American canned seafood company whose headquarters are in the U.S. (the "US Seafood Co.").</p>	<p>Jurisdiction/3rd Party Liability: US Seafood Co. is a domestic concern as it is headquartered in U.S. Further, it can be held liable for the actions of its subsidiary, Thai Fishing Company. Based on the agency theory discussed above, it is also possible for both companies to be held liable for the actions of their trawlers.</p>	<p>Jurisdiction: Jurisdiction over US Seafood Co. for its own actions because it is a U.S. company, and also for actions of its subsidiary, Thai Fishing Company, based on agency principles. Thus, US Seafood Co. could be liable for Thai Fishing Company's actions with respect to its trawlers. Third Party Knowledge: In addition to liability via agency principles, US Seafood Co. could be liable if it knows about or recklessly disregards the fact that its subsidiary was engaged in forced labor.</p>	
<p>The US Seafood Co. has accounts with a U.S.-based international bank. The Thai Fishing Company has accounts with the Thai branch of the same bank.</p>			
<p>The Burmese Worker is told that the trawler will remain at sea for two months before returning to the port. Once on board, he learns that the excursion will last six months at a minimum.</p>		<p>Third Party Knowledge: It is a weak link, but US Seafood Co. could be liable if Thai Fishing Company directed these actions or if US Seafood Co. recklessly disregarded its subsidiary's working conditions.</p>	<p>For the Employer: Confining a person and making such person to do any act (Penal Code S310bis). Confining a person in order to enslave a person or to cause such person to be in a position similar to a slave (Penal Code S312). Committing cheating and fraud offence (Penal Code S341).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The captain pays off the Thai Marine Police when they conduct an at-sea inspection and find the Burmese Worker and other illegal migrant workers on board.</p>	<p>3rd Party Liability/Knowledge-Intent/ Corrupt/Payment/GO/ Business Purpose: Depending on their relationship with the trawler captain, US Seafood Co. and its subsidiary could theoretically be held responsible for the corrupt payment made by its agent for the business advantage of continuing its illegal employment of migrant workers.</p>		<p>For the Employer: Granting any benefit to any official with intent to persuade such person to wrongfully omit to discharge of any duty in his or her office (Penal Code S144). Knowing of any foreigner entering into Thailand in contravention of the Immigration Act, and harbouring, hiding or in any manner assisting said foreigner to evade arrest (Immigration Act S64).</p> <p>For the Police: An official accepting any benefit for himself or for any other person for omitting to discharge of any duty in his or her office (Penal Code S149). An official assisting the commission of trafficking in persons offence (Anti-trafficking in Persons S7, S6, S13, S52).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>The Burmese Worker gets up at midnight and works continuously until 7pm without pay.</p>		<p>Third Party Knowledge: It is a weak link, but US Seafood Co. could be liable if Thai Fishing Company directed these actions or if US Seafood Co. recklessly disregarded its subsidiary's working conditions.</p>	<p>For the Employer: Working time per day exceeds what is prescribed by law without justification (Labour Protection Act S23 and S144). Requiring an employee to work overtime without his consent (Labour Protection Act S24 and S144). Paying employees in the amount lower than the minimum wage rate (Labour Protection Act S90 and S144). Deducting wages, overtime pay, holiday pay and holiday overtime pay for the purpose other than those prescribed by law (Labour Protection Act S76, S144) Committing cheating and fraud offence (Penal Code S341). For the Victim: Engaging in a work without having a permit (Foreign Workers Act S51).</p>
<p>He works in pitch blackness because small silver forage fish are easier to spot at night. When he is not fishing, he sorts the catch and fixes the nets.</p>		<p>Third Party Knowledge: It is a weak link, but US Seafood Co. could be liable if Thai Fishing Company directed these actions or if US Seafood Co. recklessly disregarded its subsidiary's working conditions.</p>	<p>For the Employer: Working time per day exceeds what is prescribed by law without justification (Labour Protection Act S23 and S144). Requiring an employee to work overtime without his consent (Labour Protection Act S24 and S144). Not arranging a rest period during work for an employee (Labour Protection Act S27 and S146).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>If he makes a mistake, he is beaten by the boat captain with a metal rod or is confined in foul smelling fishing holds below deck for days.</p>		<p>Third Party Knowledge: It is a weak link, but US Seafood Co. could be liable if Thai Fishing Company directed these actions or if US Seafood Co. recklessly disregarded its subsidiary's working conditions.</p>	<p>For the Employer: Causing bodily harm (Penal Code S295). Committing serious bodily harm (Penal Code S296, S295 and S289). Committing an act of violence not amounting to bodily or mental harm (Penal Code S391). Adulterating food with intent to be consumed by any other person which is likely to cause injury to health (Penal Code S236). Compelling the other person by putting him in fear of injury to life, body, liberty, reputation or property of him or another person so that he does or does not do such act (Penal Code S309). Putting a person in fear or in fright by threat (Penal Code S392). Confining a person and making such person to do any act (Penal Code S310bis). Confining a person in order to enslave a person or to cause such person to be in a position similar to a slave (Penal Code S312).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>Once a day he eats a bowl of rice that is flecked with throwaway fish. When drinking water runs low, he drinks foul-tasting ice water from the barrels of fish.</p>		<p>Third Party Knowledge: It is a weak link, but US Seafood Co. could be liable if Thai Fishing Company directed these actions or if US Seafood Co. recklessly disregarded its subsidiary's working conditions.</p>	<p>For the Employer: Adulterating food with intent to be consumed by any other person which is likely to cause injury to health (Penal Code S236). Causing bodily harm (Penal Code S295).</p>
<p>His sleeping quarters are cramped, hot and filled with toxic fumes from the constantly operating boat engine.</p>		<p>Third Party Knowledge: It is a weak link, but US Seafood Co. could be liable if Thai Fishing Company directed these actions or if US Seafood Co. recklessly disregarded its subsidiary's working conditions.</p>	<p>For the Employer: Causing bodily harm (Penal Code S295).</p>
<p>His hands have open wounds, slit from fish scales and cut from the nets. He stitches closed the deeper cut himself.</p>		<p>Third Party Knowledge: It is a weak link, but US Seafood Co. could be liable if Thai Fishing Company directed these actions or if US Seafood Co. recklessly disregarded its subsidiary's working conditions.</p>	<p>For the Employer: Not providing appropriate healthcare and paying medical expense to the employee when the employee is injured as a result of work (Workers' Compensation Act S13 and S62).</p>

EVENTS	POTENTIAL FCPA RISK	POTENTIAL TVPA RISK	POTENTIAL LOCAL LAW RISK
<p>He is resold to another fishing boat while out at sea at a higher price than his price at port. This has increased his debt.</p>		<p>Third Party Knowledge: It is a weak link, but US Seafood Co. could be liable if Thai Fishing Company directed these actions or if US Seafood Co. recklessly disregarded its subsidiary's working conditions.</p>	<p>For the Employer: Trafficking in persons (Anti-trafficking in Persons Act S6 and S52). Supporting the commission of the anti-human trafficking offence (Anti-trafficking in Persons Act S7, S6 and S52). Conspiring the commission of the anti-human trafficking offence (Anti-trafficking in Persons Act S9, S6 and S52). Receiving in order to enslave a person or to cause such person to be in a position similar to a slave (Penal Code S312).</p>
<p>He is eventually rescued. He has received no wages for the work done on the fishing trawlers.</p>		<p>Third Party Knowledge: It is a weak link, but US Seafood Co. could be liable if Thai Fishing Company directed these actions or if US Seafood Co. recklessly disregarded its subsidiary's working conditions.</p>	

Images: Julia Macher for Liberty Asia ©2015.

Special thanks to Julia Macher for photography and H. H. Yiu for publication design.

None of the individuals depicted in this report is a victim of human trafficking. Images are provided for illustration purposes only.

The Freedom Fund (US)
Six West 48th Street
10th Floor
New York, NY 10036
United States

The Freedom Fund (UK)
Lighterman House
26-36 Wharfdale Road
London N1 9RY
United Kingdom

Liberty Asia (HK, as Share Asia Pacific Limited)
233 Hollywood Road
Hollywood Centre, 1004
Sheung Wan, Hong Kong
www.libertyasia.org