



## **ASSESSING AND MINIMIZING CUSTOMS-RELATED CORRUPTION RISK IN SUB-SAHARAN AFRICA’S PORTS**

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### **INTRODUCTION**

As many Western nations in the Americas and Europe struggle to climb out of a seemingly endless economic recession, Sub-Saharan African (“SSA”) nations, over the past few years, have experienced steady growth in their various economies. The steady and substantial increase of maritime cargo over the past decade in SSA also serves as a reflection of this economic growth. Outdated, inefficient ports, however, continue to hinder burgeoning trade in the region. Moreover, bribery and corruption at these ports inflict significant economic loss upon both the African countries and business entities involved in the maritime transaction flowing through the region. Additionally, with the U.S. Foreign Corrupt Practices Act (“FCPA”) enforcement on the rise in the U.S., the risks involved in doing business with corrupt entities could cost a company millions in lost revenue, fines and penalties.

This article aims to shed some light on the complex trading arena of the maritime ports of SSA countries. It will also address problematic issues related to the ever-present element of corruption at these ports and how to evade the contagion.

## SUB-SAHARAN AFRICA'S PORTS

Customs services in Sub-Saharan Africa may be categorized into (a) those that are part of the mainstream civil service (b) those that have been given a measure of autonomy and (c) those that have been integrated with tax departments in revenue authorities.<sup>1</sup> A few customs services in Africa (such as Ethiopia and Ghana) have been granted autonomy from the mainstream civil service, while others have been merged with tax administrations in revenue authorities. In Francophone SSA, Customs still mostly operate as part of the mainstream civil service.<sup>2</sup>

The current organizational design features for customs services in Africa can be traced back to the structural adjustment reforms initiated in the mid-1980s with the support and leadership of international financial institutions and donors. The effect of these reforms on Customs has included:

- Temporary outsourcing of functions to private sector companies in Angola and Mozambique. (Moïse 2005)
- Contracting pre-shipment inspection (PSI) companies to verify the price, quantity and quality of imported goods to prevent commercial fraud and duty evasion.
- Changing the organization into a semi-autonomous government agency outside the civil service, as was the case in Ghana in 1986 (Kusi 1998) and Ethiopia in 1997. (Ethiopian Customs Authority 2008)
- Making Customs become semi-autonomous revenue agencies, as was the case in Botswana, Gambia, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Rwanda, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe

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<sup>1</sup> Creek Buyonge, "Organizational Design of Customs in Sub-Saharan Africa: A Critical Evaluation," *World Customs Journal* Volume 2, Number 2, pg. 53.

<sup>2</sup> *Id.*  
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- Shifting and revitalization of Customs within government, as was the case in Senegal.<sup>3</sup>

Some countries (mainly in Francophone Africa but including Lusophone Angola and Cape Verde, and Anglophone Liberia, Namibia, Nigeria, and Seychelles) have kept the customs administration within the civil service.<sup>4</sup> Due to the “urgency of now” nature of customs operations, Customs laws allow greater discretion to the frontline officer. The exercise of such discretion is fraught with the danger of abuse and results in perceived and real corruption in Customs even within a revenue authority model.<sup>5</sup>

Over the past two decades, seaports in SSA have experienced substantial growth in container traffic. This increase in traffic is not unconnected to the rapid economic growth the developing world of SSA is experiencing. Nonetheless, poorly equipped and inefficient ports continue to impede trade and development in the region.

SSA ports experienced measurable increases in both containerized and general cargo over the past decade. Both of these areas of port traffic recorded growth of 10 percent or more per year, and consequently, more than doubled in volume during this time period. West Africa experienced the highest growth in container traffic, while general-cargo traffic growth nearly doubled the regional average for southern Africa.<sup>6</sup>

Despite the referenced growth, SSA ports are still lagging in efficiency, capacity, and needed development. Moreover, the varying port-management models across the region indirectly cater to an atmosphere of corruption at the various facilities, which in turn increases the risk and costs for shipments to and from the region.

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 54.

<sup>5</sup> *Id.* at 57.

<sup>6</sup> African Infrastructure Country Diagnostic, Beyond the Bottleneck: Ports in Africa, Ocean Shipping Consultants, Ltd., August 2009.

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The major port-management models currently in place across SSA include:

- Management Concession – a whole port concession where the public sector is not involved with port management and operations but rather, a private sector firm handles management and operations on specific terms for an agreed number of years.
- Service Port - a centralized organizational structure, usually government sanctioned where the port-management is also the operator of the cargo-handling facility and at times, undertakes other frontline functions such as cargo freight operations and marine operations such as tug provision.
- Landlord Port - a favored worldwide model where the port management body has withdrawn from frontline operations, such as cargo handling, and handed these over to the private sector. Under this system, the port-management body focuses on aspects such as estate management, ensuring efficient and safe navigation, and port planning. In an advanced landlord port system, the port-management body functions on an autonomous, corporate basis. Nigeria may be the only port in the region that has introduced this model as part of its extensive port reform.
- Intermediate Model - an intermediate model used in many French-speaking countries in which the port authority rents on-dock storage and warehouse space to privately-owned, licensed companies through a leasing system. These companies are then contracted by ship owners or shipping lines to provide handling equipment, hire casual labor, work the vessels, and store and deliver cargo.<sup>7</sup>

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<sup>7</sup> *Id.*  
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The Landlord Port model is by far the most popular port-management model employed worldwide. This system is extensively used throughout Europe, the Americas and Asia. The concept is also gaining ground in Africa. This model allows port-management bodies to focus more on the broader aspects of port development and operations rather than frontline port operations, particularly cargo handling.<sup>8</sup>

Additionally, the regulatory framework existing in most SSA ports is a significant contributing factor for inefficiency and corruption. Independent port regulation is not a reality in the region. Most ports in the region have antiquated regulation systems in place. Moreover, regulatory functions are usually undertaken by governmental or quasi-governmental institutions such as the ministry of transportation or another governmental agency such as a national or local port-authority.<sup>9</sup>

A welcomed improvement from the forgoing is South Africa, which has an independent regulator. The regulator, however, is only a quasi-independent one. Nigeria also has plans to move in that direction as part of its extensive port reform package. As more SSA ports move toward modern port-management structures such as the landlord port system, a likely result will include the concept of independent port regulations. The independent port regulator structure is more easily adaptable to the modern landlord-port system than it is to first –generation port management systems such as the service-port system.<sup>10</sup>

Overall quality of service in SSA ports also lag far behind the level of service normally expected in developed nations like the UK and USA. With the possible exception of South Africa, the level of service in SSA reflects the service that might be expected from emerging

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

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economies or third world nations. However, port reform in Nigeria has provided major improvements in efficiencies and has benefited the country's economy as a whole. For the region's ports to be able to compete on an equal footing with modern ports in Europe, the Americas and Asia, considerable reforms and improvement has to be made in the fundamentals of port development and operations, port planning, infrastructure development, institutional reform, port pricing, coordinated development with interfacing transportation systems, etc.<sup>11</sup>

Noticeably, most African customs administrations are in the process of reforming and modernizing. Trade facilitation is becoming more and more attractive for African leaders due to the need to reduce the costs of doing business and create an environment conducive to enhanced investment for economic growth. New trade facilitation initiatives in Africa address both physical infrastructure and administrative hurdles.

An August 2006 Report commissioned by the Business Action for Improving Customs Administration in Africa (BAFICAA), an *ad hoc* grouping of multinational companies that are active in advancing the role of responsible business in promoting sustainable development in Africa, admits that unstable electricity supplies, congested borders and bureaucratic customs procedures "make it a challenge to run a business in Africa."<sup>12</sup> In terms of scope, the study covered 20 countries in three sub-regions of SSA, namely, East Africa, including Kenya, Uganda, Tanzania and Zambia; West Africa with Benin, Côte d'Ivoire, Ghana, Togo, and Nigeria; and Southern Africa with Botswana, Mozambique and South Africa.

The verdict from the report is essentially that the most senior officials were helpful and understood the problems faced by businesses, whereas, the frontline officials were officious,

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<sup>11</sup> *Id.*

<sup>12</sup> McTiernan, A. 2006 Customs and Business in Africa: A Better Way Forward Together, BATICAA.

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indecisive, susceptible to petty corruption, and suspicious of business, even the most transparent and compliant.<sup>13</sup> In addition to such a *disconnect* between the strategic and the operational levels in Customs, there was a remarkable difference between officials in Eastern Africa, who were generally more business-friendly and understandable than their counterparts in West Africa with the exception of Togo.<sup>14</sup>

To minimize the risks associated with doing business in Africa, companies need to develop a very good understanding of the unique characteristics of the SSA countries in which they are located, given the variations between the different countries in the continent. Up to 75% of the delays experienced by business can be controlled through actions by customs authorities, other government agencies and the private sector. This obvious fact is often overlooked in Africa due to the continent's history of having a poor record of government transparency and accountability, and the adversarial relationship between Customs authorities and the private sector.

African customs officials are generally well educated, with a good understanding of the laws they enforce. On the other hand, the level of education and professionalism of the customs brokers that represent importers and exporters does not always match the expectations from customs authorities. This unequal relationship allows manipulation by customs officials of the laws and procedures, which aims at intimidation of brokers with a view to extorting facilitation fees for private gain, or to maximizing revenue collection to meet set targets, both to the detriment of businesses.<sup>15</sup>

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<sup>13</sup> Creck Buyonge and Irina Kireeva, "Trade Facilitation in Africa: Challenges and Possible Solutions," *World Customs Journal*, Volume 2, Number 1.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

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It is often said that most SSA countries lack “a critical mass” of customs specialist expertise, so that decisions expected to be made at the local or regional level are unnecessarily escalated to headquarters. Decisions take even longer if applications are made by clearing agents as they often lack the knowledge necessary to persuade customs officials to make favorable findings on their customer or client customs related issues.

Automated systems in Customs provide a crucial tool for increased transparency in the assessment of duties and taxes, substantial reduction in customs clearance times, and predictability. It is well established that the higher the level of automation of customs procedures in a country, the greater the possibility of detailed inspections, detection of fraud, and firm action including prosecution in court.

Integrity in African customs administrations has improved in tandem with improved transparency and accountability of African governments. It is a key element in the reform and modernization of SSA customs administrations as a result of public-sector reform, requirements for government transparency and accountability by international financial institutions, and compliance with the WTO standards.

There are, however, some cardinal points to keep in mind in any effort to expedite customs clearance in SSA with “clean hands.” One of the ways in which companies can minimize the risk of delays is to understand and abide by the legal and regulatory regime in place in each country’s ports. Since the efficiency with which goods are cleared from customs partially depends on the work of third party logistics providers, it is also important for companies to vet the ethical practices and competence of such providers. Customs brokers in SSA are, as a rule, small and medium sized enterprises, often with insufficient working capital and equipment, so



they tend to sometimes use funds entrusted to them by one company to finance other importation projects. This causes delays that are usually unfairly attributed to Customs.<sup>16</sup>

The reform and modernization programs in Customs currently underway in many African countries should be seen as a part of wider public sector reforms to embed the rule of law and improve service delivery. While Customs practices are changing for the better, businesses need to create customs compliance strategies that reflect an understanding of the Customs clearance processes in specific countries.

Except for South Africa, SSA countries perform poorly on infrastructure quality and most aspects of logistics competence. But the most serious impediments are administrative roadblocks and bribery within the ranks of a range of officials with a quasi-monopoly position in the logistics chain. Customs and port corruption are highly correlated with the extent to which rules, regulations, and the organizational architecture of bureaucracies unwittingly confer on public officials the impetus and/or impudence to extort bribe payments from shippers.

In a comparison between the ports of Maputo (Mozambique) and Durban (South Africa), bribery of *customs* officials accounted for 80 percent of total bribery in Maputo, but only 10 percent in Durban.<sup>17</sup> The explanation was that, in Maputo, a low level of automation existed and both monitoring and sanctioning were weak, whereas in Durban, the opposite was the case. In contrast, bribery of *port* officials was lower in the privately concessioned Maputo port, where a higher level of automation, monitoring, and sanctioning exists than in the publicly operated Durban port, where automation is low and monitoring and sanctioning are poor.<sup>18</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> Sequiera, Sandra and Patricia Macchi, 2009, “The Importance of Soft Transport Infrastructure: Customs Officials in Maputo Versus the Port Operators in Durban,” *Afrique Contemporaine* 230(2).

<sup>18</sup> *Id.*

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## THE ADVERSE IMPACT OF THE AFRICAN TRADITION OF PATRONAGE

Fighting corruption in the customs administration is a major challenge for many African governments, as well as for development agencies providing technical assistance. Vast resources have been invested in integrity programs, training and institutional capacity building to no avail. According to the *Bribe Payers Index 2008*, customs administration is perceived by business executives to be one of the most corrupt sectors of government in many African countries. Case studies from individual countries and regions across the continent provide a grim picture of the problem and find that the most discredited institutions are the police and tax administration, including customs. As a merchant and one of the survey participants lamented: “*You bribe Customs and prosper or you stick to the ethical principles and perish*”.<sup>19</sup>

Corruption in Africa must be understood as sometimes driven by vertical ties of patronage. The power of these ties is maintained by redistributing resources accumulated through “corruption” to societal networks according to rules of reciprocity that have their origin in informal kinship-based social structure and pseudo-morality. Such relationships combine moral obligation and emotional attachment. They also serve to perpetuate an ethic of appropriate or fair redistribution that fuels corruption.<sup>20</sup>

Accordingly, certain public sector positions become instruments for building public support, and are critical for the sustenance of those who wield executive power.<sup>21</sup> Patronage undermines the implementation of policies and rules-of-law more generally, as where the distribution of civil-service positions on non-meritocratic criteria results in a civil service less

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<sup>19</sup> Kafeero, E. 2008, “Customs and Trade Facilitation in The East African Community (EAC),” *World Customs Journal*, Vol. 2(1): 63-71.

<sup>20</sup> Olivier de Bardan, J.P. 1999, “A Moral Economy Corruption in Africa?” *Journal of Modern African Studies*, 37(1): 25-52.

<sup>21</sup> Olowu, D. 2000. “Bureacracy and democratic reforms: Uganda’s experience”.

capable of managing the task with which it is charged. Meritocratic recruitment, appointment and promotion are overshadowed by the politics of who you know as opposed to what you know.

Customs officers and managers are truly a different breed in SSA and many tend to somewhat remain under strong influence of traditional patterns of social relations and kinship, which may influence promotions and transfers within the organization. Because ordinary citizens often perceive that customs officers receive high remunerations by “hook or crook,” extended family members “kowitz” to them and expect to get their share of the wealth amassed through bribery and corruption. A person in a position of power is expected to use that influence to help his or her kin and community of origin. It is one’s social obligation to help less fortunate members of the extended familial and social circle. Customs staff are therefore seen by their family members and social networks as important potential patrons who have access to money, resources, and opportunities that they are morally obliged to share.<sup>22</sup>

In many African communities, to accumulate, even in corrupt ways, is not necessarily perceived to be bad in itself. It is failure to corruptly amass wealth at all or accumulation without the obligatory distribution that is considered unethical or equated with impiety. One who has not accumulated more than he could from his official position is for the most part regarded as a cowardly fool by the society for not making the most of his ephemeral opportunity in government service to enrich himself and earns no respect whatsoever. He cannot offer needy relatives or friends much assistance because he failed to bring home their share of the “national cake.” In their eyes, his ethical posture or refusal to amass wealth by corruption and help his kin is not only foolish but is, in essence, deemed selfish.<sup>23</sup>

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<sup>22</sup> Smith, D.J. 2003. “Patronage, Per Diems and The Workshop Mentality”: The Practice of Family Planning Programs in South-Eastern Nigeria, *World Development*, 31(4), 703-715.

<sup>23</sup> *Id.*

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Customs officers also build up networks made up of family, friends, and acquaintances that are based on trust and reciprocity as a way of banking assistance or reserving goodwill for the future, mindful of the African belief and saying that “no condition is permanent in this world”. The larger the network, the greater the accumulation of social capital that can be drawn on in a future time of need. The use of kinship and other social relationships enables ordinary people to get access to resources that they might otherwise be denied.<sup>24</sup>

Fighting corruption in customs administration requires reformers to look beyond the formal institutions of the state, to the informal networks of patronage and kinship domination, which often determine the individual custom officer’s and manager’s behavior. In these settings, integrity reforms must include measures that reduce the possibility or attraction of favoritism versus acting in the interest of the general public. Policy makers should pursue reform that reduces the realm of the partial, and enhances that of the impartial.<sup>25</sup>

Observations of contemporary African societies suggest that the impact of traditional values and social obligations on the behavior of public officials have fluctuated and can be changed. There are customs administrations in Africa, such as Rwanda, that perform relatively well despite dauntingly unfavorable contexts and an overall poor public sector performance. Placing expatriates in key management positions has always been helpful in reducing the negative impacts of patronage and predatory authority. Strong expatriate leadership is known to more easily or readily confront political and bureaucratic pressures and impart positive systemic changes in staff behavior.

An important reason why many anti-corruption efforts have been ineffective in SSA has been the unwillingness of governments to wholeheartedly implement true reform. This calls for

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<sup>24</sup> Smith, D.J. 2003: 707.

<sup>25</sup> Kolstad, I and A Wiig. 2009, “Mission Impossible”: Energy Policy, Vol. 7(3): 954-965.

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anticorruption efforts based on thorough analysis of the political economy of the country, in order to understand the competing interests. Customs reforms should address shortcomings in the accountability environment within which the customs administration operates. The key is to focus more on measures that tend to promote integrity, strengthen civil society, business and trading associations, and accountability through independent media outlets.

Fighting corruption in customs must also seek to defame and dismantle the informal networks of patronage and social domination, which often influence the corruptibility of customs officials and how political and socio-economic power is actually wielded in Africa. More importantly, there is a need for more robust analysis of country and local contexts. Furthermore, improvement in the information and data systems for assessing integrity problems in customs and monitoring progress of anti-corruption reforms is crucial. Observers of customs modernization reforms in SSA should nevertheless keep in mind that it took generations for Western countries to develop reasonably effective customs administrations.

### **THE REAL COST OF CORRUPTION IN SUB-SAHARAN AFRICA'S PORTS**

Bribe payments and corruption at SSA ports also adversely contribute to the inefficiencies found at those port facilities and directly increase the risks and cost of doing business in the region. In 2007 and 2008, the World Bank and the International Finance Corporation funded a Harvard University study that investigated how bureaucrats set bribes at ports and whether said payments impose significant economic costs. The study generated an original dataset on bribe payments at ports in South Africa, allowing an unusually close look into the activities of corruption at the ports. Findings showed that bribes were product-specific,

frequent and substantial. Some bribes represented up to a 14% increase in total shipping costs for a standard 20ft container and a 600% increase in the monthly salary of a port official.<sup>26</sup>

Bribes were paid primarily to evade tariffs, protect cargo on the docks and to avoid costly storage fees. The study identified three systemic effects associated with corruption at ports: a “diversion effect” where firms took longer and less direct routes to avoid the most corrupt port; a “revenue effect” as bribes reduced overall tariff revenues, that at times amounted to a reduction of more than 20 percentage points of tariffs for certain categories of goods; and a “congestion effect” as the re-routing of firms cargo increased congestion and transportation costs in the region by generating imbalanced flows of cargo in the transportation network. Evidence from the study supported the theory that bribe payments at ports represent a significant distortionary tax on trade, as opposed to just a transfer between shippers and port officials that greases slow-moving clearing queues.<sup>27</sup>

The Harvard study also illustrated how the value of bribe payments, recipients of bribes and the purpose for the bribes differ depending on the organizational structure of the port-management system, the level of automation of clearing procedures and bureaucrats’ attempts to minimize bargaining costs and the risk of detection of the illicit transaction. For example, 80% of bribes at the port of Maputo were paid to custom agents, 41% of which intended to evade tariffs. On the other hand, in the port of Durban, 63% of bribes were congestion-related and were paid primarily to port operators to move, protect and store cargo on docks.<sup>28</sup>

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<sup>26</sup> On the Waterfront: An Empirical Study of Corruption in Ports, December 2008, Sandra Sequeira, Simeon Djankov; The Long Way Around: the Real Consequences of Corruption in Ports, 2007, Sandra Sequeira, Simeon Djankov & Sendhil Mullainathan.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

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## FCPA IMPLICATIONS

An added risk for companies with U.S. connections navigating the complex depths of SSA ports is avoiding the huge penalties and cost resulting from violations of the FCPA. The DOJ, the SEC and U.S. courts have found FCPA violations at least in the following custom-related activities: bribes paid in connection with preferential treatment during custom clearance,<sup>29</sup> bribes paid in connection with circumvention of custom payments in the import and export of goods,<sup>30</sup> bribes paid to evade normal customs process,<sup>31</sup> and bribes paid to reduce custom duties and sales tax.<sup>32</sup>

Indeed, it has been held that Congress intended 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 officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within this broad coverage. Bribing foreign officials to lower taxes and custom duties certainly can provide an unfair advantage over competitors and thereby be of assistance to the payor in obtaining and retaining business. In fact, bribes paid to foreign officials in consideration for unlawful evasion of custom duties could fall within the purview of the FCPA's proscription.<sup>33</sup>

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<sup>29</sup> U.S. v. Aibel Group Ltd., 07-CR-005 (S.D. Tex. 2007), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/aibel-group.html> (last visited June 12, 2011). See also United States v. Vetco Gray Controls Inc., et al. 07-CR-004 (S.D. Tex. 2007), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/vetco-controls.html> (last visited June 12, 2011).

<sup>30</sup> In Re Noble Corporation (2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/noble-corp.html> (last visited June 12, 2011).

<sup>31</sup> United States v. Panalpina, Inc., et al, 10-CR-765-771 (S.D. Tex. 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/panalpina-inc.html> (last visited June 12, 2011).

<sup>32</sup> U.S. v. Kay, 359 F.3d 738 (5th Cir. 2004).

<sup>33</sup> *Id.*, at 755.

Examples of FCPA enforcement against companies with U.S. ties doing business at the ports of SSA countries include prosecutions like U.S. v. Panalpina, Inc., 10-CR-765 and U.S. Panalpina World Transport (Holding) Ltd., 10-CR-769 (2010).<sup>34</sup> The Panalpina Group is a leading international supplier of forwarding and logistics services, focusing on intercontinental airfreight and ocean freight shipments. It has about 500 branches in over 80 countries and employs around 15, 000 people. Panalpina World Transport (Holding) Ltd. (“PWT”) is a Swiss corporation headquartered in Basel, Switzerland. Panalpina, Inc. (“Panalpina U.S.”) is a wholly owned subsidiary and agent of PWT, with 38 branches throughout the U.S. and with its principle place of business in Morristown, New Jersey.

In the U.S. District Court for the Southern District of Texas, PWT and Panalpina U.S. admitted to violating FCPA’s anti-bribery provisions. Both companies paid bribes to various foreign officials on behalf of numerous customers in the oil and gas industry. The purpose of the bribes was to avoid local rules and regulations connected to the import of goods and materials into a range of foreign jurisdictions, including Nigeria and Angola. For example, Panalpina Nigeria provided an express courier service through which it made corrupt payments on behalf of its customers to Nigerian customs officials in order to evade the normal customs process and, thereby, expedite delivery.

Specifically, between 2002 and 2007, both corporations paid bribes totaling at least \$27 million to foreign officials. To make matters worse for the Panalpina Group, some of its customers spoke up during the investigation and provided the DOJ further information of its illegal behavior. Shell Nigeria Exploration and Production Company Ltd. (SNEPCO), Transocean Inc., and Tidewater Marine International Inc. acknowledged that both PWT and

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<sup>34</sup> United States v. Panalpina, Inc., et al, 10-CR-765-771 (S.D. Tex. 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/panalpina-inc.html> (last visited June 12, 2011).  
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Panalpina U.S. endorsed and condoned the payment of bribes on the customers' behalf in Nigeria as lawful business expenditures in their corporate books, records, and accounts.

As a way to resolve the DOJ's FCPA charges, PWT entered into a deferred prosecution agreement, while Panalpina U.S. pled guilty to conspiring to violate the FCPA's books and records provisions. Ultimately, the Panalpina Group was required to pay a \$70.56 million criminal penalty. Lastly, Panalpina U.S. settled related charges with the SEC and nine of the Panalpina Group's customers pled guilty and settled related charges with the SEC and the DOJ. Panalpina and its customers agreed to pay more than \$156 million in criminal penalties and more than \$80 million as civil disgorgement and penalty. Under the terms of the respective three-year deferred prosecution agreement, Panalpina and its customers are required to fully cooperate with U.S. and foreign authorities in any ongoing investigations of the companies' corrupt payments. In addition, each company was required to implement and adhere to a set of enhanced corporate compliance and reporting obligations.

Similar actions have also been taken against Noble Corporation ("Noble"), a Cayman Island company headquartered in Sugar Land, Texas.<sup>35</sup> Noble served as an international oil and gas drilling contractor and owner of drilling rigs contracted by energy exploration, development and production companies. One of Noble's subsidiaries was Noble Drilling Nigeria. In March 2009, Noble became a wholly owned subsidiary of a Swiss company, which also assumed the name of Noble.

Noble's operations in Nigeria from January 2003 to July 2007 resulted in FCPA violations. Noble's employees, agents, and subsidiaries made improper payments to officials of

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<sup>35</sup> In Re Noble Corporation (2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/noble-corp.html> (last visited June 12, 2011).

the Nigerian Customs Service related to the company's import and export of goods. Under Nigerian law, a rig, or similar equipment, had to be imported through a temporary import permit ("TIP"), if it met three requirements: (1) it was considered a high valued piece of special equipment; (2) it was not available for sale in Nigeria; and (3) it was being imported temporarily with the intent to be exported. Whenever a rig's TIP expired, a Nigerian Customs Agent, with Noble's acquiescence, submitted false paperwork on Noble's behalf to avoid the time, cost, and risk connected to exporting and re-importing the rig back into Nigeria.

On November 4, 2010, the DOJ announced a Non-Prosecution Agreement ("NPA") with Noble. As part of the agreement, the company admitted that it had paid about \$74,000 to a Nigerian Customs Agent and that it falsely recorded the bribe payments as legitimate business expenses in its corporate accounts. Further, Noble acknowledged that some of its employees were clearly aware of the corrupt payments. The NPA was the DOJ's reward for Noble's early, voluntary disclosure of the bribes, its cooperation with the DOJ, and the compliance measures it has undertaken. However, despite these positive factors, Noble still had to pay a \$2.59 million criminal penalty.

Another example of FCPA enforcement action involving corrupt transactions at a SSA port is the case of *U.S. v. Vetco Gray Controls Inc., et al.* 07-CR-004 and *U.S. v. Aibel Group Ltd.* 07-CR-005 (2007)<sup>36</sup> On February 6, 2007, Vetco Gray Controls Inc., Vetco Gray Controls Ltd., and Vetco Gray UK Ltd., wholly owned subsidiaries of Vetco International Ltd., ("collectively Vetco") pleaded guilty to violating the anti-bribery provisions of the FCPA. To

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<sup>36</sup> *U.S. v. Aibel Group Ltd.*, 07-CR-005 (S.D. Tex. 2007), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/aibel-group.html> (last visited June 12, 2011). *See also* *United States v. Vetco Gray Controls Inc., et al.* 07-CR-004 (S.D. Tex. 2007), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/vetco-controls.html> (last visited June 12, 2011).

resolve the issue, Vetco entered into a deferred prosecution agreement for three years. As part of the plea and deferred prosecution agreements, it was agreed that Vetco Gray Controls Inc., Vetco Gray Controls Ltd., and Vetco Gray UK Ltd. would pay criminal fines of \$6 million, \$8 million, and \$12 million, respectively, for a total of \$26 million.

In addition to the criminal fines, the plea agreements also require the defendants to: (1) hire an independent monitor to oversee the creation and maintenance of a compliance program; (2) undertake and complete an investigation of the companies' conduct in various other countries; and (3) ensure that in the event that any of the companies are sold, the sale shall bind any future purchaser to the monitoring and investigating obligations.

On November 21, 2008, Aibel Group pled guilty to violating the FCPA's anti-bribery provisions. It was required to pay a \$4.2 million criminal fine and serve two years on organizational probation. The judgment against Aibel Group and its affiliates largely resulted from the voluntary disclosure of information by the involved parties to the DOJ, and their promise to take considerable remedial steps.

Vetco admitted that it violated and conspired to violate the FCPA in connection with the payment of approximately \$2.1 million in corrupt payments over approximately a two-year period to Nigerian government officials. Aibel Group admitted to their complicity with these payments. These corrupt payments were paid through a major international freight forwarding and customs clearance company to employees of the Nigerian Customs Service. Vetco authorized an agent to make at least 378 corrupt payments totaling approximately \$2.1 million to Nigerian Customs Service officials to induce those officials to provide the defendants with preferential treatment during the customs process. As a result, certain materials were smuggled into Nigeria without the payment of customs duties.

## **DESIGNING AN OPTIMAL CUSTOMS COMPLIANCE STRATEGY**

The issue that causes more vexation and heartache than any other in customs reform and modernization is corruption. Processing of a transaction can be brought to a standstill until a customs officer is induced to resume work on a given file by so-called “facilitation payments.” A number of SSA governments have made elimination of corruption a fundamental goal and some customs authorities in the region have made significant and systematic efforts to stamp out corrupt practices.

There will always be a risk of individual corruption and solicitation of facilitation payments in SSA ports. The risk will remain as long as salaries are at levels that make solicitation of additional monies attractive to individual officers. Until overall economic development allows the payment of customs salaries that make petty corruption unattractive, the general view among businesses is that corruption will remain a factor everywhere in SSA. One, however, should note the exceptional efforts of post-genocide Rwanda, which in recent times consistently emerges as the model of how to achieve the effective elimination of corruption, even in a very poor country, by strong, determined, and relentless leadership.

Given customs officers’ ability to solicit bribes during the time-sensitive movement of products from one market to another in this region, the transit of goods and equipment across SSA borders represents a particularly high-risk stage of operations. Value added tax (VAT) revenue collection, the levying of tariffs, and public health and national security requirements introduce processing and inspection procedures that can turn border crossings into logistical chokepoints.

The complicated nature of many customs procedures and the isolated location of customs posts create opportunities for bribe solicitation by individual customs officers. Companies

engaged in the cross-border movement of goods are responsible for the actions of their own employees and for those of their agents, but most of the root causes of exposure lie outside companies' control, in customs officers' motives and opportunities to solicit irregular payments.

Where high levels of corruption extend to the police and the judiciary, customs agents may not only face elevated demands for bribery but may also feel that they have relatively little choice but to submit to local practices in fulfilling their own professional duties. In such circumstances, the payment of bribes potentially reinforces a vicious circle favoring further bribery solicitations. The practical implication of such dynamics is that SSA countries with generally higher corruption levels also tend to represent higher-risk operating environments for companies attempting to navigate shipments through customs.

Some of the characteristics that constitute warning signs of elevated corruption risk levels include:

- Low levels of customs service automation and computerization
- Low levels of customs service professionalism and training
- Routine inspection regimes
- Clearance through a remote customs post
- Value and time-sensitivity of cargo

All else being equal, a shipment of one expensive and time-sensitive piece of equipment is likely to draw more bribery demands than hundreds of smaller shipments of equivalent cumulative value. A number of relatively significant SSA markets are among those that feature frequent bribery solicitations, signaling challenging operating conditions for companies and their customs agents. To protect themselves from FCPA prosecution, as well as to defend their reputations for ethical conduct, companies need to adopt and enforce clear policies prohibiting

all those who act on their behalf from engaging in bribery. In the case of external agents over whom they exercise limited day-to-day control, companies are well advised to address potential problems at their source through rigorous pre-engagement screening. Additionally, existing patterns of behavior and indications of prior involvement in corruption should be examined and treated seriously.

The ambiguous nature of facilitating payments, which are legal under the FCPA, blurs the distinction between problematic and unproblematic conduct and complicates any agent vetting process. Customs brokers who make facilitation payments to move their shipments to the head of the processing line, for example, are in violation of FCPA standards, while those who make payments to ensure that their shipments move through clearance processes without delay are technically within the bounds of the law. Given the accelerating erosion of the facilitation payments exception, even those companies not clearly subject to the UK Bribery Act's jurisdiction are well advised to conform to its stricter standard.

Developing a mandatory exhaustive questionnaire for use by all agents is a good starting point for any risk mitigation effort. The questionnaire alone may turn up "red flags" that warrant close scrutiny, if not outright exclusion from engagement. For companies or agents engaged in countries where customs and/or general corruption is prevalent, higher levels of scrutiny are warranted and may require the assistance of a risk advisory firm with sophisticated vetting capabilities. Environments featuring high levels of corruption often possess weak public record systems that may not reveal much of value, particularly given the isolated and self-contained nature of the customs sector. Customized solutions based on the discreet collection and assessment of intelligence from human sources within the customs arena who are positioned to report on agents' records and reputations for probity is usually the most effective way to proceed.

Targeted inquiries with knowledgeable sources can help to identify several frontier crossing points with efficient processing times and low levels of bribery solicitation. Thoroughly vetting brokers and the use of low-risk customs posts provides a double line of defense against both bribery and bribery prosecution.

## **FCPA BEST PRACTICES FOR ENGAGING FOREIGN CUSTOMS CLEARANCE AGENTS OR CONSULTANTS**

Because a major and complex area of exposure under the FCPA involves the retention of foreign customs clearance agents, firms or consultants to assist a company in clearing goods in SSA ports, the process must be approached with fastidiousness. There are two basic steps a company can take to reduce the likelihood that a prohibited payment will be made and to minimize the risk that knowledge of the unlawful deed will be attributed to the company if it does occur. First, the company must be meticulous in scrutinizing the background of the consultant. Second, the company, in a written agreement for the provision of the customs clearance services, must secure representations with respect to FCPA compliance. It is paramount to promote an organizational culture that encourages ethical conduct and a commitment to compliance with this important law. Further, when retaining a customs clearance agent, there are certain “red flags” which, at a minimum, require further investigation. The following is a list of red flags that should raise such concerns:

- The agent refuses to affirm in writing that he will abide by the provisions of the FCPA.
- The agent has a bad reputation in the business community.
- Misrepresentation or inconsistencies in the application or during the due diligence process.
- A customs official recommends the representative.

- The agent makes unusual requests such as a request to backdate or alter documents.
- The agent asks for commissions that are substantially higher than the “going rate” in that country.
- The agent asks for payment by unorthodox or convoluted means such as through strange bank accounts outside the country where the services are being offered.
- The agent requests unusually large bonuses or substantial up-front payments;
- The agent has been the subject of past corruption-related investigations.
- The agent appears to be unqualified or understaffed or has no infrastructure and trained staff.
- The agent has a record of clearing shipments through remote or notoriously corrupt customs posts and overpromises on expeditiousness or promises unusually rapid border transit times.
- The agent does not belong to relevant professional associations in their home jurisdiction.
- The agent is unable to provide a verifiable foreign company reference.

## **HUMAN INTELLIGENCE MAY EQUAL CULTURAL COMPETENCE**

It is also important to understand the cultural and business environment in your countries of operation. The region is not a monolithic one and should never be thought of as such. Business culture differs by country, even by sub-regions within a country. Understand how business is conducted, observe how relationships are established and maintained, and learn the rules of engagement and disengagement.



Additionally, liaise with culturally competent personnel in the worthwhile endeavor to combat corruption. U.S. based corporations must first arm themselves with internal controls and be very cautious about local agents and the roles that they are permitted to play. Train local agents and partners in native languages on FCPA compliance as compliance training in English may not sufficiently focus on specific FCPA problems in the relevant country's ports and is likely to be doomed ab initio. Therefore, the training should be conducted in native languages and tailored specifically to the special issues that arise in the ports of the particular country.

Furthermore, always use a reputable culturally competent auditor to audit operations in the country. Unlike in the U.S., detailed information might not be a matter of record in SSA. This makes skilled and well-connected culturally fluent auditors and investigators all the more important. Human intelligence is paramount in this sphere.

Finally and most importantly, even if an American corporation retains a seemingly trustworthy, reputable and competent local counsel or general counsel to oversee FCPA related compliance matters in the region or within an SSA country, you must still supervise them closely. Stated another way, "trust but verify." As long as local counsel is not a U.S. Citizen or lawful permanent resident that was raised or schooled in the United States so that they have the same values and are subject to U.S. jurisdiction for FCPA prosecution purposes, it will behoove you to keep the torchlight shining on the local compliance counsel or general counsel indefinitely. U.S. companies cannot afford to be lulled into complacency or to be lackadaisical on this point, which cannot be overstated.

## CONCLUSION

Companies doing business in SSA must be evermore vigilant regarding customs transactions at regional ports. A dollar and an hour saved today regarding a specific shipment may cost a shipper and/or the local economy millions tomorrow. Companies should protect themselves by implementing thorough risk assessment and due diligence programs.

When using a logistics company, freight forwarder or express delivery company, it is important that the third-party relationship is created in a way that avoids FCPA enforcement risks. Having a good, working understanding of the port to which you intend to ship, including its management structure and infrastructure, is also a must.

Although the risks of doing business or clearing customs at SSA ports are enormous, the benefits and value derived far outweigh the risk. An intimate knowledge of the cultural nuances and socio-economic factors impacting the tendency of employees to succumb to the usual temptations in SSA countries, however, is ultimately the key to navigating challenges to FCPA compliance in the region.

Without tackling the root causes of corruption, U.S. companies will find it extremely difficult to explore and capitalize on business opportunities in the region while complying with FCPA requirements. The companies that will ultimately stay out of trouble in this enforcement regime are those much in tune with the available human intelligence and localized aspects of the corruption equation.