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The Dark Side of Power: Corruption and Bribery within the Energy Industry

You must not distort justice; you must not show partiality; and you must not accept bribes for a bribe blinds the eyes of the wise and subverts the cause of those who are in the right.

The Law of Moses (c. 1400 BCE)

Corruption in the 21st century

Ancient Rome 70 BC, Marcus Tullius Cicero, who at that time served as a prosecutor, delivered a series of vivid trial orations before the Roman Senate against Gaius Verres, who was the former governor of Sicily.¹ Verres was the quintessence of the dishonest and unscrupulous official, who betrayed the public trust in several ways, enriched himself by accepting bribes, and even tried to bribe the judges of his trial. It is striking that today, after more than 2000 years, Cicero's words appear still so relevant:

"When he first returned from the province, he endeavoured to get rid of this prosecution by corrupting the judges at a great expense; and this object he continued to keep in view till the conclusion of the appointment of the judges. After the judges were appointed [...] the whole attempt at bribery was abandoned."²

Even if it might sound trivial, it is important to try to offer a definition of corruption. Traditionally, the various legal instruments have only identified bribery as the relevant illicit conduct to be criminalized. In reality bribery, which corresponds to "the corrupt payment,

¹ For more information about this historic trial see Douglas O. Linder, 'Gaius Verres Trial (70 B.C.)' (2008) <<http://law2.umkc.edu/faculty/projects/ftrials/Verres/verresmain.html>>.

² See C. D. Yonge (tr), *The Orations of Marcus Tullius Cicero* (Henry G. Bohn 1856) 138. The original text in Latin was the following: "*Ut primum e provincia rediit, redemptio est huius iudici facta grandi pecunia. Mansit in condicione atque pacto usque ad eum finem, dum iudices reiecti sunt. Postea quam reiectio iudicum facta est - quod et in sortitione istius spem fortuna populi Romani, et in reiciendis iudicibus mea diligentia, istorum imprudentiam vicerat - renuntiata est tota condicio.*" See Marco Tullio Cicerone, *In Verrem* (Emilio Piccolo ed, Loffredo 2009) 9.

receipt or solicitation of a private favor for official action,"³ represents only a particular form of potential corruption. The term corruption⁴ has a much wider significance than that. It is a very broad term, which might refer to a multitude of different illicit conducts.⁵ However, there is no consensus at the international level regarding the way in which corruption should be defined. The fact that the United Nations Convention against Corruption does not include a definition of corruption is clearly illustrative of the difficulties that have been traditionally encountered in fighting against such a phenomenon.⁶ A more comprehensive definition has been eventually offered at the supranational level by the World Bank Group:

"A corrupt practice is the offering, giving, receiving or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party."⁷

Anyway, even such a definition does not appear completely satisfactory in that it does not underline the extremely adverse effects that corruption produces to the social fabric of our communities. Exemplary is that, under the presidency of Barack Obama, corruption has been formally considered as a conduct that potentially violates fundamental human rights:

"We are working within the broader international system, including the U.N., G-20, Organization for Economic Cooperation and Development (OECD), and the international financial institutions, to promote the recognition that pervasive corruption is a violation of basic human rights and a severe impediment to development and global security."⁸

As a result, the best way we currently have to describe corruption is to imagine it in a figurative way as a multi-faceted and tentacular evil creature that has the power to infect every aspect of our society.⁹ Barry Rider has expressed this concept excellently:

"Corruption is something that we have all had to live with since Eve took the first bite of the serpents' apple, and it is but one manifestation of our human greed and insecurity [...] The fact that corruption is within us all, like the potential for violence, deceit and no doubt lust, does nothing to mitigate our responsibility as a matter of morality, good governance, or even self-interest in survival, to control and curb it."¹⁰

³ See Black's Law Dictionary, 9th Edition, *Bribery*, n. (16c).

⁴ As regards the ordinary meaning of the word, the Oxford Dictionary defines corruption as "dishonest or illegal behavior, especially of people in authority." See Margaret Deuter, Jennifer Bradbery and Joanna Turnbull, *Oxford Advanced Learner's Dictionary*, 9th edition (Oxford University Press 2015), *corruption*.

⁵ See David Chaikin and J. C. Sharman, *Corruption and Money Laundering: A Symbiotic Relationship* (Palgrave 2009) 8.

⁶ See 'The United Nations Convention against Corruption' (*United Nations Office on Drugs and Crime*) <www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf> accessed 5 December 2016.

⁷ See 'What is Fraud and Corruption?' *The World Bank Group* <www.worldbank.org/en/about/unit/integrity-vice-presidency/what-is-fraud-and-corruption> accessed 5 December 2016.

⁸ See 'National Security Strategy' *White House* (May 2010), at page 38 <www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf> accessed 5 December 2016.

⁹ Such a way of depicting these forms of criminal phenomena is not new. Since the mid-1980s the Italian criminal organization known as Mafia has been called "the octopus" for its notorious corruptive powers in a famous series of movies. See *The Octopus 1984 (IMDb)* <www.imdb.com/title/tt0086779/?ref_=fn_al_tt_1> .

¹⁰ See Barry Rider (ed), *Corruption: The Enemy Within* (Kluwer Law 1997) 1.

Equally illustrative is the statement made by the Secretary-General of the United Nations and included in the foreword of the United Nations Convention against Corruption:

"Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish."¹¹

No sector of our society appears immune to corruption. As a matter of fact, this phenomenon is absolutely endemic in politics.¹² It is general knowledge that political parties receive occult funds through bribes, kickbacks and other forms of payoffs.¹³ As it has been recently demonstrated by the "Panama Papers" scandal, which has represented a giant leak of more than 11.5 million financial and legal records that were previously hidden by secretive offshore companies, it is common for key politicians around the globe to be enmeshed in crime, corruption and wrongdoing.¹⁴ Taking into consideration such a widespread illicit behavior, it is not surprising that people's expectations about the honesty and ethical standards of politicians have lowered reaching a pessimistic level.¹⁵ It is emblematic that, over the course of the U.S. presidential elections, although potential conflicts of interests have been revealed between Hillary Clinton and the Clinton Foundation,¹⁶ her conduct has been considered by the media as consistent with the average politicians' one,¹⁷ she has been addressed as a "fundamentally" honest politician, and, even in the absence of sufficient transparency, any attempt to insist on her "purity" has been condemned as imposing an unfair "double standard."¹⁸ Although such a defensive reaction of the press might be considered as understandable taking into consideration Donald

¹¹ See United Nations Convention against Corruption (n 6).

¹² In democratic countries, corruption undermines the quality of representation when elected politicians make decisions motivated by the desire for personal enrichment rather than by the preferences of voters. See Matthew S. Winters and Rebecca Weitz-Shapiro, 'Lacking Information or Condoning Corruption. When Do Voters Support Corrupt Politicians?' [2013] *Comparative Politics* 418.

¹³ See Michael Levi, 'The Crime of Corruption,' in Barry Rider (ed), *Corruption: The Enemy Within* (Kluwer Law 1997) 35.

¹⁴ The leaks have unveiled the offshore holdings of 140 politicians and officials, including 12 current and former presidents, monarchs and prime ministers. See 'Leak of the century. The lesson of the Panama papers' *The Economist* (9 April 2016) <www.economist.com/news/leaders/21696532-more-should-be-done-make-offshore-tax-havens-less-murky-lesson-panama-papers> accessed 5 December 2016.

¹⁵ Due to the fact that some routines for the practice of corruption are profoundly rooted in our social and political life, it is not surprising that people show no excitement when corruptive practices are experienced on a daily basis. See Samuel Paul, 'Corruption as Spectator Sport' [2001] *Economic and Political Weekly* 1061.

¹⁶ See 'The Clintons' financial affairs. Bill and Hillary Inc.' *The Economist* (1 October 2016) <www.economist.com/news/united-states/21707936-clintons-activities-outside-politics-are-both-inspiring-and-worrying-bill-and-hillary> accessed 5 December 2016.

¹⁷ A recent research has explored two possible reasons behind the voters' support of potentially corrupt candidates: either voters lack information about corrupt behaviors (the information hypothesis); or they knowingly support a corrupt politician because of his performance in other areas (the tradeoff hypothesis). See Winters and Weitz-Shapiro (n 12) 419.

¹⁸ See Jill Abramson, 'This may shock you: Hillary Clinton is fundamentally honest' *The Guardian* (28 March 2016) <www.theguardian.com/commentisfree/2016/mar/28/hillary-clinton-honest-transparency-jill-abramson> accessed 5 December 2016.

Trump's rhetoric¹⁹ in exposing all U.S. political corruption over the course of his extremely populist campaign,²⁰ it betrays in any case the general level of tolerance for political corruption that Western countries are currently experiencing. The fact that this criminal phenomenon is extremely far-reaching is also demonstrated by the circumstance it has stretched its tentacles to sectors such as the judiciary, academy and sport. Another glaring example is the situation of Italian universities, none of which is included in any of the world's top 180 positions.²¹ This data, which denotes a condition of dramatic and continuing decline,²² appears openly conflicting with the circumstance that Italy's universities produce hundreds of highly skilled researchers that every year leave the country and achieve remarkable success abroad.²³ The reason for this poor condition lies in the extent of corruption in higher education, where the grip of family fiefdoms²⁴ is to be blamed for the countrywide brain drain²⁵ and where bribery and favoritism, *quid pro quo* arrangements, and putting a higher valuation on personal networks and cronyism instead of meritocracy represent common practices.²⁶ Not even the world of sport, whose governing bodies should be inspired by and serve as a source of inspiration for high moral principles such as fair play,²⁷ has been spared from the insidious effects of corruption. The FIFA²⁸ corruption scandal has revealed that sport is pervaded by bribery, from the kickbacks given to officials who help hand tournaments to undeserving countries to the betting agencies that make ill-

¹⁹ See Jonathan Martin, 'Donald Trump's Barrage of Heated Rhetoric Has Little Precedent' *The New York Times* (14 October 2016) <www.nytimes.com/2016/10/15/us/politics/trump-speech-highlights.html?_r=0> accessed 5 December 2016.

²⁰ For an insight into populist persuasions see Michael Kazin, *The Populist Persuasion. An American History* (Cornell University Press, 1995).

²¹ According to the Higher Education Network QS rankings, in 2016 the sole Italian university included in the top 200 positions is "Politecnico di Milano," which is ranked 183rd in the world. See 'Top 200 universities in the world 2016 - the table' *The Guardian* (5 September 2016) <www.theguardian.com/higher-education-network/ng-interactive/2016/sep/05/top-200-universities-in-the-world-2016-the-table> accessed 5 December 2016.

²² See Michael Day 'Family fiefdoms blamed for tainting Italian universities' *The Independent* (24 September 2010) <www.independent.co.uk/news/world/europe/family-fiefdoms-blamed-for-tainting-italian-universities-2089120.html> accessed 5 December 2016.

²³ See Alexander Hellemans, 'Beating the European brain drain' *Nature* (22 November 2001) <www.nature.com/nature/journal/v414/n6862> accessed 5 December 2016.

²⁴ This particular form of corruption is also known as clientelism. It consists in a situation in which individuals use their public offices to gain favorable advantages for themselves or their friends. These corrupt practices generate a system characterized by a complex network of personal or familial affiliations and ties that are based on long tradition of factional or personal loyalties. See Maria Dakolias and Kim Thachuk, 'Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform' [2000] *Wisconsin International Law Journal* 353, 356.

²⁵ See Day (n 22).

²⁶ See Emiliano Fittipaldi 'Concorsopoli. I baroni regnano sull'università' *L'Espresso* (12 May 2014) <<http://espresso.repubblica.it/inchieste/2014/05/09/news/i-baroni-regnano-sull-universita-1.164632>> accessed 5 December 2016.

²⁷ Fair play is a complex concept that comprises and embodies several fundamental values like fair competition, respect, equality, integrity, solidarity, and tolerance. See What is Fair Play? 2015 (*International Fair Play Committee*) <www.fairplayinternational.org/what-is-fair-play->.

²⁸ The Fédération Internationale de Football Association (FIFA), which was founded in 1904 and based in Zurich, represents the football's global governing body. See Who We Are 2016 (*FIFA*) <www.fifa.com/about-fifa/who-we-are/index.html>.

gotten gains from match-fixing.²⁹ It is not surprising that FIFA, which is a multi-billion dollar business, operates under Swiss Charitable association rules that effectively cloak its financial operations in a shroud of secrecy. The statement made in 2003 by Markus Sieglar, who was the then FIFA Director of Communications, to avoid giving a direct answer to the investigative journalist Andrew Jennings when he enquired about President Blatter earnings, is highly illustrative of the total lack of transparency existing in that context:

"We must abide by internal rules and cultural traditions. In Switzerland, salaries or income are simply *not* published. Also, you must *not* question FIFA's dedication to transparency."³⁰

Having verified that corruption has always constituted a plague for human civilization³¹ and that it has penetrated also into unexpected sectors of our society, two crucial questions remain unanswered: on the one hand, why for centuries corruption has been rampant and its practice appeared *de facto* tolerated by governments; on the other, why unpredictably, over the course of last two decades, significant and increasingly determined efforts have been devoted to fighting against such a criminal phenomenon.

The reason for the enormous difficulties that our societies have traditionally faced in fighting against corruption appears to lie behind the inherent connection existent between power and corruption. As brilliantly stated by Lord Acton in 1887: "Power tends to corrupt and absolute power corrupts absolutely."³² It is undeniable that in order to be corrupted an individual must be in a position of power that allows him or her to act with deliberate favoritism; at the same time, in order to corrupt, an individual must be able to offer some bargaining chip as the *quid pro quo* of the illicit agreement. As a result, corruption becomes a way of managing personal influence and getting additional advantages from it. The fact that such a criminal phenomenon affects primarily the dominant class of a country, whose members are often enmeshed in corruption, explains why for ages there had not been a serious political willingness to fight against it sanctioning the perpetrators and implementing effective regulatory countermeasures. Consequently, it is not surprising that, although corruption has always constituted a plague for human societies, it was not until

²⁹ See 'Football. Polishing up a tarnished trophy' *The Economist* (30 May 2015) <www.economist.com/news/business-and-finance/21652222-officials-world-footballs-governing-body-have-been-arrested-american-instigation?zid=319&ah=17af09b0281b01505c226b1e574f5cc1> accessed 5 December 2016.

³⁰ See Andrew Jennings, 'Investigating corruption in corporate sport: The IOC and FIFA,' [2011] *International Review for the Sociology of Sport* 387, 395.

³¹ It is undeniable that corruption exerts extremely adverse effects on our societies. In order to be merely illustrative and not exhaustive, it has been demonstrated that: It reduces income and government revenues; it increases costs undermining fair competition; it distorts policy letting priorities to be determined by personal interests; it breeds disloyalty in public institutions; it diverts resources from where they are needed the most; it reduces productivity demotivating the ones that receive unfair rewards; it destroys cultures at all levels. See Denis Osborne, 'Corruption as Counter-culture: Attitudes to Bribery in Local and Global Society,' in Barry Rider (ed), *Corruption: The Enemy Within* (Kluwer Law 1997) 27.

³² John Emerich Edward Dalberg Acton, who was a historian and moralist also known simply as Lord Acton, wrote such a statement in a series of letters sent to Bishop Creighton concerning the moral problem of writing history about the Inquisition. See Lord Acton writes to Bishop Creighton 1887 (*Online Library of Liberty*) <<http://oll.libertyfund.org/quote/214>>.

³² See Barry Rider (ed), *Corruption: The Enemy Within* (Kluwer Law 1997) 1.

the 1990s that the fight against such a criminal phenomenon was eventually included in the political agenda all over the globe.

Then, almost unexpectedly, over the course of the last two decades corruption has gradually moved from the margins to the center of the international political stage. The reason behind such a drastic change appears to lie with globalization that, with its doctrine of open markets and free trade, has radically changed the way in which international business is conducted.³³

As a matter of fact, the process of economic globalization, mainly consisting in capital and product market liberalization, has dramatically transformed the way in which companies organize their business activities and has had profound effects on the way in which corporations are governed.³⁴ Such a phenomenon also led to a wave of cross-border mergers and acquisitions that rose significantly as of the mid-1980s.³⁵ Thanks to a series of GATT negotiations that took place over the course of the second half of the 20th century and the consequent reduction of trade barriers that such agreements entailed the world gradually became a globalized single market.³⁶ Such a globalized economy created an extremely competitive market environment³⁷ that has progressively led, on the one hand, to a *de facto* reduction of managerial discretion,³⁸ and on the other, to a special attention to the risks, costs, and consequences of bribery, graft, and other forms of corruption in international business.³⁹ The reason being that such a globalized market, where only the fittest survive, inherently requires a trading system characterized by honesty, transparency, and fair dealing.⁴⁰

Taking the above into consideration, it makes perfect sense that the most relevant efforts have been traditionally limited to fighting only bribery in the conduct of international business instead of criminalizing the phenomenon of corruption *per se*. Consequently, it is not surprising that some authors consider the Foreign Corrupt Practices Act (FCPA), which is

³³ See Michael A. Almond & Scott D. Syferrt, 'Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy,' [1997] *North Carolina Journal of International Law and Commercial Regulation* 389, 391.

³⁴ The twentieth century witnessed an irreversible shift in the global economy, which has marked the end of an epoch. It has subordinated individuals, locations, and goods to skills, mobility, and ideas. Globalization has exerted a downward pressure on salaries threatening, in particular, the workers that are confined to a specific location or possess limited skills. It has also menaced the very idea of nation-state evening out cultural preferences, national tastes and standards that were originally different. See Jim Chen, 'Globalization and Its Losers,' [2000] *Minnesota Journal of Global Trade* 157.

³⁵ See Alan Dignam and Michael Galanis, *The Globalization of Corporate Governance* (Ashgate 2009) 135.

³⁶ See *ibid* 97.

³⁷ As competition intensifies and margins shrink, multinational corporations compete fiercely seeking to obtain the best combination of price, quality, reliability and delivery for products that appear highly standardized. When a global producer offers his lowest costs internationally, it rapidly acquires new market shares endangering in such a way the smaller competitors that focus on domestic markets. See Theodore Levitt, 'The Globalization of Markets,' [1983] *Harvard Business Review* 92, 95.

³⁸ Before that, during the so-called "golden age of capitalism," management exercised a wide discretion and undertook a central coordination role within the firms. This allowed corporate executives to resolve conflicts among the various resource providers and make long-term commitments to stakeholders. See Dignam and Galanis (n 35) 111.

³⁹ See Almond and Syferrt (n 33) 391.

⁴⁰ See *ibid*.

the most relevant anti-corruption piece of legislation in the United States, as a component of international trade law instead of criminal law.⁴¹ It is also emblematic that, in 1997, the members of the Organisation for Economic Co-operation and Development (OECD) adopted the historical OECD Anti-Bribery Convention, which specifically aims at establishing legally binding standards to criminalize bribery of foreign public officials in international business transactions. Specifically, the OECD Convention requires that all the adhering states should criminalize the following illicit conduct:

"A criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."⁴²

It all started in 1979 when the Foreign Corrupt Practices Act (FCPA) was eventually adopted in the United States. In fact, whilst until the 1970s the practice of bribing foreign public official did not raise any specific concern, the Watergate scandals unexpectedly brought into the public domain the circumstance that some of the major American corporations, such as Gulf Oil, Exxon, and Lockheed, had perpetrated such form of corruption on a massive scale. The public condemnation that followed the scandals resulted in the adoption of the FCPA, at that time an innovative piece of legislation.⁴³ The adoption of the FCPA constituted a point of no return, in that it permanently changed the rule of the global trade game. In fact, after the enactment of the FCPA, the American corporations suffered from a *de facto* competitive disadvantage compared with their foreign competitors who did not have to play by the rules of the FCPA and might still bribe with impunity in order to obtain favorable contracts abroad. As a result, the United States exerted an intense pressure on the global community to foster the adoption of anti-corruption regulations all over the world. Such an effort eventually resulted in a series of international achievements in the fight against this criminal phenomenon. In particular, such a result was obtained through the utilization of two international actors on which the United States have traditionally wielded enormous influence: the Organization for Economic Co-operation and Development⁴⁴ and the World

⁴¹ See Eric C. Chaffee, 'From Legalized Business Ethics to International Trade Regulation: The Role of the Foreign Corrupt Practices Act and Other Transnational Anti-Bribery Regulations in Fighting Corruption in International Trade,' [2014] *Mercer Law Review* 701, 705.

⁴² See the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Article 1(1) <www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf> accessed 5 December 2016.

⁴³ See Henry H. Rossbacher and Tracy W. Young, 'The Foreign Corrupt Practices Act: An American Response to Corruption,' in Barry Rider (ed), *Corruption: The Enemy Within* (Kluwer Law 1997) 210.

⁴⁴ The Organisation for Economic Co-operation and Development (OECD) is an international organization, which began its operations as a sort of "rich-country club" and whose objective is to promote policies that will improve the economic and social well-being of people around the world. In particular, it fights bribery in international business to strengthen development, reduce poverty and bolster confidence in markets. Its main achievements in this area have been the issuance of the OECD Anti-Bribery Convention and the Convention's 2009 Anti-Bribery Recommendation. See Bribery in international business (OECD) <www.oecd.org/corruption/anti-bribery> accessed 5 December 2016.

Bank.⁴⁵ Furthermore, other international players such as the United Nations⁴⁶ and Transparency International⁴⁷ have played a crucial role in raising a global public awareness about corruption.

The peculiarities of corruption in the energy sector

Even if, as we have argued so far, corruption is rife in every sector of our society including the most unexpected ones, such a criminal phenomenon has traditionally been wildly rampant in the energy sector and its effects have proved to be extremely dramatic. It is not surprising that, as it was revealed in 1976 during the Watergate scandal, several well-known energy firms were identified among the American corporations that took part in the most relevant corrupt activities.⁴⁸

The report of the Securities and Exchange Commission's report on questionable and illegal corporate payments and practices included an entire part dedicated to the unethical business operations carried out by energy companies. For instance, the report describes how Gulf Oil⁴⁹ made foreign political contributions, which consisted in payments to foreign officials, in seven countries totaling approximately \$6,900,000 during the period 1960-1973.⁵⁰ The report also describes how Gulf Oil used a subsidiary in the Bahamas to launder the dirty assets and highlights that past top officials of the company knew of the

⁴⁵ The World Bank Group is a Multilateral Development Bank (MDB), which is currently formed by five institutions: the International Bank for Reconstruction and Development (IBRD); the International Development Association (IDA); the International Finance Corporation (IFC); Multilateral Investment Guarantee Agency (MIGA); the International Center for Settlement of Investment Disputes (ICSID). Strictly speaking, the term "World Bank" refers to the IBRD, which represents the original institution, that was founded on the grounds of the Articles of Agreement negotiated at Bretton Woods in 1944 and opened its doors for business on 25 June 1947. The World Bank Group currently considers corruption as a major challenge to its institutional goals and the fight against such a criminal phenomenon is regarded as a priority representing the focal point of its recently established Sustainable Development Goals. See Anti-Corruption, 20 May 2016 (*The World Bank*) <www.worldbank.org/en/topic/governance/brief/anti-corruption> accessed 5 December 2016.

⁴⁶ In its resolution 55/61 of 4 December 2000, the General Assembly of the United Nations recognized that an effective international legal instrument against corruption was needed. Consequently, the United Nations Convention against Corruption was adopted by the General Assembly by resolution 58/4 of 31 October 2003. See United Nations Convention against Corruption (n 6).

⁴⁷ Transparency International is a non-governmental organization dedicated to fighting corruption, whose activities focus on advancing accountability, integrity and transparency worldwide. Among its publications, the corruption perceptions index, which was first launched in 1995, has been widely credited with putting the issue of corruption on the international policy agenda. See Corruption Perceptions Index (*Transparency International*) <www.transparency.org/research/cpi/overview> accessed 5 December 2016.

⁴⁸ As regards the connection between the Watergate scandal and the enactment of the Foreign Practices Corrupt Act, see Wallace Timmeny, 'An Overview of the FCPA,' [1982] *Syracuse Journal of International Law and Commerce* 235.

⁴⁹ Gulf Oil International is a multinational enterprise that has a strong association with fuel retail that stretches back over a hundred years. Its network today has grown to over 1100 sites in 25 countries, spreading across Europe, the Middle East and South America. See 'History of Gulf Oil' (*Gulf Oil*) <www.gulfoilltd.com/about/history-of-gulf-oil/> accessed 5 December 2016.

⁵⁰ See Securities and Exchange Commission, 'Report on Questionable and Illegal Corporate Payments and Practices,' (May 1976), B-7, <www.sec.gov/spotlight/fcpa/sec-report-questionable-illegal-corporate-payments-practices-1976.pdf> accessed 5 December 2016.

questionable and illegal activities.⁵¹ Another energy company on which the report focused was Ashland Oil Inc.,⁵² which paid \$202,000 to officials in a foreign country in connection with the acquisition of petroleum rights and the transfer of operating permits.⁵³ The report also states that in 1969, Ashland's Chief Executive Officer personally delivered \$7,500 to an official of a third foreign country.⁵⁴ The scandal revealed that also Phillips Petroleum Company⁵⁵ was enmeshed in corruption. As the SEC indicated, \$1,258,000 of off-books cash was paid to foreign individuals involved in a construction project in a foreign country and these payments were not properly entered in Phillips' books and records.⁵⁶ Finally, it emerged that Exxon⁵⁷ made political contributions in Italy averaging more than \$27,000,000 from 1963 to 1971; those political contributions were recorded through invoices for services as payments to sales organizations or were made in cash from off-book funds.⁵⁸

At least three key reasons appear to lie behind the pervasiveness of corruption in the energy sector. The first one is the crucial geopolitical importance that energy resources have always had due to the asymmetric distribution of reserves, production and consumption of natural resources among the globe.⁵⁹ The enormous difficulties that have constantly been experienced at the transnational level in regulating energy trade reflect the uniqueness of such a situation.⁶⁰ As a result, countries' ability to meet their primary energy needs might well represent a relentless national drive to conclude a contract at any cost even secretly bribing foreign public officials. Another reason, which is clearly connected with the first one, is the enormous amount of money usually involved in energy transactions. The investments in the energy sector are usually massive and require a vast amount of funds. As a matter of fact, the establishment and maintenance of energy networks (such as pipelines and gas terminals) are extremely expensive; even the mere transportation costs of crude oil and gas is very costly.⁶¹ As a result, energy companies tend to become giant and enormously rich corporations, which in many cases are also backed by governments. Such immense

⁵¹ *ibid* B-8.

⁵² Ashland is an American Fortune 500 petrochemical company which operates in more than 100 countries. See 'About Ashland' (*Ashland*) <www.ashland.com/about/about-ashland> accessed 5 December 2016.

⁵³ See Securities and Exchange Commission (n 49) B-4.

⁵⁴ See *ibid*.

⁵⁵ Phillips Petroleum Co. was an American firm incorporated in 1917, which operations included petroleum refining, natural gas gathering and producing chemicals. As a result of a series of acquisitions, it is now part of the Phillips 66 energy company. See 'Our History' (*Phillips 66*) <www.phillips66.com/EN/about/history/Pages/index.aspx> accessed 5 December 2016.

⁵⁶ See Securities and Exchange Commission (n 49) B-14.

⁵⁷ Over the last 125 years ExxonMobil has evolved from a regional marketer of kerosene to the largest publicly traded energy company in the world. 'About us' (*ExxonMobil*) <<http://corporate.exxonmobil.com/en/company/about-us>> accessed 5 December 2016.

⁵⁸ See Securities and Exchange Commission (n 49) 46.

⁵⁹ In modern times energy resources have always represented the foundation of every international order and have determined the fate of every battle for space and power. In the 18th and 19th centuries, the British Empire prospered controlling the production of coal. From the end of the 19th to the early 21st centuries, petroleum has supported the American world leadership. And the new "age of natural gas" could make the United States the world's leading geopolitical power well into the new century. See Robert D. Kaplan, 'The Geopolitics Of Energy' (*Forbes*) <www.forbes.com/sites/stratfor/2014/04/04/the-geopolitics-of-energy/#259850c547c6> accessed 5 December 2016.

⁶⁰ See Rafael Leal-Arcas, Costantino Grasso and Juan Alemany Ríos, *Energy Security, Trade and the EU - Regional and International Perspectives* (Edward Elgar 2016) 89.

⁶¹ *ibid* 230.

corporate wealth, allowed these firms to obtain "an unfair advantage in the political marketplace."⁶² Gazprom, whose net profit in 2015 amounted to \$12.2 billion USD,⁶³ and Rosneft, whose net profit in 2015 amounted to \$5.4 billion USD,⁶⁴ represent the glaring example of the scale of this phenomenon. Although both companies, which are the two largest publicly traded energy producers in the world,⁶⁵ have been privatized, the Russian Government currently controls over 50 per cent of their shares.^{66 67} Other examples are the state-owned PetroChina, which is currently the fourth world's biggest public energy company, and the semi-public Brazilian multinational corporation Petrobras, which is ranked eight.⁶⁸ Even where, through privatization processes, national governments have lost their majority holding, the interconnection between these huge companies and the state is still very strong. For instance, the necessity of cutting the UK greenhouse gas emissions has recently highlighted the close ties between British Petroleum and the local government, which in 1987 sold the last of its shares.⁶⁹ The access to virtually unlimited funds makes energy corporations the biggest potential perpetrators of grand corruption. Moreover, thanks to their wealth, power and political connections it is easy for them to arrange complex schemes to deceive the public and the prosecuting authorities about their unlawful activities. On many occasions, they could easily avoid accountability making use of the vast number of skilled lawyers and accountants at their disposal. In this regard, some of the reasons behind the collapse of Enron in 2001 appears truly emblematic. In particular, it has to be highlighted how Enron adopted an extremely complex business model, which relying extensively on the creation of shell firms made the business operations carried out by the corporation completely obscure and almost impossible to control.⁷⁰ Furthermore, the massive amount of money paid to Enron's external auditor, Arthur Andersen, undermined its independence eventually compromising its work.⁷¹

The second reason is related to the inherent intrusiveness of the vast majority of energy investments with respect to a country's environment and social fabric. For instance, it is well known that the explorations made to find crude oil and the construction of oil pipelines inevitably entail the causation of severe environmental damages as well as major risks for human health. As a matter of fact, crude oil is dangerous because it typically contains more than 1,000 chemicals, a large majority of which are hazardous to humans and might cause

⁶² See Samuel Issacharof 'On Political Corruption,' [2011] *Harvard Law Review* 118, 124.

⁶³ See 'PJSC Gazprom IFRS consolidated financial statements 31 December 2015' (*Gazprom*) <www.gazprom.com/f/posts/12/001311/gazprom-ifrs-2015-12m-en.pdf> accessed 5 December 2016.

⁶⁴ See 'Consolidated financial statements Rosneft Oil Company for the year ended December 31, 2015' (*Rustocks*) <www.rustocks.com/put.phtml/RSNT_4Q2015_IAS_consolidated_EN.pdf> accessed 5 December 2016.

⁶⁵ See 'The World's Biggest Public Energy Companies 2016' (*Forbes*) <www.forbes.com/pictures/hefj45fim/introduction/#11dab5c325de> accessed 5 December 2016.

⁶⁶ See 'Shares' (*Gazprom*) <www.gazprom.com/investors/stock> accessed 5 December 2016.

⁶⁷ See 'Shareholder structure' (*Rosneft*) <www.rosneft.com/Investors/Equity/Shareholder_structure> accessed 5 December 2016.

⁶⁸ See 'The World's Biggest Public Energy Companies 2016.'

⁶⁹ See Felicity Lawrence and Harry Davies, 'Revealed: BP's close ties with the UK government' *The Guardian* (21 May 2015) <www.theguardian.com/environment/2015/may/20/revealed-bps-close-ties-with-the-uk-government> accessed 5 December 2016.

⁷⁰ See William W. Brattof, 'Enron and the Dark Side of Shareholder Value,' [2002] *Tulane Law Review* 1275, 1306.

⁷¹ *ibid* 1349.

degenerative diseases like leukemia and neurological problems.⁷² The risks connected to investments in energy infrastructure are already significant in industrialized countries⁷³ where higher security standards have to be applied⁷⁴ and commonly spark strong anti-government protests.⁷⁵ The health and environmental risks increase dramatically in developing countries. The tremendous amount of crude oil spilled from oil pipelines in the Niger delta and the related tragic effects produced on the soil and the local population are extremely exemplificative of such a phenomenon.⁷⁶ The statement eventually released by Shell in 2010 is emblematic of the seriousness of the damages that extraction procedures may produce on local communities in countries with low safety standards:

"I am proud to say that we make a symbolic new start by saying to the people of the Niger delta: We are sorry. We are sorry for the oil and gas spills that have made your rivers toxic, we are sorry for the gas flares that stink up your villages, we are sorry for the fact that you cannot eat your fish, that you cannot grow on your land, and that you cannot drink your water. We have had similar extraction operations in Alaska with little problem. We know there is a double standard and that must end."⁷⁷

Besides the potential environmental and health damages, which are extremely difficult to be restored,⁷⁸ the construction of energy infrastructures necessitates massive deforestation and dispossession of land schemes.⁷⁹ The land-grabbing operations conducted in Myanmar

⁷² See Brant Phillips, 'Oil Pipelines and Spills' *Auburn University* (09 August 2016) <<http://cla.auburn.edu/ces/energy/oil-pipelines-and-spills>> accessed 5 December 2016.

⁷³ Oil spills resulted in North America with regard to the Keystone Pipeline, which is a pipeline that runs from Alberta, Canada to the Gulf Coast of Texas. See *ibid*.

⁷⁴ For a detailed analysis of pipelines safety in the United States see Lena Groeger, 'Pipelines Explained: How Safe are America's 2.5 Million Miles of Pipelines?' *ProPublica* (15 November 2012) <www.propublica.org/article/pipelines-explained-how-safe-are-americas-2.5-million-miles-of-pipelines> accessed 5 December 2016.

⁷⁵ For example, the works related to the Dakota Access Pipeline have led to angry protests in the United States, especially among the Sioux Native American people of the Standing Rock Indian reservation that fear it will displace sacred artifacts and pollute the water supply for surrounding communities. See Ralph Ellis, 'Standing Rock protesters ordered out by Army Corps of Engineers' *CNN* (28 November 2016) <<http://edition.cnn.com/2016/11/25/us/dakota-pipeline-access-army-corps>> accessed 19 October 2016.

⁷⁶ It has been calculated that an estimated 13 million barrels (1.5 million tons) of crude oil have been spilled in the region since 1958 from over 7000 oil spill incidents (i.e. a yearly average of about 240,000 barrels). See Best Ordinioha and Seiyefa Brisibe, 'The human health implications of crude oil spills in the Niger delta, Nigeria: An interpretation of published studies,' [2013] *Nigerian Medical Journal* 10, 395.

⁷⁷ Excerpt from the statement released by Bradford Houpe, Vice-President of the Ethical Affairs Committee at Shell. See 'Shell: We are sorry' *You Tube* (28 March 2010) <www.youtube.com/watch?v=zciWUOrIUqo> accessed 30 November 2016.

⁷⁸ For instance, the United Nations Environment Programme, which has undertaken the first major scientific study of pollution in the Niger delta area, has determined that the devastating oil spills over the past five decades will cost \$1bn to rectify and take up to 30 years to clean up. See 'Environmental Assessment of Ogoniland' *United Nations Environment Programme* (2011) <http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf> accessed 30 November 2016.

⁷⁹ The International Criminal Court's Office of the Prosecutor has recently published a policy paper on case selection and prioritisation, under which illicit activities against the environment, such as the illegal exploitation of natural resources, the illegal dispossession of land, or the destruction of the environment, will be considered by the ICC where they represent the means through which the crimes that fall within its jurisdiction (i.e. the crime of genocide; crimes against humanity; war crimes; and the crime of aggression) are perpetrated. Such an innovation will potentially allow the ICC to prosecute CEOs and other executives of multinational enterprises intentionally involved in the perpetration of crimes against the environment. See

for the construction of a pair of immense Beijing-backed transnational energy pipelines is highly illustrative of such a situation.⁸⁰ As a result, in order to obtain from the local governments the green light to construct such intrusive and damaging energy infrastructures, industrialized countries traditionally used imperialistic approaches,⁸¹ then, after decolonization, they have systematically installed puppet regimes.⁸² At the same time, the powerful energy corporations have methodically used corruption as an effective means of obtaining political support or controlling local rulers.⁸³

The third reason is that, for historical reasons, the vast majority of countries that are rich in terms of energy resources appear also more vulnerable to corruption. Although, as we have seen, every country, regardless of political tradition, culture or socio-economic status, has experienced bribery, misappropriation of funds and misuse of political position,⁸⁴ developing countries seem to be more exposed to corruption risks and that, in turn, such illicit activities exert adverse consequences on their development.⁸⁵ According to Transparency International, the majority of countries that have abundant oil resources such as Russia, China, Iraq, Iran, Brazil, Venezuela, Mexico, and Nigeria,⁸⁶ present serious levels of public sector corruption and many of them can still be considered as developing countries.⁸⁷ The vulnerability of such country to corruption depends on several determining factors. One of them is the weakness of their public institutions. Colin Leys has expressed this concept excellently:

"The idea of the national interest is weak because the idea of a nation is new. And the institutions and offices of the state are, for most people, remote and perplexing. Even to the civil servants and politicians directly involved in them they are new; they are aware of the 'official purposes' which are attached to them by importation, but they

'Policy Paper on Case Selection and Prioritisation' *International Criminal Court* (15 September 2016) <www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 30 November 2016.

⁸⁰ See 'The great land rush. Myanmar: The dispossessed' *Financial Times - Investigations* (1 March 2016) <<https://ig.ft.com/sites/land-rush-investment/myanmar>> accessed 30 November 2016.

⁸¹ See Dani Rodrik, *The Globalization Paradox* (Oxford University Press 2011) 26.

⁸² See Ibrahim J. Gassama, 'Africa and the Politics of Destruction: A Critical Re-examination of Neocolonialism and Its Consequences,' [2008] *Oregon Review of International Law* 327, 342.

⁸³ It is emblematic that, in Nigeria, corruption has always represented the main tool for allowing foreign companies like Shell to access the country's oil and gas resources. See Jêdrzej George Frynas, Matthias P. Beck and Kamel Mellahi, 'Maintaining Corporate Dominance after Decolonization: The "First Mover Advantage" of Shell-BP in Nigeria,' [2000] *Review of African Political Economy* 407, 417.

⁸⁴ See Maria Dakolias and Kim Thachuk, 'Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform' [2000] *Wisconsin International Law Journal* 353, 355.

⁸⁵ This reflects the phenomenon widely known as "resource curse," which refers to the paradox of possessing large deposits of oil and natural gas and, at the same time, being subject to poor economic performance and governance challenges. See Nicholas Shaxson, 'Oil, Corruption and the Resource Curse' [2007] *International Affairs* 1123.

⁸⁶ In 2015, these countries have been listed among the top thirteen world producers of petroleum. See 'Total Petroleum and Other Liquids Production, 2015' *U.S. Energy Information Administration* (2016) <www.eia.gov/beta/international/rankings/#?product=53-1&cy=2015> accessed 30 November 2016.

⁸⁷ All of these countries have obtained a score below 40 on a scale of 0 (highly corrupt) to 100 (very clean). See 'Corruption Perceptions Index, 2015' *Transparency International* (2016) <www.transparency.org/cpi2015> accessed 30 November 2016.

scarcely regard them as 'hallowed' and hence they do not necessarily regard them as sacrosanct."⁸⁸

Moreover, low public-sector wages, illiteracy, inadequate management controls and lack of adequate technology for monitoring, poor recruitment and selection procedures, poor working conditions and facilities, lack of public information, and the inadequate capacity to meet the demand for government services, are all factors frequently cited as a source of corruption in less-developed countries.⁸⁹ Finally, the presence of an authoritarian regime might *per se* increase corruption risks. In fact, although democracies are not impervious to corruption, their policy-making processes, which tend to be more transparent, and the accountability of politicians to voters, may help them to contain this criminal phenomenon. As a result, in democratic countries corruption tends to assume the more subtle form of influence peddling and, at the same time, blatant forms of bribery appear to be relatively more uncommon.⁹⁰

A realistic depiction of the ways in which energy investments and corruption are intertwined has been recently offered by *Big Men*, a critically acclaimed and award-winning documentary produced by Brad Pitt.⁹¹ In particular, the documentary provides the audience with a rare insight into the energy industry focusing on corruption involving American financiers and oil companies doing business in Ghana.

Another tale of dishonesty within the energy industry

On 15 November 2016, the energy sector was hit for the umpteenth time by a major scandal. The Russian Economic Development Minister Alexei Ulyukayev was arrested on charges of corruption.⁹² He allegedly received a \$2,6 million cash bribe from the Kremlin-controlled Rosneft to facilitate the controversial acquisition of Bashneft.⁹³ This case of corruption is particularly relevant for the purposes of this work not so much because the minister represents the highest-ranking official arrested in Russia since Soviet times, but because it serves as a striking illustration of the pervasiveness of corruption in the energy sector and of the circumstance that politicians are deeply enmeshed in such illicit activities.

Although Alexei Ulyukayev originally opposed the sale of Bashneft to Rosneft because he aimed at reducing the publicly controlled portion of the economic sector controlled by the state, he then adhered to President Putin's decision and, eventually, Rosneft acquired the

⁸⁸ See Colin Leys, 'What is the Problem About Corruption?,' [1965] *The Journal of Modern African Studies* 215, 224.

⁸⁹ See Kimberly Ann Elliott 'The Problem of Corruption: A Tale of Two Countries,' [1998] *Northwestern Journal of International Law & Business* 524, 527.

⁹⁰ See *ibid* 525.

⁹¹ See the movie official website at <<http://bigmenthemovie.com>> accessed 4 December 2016.

⁹² See 'Russian Economy Minister Alexei Ulyukayev detained over \$2 million bribe allegation' *ABC News* (15 November 2016) <www.abc.net.au/news/2016-11-15/russian-economy-minister-detained-over-bribe/8027834> accessed 30 November 2016.

⁹³ Bashneft is a Russia-based company, which is active within the oil and gas industry. Its principal activities include the extraction, exploration and production of crude oil and oil products. See 'Structure of the Business' *Bashneft* (15 November 2016) <www.bashneft.com/company/structure/> accessed 30 November 2016.

controlling stake in Bashneft for \$5bn.⁹⁴ The investigation was set up by the Federal Security Service (FSB), the Russian secret police, and it seems almost certain that, due to the country's highly centralized governing,⁹⁵ the investigators had to obtain the green light directly from Putin to arrest the minister.⁹⁶

In reality, it emerged that Rosneft's acquisition of Bashneft led to a major turf war between rival Kremlin factions. When the economic liberals in the government, like Alexei Ulyukayev, fiercely opposed the acquisition believing that Bashneft should go to private investors, they dared to challenge the head of Rosneft, Igor Ivanovich Sechin, who had lobbied hard for buying Bashneft.⁹⁷ Sechin, who is ranked 47 in Forbes world's most powerful people ranking,⁹⁸ is a former Soviet spy, one of the closest ally of Vladimir Putin and the puppeteer of Russia's strategies in the energy sector.⁹⁹ As a result, the arrest of the minister appears more like a retaliation than an action to fight corruption that is rampant in the country. Alexei Navalny, who is an opposition politician and anti-corruption campaigner, expressed this clearly:

"Of course this case has nothing to do with any real fight against corruption [...] It's clear that only Putin can make the decision on something like Rosneft taking over Bashneft. The idea that Ulyukayev was in a position to somehow blackmail Rosneft and demand money for approving the deal is utterly comical."¹⁰⁰

Researchers, journalists, and nongovernmental organizations widely agree that, since the 1990s, corruption and abuses of power have gone out of control in Russia. The country is considered as the most corrupt economic and political system among the major economic powers.¹⁰¹ In particular, the law enforcement agencies have increasingly conducted their investigations through what is known as "predatory policing," which means that police activities primarily aim at obtaining personal enrichment and repressing dissenting groups rather than guarantying the protection of the public.¹⁰² Within such a scenario, since the adoption of the farcical privatization processes that followed the collapse of the Soviet Union, the energy sector has become the privileged hunting ground for the new class of

⁹⁴ See 'Russian intrigues. Arresting developments' *The Economist* (19 November 2016) <www.economist.com/news/europe/21710197-corruption-charges-against-minister-signal-rising-tensions-russias-elite> accessed 30 November 2016.

⁹⁵ The contemporary Russian police system has inherited a centrally controlled and managed structure from the Soviet police. See Theodore P. Gerber and Sarah E. Mendelson, 'Public Experiences of Police Violence and Corruption in Contemporary Russia: A Case of Predatory Policing?' [2008] *Law & Society Review* 1, 10.

⁹⁶ See *ibid.*

⁹⁷ See *ABC News* (n 90).

⁹⁸ See 'The World's Most Powerful People, 2015 Ranking - #47 Igor Sechin' *Forbes* (2015) <www.forbes.com/profile/igor-sechin> accessed 30 November 2016.

⁹⁹ See Luke Harding, 'Igor Sechin: Rosneft's Kremlin hard man comes out of the shadows' *The Guardian* (18 October 2012) <www.theguardian.com/business/2012/oct/18/igor-sechin-rosneft-kremlin-hard-man-shadows?INTCMP=SRCH> accessed 30 November 2016.

¹⁰⁰ See Shaun Walker, 'The Russian economy minister in court over alleged \$2m bribe' *The Guardian* (15 November 2016) <www.theguardian.com/world/2016/nov/15/russia-economy-minister-detained-over-alleged-2m-bribe> accessed 30 November 2016.

¹⁰¹ See Liam Anderson, 'Corruption in Russia: Past, Present and Future,' in Charles Funderburk (ed), *Political Corruption in Comparative Perspective: Sources, Status and Prospects* (Routledge 2012) 71.

¹⁰² See Gerber and Mendelson (n 94) 1.

emerging rich oligarchs.¹⁰³ This phenomenon was consolidated during the ongoing Putin era. The President used his political influence to pursue a strategy aimed at gaining the complete control of the enormous amount of Russian energy resources and, in order to implement this plan, he had no qualms about inflicting severe casualties on any dissenting party. In 2003, the arrest of Mikhail Khodorkovsky, who was one of the richest persons in Russia and the head of the energy company Yukos, is emblematic of such an approach. Although he was formally charged with tax evasion, embezzlement and fraud, it emerged that the real reasons behind his arrest were his direct challenge to the president's authority and Putin's lust for power.¹⁰⁴ In fact, at the beginning of 2003, Khodorkovsky decided to openly support two opposition parties and made public statements criticizing the anti-democratic trends of Russian politics.¹⁰⁵ Moreover, in the period of time prior to the arrest, he was actively seeking to merge his firm with Sibneft, another large Russian oil company, and with the US-based company Exxon Mobil. Moreover, Yukos and the state company Rosneft were involved in a public struggle for the control of some strategic oilfields.¹⁰⁶ After the prosecution, the Russian tax authorities, carefully directed by the central government, froze the firm's bank accounts and set impossible deadlines. Consequently, Yukos's tax bills became unpayable and, eventually, the company ended up in the hands of the state-owned oil firm Rosneft.¹⁰⁷ It is not surprising that, in 2011, the European Court of Human Rights affirmed that the criminal proceedings against Khodorkovsky violated several fundamental human rights enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁰⁸

Once obtained the control of the vast majority of Russian energy resources, Putin began to exercise an immense power to benefit himself and his entourage by means of misuse of public functions and the appointment of his most loyal lieutenants, such as Sechin, in crucial roles within the vast public energy sector. In particular, in order to pursue his political interests, the President used such a power to persuade key individuals, both domestically and abroad, to join his corrupt inner circle.

¹⁰³ See Anderson (n 100) 83.

¹⁰⁴ See *ibid* 87.

¹⁰⁵ See *Khodorkovskiy v Russia* ECHR 2011 Case no. 5829/04, para 9.

¹⁰⁶ See *ibid*, para 8.

¹⁰⁷ See 'The Khodorkovsky case. The tycoon and the president' *The Economist* (19 May 2005) <www.economist.com/node/3983898> accessed 30 November 2016.

¹⁰⁸ In particular, the Court affirmed that, during his detention, Khodorkovsky was subjected to "inhuman or degrading treatments," which amounted to a violation of Article 3 of the Convention. It also ruled that Russian authorities violated Article 5 § 1 (b) of the Convention because they maliciously changed the venue of the eventual detention proceedings to one that was more convenient for the central government (i.e. they moved it from Novosibirsk to Moscow where is located the General Prosecutor's Office). Furthermore, the Court recognized the infringement of Khodorkovsky's right to liberty and security as provided Article 5 § 3 of the Convention because his detention was not justified and had thus exceeded any "reasonable time". Finally, in the decision, it was stated that the applicant's detention was not compatible with the minimal procedural requirements of Article 5 § 4 of the Convention in that the defense lawyers were not allowed to communicate freely with their client. See *Khodorkovskiy v Russia* ECHR 2011 Case no. 5829/04, paras 119, 142, 202, 234.

As a matter of fact, a journalistic inquiry¹⁰⁹ has recently investigated the shady deals that Putin orchestrated to establish a close relationship between the Russian energy companies and Eni SpA, the Italian multinational oil and gas giant.¹¹⁰

The existence of such corrupt activities was originally unveiled by Julian Assange through the website WikiLeaks.¹¹¹ Specifically, American diplomats reported that the then Italian Prime Minister, Silvio Berlusconi, profited individually and substantially from secret deals with Vladimir Putin.¹¹² Corruption and misuse of public functions lay at the bottom of such agreements. These corrupt activities were possible because, like the state-controlled Russian companies, the Italian energy conglomerate is partially owned by the Italian government. It also appeared that Putin promised Berlusconi "a percentage of profits from any pipelines developed by Gazprom in co-ordination with ENI."¹¹³ The words of the US diplomats are illustrative of such a situation:

"It seems that Russian-Italian economic relations are directed by PMs who have a direct line to each other as well as control over some of the largest assets of their respective economies. To whatever end they direct those assets, it is likely they are not doing so based solely on commercial or rate-of-return calculations."¹¹⁴

The following excerpts from the comprehensive report on the relations between Italy and Russia issued by the US Ambassador in Rome, Ronald P. Spogli, are even more emblematic of the level of corruption that pervades the energy sector:

"Italy's relationship with Russia is complex, encompassing historical ideological sympathies, geostrategic calculations, commercial pressure, energy dependence, and personal relationships between top leaders [...] In its relationship with Russia, energy is the most important bilateral issue and the quest for stable energy supplies from Russia frequently forces Italy to compromise on security and political issues [...] By far the most important factor is the personal attention Putin devotes to the relationship. [Putin] has held more bilateral meetings with sitting Italian PMs in the recent past than any other world leader. Contacts in both the opposition center-left party and Berlusconi's own PdL party, however, have hinted at a more nefarious connection. They believe that Berlusconi and his cronies are profiting personally and handsomely from many of the energy deals between Italy and Russia [...] ENI, Italy's most prominent energy parastatal, wields immense political power; its business strategy has focused on complicated

¹⁰⁹ See Andrea Greco and Giuseppe Oddo, *Lo Stato Parallelo* (Chiarelettere 2016).

¹¹⁰ Eni SpA has been ranked 12 by Forbes among the world's biggest public energy companies. See 'The World's Biggest Public Energy Companies' (*Forbes*) (n 64) 83.

¹¹¹ WikiLeaks is the multi-national media organization founded by Julian Assange in 2006. It is specialized in the analysis and publication of censored or otherwise restricted official materials involving war, spying and corruption. See 'What is WikiLeaks' *WikiLeaks* (3 November 2015) <<https://wikileaks.org/What-is-Wikileaks.html>> accessed 30 November 2016.

¹¹² See Rob Evans, Luke Harding and John Hooper, 'WikiLeaks cables: Berlusconi 'profited from secret deals' with Putin' *The Guardian* (2 December 2010) <www.theguardian.com/world/2010/dec/02/wikileaks-cables-berlusconi-putin> accessed 30 November 2016.

¹¹³ See *ibid.*

¹¹⁴ See 'Public Library of US Diplomacy: Italian Diplomat on Energy Interests, Putin-Berlusconi Link (C-RE9-02730)' *WikiLeaks* (5 February 2010) <https://wikileaks.org/plusd/cables/10MOSCOW266_a.html> accessed 30 November 2016.

geopolitical environments generally perceived as overly risky by many of its international competitors [...] There is even suspicion that ENI maintains journalists on its payroll."¹¹⁵

Over the course of their inquiry, the Italian journalists had the opportunity to interview the Georgian President, Mikheil Saakashvili. He revealed the existence of a "small and exclusive club," whose members were political leaders who met in Rome, Saint Petersburg or Moscow in order to conduct "their private affairs" in the energy sector.¹¹⁶ This club was described as a sort of "Spectre" that tried to dominate Europe by means of personal policies established among friends who abused public functions for private gains.¹¹⁷

Conclusions

Within such a grim scenario, the circumstance that many governments, international organizations and NGOs are committed to fighting against corruption is surely admirable and has to be warmly welcomed. However, it is necessary to recognize that, especially in the energy sector, we are still very far away from defeating corruption or even curbing it. Besides the United States, some other key countries have adopted, or firmed up, their anti-corruption regulations that might potentially exert a positive influence on the energy industry: In 1998, the federal government of Canada enacted the Corruption of Foreign Public Officials Act;¹¹⁸ in 2010, the United Kingdom adopted the Bribery Act,¹¹⁹ which is characterized by an extensive extraterritorial reach; in 2013, Brazil passed an Anti-Corruption Act (Federal Law 12,846/2013);¹²⁰ in 2015 Italy has amended its anti-corruption laws;¹²¹ on 18 July 2016, Mexican President Enrique Peña Nieto approved the laws of Mexico's new National Anti-Corruption System, which aim at coordinating the efforts of all governmental bodies involved in anticorruption enforcement.¹²² However, such measures do not appear *per se* capable of solving the vexed question of corruption especially in sectors, such as the energy one, in which this illicit phenomenon is rampant. These interventions are sporadic and their implementation depends on the willingness of national

¹¹⁵ See 'Public Library of US Diplomacy: Italy-Russia Relations: The View from Rome (C-RE8-02675)' *WikiLeaks* (26 January 2009) <https://wikileaks.org/plusd/cables/09ROME97_a.html> accessed 30 November 2016.

¹¹⁶ It appears that leaders such as Putin, Berlusconi, Schröder and Erdoğan, participated in such exclusive meetings. See Andrea Greco and Giuseppe Oddo, *Lo Stato Parallelo* (Chiarelettere 2016) 26.

¹¹⁷ See *ibid* 27.

¹¹⁸ See 'Corruption of Foreign Public Officials Act (S.C. 1998, c. 34)' *Government of Canada - Justice Laws Website* (21 November 2016) <<http://laws-lois.justice.gc.ca/eng/acts/c-45.2/>> accessed 30 November 2016.

¹¹⁹ See 'Bribery Act 2010' *legislation.gov.uk* <www.legislation.gov.uk/ukpga/2010/23/contents> accessed 30 November 2016.

¹²⁰ See 'Lei nº 12.846, de 1º de Agosto de 2013' *Câmara dos Deputados* <www2.camara.leg.br/legin/fed/lei/2013/lei-12846-1-agosto-2013-776664-publicacaooriginal-140647-pl.html> accessed 30 November 2016.

¹²¹ See 'Disposizioni in materia di delitti contro la pubblica amministrazione, di associazioni di tipo mafioso e di falso in bilancio' *Senato della Repubblica* <www.senato.it/service/PDF/PDFServer/BGT/00910713.pdf> accessed 30 November 2016.

¹²² See 'Mexico Enacts New Anti-Corruption Laws' *Lexology* <www.lexology.com/library/detail.aspx?g=5294bfa9-c7e1-4c13-a26f-a7e20537d54a> accessed 30 November 2016.

authorities.¹²³ Moreover, the general perception that, in the absence of a globally accepted regime, enforcing tight domestic laws might put energy companies at a competitive disadvantage against foreign firms, may dissuade even the most virtuous administrations from rigorously enforcing their law.¹²⁴ Consequently, concerted anti-corruption actions at the global or regional level appear to be preferable to the national ones. Most importantly, the criminal law approach has proved to be highly inefficient for the purpose of preventing corporate crime and, specifically, corruption. The reasons behind such a failure lie, on the one hand, in the fact that prosecutors face considerable difficulties in securing convictions in corruption trials,¹²⁵ and on the other that this area of law has been originally conceived and developed to be applied to natural persons, not to legal entities. As a result, a compelling need exists to develop alternative legal instruments and regulatory measures specifically designated for fighting corporate crime. Due to its inherent genetic defects, long-term successes cannot be achieved merely resorting to criminal law. Contrariwise, only the combined application of criminal, corporate governance and corporate social responsibility measures could produce profound and lasting effects in eradicating corporate criminal behaviors.¹²⁶ As a matter of fact, the perpetration of corporate offenses is often related to the distorted way in which firms are governed and to the absence of an adequate anti-financial crime culture among companies' employees. Consequently, the repression exercised by means of criminal law should always be accompanied by the implementation of specific measures having a different nature,¹²⁷ such as purposely developed compliance programs, mandatory reporting systems or the inclusion of independent financial crime experts in the firms' decision-making processes. From this perspective, the European Union effort that led to the adoption of a new Accounting Directive in 2013, which has introduced ground-breaking new rules forcing oil, gas and mining companies to publish details of the

¹²³ It seems that only four countries (Germany, Norway, Switzerland, and the United States) are actually active enforcers of their anti-bribery laws. See Peter Jeydel, 'Yoking the Bull: How to make the FCPA Work for U.S. Business,' [2012] *Georgetown Journal of International Law* 523, 534.

¹²⁴ For instance, it has been widely argued that the FCPA may have such an effect on U.S. energy companies. This because, where American energy firms operate within corrupt markets, they do not bribe and "in doing so lose contracts to foreign companies that engage in bribery without fear of penalty." See Will White, 'Oil, Corruption, and The Department Of Justice: FCPA Enforcement and the Energy Industry,' [2014] *Texas Journal of Oil, Gas, and Energy Law* 181, 202.

¹²⁵ The necessity to ease prosecution of corporations led in England to the introduction of the offence of "Failure of commercial organisations to prevent bribery" as provided by section 7 of the Bribery Act 2010. It represents a new form of corporate liability for omission that does not require knowledge, intention or recklessness and occurs when the commercial organization has failed to prevent a corrupt practice. See Costantino Grasso, 'Peaks and troughs of the English deferred prosecution agreement: the lesson learned from the DPA between the SFO and ICBC SB Plc,' [2016] *Journal of Business Law* 388, 391.

¹²⁶ As an example of corporate social responsibility measure in this area, it can be mentioned the academic research project on preventing corporate corruption that Eni SpA has sponsored in 2014. However, due to the fact it was not part of a coherent corporate plan to create a sound anti-corruption culture, the measure, although commendable, appears to fall into the corporate charity category and, as such, seems to be inherently incapable of altering in a positive way the corporate behavior. In any case, the interesting outcomes of the research were published in a dedicated volume, see Stefano Manacorda, Francesco Centonze, Gabrio Forti (eds), *Preventing Corporate Corruption: The Anti-Bribery Compliance Model* (Springer 2014).

¹²⁷ Taking this into consideration, it is not surprising that the current anti-corruption strategies appear multi-faceted and involve a combination of regulation, self-regulation and multi-stakeholder initiatives. See Indira Carr and Opi Outhwaite, 'Corruption and Business Integrity: Law, Policy and Company Practices,' [2009] *Manchester Journal of International Economic Law* 16, 18.

payments made during their commercial operations, has to be praised.¹²⁸ Similarly, international projects such as the Extractive Industries Transparency Initiative (EITI), which specifically aims at establishing principles of greater transparency and accountability in the oil, gas and mining sectors, have to be widely supported.¹²⁹ Such a necessity and the circumstance that no comprehensive empirical study has focused exclusively on the effect of anti-corruption measures within the energy industry will surely lead corruption experts to pursue in the near future a rich and rigorous research agenda. This appears even of greater importance to the present day where, with the decline of globalization,¹³⁰ the victory of a populist leader like Donald Trump,¹³¹ and the surprising results of extremist parties such as the ones led by Marine Le Pen¹³² and Nigel Farage,¹³³ dark clouds are gathering on the horizon. ¹³⁴ On 3 February 2017, with a resolution sponsored by 34 Republican Representatives,¹³⁵ the U.S. Congress nullified the rules that the SEC issued in 2016 to implement Section 1504 of the Dodd-Frank Act under which companies in the extractive industries (oil, gas, and mining) have to publicly disclose the amounts that they pay to foreign governments in connection with projects abroad.¹³⁶ Such a complete change in the United States' anti-corruption strategy not only appears clearly unethical¹³⁷ but also poses

¹²⁸ Under Chapter 10 of the Directive, companies involved in the exploration, prospection, discovery, development, and extraction of minerals, oil, natural gas deposits or other materials, have to report to governments any "amount paid, whether in money or in kind," for those activities. See Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings.

¹²⁹ The Extractive Industries Transparency Initiative is a meritorious project, which promotes public awareness about how countries manage their oil, gas and mineral resources. See 'The Extractive Industries Transparency Initiative' *EITI* <<https://eiti.org>> accessed 05 December 2016.

¹³⁰ See 'In retreat. The multinational company is in trouble' *The Economist* (28 January 2017) <www.economist.com/news/leaders/21715660-global-firms-are-surprisingly-vulnerable-attack-multinational-company-trouble> accessed 6 February 2017.

¹³¹ As argued on the New York Times "Trump's 'authoritarian xenophobic' rampage has taken him to the White House." See Thomas B. Edsall, See 'The Peculiar Populism of Donald Trump' *The New York Times* (2 February 2017) <www.nytimes.com/2017/02/02/opinion/the-peculiar-populism-of-donald-trump.html?_r=0> accessed 11 June 2017.

¹³² Although Marine Le Pen lost the presidential election, it would be a mistake to underestimate her achievement. There is no doubt she has set an unprecedented record for the right-wing populist and nationalist political party, the Front National. See 'Even if defeated, Marine Le Pen has changed French politics' *The Economist* (4 May 2017) <www.economist.com/news/europe/21721659-france-more-divided-ever-even-if-defeated-marine-le-pen-has-changed-french-politics> accessed 11 June 2017.

¹³³ Nigel Farage, leader of the UK Independence Party, said June 23rd marked independence day for Britain. See 'After the vote, chaos' *The Economist* (25 June 2016) <www.economist.com/news/britain/21701264-britain-has-voted-leave-eu-what-follows-will-be-new-prime-minister-volatile-financial> accessed 11 June 2017.

¹³⁴ As clarified by Transparency International, whilst populist leaders like Donald Trump, Marine Le Pen, and Nigel Farage, are on the rise in part in response to corruption, their election only exacerbates widespread malpractices and social inequality. See Finn Heinrich, 'Corruption and inequality: how populists mislead people' *Transparency International* (25 January 2017) <www.transparency.org/news/feature/corruption_and_inequality_how_populists_mislead_people> accessed 6 February 2017.

¹³⁵ See U.S. Congress Joint Resolution H.J.Res.41 of 3 February 2017.

¹³⁶ See 'SEC Adopts Rules for Resource Extraction Issuers Under Dodd-Frank Act' *U.S. Securities and Exchange Commission* <www.sec.gov/news/pressrelease/2016-132.html> accessed 6 February 2017.

¹³⁷ As Rep. Maxine Waters, who is a ranking member of the House Committee on Financial Services, clearly underlined: "Striking Section 1504 would mean that Big Oil companies like ExxonMobil would be able to continue their questionable dealings with corrupt parties such as Vladimir Putin and Russia." See Rene Marsh,

the risk of triggering a domino effect that could let the world slip back to the old days where multinational corporations corrupted with impunity to secure profitable contracts. In fact, it is hard to believe that the other virtuous countries will continue to impose on their companies transparency rules that are more stringent than the ones applicable to the firms of the world's biggest economy.