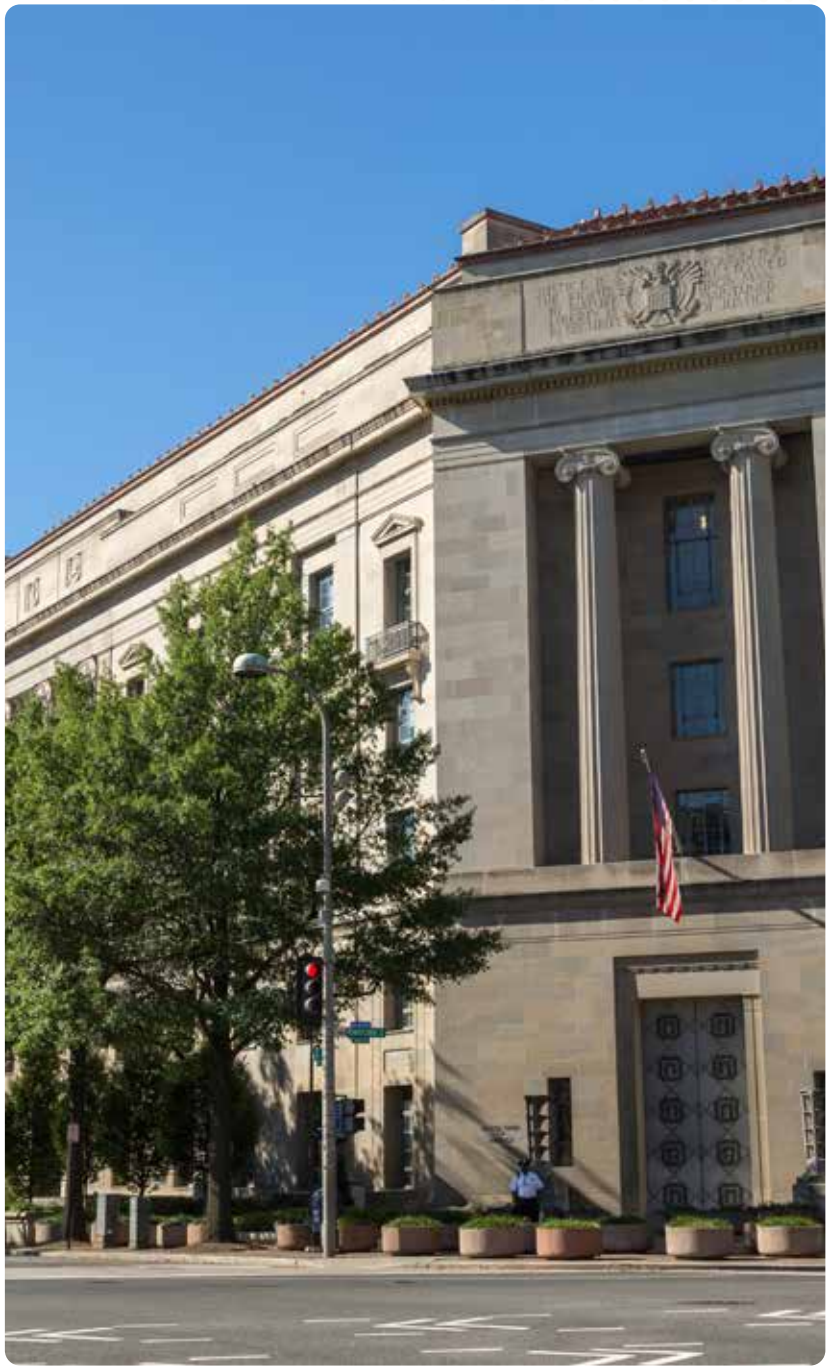

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ANTI-CORRUPTION 2022

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About the editor

John E Davis
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John E Davis is a member and coordinator of Washington DC-based Miller & Chevalier's Foreign Corrupt Practices Act (FCPA) and international anti-corruption practice group, and he focuses his practice on international regulatory compliance and enforcement issues. He has over 25 years of experience advising multinational clients on corruption issues globally. This advice has included compliance with the US FCPA and related laws and international treaties, internal investigations related to potential FCPA violations, disclosures to the US Securities and Exchange Commission (SEC) and US Department of Justice (DOJ), and representations in civil and criminal enforcement proceedings. He has particular experience in addressing corruption issues in West Africa, China, the former Soviet Union, Southeast Asia and Latin America.

Mr Davis has worked extensively with clients in developing and implementing internal compliance programmes, conducting due diligence on third parties, assessing compliance risks in merger and acquisition contexts, and auditing and evaluating the effectiveness of compliance processes. Additionally, Mr Davis focuses his practice on a range of other issues relating to structuring and regulating international trade and investment transactions.

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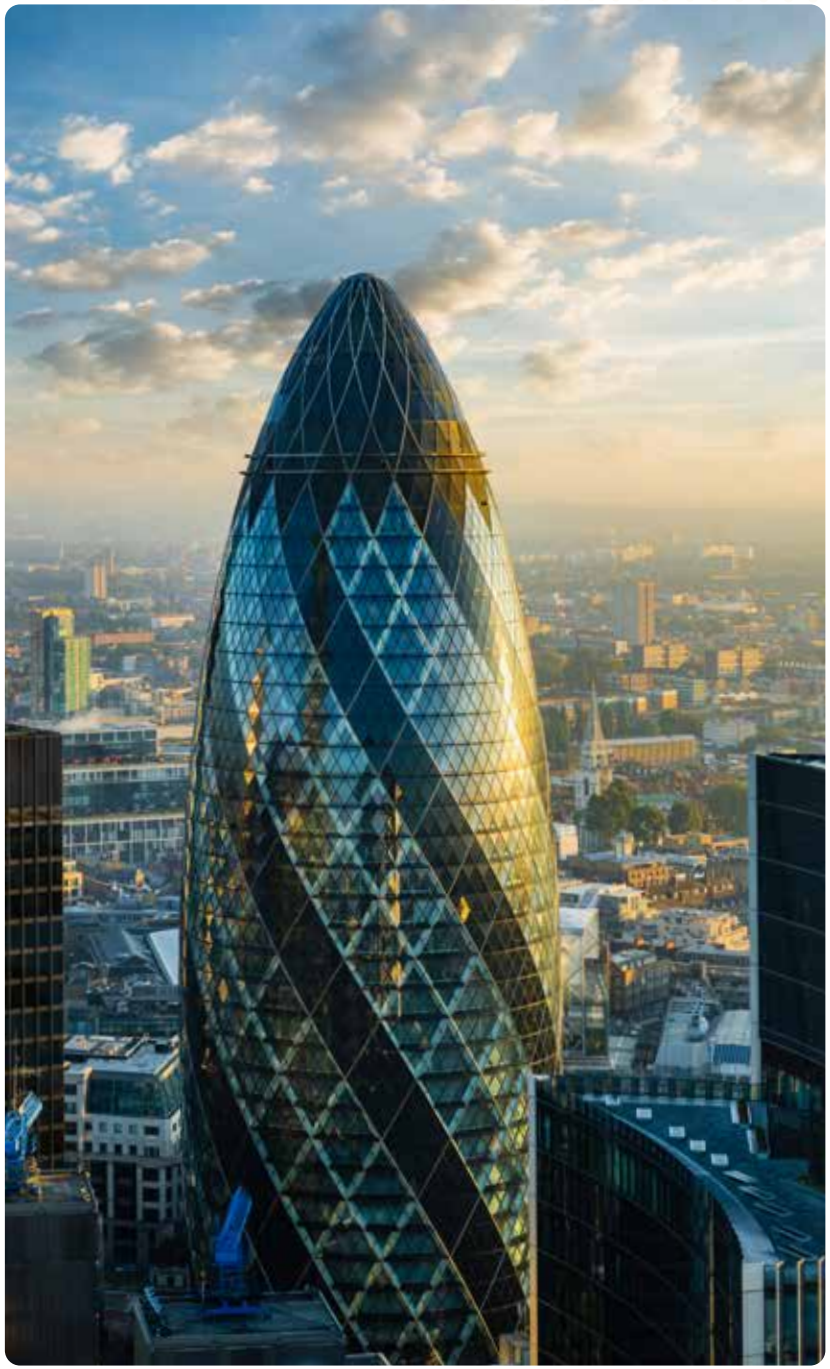

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Global trends

John E Davis is a member and coordinator of Washington DC-based Miller & Chevalier's Foreign Corrupt Practices Act (FCPA) and international anti-corruption practice group, and he focuses his practice on international regulatory compliance and enforcement issues. He has over 25 years of experience advising multinational clients on corruption issues globally. This advice has included compliance with the US FCPA and related laws and international treaties, internal investigations related to potential FCPA violations, disclosures to the US Securities and Exchange Commission (SEC) and US Department of Justice (DOJ), and representations in civil and criminal enforcement proceedings. He has particular experience in addressing corruption issues in West Africa, China, the former Soviet Union, Southeast Asia and Latin America.

In 2017, Mr Davis was appointed to serve as an Independent Compliance Monitor pursuant to an FCPA disposition following extensive vetting by the DOJ and SEC. This multi-year project recently concluded.

Mr Davis is a frequent speaker and trainer on FCPA issues and has written various articles and been quoted in media publications ranging from *Compliance Week* to *The Daily Beast* to *The Wall Street Journal* on FCPA compliance and related topics.

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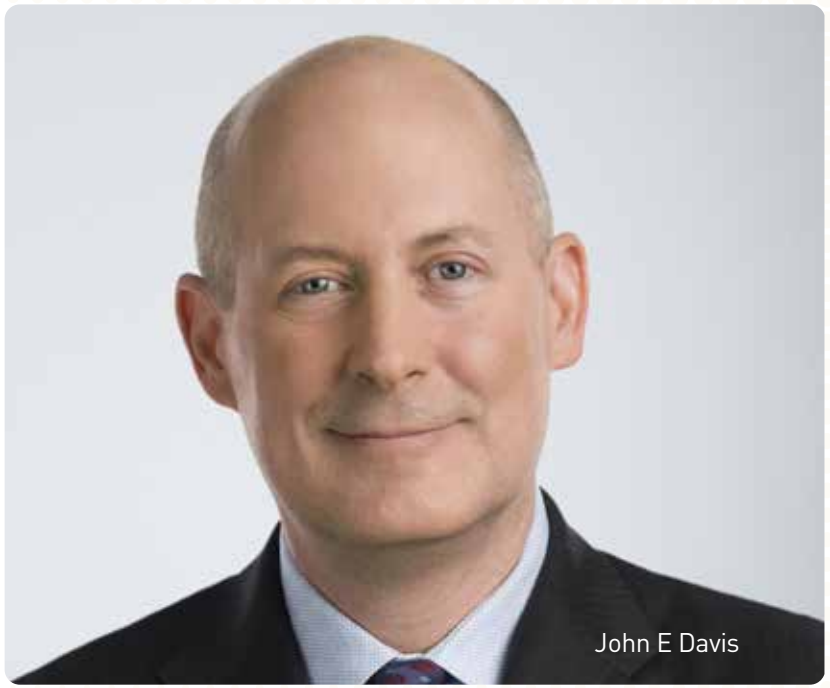
International anti-corruption efforts continue to attract attention from companies, investors and governments of both exporting and host countries and, in many places, populations in general. The problems of endemic corruption have been prominent factors in political upheavals experienced by countries such as South Africa, Malaysia, Israel and Peru – all of which are investigating or have convicted current or former heads of government for corruption. Indeed, on 22 August 2022, former Malaysian Prime Minister Najib Razak lost his final appeal on his corruption-related conviction and began serving his jail sentence. The United States, generally seen as an anti-corruption leader, experienced political discord over perceived domestic corruption during the Trump administration not seen since the era of the 1970s Watergate scandals. Even governments with less accountability to voters, such as those in China and Russia, evidence anxiety that corruption undermines their authority.

On the economics side, in 2018 the World Economic Forum estimated that the annual cost of corruption is roughly 5 per cent of the total global GDP – a figure that translated at that time to be about US$2.6 trillion. An estimate of 'between 2 and 5 percent from global gross domestic product' was cited by the US National Security Study Memorandum on corruption issued by President Biden in June 2021. These corruption costs figures have been questioned as to both sourcing and methodology and are considered by most experts to be significantly over-inclusive – they are likely to count economic costs from pendant but separate activities such as money laundering, other fraud, and perhaps even drug trafficking. That said, these ranges have been used to support various international anti-corruption efforts over the past several years.

Whatever their true scale, concerns regarding the corrosive political and economic effects of public corruption have provided an impetus for several multinational conventions designed to combat bribe payments and related issues. This started with the 1996 Inter-American Convention against Corruption, and accelerated with the


John E Davis

1999 Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention and two Council of Europe conventions (criminal and civil) that came into force in 2002 and 2003. The scope of these international obligations expanded significantly with the entry into force of the UN Convention Against Corruption (UNCAC) in December 2005 – which remains the centrepiece of UN anti-corruption efforts, as recently demonstrated by a political declaration adopted on 2 June 2021 in the aftermath of the UN General Assembly's special session on corruption, UNGASS 2021. The most important impact of these various treaties and other efforts was to require signatories to prohibit domestic and transnational corruption, and many countries have implemented laws that in significant ways mirror the provisions of the law that first focused specific attention on these issues – the 1977 US Foreign Corrupt Practices Act (FCPA).

> "Enforcement of anti-corruption laws around the globe has continued on an upward, if uneven, trend, though it was impacted significantly in 2020–2021 by the covid-19 pandemic."

While the grand political dynamics may not concern compliance professionals on a day-to-day basis, the growth of anti-corruption regulation globally has resulted in the need to focus not just on the long and assertive reach of the FCPA, but also on an expanding array of other national laws, some of which create different compliance standards or (in the case of laws or judicial decisions related to issues such as data privacy, national security or the application of legal privileges) may undermine key aspects of a company's compliance programme if not handled appropriately. Companies also increasingly need to assess potential liability risks in many jurisdictions, as multi-country, coordinated international enforcement (in some cases, led by non-US countries) continues to become the norm in the anti-corruption sphere.

The effects of the covid-19 pandemic and related public lockdowns on governments' and companies' anti-corruption activities around the world started to dissipate in mid-late 2021. There is more public evidence that multilateral investigations are moving forward, and travel (and the ability to meet witnesses in person) has increased. Companies' compliance activities are still, in some cases, impacted by budget constraints, and many are cautious of spending in the face of economic headwinds evident in mid-2022. However, enforcement activities and expectations by governments often do not account for such budgetary issues, and companies will need to continue to find creative ways to effectively address their corruption risks.

International enforcement trends

Enforcement of anti-corruption laws around the globe has continued on an upward, if uneven, trend, though it was impacted significantly in 2020–2021 by the covid-19 pandemic. Reporting on enforcement by the signatories of the OECD Anti-Bribery Convention is considered by many to be the best yardstick to measure this progression, as the OECD Convention parties include most of the major capital-exporting countries (which can be seen as funding the supply side of cross-border corruption) as well as other key economies, such as Russia and Brazil. The OECD also evaluates each signatory's implementation of Convention obligations and issues detailed public reports that include critiques and recommendations for improvement.

The latest data on enforcement collected by the OECD Working Group on the Anti-Bribery Convention (released in December 2021 and covering through the end of 2020) show that at least 684 individuals and 245 entities have been sanctioned pursuant to criminal proceedings for foreign bribery by various Convention signatories from the Convention's 1999 entry into force to the end of 2020. The OECD report also states that 485 corruption-related investigations were ongoing in 32 countries as of the end of 2020. In 2020, 13 Convention signatories were conducting 181 prosecutions (against 167 individuals and 14 entities) related to offences defined by the Convention or relevant applicable country laws.

The non-profit advocacy group Transparency International (TI) has released its own assessments of the effectiveness of the OECD Anti-Bribery Convention. The latest TI report on Exporting Corruption

(published in October 2020) provides a less sanguine outlook: TI asserts that 13 'major exporting' countries accounting for about 35 per cent of world exports' 'actively' or 'moderately' enforce their anti-corruption laws. The TI report states that only four countries (Israel, Switzerland, the United States and the UK) 'actively' enforce their anti-corruption laws, while nine other countries (Australia, Brazil, France, Germany, Italy, Norway, Portugal, Spain and Sweden) manage 'moderate' enforcement. TI cites 15 other countries with 'limited' enforcement, though the report states that the moderate and limited levels of enforcement 'are considered insufficient deterrence'. Most tellingly, TI noted that as of the end of 2019 there was little or no enforcement by 19 countries, representing 36.5 per cent of the world's exports. That group includes China, Hong Kong, India, Japan, Mexico, Russia and Singapore. TI asserted in the report that 'active enforcement against foreign bribery has significantly decreased by more than one-third since 2018.' Of interest to compliance professionals, the TI report stated that 'most OECD Convention countries still fail to publish foreign bribery enforcement information, including statistical data and information on charges filed and outcomes in cases of foreign bribery and related money laundering.' The organisation's experts also noted that 'court decisions are often hard to access' and that 'information about non-trial resolutions is restricted' – making the tracking and understanding of enforcement trends and risk areas difficult.

In a separate report issued in September 2020, the OECD (with support from the G-20, an organisation discussed below) issued the results of a study on foreign bribery and the role of intermediaries, managers, and gender. The primary data source was information collected by the OECD on '115 foreign bribery resolutions against companies concluded [by various OECD members states] between January 2014 and June 2018'. Confirming earlier studies by the OECD and other organisations, the report found that 'an intermediary was involved in 81 per cent of cases (93 out of 115) and, in almost all

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cases, the intermediary made at least one direct bribe payment.' Summarising another aspect of the study, the report stated that '[e]nforcement data shows that senior management is the hierarchical level of individuals most frequently involved in bribery committed by a company … in 75% of the cases (87 out of 115), a senior manager was involved in the scheme.' The report also noted that 'gatekeepers' (eg, lawyers, accountants) played roles in various cases, but that more study and better data was needed to assess the frequency of such involvement. As to gender, the report laid out steps for obtaining better data. All of this information is relevant to how compliance professionals in multinational companies assess corruption and international enforcement risks.

The OECD Antibribery Working Group is also focusing on enforcement as part of its Phase 4 monitoring of implementation of the OECD Anti-Bribery Convention by signatory countries. The OECD launched Phase 4 in 2016 and currently anticipates the review lasting through 2024. The Working Group's Phase 4 guide states that the review is focusing on: 'the progress made by Parties on weaknesses identified

in previous evaluations; enforcement efforts and results; any issues raised by changes in the domestic legislation or institutional framework of the Parties' and 'good practices which have proved effective in combating foreign bribery and enhancing enforcement'. Each treaty member will be the subject of a written report during this phase of the Convention's monitoring. Phase 4 reports have already been issued for such countries as the United States, UK, Australia, Chile, France, Germany, Greece, Hungary, Japan, Korea, Mexico, the Netherlands, Norway and Switzerland. In a related development, the Working Group will have a new chair as of 2 January 2023, Daniëlle Goudriaan, who is currently the European Prosecutor for the Netherlands. She will replace Drago Kos, who has chaired the Working Group since 2014.

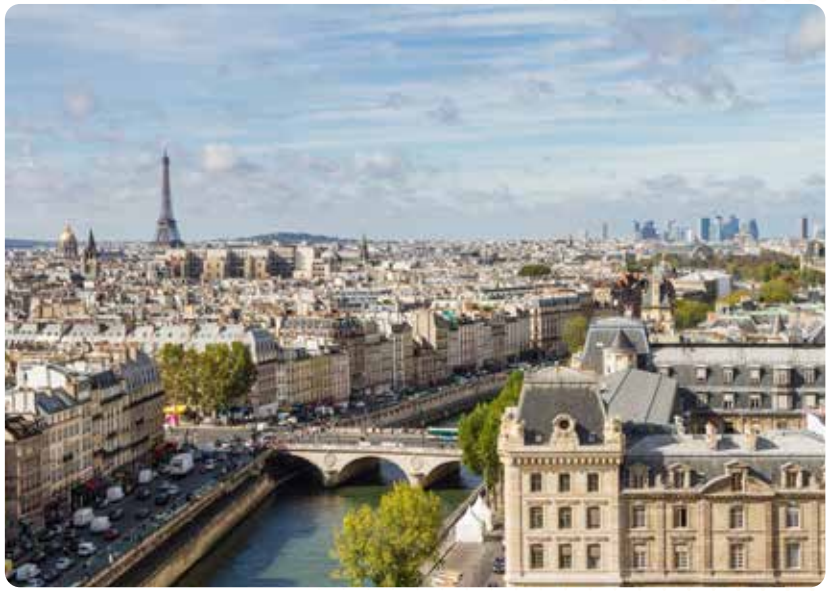
In November 2021, the OECD issued a long-awaited update of its Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions. The original Recommendation was published in 2009 and the document has been under review for several years. Among the new sections or areas of discussion of interest to compliance professionals are the following: recommendations related to raising awareness of and addressing the 'demand-side' of bribery; discussions on enhancing international cooperation and mutual legal assistance in investigations; recommendations on upgrading standards for protection of whistleblowers; discussions related to the interplay and potential hurdles created by data protection laws on investigations; issues in public procurement, including enhanced scrutiny by governments of compliance risks presented by contractors; standards for the use of non-trial resolutions (such as DPAs, NPAs, leniency agreements and the like) by OECD signatories; and recommendations on how enforcement authorities can incentivise corporate compliance.

Following the political declaration and related efforts resulting from the June 2021 UNGASS session, the conference of the UNCAC state parties held their ninth session in December 2021. Several

> "The IMF, as part of its 1997 Governance Policy, has long assessed and attempted to address governance issues."

resulting resolutions focused on international cooperation (and will be discussed below). With regard to enforcement, Resolution 9/2 requested the United Nations Office on Drugs and Crime (UNODC) to provide assistance and undertake various actions including preparing a 'comprehensive report … on the state of implementation of the Convention after the completion of the current review phase, taking into account information on gaps, challenges, obstacles, lessons learned and best practices in preventing and combating corruption, in international cooperation and in asset recovery since the Convention entered into force'. In addition, the conference authorised the convening of an 'intersessional meeting' of the state parties in September 2022. Among the agenda items for that meeting is a discussion of '[g]ood practices, gaps, challenges, obstacles and way forward in the achievement of the commitments contained in the section of the UNGASS political declaration on criminalization [of bribery and public corruption] and [related] law enforcement'.

Several other multinational bodies have focused on anti-corruption enforcement and related national strategies for reducing public



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corruption. The IMF, as part of its 1997 Governance Policy, has long assessed and attempted to address governance issues that can threaten to divert or undermine the financial assistance provided by the institution to specific countries. In April 2018, the IMF's Executive Board adopted a 'new framework' for 'enhanced fund engagement' on governance and corruption issues. Of the four elements of this new framework, two are noteworthy in regards to enforcement trends. The first element 'is designed to enable the Fund to assess the nature and severity of governance vulnerabilities – including … the severity of corruption'. The focus of such analysis will be larger-scale corruption issues – ones that arise related to the IMF's 'surveillance' of economies 'when [such issues] are sufficiently severe to significantly influence present or prospective balance of payments and domestic stability', or that 'affect the use of Fund resources'. The framework paper notes, in particular, different types of corruption indicators and some initial concepts related to how the IMF should weigh them.

The framework notes specifically that 'an effective strategy requires action to curb the facilitation of corrupt practices by private actors, particularly in the transnational context.' Thus, the fourth element will focus 'on measures [in countries under review] designed to prevent the private actors from offering bribes or providing services that facilitate concealment of corruption proceeds'. To that end, 'irrespective of whether a member is experiencing severe corruption itself, the Fund urges all members to volunteer to have their own legal and institutional frameworks assessed in the context of bilateral surveillance for purposes of determining whether: (a) they criminalize and prosecute the bribery of foreign public officials; and (b) they have effective…system[s]….designed to prevent foreign officials from concealing the proceeds of corruption.' The framework notes that, if such an assessment occurs, the country would be benchmarked against applicable international standards to which the country has agreed, such as those in the OECD Anti-Bribery Convention or the UNCAC. Significantly, the framework states that '[t]he Fund should continue to avoid interference in individual enforcement cases.'

In June 2020, the IMF released a staff analysis of implementation to date of the new framework. The report found, among other things, that 'a new centralized process to systematically analyse governance and corruption vulnerabilities for all Fund members – a core aspect of the Framework – has been put in place'; 'the Framework has supported deeper discussions on governance and anti-corruption issues' related to surveillance reports; the framework has supported efforts to link 'specific conditionality related to governance and anti-corruption reforms, with governance improvements now being a core objective of many programs' supported by the IMF; and technical assistance efforts related to governance have focused in part on anti-corruption aspects. The report also noted areas for continued work. The next formal evaluation of the framework was originally scheduled for mid-2021. However, during the pandemic the IMF has focused on governance measures tied to emergency covid-19 lending, which has for now taken priority over an evaluation of the larger

framework (though the covid-19 experience likely will signal many 'lessons learned').

The IMF's attention to countries' anti-corruption enforcement frameworks dovetailed with efforts surrounding the 2020 G20 meetings focused on further implementing the G20's 2017 High Level Principles on Organizing Against Corruption. These principles include the need for 'administrative measures' that deter corruption and encourage transparency across government agencies and on international cooperation relating to technical assistance and enforcement. In the aftermath of the first G-20 Anticorruption Ministerial Meeting held in October 2020, the G-20 ministers issued a communique that summarised several initiatives taken during the year and set out further goals. The ministers acknowledged the 'existing international anti-corruption architecture' – including the UNCAC, the OECD Anti-Bribery Convention and the Financial Action Task Force (FATF) standards – and pledged 'to more effectively implement our existing obligations and commitments [many of which involve enforcement efforts]... recognising that these instruments should serve as the foundation for future efforts to expand international cooperation and coordination against corruption and related challenges.' The ministerial meeting also approved three new 'high level principles' related to various anti-corruption-related issues, including High-Level Principles for the Development and Implementation of National Anti-Corruption Strategies.

In October 2021, the G-20 ministers adopted an Anti-Corruption Action Plan for 2022–2024 that builds on the 2020 initiatives. Highlights of the plan related to enforcement include focusing on the effective implementation of the UNCAC; ensuring that 'each G20 country has a national law in force to criminalize [foreign and domestic] bribery'; '[a]ddress[ing] the misuse of legal persons and arrangements such as shell companies for corruption'; enhancing anti-money laundering standards; 'encourag[ing] active assistance, where possible, in identifying, seizing, and confiscating stolen assets ... and locating

"In October 2021, the G-20 ministers adopted an Anti-Corruption Action Plan for 2022–2024."

corrupt actors'; and 'explor[ing] ways to strengthen joint or related anti-corruption investigations and efforts to deny safe havens by G20 countries'. One other goal endorsed by the ministers was 'possible adherence of all G20 countries to the OECD Anti-Bribery Convention' – in recognition of the OECD's robust monitoring and cooperation mechanisms. This goal likely builds on a July 2021 report prepared by the OECD at the G-20's request on the status of implementation of the G-20's anti-corruption commitments, which identified a variety of areas for improvement.

The entity that monitors implementation of the Council of Europe conventions, GRECO, is in its fifth round of evaluations of member states' compliance with their treaty obligations. A focus for this round, which began in March 2017, is 'preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies'. GRECO has emphasised that this review in part covers protection of whistle-blowers. Meanwhile, despite disruptions to its schedule created by covid-19 travel restrictions, GRECO has continued to issue reports related to member countries'

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compliance with recommendations from earlier rounds of reviews, each of which has a different focus (for example, measures related to the integrity of legislators and judges). In May 2020, GRECO, in conjunction with the OECD and the French Anti-Corruption Agency (AFA), issued a report on 'Global Mapping of Anti-Corruption Authorities' – which contains information on relevant national enforcement authorities as well as the results of surveys of those authorities' status and powers. Among its conclusions, the report noted that many authorities' powers are focused on investigation of 'natural persons' (as opposed to corporate entities) and that '[l]ess than half of respondent [authorities] have sanction mechanisms and those typically are of administrative nature.'

In December 2021, the OECD, UNODC and GRECO issued a joint paper (as part of the UNCAC state parties session noted above) on '[e]nhancing synergies between anti-corruption peer review mechanisms'. In the paper, the respective organisation secretariats pledged to '[s]trengthen our active dialogue with a view to enhancing the performance of [the 3 bodies'] anti-corruption review mechanisms, maximising the effectiveness of our work and avoiding duplication of efforts, including by sharing experience on good practices and challenges in the conduct, development and planning of peer reviews.' The three entities also committed to '[i]mprov[ing] cooperation in particular with a view to enhancing follow-up to recommendations' – which could allow the UNCAC to bring more pressure and expertise to bear on the much larger group of signatories that its review mechanisms cover.

Trends in international cooperation and legal assistance

International cooperation through mutual legal assistance provisions of bilateral and multilateral treaties (including, most prominently, the OECD Anti-Bribery Convention, the OAS Convention, and the UNCAC) continues to accelerate. Public data on the actual effects of multilateral legal assistance is difficult to find, but as an initial benchmark, the OECD's comprehensive 2014 Foreign Bribery Report found that '13 per cent of foreign bribery cases are brought to the attention of law enforcement authorities through the use of formal and informal mutual legal assistance between countries for related criminal investigations accounts'.

A more recent OECD report from December 2017, entitled The Detection of Foreign Bribery, stated that 7 per cent 'of bribery schemes resulting in sanctions have been detected through mutual legal assistance (MLA) requests'. The drop in percentage may be the result of the overall increase in the number of bribery sanctions in the intervening years (which could show a numerical increase in MLA-based cases as a percentage drop in the resulting larger universe), as well as possible differences in counting methodologies. It is also noteworthy that these statistics only cover cases 'detected' through MLA; the figures do not appear to document assistance in cases that have arisen through other methods, such as company self-reporting. The rise in publicly announced enforcement dispositions involving multiple country authorities over the past few years provides

> "In July 2021, the OECD published updated information on 'country contact points for international cooperation'."

strong evidence that cooperation efforts (at least among a select group of countries – all OECD members) have increased, and the 2017 OECD report notes the proliferation of formal and informal cooperation mechanisms and arrangements.

Since 2015, the OECD has hosted meetings of the Global Network of Law Enforcement Practitioners against Transnational Bribery (GLEN) – a 'technical network for peer learning and exchanging … real life … experiences and good practices among law enforcement practitioners who focus primarily on fighting transnational bribery'. The most recent meeting occurred in June 2022 and focused on the 'most challenging aspects of the detection, investigation and prosecution of corruption during crisis situations' including the covid-19 pandemic. The OECD also hosts twice-yearly confidential meetings of law enforcement personnel from signatory countries – meetings that, according to recent OECD reports, 'have proven to be instrumental in fostering contacts between law enforcement officials and facilitating international co-operation in foreign bribery cases'. In July 2021, the OECD published updated information on 'country contact points for international cooperation' for all Convention member states, including mutual legal assistance and extradition requests.

The updated 2021 OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions includes a section on international cooperation (section XIX). Provisions aimed at enhancing bilateral and multilateral cooperation recommend, among other things, use of both formal and informal processes (the latter consistent with relevant laws), employment of technologies to speed information sharing, ensuring that relevant statutes of limitations allow for the time needed for multinational sharing of evidence, rapid responses by national authorities to information or allegations shared by multilateral institutions (such as development banks), and 'setting up joint or parallel investigative teams' of representatives from involved countries under appropriate circumstances.

The G-20 and the UN have taken significant steps recently to enhance multilateral legal assistance in the corruption context. In October 2020, the G-20 Anticorruption Ministerial Meeting approved the Riyadh Initiative for Enhancing International Anti-Corruption Law Enforcement Cooperation. This initiative is designed to supplement existing formal multilateral assistance mechanisms, such as those established by the OECD, FATF and the UNCAC, as well as other cooperative efforts, such as the INTERPOL channel for police-to-police communication or the Egmont Group of Financial Intelligence. The ministers emphasised 'the importance of informal means of cooperation and exchange of information between law enforcement authorities' in addition to the formal mechanisms, as well. A key goal of the initiative is the establishment of a Global Operational Network of Anti-Corruption Law Enforcement Authorities to be based in Vienna, Austria. The goal of the network was to cooperate closely with UNODC to build a secure communications network, sponsor training and forums, and coordinate with other anti-corruption law

enforcement networks, such as the OECD Global Law Enforcement Network and the INTERPOL/StAR Global Focal Point Network.

After meetings in the spring of 2021 by various task forces and a panel of experts that established concept documents and a roadmap to implementation, the new GlobE Network was launched during the UNGASS meetings in early June 2021. UNODC was designated to function as the network's permanent secretariat, and the roadmap sets out work plans for three different task forces: one to discuss membership, structure and financing of operations, one to collect and expand resources available to network members, and one 'to discuss complementarity and synergies between the GlobE Network and other relevant operational and liaison networks'. The GlobE Network's charter was adopted in November 2021. The timing for completion of the network's various initiatives remains unclear, but effective implementation of this initiative could enhance multilateral enforcement cooperation, and thus bears watching.

In December 2021, the ninth session of the conference of UNCAC state parties adopted two resolutions specifically targeted at international law enforcement cooperation in anti-corruption matters. The first was the 'Sharm el-Sheikh declaration on strengthening international cooperation in the prevention of and fight against corruption during times of emergencies and crisis response and recovery' – which was the primary resolution listing the key actions and plans of the parties. Another resolution (9/5) addressed '[e]nhancing international anti-corruption law enforcement cooperation' and called for all parties to join the GlobE Network and to use the network and other available bodies to maximise cooperation in corruption-related investigations. International cooperation is also one of the agenda items for the UNCAC intersessional meeting scheduled for September 2022, which will cover 'making use of existing regional and international networks, denying safe haven for those responsible for corruption and ensuring the widest possible measure of mutual legal assistance'.

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Most of the recent corporate corruption investigations that have resulted in significant penalties have featured international cooperation among authorities. For example, the Car Wash scandal in Brazil has resulted in extraordinary international cooperation – recent examples being significant settlements involving Petrobras in late 2018, TechnipFMC in mid-2019, J&F Investimentos and Vitol in late 2020, and Samsung in late 2019 and early 2021 (the latter date being the execution of a final leniency agreement between Samsung and the Brazilian authorities).

The Car Wash enforcement task forces were formally disbanded in the beginning of 2021, though some of their members transferred to other departments of Brazil's Federal Public Prosecutor's Office and certain investigations and trials continue. According to the Public Prosecutor's Office, the Car Wash investigations have led to more than 1,000 international cooperation requests involving 70 countries. Over 1,500 individuals have been charged, and more than 200 individuals have been convicted in cases that have been confirmed at an appellate court level. The Curitiba Car Wash Task Force estimated

that approximately 4.3 billion reais in funds were returned to the Brazilian government as a result of the operation.

As another measure of the growth of international cooperation, it is noteworthy that eight of the top 10 largest global resolutions related to the US FCPA (historically the most active anti-corruption enforcement regime) were completed in 2016 or later: Airbus ($3.92 billion – France, UK, US); Odebrecht/Braskem ($3.77 billion – Brazil, US, Switzerland, Panama); Goldman Sachs ($2.9 billion – US, UK, Singapore, Hong Kong, Malaysia); Petrobras ($1.78 billion – US, Brazil); Telia ($965 million – US, Netherlands, Sweden); Rolls-Royce ($816 million – UK, US, Brazil); VimpelCom ($795 million – US, Netherlands); and Glencore ($650 million (and counting) – US, Brazil, UK, Switzerland).

Despite these trends, there are data that suggest that international cooperation still has a long way to go before becoming the norm across the world. The July 2019 OECD/UN report on the G-20 2030 Sustainability Goals noted above found that '[w]hile all G20 countries can use the UNCAC as a legal basis for mutual legal assistance, extradition or law enforcement co-operation, few countries regularly do so in practice.' This finding directly underlies the recent activities to establish the GlobE Network and the G-20 ministerial commitments to more active use of mutual legal assistance frameworks contained in the UNCAC and OECD Convention treaties.

International cooperation can often be difficult and time-consuming. A survey by the OECD conducted in December 2015 indicated that '70 per cent of anti-corruption law enforcement officials report that mutual legal assistance challenges have had a negative impact on their ability to carry out anti-corruption work.' The October 2020 TI Exporting Corruption report noted that, in addition to sometimes restrictive legal requirements, mutual legal assistance 'processes often suffer from limited resources, lack of coordination, and long delays.' Other issues cited by the report include 'differences in

> "The Car Wash scandal in Brazil has resulted in extraordinary international cooperation."

legal and procedural frameworks'; 'administrative delays'; 'lack of resources and training'; 'dual criminality requirements'; and 'lack of data' on mutual legal assistance statistics, successes and challenges within many specific countries.

A scoping paper prepared by the OECD, UNODC and the Financial Action task Force (FATF) for the G-20 in 2020 listed dual criminality requirements, bank secrecy laws, short or varying statutes of limitation, the lack of systems in some countries to impose liability on 'legal persons' (eg, companies) and 'undue influence' in some countries over decisions on whether to provide legal assistance as key challenges for multilateral cooperation in corruption actions. A set of 'think pieces' tied to the G-20 meetings in 2021 described other 'operational… difficulties' such as 'weaknesses in national police', 'issues of inter-agency coordination, limited human resources, inadequate technological and institutional capacities, language barriers,' 'regulations on data sharing', and 'lack of trust' between national enforcement agencies. The paper noted that many participants considered the 'process of formal mutual

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legal assistance to be lengthy and burdensome' and that 'formal cooperation often tak[es] significant amounts of time (months or even years).' Countries do not often explore 'the potential of informal and direct law enforcement cooperation'. Many of the multilateral initiatives begun in the past couple of years are designed to address these challenges, but some of the cited issues will remain as significant hurdles for cooperation for years to come.

For companies under investigation, dealing with even the possibility of multiple investigations by different government authorities can create significant challenges related to coordination of sometimes competing government priorities, additional costs and the quantification of liability risks (the last especially in countries where investigators are inexperienced or not subject to effective due process requirements).

International guidance on anti-corruption compliance programmes

The US authorities in charge of enforcing the FCPA have set out the basic elements of what they consider to be an 'effective' anti-corruption compliance programme. Due to the active anti-corruption enforcement undertaken by the United States over at least the past 20 years, these elements have influenced the development of many of the compliance standards by multinational bodies and other countries that are discussed in this section. The US authorities initially provided this guidance through a series of annexes to specific investigation dispositions, which the agencies over time revised to add details based on issues identified by them and compliance professionals. The culmination of that effort is contained in the US agencies' publication 'A Resource Guide to the US Foreign Corrupt Practices Act' – the second edition of which was issued in July 2020. The DOJ also has issued several versions of a guidance document (the most recent update was in June 2020) to help prosecutors evaluate the effectiveness of compliance programmes of companies under investigation. The guidance walks through a series of questions focusing on various programme elements and in some cases implies preferred responses, though the documents do not provide benchmarks.

Similarly, the UK Ministry of Justice in 2011 issued guidance regarding what it considers to be 'adequate procedures' for companies to put into place to prevent bribery; these are used to determine whether a company has a defence against a UK Bribery Act charge that it failed to prevent bribery by an associated person. More recently, in January 2020, the UK SFO issued its own guidance on compliance programmes, which makes clear the SFO's expectation that companies under investigation must ensure that they can provide evidence of an effective, tailored and risk-based compliance programme if they want to maximise their positions with respect to the SFO's prosecutorial decisions or their eligibility for a DPA upon the completion of the investigation.

Several other countries in the past few years have enunciated standards for evaluating corporate compliance programmes under their national anti-corruption laws. For example, France issued its anti-corruption guidelines under its Sapin II legislation in

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December 2017. Among other details, the guidelines describe eight characteristics of a 'coherent and indivisible [compliance] policy framework' that largely track international practice; the importance of these guidelines was reinforced by the June 2019 guidance on the eligibility of companies for French CJIPs. In July 2020, the French AFA, as part of its annual report, summarised several findings regarding the quality of corporate anti-corruption programmes based on AFA company audits following the 2019 fiscal year, including that: (1) the commitment of company boards of directors to anti-corruption compliance is progressing but remains generally insufficient; (2) the methodology used by companies to establish risk mapping and third-party assessments is often insufficiently precise (as contrasted with codes of conduct, training and whistle-blowing procedures); and (3) violations of Sapin II's compliance requirements have related primarily to non-compliance or failure to implement particular compliance procedures rather than to a total lack of anti-corruption compliance procedures. In March 2022, the AFA and PNF published guidance for companies on conducting corruption investigations that included a section on compliance programme remediation requirements, including risk mapping, training and management of third-party risks.

The May 2020 GRECO/OECD/AFA survey discussed above also touched on the prevalence of anti-corruption standards in various countries – both in the public sector and among private companies. The survey found that 'the adoption of codes of conduct is more widespread than risk mapping, and that both are rarely mandatory in the private sector.' The report noted further that '[c]orporate responsibility to detect and prevent corruption is rarely established by law. Even though some companies do introduce anticorruption measures on a voluntary basis, the absence of legally binding commitments might make it difficult to ensure a systematic approach to compliance.' Thus, while some countries have joined the United States in various efforts to push companies subject to their laws to build and fund compliance programmes that deter corrupt behaviour, companies in many other countries, including some capital exporters, are not subject to such incentives or requirements.

International bodies have long focused on issuing their own guidance regarding the structure and critical components of corporate compliance programmes. The OECD has led the field in this area, with its first Guidelines for Multinational Enterprises issued in 1976. The seventh guideline stated that companies should 'not render – and they should not be solicited or expected to render – any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office'. The OECD has updated these Guidelines several times, with the current 2011 version containing more expansive language. Pendent to these guidelines, the OECD has issued general Due Diligence Guidance for Responsible Business Conduct (the latest version is dated 2018), as well as sector-specific due diligence guides, all of which cover corruption risks among other issues.

The OECD's revised 2021 Anti-Corruption Recommendation, like its 2009 predecessor, contains two annexes. The second annex covers the Good Practice Guidance on Internal Controls, Ethics, and Compliance. This document lists key elements of an anti-corruption compliance programme and related accounting controls. A review of the updated annex shows the influence of the US authorities' work on similar guidance (as well as the efforts by the UK and France), as many of the elements are the same. New areas covered in the guidance include a section on mergers and acquisitions (M&A) due diligence and the importance of termination and audit rights in the management of compliance risk created by business partners. As of the date of this publication, the revised 2021 OECD Good Practice Guidance represents the leading international standard on corporate compliance programmes, and I suggest that multinational companies use it as a key benchmark for their own programmes.

In September 2020, the OECD published the results of a study on Corporate Anti-corruption Compliance Drivers, Mechanisms and Ideas for Change The report focuses on '[w]hat motivates companies to adopt anti-corruption compliance measures, and how companies (including SMEs) could further be incentivised to do so', as well as '[w]hat types of measures companies currently adopt to prevent and detect corrupt conduct, including what measures could be further developed'. The companies that participated in providing data for the study ranged across various regions and corporate sectors. Among the many findings discussed, the report noted that concerns about enforcement risk and company reputation were primary drivers for the creation and upkeep of compliance programmes, although the importance of 'memorializing' or incentivising a firm's ethical culture (either due to board/senior management priorities or to respond to investor or customer imperatives) was also noted. Other sections of the report discuss how the sampled companies perform corruption risk assessments and the primary types of anti-corruption measures that the companies have adopted. I commend the report to any compliance professional wishing to benchmark their efforts using data collected on a global scale.

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The UNCAC established in its article 12.2(b) that all of its signatories 'shall take measures' to 'prevent corruption in the private sector', including 'promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business'. The UNCAC itself does not define those standards, but this obligation covers all of the convention's parties. The UNCAC article thus globalises the idea that companies operating internationally should establish compliance programmes and related systems. UNODC issued a detailed Anti-Corruption Ethics and Compliance Handbook for Business in November 2013; the handbook discusses, in part, risk assessment issues and programme elements, and was developed with input from the OECD and the World Bank.

"The revised 2021 OECD Good Practice Guidance represents the leading international standard on corporate compliance programmes."

The International Chamber of Commerce (ICC) issued its first set of Rules on Combating Corruption in 1977. The ICC updated its rules in 2011, and the current version contains specific advice on what the ICC considers to be the essential elements of a compliance programme. The rules are also part of a comprehensive 2017 ICC Business Integrity Compendium that contains other guidance from the organisation on such relevant compliance topics as gifts and hospitality, use and monitoring of agents and intermediaries, and whistle-blowing.

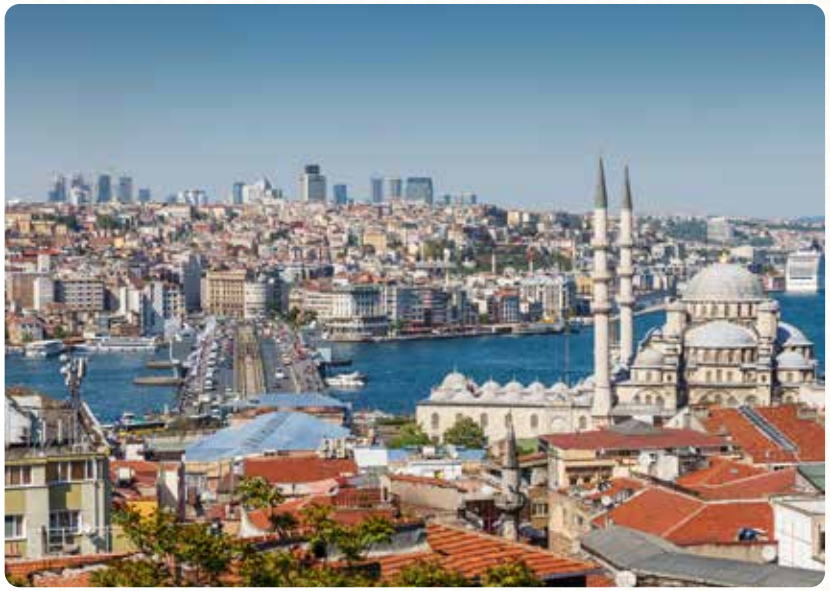
On 15 October 2016, the International Organization for Standardization (ISO) issued a new standard for 'anti-bribery management systems', called ISO 37001. The goal of this exercise was to create an internationally recognised standard for such compliance systems that would allow for certification by third-party auditors. The standard acknowledges that it is built on previous guidance from the OECD, ICC, TI and 'various governments', though the standard differs in certain respects on requirements and coverage (for example, risks from mergers and acquisitions are not specifically covered). The standard also contains information regarding how companies can achieve the relevant ISO certification. In May 2021, the ISO and the United Nations Industrial Development Organization (UNIDO) published a 'practical guide' to the ISO standard.

Based on available public information, companies and countries have generally been slow to adopt this standard. Several companies, including Eni, Alstom SA, Legg Mason (all of whom have been the subject of FCPA-related cases), have announced that they have been certified under the standard after assurance audits by independent organisations. Several other prominent multinationals, including Microsoft and Walmart, initially said that they would adopt the standard for their operations, but public updates on these efforts have been scarce (though it appears that at least some Microsoft businesses have been certified). There has been criticism within the compliance community regarding both the content of the standards

and the accreditation process for certifying bodies. Some enforcement officials have warned companies, moreover, that ISO certification of their compliance programmes should not be considered as a safeguard against prosecution. For example, in November 2016, a DOJ official stated that while 'certification is a factor, the DOJ would have a lot of questions about what was done' and would evaluate 'how the program was adopted at the time'. More recently, another DOJ official stated that the certification 'may be helpful, but the DOJ will look at your program, not a proxy for your program' and that DOJ will want 'evidence that what you're doing is working'. It is perhaps notable that the DOJ's June 2020 guidance on measuring the effectiveness of compliance programmes does not on its face give any weight to such certifications.

Efforts to measure and deter 'demand' for bribes

While corporate enforcement actions and compliance programmes are designed to constrain the 'supply' of bribe payments to public officials by businesses and their associated personnel, there is also an increasing focus on attempting to gauge and deter the 'demand' side. The UNCAC/G-20 anti-corruption drives noted above have focused heavily on combatting such demand, advocating for expanded national laws to deter self-enrichment by officials (with higher penalties), greater transparency regarding assets of public officials, and more extensive efforts at cooperation to find and recover assets held by corrupt officials and 'kleptocrats'. The 2021 OECD Recommendation also contains a section on 'addressing the demand side'. The current US administration is focusing extensively on the demand side, as well – the December 2021 Strategy on Countering Corruption focuses intensively on, for example, directly criminalising demands for bribes; 'curbing illicit finance' through new beneficial ownership disclosure rules, expanded 'know your customer' requirements and other methods; and 'holding corrupt actors accountable' through various means, including expanded economic sanctions and asset seizure efforts. Indeed, while supply-side



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enforcement will continue, the biggest changes in national and multilateral anti-corruption regimes over the next several years likely will occur on the demand side.

On a practical level for companies, because today's standards require that compliance programmes be designed to mitigate the actual risk faced across the globe, there is a need for compliance professionals to follow efforts to measure the actual likelihood that corrupt payments will be solicited in specific countries of operation. TI remains the most cited resource for this information. Since 1995, TI's Corruption Perceptions Index (CPI) has ranked countries (180 in 2021, the latest survey) by perceived levels of corruption. Those countries ranked lower on the survey are perceived as more corrupt, and thus are considered to harbour greater risks of official corruption. Though some private consultancies are now offering different or more complex data sets to provide alternative measures, TI's CPI rankings are still frequently used by companies (and sometimes by enforcement agencies) as measures of potential overall corruption risks in the countries ranked.

In May 2022, the European Research Centre for Anti-Corruption and State-Building (ERCAS), the Anti-Corruption & Governance Center and the Center for International Private Enterprise launched the Corruption Risk Forecast (CRF). The CRF is based on certain data indicators, such as budget transparency, administrative burden, judicial independence, press freedom and e-citizenship, to measure corruption levels in more than 120 jurisdictions and provides trends analysis. The scope of data is somewhat broader than that used by TI and preliminary evaluation suggests that the CRF may at least be a helpful addition to compliance professionals' toolkit.

The World Bank's Enterprise Surveys provide another source of perceived levels of corruption in various countries. This source covers 149 countries, though some of the specific country data sets are ageing – many are over five years old and some are now a decade old. According to the World Bank, the data is based on survey responses by over 135,000 firms worldwide. Compliance professionals may find here information that is more directly related to day-to-day operational issues, as the surveys cover responses to 12 'indicators' of potential corruption, including the likelihood of having to make a payment or gift to obtain an operating licence, the value of a gift to an official expected to secure a government contract, or percentage of firms expected to give gifts to officials to 'get things done'.

There are also regional efforts to measure corruption demand. One example is the Latin America Corruption Survey, the most recent version of which was published in July 2020. This survey, conducted by 15 law firms practising across the region, focused on the perceived effectiveness of local anti-corruption laws and compliance practices. In the survey, 54 per cent of respondents region-wide responded that corruption was a significant obstacle to doing business, and 47 per cent stated that they believed that they had lost business to competitors that paid bribes – though respondents in certain countries with high perceived levels of corruption reported significantly higher numbers. Only 45 per cent of respondents stated that they believe offenders were likely to be prosecuted in their countries, a figure that was down from 66 per cent when the survey first asked this question in 2008. In addition to trends on the demand side, the survey also provides useful information for benchmarking compliance efforts; for example, the responses discuss specific types of compliance programme activities that companies operating in the region have undertaken.

Deterrence on the demand side generally is handled by local laws that govern the conduct of officials, and all of the major anti-corruption conventions require their state parties to enact and enforce those laws in good faith. Some entities, such as the OECD and GRECO, have taken steps to assess countries' legal frameworks related to the demand side and to offer technical assistance for improving such frameworks, as well as training for public officials.

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