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Anti-Corruption

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Contributing Editor

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Panoramic Next: Anti-Corruption

the most prominent recent developments in the global fight against corrupt practices. A panel of legal experts from key jurisdictions discuss enforcement trends, compliance risks and the related practical effects on companies' anti-corruption compliance programmes.

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Global Trends

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About the lawyers

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 30 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 (a multi-year project) pursuant to an FCPA disposition following extensive vetting by the DOJ and SEC.

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.

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.

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 social problems created by endemic corruption have been prominent factors in recent political upheavals experienced by countries such as Spain, Portugal, South Africa, Israel, Vietnam, Brazil, and Peru. Even governments with less accountability to voters, such as in Russia and China, evidence anxiety that corruption undermines their authority -- and undergo periodic anti-corruption crackdowns to combat this issue.

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 per cent 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 many

experts to be significantly over-inclusive – they likely count economic costs from pendant but separate activities such as money laundering, other fraud, and perhaps even drug trafficking. (Indeed, the World Bank, citing a U4/Anti-Corruption Resource Center review of 'the credibility of corruption statistics' from 2021, has suggested that this and other estimates should not be used in public pronouncements on corruption.) That said, these ranges and other estimates are all substantial and have been used to build support for various international anti-corruption efforts over the past several years.

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 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 centerpiece of the UN's anti-corruption programme. The UN adopted a political declaration on 2 June 2021 in the aftermath of the UN General Assembly's special session on corruption, UNGASS 2021, which still serves as a key focus in 2024 for various multinational anti-corruption efforts. The most important impact of these various treaties and related 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).

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 and investigation risks in many jurisdictions, as coordinated, multi-country enforcement (in some cases, led by non-US authorities) has become the norm in the anti-corruption sphere.

International enforcement trends

Enforcement of anti-corruption laws around the globe has continued on an upward, if uneven, trend. 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 2022 and covering through the end of 2021 -- a 2023 report has not been issued as of August 2024) show that at least 687 individuals and 264 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 2021. The OECD report also states that 481 corruption-related investigations were ongoing in 35 countries as of the end of 2021. As of the end of 2021, 12 Convention signatories were conducting 181 prosecutions (against 166 individuals and 14 entities) related to offences defined by the Convention or relevant applicable country laws.

The nonprofit advocacy group Transparency International (TI) has released its own assessments of the effectiveness of OECD countries' anti-corruption efforts. The latest TI report on 'Exporting Corruption' (published in October 2022) provides a less sanguine outlook: TI asserts that only nine 'major exporting' countries accounting for about 28.7 per cent of world exports' 'actively' or 'moderately' enforce their anti-corruption laws. The TI report states that only two countries (Switzerland and the United States) 'actively' enforce their anti-corruption laws, while seven other countries (Australia, France, Germany, Israel, Latvia, Norway, and the UK) manage 'moderate' enforcement. TI cites 18 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 2021, there was little or no enforcement by 38 countries, representing 55 per cent of the world's exports. That group includes China, Hong Kong, India, Japan, Mexico, Russia, Singapore and South Korea.

TI asserted in the report its view that 'enforcement continues to decline significantly…since [the first report in 2018]', 'hitting a new low [in 2022]'. Of interest to compliance professionals, the TI report stated that in most OECD Convention countries 'there continues to be a lack of transparency in data and case outcomes…statistics on foreign bribery enforcement are not publicly available, and not enough information is published on court judgements and non-trial resolutions'. The organisation's experts noted that these gaps in data continue to impede effective tracking and understanding of enforcement trends and risk areas. The report also highlighted that no country is immune from corruption risk – noting that the known enforcement actions 'reveal that companies, company employees, agents and facilitators involved in foreign bribery transactions come from almost every [OECD] country….'

In a separate report issued in September 2020 that still provides a useful data set in 2024, the OECD (with support from the G-20) 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 member 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 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 per cent 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 were needed to assess the frequency of such involvement. As to gender, the report laid out steps for obtaining better data. All 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 the implementation of the OECD Anti-Bribery Convention by signatory countries. The OECD launched Phase 4 in 2016 and currently anticipates the review lasting through most of 2026. The Working Group's Phase 4 guide states that the review focuses 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 many countries and often contain valuable insights on the topics covered.

In March 2024, the OECD published its 2024 Anti-Corruption and Integrity Outlook -- a new publication that is designed to 'shed new light on how key aspects of countries' integrity frameworks are currently performing and points at opportunities for improvements [and] explore how key global challenges, namely the green transition, artificial intelligence [AI], foreign interference and so-called strategic corruption, will increase pressure on countries' anti-corruption and integrity frameworks, especially where they are weakest'. Among the report's key findings are a conclusion that while 'OECD countries meet an average of 61% of standard criteria for [issuing] regulations [related to OECD Anti-Bribery Convention and related requirements and guidance],... the implementation rate drops to 44%, resulting in a [significant] implementation gap....' The report also asserts that many countries do not collect sufficient information to appropriately 'monitor the effectiveness of policies and processes and their impact on corruption risks and integrity'. Also, the report cites 'a need to address emerging corruption and integrity risks, such as those related to the green transition' and AI, as well as updating 'lobbying, conflict of interest, and political finance policies and practices' to combat foreign interference and corruption.

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. 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 whistle-blowers; 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.

The state parties to the UNCAC held their 10th conference in December 2023. The conference passed several resolutions and decisions covering various items, including a decision to extend the current review of the parties' implementation of their treaty obligations through June 2026. With regard to enforcement, perhaps the most notable development was Resolution L.11, in which the conference called on the state parties to take various steps in support of expanding civil and administrative proceedings against corrupt activities as a supplement to criminal actions. The resolution recognised a 2023 report issued at the conference by the United Nations Office on Drugs and Crime (UNODC) on 'Civil and Administrative Liability for Corruption' that 'explore[d] the extent to which civil and

administrative law remedies...contribute to the fight against corruption' – a report that is worth review by compliance personnel for information on the various non-criminal sanctions used by various governments to address corruption.

Several other multinational bodies have focused on anti-corruption enforcement and related national strategies for reducing public 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. 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 framework focuses in part '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: (1) they criminalise and prosecute the bribery of foreign public officials; and (2) 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 April 2023, the IMF Executive Board announced that it had completed a review of the 2018 framework. Overall, the Board found that the framework 'has made the Fund's engagement [with countries on governance issues, including corruption] more candid, systematic, and effective, while acknowledging that there remain areas for improvement'. In their findings, the Board noted that 'the proportion of governance-related conditions in Fund-supported programs has increased' 'and compliance rates for governance-related benchmarks are similar to those for other structural benchmarks'. The Board also noted some challenges for further action, including 'implementation constraints related to limited capacity and vested interests' and concerns by some Directors regarding whether the framework is being applied in an 'evenhanded' manner. On the latter point, the review found that 'country teams address identified vulnerabilities at overall comparable rates across similarly situated member countries, but more systematically with lower income countries'. Thirteen countries have signed up for IMF assessments of 'their frameworks for combating transnational aspects of corruption', which the Board notes is 'a number still below expectations'. The Board requested that IMF staff provide another update in two to three years.

The detailed underlying report contains further information on corruption-related discussions within the 2018 framework. For example, statistics on specific recommendations by IMF staff for addressing governance vulnerabilities show that staff focused heavily on 'anti-corruption' and related anti-money laundering measures (termed 'AML/CFT'). When combined, these two categories outweighed all other areas of discussion, including 'fiscal governance'. The report notes that examples of such recommendations included increased whistle-blower protections, 'enhance[ment

of] AML/CFT compliance with measures for Politically Exposed Persons', and greater transparency regarding official asset declarations and beneficial ownership of entities.

The IMF's attention to countries' anti-corruption enforcement frameworks dovetails with other multilateral efforts. For example, in October 2021, the ministers of the G-20 countries adopted an Anti-Corruption Action Plan for 2022-2024. 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; 'encourage[ing] active assistance, where possible, in identifying, seizing, and confiscating stolen assets…and locating 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 the 'possible adherence of all G20 countries to the OECD Anti-Bribery Convention' – in recognition of the OECD's robust monitoring and cooperation mechanisms.

The G-20 established an Anti-Corruption Working Group (ACWG) in 2010, and this entity is charged with managing the current Action Plan. As a result of ACWG efforts, the G20 Anti-Corruption Ministerial Meeting in August 2023 announced various initiatives, including the adoption of High-Level Principles on 'Promoting Integrity and Effectiveness of Public Bodies Responsible for Preventing and Combating Corruption'; 'Strengthening Law Enforcement Cooperation for Action against Corruption and Related Economic Crime'; and 'Strengthening Asset Recovery Mechanisms for Combating Corruption'. The first set of principles discusses the need for appropriate independence and resourcing of anti-corruption enforcement authorities, emphasises the need for transparency in their operations and integrity among those bodies' personnel, and advocates strengthening those agencies' abilities to identify and pursue new types of corruption risks.

In May 2023, the European Commission and the EU's High Representative for Foreign Affairs jointly submitted a proposed draft anti-corruption directive to the European Parliament. A likely impetus of this proposal is what the Parliament in December 2022 called 'suspicions of corruption from Qatar and the broader need for transparency and accountability in the European institutions'. The proposed directive suggests, first, that there should be stronger communication among member states, including by establishing an EU network against corruption that would cultivate the exchange of best practices and guidance. Second, the proposal would require member states to establish stronger rules and better enforcement against corruption by having specialised anti-corruption bodies and fostering a culture of integrity. Third, the proposed directive would require the harmonisation of definitions of corruption (and related offences) in criminal prosecution, sanctions for criminal violations and enforcement action for corrupt practices. If enacted, the directive would require a significant number of EU member states to adjust their anti-corruption laws and practices to come into compliance. A key area is the proposed scope of penalties, which would impose prison sentences more often and would require corporate penalties to be equal to no less than five per cent of a company's total worldwide turnover in the business year in which charges are brought.

In February 2024, the EU Parliament issued a report on its own positions relating to an EU-wide anti-corruption directive. The report included a side-by-side analysis of the Parliament's proposals compared to the 2023 draft Commission directive, which shows that the Parliament is proposing, among other things, additional provisions that

address 'demand' side bribery, especially when high-level officials are involved. The Parliament's proposal also expands the required definitions for corporate criminal liability; the Commission's definition suggests this should be limited to actions involving 'leading persons' (ie, higher-level managers) while the Parliament version envisions corporate liability for acts of a broader set of actors associated with a company. Negotiations on reconciling and finalising the proposed directive will occur in late 2024.

In April 2022, a ministerial declaration from the Financial Action Task Force (FATF) called on FATF countries to do more to counter the 'serious impact of grand and systemic corruption on our economies and societies' by working closely with the OECD, G-20, and UNCAC members and signatories. The ministers encouraged FATF 'to pursue work on…[identifying and holding accountable] complicit financial and non-financial professional services providers [used] by the corrupt' and 'to discuss operational challenges and investigative strategies on how best to investigate and prosecute complicit financial service providers that are facilitating corrupt actors'. At the same time, the FATF also amended its Recommendation 24, which requires countries 'to prevent the misuse of legal persons for money laundering or terrorist financing and to ensure that there is adequate, accurate and up-to-date information on the beneficial ownership and control of legal persons'. FATF issued new guidance on implementing revised Recommendation 24 in March 2023.

Trends in international cooperation and legal assistance

There is evidence that 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 increase. That said, public data on the actual effects of multilateral legal assistance on corruption prosecutions is difficult to find. Indeed, TI's October 2022 'Exporting Corruption' report noted that 'there is…a lack of published statistics on mutual legal assistance requests made and received, which could otherwise be helpful in the analysis of country-level challenges'.

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

The G20 ACWG published an 'Accountability Report on Mutual Legal Assistance' in December 2023, which 'focuses on progress made by countries to ensure effective

Mutual Legal Assistance [MLA] processes [and] highlights common challenges being faced by countries in implementing MLA requests, measures undertaken for improving MLA processes and collates good practices of countries on specific principles related to cooperation....' The report generally provides a good overview of MLA processes and issues some of which will be touched on below – and, in section 5.2, includes 'statistical data for the last five years (2018-22) on MLA requests on corruption cases sent by the country and received by the country'. Unfortunately, the report's data suffers from the fact that the ACWG made reporting by countries optional, and as a result, statistics from key players in the space, including the United States, are missing. Thus, while this source provides a good update on some MLA trends from the last five years, it does not give a complete picture.

The 2021 OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions includes a section on international cooperation (section XIX) that likely forms the basis for a substantial subset of current MLA efforts in the anti-corruption area. Provisions aimed at enhancing bilateral and multilateral cooperation recommend, among other things, the use of both formal and informal processes (the latter only if 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.

There are various multilateral initiatives designed to support formal and informal contacts among anti-corruption enforcement agencies and to promote cooperation in investigations. 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 December 2023 and, according to the published agenda, focused on 'the benefits and challenges of conducting joint and parallel investigations and prosecutions' and 'the practice of resolving transnational corruption cases in multiple jurisdictions through simultaneous or coordinated non-trial resolutions'. The OECD also hosts twice-yearly confidential meetings of law enforcement personnel from signatory countries. In addition, the OECD sponsors regional anti-corruption initiatives and networks, all of which incorporate regional 'law enforcement networks' and working groups. In July 2021, the OECD published updated information on 'country contact points for international co-operation' for all Convention member states, including mutual legal assistance and extradition requests.

The G-20 and the UN also have taken significant steps recently to enhance multilateral legal assistance in the anti-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 was 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 was the establishment of a 'Global

Operational Network of Anti-Corruption Law Enforcement Authorities' based in Vienna, Austria that would coordinate with UNODC and other anti-corruption law enforcement networks, such as the OECD GLEN and the INTERPOL/StAR Global Focal Point Network.

The '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 GlobE Network's charter was adopted in November 2021. A newsletter released in June 2024 to recognise the network's third anniversary stated that the network as of that date has 205 members from 115 countries. In 2022, the network launched an encrypted communications portal (called GlobE Threema) for the sharing of investigative tips and information, which as of June 2023 has been 'used 2059 times by 72 registered users for informal cooperation'. An announcement in June 2024 stated that a new secure communications platform is being planned, as well. Also in June 2024, the network issued a report on the 'status of implementation of joint investigations under article 49' of the UNCAC; the paper addressed both 'good practices' and 'challenges' for these cooperative efforts. Finally, the network also issued a 'Compendium of Practices on Informal Cooperation in Transnational Corruption Cases' that is worth studying by compliance professionals who wish to learn more about practices by specific enforcement authorities in this area.

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 produced extraordinary international cooperation – examples being significant investigations and penalties involving Petrobras in late 2018, TechnipFMC in mid-2019, J&F Investimentos and Vitol in late 2020, Samsung in late 2019 and early 2021 (the latter date being the execution of a final 'leniency agreement' between Samsung and the Brazilian authorities), Tenaris in June 2022, Honeywell in December 2022, and Corficolombiana in August 2023.

As another measure of the growth of international cooperation, it is noteworthy that nine 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 (US$3.92 billion – France, UK, US); Odebrecht/Braskem (US$3.77 billion – Brazil, US, Switzerland, Panama); Goldman Sachs (US$2.9 billion – US, UK, Singapore, Hong Kong, Malaysia); Petrobras (US$1.78 billion – US, Brazil); Telia (US$965 million – US, Netherlands, Sweden); Rolls-Royce (US$816 million – UK, US, Brazil); VimpelCom (US$795 million – US, Netherlands); Gunvor (US$666 million -- US, Switzerland, Ecuador); and Glencore (US$650 million (and counting) – US, Brazil, UK and Switzerland).

Despite these trends, some data suggest that international cooperation in anti-corruption investigations still has a long way to go before becoming the norm across the world. A July 2019 OECD/UN report on the G-20 2030 Sustainability Goals 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 a continuing focus on these issues by the OECD, UNCAC, and other bodies. As noted, for example, both the most recent UNCAC conference of state parties (via its resolution on 'promoting international cooperation in civil and administrative proceedings related to corruption') and G20 ministerial meetings (through the August 2023 endorsement of the G20 'High-Level Principles on Strengthening Law Enforcement related International Cooperation and Information Sharing for Combatting Corruption') made enhancing international cooperation

a key goal for ongoing activities. UNODC in 2023 also updated its guides on 'Requesting Mutual Legal Assistance in Criminal Matters from G20 Countries' and 'Requesting International Cooperation in Civil and Administrative Proceedings' – though again, the available guides do not cover some key national authorities.

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 2022 TI 'Exporting Corruption' report noted that 'challenges in international cooperation…include insufficient or incompatible legal frameworks, limited resources and know-how, a lack of coordination, and long delays'. 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 anti-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. One paper noted that many participants considered the 'process of formal mutual 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'. The G20 ACWG Accountability Report published in 2023 echoed many of these challenges, noting differences in legal frameworks, 'administrative and procedural gaps' among different countries, 'quality of MLA requests' (in terms of drafting and scope), 'operational challenges', and lack of responsiveness by receiving authorities as factors that require redress. One aspect of the Accountability Report that might be useful for practitioners is an accompanying publication that sets out 'Responses to the 2023 Accountability Report' by state parties; the responses summarise key aspects of each country's MLA framework in response to ACWG questions.

Many of the multilateral initiatives initiated in the past couple of years are designed to address these challenges. However, many of the cited issues likely 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 coordinating 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' corporate anti-corruption compliance programme. Due to the active anti-corruption enforcement undertaken by the United States over at least the last 30 years, these elements have influenced the development of many compliance standards issued by multinational bodies and other countries 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 U.S. 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 March 2023) 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 December 2017. Among other details, the guidelines describe eight characteristics of a 'coherent and indivisible [compliance] policy framework' that largely track international practice. 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 whistleblowing 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 July 2022, the Brazilian government, which has been an active player in anti-corruption enforcement, published a new decree amending regulations of the Clean Company Act that included updated guidance on the Brazilian authorities' expectations for assessing the effectiveness of a company's compliance programme. The decree notes new elements for consideration, such as whether a company has adopted effective risk management processes, whether a company has allocated sufficient resources for its compliance programme, and whether a company has implemented adequate due diligence procedures, including when dealing with politically exposed persons (PEPs) and considering sponsorships or donations. The decree also states that the Brazilian CGU will take into consideration a company's revenue and corporate governance structure when evaluating the company's compliance efforts.

The Attorney General of Australia, in response to the passage of the 'Combatting Foreign Bribery Act' by Parliament in February 2024, published draft guidance in April 2024 on

'adequate procedures to prevent the commission of foreign bribery' by companies. The guidance sets out the Attorney General's expectations on the key elements of company compliance programmes that must be in effect for a company to qualify for the relevant legal defence under the new law. The guidance likely will be finalised in late 2024.

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 states 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. The OECD also 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 'Good Practice Guidance on Internal Controls, Ethics, and Compliance'. This document lists key elements of a corporate anti-corruption compliance programme and related accounting controls. A review of the updated annex shows the influence of the various countries' work on similar guidance, as many of the elements are the same as in the national frameworks discussed above. New areas covered in the OECD 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. The 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 addition to relevant national guidelines.

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 continue to recommend the report to any compliance professional wishing to benchmark their efforts using data collected on a global scale.

In March 2024, the OECD and UNODC issued 'A Resource Guide on State Measures for Strengthening Business Integrity' -- a publication designed to provide OECD Convention parties 'with a framework for identifying and implementing an appropriate mix of sanctions and incentives for encouraging business integrity'. The publication (updating a 2013 UN

guide) notes the OECD Good Practice Guidance as an important source of compliance programme guidance and discusses potential incentives that states can offer companies to encourage adoption of such programmes, including 'offering exemptions from prosecution [and] other penalty mitigation' (the US DOJ's updated 2023 Corporate Enforcement Policy reflects this approach); 'reward[ing] prevention procedures by allowing these to be used as a defence for corporate liability offences' (an approach used by the UK, France, Australia, and others); 'preferential access to government benefits' and procurement opportunities; and other potential incentives. This guide is part of renewed efforts by the OECD to engage the private sector in anti-corruption activities through the organisation's 'Global Initiative to Galvanize the Private Sector as Partners in Combating Corruption', which also encompasses such initiatives as the issuance in July 2023 of a 'Compliance Without Borders Handbook' directed at 'galvanising the private sector to work with their state-owned [enterprise] counterparts in preventing corruption and levelling the playing field' (including through the encouragement of compliance programme best practices) and a parallel 'Public Private Integrity Accelerator' initiated in mid-2024.

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 anti-corruption 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 above-referenced 2024 'Resource Guide on State Measures for Strengthening Business Integrity' cites this handbook as appropriate guidance on compliance programmes.

The International Chamber of Commerce (ICC) issued its first set of 'Rules on Combating Corruption' in 1977. The ICC updated those rules in December 2023 (the first update since 2011), and the rules require relevant enterprises to 'develop a compliance programme proportionate to the risk they face'. Parts II and III of the revision contain rules and specific advice on what the ICC considers to be the essential elements of an effective compliance programme; among other elements, the rules cover engaging and monitoring of third parties, gifts and hospitality, political and charitable contributions, conflicts of interest, accounting and recordkeeping, the prohibition of 'facilitating payments', risk assessments and managing employee reporting of potential wrongdoing.

On 15 October 2016, the International Organization for Standardization (ISO) issued a new standard for 'anti-bribery management systems', called ISO 37001. This exercise aimed 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, Transparency International 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 and 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. It is perhaps notable, for example, that the DOJ's March 2023 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 enforcement actions and corporate compliance programmes are designed to constrain the 'supply' of bribe payments to public officials by businesses and their associated personnel, over the past few years there has been 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 combating 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 US 'Strategy on Countering Corruption' establishes goals related to, for example, directly criminalising demands for bribes; 'curbing illicit finance' through new beneficial ownership disclosure rules; expanding 'know your customer' requirements; and 'holding corrupt actors accountable' through various means, including expanded economic sanctions and asset seizure efforts. Perhaps the most prominent result of this US focus was the passage in December 2023 of the 'Foreign Extortion Prevention Act' (FEPA) that for the first time directly criminalises the solicitation or receipt of bribes by a foreign official from persons or entities subject to US law. Indeed, while 'supply-side' 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 actual risks 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 2023, 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 (ACGC) and the Center for International Private Enterprise (CIPE) 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 provide 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 159 countries, though some of the data sets on individual countries are ageing. A significant number are over five years old and some date even from the late 2000s, though the Bank has made public new data from 50 countries in 2023-24. According to the World Bank, the data is based on survey responses by over 219,000 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 April 2024. This survey, conducted by 15 law firms practising across the region (including Miller & Chevalier), focuses on the perceived effectiveness of local anti-corruption laws and compliance practices. In the latest survey results, 46 per cent of respondents region-wide responded that corruption was a significant obstacle to doing business, and 41 per cent stated that they believed that they had lost business to competitors that paid bribes (down from 47 per cent in 2020) – though respondents in certain countries with high perceived levels of corruption reported significantly higher numbers. The survey found an increase in the perceived effectiveness of local anti-corruption laws (including recent laws issued in some countries), with '40% of respondents say[ing that] such measures are effective in the country where they work', a figure that is 'up 10 percentage points from 2020'. 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, 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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