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ANTI-CORRUPTION 2021

Global interview panel led by Miller & Chevalier Chartered

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Anti-Corruption 2021

Global Trends

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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.

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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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, Pakistan and Bulgaria – all of which are investigating or have convicted current or former heads of government for corruption. The United States, generally seen as an anti-corruption leader, experienced political discord over perceived domestic corruption under 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.

Concerns regarding the corrosive political and economic effects of public corruption have provided an impetus for several multinational conventions designed to combat corrupt 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 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 US Foreign Corrupt Practices Act (FCPA), enacted in 1977.

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 US 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.


John E Davis

The ongoing covid-19 pandemic and related public lockdowns in response to the crisis continue to affect governments' and companies' anti-corruption activities around the world. Government investigations have slowed down as authorities are unable to meet witnesses, engage in certain mutual legal assistance activities, or acquire or review needed information. In many countries, public funds or assets have been redirected towards pandemic-related activities. Even governments in countries with robust digital infrastructures have struggled. Companies have been similarly impacted, as compliance functions have faced sometimes severe budget crunches (often in the context of across-the-board cost cutting) and have had to devise methods of monitoring and training to make up for an inability to travel. Generally, companies with more sophisticated ERP and other control systems have more options to manage compliance activities remotely, but even those systems can be less effective than processes that include the ability to engage with business managers and frontline employees face-to-face.

Several multilateral organisations have issued guidance on mitigating the covid-19 pandemic's effects on corruption risks and related resource challenges.

"The OECD policy paper notes the importance of governments maintaining the integrity of their anti-corruption efforts."

For example, the OECD issued a policy brief in late May 2020 that focuses on issues such as:

- addressing increased corruption risks in pandemic-related emergency government procurement;
- ensuring accountability, transparency, and fiscal controls over financial aid and economic stimulus and recovery packages;
- requiring companies to maintain appropriate risk management and internal control tools (especially ones allowing for remote access and control);
- highlighting the corruption risks from increased uses of business intermediaries in place of employees who cannot travel; and
- protecting whistleblowers.

The OECD policy paper also notes the importance of governments maintaining the integrity of their anti-corruption efforts noting, for example, that 'investigations and prosecutions should not be influenced by considerations of national economic interest' and that governments should find ways to maintain 'adequate resources for investigative agencies' both during and after the pandemic. The OECD issued

further findings in July 2020 in a report on 'initial policy responses to the covid-19 crisis' from the perspective of public procurement and infrastructure governance, and in spring 2021 sponsored a series of public panels and discussions on business integrity in a 'post covid-19 world.'

The International Monetary Fund (IMF) began to offer covid-19-related recovery funding and debt relief to some client countries, and confirmed in late July 2020 that such assistance would be subject to the IMF's governance and anti-corruption requirements, including such steps as conducting and making public 'independent ex-post audits of crisis-related spending' and taking steps to identify companies (and, importantly, their beneficial owners) that receive 'crisis-related procurement contracts' and the terms of such contracts. In response, the NGO Transparency International (TI) instituted its 'Tracking the Trillions' project to monitor the disbursement of these IMF funds and to call out countries using these funds that are not appropriately prioritising anti-corruption. TI also emphasised the importance of protecting whistleblowers, especially in these times of economic hardship, which makes disguising retaliation as the product of cost-cutting easier.

By the spring of 2021, the IMF had only approved a relatively small percentage of the available funds – according to TI, due to 'technical restrictions as well as many countries' mounting debt.' A March 2021 TI/Human Rights Watch report examined IMF emergency loans to four sample countries and found that the transparency and monitoring measures imposed by the IMF varied among different recipients, and that the 'amount, accessibility, and quality of disclosed information [on loan usage and documentation] . . . was inadequate for meaningful oversight in any of the four countries.' It is likely that future efforts to assess the use of government funds related to the covid-19 pandemic will raise similar concerns, as well as scandal-generating tales of corruption.

While there are many uncertainties related to the covid-19 crisis (including the effect of the delta variant), one thing is certain – companies continue to face a very challenging corruption environment globally for the foreseeable future and will need to continue to adapt to events over the next year.

International enforcement trends

Enforcement of anti-corruption laws around the globe has continued on an upward, if uneven, trend, though as noted has been significantly impacted by the global lock-downs and other measures countries are taking to combat 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 2020 and covering to the end of 2019) show that at least 651 individuals and 230 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 2019. The OECD report also states that 492 corruption-related investigations were ongoing in 28 countries as of the end of 2019. In 2019, 11 Convention signatories were conducting 154 prosecutions (against 146 individuals and eight entities) related to offences defined by the Convention or relevant applicable country laws.

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.' TI'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 G20, 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 OECD member states] between January 2014 and June 2018.' Confirming earlier studies by the OECD and other organisations, the

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report found that 'an intermediary was involved in 81% 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 OECD/G20 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 Working Group on Bribery 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 to last until 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

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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, United Kingdom, Australia, Chile, Germany, Japan, Korea, Mexico, the Netherlands, Norway, and Switzerland.

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. 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 analyze 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, including 'ensuring sustained engagement by the Fund, building further ownership and efforts by country authorities, supporting country teams in these complex discussions, and filling data gaps.'

The next formal evaluation of the framework was originally scheduled for mid-2021. However, as noted above, 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 'High Level Principles on Organizing Against Corruption.' These principles date from July 2017 and 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. At the first G20 Anti-corruption Ministers Meeting held in October 2020, the G20 ministers issued a communique that summarised several initiatives taken during the year and set out further goals. The G20's leaders endorsed the results of the ministerial meeting in their own November 2020 communique.

First, 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] . . . recognizing that these instruments should serve as the foundation for future efforts to expand international cooperation and coordination against corruption and related challenges.' Like other multilateral bodies, the G20 also focused on the intersection of corruption and the covid-19 pandemic, issuing a 'call for action' that focused on transparency, coordinated action on emergency relief and relevant medicines, maintaining sound governance and methods for oversight of covid-19 government expenditures and procurement, and using existing anti-corruption frameworks to cooperate in the investigation and determent of corruption. In addition, the Anti-Corruption Working Group compiled a 'Good Practices Compendium on Combating Corruption in the Response to COVID-19' in October 2020.

The ministerial meeting also approved three new 'high level principles' related to various anti-corruption-related issues, all of which touch on enforcement actions by relevant countries against corruption. These were:

- High-Level Principles for the Development and Implementation of National Anti-Corruption Strategies;
- High-Level Principles for Promoting Public Sector Integrity through the Use of Information and Communications Technologies (ICT); and
- High-Level Principles for Promoting Integrity in Privatization and Public-Private Partnerships.

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 whistleblowers. Meanwhile, despite disruptions to its schedule

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created by covid-19 travel restrictions, GRECO has continued to issue reports related to member countries' 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). The organisation also has continued to emphasise the anti-corruption guidelines GRECO issued in April 2020 to manage pandemic-related corruption risks. 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.'

Finally, an enforcement trend worth noting across many countries is the increasing, and increasingly formalised, use by various authorities of negotiated agreements with companies to reach dispositions in anti-corruption investigations. These tools, which go by different names, are similar to US-style DPAs and

"The French government's formal guidelines for CJIPs, issued in June 2019, encourage companies to self-report, conduct internal investigations and cooperate with prosecuting authorities."

non-prosecution agreements (NPAs), which are favoured in FCPA enforcement. Among the countries that have authorised or used these types of agreements are the UK (DPAs); France (judicial agreements in the public interest (CJIPs)); Canada (remediation agreements); Israel (conditional agreements); the Netherlands (out of court settlements); Argentina (effective collaboration agreements); and Brazil (leniency accords). These agreements allow for flexibility in terms and the imposition of ongoing obligations, such as compliance programme implementation or reporting on activities, and thus are increasingly favoured by the authorities. They also mirror many aspects of US DPAs and NPAs in terms of eligibility requirements. For example, the UK SFO updated its Operational Handbook in October 2020 to include a revised chapter on DPAs that lists factors that the SFO takes into account in determining whether a DPA is appropriate, including timely and voluntary self-reporting, implementing remediation steps, preserving relevant evidence, identifying witnesses and ensuring their availability for interviews, reporting on internal investigations and waiving privilege. Similarly, the French government's formal guidelines for CJIPs, issued in June 2019, encourage companies to self-report, conduct internal investigations and cooperate with prosecuting authorities – concepts that are relatively novel

in the French criminal law system. The increase in the use of such tools is also likely influenced by ongoing developments in international cooperation among various agencies in anti-corruption investigations. The OECD released a useful study of this trend among treaty signatories of using 'settlements and non-trial agreements' to resolve corruption cases in March 2019.

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. 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 four years provides strong evidence that international 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.

In April 2016, the OECD held a workshop on mutual legal assistance in international corruption investigations that highlighted both the challenges and the growth of best practices regarding cooperation with the participation of enforcement authorities from 20 countries, including China, and issued a summary report of the proceedings. 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 co-operation' for all Convention member states, including mutual legal assistance and extradition requests.

The G20 and the UN recently took steps to enhance multilateral legal assistance in the corruption context. In October 2020, the G20 Anti-corruption Ministers 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 network would cooperate closely with the United Nations Office on Drugs and Crime (UNODC) to build a secure communications network, would sponsor training sessions and forums, and would 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 Riyadh Initiative's 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 timing of the network's various initiatives remains unclear, but effective implementation of this initiative could enhance multilateral enforcement cooperation, and thus bears watching.

In July 2017, the new International Anti-Corruption Coordination Centre (IACCC) was launched under the auspices of the UK National Crime Agency, with the goal of 'bring[ing] together specialist law enforcement agencies around the world to tackle allegations of grand corruption.' IACCC participants include the UK, US, Australia, New Zealand, Canada and Singapore, with Switzerland and Germany as observers. The IACCC has enjoyed support from INTERPOL since 2019. While most of these countries already engage in significant international cooperation generally, the IACCC participants share intelligence and conduct other mutual assistance activities designed to 'bring corrupt elites to justice.' According to a public summary of its activities in 2018 (the latest data available), the IACCC 'provided vital intelligence support' for nine grand corruption investigations, 'identified and disseminated intelligence of 227 suspicious bank accounts found within 15 different jurisdictions,'

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and offered intelligence and technical support to countries 'who have never received international law enforcement support before.' In July 2020, the IACCC began implementation of a new 'Associate Member Scheme' through which law enforcement agencies 'from smaller financial centres' can access resources, coordinate activities and intelligence, and receive help on mutual legal assistance requests. The list of Associate Members includes various anti-corruption and financial intelligence units in jurisdictions such as the Cayman Islands, the Channel Islands, the Seychelles, and Turks and Caicos.

The IACCC coexists with an older, smaller group, the International Foreign Bribery Taskforce (IFBT), which has operated since 2013. The IFBT has taken the lead, for example, in the multi-jurisdictional investigation of the company Unaoil and its interactions with various companies in the oil and gas and other industries. Public information on IFBT activities since around 2019 is scarce, and it is possible that other multilateral efforts noted above may be the focus of attention for the constituent countries.

Most of the recent corporate corruption investigations that have resulted in significant penalties have featured international cooperation among authorities. For

"Eight of the top ten largest global resolutions related to the US FCPA have involved the extraction of penalties by authorities from at least two countries."

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 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 ten largest global resolutions related to the US FCPA (historically the most active anti-corruption enforcement regime) have involved the extraction of penalties by authorities from at least two countries. Seven of those cases were completed within the last four years: *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); *Petrobras* (US$1.78 billion – US, Brazil); *Telia* (US$965 million – US, Netherlands, Sweden); *Rolls-Royce* (US$816 million – UK, US, Brazil); and *VimpelCom* (US$795 million – US, Netherlands).

Despite these trends, there is data that suggests 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 G20 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 G20 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 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. 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 compliance standards by multinational bodies and other countries. 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 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 actual 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 to be 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 Serious Fraud Office (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 and have evaluated corporate compliance programmes under their national

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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; 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; 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.

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

"International bodies have long focused on issuing their own guidance regarding the structure and key provisions of corporate compliance programmes."

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 key provisions 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 edition of these guidelines 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.

The OECD's 2009 Anti-Corruption Recommendation, which is currently under review, contains two annexes. The second, which the OECD Council adopted on 18 February 2010, is 'Good Practice Guidance on Internal Controls, Ethics, and Compliance'. This document lists key elements of an anti-corruption compliance programme and related accounting controls. Given the number of compliance programme guidance documents that have been issued by national enforcement authorities and international bodies since 2010, it is likely that the OECD Good Practice Guidance will be significantly updated as part of the overall review of the Recommendation.

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 memorialising or incentivising a firm's ethical culture (either due to board or 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.

The UNCAC, which entered into force on 14 December 2005, 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. The 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 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 whistleblowing.

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 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

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for their operations, but public updates on these efforts have been scarce. There has been criticism within the compliance community regarding both the content of the standards and, especially, 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.

Because today's standards require that compliance programmes be designed to mitigate the actual risk faced by companies 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 2020, 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.

The World Bank's Enterprise Surveys provide another source of perceived levels of corruption in various countries. This source covers 139 countries, though some of the data sets on individual countries 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 which 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.

For example, a December 2018 report by the OECD Working Group analysed a sample of case studies to assess the consequences for officials who solicited bribes in investigations brought in various signatory states during the period 2008–2013. The report noted that 'although a considerable number of investigations and prosecutions targeting public officials took place, only 20% of the 55 cases [examined by the OECD's analysis] ended with sanctions on one or more public officials.' The OECD report noted several other issues: that 11 investigations of officials were still pending years after the study's technical cut-off date; that mutual legal assistance appeared to have little effect on demand-side investigations; and that media played a major role 'as an intermediary in information flow between the supply-side and demand-side enforcement authorities.' While it contains valuable data, the report does not cover more recent years in which there have been significant investigations and convictions of officials who solicited bribes, especially in several individual high-profile cases, some of which are discussed in this volume.

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