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IBA Anti-Corruption Committee

Anti-Corruption Law and Practice Report 2017: Innovation in Enforcement and Compliance

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Preface

The International Bar Association (IBA) Anti-Corruption Committee (ACC) provides an international forum for private and public-sector practitioners to meet, share best practices, and discuss anti-corruption laws, case law, compliance practices, enforcement trends, and asset recovery issues. IBA ACC members exchange views and share information in recognition that rolling back corruption will take cooperative effort across disciplines, cultures, and socio-economic strata.

The IBA ACC aims in particular to assist practitioners in areas where anti-corruption laws and procedures are relatively underdeveloped or under-enforced. This report examines developments in law and practice in the dynamic and often controversial field of international anti-corruption. The majority of people working in private and public organisations strive to maintain high standards of conduct. Recent scandals around the world, however, have shown how the actions of a very small number of individuals can tarnish the reputation of an entire organisation. Practitioners therefore have an ongoing need for the global overview of trends in anti-corruption regulation, legal practice, and research provided by this report. The committee has done an excellent job in preparing a report that is practitioner-friendly by providing brief in-depth analyses of seven key issues relevant to enforcement and compliance.

This report demonstrates the commitment and hard work of Professor Kath Hall and the Drivers of Corruption Subcommittee over the past several months. Their accomplishments would not have been possible without the support of the IBA's staff who have not only provided the forum in which this group may collaborate, but also support for reports like this one that keep the international legal community informed and up to date.

A heartfelt thanks to Kath Hall, Stéphane Brabant, Abiola Makinwa, Sevi Firat, Angela Barkhouse, Jitka Logesova, Leopoldo Pagotto, Isabell Weaver, Francesca Petronio, Gemma Aiolfi, Caroline Hailey, Neil V. Getnick, Gregory M. Krakower, and Kieran Pender for their work on this report.

Pascale Dubois and Bruno Cova

Co-Chairs, IBA Anti-Corruption Committee

IBA Anti-Corruption Committee

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Dr Kath Hall*

It is now widely accepted that foreign bribery and corruption present serious threats to global economic and social progress. Corruption in its various forms undermines efforts to achieve growth, reduce poverty and improve access to justice. Increasingly, the global focus has shifted to the ‘supply’ side of corruption, targeting multinational corporations that pay bribes to agents or corrupt parties to secure contracts or business advantages. Regulatory and enforcement efforts are gaining ground in many jurisdictions, making the risk of detection and prosecution for managers, employees and corporations greater.

In this context, it is often lawyers who are tasked with ‘spreading the message’ on the risks to an organisation’s reputation, its shareholders, stakeholders and employees, and to the social licence under which it operates, if it is found to have engaged in bribery or corruption. This role can be tough and requires that lawyers are up to date on the latest trends and developments in anti-corruption law and practice.

This report is designed to assist lawyers and compliance professionals who are fighting against corruption. It is the first in a series of Anti-Corruption Law and Practice Reports to be prepared by the IBA Anti-Corruption Committee Drivers of Corruption Subcommittee (DOCS) aimed at keeping practitioners aware of the latest trends and debates.

This first report explores the theme of ‘Innovation in Enforcement and Compliance’, and provides succinct discussions of seven key areas at the centre of reform and debate in 2017. These are: negotiated/structured settlements; corporate criminal liability; corruption and human rights; whistleblowing; internal investigations; collective action; corporate compliance and behavioural regulation.

Throughout the report, two themes consistently emerge. The first is the ongoing trend towards global convergence with anti-corruption laws and practices. This trend is particularly evident in the context of negotiated settlements (section 1.1), corporate criminal liability laws (section 1.2), whistleblowing laws (section 2.3), the rules on double jeopardy (section 1.6) and compliance (2.2).

The second theme is the expanding focus on and relevance of regulatory and enforcement developments taking place outside the United States and United Kingdom. This point is highlighted in the interview with Stéphane Brabant at the start of the report. It also arises from the discussion on data protection in Europe (section 1.4) and the ‘Car Wash Case’ in Brazil (section 1.5).

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We hope that members of the legal profession will find this report useful. IBA members interested in contributing to further reports should email details of their suggested topics to DOCS Chair, Dr Kath Hall (kath.hall@anu.edu.au).

Credit for the coordination and editing of this report goes to Kieran Pender, Australian National University, Canberra. Thanks also to Adam Silverwood for compiling the list of new books at the end of the report, and to Megan Lingafelter for assistance in the report's early development.

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Introduction: The lawyer's role in helping clients to say no!

Stéphane Brabant in conversation with Kieran Pender

Stéphane Brabant is a senior statesman in the anti-corruption compliance field. The Paris-based lawyer is global co-chair of Africa, co-head of mining and co-head of business & human rights with international law firm Herbert Smith Freehills. He has spent more than three decades advising companies on their business dealings across francophone Africa, and has extensive on-ground experience. He shared his expertise with Kieran Pender.

KP: Firstly, how did you become passionate about anti-corruption compliance?

SB: My interest in this area arose in a similar way to my interest in the intersection between business and human rights. It was from being on the ground and having experience in Africa that I came to understand the complexity of business deals – not only in Africa, but for me particularly in that continent. I am a projects lawyer; I assist companies with investments (including management of risks and crises), specialising in oil, gas, energy, mining and infrastructure. I spent seven years in Africa based in Gabon, and through the course of my practice I realised that there was scope for improvement in this space. During my 30-odd years in practice I have always taken a very cautious approach with corruption so I could not ignore it, especially as the regulation has changed over time. I also realised that companies were spending so much time and considerable resources responding to corruption and attempted extortion of funds. I could see that the system was not working, and something had to be done.

KP: What is the role of a lawyer, whether external or in-house, in helping companies comply with their anti-corruption obligations?

SB: Firstly, lawyers need to understand what is meant by corruption. It is a very delicate notion – we think we know, but it is far more nuanced than what we see. Corruption is always evolving. We must understand the difference between corruption as it is seen locally and the international standard for corruption – whether in the Foreign Corrupt Practices Act in the United States or elsewhere. When I was on-ground I was seeing corruption as it happened, then when I was in Paris I was more concerned with the international definitions – such as corruption of a public officer. When it comes to companies securing agreements or maintaining deals, ten years ago the companies saw the law as meaning they could not bring in a million dollars and pay off public officers. Today, the interpretation has expanded. If you invite a minister for a meeting and pay for their trip and visit, that can now be seen in certain contexts as corruption. Interpretation is absolutely key.

Secondly, companies these days are not just national, they always have connections with other jurisdictions such as the US or the United Kingdom – this is particularly the case for extractive industries. Therefore companies have to face not only corruption regulations as interpreted and defined within their own country, but also as it might apply in other countries. As lawyers – and this

is where an international law firm can be very helpful – we have to give comprehensive advice to companies. If advising a French client on their international business, we might have to understand the situation not only in France but also in the US and the UK because of financial links to those jurisdictions. Even though we are all operating under the OECD Convention, there are both substantive and procedural differences in the regulatory approach. This is extremely difficult – lawyers have to give truly international advice to help clients mitigate risk.

KP: Do you ever find it difficult to say no to a company? When the spectrum of potentially prohibited activities is so broad, and previously commonplace practices are now suspect, is it hard to say no to clients – particularly when they might be able to find another lawyer with a different view?

SB: It is not difficult to say no – but that advice must be well based. It is not the ‘no’ that is important, it is saying to the client ‘you cannot do A or B because of C and D, and if you do the consequences will be X or Y’. Sometimes there is a very challenging grey zone, the client might ask ‘what if I invite the minister and we pay for his flight but not his hotel?’ In those cases we have to fear the worst and, depending on the facts, may have to advise ‘no’. The risk is perhaps not that there will be an adverse judicial decision, but the potential reputational impact. The ultimate court judgment might say ‘well, in those particular circumstances, the elements of corruption are not fulfilled’, but in the meantime the reputational effect could be significant. These are the new judges – civil society, consumers, the media. Our advice as lawyers must go beyond black-letter law, and be pragmatic and intelligent – advising where companies can take commercial risks and where they should not.

KP: How should lawyers go about persuading companies against taking actions that they see as beneficial but could breach anti-corruption regulations?

SB: It is really important to listen. I have faced many situations where the client says, ‘if I don’t win this deal I will have 250 employees looking for work’. That is not an easy position to be in, so you need to fully appreciate the context. To listen does not mean to agree; to listen does not mean to accept. Seeking to understand what the client has in mind is not a crime – what is a crime is at the end of the discussion not convincing the client against doing something illegal, and more than that, not advising them how they can act in a way that is not corrupt but will have the same substantive commercial benefit. You must be creative, constructive, positive and pragmatic. You say: ‘This is the situation, these are the risks, how can we deal with this, what are the alternatives?’ Instead of paying a bribe, is there a legal and acceptable way of reaching the same outcome. You also say: ‘your company won’t just pay once, you face the risk of having to pay twice, three times, four times – and then (or if you get caught out) you will be insolvent and your employees will be looking for work!’ It is not just about saying ‘no’, it is about thinking of ways to say ‘yes’ to create alternatives. Often clients become obsessed: ‘If I do not do this I will lose the market’. You need to say: ‘Let us find another way in compliance with the law and acceptable for all’. That option will always exist, even if it might take time to identify it.

KP: There are grey areas where activities may be morally or ethically dubious, even if not strictly illegal. You want to help your client operate to the limit of what is legally permissible, but you also have broader ethical obligations – do these interests ever come into conflict?

SB: I remember several years ago I made a presentation on anti-corruption compliance, comparing American, French and English law. During my talk I used words like ‘ethics’ and ‘the appropriate way to behave’. I won’t name names, but the general counsel of a company stood up and said: ‘Stéphane, can you please focus on the law and forget about ethics. You are not paid to give ethical advice.’ In recent years there has been an evolution in anti-corruption law (particularly as concerning the respect of human rights by businesses), which means that lawyers must now advise not only on black-letter law (a prerequisite) but also on broader ethical issues. In the past a corporation may have acted in a way which was not ethical but very much legal – we must not forget that facilitation payments were tax deductible in many jurisdictions only 15 years ago! The mindset is changing, and as a lawyer we must act as a trusted adviser on more than just black letter law. We have to adapt.

KP: You work regularly across Africa – how effective have the US Foreign Corrupt Practices Act and UK Bribery Act been in introducing extraterritorial compliance obligations in the region?

SB: Firstly it is important not to focus solely on anti-corruption regulation in the English-speaking world. The entire world is fighting corruption, from China, Nigeria and India to France, Germany and elsewhere and thus it is not only US and UK laws to be concerned about, including regarding corruption of foreign public officers (which is criminalised by OECD members and several other jurisdictions). That said, in my opinion extraterritorial compliance obligations have been very effective in changing corporate mindsets. I see it in my practice all the time – companies want to understand what corruption is and do the right thing from a compliance perspective. Yes, extraterritorial anti-corruption regulation has been important. No, of course, corruption has not disappeared, but corporate culture is changing.

KP: Finally, what are some trends you are seeing in the anti-corruption enforcement and compliance space?

SB: Corruption is becoming a widely international concern. More and more non-OECD countries are adopting anti-corruption regulation. In many countries that have been plagued by corruption, there has also been a change in attitude: many political candidates are putting the fight against corruption high on their election manifestos. Fifteen years ago that was unthinkable! Today, governments and companies around the world are aware of the challenges posed by corruption and are moving in the right direction to prevent its occurrence and punish its perpetrators. There is plenty to do, but the wave is in motion and it will not stop. Complete eradication of corruption will not occur tomorrow, but we must persevere.

Part 1 Trends in enforcement

1.1 Challenges and trends in structured settlements for corruption offences – Abiola Makinwa¹

While a growing percentage of foreign bribery cases are resolved by negotiated or structured settlements, differences in jurisdictional approaches pose an ongoing challenge for legal and anti-bribery compliance professionals. This section summarises the benefits and challenges with structured settlements, discusses the types of regulatory regimes that currently exist, and outlines plans by the IBA to contribute to the global dialogue in this context.

What are structured settlements?

Structured settlements for corruption offences are best characterised as *cooperation* between regulatory authorities and alleged offenders. They occur where an alleged offender can show that every reasonable step was taken to prevent the act of bribery in question from occurring. This ‘compliant conduct’ is taken into consideration by regulatory authorities in the determination of the eventual sanction. In simple terms, it is an incentive-based framework that rewards ‘good corporate behaviour’.

Key benefits

Structured settlements for corruption offences can help to socially engineer good corporate behaviour by strongly encouraging corporations to manage bribery risks, not only internally but also externally with third party intermediaries and along the supply chain. For regulatory authorities, the voluntary disclosure and self-policing aspects of structured settlements can help them to address information asymmetries and the ‘real world challenges’ involved in discharging a criminal burden of proof in complex multijurisdictional transactions with multiple levels of decision-making.

At the same time, the focus on robust anti-bribery compliance programmes in many structured settlement frameworks incentivises corporations to rigorously review bribery risk and reputational damage, as well as the costs associated with regulatory breach. Such anti-bribery controls intersect with other regulatory regimes such as anti-money laundering, the financing of terrorism, tax evasion, data protection, privacy and fraud, where corporations also need to have a coordinated compliance strategy.

Key challenges in implementation

The spread of structured settlements brings into sharp focus the fragmented anti-corruption landscape. Key areas of difference in settlement regimes often include:

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- the level of prosecutorial discretion available to allow cooperation with the prosecutor and the alleged corrupt corporation;
- the legal hurdles that need to be overcome to prove criminal liability when contrasted with the *respondeat superior* theory;
- the extent of judicial oversight involved in the settlement process;
- the requirements for a guilty plea or an acknowledgement of guilt;
- differences in double jeopardy rules;
- differences in principles of corporate criminal liability; and
- questions surrounding third party certification.

This fragmentation notwithstanding, in the interlinked and interdependent global market, corporations are compelled to comply with the regulatory requirements of the most aggressive policing regime with extraterritorial reach. For many corporations, this is the United States. This fact tilts the power to frame the modern compliance and structured settlement agenda very decisively in one direction. Indeed, the current ABC compliance programme is firmly based on the Foreign Corrupt Practices Act (FCPA) style of enforcement practices in the United States. This political reality casts a large shadow across the compliance and settlement marketplace.

Types of settlement regimes

The various regimes that now exist for structured criminal settlements for corruption offences can be grouped into two broad categories. At one end of the spectrum are de facto models of cooperation, an example being the ‘informal discussions’ that may occur under article 69 of the Norway Criminal Procedure Act. At the other end of the spectrum is the *de jure* or *explicit* model of cooperation. These exist where there is a framework that takes the best efforts of a corporation to prevent acts of foreign bribery into consideration when considering eventual sanction for bribery violations; such framework includes clear guidance on what constitutes the relevant factors in such a consideration; and, there is a clear indication of the extent to which the ‘good behaviour’ of a corporation can influence the sanction that would otherwise be imposed.

Such *de jure* frameworks of cooperation provide a level of information, transparency, clarity and consistency that encourage strong anti-bribery compliance programmes. Furthermore, from a legitimacy standpoint, the more explicit the system of cooperation, the easier it is to get public buy-in. Public acceptance of structured settlements often depends on the following:

- the relationship between the public need (or desire) for ‘revenge’ for serious crimes and the severity of the sanctions applied (including the use of fines, disgorgement, confiscation and other financial penalties, robust compliance programmes, acceptance of corporate and personal responsibility);
- the transparency of the process (including comprehensive public information); and
- the fairness of the process (including due process, no abuse of power by authorities, and judicial oversight).

The US is a classic example of a *de jure* framework. The US Sentencing Guidelines, the Principles of Federal Prosecution of Business Organizations, the Resource Guide to the Foreign Corrupt Practices Act, the recent 2015 Individual Accountability Policy (the Yates Memo) and the 2016 Department of Justice Fraud Sections' Foreign Corrupt Practices Act Enforcement Plan and Guidance Pilot, provide an explicit framework that lists the factors that will increase or reduce a corporation's culpability for acts of foreign bribery. This explicit framework provides transparency by explaining the full range of potential mitigation credit available to companies. It incentivises self-policing and self-reporting by rewarding corporations that have 'an effective programme to prevent and deter violations of law'; that promptly report wrongdoing; and that fully cooperate with the government and accept responsibility. The quantifiable 'reward' of such cooperation takes the form of non-prosecution agreements, deferred prosecution agreements or declinations. The rich history of these outcomes is well reported on the US Department of Justice and Securities and Exchange Commission websites.

Another notable *de jure* example is the United Kingdom. The Guidelines published under section 9 of the UK Bribery Act provide factors in favour of or against prosecution, as well as a framework of determining what will constitute 'adequate procedures' as a defence to the section 7 offence of failing to prevent bribery. Schedule 17 of the 2013 Crime and Courts Act now allows for deferred prosecution agreements (DPA). The accompanying Deferred Prosecution Agreements Code of Practice provides insight into the circumstances when prosecutors will consider a DPA. In December 2015, under these new rules, Standard Bank entered into a DPA and the ultimate fine was reduced by a third because the bank had self-reported. By contrast, the Sweet Group Plc was sentenced and not offered the possibility of a DPA because of its 'deliberate attempt to mislead the [Serious Fraud Office]'. A second DPA, in July 2016, centred on the fact that a British small-to-medium enterprise with a US-registered parent company had self-reported and cooperated with the Serious Fraud Office's investigation.

Other countries with *de jure* frameworks include:

- Chile, where Law 20.393 of 2009 provides credit for a corporation which has in place a Crime Prevention Model well as a process for certification of such a programme;
- Italy, where under article 6 of Law 231/2001, a company may be exempted from administrative liability if it can prove it had a Model of Organisation, Management and Control aimed at preventing the criminal offence allegedly committed;
- Spain, where Law 1/2015, dated 30 March 2015, exempts corporations from criminal liability where they have business procedures to prevent crimes being committed;
- Brazil, where under Decree No. 8,420/15, the existence of internal mechanisms and procedures of integrity, audit and incentives for reporting of irregularities, as well as the effective enforcement of codes and ethics will be taken into consideration in applying sanction; and
- France where the new Sapin II Law provides a 'French style DPA' (*convention judiciaire d'intérêt public*) that places an obligation on corporations to monitor, detect and remediate corruption.

In Australia, a public consultation on the implementation of a DPA scheme is underway. At the international institutional level, the World Bank's negotiated resolution agreements system (NRAs) is also a *de jure* framework. Depending on the extent to which a party agrees to or does cooperate

with the investigation; admits culpability; and takes corrective measures (including implementing a compliance programme) an NRA may be warranted.

Outside of this *de facto/de jure* spectrum, a third approach occurs where corporations are encouraged to take a *preventative approach* by having internal mechanisms to identify and mitigate corruption risk as part of a good corporate governance strategy. In Japan, for example, the Ministry of Economy, Trade and Industry has developed guidelines to ‘support companies involved in international commercial transactions to voluntarily take a preventative approach to the prevention of bribery of foreign public officials.’ In Hong Kong, the Independent Commission against Corruption, via its Corruption Prevention Advisory Service (CPAS), provides best practices guides to assist private and listed companies in developing or enhancing their anti-corruption policies, corruption prevention systems and measures.

Moving forward

As structured settlements spread in an interlinked global market, so too will the call for cross-border coordination, or, possibly, unified global standards. There is also rising concern from the public and civil society regarding ‘compensation’ for ‘victims’ of corruption in the structured settlements process. Another issue to consider is whether the use of structured settlements will be influenced by political events, such as the recent changes in the US. However, all the evidence suggests that there is currently increased impetus for a global dialogue on the models, scope, application and future of structured settlements for corruption offences.

To this end, the Anti-Corruption Committee of the IBA has set up a new subcommittee on Structured Criminal Settlements, to map best practice, and examine the extent to which it is possible to have uniform global standards with regards to structured settlements for corruption offences. This Subcommittee will aim to publish ongoing reports on these topics for legal practitioners. More information is available on the IBA Anti-Corruption Committee website.

1.2 Challenges and trends in corporate liability regimes – Elvan Sevi Firat²

This section examines emerging trends in corporate criminal liability regimes and the steps being taken towards convergence in the regimes of common and civil law countries. The different approaches and tools that common law and civil law countries utilise for assessing corporate criminal liability are highlighted. The section concludes that, despite trends towards convergence, a considerable amount of divergence still exists.

Focus on corporate liability

For decades, countries have been working on developing a better legal regime to fight corruption. As global trade has evolved, higher standards of corporate governance and accountability have developed, and awareness of the need for corporate criminal liability has grown.

Many international anti-corruption instruments now require State Parties to take necessary measures to establish the liability of legal persons for corruption offences. These include the following:

- article 3 of the Second Protocol to the European Union Convention on the Protection of the Financial Interests of the European Communities (1997), which requires measures be taken to establish liability of legal persons for fraud, corruption and money laundering;
- articles 2 and 3 of the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) requires corporate liability be created for bribery of a foreign public official;
- article 18 of the Council of Europe Criminal Law Convention on Corruption (1999) requires corporate liability for active bribery, trading in influence and money laundering; and
- article 26 of the United Nations Convention against Corruption (2003) requires measures to be taken to establish corporate liability for the offences created under the Convention including embezzlement of property, bribery and concealment.

The importance of imposing corporate criminal liability lies in the creation of proper incentives for both individuals and corporations to avoid engaging in corruption. Where countries recognise corporations as subject to criminal liability, and impose criminal sanctions on them, individuals cannot hide behind corporate actions and the corporation as a whole cannot avoid criminal liability for its sanctioning of bribery and corruption. Moreover, the threat of criminal liability can encourage corporations to adopt better standards by implementing effective compliance programmes and monitoring risks of legal liability.

Punishing corporations for criminal activities, usually by imposing significant fines, can also lead to reputational damage which in turn can act as a deterrent to corruption. Finally, it is arguable that just punishing individuals for bribery and corruption, and leaving corporations to face administrative punitive liability only, is not sufficient in complying with the international instruments referred to above. However, as discussed below, different approaches are taken to the issue of corporate criminal liability in common law and civil law countries.

² Partner, Firat zgi, stanbul (sevi.firat@firatizgi.com).

Common law and civil regimes

Corporate criminal liability can be classified as strict liability, negligence or as *mens rea* schemes. Because a corporation exists as an artificial identity, exhibiting the sum intentions and actions of the individuals involved in the entity, identifying the corporate ethos or *mens rea* (guilty mind) is often not easy. While the ‘directing mind’ theory of corporate liability still exists in a number of common law jurisdictions, it can be difficult to establish, with the result that corporates and their boards are often protected from criminal liability for offences committed on their watch. Accordingly, improvements to criminal law principles and their application to corporate conduct has been an increasing focus of law reform in this area.

Whereas common law countries generally accept that a company can be held criminally liable as well as the individuals involved, the notion of corporate criminal liability has not existed in most civil law countries. The civil law focus has been on the culpability of individuals and it has generally been considered that organisations cannot be held liable under criminal law (*societas delinquere non potest*). However, recently, especially as a result of the adoption of the aforementioned Conventions, a greater emphasis has been placed in civil law countries on prosecuting corporate entities for the criminal misconduct of their officers and employees.

Many civil law countries (including Belarus, Kazakhstan and Kyrgyzstan) still do not have a corporate criminal liability regime. In Brazil, Bulgaria, Colombia, Germany, Greece, Italy, Turkey and the Russian Federation there is the possibility of administrative sanctions or security measures being imposed on corporations. In Turkey, corporate criminal liability was briefly introduced into law as a result of pressure from the OECD’s Working Group on Bribery, but that law was later repealed on the grounds that it violated the principle of individual criminal liability, which is enshrined in the Turkish Constitution. Nevertheless, corporations in Turkey can still be held administratively liable for offences – including corruption – committed by their organs or representatives. Armenia and Uzbekistan also have drafted a Code of Administrative Offences which provides for liability of legal persons, however, currently there are no provisions for holding corporations criminally liable for their unlawful actions.

Other civil law countries (such as France, the Netherlands, Norway, Switzerland, Hungary and Georgia) have now implemented legislation introducing corporate criminal liability. The Netherlands was the first civil law country to recognise the concept of corporate criminal liability. In Germany, although a legislative bill (the Corporate Criminal Liability Act) was presented in 2013, the Act remains pending and so the situation regarding corporate criminal liability is uncertain. In Argentina, amendments to allow for criminal liability of corporations were drafted in 2010 but have not yet been adopted.

Recent reforms in France under the Sapin II legislation have changed the legal framework for the prevention and prosecution of corruption in France. As a result, companies carrying out business in France have a corporate duty to prevent corruption and penalties can be imposed on the company if they fail to implement a compliance programme in accordance with the legislation. A new anti-corruption agency has been created to monitor the effectiveness of these compliance measures. The Sapin II bill also provides for a deferred prosecution agreement between companies and prosecutors.

In common law countries, where corporate criminal liability regimes are common, there has been an increasing tendency to hold individuals liable for their wrongful acts on behalf of corporations. This is particularly evident in the United States, where primarily companies have been held liable for Foreign Corrupt Practice Act violations. Under US law, vicarious liability can apply to a corporation regardless of a determination of corporate fault. This liability is based on the principle of *respondeat superior* and the US Department of Justice and Securities and Exchange Commission have employed this theory as the basis for many alternative settlement agreements such as Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs).

The United Kingdom has also improved the accountability of corporations for corruption. Section 7 of the Bribery Act provides that a corporation can be liable for failure to prevent an offence of bribery unless it can prove that it had in place sufficient measures to prevent the act of bribery from occurring. Recent indications suggested that the UK might extend section 7 liability to economic crimes such as fraud and money laundering. However, a bill creating these offences has not yet been presented and it may be that the UK has abandoned these plans.

Accordingly, we can say that both common law and civil law countries are trying to improve their systems to provide more effective measures for anti-corruption and corporate criminal liability. For many common law countries, the ‘directing will and mind’ principle remains a hurdle. At the same time, various European legal frameworks continue to evolve and adapt new measures to increase corporate criminal liability.

Finally, both common law and civil law systems are trying to emphasise individual liability in corruption crimes, as a supplement or alternative to corporate liability. As we see more settlements, NPAs and DPAs globally, incentives for self-disclosure by corporations are likely to continue to grow. Even though significant differences remain among jurisdictions, the emergence of gradually converging views regarding corporate and individual criminal liability among these different legal systems is an encouraging development.

1.3 Trends in the enforcement of human rights and corruption – Angela Barkhouse

Human rights are indivisible and interdependent, and the consequences of corrupt governance are multiple and touch on all human rights – civil, political, economic, social and cultural. Increasingly there is recognition of the impact of corruption on human rights. This section highlights noteworthy cases in this area.

Corruption and human rights

The obligations of states are set down in the international human rights treaties to which they are party, as well as in the United Nations Charter, which promotes social progression, better standards of life and dignity of the human person. The state retains primary responsibility to promote and protect the human rights of citizens and/or people within their jurisdiction. Yet when corruption is prevalent, those in public positions often fail to take decisions with the interests of society in mind, causing violations of these obligations as recognised in the International Covenant on Economic, Social and Cultural Rights.

Anti-corruption debates increasingly comment on the impact of corruption on human rights. At an operational level however, the vagueness or ‘softness’ of these concepts is noteworthy especially when compared to the scale of the human rights challenges posed by corruption. Further, when prosecuted by national judicial systems, under national, regional and multilateral treaties or legislation, and under criminal law, corruption is perceived as an economic crime. However, this focus frequently fails to consider the damage caused to victims, which may not be immediately identifiable due to the remoteness of corrupt activity to the consequence of the act; for example, the consequences of the theft of funds intended to purchase vaccinations for children, pay teachers’ salaries or ensure clean drinking water. Moreover, it can also neglect to restore victims of corruption to the position they should have been in prior to the wrongdoing, and ensure that the colossal sums of money that have been stolen are rightfully returned.

There is a view that civil action for bribery and corruption (which can be taken in parallel to criminal action) can be more advantageous to victims. Advocates for this approach often refer to the lower standard of proof required in linking financial misconduct to stolen assets; the ability to launch civil proceedings (or be party to criminal action) in jurisdictions other than the home state; and the ability to control the proceedings. More germane for discussion is that while generally it is public bodies that bring criminal cases focused on punishing the offender, civil cases are private proceedings; in which individuals can enforce their legal rights, and seek redress. This provides a compelling argument to taking such action if the state refuses to act.

Thus where the corrupt management of public resources compromises a government’s ability to deliver services, contributing to civil conflict, poverty, social inequality, and high levels of mortality and disease, it is important to seek ways to make the victims of corruption more visible in the process, and to enable them to take charge of their own grievances.

Formative cases

The 2007 African case of the ‘ill-gotten gains’ began to actualise this concept. Non-governmental organisations Sherpa, Transparency International (TI) and an association of Congolese citizens lodged a criminal complaint in France against Teodoro Obiang Nguema Mbasogo of Equatorial Guinea, Omar Bongo of Gabon and Denis Sassou-Nguesso of the Republic of Congo, accusing the three heads of state of embezzling state money for the illegal acquisition of personal assets. Initially, French prosecutors refused to act, so TI France successfully obtained standing to file a civil party petition to trigger a judicial process, leading to criminal proceedings. The Cour de cassation found their complaint admissible and the case against Teodorin Obiang Nguema, the son of the President of Equatorial Guinea, has now progressed and has been referred to the Paris Criminal Court. This action is significant as it employed a civil process available to individuals and entities in France to support legal action on behalf of victims of corruption.

A more instructive example is the 2010 case of *Socio-Economic Rights and Accountability Project* (‘SERAP’) *v Nigeria* at the Economic Court of West African States (ECOWAS) Court of Justice. The claim by SERAP was based on allegations of the violation of the rights to education, human dignity and of people to their wealth and natural resources resulting from the plundering of funds held by the Universal Basic Education Commission (UBEC) in Nigeria. US\$351.54m was missing from state funds destined for the education of its citizens, which meant that ‘Nigeria was unable to attain the level of education that she deserves in that over five million Nigerian children have no access to primary education amongst others’.

SERAP argued that such corruption had violated the right of the people to economic and social development because the funds were stolen from the very organisation, introduced by the Federal Government of Nigeria in 1999, that was designed to ensure access to and the quality of basic education, as enacted under the Basic Education Act and Child’s Rights Act of 2004.

Nigeria argued that the court lacked jurisdiction to hear the case because it raised issues of domestic law and policy, which were not within the jurisdiction of the court. Nigeria also contended that SERAP lacked standing since these laws did not directly affect it. ECOWAS disagreed, considering that it had the jurisdiction to adjudicate a claim involving the right to education under the African Charter on Human and People’s Rights (ACHPR) even if such a right was arguably non-justiciable in domestic constitutional or statutory law. Specifically, the Court noted that Article 9(4) of the Supplementary Protocol to the ACHPR granted the court jurisdiction to determine cases of violations of human rights in Member States of ECOWAS, noting a distinction between the recognition of education within the domestic legal framework of Nigeria, and the *human right to education* under the ACHPR to which Nigeria is a state party. The court concluded: ‘The fact that these rights are domesticated in the municipal law of Nigeria cannot oust the jurisdiction of the Court.’

This case is significant for conceptualising the prosecution of corruption as a human rights violation; for its decision on the justiciability of the right to education protected under the ACHPR (thus removing a potential impediment to justice); and for its determination on the ability of individuals and civil society groups to bring public interest litigation cases (citing the doctrine of *action popularis* that allows any person or entity to challenge a violation of a public right).

However, the court concluded that ‘In a vast country like Nigeria, with her massive resources, one can hardly say that an isolated act of corruption contained in a report will have such devastating consequence as a denial of the right to education, even though as earlier pointed out it has a negative impact on education’. The judgment therefore indicated that while embezzlement or theft of part of the funds allocated to the education does indeed have a negative impact, there must be a clear link between the acts of corruption and *a denial of the right* to education. The court also held that it could not accept that Nigeria had not fulfilled the right to education, because organisations and departments had been set up to deliver education to its children (including UBEC), rather, that the Nigerian government had an obligation to ensure that such funds were properly used, and that education is not undermined by corruption.

It is pertinent to note that the report, which SERAP provided to ECOWAS in support of its claim, provided only prima facie evidence of the facts. As there was no judicial pronouncement on these findings, nor were the alleged perpetrators named as defendants or parties before the court, the court was unable to make a declaration of illegality, which would have been critical in seeking damages enabling a recovery of the stolen funds.

However, as the cases above demonstrate, where there is state inaction, the courts may become a mechanism for the prosecution of corruption by enforcing rights protected under Human Rights Charters, supporting a more restorative, victim-centric approach. To ensure such momentum is not lost, the following should also be considered in future claims:

- the alleged perpetrators should be included as defendants to enable direct recovery of the stolen funds (if a judgment on the illegality of their behaviour has not already been achieved through prior proceedings); and
- the financial wrongdoing should be forensically linked to the denial of the right (sufficient to meet the balance of probabilities of which civil claims allow).

Effective prosecution is one of the most powerful deterrents in combatting corruption and upholding social control, and is the responsibility of the state. It is by holding the perpetrators of corruption criminally and personally accountable for the harm caused to the society by whom they are elected to protect, that the perception of impunity can be eroded. If it cannot be achieved due to state inaction, perhaps it is time to seek another route, through private civil action, building on the emerging norms resulting from these cases. For indeed, what is the purpose of justice, if it is not to sanction the wrongdoing and repair the harm done?

1.4 Challenges in internal investigations – Jitka Logesová, Dessislava Fessenko, Michal Kníž, Kristýna Del Maschio and Kamen Chanov³

Corporations are now under more scrutiny in relation to bribery and corruption than ever. What started with the Foreign Corrupt Practices Act in the United States is now seen as a global trend. The concept of corporate criminal liability, allowing for a defence based on compliance, exists in a number of jurisdictions and, as a result, enforcement authorities around the world are carrying out internal investigations in increasing numbers. International cooperation between enforcement authorities has also increased.

Bearing this in mind, it is extremely important for legal and compliance professionals to ensure that their clients follow best practices and are ready for an investigation should one occur. In such cases, properly conducting an investigation becomes an essential part of a company's control procedures. To assist legal practitioners and compliance professionals, this section outlines some of the issues that typically arise during internal investigations in the countries of Central and Eastern Europe (CEE). In our experience, challenges most commonly arise in the areas of legal privilege, employment law, privacy and data protection.

Legal privilege and reporting considerations

One of the first issues that a company must consider when conducting an internal investigation is who will carry it out. An investigation can be undertaken by the company itself or by an external adviser. This is especially important when it comes to the duty to cooperate with law enforcement authorities, which can include the duty to hand over to authorities certain documents or other materials important to an investigation. A key concept here is legal privilege. In most CEE countries, legal privilege is understood as the duty of lawyers to maintain confidentiality regarding all the information they receive while providing legal services to the client.

A lawyer will not breach their duty of confidentiality in handing over documents in such circumstances, except in very limited cases; for example, if the lawyer is released from this duty by the client, or under anti-money laundering laws. In-house lawyers do not always enjoy the protection of the duty of confidentiality, which applies primarily to lawyers, barristers, attorneys and other legal practitioners and their employees and other persons who assist them in providing legal services (such as auditors, experts or forensic firms). However, since legal privilege, as well as any other statutory professional confidentiality duties, does not extend from these third persons to the client, in order to preserve the duty of confidentiality any third parties should not be engaged directly by the client. A practical solution is to structure the internal investigation so that any third person is subcontracted by the law firm involved.

In most CEE countries, it is not clear whether legal privilege still applies if the documents requested by the regulatory authority are in the client's possession. In terms of internal investigations, this must be considered when deciding whether reports containing certain findings should be provided to local management, as there is a risk that the police may request the local management to produce such reports.

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Another important question is whether a company should report to law enforcement authorities misconduct that it becomes aware of while conducting an internal investigation. Given that most CEE countries recognise (with variations) the duty to report (especially in relation to bribery crimes), and failure to do so may in some cases be considered a criminal offence, it is important that clients are aware of the need for self-reporting to authorities based on the specifics of the local law. External legal advisers are for the most part exempt from the duty to report if they learn about a potential crime while providing legal services. However, even if there is no reporting obligation in a specific case, the potential benefits of voluntarily reporting (such as the possibility of settlement or at least of mitigating the punishment) should always be considered.

Employment considerations

As internal investigations directly concern the employees and management of the companies involved, this can trigger many issues related to employment law. One issue which frequently arises is the question of employees' obligation to cooperate with an internal investigation. Generally speaking, both employees and management have certain obligations when it comes to the prevention of wrongdoing in the company. While management is obliged to comply with the duty of care, and thus initiate an internal investigation if they learn about material compliance breaches, employees must act in a manner that protects the financial interests of their employer, which can be interpreted to mean that they should cooperate with an internal investigation and, for example, answer the investigator's questions or provide business documents. Other issues to consider are whether local law or relevant collective bargaining agreements stipulate that a works council or trade union be involved in the investigation, and whether (and if so, when) the employees should be offered or indeed have a right to be represented by independent legal counsel during internal interviews.

Privacy and data protection considerations

Internal investigations usually carry a serious risk of intruding into employees' and third parties' privacy. Appropriate measures should be implemented to prevent the risk of such intrusion. Measures include, for example, setting up automated key word filtering before an electronic document review is initiated and properly instructing the investigator's staff and subcontractors on the use of such a process.

Furthermore, given that personal data is almost always accessed during internal investigations, data protection laws must be considered. In light of the recent adoption of the European Union's General Data Protection Regulation (GDPR), companies must now review and modify where necessary their existing policies to comply with the new regime, set to apply from 25 May 2018. Although the core rules remain largely unchanged, the GDPR introduces some strenuous obligations that will take time for companies to address. For example, due to its significantly expanded territorial reach, the GDPR now applies to data controllers and processors established outside the EU, that target EU consumers for the purposes of offering goods or services or for monitoring EU data subjects' behaviour.

When it comes to internal investigations, companies must analyse the legal grounds on which they depend for data processing purposes. For instance, if an organisation relies on the 'legitimate interest' ground, it must balance its interests against possible intrusion into an employee's privacy.

The GDPR recognises, as permitted legal bases, the prevention of fraud, the transmission of personal data within a group of undertakings for internal administrative purposes, and ensuring network and information security. Companies must take note that they have an obligation to inform data subjects of those legitimate interests.

It is also advisable to avoid, where possible, relying on an employee's consent. The GDPR introduces additional requirements for such consent, such as the obligation to separate consent from other matters in written declarations or agreements, and to provide for equally simple withdrawal. Companies must keep proper records of consent since they have an active obligation to demonstrate that a data subject has agreed to his or her personal data being processed. It is expected that CEE data protection authorities will now start interpreting and resolving issues related to the processing and export of data for investigations in the light of this new regime.

Data protection – EU-US privacy shield

In October 2015, the European Court of Justice struck down the Safe Harbour agreement between the EU and the US on the basis that it did not provide adequate protection of personal data. This has created significant turmoil for both EU and US businesses, which depend on transatlantic data transfers for the functioning of their operations. After intense negotiations, a new framework was agreed upon, called the 'EU-US Privacy Shield'. This framework became effective on 1 August 2016.

Companies based in the US that process EU subjects' data must now submit a self-certification to the US Department of Commerce that they comply with a comprehensive set of 'Privacy Principles' introduced by the Privacy Shield. For instance, organisations have an obligation to provide information to individuals about the key elements of the processing (for example, the type of data collected, purpose of processing and right of access). In addition, robust mechanisms assuring compliance with the Privacy Principles and a system for reviewing individual complaints and possible remedies must be put in place.

Where a company is involved in an internal investigation, this means that they must now enter into a contract with a third-party controller, which can assure, among other things, the same level of protection as provided by the Privacy Shield. The Privacy Principles apply immediately upon certification, which needs to be renewed annually. If a company certified under the Privacy Shield is a target in a takeover or participates in a merger, it must notify the US Department of Commerce whether the acquiring/resulting entity will continue to be bound by the Privacy Principles. Additional rules apply to data collection and processing for human resources purposes in the context of an employment relationship. An EU-based organisation transferring information about its employees to a parent, affiliate or unaffiliated service provider in the US which has been certified under the Privacy Shield is subject to the national laws of the country from which the information originates. The US company is also under a duty to cooperate and comply with the advice of the relevant authority. As a result of all of these changes, CEE data protection and labour authorities will now play an important role in resolving any disputes that might arise from transatlantic data transfers.

1.5 Anti-corruption in Brazil: Lessons from the ‘Car Wash’ case – Leopoldo Pagotto⁴ and Isabell Weaver⁵

This section seeks to address various questions relating to corrupt practices in Brazil and the introduction and strengthening of anti-corruption legislation and its strict enforcement. What has caused Brazil to take this stance? To consider this and other aspects we will first look at Operation Car Wash and how it became the biggest corruption scandal in Latin America. We will then consider the impeachment of President Dilma Rousseff; and finally, examine the resulting changes in law enforcement techniques and behaviour with a brief glimpse at what Brazil might expect next.

Operation car wash

Operation Car Wash started out as a money laundering investigation targeting a black market dollar operator, who laundered money from gas stations and car washes. As the investigation continued, it was discovered that the initial target, the *doleiro* (black market money dealer) Alberto Youssef, had bought a Land Rover for Paulo Roberto Costa, a director of the semi-public oil company Petrobras. Further investigations revealed improper payments to Youssef from companies that had won Abreu & Lima (Petrobras) refinery contracts. Costa and Youssef both struck a plea bargain with prosecutors in exchange for information on a kickback scheme where several top Petrobras officials colluded with a cartel of Brazilian construction companies to overcharge the oil company for construction and service work.

From these two plea deals the operation mushroomed, revealing the largest corruption scheme under investigation in the world. The cartel would decide which construction company would win a contract bid to, for example, service an oil rig or build part of a refinery. This fake competition was overseen by Petrobras directors and agents. They were rewarded with bribes. They kept some of the money but shared much of it with politicians. Petrobras, while publicly traded, is 51 per cent government-owned. Many Petrobras executives owe their jobs to elected officials.

Key political figures

For many Brazilians, the last two years have seemed like a ‘reality’ or perhaps better version of the television series *House of Cards*, with the arrests and convictions of politicians, including serving ministers and high company executives such as the CEO of Odebrecht (a Brazilian construction company); investigations regarding money laundering, fraud, corruption and obstruction of justice against the former President Inácio Lula da Silva (Lula); Lula’s detention; the raid of his house; the (unsuccessful) attempt to make him Chief of Staff to protect him from such investigations by the then President Rousseff; and finally, with Lula being officially charged with all of these crimes.

From the outset it has been alleged that Rousseff has been involved in the Petrobras scheme but although he remains under investigation he has not been charged. Recently, he was impeached for fiscal crimes, in the form of fraudulent adjustments of government accounts by taking loans from state banks and the opening of supplementary credits without congressional approval. President

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Rouseff's impeachment was broadcast live on Brazilian television and widely viewed. The Speaker of the House, Eduardo Cunha, was also removed from office for, among other allegations, receiving US\$5m as kickback payments from the Petrobras scheme. Several other ministers in the government of the current President Michel Temer have been mentioned in plea agreements as having benefited from the corruption scheme, though President Temer himself is not under investigation.

Changes in legislation

As a result of Operation Car Wash 232 people were investigated, 160 arrested, 93 convicted and US\$800m in assets frozen, largely as a consequence of two new laws being enacted on 1 August 2013: the Brazilian Anti-Corruption Law (Law No. 12,846/2013) and the Organised Crime Act (Law No. 12,850/2013). These laws followed a series of events related to corruption, in particular the Mensalão Trial and the protests of July 2013. The Organised Crime Act created the legal basis for the most powerful tool in recent anti-corruption investigations: plea bargains. Following Operation Car Wash, Costa and Youssef were the first to make a deal with the prosecution. They gave information on the corruption scheme in exchange for a more lenient sentence. There were many more to follow their example.

The Brazilian Anti-Corruption Law established administrative sanctions and strict civil liability of companies for the corrupt acts of their directors, officers, employees and other agents acting on their behalf. Administrative sanctions can amount to 20 per cent of the company's gross revenues in the year prior to the beginning of the investigation. Sanctions also include the publication of the decision on the internet and print media. Civil sanctions may include, for example, the loss of assets or rights; suspension of the company's activities; and compulsory dissolution of the company.

Sanctions are cumulative with the obligation to provide full reparation for the damages caused. Companies within the same group or consortium partners may be held joint and severally liable for the payment of fines and for the restitution of damages. The introduction of strict liability for third parties such as agents, used by a company for its business operations, has also led to stricter enforcement than previously, when companies had a comfortable defence ('I did not know that the agent or third party paid bribes'), which is no longer valid.

Law enforcement techniques have also changed. In the past, there was little information exchange between the different enforcement agencies. Today, the investigative duties of police and prosecutors are more intertwined, with active judicial oversight and an intensive exchange of information with government agencies, such as tax authorities and the Financial Intelligence Unit. Greater prosecutorial and judicial coordination has created a more effective system for the requesting and granting/denying of search and seizure orders, arrest warrants or detention orders for questioning. The creation of specialised task forces and federal police units has also helped to make law enforcement more effective.

The strategy, behaviour and attitude of the authorities towards public opinion has also changed. Law enforcement in Brazil today tries to leverage the public opinion in favour of law enforcement. Prosecutors give press conferences with PowerPoint presentations following arrests or detention orders. Occasionally, potential evidence or testimonies or recorded conversations from wiretapping are leaked to gain public attention. The media and the internet play an important role in law

enforcement strategy. The Federal Prosecutor's Office promotes its proposed 'Ten Measures Against Corruption' on their website and in social media with cartoons, downloadable campaign posters and a real-time digital signature counter and other interactive tools.

Proposed changes in legislation

The vast scope and pace of Operation Car Wash has spurred legislative proposals that seek simultaneously to intensify and strengthen law enforcement, and conversely, to restrict it.

TEN MEASURES AGAINST CORRUPTION

The 'Ten Measures Against Corruption' as proposed by the Federal Prosecutor's Office, involve changes to criminal law and procedure, including higher penalties for corrupt practices, speedier convictions, limitation of the right to appeal, the authorised use of unlawful evidence if obtained in good faith, and reform of the criminal statute of limitation rules.

Measures are proposed to allow for greater accountability of political parties and the criminalisation of political slush funds. Thus, a political party may be held liable for crimes committed for the benefit of the party. A new criminal offence would be introduced whereby individuals directly involved in the handling and use of political slush funds would face imprisonment for a period of four to five years.

Further provisions are intended to legalise 'sting' operations and to allow for the introduction of civil asset forfeiture, enabling law enforcement agencies to seize private property of unlawful origin. Any private property thus forfeited can only be returned to the legitimate owner if the owner can prove it was not part of any criminal activity.

WHISTLEBLOWER'S REWARD BILL

Currently under the consideration of Congress is the Whistleblower's Reward Bill. Individuals who, under their own initiative, give relevant information to the authorities regarding the commission of a crime or an act of administrative improbity and so successfully trigger an investigation will be entitled to a share of up to ten per cent of the assets forfeited by the government, as well as compensation for damages. The whistleblower's identity will be protected with appropriate measures. The bill is still at a preliminary stage and may change substantially before and if it is enacted.

THE ABUSE OF AUTHORITY BILL

The Abuse of Authority Bill was proposed by former Senate leader Renan Calheiros earlier this spring. The bill was seen as an attempt to constrain enforcement agents (policemen, prosecutors and even judges) engaged in Operation Car Wash, especially those involved in plea bargaining deals. The bill only allows for plea bargains for those individuals not under arrest and vetoes the acceptance of criminal complaints based solely on plea agreements. Plea bargaining has become a key element in anti-corruption investigations in Brazil. The criticism inherent in the bill is also personal, since Calheiros was mentioned in several plea bargain agreements in Operation Car Wash. In December 2016 Calheiros was removed as Senate leader after being indicted for embezzlement.

Future challenges

Brazil has embraced a strict law enforcement regime which is now accustomed to national and international cooperation. Operation Car Wash has become a global operation. Companies caught up in the Petrobras investigation face scrutiny in multiple countries not least Brazil, including the Netherlands, Switzerland, the United States, and the United Kingdom. Brazil and the US in particular continue to closely cooperate in this regard.

So what comes next? Companies are expected to cooperate more fully with law enforcement. Although not mandatory, the implementation of compliance mechanisms and programmes is highly recommended for companies operating in Brazil. 'Big data' will play a more important role in law enforcement investigations. In Brazil as elsewhere, everyone collects data: from the federal tax agency to banks, employers, internet and telephone companies and many others. Law enforcement will want to have more access to such data. Suspects in current investigations have been exposed by credit card transactions for luxury goods in Europe or frequent travels to Switzerland; more being exposed in a similar fashion are likely to follow.

There are further challenges: the justice system oversees the enforcement of anti-corruption legislation but there is no case law as yet. This will develop, both for criminal law matters and administrative and civil sanctions, as governed by the Brazilian Anti-Corruption Law. Another challenge is the fragmentation of law enforcement agencies and their investigations and proceedings. Often companies and individuals face investigations under the same allegations by several agencies at federal, state and municipal level. Once settlement options such as a Leniency Agreement are discussed it gets complicated and more difficult to reach an agreement say with five parties rather than with two.

These and other challenges remain for Brazil's 'new look' and much stricter law enforcement regime. Time, prevailing attitudes and behaviour together with emerging case law will help shape what develops.

1.6 Double jeopardy in a multijurisdictional reality: new trends and challenges – Francesca Petronio⁶

In the anti-corruption sector, the presence of an increasing number of anti-corruption regulations around the globe, plus the extraterritorial reach of many of them and the increasing level of aggressiveness by regulatory authorities, represent a challenge for companies operating across various jurisdictions. This section discusses the challenges posed by such a scenario in the context of double jeopardy.

Background

Today, many countries are adopting, strengthening and refining anti-corruption laws and regulations in order to keep pace with the prosecution of these offences and the adoption of innovative tools to combat bribery. This approach is evident in the recent adoption by the French Parliament, on 8 November 2016, of a final version of the Sapin II Law, which includes legal measures to fight corruption inspired by international standards. Similarly, on 18 July 2016, the President of Mexico enacted laws of the National Anti-Corruption System in an effort to create a far-reaching and up-to-date anti-corruption enforcement system. Ukraine's anti-corruption laws are also relatively recent and aim to establish well-financed and independent institutions to assist in the fight against corruption; however, such laws lack an extraterritorial application. Italy reformed its anti-corruption regulations in 2014 and 2015 by strengthening preventive measures and creating a culture of transparency in the public administration rather than focusing solely on criminal offences. Lastly, in Germany, there are ongoing reforms in the implementation of new legislative measures in the field of anti-corruption, designed to comply with European and international conventions on cross-border corruption.

The risk of multiple legal actions

The existence of these similar and overlapping laws has resulted in an increased risk that corporations and individuals may be prosecuted by different authorities for the same offence, and this has stimulated discussions on the resolution of conflicts among jurisdictions. Such discussions are linked to the existence and enforcement of an international *ne bis in idem* principle (double jeopardy principle), which operates as a procedural defence preventing a defendant from being tried multiple times on the same charges following a legitimate acquittal or conviction. In this context, recent multijurisdictional investigations confirm the growing relevance of these double jeopardy issues. For example, in the United States, the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) recently started investigating some companies allegedly involved in corruption in Brazil (Operation Car Wash) on the basis that such companies are listed or operate as foreign issuers on the New York Stock Exchange and/or that the relevant transactions passed through the US financial system. Similarly, in Europe, Eni and Royal Dutch Shell are being investigated in multiple jurisdictions in connection with an alleged corrupt scheme for the acquisition of a stake in an oil block in Nigeria.

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There are some indications on how national courts and authorities may resolve these matters. One example is given by the SBM Offshore case, concerning a Dutch offshore services company that was investigated for alleged improper payments to government officials in Angola, Brazil, and Equatorial Guinea made by sales agents between 2007 and 2011 in order to secure contracts with several foreign engineering firms. In 2014 the DOJ decided to drop its two-year investigation of the matter on the basis, inter alia, of the ‘adequacy’ of the out-of-court settlement for \$240m reached by the company in the Netherlands. However, in the absence of any specific guideline or policy addressing the enforcement of the international double jeopardy principle under the US legal framework, such matters are left entirely to the discretion of the prosecutor. The trend of the DOJ, followed also in the SBM case, is to resolve the issue by adopting a pragmatic approach, taking into account the ‘adequacy’ of any foreign proceeding outcome (the out-of-court settlement) in connection with the offence that occurred.

A different approach was taken in the case of Vitol SA, involving a Switzerland-based oil company which entered a guilty plea with the New York State Court for ‘grand larceny’ under New York State’s Penal Law, in connection with the corruption of Iraqi public officials in order to win contracts in the Oil-for-Food Programme. On 26 February 2016, the Paris Court of Appeal ordered the company to pay a fine of €300,000, ruling that the plea deal reached by Vitol SA and the US prosecuting authority, even if related to the same facts and actions, did not bar the French prosecution. The US authority had charged Vitol SA in relation to the economic offence of grand larceny, whereas, under French law, the same facts are punishable under the anti-bribery statute, which protects interests including the preservation of markets’ integrity and transparency.

The approach of the Paris Court of Appeal, as opposed to that of the DOJ, seemed to depend on a formal characterisation of the *ne bis in idem* principle. According to the French Court, the enforcement of such a principle depends on the legal definition attributed to the offence being prosecuted. Applying the notion of ‘legal *idem*’, focus is given to the overall coherence of the legal framework and the legal definition of the offence. This can result in fewer safeguards for the accused where there are disparities and inconsistencies between different legal systems. The opposite view, which would produce a similar outcome to the DOJ’s approach, focuses on the nature of the acts involved and applies the notion of *idem factum* (same act/behaviour). This approach allows for greater application of the double jeopardy principle and limits the risk of manipulation of the legal categorisation of an act by domestic regulators or prosecutors.

Global trends

As these cases demonstrate, there is currently a considerable lack of harmonisation and consistency due to the various domestic laws and regulations concerning the prosecution and enforcement procedures for corruption cases where similar facts are involved. This has given rise to concerns in the last few years over the extraterritorial application of different states’ anti-corruption laws. On the other hand, these cases demonstrate that courts and authorities are aware of the risks resulting from the overlap of anti-corruption laws between jurisdictions, are acknowledging the necessity to avoid the negative consequences of a multiple prosecution and are recognising the double jeopardy principle as a solution to the matter. This confirms the importance of resolving these issues through developing a consistent approach and interpretation of that principle.

In this context, the main challenge remains the lack of a global definition and enforcement standard for the double jeopardy principle. No globally binding treaty regulating double jeopardy is in force, although at least 50 national authorities have recognised the existence of the principle, which has been incorporated into numerous international treaties and conventions. Among these, the most relevant are the International Covenant on Civil and Political Rights (Article 14.7) and the Rome Statute of the International Criminal Court (Article 20). With specific regard to anti-corruption legislation, the United Nations Convention Against Corruption (Article 42.5) and the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions (Article 4.3), include provisions that refer to this principle.

However, both these provisions only provide for a consultation procedure between the countries involved, with a view to determining the most appropriate jurisdiction for the prosecution, or in order to coordinate their actions, and do not guarantee a right against double jeopardy or a legally enforceable ban on multiple prosecutions.

Various European provisions deal with the issue of mutual legal assistance in criminal matters and provide for a set of rules on the establishment of joint investigation teams, which have proved to be a valuable and effective tool in the fight against cross-border crimes, to carry out criminal investigations in one or more Member States of the European Union (EU).

In the EU, the principle of *ne bis in idem* has been recognised in Article 54 of the Convention implementing the Schengen Agreement and Article 50 of the Charter of Fundamental Rights of the European Union. Such articles bar the possibility of prosecuting the same individual again for the same misconduct.

Conclusion

The path towards a global definition and enforcement of the double jeopardy principle seems to be just starting, and it is assumed to be a long and challenging process. The pragmatic approach followed by the DOJ in the US is an encouraging first step towards a general recognition of this principle and represents a signal that US authorities are more and more aware of the necessity to discharge multinational companies from the adverse effects of double jeopardy. The optimal solution seems to be the recognition of a double jeopardy principle enforced through the adoption of a pragmatic approach, drawing inspiration from the DOJ's latest line of action, in order to find a fair balance between the right not to be prosecuted twice for the same offence (reflecting a view that the rule of law should be applied fairly to all persons), and each country's right to prosecute crimes committed within its territory (according to the local regulation) to avoid forum shopping practices.

Part 2 Trends in compliance and prevention

2.1 The value and importance of Collective Action – Gemma Aiolfi⁷

‘Sticks in a bundle are harder to break.’

‘If you want to go fast, go alone, but if you want to go far, go together.’

These two African proverbs have been used to encourage the private sector to become actively involved in anti-corruption Collective Action. But before joining an initiative with other stakeholders, corporate management usually needs to be convinced that there will be good reasons and value in taking such a step and, not unreasonably, will also want to understand what they are getting into and, if they do decide to proceed, how best to go about it. This section provides an introduction to this topic and examples of anti-corruption Collective Action open to the private sector, as well as other stakeholders. It also considers the role of the legal profession in promoting Collective Action.

Anti-corruption Collective Action

Definitions of anti-corruption Collective Action illustrate how broad the concept has become since the early days of Integrity Pacts. Mark Pieth describes Collective Action as a ‘catch all term for industry standards, multi-stakeholder initiatives, and public-private partnerships’. The World Bank Institute define Collective Action as a ‘collaborative and sustained process of cooperation amongst stakeholders [that] increases the impact and credibility of individual action, brings vulnerable individual players into an alliance of like-minded organizations and levels the playing field between competitors’.¹ Collective Action can take the form of anti-corruption declarations, principle-based initiatives, business coalitions that are subject to certification and integrity pacts. These forms of Collective Action are distinguished from each other by the degree of enforceability of the participants’ joint commitments and the goals of the initiatives. The geographical scope, stakeholder composition and operating mechanism can also be adapted as circumstances require making the potential for Collective Action almost limitless.

As a flexible tool that can help to prevent and combat corruption, the business case for joining a Collective Action initiative can be made irrespective of an organisation’s size, and often focuses on the reduction of legal risk. In the United Kingdom, according to the Ministry of Justice, an organisation’s involvement in a collective action against bribery in the same business sector is an indicator of ‘top level commitment’ under the adequate procedures defence in section 7 of the UK Bribery Act. Business-led Collective Action also enables companies to collaborate with industry peers and other key stakeholders to create markets that are driven by economic considerations and not influenced by corruption. In so doing, they can help to establish a level playing field that can contribute to greater transparency and predictability for business, enhance corporate reputations, and tackle some of the systemic aspects of corruption in markets and sectors in a practical manner.

Companies can join or initiate anti-corruption Collective Action at any point as part of their developing or improvement of their compliance programmes. Collective Action can assist a company

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to start if it does not yet have a compliance programme, or it can assist companies that already have implemented and advanced programmes to encourage their peers to raise their standards, or to improve their supply chains.

Collective action as part of developing compliance programmes

In February 2016, the government of Columbia introduced a new law to address transnational bribery. As part of implementing the law, companies in certain sectors are required to introduce anti-corruption compliance programmes. The purpose of this initiative is to incentivise companies to develop their programmes. As part of a pilot programme completed in mid-2016, the government developed a questionnaire to assess 17 of the largest companies' compliance programmes and an independent body analysed the results. Four companies dropped out citing the procedure as too onerous, and of the remaining 13 only one passed the assessment and was deemed as having an adequate compliance programme. However, of the 13 companies that 'failed' the Secretariat's assessment, all indicated that they are willing to improve their programmes and to learn from an exercise that involved close collaboration between the public and private sectors, and involved an independent group of technical experts.

An assessment tool developed by Inteli in Portugal provides an example of a Collective Action involving some seven companies that contributed to its development. The tool is designed for mid-sized businesses that do not have an anti-corruption compliance programme. With a few clicks the risk parameters help to determine the scope and level of detail that an anti-corruption programme should encompass; it has proved useful for companies that are too small to justify having a dedicated compliance function.

Collective Action for companies with existing programmes

For companies that have already embarked on developing a compliance programme, Collective Action involving discussions between compliance officers (during which benchmarking of specific aspects of their programmes) are practical and efficient ways to improve anti-corruption programmes; and this approach that has been cited by the US Department of Justice's Compliance Expert as one of the most useful ways to share and compare programmes. Many examples of such groups are to be found around the world, such as in Nigeria (Convention on Business Integrity), Thailand (Collective Action Against Corruption) and Russia (Compliance Alliance).

Companies with mature compliance programmes may be well placed to support other companies in their supply chains as they seek to develop their own programmes, such as the Argentine Agreement in the Electrical Power Transmission Industry. Companies can also effect change by wielding their influence to support a Collective Action, as has happened in the Customs Broker initiative in Turkey. Several multinationals have asked their customs brokers to join the initiative and start adopting anti-corruption standards and to refrain from paying facilitation payments. While some of these initiatives are modest in scope and may only have limited effects, they serve as a starting point and provide examples of what can be achieved even in areas where bribery is deep-seated and part of daily life.

The role of lawyers in anti-corruption Collective Action

Lawyers are ideally placed to support their corporate clients in identifying and joining anti-corruption Collective Action. Lawyers should inform themselves about the range of possibilities open to their clients, for example, by consulting the database in the B20 Collective Action Hub. Companies that take an active role in Collective Action will likely be more attuned to the risks that their industry faces and more willing to develop solutions that can change the environment in which they operate. The Maritime Anti-Corruption Network (MACN) provides shipping companies that are part of the initiative the opportunity to benefit from the tools developed by the group as well as the opportunity to contribute to the identification of the specific jurisdictions and markets where ships captains are mostly likely to be solicited for bribes or facilitation payments. Lawyers should be able to cite examples such as the MACN to their clients to help ensure they are fully informed about the opportunities to manage their risks globally.

Legal advisers assisting with their clients' risk assessments can do so by balancing an analysis of the risk profile of each country with the potential for mitigating that risk by identifying existing in-country Collective Action initiatives (which could be led either by the local UN Global Compact, civil authority or government led, or involve company peers).

Apart from recommending existing Collective Action, lawyers can also help to establish a new initiative. If a corporate client is being solicited for bribes such as may occur at customs or the local land registry or indeed at any government department, it is highly likely that they will not be alone in having to contend with such demands. Joining forces with other companies across sectors or in the same sector can help to change an intransigent public authority.

Conclusion

Collective Action is becoming increasingly popular as a tool to help solve some of the more difficult and systemic aspects of bribery. It also plays an important role for peer companies keen to ensure a level playing field when acquiring new business. Lawyers can help their clients to identify, join or initiate new forms of Collective Action because the opportunities and scope are so broad and flexible. There is the potential therefore to find something suitable for all companies wherever they operate in the world.

2.2 Corporate compliance developments and trends – Caroline Hailey⁸

This section discusses emerging developments and trends in corporate compliance. It examines changes that are occurring as a result of the Yates Memo, changes in rules requiring the extractive industry to disclose government payments and the likely impact of ISO 37001. It also considers the emergence of non-traditional training tools.

Evaluating corporate compliance programmes in the wake of recent DOJ guidance

In late 2015, the United States Department of Justice (DOJ) added to its long-standing body of interpretive guidance by issuing a memorandum on factors that it would take into account when determining whether a company is eligible for cooperation credit. Now known as the Yates Memo, this document should be required reading for any practitioner working on anti-corruption compliance. The Memo highlights six guiding principles that are designed to strengthen the DOJ's pursuit of corporate wrongdoing, focusing principally on the importance of company cooperation in disclosing relevant facts, particularly with respect to individuals responsible for the misconduct, and the DOJ's view as to the importance of holding individuals, not just companies, accountable for wrongdoing.

There has been much speculation within the compliance community as to whether and to what extent the Yates Memo will change the DOJ's approach and strategy with respect to enforcement, particularly given the recent change in leadership within the DOJ. In addition to closely monitoring DOJ enforcement actions and guidance, in-house counsel and compliance officers may consider reviewing their approaches to conducting internal investigations, particularly for companies operating outside of the United States but nonetheless subject to US law, to identify any weaknesses or areas that could prevent the company from cooperating in the manner identified in the Yates Memo. Questions to be asked include:

- Does the company have a clear policy with respect to conducting investigations itself, or does it generally rely on outside counsel?
- Does it have a clear policy with respect to reviewing employee correspondence or interviewing employees suspected of have committed fraud?
- Are there any local law considerations, such as those relating to data privacy, labour law or evidentiary considerations, that could make it difficult for the company to work with the DOJ in the manner contemplated in the Yates Memo?

Thinking through some of these questions in a preventative context, including with other business units such as the human resources department, may better prepare a company for such an investigation.

It is also useful for practitioners to review the factors that US prosecuting attorneys take into account in evaluating corporate compliance programmes. The DOJ notes in its Attorney Manual, for example, that one critical factor is whether the programme is appropriately designed, effective in preventing and detecting misconduct and whether there is any tacit encouragement or pressure

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from management to engage in wrongdoing to achieve business objectives. Other factors include the comprehensiveness of the programme; the scope and extent of misconduct in terms of seriousness, number of employees, duration and frequency; any remedial actions taken by the company – including disciplinary action against individuals found to have engaged in misconduct – and revisions to the programme in light thereof. Equally, prosecutors are encouraged to take into account corporate governance considerations such as the extent to which directors exercise independent review over proposed corporate actions and challenge where necessary, and whether the internal audit function is sufficiently independent, resourced and senior. Last, prosecutors will seek to determine whether the programme is simply a ‘paper programme’ and whether employees are sufficiently informed about the programme and believe in management’s commitment thereto.

Much speculation surrounds the approach to Foreign Corrupt Practices Act (FCPA) enforcement to be taken by the DOJ’s new leadership. In addition to the focus on prosecuting individuals outlined in the Yates Memo, it appears that there is also a focus on evaluating the effectiveness of a company’s compliance programme. This is underscored by recent DOJ guidance issued in February 2017, which provides a list of topics and questions that the Fraud Section tends to view as important in its evaluation of a programme. The guidance contains over 40 topics, including: tone and conduct at the top; the adequacy of compliance resources and autonomy; policy design; integration of compliance into operations; risk identification and analysis; training and communications: reporting and investigations; disciplinary measures; and continuous testing and improvement. This focus on programme evaluation, viewed together with a series of declinations in 2016 citing the importance of self-reporting in connection with the FCPA’s Pilot Programme, demonstrates that a company’s approach to compliance, both preventative and following identification of wrongdoing, is a critical component in the DOJ’s evaluation of whether to bring charges or negotiate a plea agreement.

Changes in requirements for extractive industry companies to disclose government payments

In June 2016, the US Securities and Exchange Commission (SEC) adopted a rule known as 13q-1, requiring US-listed issuers within the extractive industry to disclose information relating to the type and amount of any payment exceeding USD\$100,000 made by the issuer or any of its subsidiaries to the US federal government or any foreign government in connection with the development of oil, natural gas or minerals. In February 2017, US Congress voted to repeal Rule 13q-1 before it had taken effect.

The principle behind Rule 13q-1 was created in 2010 under the Dodd-Frank Act and was intended to require disclosure of any payment made to further the ‘commercial development’ of any natural resource. It was then challenged by a group of extractive industry associations in US federal court, which required the SEC to rewrite it. This took several years, and the final rule was only published in June 2016 and expected to go into effect in 2018.

In the meantime, however, the extractive industry began adapting in anticipation. Other jurisdictions, including the European Union, Canada and Norway, adopted their own rules requiring the same sort of disclosure so as to level the playing field and to build on the work of the Extractive Industries Transparency Initiative, which provides a reporting framework for companies and countries to provide greater transparency on payments.

The repeal of Rule 13q-1 is certainly a setback to the push towards greater corporate transparency. Its impact will depend to a large extent on whether the EU and other key financial markets jurisdictions continue to require extractive issuers to publish information on payments made to governments, and whether companies not subject to other jurisdictions' rules will nonetheless choose to provide the information on a voluntary basis.

ISO 37001

One of the key developments in anti-corruption compliance that emerged during 2016 was the establishment of new International Organization for Standardization (ISO) 37001 standard, relating to anti-bribery management systems. This new standard, along with other ISO's business compliance standards, was discussed in detail by panellists at the 2016 IBA's Anti-Corruption Conference in Paris, and attendees were encouraged to think about the benefits of seeking certification for their companies.

According to the ISO, standard 37001 reflects input from over 80 experts in approximately 45 countries and is designed to be a flexible tool that can help a diverse range of organisations, from global corporations to NGOs, demonstrate adherence to a range of widely accepted best practices as well as engagement and commitment to anti-bribery compliance measures more broadly.

The key requirements of ISO 37001 will be familiar to compliance officers, and cover the pillars of an effective programme, including engagement of senior management, risk evaluation, policies and procedures, training, due diligence, monitoring and investigation and remedial action plans where necessary. The standard, however, provides specific input as to how to structure and define these pillars, which can then be tailored depending on an organisation's size, risk profile and industry of operation.

Although the standard was only released in October 2016, it has been the subject of much press and analysis within the corporate compliance community. One critical element that remains unclear is the view of regulators, particularly whether – and the extent to which – an ISO 37001 certification will be viewed as a benchmark for compliance programmes designed to respond to the requirements of the US FCPA and UK Bribery Act. While certification has been cited as proof of a company's efforts to strengthen its compliance programme in proceedings before the Swiss authorities, reference to ISO 37001 was notably absent from the DOJ's recent guidance on corporate compliance programmes.

Legal and compliance practitioners will undoubtedly play a key role in evaluating the standard and determining whether obtaining the certification outweighs the commitment in terms of time and resources. In terms of evaluating whether pursuing certification is the right decision for a company, it may be useful to ask the following key questions:

- How mature is the company's compliance programme? Are there significant aspects that would appear to need reinforcing before moving to a formal evaluation?
- How do the ISO 37001 requirements fit in with the company's existing internal audit programme? Is the company already reviewing the topics covered by the standard?
- Does the compliance programme have the necessary resources (both in terms of personnel and budget) to ensure smooth functioning throughout the audit process?

While at least one major company has announced that it has obtained the certification, many companies appear to be taking a 'wait-and-see' approach until trends emerge. An intermediate solution might be to look critically at the questions posed by the standard and conduct an analysis of a targeted segment of a company's operations – for example, operations in countries where the perception of corruption is higher, business segments that rely heavily on the use of third-party agents or areas of the business that otherwise pose a higher corruption risk.

Non-traditional training tools

Although commercially developed electronic or 'e-learning' training tools can be efficient in delivering a broad understanding of key compliance issues to a large number of employees, they do not always provide employees with training on nuanced or complex situations. This is particularly true in the anti-bribery area, where rules may differ from country to country and risks differ depending on the industry and employee's role. Guidance published by both the US DOJ and the UK Ministry of Justice indicate that all training should be tailored to the specific risks facing the company, which decreases the likelihood that a tool developed by a third party can act as a standalone training solution.

Disseminating internally developed content has the advantage of keeping compliance considerations at the forefront of the employee experience, providing real life examples that employees are more likely to encounter and avoiding training fatigue, as well as demonstrating to regulatory authorities that the company has taken a tailored approach to training in contrast to purely off-the-shelf content. Content can be delivered through different channels, with some companies using internal compliance blogs and email blasts highlighting short case studies. Other companies have tried to facilitate access to compliance programmes through technological channels such as 'Apps' that allow employees to download codes of ethics, quick guides and other key compliance documents to their tablets or smartphones. Some of these initiatives are country-specific to help employees stay on top of compliance considerations during business travel. Other companies have focused on engaging employees in discussions about compliance in smaller settings, similar to 'focus groups', which provide more informal, interactive settings to get employees thinking about compliance issues.

2.3 Whistleblowers beyond borders: the globalisation of whistleblower protection – Neil V. Getnick,⁹ Gregory M. Krakower¹⁰ and Kieran Pender¹¹

For whistleblowers – those who expose corporate wrongdoing – legal protections have traditionally operated within national borders, not transnationally. Even within territorial limits, whistleblower safeguards provided by many countries remain patchy at best. The situation is even more problematic beyond those borders, where no global institution or legal regime provides systematic protection. Nevertheless, certain jurisdictions have moved to adopt, explicitly or implicitly, extraterritorial expansions of their whistleblower laws. In the United States, for example, such expansions can be seen in the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, the Internal Revenue Service’s tax whistleblower programme and the federal False Claims Act.

In response to this trend, whistleblowers are starting to gravitate towards the jurisdictions where the available protection is best. The US Securities and Exchange Commission (SEC) received 464 tips from foreign individuals in the financial year 2016 as part of its whistleblower reward programme, a 43 per cent increase on 2012. US courts also have brought to account several prominent examples of international corruption and fraud, with foreign whistleblowers often providing key evidence.

We consider in this section the rationale for extending whistleblower laws beyond national borders and highlight three categories of legal schemes that aim to encourage transnational whistleblowing. We then survey recent developments in the US, before concluding with a discussion about globalising the culture of whistleblowing. With thousands of financial transactions crossing national borders every minute and human capital becoming increasingly mobile, the globalisation of whistleblower protection is unlikely to slow.

Why do we need international whistleblowing laws?

Corruption does not respect national borders. This has long been accepted wisdom in the fight against corrupt practices, and the prevalence of cross-border corruption has only increased with ever-globalising commercial activities. Yet while most legislation in this sphere is designed to address the transnational nature of much corruption – the US did not style its law as the Foreign Corrupt Practices Act (FCPA) of 1977 accidentally – whistleblowing protection has typically been more circumscribed.

Two developments emphasise the desirability of international protection for those who report corporate wrongdoing. First, in recent decades the labour market has become increasingly global. Multinational companies now have employees in far-flung locations across the globe, and such workers must be empowered to report misdeeds regardless of geographical location. ‘Offshoring’ should not become a method of concealing dubious business activities. Moreover, technological advancements have made it easier than ever for corporations to hide fraud and corruption. Cross-border crypto-currency transactions, for example, are practically untraceable without inside information.

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The necessary response is global enforcement. At a minimum, global enforcement requires coordination and cooperation among different nations' law enforcement agencies. But an additional set of tools has developed to fight global corporate malfeasance: the transnational application of powerful and effective whistleblower laws, most prominently those found in the US.

What are whistleblowing laws?

In different ways and to different extents, any purported 'whistleblower' law does one or more of three critical things: protect whistleblowers; reward whistleblowers; and empower whistleblowers.

PROTECTION

First, almost all whistleblower laws protect whistleblowers from employer retaliation – and sometimes industry-wide retaliation – for providing evidence of corporate wrongdoing to the appropriate authorities. Typically such laws provide that a firm cannot fire, demote, harass, ostracise or otherwise disadvantage actual or prospective employees for whistleblowing. In many instances, an employer found retaliating against a whistleblower can be ordered not only to reinstate the whistleblower, but also to provide double-back pay, returned seniority and attorneys' fees. These laws send whistleblowers, and society at large, a powerful message: our legal system rejects the old ethos that vilified whistleblowers as traitors. Instead, citizens are invited to join the battle against corporate fraud, and corporations are required to protect those who accept this invitation.

REWARD

Second, the US experience is unequivocal. Whistleblower reward programmes work and work well. The rewards are either funded directly out of a recovery paid by a liable defendant, or from a fund established by the government.

EMPOWERMENT

Third, there are two basic categories of whistleblower laws: *qui tam* statutes (from the Latin '[he] who sues in this matter for the king as well as for himself'), and 'tipster' laws. The main distinction is that in *qui tam* statutes, whistleblowers do not merely provide information to the government; they are empowered with an absolute right to initiate legal cases on behalf of the government, and a qualified right to pursue the cases if the government declines to prosecute the cases itself. In tipster programmes, however, there is no private right of action.

Practical guidance: extraterritorial laws

There is no one comprehensive whistleblower law in the US. Rather, there are three main whistleblower laws and programmes particularly well suited for global application:

- the False Claims Act, which addresses fraud against the US government;
- the Dodd-Frank Act, which addresses securities and commodities fraud; and
- section 7623(b) of the Internal Revenue Code, which addresses large scale illegal tax evasion.

All of these whistleblower programmes implicate activities and companies in foreign countries. For example, the largest Internal Revenue Service whistleblower award to date involved the reporting of a billion-dollar tax fraud by Swiss bank UBS, with the whistleblower recovering US\$104m for his efforts.

Under the False Claims Act (a *qui tam* statute), whistleblowers have recovered *billions* of dollars for the government as the result of ‘false claims’ by foreign companies for kickbacks, manufacturing problems, false marketing of their products and price frauds. A notable example is the international False Claims Act case brought by Getnick and Getnick LLP (with which two co-authors of this article are affiliated) against GlaxoSmithKline (‘GSK’), the multinational British-based pharmaceutical company. The whistleblower in that case, Cheryl Eckard, a Global Quality Assurance Manager for GSK, became concerned that a major GSK manufacturing facility was producing adulterated medications. Although she urged the company to shut down the plant, GSK continued to ship and sell the drugs. Eckard eventually filed a False Claims Act case on the theory that GSK defrauded federal and state governments by causing them to pay for adulterated pharmaceuticals. The case resulted in a global recovery of US\$750m in 2010, as well as a criminal conviction. Her False Claims Act recovery, the largest in history awarded to a single whistleblower, was US\$95m from the federal government and an additional amount from the states.

Moreover, by definition, violations of FCPA by companies publicly traded in the US involve activity in foreign countries – for example, bribing a foreign official. This is a major avenue for global whistleblowing against foreign corruption. Critically, a whistleblower does not need to be a citizen or resident of the US to take advantage of these laws. A whistleblower in one country can use the SEC programme to report a FCPA violation by an individual or business entity in an entirely different country. For example, if a corrupt business wins a contract by bribing a foreign government official, a competitor could file a SEC whistleblower action and be eligible for the reward (assuming certain jurisdictional requirements are satisfied). This is the case even if the corrupt business, the whistleblower, and the bribed official are non-Americans, and regardless of whether the offending activity occurred inside or outside the US. Provided the statute’s nexus requirements are met, a foreign whistleblower can take advantage of the SEC’s attractive whistleblower programme. Further, under the False Claims Act, a non-citizen or a foreign business can be a whistleblower eligible for a reward by filing a lawsuit that exposes a competitor’s fraud against the US government.

Globalising the culture of whistleblowing and integrity

Enacting whistleblower laws with extraterritorial reach like those described above, that protect, reward and empower citizens and companies to join the global fight against corporate fraud and corruption, is common sense. Furthermore, the extraterritorial expansions of whistleblower protections in the US are not unique. In Australia, the Public Interest Disclosure Act 2013 expressly provides for extraterritorial reach. Similarly, in the United Kingdom the Public Disclosure Act 1998 applies to UK-based employees even where the relevant conduct occurred overseas. The UK Financial Conduct Authority and Prudential Regulation Authority have discussed applying financial sector whistleblower rules to the UK branches of overseas banks and insurers. This could have a considerable impact, although it currently remains in the consultation stage. Recently a blue-ribbon

Quebec commission investigating corruption in the construction industry recommended the adoption of ‘le False Claims Act.’

There has also been an uptick in cooperative law enforcement based on information received from whistleblowers. Securities regulators in the UK and US recently started sharing tips, while the multilateral development banks have long cooperated with national authorities in pursuing fraud and corruption on their projects. A 2016 case in the Canadian Supreme Court, which had threatened the World Bank Group’s programme of cooperation by removing immunities and privileges on disclosed information, was resolved in the Bank’s favour.

More broadly, it appears that jurisdictions and businesses across the world are slowly embracing a culture of integrity. There is mounting recognition that ‘law-driven’ compliance programmes, which allow corporate wrongdoers to face reduced liability if they adopt specified internal compliance controls, are ineffective. Such programmes can encourage ‘box-ticking’ and gaming the system as opposed to serious and concerted efforts to change corporate culture. By contrast, ‘business-driven’ integrity programmes, where corporations embrace integrity as a competitive advantage and recognise whistleblowing as pro-integrity rather than anti-business, can have a far greater long-term impact.

This cultural shift is still in its early stages. Old habits die hard. As recently as two decades ago, many jurisdictions still treated bribes as legitimate – and tax deductible – business expenses. Yet there are reasons for optimism. The trend towards extending the reach of the law to protect and empower whistleblowers around the world will do much to encourage a growing global culture of integrity.

2.4 Behavioural insights and corruption – Dr Kath Hall¹²

In the ongoing campaign to fight corruption, understanding factors that can influence behaviour in this context is important. This section briefly outlines the importance of psychology to understanding corruption and some of the psychological factors that can influence corporate decision-making and regulation.

Background

Despite the large quantity of literature written on bribery and corruption, relatively little attention has been addressed to understanding the psychological aspects of corporate corruption. Corporations are not by themselves corrupt. Their actions are the result of decisions of individuals and groups within the organisation.

In the last three decades, a significant amount of psychological research has been conducted on how decisions are made. As a descriptive science, psychology seeks to empirically test how the mind operates and how people behave in a wide range of circumstances. One of the clear conclusions that has emerged from this research is that both individuals and groups are subject to systemic cognitive ‘weaknesses’ in decision-making. These weaknesses can result in a wide range of cognitive biases including the failure to accurately assess negative information; inaccurate appraisals of long-term consequences and unjustified belief in the defensibility of one’s actions. In the organisational context, psychologically based research has also shown that internal ‘norms’ and value systems can bind group members together and blind them to their collective failings and excesses.

In the context of bribery and corruption, the application of psychological research is still limited. Most discussions by regulators and legal professionals assume that corruption is the result of calculated and rational planning by corporate managers and/or employees, who focus on utility maximisation and weigh the costs and benefits of the alternative courses of action. In contrast to these assumptions, behavioural research has shown that people display bounded rationality that can result in errors of judgment and sub-optimal decisions. In particular, research has shown that people have far less control over their decision-making than they think. As a result of this research, it has become clear that concepts such as free will and rationality, which tend to dominate legal and economic discussions of corruption, do not provide a complete picture of how decisions are made.

Developing a framework for corruption

Behavioural research may assist in understanding corporate bribery and corruption. For example, research on the normalisation of corruption indicates that an initial decision to pay a bribe is generally harder to make than subsequent decisions, and that once such a decision is justified it can become submerged in everyday behaviour. Similarly, research on cognitive heuristics (such as the availability bias and the over-confidence bias) show that people generally place disproportionate emphasis on short-term benefits over long-term consequences, and that individuals and groups generally believe themselves to be more ethical than they actually are (the halo effect and the confirmation bias).

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Psychology can also assist in identifying behavioural factors in corrupt behaviour. These factors include:

OPPORTUNITY

An opportunity to pay a bribe must present itself in the circumstances. This includes situations where a ‘bribe payer’ (whether individual or corporate) creates the opportunity by offering a bribe. The fact that such an opportunity exists is the least important factor in determining whether a bribe will be paid.

BENEFIT

There must be a benefit to the bribe payer in paying the bribe. The benefit can be financial, competitive, reputational, personal or professional. However, the benefit must be something that is important to the bribe payer’s self-interest. What is in their self-interest will depend on the values and priorities of the bribe payer.

IMPUNITY

The bribe payer must feel a sense of impunity in paying the bribe. Psychological factors can contribute to such a feeling such as an elevated sense of self-confidence, a focus on short-term gain over long-term consequences, and a belief in the justifiability of their actions. Perceptions regarding the effectiveness of anti-corruption regulation and enforcement might also be relevant here.

DENIAL OF A VICTIM

The bribe payer must believe that there is limited or no harm caused by their actions, or that the benefits outweigh the harms. Victims can include shareholders, citizens in the countries where a bribe is paid, and consumers. Where bribe payers are physically distant from the victims of their actions this belief can be easily maintained.

RATIONALISATION

The bribe payer must be able to rationalise their conduct to both themselves and to others. The most common rationalisations in the context of bribery and corruption are: ‘this is just the way business is done’; ‘if we/I don’t do it someone else will’; ‘everyone else is doing it’; and ‘it’s not that bad anyhow’.

When all of these factors are present in a particular context, the risk of a person or organisation engaging in bribery is high. However, when even one factor is absent, the risk reduces significantly.

Behavioural regulation

Finally, psychological research can be applied to law and regulation. As demonstrated by popular books such as *Nudge* by Richard Thaler, and *Thinking Fast and Slow* by Daniel Kahneman, behavioural research can be used to understand everyday transactions, including how people interact with law.

Building on these insights, taskforces have been created in Australia, Norway, Sweden, France the United States and the United Kingdom aimed at developing behaviourally informed regulation. While many of the initiatives flowing from these efforts have focused on reforming consumer and credit law, some have potential in the context of bribery and corruption. For example, the 2015 World Development Report argued that behavioural economics could assist in tackling global problems (such as corruption) by better design and evaluation of development and governance projects. The report conclusions included among others that:

- the way the information that is provided to target audiences, influences which facts are salient (remembered) and which are not;
- the way that problems are ‘framed’ affects the solutions that are developed (including legal solutions); and
- the use of default rules and ‘tick the box’ forms result in minimal mental effort being devoted to an issue.

These points are useful in regulating corruption. They suggest that messages on bribery need to highlight the most salient information, and raise questions such as: which facts have more impact on decisions not to engage in bribery or corruption – the size of fines incurred by corrupt companies or the number of companies that are standing up against corruption? They also confirm that the way the ‘problem’ of corporate corruption has been framed (ie, primarily in economic and moral terms) has led to particular legal solutions: namely, to ‘punish or persuade’. We might therefore wonder what might happen if corruption was framed primarily as an issue of human rights.

Finally, behavioural research raises interesting points for consideration by lawyers. It suggests the value of simple techniques such as framing messages in terms of reputation rather than economic loss, emphasising the risk of personal or individual liability over corporate liability, and using vivid examples and warnings rather than statistical information to deliver messages on the risks of engaging in bribery and corruption.

All of these issues deserve much greater attention if we are going to successfully tackle the behavioural elements of corruption.

Part 3 New books on corruption 2016-2017

Further reading

Corruption has been a much-discussed topic in recent literature. Here we highlight three noteworthy contributions. We then offer for the reader's benefit a more comprehensive survey of recently published works.

Alina Mungiu-Pippidi, The Quest for Good Governance: How Societies Develop Control of Corruption (Cambridge University Press, 2015)

The International Review of Administrative Sciences says:

'The high relevance of this book to readers of [the Review] can be starkly put: the majority of states in the world, including some of the most developed economically, routinely suffer from corruption ... This an accomplished and important book, and one which deserves very wide readership. Mungiu-Pippidi is a formidable critic of simplistic, formulaic solutions to corruption. Indeed, it is a relief to read her deconstructions of glib claims that creating this kind of institution or passing that kind of law will somehow quickly solve the problem. Her evident, if mildly expressed scepticism about the endless conferences and workshops of the international anti-corruption industry seems well-founded. Yet at the same time she is constructive, working patiently to string together different strands of evidence that eventually yield some powerful, though nuanced and contextualized ideas about what might work.'

Sarah Chayes, Thieves of State: Why Corruption Threatens Global Security (WW Norton, 2015)

The *New York Times* says: 'This is an important book that should be required reading for officials in foreign service, and for those working in commerce or the military. The story will interest the non-specialist reader too, though the balance of exciting narrative, academic discourse and policy-wonk-speak will unsettle some.'

J C Sharman, The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption (Cornell University Press, 2017)

The Economist says:

'Jason Sharman, professor of international relations at Cambridge University, is particularly interested in 'grand corruption': the theft of national wealth by kleptocratic leaders and their cronies, often in poor (albeit resource-rich) countries. It is a subject he knows well ... Mr Sharman ends with some suggestions for strengthening the fight against the mega-thieves: tougher penalties for firms that help them, especially banks (fines are paltry, except in America); blacklisting of the worst kleptocracies, with their officials denied physical or financial access to the West; and greater use of tax policy, especially in light of the recent wave of international tax-transparency agreements. Like Al Capone, most corrupt officials are also guilty of a tax crime. The fact that these are still only proposals shows just how far there is to go.'

Books

Date	Author	Title	Publisher	Summary
2017	Petter Gottschalk	<i>Understanding White-Collar Crime: A Convenience Perspective</i>	CRC Press	This book discusses the distinct features of corruption, as opposed to other financial crimes, and explores the case study of Yarra corruption in Libya.
2017	Irena Georgieva	<i>Using Transparency Against Corruption in Public Procurement 2017: A Comparative Analysis of the Transparency Rules and Their Failure to Combat Corruption</i>	Springer	Examines corruption in public procurement in three Member States of the EU, reviewing their different approaches to combating corruption, and the extent to which the transparency principle is applied in their procurement systems.
2017	Kempe Ronald Hope	<i>Corruption and Governance in Africa: Swaziland, Kenya, Nigeria</i>	Springer	Nature and extent of corruption are identified; factors influencing the causes & determining the consequences of corruption are delineated; measures that have been put in place to control corruption are outlined & discussed; & new policy solutions are proposed & advocated to more effectively control corruption in Africa.
2016	Laurence Cockcroft, Anne-Christine Wegener	<i>Unmasked: Corruption in the West</i>	I. B. Tauris	Takes a broad definition of corruption to explore examples of institutionalised behaviour in the Europe and the US that may be considered corrupt (including examples of defence, pharmaceuticals and international sport).
2016	Funso E. Oluyitan	<i>Combating Corruption at the Grassroots Level in Nigeria</i>	Springer	Examines public oath taking as an anti-corruption strategy that has been implemented with successful results in Nigeria and that has applications for other countries.
2016	Graham Brooks	<i>Criminology of Corruption: Theoretical Approaches</i>	Springer	'Theoretical thoughts have future consequences on how we treat, punish and deter and corruption policy illustrates that theoretical approaches affect what laws and techniques are implemented. Theoretical approaches are part of the changing social world and understanding why corruption occurs is a preface to developing strategies to prevent it.'
2016	Davide Torsello	<i>Corruption in Public Administration: An Ethnographic Approach</i>	Edward Elgar Publishing	Topics covered include: the role of anti-corruption legislation; organisational change and integrity; party corruption; socio-cultural dimensions of corruption; gift-exchange; and clientelism. Analysing these topics comparatively, this book concludes that in countries where public perception of corruption is high, citizens are well aware of the generalised damage of these practices and the loss of trust they cause for public administrations. On the other hand, corruption in public administration takes place following patterns that mirror some of the fundamental social and cultural features that characterise interactions among citizens and institutions.

2016	OECD Development Centre	<i>Corruption in the Extractive Value Chain: Typology of Risks, Mitigation Measures and Incentives</i>	OECD	Focuses on the prevalence of corruption in the resource extraction process. 'This report is intended to help policy makers, law enforcement officials and stakeholders strengthen prevention efforts at both the public and private levels, through improved understanding and enhanced awareness of corruption risk and mechanisms. The report also offers options to put a cost on corruption to make it less attractive at both the public and private levels.'
2016	Andreas Bergh, Gissur Ó. Erlingsson, Mats Sjölin, Richard Öhrvall	<i>A clean house? Studies of Corruption in Sweden</i>	Nordic Academic Press	First comprehensive study in English of corruption in a low-corruption, mature welfare state. Reveals causes, scope and consequences of corruption in low-corruption countries, pointing out shortcomings of international evaluations of corruption. Primarily focuses on public sector.
2016	Esra Çeviker Gürakar	<i>Politics of Favoritism in Public Procurement in Turkey: Reconfigurations of Dependency Networks in the AKP Era</i>	Springer	Uses analysis of 49,355 high value public procurement contracts in Turkey, awarded between 2004 & 2011, to demonstrate favouritism in decision-making amounting to corruption and outlines legal frameworks which have contributed to this trend through reducing competition and permitting discretionary decision-making.
2016	Blendi Kajsiu	<i>A Discourse Analysis of Corruption: Instituting Neoliberalism Against Corruption in Albania, 1998-2005</i>	Routledge	Explores the growth of corruption in Albania, despite the implementation of what were described as highly effective anti-corruption measures. Provides an insight into how perceptions of corruption as a purely public sector phenomenon can be detrimental to anti-corruption measures.
2016	Susan Rose-Ackerman and Bonnie J. Palifka	<i>Corruption and Government: Causes, Consequences, and Reform</i>	Cambridge University Press	Focuses on political corruption and instruments of accountability. Treatment of culture as a source of entrenched corruption and explores criminal law, organised crime, and post-conflict societies. Outlines domestic conditions for reform and discusses international initiatives - including both explicit anti-corruption policies and efforts to constrain money laundering.
2016	Tina Søreide	<i>Corruption and Criminal Justice: Bridging Economic and Legal Perspectives</i>	Edward Elgar Publishing	'...emphasis on the fundamental role of the criminal justice system in the fight against corruption, and the effect this can have on other mechanisms in society. ...explains the concept of criminal law efficiency through economic approaches and why many criminal law responses to corruption are at risk of becoming 'façade strategies' that may, in fact facilitate corruption. ...offers insights into the obstacles that policymakers and government advisers cannot ignore.'
2016	Sebastian V duva	<i>From Corruption to Modernity: The Evolution of Romania's Entrepreneurship Culture</i>	Springer	'Using Romania as a case study, this book argues that corruption can be reduced via institutional reforms and effective civic education. Describing various causes and types of corruption, the authors explore the causes and influences that result in corruption and the current political and bureaucratic practices that inhibit social, political or economic reform.'

2016	M. Krambia-Kapardis	<i>Corporate Fraud and Corruption: A Holistic Approach to Preventing Financial Crises</i>	Palgrave Macmillan	Explores the role of fraud and corruption in contributing to the corporate collapse. Explores the importance of ethics, corporate governance, sustainability and a holistic approach in preventing corruption.
2015	Michael Joachim Bonell and Olaf Meyer (editors)	<i>The Impact of Corruption on International Commercial Contracts</i>	Springer	Presents national reports describing the legal instruments that are available to prevent the payment of bribes for acquiring primarily commercial contracts.
2015	Aurora A. C. Teixeira, Carlos Pimenta, Antonio Maia, Jos Antonio Moreira	<i>Corruption, Economic Growth and Globalization</i>	Routledge	Presents a theoretical and empirical framework of corruption, exploring the key literature. Provides an in-depth analysis of several countries (Portugal, Serbia, Russia, Thailand, China). Draws a distinction between the circumstances giving rise to grand corruption and those giving rise to petty corruption.
2015	Yahong Zhang and Cecilia Lavena	<i>Government Anti-Corruption Strategies: A Cross-Cultural Perspective</i>	CRC Press	Provides case studies of anti-corruption efforts in several countries, exploring how they are put into practice (China, India, South Korea, Nepal, and Central and Eastern European countries).
2015	P. Hardi, Paula M. Heywood, Davide Torsello (editors)	<i>Debates of Corruption and Integrity: Perspectives from Europe and the US</i>	Palgrave Macmillan	Features chapters on: International Anti-Corruption Policies and the United States National Interest; Enforcing Anti-Bribery Laws against Transnational Corporations — A UK Perspective; Curbing Corruption or Promoting Integrity? Probing the Hidden Conceptual Challenge; Inequality and Corruption; Behavioral Ethics, Behavioral Governance, and Corruption in and by Organizations; Corruption as Social Exchange: The View from Anthropology; Corruption vs Integrity: Comparative Insights on the Problematic of Legitimacy.

Key reports, papers and journal articles

Date	Author	Title	Link	Summary
2017	Global Legal Insights	<i>Hong Kong: Bribery & Corruption 2017, 4th Edition</i>	www.globallegalinsights.com/practice-areas/bribery-and-corruption/global-legal-insights---bribery-and-corruption/hong-kong	Provides an overview of bribery and corruption issues and enforcement trends in Hong Kong.
2017	ADB/OECD Anti-Corruption Initiative for Asia and the Pacific	<i>Mutual Legal Assistance in Asia and the Pacific Experiences in 31 Jurisdictions</i>	http://www.oecd.org/corruption/ADB-OECD-Mutual-Legal-Assistance-Corruption-2017.pdf	
2017	Innovations for Successful Societies	<i>The Sum of its Parts: Coordinating Brazil's Fight Against Corruption, 2003 – 2016</i>	https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/GLF_AC-Strategy_Brazil_FORMATTED_20Feb2017.pdf	Case study of a government response to corruption in Brazil.
2017	Roxana Bratu, Dimitri A. Sotiropoulos and Maya Stoyanova	<i>Through the Lens of Social Constructionism: The Development of Innovative Anti-Corruption Policies and Practices in Bulgaria, Greece and Romania, 2000–2015</i>	http://www.jstor.org/stable/10.5699/slavestorev2.95.1.0117	Explores the development of innovative anti-corruption policies and practices in Bulgaria, Greece and Romania between 2000 and 2015, using a social-constructionist focus (based in interviews and documentary evidence). Examines the ways in which corruption perceptions, policies and assumptions shape anti-corruption practices.
2017	Klaus Abbink, Kevin Wu	<i>Reward self-reporting to deter corruption: An experiment on mitigating collusive bribery</i>	http://dx.doi.org/10.1016/j.jebo.2016.09.013	Investigates the effectiveness of offering rewards for self-reports as a means of combating collusive bribery. Finds that enabling both parties to self-report is highly effective in deterring bribes being exchanged and corrupt favours being granted, while allowing only one part to self-report has limited effect,
2017	Paula M. Heywood	<i>Rethinking Corruption: Hocus-Pocus, Locus and Focus</i>	http://www.jstor.org/stable/10.5699/slavestorev2.95.1.0021	Explores three limitations on anti-corruption practices. (1) Role of incentives in decision-making has given rise to fixes that are too abstracted from reality. (2) An emphasis on the nation state has not kept pace with changes in how some forms of corruption operate in practice. (3) Different types of corruption are insufficiently disaggregated. Link: to informal governance (below).
2017	Claudia Baez-Camargo and Alena Ledeneva	<i>Where Does Informality Stop and Corruption Begin? Informal Governance and the Public/Private Crossover in Mexico, Russia and Tanzania</i>	http://www.jstor.org/stable/10.5699/slavestorev2.95.1.0049	Explores the role of informal governance practices in Russia, Mexico and Tanzania in facilitating and perpetuating corruption. Links these practices to a lack of clarity between public and private sectors in these countries. Hypothesises as to why these corrupt practices are resilient to change.

2016	Olivier De Schutter, International Corporate Accountability Roundtable, Global Witness	<i>Tainted Lands: Corruption in Large-Scale Land Deals</i>	http://icar.ngo/publications/2017/5/9/tainted-lands-corruption-in-large-scale-lands?rq=tainted%20lands	Aims to raise awareness of large-scale land deals, corruption, & the combined effects of these issue areas on human rights around the world. Outlines practical steps that investors, financial institutions & governments must take to prevent human rights harms from occurring in the context of corruption & land.
2016	Mari-Liis Sööt, Lars Johannsen, Karin Hilmer Pedersen, Maaja Vadi and Anne Reino	<i>Private-to-private corruption: Taking business managers' risk assessment seriously when choosing anti-corruption measures</i>	www.oecd.org/cleangovbiz/Integrity-Forum-16-Soot-Johannsen-Pedersen-Vadi-Reino.pdf	This paper discusses managerial perceptions of risk arising from corruption and how these perceptions determine the effectiveness of anti-corruption measures
2015	Peter Eberl, Daniel Geiger, Michael S. Aßländer	<i>Repairing Trust in an Organization after Integrity Violations: The Ambivalence of Organizational Rule Adjustments</i>	www.wiso.uni-hamburg.de/fachbereich-sozoek/professuren/geiger/archiv/publikationen/eberl-geiger-os-2015.pdf	This paper looks at the responses of organisations after integrity violations, with considerable discussion of the Siemens corruption case.



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