



# Webcast: FCPA Trends in Emerging Markets

*14th Annual Webcast*

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GIBSON DUNN

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# Topics to Be Discussed

- **An Overview of FCPA Enforcement**
- **Emerging Market Anti-Corruption Enforcement and Trends:**
  - China
  - India
  - Other Key Markets in Asia
  - Eastern Europe and Central Asia
  - Latin America
  - Africa
- **Global Trends and Risk Mitigation Strategies**
- **Appendix: The FCPA**

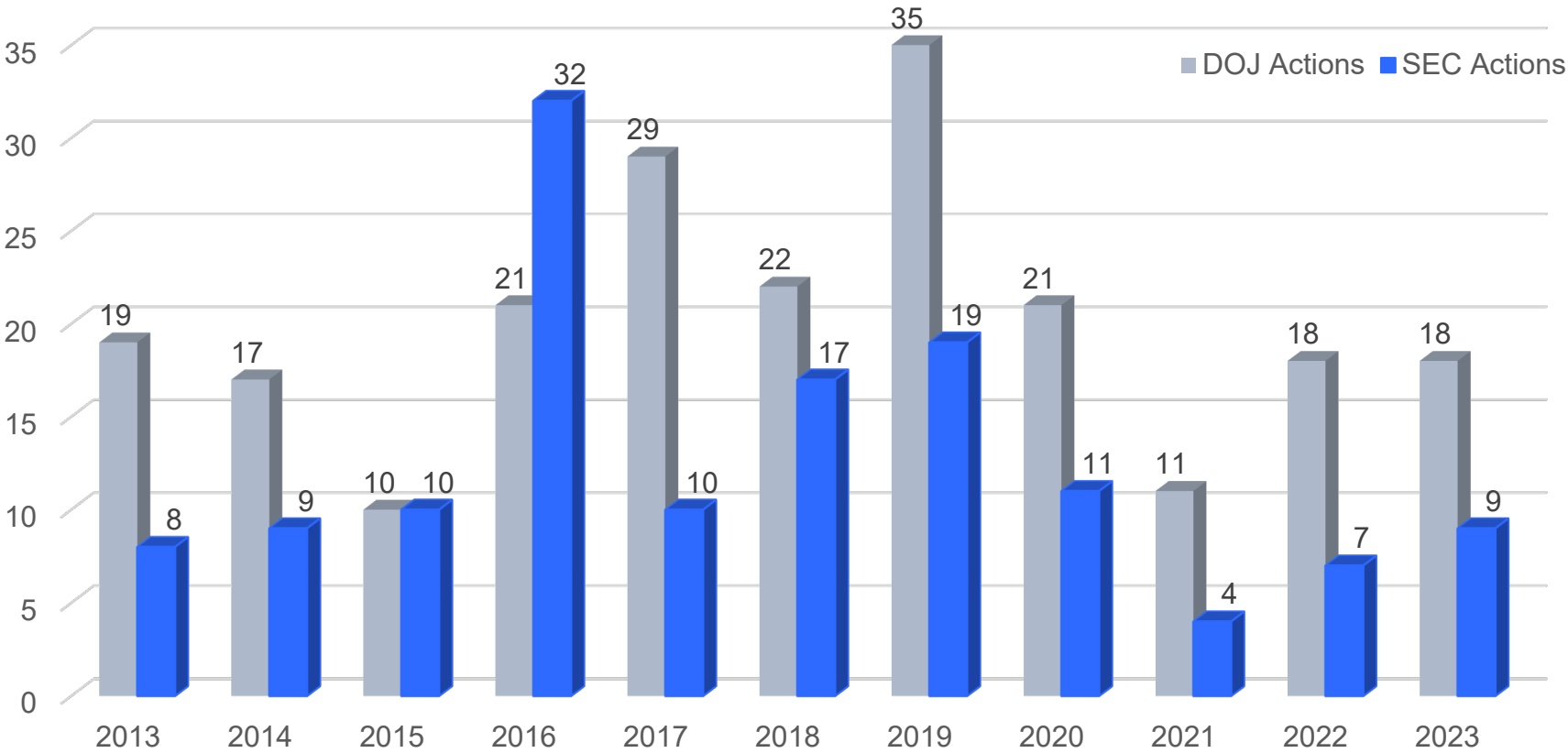


# An Overview of FCPA Enforcement

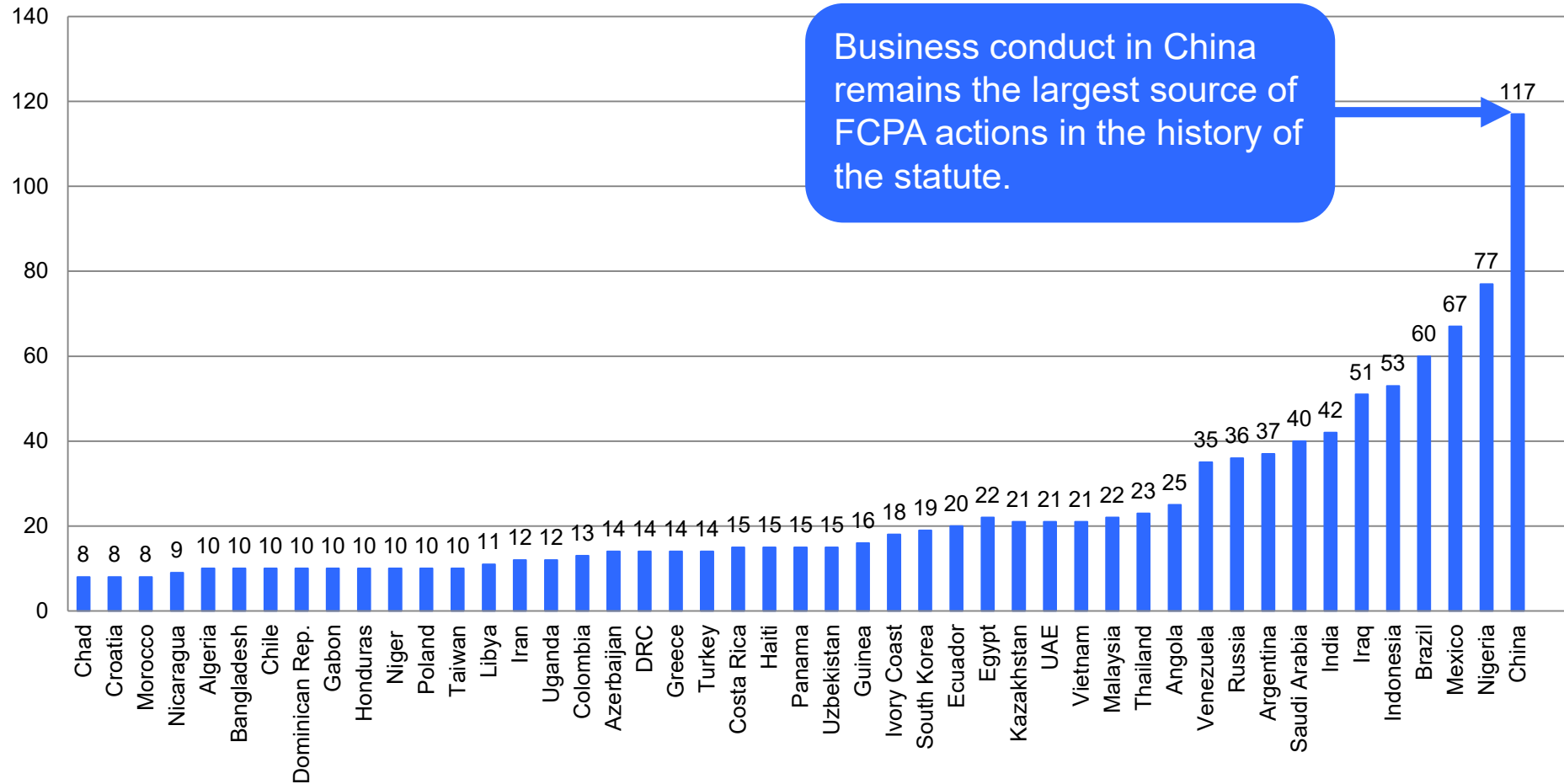


# FCPA Enforcement Actions Per Year (2013-2023)

## Number of FCPA Enforcement Actions Per Year



# Number of FCPA Enforcement Actions by Country (1978 to Present\*)



\* Minimum eight enforcement actions.

# Enforcement of the FCPA: Criminal Penalties

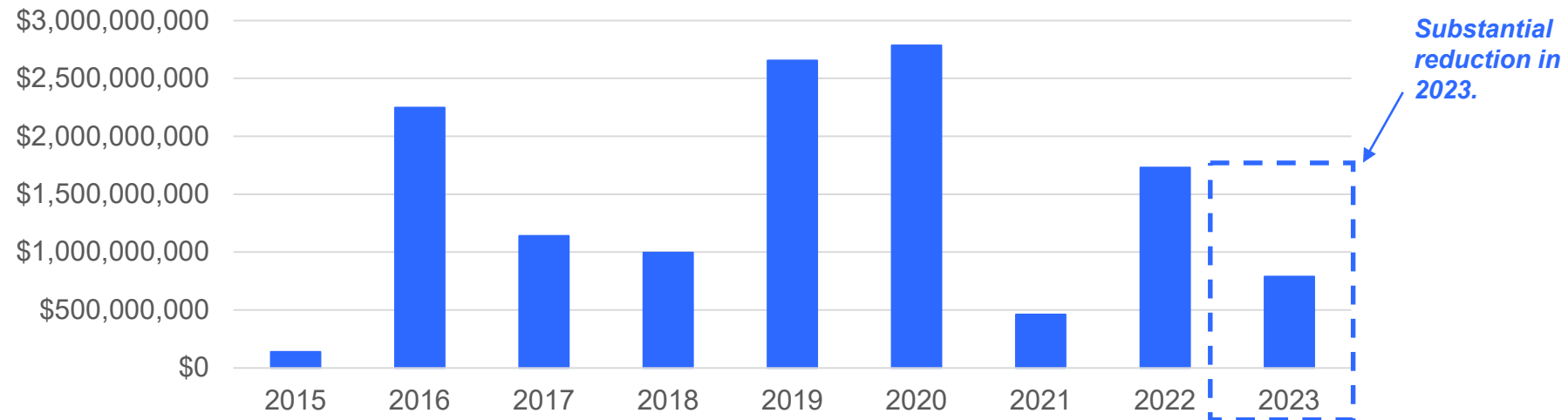
## Anti-Bribery Provisions

- **Corporations:** USD 2 million fine *or* twice the pecuniary gain or loss.
- **Individuals:** Up to 5 years' imprisonment *and* a USD 250,000 fine *or* twice the pecuniary gain or loss.

## Accounting Provisions

- **Corporations:** Criminal penalties up to a USD 25 million fine *or* twice the pecuniary gain or loss.
- **Individuals:** Up to 20 years' imprisonment *and* a USD 5 million fine *or* twice the pecuniary gain or loss.

## Total Value of Corporate FCPA Monetary Resolutions (2015 – 2023)



# Enforcement Actions of 2023 by Value

Despite an overall decrease in total value of FCPA enforcement actions compared to the previous year, 2023 still had several significant settlements.

No.	Company	Total Resolution	DOJ Component	SEC Component	Jurisdiction(s) in which alleged misconduct occurred	Date
1	Albemarle Corporation	USD 300,366,526	USD 196,748,216	USD 103,618,310	China, India, Indonesia, United Arab Emirates, Vietnam	09/2023
2	Telefonaktiebolaget LM Ericsson	USD 206,728,848	USD 206,728,848	USD 0	China, Djibouti, Iraq	03/2023
3	Freeport Commodities LLC	USD 98,551,150	USD 98,551,150	USD 0	Brazil	12/2023
5	Grupo Aval Acciones y Valores S.A. and Corporacion Financiera Colombiana S.A.	USD 80,869,289	USD 40,600,000*	USD 40,269,289	Colombia	08/2023
4	Koninklijke Philips N.V.	USD 62,173,803	USD 0	USD 62,173,803	China	05/2023
6	Clear Channel Outdoor Holdings, Inc.	USD 26,116,487	USD 0	USD 26,116,487	China	09/2023

\* According to DOJ's press release, Corficolombiana paid a criminal penalty of USD 40.6 million, with DOJ agreeing to credit "up to half" of that amount against fines paid to Colombian authorities based on the same conduct. DOJ has not released the precise payment allocation amounts, so these numbers remain estimates.



# Legislative Development: New Foreign Extortion Prevention Act

## Congress Passes Law Criminalizing Demand-Side of Foreign Bribery

*The first federal legislation directly prohibiting foreign officials from soliciting or receiving bribes.*

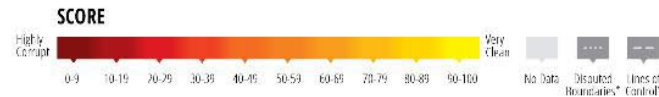
- On December 14, 2023, the U.S. Congress passed the annual National Defense Authorization Act, including the new ***Foreign Extortion Prevention Act*** (“FEPA”).
- The new FEPA amends the federal domestic bribery statute (18 U.S.C. § 201) to prohibit “any ***foreign official*** or person selected to be a foreign official to ***corruptly demand, seek, receive, accept, or agree to accept, directly or indirectly, anything of value***” from any covered person under the FCPA in exchange for “being influenced in the performance of any official act,” “being induced to do or omit to do any act in violation” of their duties, or “conferring any improper advantage” “in connection with obtaining or retaining business.”
- The FEPA defines “***foreign official***” more broadly than the FCPA. The term applies to ***persons acting in an official or unofficial capacity*** for or on behalf of a foreign government, department, agency, instrumentality, or public international organization, and also includes persons selected but not yet formally installed as foreign officials.
- Foreign officials that violate this provision face ***civil and criminal penalties***, with fines up to “USD 250,000 or 3 times the monetary equivalent of the thing of value” and imprisonment “for not more than 15 years.”

# Corruption Trends: Asia, Europe, Latin America, and Africa

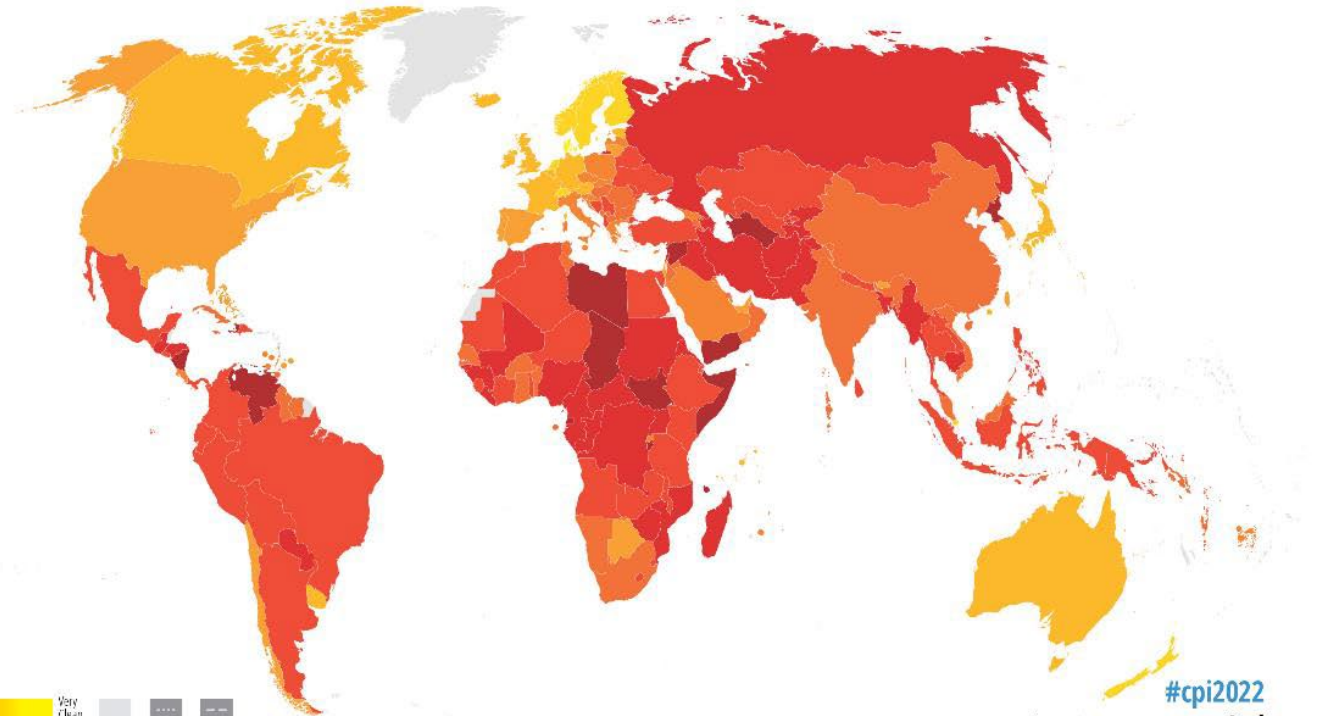


## CORRUPTION PERCEPTIONS INDEX 2022

The perceived levels of public sector corruption in 180 countries/territories around the world.



\*The designations employed and the presentation of material on this map follow the UN practice to the best of our knowledge and as of January 2023. They do not imply the expression of any opinion on the part of Transparency International concerning the legal status of any country, territory, city or area or of its authorities or concerning the delimitation of its frontiers or boundaries.



#cpi2022

[www.transparency.org/cpi](http://www.transparency.org/cpi)

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# China





# China: Market Characteristics



**1.4 billion**

Estimated population of China in 2023. Median age of 39.

**USD 823 billion**

China's trade surplus through December 2023.

**4.6%**

Decrease in exports compared to 2022.

**5.2%**

GDP growth in 2023, a ~70% increase from 2022.

**2.10%**

China's projected inflation for 2024.

**USD 145.51 billion**

Foreign direct investment into China through October 2023; a 10% decrease year-on-year.



Sources: Worldometers, China Population 2023 (January 18, 2024) <https://www.worldometers.info/world-population/china-population/>; Trading Economics, China Balance of Trade (January 18, 2024) <https://tradingeconomics.com/china/balance-of-trade>; Trading Economics, China Exports YoY (December 8, 2023) <https://tradingeconomics.com/china/exports-yoy>; Trading Economics, China Full Year GDP Growth (January 18, 2024) <https://tradingeconomics.com/china/full-year-gdp-growth>; Trading Economics, China Inflation Rate (December 8, 2023) <https://tradingeconomics.com/china/inflation-cpi>; Trading Economics, China Foreign Direct Investment (December 8, 2023) <https://tradingeconomics.com/china/foreign-direct-investment>.

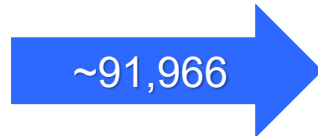
# China: Corruption Landscape

China ranks **65<sup>th</sup>** out of 180 countries in Transparency International's latest Corruption Perceptions Index, moving up one spot from the previous year's rankings.

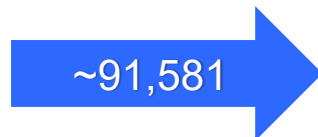
According to the World Bank's Global Governance Indicators, China improved from the **41<sup>st</sup>** percentile in 2012 to the **55<sup>th</sup>** percentile in 2022 on "control of corruption."



Number of people who were transferred to the prosecutorial office in relation to bribe-giving (through September).



Number of officials disciplined by CCDI in China in 2023 (through November) for violations of the "Eight Rules" (including embezzlement, bribery, abuse of power, misappropriation, dereliction of duty, and malpractice).



Number of cases investigated by CCDI in China in 2023 (through November) for violations of the "Eight Rules."

Sources: Transparency International, Corruption Perceptions Index 2022 (December 8, 2023) <https://www.transparency.org/en/countries/china>; Worldwide Governance Indicators Project (October 19, 2023) <https://info.worldbank.org/governance/wgi/>; China Anti-Corruption, [https://www.moj.gov.cn/pub/sfbgw/jgsz/gjjwzsfbjjz/zyzsfbjjzjdbg/202310/t20231030\\_488592.html](https://www.moj.gov.cn/pub/sfbgw/jgsz/gjjwzsfbjjz/zyzsfbjjzjdbg/202310/t20231030_488592.html) (October 30, 2023) (in Chinese); Country-wide investigations indicate 11,860 Instances of Violations of Eight Rules in November, <http://politics.people.com.cn/n1/2023/1228/c1001-40148804.html> (January 21, 2024) (in Chinese)



# China: National Legislative Developments

## Work Report of the Second Plenary Session of the 20th Central Commission for Discipline Inspection (“CCDI”) of the Communist Party of China (the “Work Report”)

- In January 2023, the CCDI held a plenary session during which President Xi Jinping reiterated the Party’s “zero tolerance” policy against corruption and the need to address “both the symptoms and the root causes” of corruption.
- The Work Report notes that the key areas of anti-corruption efforts are the *finance*, *energy*, and *pharmaceutical* sectors.

## Opinion on Strengthening Anti-Money Laundering Cooperation in Handling Corruption and Bribery Crime Cases (the “Opinion”)

- In September 2023, the CCDI, the Supreme People’s Procuratorate, and the Ministry of Public Security issued the Opinion to strengthen cross-agency cooperation in investigating money laundering conduct in corruption and bribery enforcement actions.

## December 2023 Amendment to the Criminal Law (the “Criminal Law Amendment”)

- The Criminal Law Amendment, which will take effect on March 1, 2024, clarifies the scenarios in which offenders are subject to increased penalties for giving bribes. The Criminal Law Amendment adds seven aggravating sentencing factors to the Criminal Law: (1) repeatedly giving bribes; (2) giving bribes to government officials; (3) giving bribes in connection with key government projects or contracts; (4) giving bribes to obtain certain positions; (5) giving bribes to law enforcement and judicial staff; (6) giving bribes in certain industries; and (7) using illegal proceeds to pay bribes.
- The Criminal Law Amendment expanded existing anti-corruption clauses to cover private company managers. Further, the Criminal Law Amendment revises the penalties for bribe-giving to be in line with the penalties for bribe-taking and increases penalties for bribe-givers that are business entities.

Sources: [http://www.news.cn/politics/leaders/2023-02/23/c\\_1129391494.htm](http://www.news.cn/politics/leaders/2023-02/23/c_1129391494.htm) (January 9, 2023) (in Chinese);  
[http://www.moj.gov.cn/pub/sfbgw/jgsz/gjjwzsfbjjz/zyzsfbjjztzgg/202309/t20230921\\_486633.html](http://www.moj.gov.cn/pub/sfbgw/jgsz/gjjwzsfbjjz/zyzsfbjjztzgg/202309/t20230921_486633.html) (September 21, 2023) (in Chinese);  
[http://www.npc.gov.cn/npc/c2/c30834/202312/t20231229\\_433988.html](http://www.npc.gov.cn/npc/c2/c30834/202312/t20231229_433988.html) (December 29, 2023) (in Chinese).

## Key Takeaways

- The government remains committed to combating bribery, in particular commercial bribery and bribe-giving.
- Organizations operating in China should review their anti-bribery and anti-corruption compliance policies and programs to ensure they reflect the latest legislation.

# China: Noteworthy Domestic Enforcement Cases

## Commercial Bribery:

- On October 21, 2023, the Shanghai police detained a current employee and two former employees of *GroupM, a media investment group owned by WPP*, on suspicion of taking kickbacks from suppliers. While the police did not disclose details of the investigation, the detained employees were suspected of taking RMB 700 million (~USD 98.5 million) in kickbacks from 2019 to 2023. The investigation appears to be ongoing.
- In 2023, the Market Supervision Administration of Beijing fined a medical device company RMB 1.2 million (~USD 168,000) for bribing a hospital client. The medical device company allegedly paid a marketing company to produce an educational video that the hospital client needed in exchange for business opportunities at the hospital.

## A rare enforcement action of China's "FCPA":

- On October 23, 2023, the Guangzhou Intermediate People's Court sentenced two executives of *China Railway Tunnel Group Co., Ltd.*, a state-owned enterprise, to two years and four years in prison respectively, for bribing government officials in *Singapore*. The court found that the executives bribed the Singapore officials on three separate occasions and that the amount totaled SGD 220,000 (~USD 165,500).

## Key Takeaways

- Multinational corporations should regularly conduct anti-corruption and anti-bribery training for employees in China to minimize risks under both the FCPA and local anti-corruption laws.
- Multinational corporations operating in China are advised to have contingency plans in place in the event that the authorities visit their offices or detain their employees.

# China: Industry Trends

## Healthcare Sector

- On May 10, 2023, the National Health Commission (“NHC”) and 13 other government agencies jointly issued a notice on “**correcting unethical practices in medical procurement and services**,” targeting corruption in the healthcare sector.
  - In particular, with respect to activities organized by industry associations, **donations, academic activities, and conferences** are the areas of focus.
- On July 21, 2023, the NHC, together with nine other government agencies, launched a **one-year campaign targeting corruption issues in the healthcare industry**.
- On July 28, 2023, the CCDI announced its cooperation with the ongoing anti-corruption campaign in the healthcare industry. According to the CCDI’s statement, the campaign will take a “comprehensive and systematic approach that covers all areas.” The CCDI indicated that it would increase enforcement efforts on key leaders and personnel and investigate both bribe-taking and bribe-giving.
- After the CCDI’s statement, provincial government agencies also issued statements announcing their collaboration with the campaign and providing reporting channels for the public to report misconduct.
- In the recent amendment to the PRC Criminal Law, bribe-giving in the healthcare industry is explicitly mentioned as an aggravating sentencing factor.
- Some Chinese media outlets have described the scale of the anti-corruption campaign in the healthcare sector as “**unprecedented.**” From January to September 2023, **nearly 200 hospital heads** nationwide were detained as a result of the 2023 campaign.

A public hospital in Guangxi province reportedly required Healthcare Practitioners to **disgorge speaker fees, training fees, and research fees** received since 2018.

A public hospital in Shenzhen **prohibited HCPs from receiving speaker fees** from pharmaceutical companies.

**Sources:** <http://www.nhc.gov.cn/ylyjs/pqt/202305/e3d690702571455dbdd301f2bc9e7a3c.shtml> (May 10, 2023) (in Chinese); <http://www.nhc.gov.cn/cms-search/xxgk/getManuscriptXxgk.htm?id=7baafcfc244af69a962f0006cb4e9c> (July 21, 2023) (in Chinese); [http://www.moj.gov.cn/pub/sfbgw/jgsz/gjjwzsfbjjz/zyzsfbjjzyw/202307/t20230731\\_483786.html](http://www.moj.gov.cn/pub/sfbgw/jgsz/gjjwzsfbjjz/zyzsfbjjzyw/202307/t20230731_483786.html) (July 31, 2023) (in Chinese); [https://wjw.beijing.gov.cn/zwgk\\_20040/tzgg/202308/t20230802\\_3212583.html](https://wjw.beijing.gov.cn/zwgk_20040/tzgg/202308/t20230802_3212583.html) (August 2, 2023) (in Chinese); [https://www.gdjct.gd.gov.cn/lzlt/content/post\\_189578.html](https://www.gdjct.gd.gov.cn/lzlt/content/post_189578.html) (August 8, 2023) (in Chinese); [https://wsjkw.cq.gov.cn/zwgk\\_242/zxgk/202308/t20230804\\_12215853.html](https://wsjkw.cq.gov.cn/zwgk_242/zxgk/202308/t20230804_12215853.html) (August 4, 2023) (in Chinese); [http://wsjkw.nx.gov.cn/ztzl/ylyjybf/202308/t20230809\\_4212411.html](http://wsjkw.nx.gov.cn/ztzl/ylyjybf/202308/t20230809_4212411.html) (August 9, 2023) (in Chinese); [http://ynswsjkw.yn.gov.cn/html/2023/gongshigonggao\\_0808/17749.html](http://ynswsjkw.yn.gov.cn/html/2023/gongshigonggao_0808/17749.html) (August 8, 2023) (in Chinese); [https://www.thepaper.cn/newsDetail\\_forward\\_24145445](https://www.thepaper.cn/newsDetail_forward_24145445) (August 8, 2023) (in Chinese); <https://www.wsj.com/world/china/in-china-a-completely-different-approach-to-lowering-healthcare-costs-f5a8ebba>.

# China: Industry Trends (Cont'd)



## Financial Sector

In 2023, the Chinese government has continued its anti-corruption campaign targeting the **financial industry**. More than 100 executives and government officials in the industry have been investigated, charged, or penalized since the beginning of 2023:

- In June 2023, the Supreme People's Procuratorate announced that Fan Yifei, the former deputy governor of the People's Bank of China, was arrested for suspected corruption. After Fan's arrest, the Communist Party chief of the People's Bank of China noted in a statement that the central bank will continue fighting against corruption in the financial sector.
- In September 2023, Wang Bin, the former chairman of China Life Insurance, was sentenced to death with a two-year reprieve for receiving RMB 325 million (~USD 44.6 million) in bribes between 1997 and 2021.
- In December 2023, Xu Guojun, the former head of a Bank of China branch in Guangdong province, was convicted of embezzling RMB 2.3 billion (~USD 325 million).



## Sports Sector

The Chinese government has stepped up its anti-corruption enforcement efforts targeting the **football / soccer industry**:

- In February 2023, Chen Xuyuan, the chairman of the Chinese Football Association, was placed under investigation for suspected serious violations of discipline and law.
- In July 2023, the General Administration of Sport announced that Qi Jun, head of the Chinese Football Association's ("CFA") strategic planning department, and Tan Hai, director of the CFA's technical department, were suspected of serious violations of discipline and law.
- In August 2023, Liu Jun, a senior Chinese soccer official and chairman of the Chinese Super League, was investigated for suspected violations of discipline and law.

Sources: <https://www.bloomberg.com/news/articles/2023-12-14/ex-bank-of-china-manager-jailed-for-life-over-322-million-fraud> (December 14, 2023); <https://www.reuters.com/world/china/ex-china-central-bank-deputy-head-arrested-suspected-bribery-2023-06-20/> (June 20, 2023); <https://www.bloomberg.com/news/articles/2023-06-20/pboc-chief-vows-to-curb-corruption-after-ex-official-s-arrest> (June 20, 2023); <https://www.bbc.com/news/business-66793613> (September 13, 2023); <https://www.bbc.com/news/business-67724241> (December 15, 2023); <https://www.reuters.com/lifestyle/sports/chinese-football-chief-probed-suspected-serious-violation-law-2023-02-14/> (February 14, 2023); <https://www.scmp.com/news/china/article/3228573/chinas-football-corruption-crackdown-targets-2-more-senior-officials> (July 22, 2023); <https://www.reuters.com/sports/soccer/chinese-soccer-official-taken-away-investigation-state-media-2023-08-29/> (August 29, 2023)

# Lessons Learned from Recent FCPA Enforcement Actions Involving China



**Background:** In September 2023, Clear Channel Outdoor Holdings Inc. agreed to pay over USD 26 million to resolve charges that it bribed Chinese government officials to secure outdoor advertising contracts. According to SEC order, from 2012 through 2017, Clear Channel Outdoor's majority-owned subsidiary in China at the time engaged cleaning and maintenance entities to provide improper payments and gifts to Chinese government officials in an effort to obtain concession contracts with local Chinese government transport authorities. The payments were facilitated through intentionally vague record keeping, despite repeated red flags raised by internal auditors.

**Lessons:** (1) ensure there are adequate internal accounting and compliance controls in place; (2) ensure internal audit findings are being investigated and responded to appropriately; and (3) ensure the anti-corruption risks associated with third parties are properly assessed.

**Background:** In August 2023, SEC announced that 3M Company agreed to pay more than USD 6.5 million to resolve charges that it violated the books and records and internal controls provisions of the FCPA. SEC's order found that, from at least 2014 to 2017, employees of a 3M wholly owned subsidiary in China arranged for Chinese government officials employed by state-owned healthcare facilities to attend overseas conferences, educational events, and healthcare facility visits, which were often a pretext to provide the Chinese government officials with overseas travel to induce them to purchase 3M products. According to SEC, 3M's Chinese subsidiary paid nearly USD 1 million to fund at least 24 trips for Chinese government officials that included tourism activities.

**Lessons:** (1) obtain granular details of the trip, limit any extracurricular activities, and require compliance or legal approval of the actual itinerary; (2) ensure that gifts and hospitality provided are proportionate and in-line with industry standards; (3) conduct post-travel reviews; and (4) conduct adequate due diligence on high-risk third parties that interact with government officials, including travel agencies.



# Lessons Learned from Recent FCPA Enforcement Actions Involving China

**Background:** On May 11, 2023, SEC announced a resolution with Koninklijke Philips N.V., pursuant to which the company paid more than USD 62 million to resolve FCPA violations in connection with its sales of medical diagnostic equipment in China.

According to SEC's order, between 2014 and 2019, the company's subsidiaries in China (collectively, "Philips China") violated the FCPA's books and records and internal controls provisions by providing special price discounts to distributors, improperly influencing hospital officials to tailor specifications in public tenders to favor the company's products, and engaging in improper bidding conduct. SEC alleged that the special discounts to distributors created a risk that excessive distributor margins *could* lead to improper payments to employees of government-owned hospitals. SEC also faulted the company for having internal accounting controls that were insufficient to prevent and detect the misconduct.



This was Philips' second FCPA resolution. In 2013, Philips agreed to pay SEC USD 4.5 million for FCPA books and records and internal controls offenses in its Poland subsidiary.

**Lessons:** (1) ensure adequate controls are in place to detect and mitigate risks associated with the use of distributors and sales agents; (2) in particular, review your distributor incentive and compensation structure to ensure that business partners' commitment to compliance matches your own; (3) ensure enhanced oversight and training for employees responsible for public tenders; and (4) ensure controls are functionally effective in emerging markets.

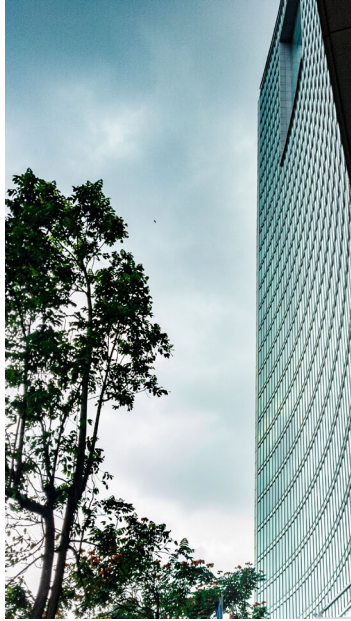
# India



Photo Credit: Yash Kiran



# India: Market Characteristics – Opportunities and Challenges



**6.2%**

Forecasted increase in real GDP in 2024

**400%**

Increase in U.S. and European greenfield investments in 2021 and 2022, even as ...

**-16%**

FY 2022-2023 saw the first fall in FDI into India in the last decade

**36%**

The estimated percentage of India's total population that resides in urban areas. Increasing at 2+% each year

**23%**

Youth unemployment rate in 2022, with some estimates for 2023 as much as 45%

**23%**

Female labor force participation

# India: Trends Over the Last Decade v. Situation on the Ground

## Has there been meaningful progress with anti-corruption efforts?



91 >>> 85

TI has noted that the Indian Government “*continues to consolidate power and limit the public’s ability to respond.*”  
Meanwhile, India’s score on TI’s index has remained stagnant over the last few years.



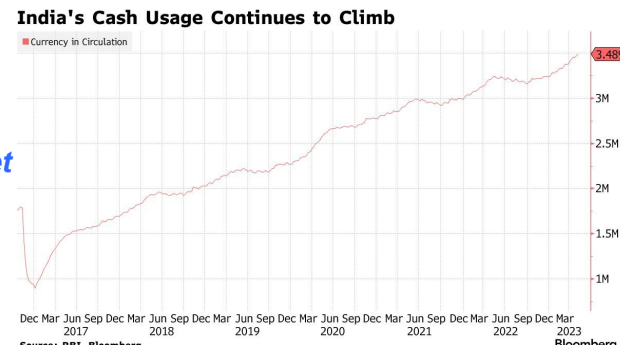
38.6 >>> 46.6

### Anti-corruption efforts have been poorly targeted and have not yielded significant results



A recent raid in which a record haul of cash (~USD 42 million) was recovered from a politician.

Cash circulation is at an all-time high and most big-ticket transactions (such as real estate purchases) often include a cash element.



#### Slow Progress on Anti-Corruption Initiatives

- The much-vaunted Lokpal has yielded no real results so far.
- Lokpal has not prosecuted a single public official to date and panel positions have remained vacant for extended periods of time.
- No protection for whistleblowers under general laws.
- Mechanisms relating to campaign finance and electoral funding are opaque.
- The average conviction rate in corruption cases is below 40% (and in some major states, like Maharashtra, is below 9%).

Sources: Transparency International, Corruption Perceptions Index (2012-2022) (The methodology changed in 2012); Transparency International, Corruption Perceptions Index (2021); Hindustan Times, Dhiraj Sahu I-T raid (December 2023); Reserve Bank of India and Bloomberg (May 2023); National Criminal Records Bureau, Crime in India (December 2023).

# India: Key Provisions and Requirements Under India's Anti-Corruption Laws

## Prevention of Corruption Act, 1988 ("PCA")

### A. Demand Side Prohibitions

- § 7 – Indian public servants must not obtain "undue advantage" with the intention of (or as a reward for) performing a public duty "improperly or dishonestly" or forbearing to perform such duty. (§ 7A targets intermediaries).

### B. Supply Side Prohibition

- Amendments to the PCA in 2018 introduced a specific provision (§ 8) that prohibits the giving of an "undue advantage" to anyone with the intent of inducing or rewarding the improper performance of a public duty by a public servant. **No exception for facilitation payments.**

### C. Obligations/Liabilities under the PCA

- § 9 – commercial organizations can be liable for violation of supply-side prohibition by persons associated with such organization (to benefit the organization). **A foreign parent company can be held liable for the actions of its Indian subsidiary.**
- § 10 – managerial personnel of an organization will be liable for up to 7 years imprisonment and/or fines if such personnel consent to or connive with the offender under the PCA.

## Companies Act, 2013

### A. Key Requirements

- § 134(5) – annual certification by company directors that "proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively" are in place.
- §§ 134(8), 447 – significant penalties (fines/imprisonment) for fraud and non-compliance.

### B. Disclosure Obligations

- Statutory auditors must disclose instances of fraud by employees and officers.
- Guidance by the Institute of Chartered Accountants urges auditors to report bribes and corrupt acts.
- Broadly, for frauds involving INR 10 million (USD 123,000) or more, auditors must notify the board and obtain a response within 45 days, before these are forwarded by the auditors to the government.
- **Board is required to disclose details of fraud and remedial action taken in the annual report** that is filed by the company with the Registrar of Companies.



# India: Disclosure Requirements Regarding Compliance and Investigations

## India has introduced obligations that impact the way companies conduct and report internal investigations.

### A. Forensic Audit Disclosures

Companies listed on Indian stock exchanges must disclose information regarding the initiation of any forensic audit, irrespective of materiality. A listed company must disclose:

- that it has initiated a forensic audit;
- the name of the entity initiating and the reasons for initiating the forensic audit; and
- the final forensic audit report, along with any comments from company management.

### B. Disclosure Obligations – Whistleblower Reports

Indian companies (other than certain classes of private, unlisted Indian companies) and their statutory auditors have been subject to additional requirements for the last few years.

- Companies are required to share information on whistleblower complaints received during the financial year with their statutory auditors.
- Statutory auditors must consider these complaints and how they were handled by the company.
- In 2023, India's financial reporting authority clarified that:
  - Auditors are required to report frauds discovered by them in the course of an audit **and frauds disclosed to them by the Company or any other person**.
  - Auditors are **not absolved of their duty to report by resigning** from their role as the statutory auditor.

### Key Takeaways

- Even smaller companies—including Indian subsidiaries of foreign companies—must consider implementing robust ethics reporting and handling procedures.
- Indian regulations continue to heighten their reliance on statutory auditors to bring instances of corporate fraud to light.

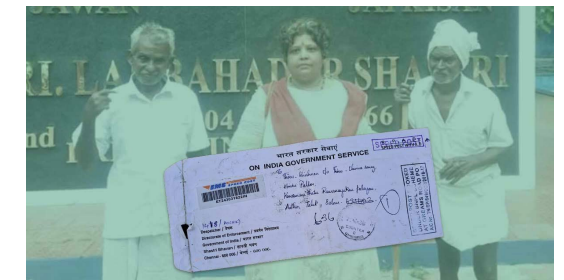
# India: A Federal System with Multiple, Intersecting Enforcement Agencies

Some enforcement agencies in India have been very active, while others are underperforming



## Meteoric Rise of the Enforcement Directorate (“ED”)

- Principal mandate of the ED is to investigate money laundering offenses and violations of foreign exchange laws.
- The ED can act against ‘proceeds of crime’ covering offenses scheduled under the Prevention of Money Laundering Act, 2002. This schedule has been significantly expanded in recent years.
- The ED has the power to attach property independent of any money laundering prosecution for a finite period of time. The ED has attached extensively: over USD 13.5 billion worth of assets.
- Very low conviction rates – 24 out of 1142 complaints filed (which is about 2.1%), while the conviction rate under general criminal laws is significantly higher.
- Disposal rates of cases are also very low.



# India: Trend — India's New Criminal Law Codes

## Recently enacted criminal laws in India have introduced new reporting requirements

### *Reporting Obligation Relating to Criminal Breach of Trust*

- The offense of “criminal breach of trust” may cover instances involving private sector fraud and corruption, such as misappropriation of funds and bribery.
- Under the new laws that have been enacted, any person who becomes aware of any criminal breach of trust is required to report such matter to the nearest magistrate or police officer.
- The only exception to this obligation is where the person has a ‘reasonable excuse’ not to report the matter (which has not been defined).
- The maximum punishment for this offense has been increased.

### *Other Changes*

- Significant increase in the powers of the lower judiciary to attach property that is suspected to be proceeds of crime:
  - This power covers any crimes rather than a specific schedule of offenses;
  - Procedural safeguards in relation to attachment are very weak.
- The new evidence law also recognizes electronic and digital records as “documents.”
  - There remains, however, some uncertainty around the admissibility requirements of such records.
  - Such electronic and digital records will also require a certificate identifying the electronic information from the custodian of such records.
- The new law includes a newly defined term, “economic offence,” to deal with organized crimes in India. Other offenses, like “cyber-crimes,” that are included in the definition of “organized crime” have not been defined.

Note: While the new criminal codes have been enacted, they are yet to be brought into force. The laws are expected to be operationalized in the first half of 2024.

# India: Private Sector Bribery



- In June 2023, India's largest information technology service provider Tata Consultancy Services ("TCS") reported that it had received a whistleblower complaint that certain employees of TCS had accepted bribes from staffing firms in India in return for directing business to such firms.
- Information technology majors like TCS contract with a large number of staffing firms in India and abroad for manpower requirements.
- In October 2023, TCS fired 16 employees and debarred 6 vendors in relation to a recruiting scam.
- No information has been released on whether any criminal proceedings have been commenced against the employees and vendors.

## *Legal Framework for Private Sector Corruption/Fraud*

- Indian anti-corruption laws do not cover private sector bribery. However, such actions are covered by general criminal and corporate laws.
- Disclosure requirements for companies listed on stock exchanges.
- Reporting requirements that apply to statutory auditors.
- Some sectors like banking and stock exchanges are within the scope of anti-corruption legislation

## Key Takeaways

- This case highlights the importance of:
  - Availability of whistleblower mechanisms;
  - Background checks for employees and vendors;
  - Periodic audits of selection processes; and
  - Robust contracts with employees and vendors.
- Legal remedies covering private sector employees:
  - Offenses of criminal breach of trust and cheating under criminal laws; and
  - Rely on contractual provisions for effective and confidential actions.



# India: Trend — Impact of New Data Protection Law on Investigations

The recently enacted Digital Personal Data Protection Act, 2023 (“DPDPA”) is India’s first comprehensive data protection legislation and has implications for investigations involving India.

## *Applicability*

- In general, personal data can be used by a **“data fiduciary”** only for lawful purposes for which a **“data principal”** has provided explicit consent. This applies to digital personal data and non-digital personal data that is subsequently digitized.
- Certain exemptions to data fiduciaries for data processing where necessary:
  - for **“enforcing any legal right or claim”**; and
  - in the interest of **“prevention, detection, investigation”** of **“any offence or contravention of any law.”**

## *The Extent of Legitimate Uses*

- Consent is not required for **“certain legitimate uses.”** One such legitimate use is for **“safeguarding the employer from loss or liability, such as prevention of corporate espionage, maintenance of confidentiality of trade secrets, intellectual property, classified information.”**
  - Employees are covered – how about independent contractors and other third parties?
  - The value of specific and express consent.
  - So you obtained consent before the DPDPA – Now what?

### DPDPA Timeline

- Enacted in 2023
- Expected to be in force by mid-2024
- Data Protection Board of India to be set up

### Overarching Obligations

- Principal responsibility for protecting personal data
- Putting in place “reasonable security safeguards to prevent a personal data breach”
- Fines of up to INR 250 crores (~USD 30 million)

Note: The DPDPA is yet to be notified in the official gazette and brought into force.



# Other Key Markets in Asia



# Singapore: Enforcement Trends

## Singaporean authorities investigate global schemes

- On May 31, 2023, Singapore’s Corrupt Practices Investigations Bureau (“CPIB”) commenced an investigation into **Seatrium** (a company formed in February 2023 by a merger of Sembcorp Marine and Keppel Offshore & Marine) as part of Brazil’s long-running “Operation Car Wash” anti-corruption investigation. On August 16, 2023, CPIB charged a former commercial executive of Sembcorp Marine with 14 counts of corruption under the country’s **Prevention of Corruption Act 1960** (“PCA”) for allegedly receiving cash bribes totaling at least SGD 202,877 (~USD 150,000) from nine contractors between 2011 and 2015 in exchange for contracts with a Sembcorp Marine subsidiary.
- On January 18, 2024, Singaporean authorities charged cabinet minister **Subramanian Iswaran** with 27 PCA violations, including receipt of over SGD 160,000 (~USD 119,145) in flights, hotels, and tickets to sporting events. Subramanian, who oversaw Singapore’s tourism industry until his resignation admits the charges, allegedly received these gifts in exchange for advancing the interests of Ong Ben Seng, an influential property tycoon and event promoter for **Singapore’s Formula 1 race**.

### Key Takeaways

- Singapore continues to adopt a zero-tolerance approach towards corruption. The **PCA** has **extra-territorial powers** that can apply to corrupt acts committed inside and outside of Singapore.
- The Sembcorp Marine matter shows that wide-scale corruption schemes may encompass multiple jurisdictions and enforcement authorities.
- In published guidance, the CPIB encourages companies to enhance their compliance programs in line with global standards (specifically mentioning the Singapore Standard ISO 37001 — Anti-Bribery Management Systems). CPIB will likely look favorably on companies with robust controls when making investigation and charging decisions.





# Japan: Enforcement Trends

## Japan continued high-profile prosecutions in 2023

### *Tokyo Olympic Bribery Scandal*

- On February 17, 2023, **Shinichi Ueno**, the former President of marketing and creative content company **ADK Holdings Inc.**, admitted to making improper payments totaling JPY 14.85 million (~USD 110,000) to **Haruyuki Takahashi**, a former 2020 Tokyo Olympic and Paralympic Organizing Committee Executive Board Member, in exchange for marketing contracts. On June 12, 2023, the Tokyo District Court sentenced Ueno to two years in prison.
- On June 6, 2023, the Tokyo District Court sentenced **Taiji Sekiguchi**, former President of toymaker **Sun Arrow Inc.**, and his father, former Sun Arrow executive **Yoshihiro Sekiguchi**, to suspended prison terms for bribing Takahashi with JPY 2.2 million (~USD 16,000).
- On October 10, 2023, **Toshiyuki Yoshihara**, an executive at a Japanese publishing house **Kadokawa**, was found guilty of bribing Takahashi. The payments, totaling JPY 69 million (~USD 463,000), were provided in exchange for becoming a sponsor and publisher of the Olympics' official program and guidebooks. Yoshihara was sentenced to two years in prison with an additional four-year suspension.



Sources: <https://www.japantimes.co.jp/news/2023/12/14/japan/crime-legal/olympics-bribery-1st-hearing/>;  
<https://www.asahi.com/ajw/articles/15083925#:~:text=A%20former%20Tokyo%20Olympic%20organizing,District%20Court%20on%20Dec.%202014,>  
<https://apnews.com/article/tokyo-olympics-bribery-trial-sponsors-takahashi-cf91a84df10d77911fa93bda90134d3a;>  
<https://japannews.yomiuri.co.jp/society/crime-courts/20231212-155302/>; <https://asia.nikkei.com/Spotlight/Society/Crime/Japan-s-ex-vice-foreign-minister-arrested-over-suspected-bribery>

# Japan: Enforcement Trends

## Tokyo Olympic Bribery Scandal (Cont'd)

- On February 28, 2023, Japan's Fair Trade Commission filed criminal complaints against six companies and seven individuals, including one of Japan's largest advertising agencies, *Dentsu Group*, and *Yasuo Mori*, a former 2020 Tokyo Olympic and Paralympic Organizing Committee executive.
  - The companies and Mori were accused of bid rigging in connection with JPY 43.7 billion (~ USD 320 million) in contracts for planning and managing Olympic events and competitions.
  - On the same day, the Tokyo District Public Prosecutors Office indicted the same companies and individuals for violations of other Japanese antitrust regulations.
  - On December 12, 2023, the Tokyo District Court sentenced Mori to two years in prison, suspended for four years.

### Key Takeaways

- Though Japan is perceived to have a relatively low risk of corruption, the domestic market is ultra-competitive, resulting in potential incentives to cut corners to win business.
- The Olympic scandals show that oftentimes government investigation will begin examining one type of misconduct and subsequently enlarge the inquiry to include other areas. Here, what started as a corruption investigation eventually broadened to include antitrust issues. Companies should ensure that compliance programs meet global standards in all major areas and that compliance teams are well-integrated.
- The case also shows that while enforcement levels in Japan are still catching up to other countries, Japanese prosecutors are not afraid to target senior executives at companies.

Sources: <https://www.japantimes.co.jp/news/2023/12/14/japan/crime-legal/olympics-bribery-1st-hearing/>; [https://www.asahi.com/ajw/articles/15083925#:~:text=A%20former%20Tokyo%20Olympic%20organizing,District%20Court%20on%20Dec.%202014](https://www.asahi.com/ajw/articles/15083925#:~:text=A%20former%20Tokyo%20Olympic%20organizing,District%20Court%20on%20Dec.%202014;); <https://apnews.com/article/tokyo-olympics-bribery-trial-sponsors-takahashi-cf91a84df10d77911fa93bda90134d3a>; <https://japannews.yomiuri.co.jp/society/crime-courts/20231212-155302/>; <https://www.bbc.com/news/world-asia-67712367>; <https://www.aljazeera.com/news/2023/12/14/ministers-quit-as-japans-pm-kishida-battles-for-trust-amid-fraud-scandal>; <https://www.meti.go.jp/press/2022/03/20230310002/20230310002.html>; <https://apnews.com/article/japan-kishida-funds-scandal-arrest-prosecutors-ikeda-2fae98f45f312b7e25c900387f26eb55>

# Malaysia: Enforcement Trends

## Malaysia continued to combat political corruption in 2023

### *Parti Pribumi Bersatu Malaysia (“Bersatu”) Investigation*

- On February 1, 2023, Malaysia’s Anti-Corruption Commission (“MACC”) confirmed that it had frozen two bank accounts held by the *Parti Pribumi Bersatu Malaysia* (“Bersatu”) political party, alleging that Bersatu had misappropriated public funds.
- On March 9, 2023, in connection with the same investigation, MACC arrested former Prime Minister *Muhyiddin Yassin* and charged him with corruption and money laundering.

### *1Malaysia Development Berhad (“1MDB”) Scandal*

- Former Malaysian Prime Minister *Najib Razak* was sentenced to 12 years imprisonment in 2020 in connection with the 1MDB corruption scheme. On March 31, 2023, the court dismissed Najib’s bid to review his convictions, effectively ending his avenues for appeal.
- On July 12, 2023, the MACC announced the arrest of former 1MDB General Counsel *Jasmine Loo Ai Swan* on further charges arising from the 1MDB scandal. Loo has been described in U.S. court filings as a close confidant of *Jho Low*, the fugitive businessman and alleged mastermind of the scam.
- The Pardons Board will consider a pardon for Najib in the coming weeks.

### Section 17A of the Malaysian Anti- Corruption Act 2009

- **Corporate Liability:**  
Imposes strict liability on a commercial organization if a person associated with the organization (e.g., director, employee) commits bribery to obtain or retain business or a business advantage for the organization.
- **Importance of Compliance Controls:**  
Provides a defense where an organization can prove that it has in place adequate procedures designed to prevent bribery.

Sources: <https://www.channelnewsasia.com/asia/malaysia-bersatu-pn-hamzah-zainudin-macc-investigation-frozen-bank-account-covid-fund-3248801>; <https://www.aljazeera.com/news/2023/3/9/holdmalaysiaformerpm-muhyiddin-yassin-arrested-over-covid-funds>; <https://apnews.com/article/malaysia-corruption-former-prime-minister-muhyiddin-8bffff4e4fed2172a239427eb027dd9e>; <https://www.reuters.com/world/asia-pacific/former-malaysia-pm-1mdb-ex-ceo-cleared-audit-tampering-charges-2023-03-03/>; <https://www.reuters.com/world/asia-pacific/malaysia-set-decide-royal-pardon-jailed-former-pm-najib-media-2024-01-10/>.



# Indonesia: Enforcement Trends

## KPK Enforcement Update

- In 2022, the Corruption Eradication Commission (known locally as the “KPK”) detained former Supreme Court judge **Sudrajad Dimiyati** for allegedly accepting IDR 800 million (~USD 53,000) in bribes from a lending cooperative in exchange for a favorable ruling. On May 30, 2023, an Indonesian court found Dimiyati guilty and sentenced him to eight years imprisonment, in addition to a fine of IDR 1 billion (~USD 67,000).
- On October 12, 2023, KPK arrested former agriculture minister **Syahrul Yasin Limpo** for allegedly receiving IDR 13.9 billion (~USD 885,000) in bribes.

## Other Corruption Cases Involving High-Ranking Government Officials

- On November 8, 2023, the Jakarta Corruption Court sentenced former Communications and Information Minister **Johnny G. Plate** to 15 years in prison for collecting at least IDR 11.5 billion (~USD 735,000) in kickbacks from inflated procurement contracts in connection with a government 4G telephone project.

## Timeline: Decreased Independence of the Corruption Eradication Commission (“KPK”)

- **2003:** KPK was formed as an *independent agency* and started successfully investigating and prosecuting corruption cases involving high-profile public officials.
- **2019:** *KPK’s governing law was reformed*, making the agency answerable to a new Supervisory Board appointed by the President of Indonesia. This oversight effectively reduced KPK’s investigative powers. For instance, KPK could no longer conduct searches and evidence seizures without the Board’s approval.
- **2021:** KPK was *incorporated into the civil service*. Staff were screened using a “civic knowledge” test. Over 50 staff – including prominent KPK investigators – failed the test and were *removed* from KPK.
- **2022:** The U.S. State Department reported that the recent KPK reforms have caused a *“significant decline in investigations and prosecutions.”*
- **2023:** **Firli Bahuri**, former chairman of the KPK, was named as a suspect in an extortion case and was removed from office. Firli denied the allegations and claimed that they are a ploy to weaken KPK’s influence.

Sources: <https://www.thejakartapost.com/indonesia/2023/05/31/former-senior-justice-jailed-for-eight-years.html>; <https://thediplomat.com/2023/10/indonesias-ex-agriculture-minister-arrested-on-accusations-of-corruption/>; <https://asianews.network/indonesias-ex-communications-minister-gets-15-years-in-prison-for-corruption/>; <https://antikorupsi.org/en/responding-indonesias-anti-corruption-chief-firli-bahuri-named-suspect-alleged-extortion-case>; <https://en.tempo.co/read/1799048/firli-bahuri-extortion-allegations-are-corruptors-ploy-to-weaken-kpk>

# Indonesia: Enforcement Trends

## SAP's Settlement with the U.S. DOJ and SEC

- On January 10, 2024, **SAP**, a German software company, reached a settlement with **DOJ and SEC** to resolve charges that it **made improper payments to foreign government officials** in Indonesia and other countries and **inaccurately recorded these payments as legitimate expenses** in its books and records.
- In Indonesia, SAP allegedly made (and attempted to make), **improper payments to officials at eight state-owned entities**—Balai Penyedia dan Pengelola Pemdiayaan Telekomunikasi dan Informatika, the Ministry of Maritime Affairs and Fisheries, the Social Ministry, PT Pertamina, Pemda DKI, PT Mass Rapid Transit Jakarta, PT Angkasa Pura I, and PT Angkasa Pura II—**to obtain or retain contracts** with those customers.
- WhatsApp messages between SAP Indonesia account executives and local third-party resellers show requests for “baggage” and “envelopes,” both understood to be codes for bribes to government officials. Two employees at the third-party resellers admitted making payments to government officials.
- Lessons Learned from SAP Indonesia:
  - Indonesia has a vast network of state-owned entities spanning a variety of sectors. Government contracts in Indonesia are competitive and lucrative, and much government procurement still has not transitioned to an online tendering system.
  - U.S. enforcement authorities expect companies to attempt to obtain WhatsApp and other third-party messaging app records during internal investigations.
  - Transacting through distributors or resellers comes with risk, even though you may view them as “customers.”



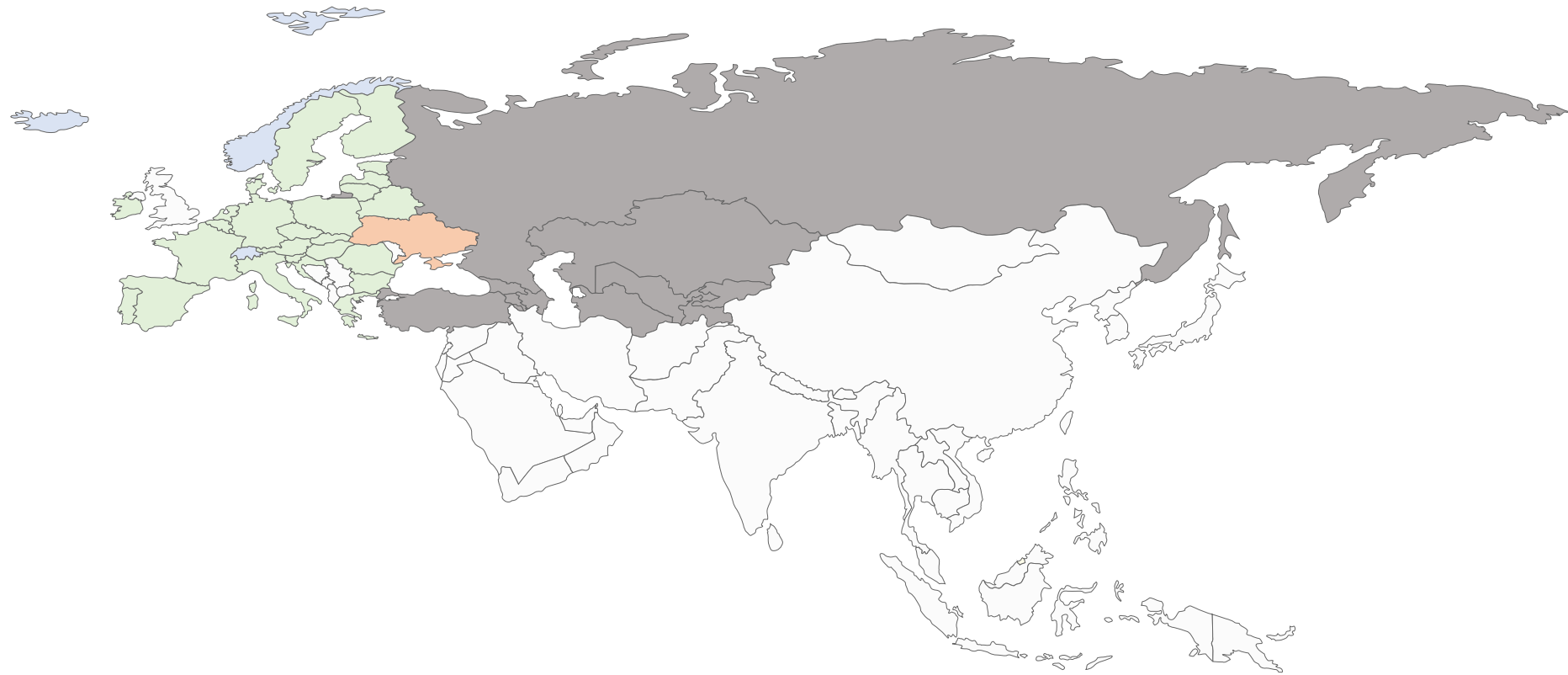
# Korea: Anti-Graft Act Commentary and Recent Enforcement

## Recent publications provide insight into key anti-corruption law

- Korea's Anti-Corruption and Civil Rights Commission published *Commentaries on the Anti-Graft Act* on January 3, 2024, and an updated *Anti-Graft Act Case Digest* on July 4, 2023, providing insights into the enforcement of the Anti-Graft Act, and summarizing 121 key prosecutions.
  - One new case involved the prosecution of a Korean government official who received a lavish meal while in the U.S., underscoring the *extraterritorial reach* of the law.
  - Another case involved prosecution of a company whose employees had provided gift certificates to Korean government officials using an off-book fund. Even though the company was unaware of the fund, prosecutors still argued that the company failed to *supervise the employees* and *implement sufficient internal controls*.
  - Commentaries on the Anti-Graft Act include a section *calling for more case precedents in Korea* and for *guidance on* what constitutes an effective *compliance program*. The commentaries refer to the FCPA and related guidelines published by U.S. authorities as containing examples of effective anti-corruption compliance standards.

**Sources:** [https://www.acrc.go.kr/board.es?mid=a10106000000&bid=128&&act=view&list\\_no=63654&tag=&nPage=1;](https://www.acrc.go.kr/board.es?mid=a10106000000&bid=128&&act=view&list_no=63654&tag=&nPage=1;)  
[https://www.acrc.go.kr/board.es?mid=a10106000000&bid=118&&act=view&list\\_no=63069&tag=&nPage=1;](https://www.acrc.go.kr/board.es?mid=a10106000000&bid=118&&act=view&list_no=63069&tag=&nPage=1;)  
[https://www.acrc.go.kr/board.es?mid=a10106000000&bid=128&&act=view&list\\_no=45858](https://www.acrc.go.kr/board.es?mid=a10106000000&bid=128&&act=view&list_no=45858) (In Korean)

# Eastern Europe and Central Asia



- EU states
- EFTA states (Iceland, Norway, Switzerland, Liechtenstein)
- Ukraine
- Eastern Europe and Central Asia



# Eastern Europe and Central Asia: Market Characteristics

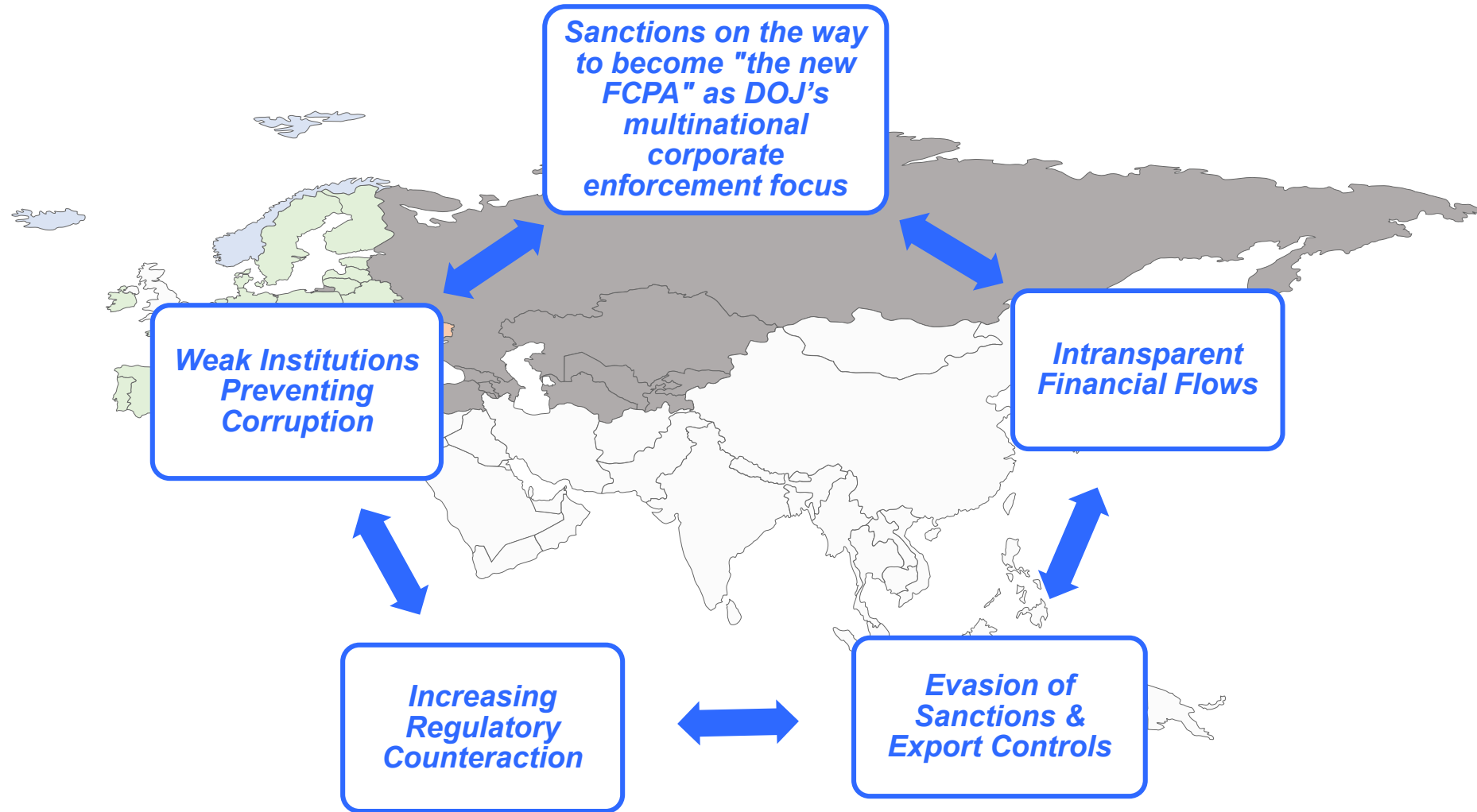
**376 million**  
POPULATION

**4.6%**  
OF WORLD'S POPULATION

**USD 3.7 trillion**  
GDP



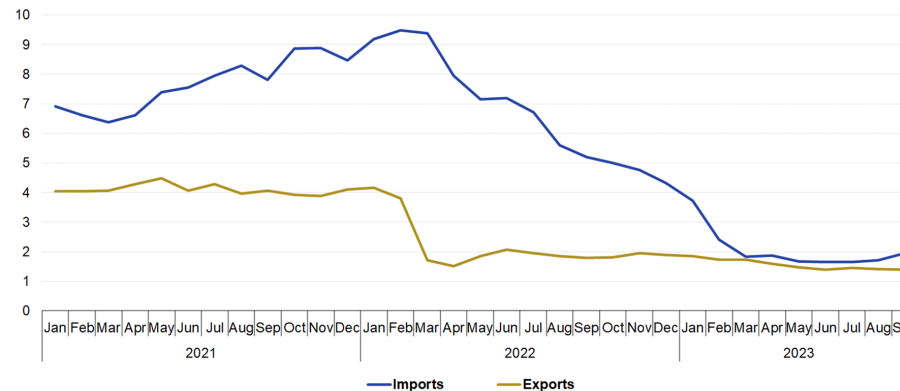
# Eastern Europe and Central Asia: Key Elements Resulting in Corruption Risks



# Eastern Europe and Central Asia: Focus on Sanctions Corruption Risks

- 2022-2023 Trade volumes data show a significant increase in imports in countries neighboring Russia, revealing almost *identical trendlines*. *Russia, Kazakhstan, and Kyrgyzstan* are members of the *Customs Union* of the Eurasian Economic Union.
- FinCEN Bank Secrecy Act (“BSA”) reports illustrate how Russian entities conduct procurement activities through Central Asia conduits - *Azerbaijan, Kazakhstan, Kyrgyzstan, and Turkey*. For example:
  - “Analysis of BSA data identified that a U.S.-based company that manufactures fluid transfer system components received wires from entities in Russia for potential purchases from December 2021 to October 2022. Between October 2022 and January 2023, this company began receiving wires for purchases from a *Central Asia-based company*, potentially to *evade Russia-related export controls*.”

EU Trade in goods with Russia 2021-2023  
(% share in extra-EU trade)



Source: Eurostat (online data code: ext\_st\_eu27\_2020sitc)



Kazakhstan



Kyrgyzstan



TRADINGECONOMICS.COM

Sources: FinCEN “Financial Trends in Bank Secrecy Act Data: Suspected Evasion of Russian Export Controls” September 2023; <https://tradingeconomics.com/>; Eurostat: EU trade with Russia - latest developments, available at [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU\\_trade\\_with\\_Russia\\_-\\_latest\\_developments#Latest\\_developments](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU_trade_with_Russia_-_latest_developments#Latest_developments).

# Eastern Europe and Central Asia: Focus on Sanctions Corruption Risks

- EU's latest **11<sup>th</sup> and 12<sup>th</sup> sanctions packages** focus on cooperating with third countries to address circumvention of existing sanctions against Russia, e.g., through re-exports.
  - A **novel obligation** of EU exporters to **contractually prohibit re-export** to Russia / for use in Russia when selling, supplying, transferring, or exporting certain items to third countries (except partner countries) and to ensure that the **agreement with the third-country counterpart** contains **adequate remedies** in the event of a breach of such contractual obligation (see Art. 12g of Regulation 833/2014).
  - A **novel anti-circumvention tool** allowing to **restrict exports** of certain goods to **third countries** whose jurisdiction is demonstrated to be at **high risk of being used for circumvention** of EU sanctions against Russia (see Art. 12f of Regulation 833/2014).



March 15, 2022

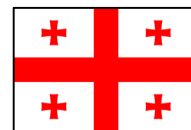
### Fourth package of EU sanctions against Russia:

- Ban on exports of luxury goods, including vehicles for the transport of persons of a value exceeding EUR 50,000.

June 23, 2023

### Eleventh package of EU sanctions against Russia:

- Full ban on exports of all new and second-hand cars with an engine size above 1,900 cm<sup>3</sup> within industrial good restrictions.



Beginning **August 1, 2023**, Georgia prohibited re-export, export, or transit to Russia of vehicles imported from the U.S. and from **September 26, 2023** vehicles from the European Union.

### Kyrgyzstan imports from Germany of motor cars and vehicles for transporting persons in 2021-2022



Sources: [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_23\\_3449](https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_3449); <https://tradingeconomics.com/kyrgyzstan/imports/germany/motor-cars-vehicles-transporting-persons>; [https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine\\_en](https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine_en); <https://rs.ge/NewsArchive-en?newsId=1062>

Source: tradingeconomics.com | Comtrade

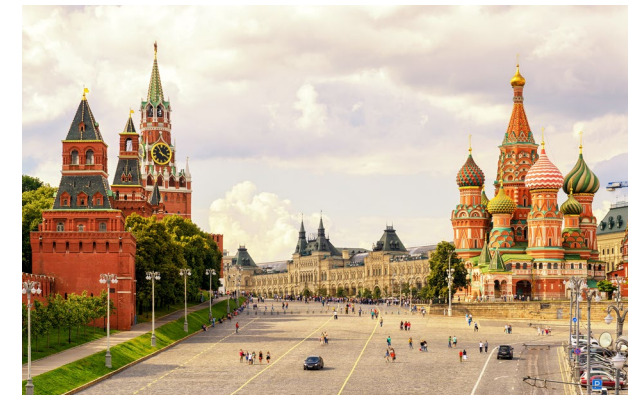


# Eastern Europe and Central Asia: Developments and Headlines



## Russia

- Following the denunciation by the Russian Federation of the Council of Europe Criminal Law Convention on Corruption (ETS 173), the Russian Federation ceased to be a member of **GRECO** with effect from 1 July 2023.
- New Criminal Code Article 291.2 introduced liability of up to 3 years in prison for **petty public official bribery** and Article 204.2 introduced liability of up to 1 year in prison for **petty commercial bribery** involving less than RUB 10,000 (~USD 110), as a response to change in tactics, replacing a one-time large bribe with systematic extortions.
- The increasing number of **Russian counter-sanctions** targeting individuals and companies from “unfriendly” states, together with other regulatory requirements in connection with the management or disposal of Russian assets, present ample risks for corruption due to the increased necessity for interaction with government agencies:
  - Transactions with shares of Russian companies owned or controlled by persons associated with “unfriendly” states require **Approval from the Government Commission** for Control over Foreign Investment, on the following conditions:
    - Sale with at least a **50% discount** from the market value based on the independent valuation by an appraiser recommended by the Commission;
    - A contribution to the state budget of **15%** of the total market value of the assets;
    - Specific **KPIs** for the new shareholders.
  - Approval of the Russian President is required for transactions regarding **entities in the strategic sectors**.
  - Presidential Decree from April 25, 2023, N 302 creates framework for placing Russian property owned or controlled by persons associated with “unfriendly” states under **external administration** by the Russian government, selecting German **Unipro**, Finnish **Fortum**, French **Danone**, and Danish **Carlsberg Group** as the first companies to fall under such administration.
  - Prior **consent of the antimonopoly authority** for transactions with shares (interests), property of commercial organizations, and rights in relation to commercial organizations over RUB 7 billion (~ USD 80 million).
- On March 6, 2023, Irish sports betting and gaming company **Flutter** agreed to pay a **USD 4 million** civil penalty to resolve the FCPA books-and-records and internal controls charges related to conduct in Russia. According to SEC’s order, Flutter paid nearly **USD 9 million** to Russian consultants between 2015 and 2020 in an apparently unsuccessful effort to legalize online poker in the country. SEC alleged that Flutter **failed to perform risk-based diligence** prior to hiring the consultants, entered into contracts that **did not contain anti-corruption provisions**, and failed to review expense reimbursements submitted by the consultants, which caused the company to **reimburse expenses that did not comply with its own policies**.



**Flutter**

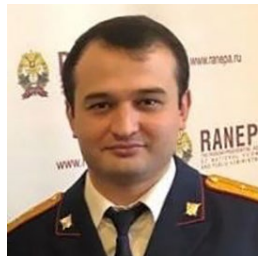
# Eastern Europe and Central Asia: Crypto Technologies



## Russia: Increasing Relevance of Cryptocurrencies in Facilitating Corruption and Illicit Finance

*Isolation from conventional banking systems creates demands for circumvention through anonymous electronic payments.*

- In December 2023, the 12th EU Sanctions Package introduced a ban for Russian nationals from owning, controlling, or holding posts in the governing bodies of entities providing **crypto-asset wallet, account or custody services**.
- 2023 Transparency International Russia reports highlight how funds can be transferred from Russia avoiding AML checks via crypto technologies, such as **stablecoins** and anonymous conversion of funds in cryptocurrencies, into fiat money using verified accounts for sale registered in the names of the citizens of Ukraine, Latvia, Estonia, Poland, Czech Republic, Bulgaria and Spain ("**crypto-to-fiat mules**").
- **Marat Tambiev**, a former high-ranking official of the Investigative Committee of the Russian Federation was arrested in June 2023 on corruption charges: In April 2022, he allegedly received a bribe in bitcoins equivalent to RUB 1.6 billion (~**USD 24 million**) from members of the hacker group, Infracod Organization, involved in a criminal case under his investigation. The bribe is a record for an employee of the Russian Investigative Committee.
- On January 17, 2023, **Anatoly Legkodymov**, founder and majority owner of the China-based cryptocurrency exchange **Bitzlato**, was arrested and charged with processing over USD 700 million of illicit funds and violating AML requirements. FinCEN identified Bitzlato as a "primary money laundering concern" in connection with Russian illicit finance.



Sources: <https://www.consilium.europa.eu/en/press/press-releases/2023/12/18/russia-s-war-of-aggression-against-ukraine-eu-adopts-12th-package-of-economic-and-individual-sanctions/>; <https://www.rbc.ru/society/03/06/2023/647a6d2c9a79473cf7a81ef4?ysclid=lqwpmwxt4b751366151&from=copy>; <https://www.kommersant.ru/doc/6026773>; <https://www.fincen.gov/news/news-releases/fincen-identifies-virtual-currency-exchange-bitzlato-primary-money-laundering>; <https://www.justice.gov/opa/pr/founder-and-majority-owner-cryptocurrency-exchange-charged-processing-over-700-million>

# Eastern Europe and Central Asia: Developments and Headlines



## Ukraine

- A **GRECO** member since 2006, Ukraine has undertaken significant efforts to combat relatively high levels of corruption (CPI 116) on the path to EU membership. In December 2023, the European Council decided to open accession negotiations with Ukraine.

### **Key Legislative Developments:**

- On March 4, 2023, the Cabinet of Ministers of Ukraine adopted the **State Anti-Corruption Program for 2023-2025**, indicating more than 1,700 measures in 15 policy areas to fight corruption.
- On September 20, 2023, Verkhovna Rada adopted a law on the restoration of **electronic declarations** of income for public officials, making register records open to the public. The **National Agency on Corruption Prevention** (“NACP”) has the authority to verify information in declarations for signs of illegal enrichment.
- In December 2023, Ukraine passed the four remaining legislation requirements necessary for the European Commission’s final recommendation to begin accession negotiations – three of these **requirements relate to anti-corruption priorities**:
  - December 7, the Cabinet of Ministers approved a draft law to regulate **lobbying** according to EU standards;
  - December 8, President Zelenskyy signed into law two bills to strengthen anti-corruption authorities, significantly **increasing the number of staff and officer positions at the National Anti-Corruption Bureau** (“NABU”) and **reorganizing the Specialized Anti-Corruption Prosecutor’s Office** (“SAPO”) into a separate, independent legal entity.

### **High-Profile Corruption Cases:**

- In February 2023, the State Bureau of Investigation detained former Deputy Minister of Defense **Vyacheslav Shapovalov** on charges of obstructing the lawful activities of the Armed Forces of Ukraine. Shapovalov allegedly oversaw military procurement contracts pursuant to which the government paid inflated prices or received low-quality goods.
- Head of the Ukrainian Supreme Court, **Vsevolod Kniaziev**, was arrested in May 2023 for allegedly accepting a bribe worth ~USD 2.7 million, after a large-scale corruption scheme was exposed in the Supreme Court.
- Odessa Mayor **Gennadiy Trukhanov** was detained in May 2023 on accusations of embezzling ~USD 2.5 million through a scheme involving the acquisition of a building in 2016.
- One of Ukraine’s richest men and former Head of the Dnipropetrovsk Regional State Administration, **Ihor Kolomoisky**, was detained in September 2023 on suspicion of his involvement in fraud and money laundering of ~USD 14 million through the banks under his control and embezzlement of ~USD 240 million.





# Eastern Europe and Central Asia: Developments and Headlines



## Kazakhstan

- Significant increase in trade volumes together with historically high CPI risk score represent significant risks for sanctions circumvention.
  - In 2022, the EU's trade in goods with Kazakhstan totaled EUR 40.2 billion, a **74% increase** compared to 2021. EU exports **increased 89%** compared to 2021, and imports from Kazakhstan are **up 70%** vs. 2021.
  - Merchandise exports growth rate is **40%** in 2022.
  - Kazakhstan has been a **GRECO** member since 2020. The 2022 GRECO Report on Kazakhstan noted, inter alia, **weak company registration control** and **difficulty in identifying the beneficial owners** of legal persons.



### Key Legislative Developments:

- On July 12, 2023, President Tokayev signed the “Law of the Republic of Kazakhstan on the Return of Illegally Acquired Assets to the State,” introducing procedures for voluntary or compulsory return of assets from **public officers and affiliated persons** with assets over KZT 44 billion (~USD 100 million), and who are not able to prove the legality of the origin of their assets. According to a note on the President’s website, the mechanisms will be applied to corrupt officials and “**oligopoly groups that have colluded with persons who have administrative and authoritative resources.**”
- In November 2023, the Anti-Corruption Agency of the Republic of Kazakhstan announced a recovery of KZT 857 billion (~USD 1.8 billion) since 2022, in cash and assets derived from alleged corruption schemes — of which KZT 159.8 billion (~USD 336 million) came from foreign jurisdictions. Approximately 1,500 corruption crimes were registered during the preceding ten months, involving over 1,100 individuals.



**Anti-corruption Agency of the Republic of Kazakhstan**

### High-Profile Corruption Cases:

- On May 10, 2023, the Anti-Corruption Service detained **Ablai Myrzakhmetov**, an ex-chairman of the Board of the Atameken National Chamber of Entrepreneurs of the Republic of Kazakhstan, for suspected fraud and soliciting a bribe of almost USD 30 million.
- In October 2023, former Minister of Justice, **Marat Beketaev**, was detained for allegedly abusing his power by steering state contracts to an affiliated company.

Sources: <https://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/398/index.html>; GRECO Joint First and Second Evaluation Rounds Evaluation Report on Kazakhstan, March 2022, paras.146, 283; The Law of the Republic of Kazakhstan dated July 12, 2023 № 21-VIII.



# Eastern Europe and Central Asia: New Red Flags

- Appearance of ***newly created customer accounts***, which purchase goods formerly purchased by Russian / Belarusian customers that are now restricted, suggests that these customers are fronting sanctioned parties.
- ***Stable sales despite the expected drop in sales*** as a result of applicable Russia sanctions raise the question of whether goods are re-routed through other countries (Turkmenistan, Uzbekistan, Kazakhstan, etc.) into the Russian market in circumvention of the sanctions regime.
- ***Unusual acquisition / disposal structures*** in sectors that are covered by sanctions (Russian oil & gas industry, iron and steel industry, oil transports, air carriers, etc.) may suggest transactions masking the circumvention of applicable sanction regimes.
- ***Activities carried out through trust and similar intransparent structures*** may suggest that the underlying transaction is for the benefit or at the direction of a sanctioned person or entity.
- ***Businesses engaged in freight forwarding*** (shipping, railroad, etc.) will ***face more scrutiny*** from regulators to ensure that they are in line with the applicable sanctions regimes and should be mindful of the heightened sensitivity of regulators to their processes and procedures to ensure compliance.
- ***Transactions involving Cryptocurrencies*** require special attention and screening to ensure transparency.
- Parties' use of ***unusual payment methods***, conducting ***payments through third countries*** unrelated to the transaction, or recurring changes to end-users and recipients.

# Eastern Europe and Central Asia: Key Takeaways

- EU neighboring markets that are now partly replacing former trade and investment flows with Russia **and are expected to become more significant trade partners of the EU** frequently have a **high level of corruption**.
  - The risks are particularly high when transactions and investments are made under **significant time pressure**, as is often the case in the current political environment.
  - Revisit **agreements with third parties** to reflect obligations imposed by recent EU regulations regarding exports to Russia.
- **Russia's war against Ukraine** has led to unprecedented international **sanctions**, causing many international businesses to **exit the Russian market** entirely despite aggressive Russian countermeasures.
  - Companies re-directing their sales, purchases, and investments to other countries neighboring Russia need to implement **anti-corruption programs** vigorously to avoid risks.
  - As some Russian individuals added to **sanctions lists** have also regularly faced allegations of **corruption, tax evasion, or money laundering**, sanctions enforcement linked to these persons can be expected to be intertwined with investigations into such offenses.
  - Activities in connection with the **management or disposal of Russian assets** involve increased corruption risks due to new regulation hurdles for entities associated with “unfriendly” states.
- **Ukraine** continues to withstand Russian aggression while simultaneously **embracing reforms** in various fields, including **anti-corruption**, which are necessary on its **path to EU membership**.

# Latin America & the Caribbean



# Latin America: Market Characteristics

## 2023 REGIONAL STATISTICS

**668 million**

POPULATION

**8.3%**

OF WORLD'S POPULATION





**31**

MEDIAN AGE

**+ 3%**

GDP GROWTH  
(EST.)

## LARGEST COUNTRIES

	POPULATION	GDP	CORRUPTION INDEX RANK (out of 180 countries)	COMBAT CORRUPTION RANK (out of 15 LatAm countries)
 BRAZIL	<b>216.3 million</b>	<b>USD 1.9 trillion</b>	<b>94<sup>th</sup> (tied)</b>	<b>8<sup>th</sup></b>
 MEXICO	<b>132.3 million</b>	<b>USD 1.46 trillion</b>	<b>126<sup>th</sup></b>	<b>12<sup>th</sup></b>
 COLOMBIA	<b>52.2 million</b>	<b>USD 343 billion</b>	<b>91<sup>st</sup></b>	<b>9<sup>th</sup></b>
 ARGENTINA	<b>46.2 million</b>	<b>USD 631 billion</b>	<b>94<sup>th</sup> (tied)</b>	<b>7<sup>th</sup></b>



# Latin America: Anti-Corruption Efforts Continue to Lose Support

## Corruption Concerns are Prevalent in Latin America

- Per Transparency International's *Corruption Perceptions Index*, more than two-thirds of countries in the region score below 50 out of 100.
- In the *2023 Capacity to Combat Corruption Index*, **Uruguay**, **Costa Rica**, and **Chile** maintained strong anti-corruption scores.
- **Panama** saw the greatest improvement in its score, continuing a two-year upward trajectory.
- **Guatemala** experienced the sharpest decline in the Index.
- The region's two largest economies saw sharp declines.
  - **Brazil's** score has continued to drop steadily for the past several years, dropping from 4<sup>th</sup> out of 15 countries in Latin America in 2020 to 8<sup>th</sup> in 2023.
  - **Mexico** has continued its fall from 8<sup>th</sup> in 2020 to 12<sup>th</sup> by 2023.

### Overall ranking

1	Uruguay	6.99
2	Costa Rica	6.76
3	Chile	6.67
4	Peru	5.53
5	Dominican Republic	5.42
6	Panama	5.39
7	Argentina	5.07
8	Brazil	4.83
9	Colombia	4.78
10	Ecuador	4.68
11	Paraguay	4.61
12	Mexico	3.87
13	Guatemala	2.86
14	Bolivia	2.56
15	Venezuela	1.46



# Latin America: Significant Corruption News



## Argentina

### *Former Vice President Continues to Accumulate Corruption Investigations in Argentina*

- On November 28, 2023, a federal appeals court in Argentina reopened a money laundering investigation into the now-former Vice President ***Cristina Fernández de Kirchner*** days before leaving office. The former President and former VP faces multiple other legal cases, including accusations of money-laundering involving her family's hotels. Her prior conviction and sentence in a separate corruption case from 2022 are pending a final appeal decision.



## Ecuador

### *Former President, Minister of Energy charged in corruption schemes*

- In March 2023, an Ecuadorian judge approved prosecutors' request to charge 37 people, including former President ***Lenin Moreno***, with bribery in connection with a Chinese-built hydroelectric plant. According to the indictment, the defendants, including Moreno, then-vice-President, received bribes of up to USD 76 million.
- In May 2023, Ecuadorian authorities detained ***Ecuador's former Minister of Energy and Mines*** in connection with various corruption allegations, including arranging jobs at the Ecuadorian state-owned oil company, ***Petroecuador***, in exchange for bribes.

Source: <https://apnews.com/article/argentina-cristina-fernandez-kirchner-db0ff8b0e514af431e4dca256d44a85d>; [https://www.reuters.com/world/americas/ecuador-judge-oks-bribery-charges-against-ex-president-over-chinese-dam-contract-2023-03-06/#:~:text=The%20indictment%2C%20which%20includes%2037,operated%20between%202009%20and%202018](https://www.reuters.com/world/americas/ecuador-judge-oks-bribery-charges-against-ex-president-over-chinese-dam-contract-2023-03-06/#:~:text=The%20indictment%2C%20which%20includes%2037,operated%20between%202009%20and%202018;); <https://latinlawyer.com/article/ecuador-file-charges-over-alleged-hydro-dam-bribery-scheme>; <https://www.infobae.com/america/america-latina/2023/05/15/detuvieron-en-ecuador-al-ex-ministro-de-energia-xavier-vera-por-un-caso-de-cohecho/>; <https://www.eluniverso.com/noticias/politica/xavier-vera-grunauer-cohecho-corrupcion-ministerio-de-energia-fiscalia-general-del-estado-corte-nacional-de-justicia-nota/>

# Latin America: Significant Corruption News



## Peru

### *Peruvian Agency Fines Odebrecht Domestic Subsidiary USD 1.1 Million For Withheld Information in Cartel Investigation*

- Peru’s Competition watchdog, the *National Institute for the Defense of Competition and the Protection of Intellectual Property* (“Indecopi”), found that *CNO*—formerly Constructora Norberto Odebrecht—refused to supply relevant evidence without justification during its construction sector cartel probe in which it found the cartel rigged bids on over 100 tenders for public road projects between 2002 and 2016. It fined the company 4.3 million Peruvian soles (equivalent to USD 1.1 million), just under the maximum penalty available.

### *Court Clears Path For Keiko Fujimori to Face Trial For Alleged Money Laundering*

- In December 2023, a Peruvian court officially indicted opposition leader and former presidential candidate *Keiko Fujimori*, initiating a criminal trial for alleged money laundering related to illicit contributions to her electoral campaigns. The indictment arises as part of the “Cocktails” case related to an investigation by Peru’s Public Ministry’s Lava Jato Special Team that implicates the Brazilian construction company *Odebrecht*, which involves 38 people, including Fujimori’s ex-husband and members of her political party.

# Latin America: Significant Corruption News (Con't)



## Panama

### *Former President Martinelli's Sons Forfeited nearly USD 38 Million for Bribe Involvement*

- Per a U.S. court's Final Order of Forfeiture, dated January 27, 2023, former Panamanian President **Ricardo Martinelli**'s two sons forfeited nearly USD 38 million for their involvement in a scheme to bribe a government official in Panama in exchange for business for a Brazilian construction conglomerate. Prosecutors say **Ricardo Alberto Martinelli Linares** and his brother **Luis Enrique** served as intermediaries for about USD 28 million in bribes paid by **Odebrecht** to a close relative, who was a high-ranking government official in Panama from 2009 to 2014.



## Colombia

### *Leftist President's Growing Corruption Scandal Shakes Up Trust in Promises of Anti-Corruption Reforms*

- Released voice recordings captured as former Colombian Ambassador **Armando Benedetti** threatened to expose damaging details of President **Gustavo Petro**'s 2022 campaign. Allegations include Benedetti raising nearly USD 4 million for Petro's campaign, hinting at possible ties to drug trafficking. The scandal, involving wiretapping, disappearing cash, and subsequent job losses, has weakened the administration's credibility, prompting the suspension of key legislative hearings and jeopardizing Petro's ambitious reforms.



# Latin America: Significant Corruption News (Con't)



## *Lingering Investigations Into SembCorp Marine's Subsidiary After Executives' Acquittal By Brazilian Court*

- In March 2023, Brazil's anti-corruption agency, Office of the Comptroller General ("CGU"), announced an investigation into **SembCorp Marine's** subsidiary, **Estaleiro Jurong Aracruz**. The investigation into alleged irregularities appears temporarily suspended. In June 2023, Singapore's Corrupt Practices Investigation Bureau launched its own investigation linked to the company's pre-2015 activities in Brazil (see Slide 31). These developments highlight the ongoing legal scrutiny that the company is facing.
- In late 2023, two executives were acquitted by a Brazilian court in the long-running corruption, bribery, and money laundering case related to contracts the company secured a decade ago from **Sete Brasil**, a Brazilian offshore energy company.

## *Foreign Bribery Settlement First-of-its-kind For Brazilian Local Government*

- A Brazilian subsidiary of **Medartis** agreed to pay ~USD 2 million for breaches of Brazil's anti-bribery law following a request for a leniency agreement. An investigation by the Office of the State Comptroller General found that the company paid "undue advantages" between 2011 and 2017 to induce doctors in São Paulo hospitals to purchase medical products sold by the company prior to its acquisition by Medartis in 2017.

# Latin America: Significant Corruption News (Con't)



## Brazil

- Brazil's Supreme Court nullified the use of any information stemming from *Odebrecht's leniency agreement*, which was used to secure many other convictions at the federal and state levels in the following years. *Novonor* (Odebrecht's successor) requested the Brazilian Supreme Court to uphold the bribery settlement, seeking confirmation that it "continues to enjoy all rights and guarantees provided for in the leniency agreement, in any scope or degree of jurisdiction" after the decision.



## Mexico

- An appeals court in Mexico City dismissed bank account evidence as inadmissible in an Odebrecht-linked case against the former PEMEX CEO, *Emilio Lozoya*, who stands accused of receiving more than USD 9 million in bribes from the Brazilian company. Mexico's AG disputes the appeals court's decision on the basis that evidence was gathered following international cooperation protocols established by Mexico's Ministry of Finance, and has alleged the appeals court judges demonstrated "partiality and illegality" in favor of Lozoya.
- Lozoya's counsel allege the evidence was obtained through violations of fundamental rights, and is seeking to rely on the Brazilian Supreme Court's decision to declare all evidence stemming from Odebrecht's settlement with Brazilian prosecutors as inadmissible.

# Latin America: Regional Enforcement Activity

## Former National Treasurer of Venezuela & Husband Sentenced to 15 Years in Prison in Money Laundering and International Bribery Scheme

- In April 2023, a U.S. court sentenced former Venezuelan National Treasurer **Claudia Patricia Díaz Guillen**, 49, and her husband, **Adrian José Velásquez**, 43, who accepted and laundered over USD 136 million in bribes from billionaire and media mogul **Raúl Gorrin Belisario**. In return, Belisario obtained access to purchase bonds from the Venezuela National Treasury at a favorable exchange rate. According to court documents, the conspiracy included offshore shell companies, foreign bank accounts, international wire transfers allegedly from Gorrin for Díaz and Velásquez's benefit, including the purchase of multiple private jets and yachts, and to fund a high-end fashion line.

## Former GC at PDVSA Gets Three-Year Prison Sentence for Money Laundering

- In June 2023, a U.S. court sentenced the former general counsel for Venezuela's state-owned oil company **Petróleos de Venezuela Alvaro Ledo Nass** to three years imprisonment. Nass plead guilty to one count of money laundering conspiracy in March 2023. He was also required to repay the bribe money received for participating in an illegal scheme that exploited inflated currency exchange rates for profit (amounting to over USD 11.5 million), plus an additional fine.

# Latin America: Regional Enforcement Activity (Con't)

## Grupo Aval and its Subsidiary, Corficolombiana, Settle Parallel Bribery Investigations in the U.S. and Colombia

- In August 2023, *Grupo Aval Acciones y Valores S.A.* (“Grupo Aval”) and its subsidiary, *Corporación Financiera Colombiana S.A.* (“Corficolombiana”), one of the largest financial services organizations in Colombia, agreed to pay over USD 80 million to settle bribery allegations with the U.S. DOJ, U.S. SEC, and Colombian authorities.
- Court documents show that between 2012 and 2015, Corficolombiana and its subsidiary, *Episol*, conspired with *Odebrecht* to pay bribes to high-ranking Colombian government officials in order to win a contract to own and operate a highway toll road. The three companies, through their joint venture, *Concesionaria Ruta del Sol S.A.S.*, caused other entities to enter into fictitious contracts with intermediaries that passed bribe payments along to Colombian government officials.



# Latin America: Regional Enforcement Activity (Con't)

## Freepoint Commodities LLC Settles U.S. Corruption Probe

- In December 2023, **Freepoint Commodities** settled foreign bribery allegations with U.S. authorities and will pay over USD 98 million in penalties to the U.S. DOJ. According to court documents, between 2012 and 2018, Freepoint and its co-conspirators paid bribes to Brazil's state-owned oil company, **Petrobras**, in exchange for confidential pricing and bid information. The company concealed the payments through encrypted messaging, sham negotiations, and funneling bribes through intermediaries, among other tactics.

## Tysers Insurances Brokers Ltd. And H.W. Wood Ltd. Resolve Bribery Allegations

- In November 2023, U.K.-based re-insurance brokers **Tysers** and **H.W. Wood** agreed to settle U.S. investigations into the companies' bribe payments to Ecuadorian officials. Tysers agreed to pay over USD 46 million in penalties, and H.W. Wood agreed to a reduced penalty of USD 506,000 due to its inability to pay. According to court documents, the companies paid bribes to the chairman of two Ecuadorian state-owned insurance companies and other Ecuadorian officials in order to obtain reinsurance business with state-owned insurance companies.

# Latin America: Regional Enforcement Activity (Con't)

## Multiple Peruvian Ex-Presidents Face Corruption Investigations and Charges

- In February 2023, Peru's Attorney General's Office opened an investigation into Peru's ex-President **Pedro Castillo** for corruption dating back to 2021. The corruption allegations date back to 2021, prior to Castillo's ouster for his attempts to dissolve Congress, and include accusations of influence peddling, organized crime, and being an accomplice to collusion during his administration. In March 2023, the Supreme Court ratified the decision to impose a 36-month preventive detention on Castillo while the investigation proceeds.
- Also in February 2023, the U.S. Department of State agreed to extradite former Peruvian president **Alejandro Toledo** to Peru, where he faces corruption charges. The former president returned to Peru in April 2023, where he is accused of taking at least USD 20 million in bribes from **Odebrecht**, the Brazilian construction conglomerate that has admitted to paying millions of decades in bribes to government officials throughout Latin America. Toledo is one of four ex-presidents linked to the Odebrecht corruption scandal.

Source: <https://latinlawyer.com/guide/the-guide-corporate-compliance/fourth-edition/article/no-signs-of-slowng-down-latin-america-current-compliance-climate>; <https://www.reuters.com/world/americas/perus-top-prosecutor-opens-corruption-probe-ex-president-castillo-2023-02-21/>; <https://www.laprensa-latina.com/court-upholds-preventive-detention-against-pedro-castillo-for-coup-attempt/>; <https://www.latimes.com/world-nation/story/2023-04-23/perus-ex-president-returns-home-to-face-corruption-charges>

# Latin America: Key Trends

## **Anti-democratic slides, particularly in Central America, create significant risks going forward.**

- Latin America has witnessed the sharpest regression in democracy of any region over the past 20 years and is “heading in the wrong direction.” (The *Economist*.)
- The region’s score in the *Economist Intelligence Unit’s Democracy Index* has declined for seven consecutive years.

## **Widely heralded reforms in Latin America have failed to result in meaningful corporate enforcement actions to curb corruption.**

- Initiatives such as the Mexican National Anti-Corruption System and the Argentine Anti-Corruption Office have not resulted in significant prosecutions so far.
  - Almost eight years after the Mexican National Anti-Corruption System’s passage Mexico’s Capacity to Combat Corruption Index score has continued to decline steadily, with the country receiving the fourth-lowest score in the region in 2023.

## **There are no major, known anti-corruption investigations in Latin America, as in prior years with the far-reaching Lava Jato investigation.**

- This may reflect a ‘retrenching’ of sorts: governments refocusing resources after years of active investigations and coming out of the COVID-19 pandemic.

## **Corruption continues to be a top-down problem in Latin America; there is some progress in prosecuting presidents throughout the region.**

- In several countries, corruption charges or related enforcement actions have been brought against former presidents, vice presidents, or their immediate family, including: (1) Argentina; (2) Brazil; (3) Colombia; (4) Dominican Republic; (5) Ecuador; (6) El Salvador; (7) Panama; and (8) Peru, among others.
- This trend suggests that while enforcement may be on the rise, corruption is systemic even at the highest levels of government.



# Africa



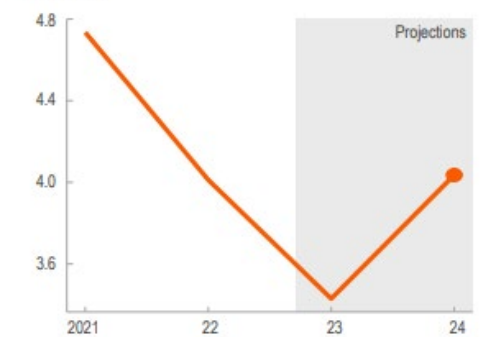


# Africa: Market Characteristics

## 2023 has been a difficult year for activity in sub-Saharan African economies:

- **Growth is expected to fall** for the second year in a row to 3.3% from 4.0% last year.
- As of July 2023, the latest inflation estimate was 7%, a 3% drop from the 10% peak in March 2023.
- A long-awaited rebound is on the horizon with regional growth expected to increase to 4.0% in 2024.
- Sub-Saharan Africa is the most food-insecure region in the world. **142 million people** are acutely insecure, up by 10 million from last year and representing 12% of the population.

Figure 1. Sub-Saharan Africa: GDP Growth, 2021-24 (Percent)



Source: IMF, World Economic Outlook database.

## Four key challenges:

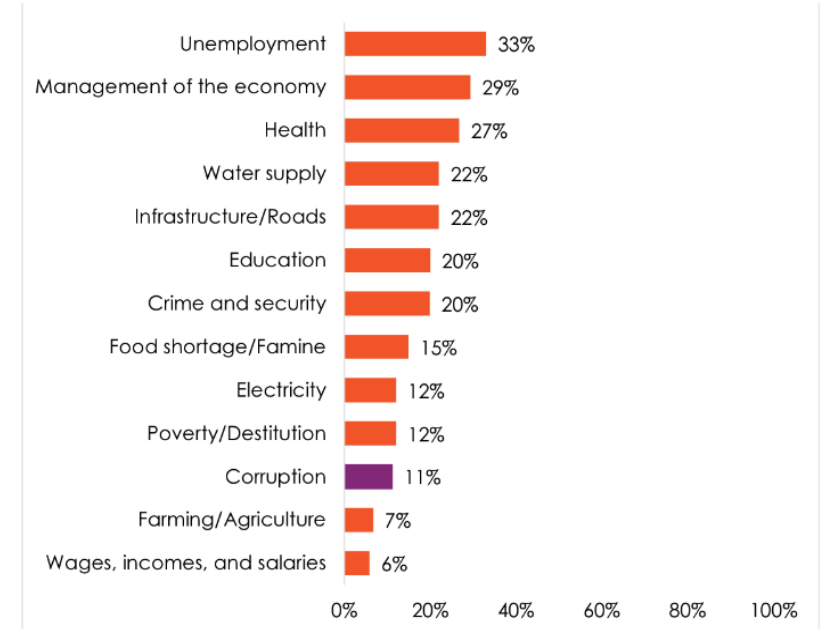
- **Inflation** remains excessively high – in the double digits in 14 countries and remains above target in countries that have explicit targets.
- **Exchange rate pressures** remain significant. Trade is slow to respond to exchange rate depreciation as goods are invoiced mostly in USD, and exporters require time to adjust production despite higher profits while consumers face difficulties finding local substitutes for imports.
- **Debt vulnerabilities** are elevated. Borrowing costs remain high. The substitution of low-cost, long-term multilateral debt with higher-cost private funds has resulted in rising debt-service costs and higher rollover risks. 19 of the region's 35 low-income countries are in debt distress or at a high risk of distress.
- **Economic divergencies** are widening. Per capita incomes in resource intensive economies remain subdued.

Source: International Monetary Fund, Regional Economic Outlook: Sub-Saharan Africa (Oct 2023); Fitch Predicts 4% Growth for Sub-Saharan Africa in 2024, Mozambique360 (updated December 18, 2023)

# Africa: Corruption Climate

## Corruption remains a significant problem faced by African Countries

- African countries scored an average of just **32.5 out of a possible 100** on the 2022 Corruptions Perception Index, with just **four** countries across the continent scoring over 50.
- Corruption ranks **11<sup>th</sup>** among the most important problems that Africans want their governments to address and has climbed to **No. 1** in Kenya and **No. 3** even in Botswana and Namibia, countries with comparatively high anti-corruption performance.
- On average across 39 countries, **58%** of Africans say corruption increased “somewhat” or “a lot” in their country in the last year.
- However, **67%** of Africans say their government is doing a poor job of fighting corruption, and only **26%** say people can report corruption to the authorities without fear of retaliation.



**Respondents were asked:** In your opinion, what are the most important problems facing this country that government should address? (Up to three responses per person. Figure shows % of respondents who mention each problem as one of up to three priorities.)

## Trend: Increase in Military Coups

- There has been an increase of military coups over the last couple of years, affecting the political and economic stability of the region. Since 2020, there have been nine coups in West Africa, Central Africa, and the Sahel region.
- In August 2023, Gabon became the latest country to experience a military coup, following Niger in July 2023.

**Source:** Transparency International, Corruptions Perception Index 2022; Freedom house, *A Surge of Military Coups in Africa Threatens Human Rights and the Rule of Law* (updated October 12, 2023), BBC, *Gabon Coup: The Latest in a Series of Military Takeovers on the Continent* (updated August 30, 2023), Afrobarometer, *Amid Rising Corruption, Most Africans Say They Risk Retaliation if They Speak Up* (updated December 6, 2023), Aljazeera, *Africa's Coup Epidemic: Has Democracy Failed the Continent?* (updated September 22, 2023)

# Africa: Regional Cooperation in Anti-Corruption Efforts

## Africa Anti-Corruption Day: “AUCPCC 20 Years After, Achievements and Prospects”

- In July 2023, anti-corruption agencies across Africa celebrated the 20<sup>th</sup> anniversary of the adoption of the African Union Convention on Preventing and Combating Corruption (“AUCPCC”).
- As of 2023, 48 African states have ratified the AUCPCC.
- Ratifying states celebrated the occasion by reflecting on the continued efforts needed to stamp out corruption and focusing on the role that individuals play in anti-corruption:
  - **Uganda:** the Inspectorate of the Government called on all Ugandans to combat corruption by enhancing public awareness about the cost and pain of corruption and encouraged citizens to despise, detest, and reject all corruption.
  - **Mauritius:** the battle against corruption must take place at a personal level. Every citizen, from the common person to the highest authority, holds the power to make a difference in curbing corruption on the African continent. Encouraging the active participation of the youth in this endeavor is paramount for fostering a transparent and accountable society.



Source: African Union Advisory Board Against Corruption (“AUABC”), celebrates the 20<sup>th</sup> anniversary of the adoption of the AUCPCC (July 1-12, 2023); Centre for Fiscal Transparency and Integrity Watch, press release on 13 July 2023; Inspectorate of the Government, Uganda, press release on 12 July 2023; Independent Commission Against Corruption of Mauritius, press release on 24 August 2023.

# Africa: Local Enforcement Action within African Countries (1)

**Nigeria:** Nigeria's Independent Corrupt Practices Commission ("ICPC") brought proceedings in the Federal High Court in Abuja against the former Register of the Joint Admission and Matriculation Board ("JAMB"), **Professor Dibu Ojerinde**, and his four children. The ICPC alleges that Professor Ojerinde has engaged in money laundering and misappropriated funds during his tenure at JAMB. The trial has recently been adjourned until February 2024 due to the defendant's recent change in counsel.



**Ghana:** In July 2023, Ghana's OSP arrested the country's (now former) Minister of Sanitation and Water Resources, **Cecilia Abena Dapaah**, for suspected corruption-related offenses related to large sums of money and other valuable items that were allegedly stolen from her residence.

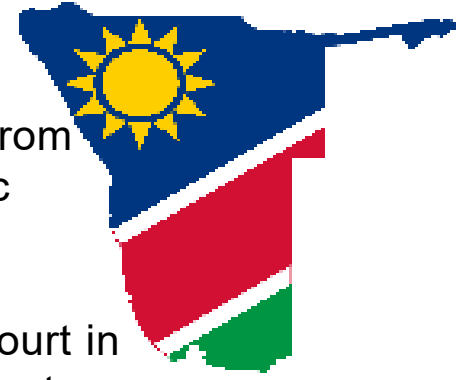


The arrest came after Dapaah reported the theft at her house to the police. Suspicions were aroused due to the large amounts of cash held in both foreign and local currencies that she reported stolen.

On 16 October 2023, the OSP reported that itself and the FBI in the U.S. had initiated collaborative, concurrent inquiries into the former minister, focusing on her assets and financial transactions within the U.S.

# Africa: Local Enforcement Action within African Countries (2)

**Namibia:** In 2019, a Wikileaks release named the 'Fishrot Files' uncovered large-scale corruption in Namibia's fishing industry. A number of prominent businessmen and politicians (including the former Fisheries Minister, **Bernard Esau**, and former Justice Minister, **Sakeus Shangala**) were accused of running schemes to get control of valuable fishing quotas from the state-owned fishing company, which they then diverted to Icelandic company **Samherki** in return for kickbacks.



After a lengthy investigation, the trial commenced in Namibia's High Court in December 2023 and is set to be the biggest in the country's history. Most recently, plea proceedings were paused until an application for the recusal of the presiding judge has been heard and decided.



**Uganda:** In April 2023, Uganda's Director of Public Prosecutions charged **Mary Goretti Kitutu**, the previous Cabinet Minister for Energy and Mineral Development, with corruption over a scandal involving the alleged theft of thousands of metal roofs that were intended for vulnerable communities in the Karamoja region. The State Minister for Finance, **Amos Lugoloobi**, and State Minister for Karamoja Affairs, **Agnes Nandutu**, were arrested shortly after.

Their trials are set to continue into 2024.



# Africa: Enforcement Actions Outside Africa in relation to Africa-related Corruption (1)

The Gartner logo consists of the word "Gartner" in a bold, dark blue, sans-serif font, followed by a registered trademark symbol (®).

**South Africa:** Technological research and consulting company, *Gartner, Inc.*, headquartered in Connecticut, without admitting or denying SEC's findings, agreed to pay over USD 2.45 million to resolve charges that it violated the anti-bribery, books and records, and internal accounting control provisions of the FCPA. SEC's order alleged that from December 2014 through August 2015, Gartner entered into a corrupt arrangement with a private South African consulting firm with close ties to South African government officials, knowing or consciously disregarding that all or part of the money paid to the private company would be used to bribe government officials to influence the award of consulting contracts to Gartner.

**West Africa:** The U.K.'s Serious Fraud Office ("SFO") is still considering whether to charge ex-employees of mining company *Glencore* with bribery offenses related to the company's operations in Nigeria, Ghana, Cameroon, and Côte d'Ivoire between 2011 and 2016. The SFO expects to make its decision by July 2024.

The Glencore logo features the word "GLENCORE" in a large, black, serif font with wide letter spacing.The Frank's International logo features the word "FRANK'S" in a bold, green, sans-serif font with a registered trademark symbol (®), positioned above three horizontal lines (two gold, one green), with the word "INTERNATIONAL" in a smaller, green, sans-serif font below the lines.

**Angola:** Dutch corporation and global oilfield services provider *Frank's International N.V.*, now known as *Expro Group Holdings N.V.*, agreed to pay ~USD 8 million to resolve charges for violating the anti-bribery, books and records, and internal accounting controls provisions of the FCPA. SEC alleged that from approximately January 2008 through October 2014, Frank's International's subsidiaries: (1) paid commissions to an Angolan sales agent when its subsidiary employees knew that there was a high probability that the agent would use the commissions to bribe Angolan government officials, and (2) that the agent diverted some of those funds to an Angolan government official to influence the award of contracts to Frank's International's subsidiaries.

# Africa: Enforcement Actions Outside Africa in relation to Africa-related Corruption (2)



RioTinto

**Guinea:** In March 2023, global mining and metals company *Rio Tinto Plc* agreed to pay a USD 15 million civil penalty to resolve SEC's charges that it violated the books and records and internal accounting control provisions of the FCPA. It was alleged that Rio Tinto hired a French investment banker (and close friend of a former senior Guinean government official) as a consultant to help the company retain its mining rights in the Simandou mountain region in Guinea. The consultant eventually retained the mining rights and was paid USD 10.5 million for his services. SEC's investigation uncovered that the consultant, acting as Rio Tinto's agent, offered and attempted to make an improper payment of at least USD 822,000 to a Guinean government official in connection with the consultant's efforts to help Rio Tinto retain its mining rights.

**Madagascar:** In August 2023, the National Crime Agency reported that the former chief of staff (Romy Andrianarisoa) to the president of Madagascar and an associate were arrested at a meeting where they allegedly attempted to secure a bribe (GBP 224,400 (~USD 285,000) in upfront charges and a 5% equity stake in the company) in exchange for mining licenses to operate in Madagascar from *Gemfields*, a London and Johannesburg-listed mining company and marketer of gemstones. The crime of requesting a bribe in contravention of Section 2 of the Bribery Act 2010 carries a fine or imprisonment of up to 10 years if convicted. At an arraignment hearing in September 2023, Andrianarisoa pleaded not guilty. Gemfields brought the matter to the attention of the NCA and have cooperated with the investigation.

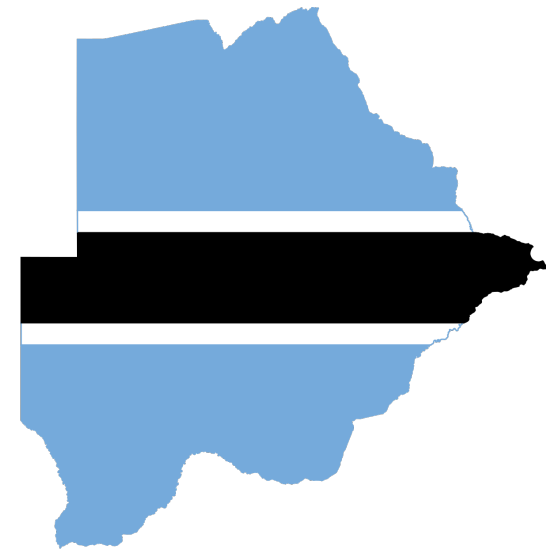
GEMFIELDS

# Africa: World Bank Debarment Actions



**Kenya:** In March 2023, the World Bank debarred Kenyan engineering, procurement, and construction company, *Burhani Engineers Ltd.* and its affiliates (based in *Kenya*, *Uganda*, and *Tanzania*) from participating in projects and operations financed by the World Bank Group for a 24-month period for fraudulent practices in connection with the Energy for Rural Transformation III Project in Uganda. Burhani misrepresented its prior experience in multiple submissions to mislead the selection process and obtain contracts under the project.

**Botswana:** In December 2023, the World Bank announced a 42-month debarment of *Multi-Tech Consult (PTY) Ltd.*, a civil engineering company based in Botswana, and Peter Lambileki, its Managing Director, for engaging in fraudulent practices in connection with the World Bank-financed Improved Rural Connectivity Project in Zambia, the Second Kenya Informal Settlements Improvement Project, and the Strategic Cities Project in Tanzania. MTC and Lambileki submitted three “expressions of interest” that misrepresented MTC’s experience in an effort to obtain contracts.



# Africa: Enforcement - Company in Focus



Global enterprise software giant **SAP** agreed to pay DOJ and SEC around USD 222 million in penalties and disgorgement to resolve FCPA offenses related to bribing government officials.

## *South Africa's National Prosecuting Authority ("NPA")*

- The day after DOJ and SEC settlements, South Africa's NPA announced that SAP will pay USD 150 million to resolve criminal allegations of "corruption and related offences" by former executives and managers of **SAP South Africa**, involving "tainted contracts" with various state-owned companies in South Africa. NPA reserves the right to reopen this investigation if SAP fails to continue cooperating.
- The agreement represents only the second such resolution the NPA has reached with a company.

Source: The FCPA Blog, Press Release, SAP pays DOJ and SEC USD 222 million to settle global FCPA 'large bait' violations (January 2024); Global Investigations Review, SAP enters USD 220 million resolution with U.S. over bribery in Africa, Indonesia (January 2024); Global Investigations Review, SAP resolves foreign bribery probe in South Africa (January 2024).

# Global Trends and Risk Mitigation Strategies





# Trend: Third Parties Remain the Single Greatest Area of Corruption Risk

- **Albemarle Corporation:** On September 29, 2023, Albemarle Corporation, a chemical catalyst business, resolved investigations by SEC and DOJ into its participation in bribery schemes involving multiple foreign governments, agreeing to pay over USD 218 million in penalties and disgorgement. Albemarle allegedly made *payments through intermediaries* to secure business with state-owned oil companies in Vietnam, India, and Indonesia. Albemarle also allegedly made improper payments to private sector refineries in India.
- **H.W. Wood Limited:** On November 20, 2023, H.W. Wood Limited, a U.K.-based reinsurance broker, entered into a three-year DPA with DOJ and agreed to pay USD 508,000. According to the DPA, H.W. Wood allegedly *utilized a third-party intermediary to pay commissions* to three Ecuadorian officials and two Ecuadorian state-owned insurance companies to secure advantages in obtaining and retaining insurance and reinsurance business with the state-owned insurance entities.
- **Tysers Insurance Brokers Limited:** On November 20, 2023, Tysers Insurance Brokers Limited, another U.K.-based international reinsurance broker, also entered into a DPA with DOJ. Tysers allegedly paid ~USD 20.3 million in commissions to two *third-party intermediaries*, who *bribed an official* who chaired Ecuador's state-owned insurance companies and three other officials within the Ecuadorian government to secure advantages and retain reinsurance business with state-owned insurance companies. The company agreed to pay a USD 36 million penalty and forfeiture of ~USD 10.5 million.

# Mitigation: Carefully Monitor High-Risk Third Parties

Use of third parties is an inevitable part of doing business in an emerging market. Pre-engagement screening, as well as close monitoring, can help offset the decreased transparency and control that comes with using agents and intermediaries.

## *BEST PRACTICES*

- Identify the specific functions *prone to corruption* that are handled by third parties.
- Involve *Legal and Compliance* in contract negotiations/drafting to ensure that services are specifically and accurately described and ensure that an efficient control (e.g., Finance) can assess whether the services have actually been rendered and whether prices are reasonable in light of those services and in line with market rates.
- Include *audit rights with a trigger* in third-party agreements to allow for audits when indicated.
- Conduct *specific training* for employees working with third parties and with end customers.
- Use a risk-based approach to periodically select third parties for an *audit review*.
- Ensure that *rebates, credit notes, and other payments* provided to the third party are made to the contracting entity, including identifying any offshore arrangements.
- Understand the *interaction* in emerging markets between sales force, third parties (e.g., distributors, agents), and end-customers, and conduct function-specific compliance training with these employees.
- Understand whether margins of intermediaries are *passed on* to end-customers by reviewing publicly available tender materials or conducting audit reviews.

# Trend: Increasing Importance of Self-Reporting

## Corporate Enforcement & Voluntary Self Disclosure Policy, Department of Justice Criminal Division

This revised policy, dated January 17, 2023, substantially increases the discounts available to companies for voluntary disclosure, cooperation, and remediation. The “*presumption of declination*” in voluntary disclosure cases remains, however. Companies are eligible for:

- up to 75% discount on the Sentencing Guidelines range in cases of voluntary disclosure; and
- up to 50% discount on the Sentencing Guidelines range in cases of non-voluntary disclosure.

Assistant Attorney General Kenneth Polite noted that the revised policy offers a way forward for companies, even where aggravating factors may be present if the company can demonstrate:

1. immediate voluntary self-disclosure;
2. extraordinary cooperation and remediation; and
3. an effective and robust compliance program at the time of the misconduct and disclosure.

### Enforcement actions following the introduction of the revised policy

- In May 2023, technology and consulting company **Gartner** resolved FCPA bribery and accounting charges with SEC. The company agreed to pay a USD 1.6 million civil penalty and USD 856,754 in disgorgement plus interest. In recognition of the self-disclosure, SEC did not require any additional, forward-looking compliance undertakings.
- Corporación Financiera Colombiana S.A, a Colombian financial services corporation and subsidiary of **Grupo Aval**, agreed to pay over USD 80 million to resolve bribery investigations in both the U.S. and Colombia. The company entered into a DPA with DOJ and agreed to pay a USD 40.6 million criminal penalty and over USD 40 million in disgorgement. DOJ granted a 30% reduction in the criminal penalty, recognizing the company’s cooperation and extensive remedial efforts.
- In November 2023, DOJ issued a declination and disgorgement to **Lifecore Biomedical, Inc.** relating to alleged FCPA violations. DOJ declined to prosecute due to Lifecore’s timely and voluntary disclosure and continued cooperation. The company appropriately remediated the conduct and agreed to disgorge the amount it had avoided paying due to the misconduct.

Sources: <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law>;  
<https://www.justice.gov/opa/pr/corficolombiana-pay-80m-resolve-foreign-bribery-investigations>; <https://www.justice.gov/criminal/case/lifecore-biomedical-inc-fka-landec-corporation>; <https://www.sec.gov/enforce/34-97609-s>

# Mitigation: Ensure Proactive Disclosure, Cooperation and Remediation

## Companies should have internal policies to assist in making informed disclosure decisions and cooperation with enforcement agencies

*Grupo Aval* received credit from DOJ for its cooperation and remediation efforts. This provides an insight into the conduct required by a company to qualify for discounts under DOJ's revised Corporate Enforcement & Voluntary Self Disclosure Policy. In the press release announcing the resolution of its investigation, DOJ pointed to Grupo Aval's

### *Genuine and prompt cooperation, including:*

- promptly sharing facts obtained through the company's internal investigations;
- proactively identifying information previously unknown to the government;
- providing key documents to which investigators may not otherwise have access;
- making detailed factual presentations that distill key factual information;
- providing sworn testimony from relevant witnesses whom the law enforcement agency cannot independently interview; and
- providing translations of key documents in foreign languages.

### *Extensive remedial measures, including:*

- root-cause analysis of the misconduct;
- overhauling compliance programs;
- enhancing third-party intermediary risk management processes;
- implementing robust processes for reporting and investigating allegations of misconduct and establishing a disciplinary process overseen by an ethics committee; and
- conduct testing of anticorruption compliance programs.



# Trend: Enforcement Authority's Focus on Due Diligence

## Enforcement authorities emphasized importance of compliance due diligence

### *DOJ's New Mergers & Acquisitions Safe Harbor Policy*

Assistant Attorney General Lisa O. Monaco's Remarks as Prepared for Delivery at the Society of Corporate Compliance and Ethics' 22nd Annual Compliance & Ethics Institute

(October 4, 2023)

"We are placing an enhanced premium on timely compliance-related due diligence and integration. Compliance must have a prominent seat at the deal table if an acquiring company wishes to effectively de-risk a transaction...By contrast, if your company does not perform effective due diligence or self-disclose misconduct at an acquired entity, it will be subject to full successor liability for that misconduct under the law."

"To ensure predictability, we are setting *clear timelines*."

1. "As a baseline matter, to qualify for the Safe Harbor, *companies must disclose misconduct* discovered at the acquired entity *within six months from the date of closing*. That applies whether the misconduct was discovered pre- or post-acquisition."
2. "Companies will then have a baseline of *one year from the date of closing* to *fully remediate* the misconduct."
3. "Unless aggravating factors exist at the acquired company, th[e] *entity can also qualify for applicable VSD benefits*, including potentially a declination."

"[A]ny *misconduct disclosed* under the Safe Harbor Policy will *not be factored into future recidivist analysis* for the acquiring company."

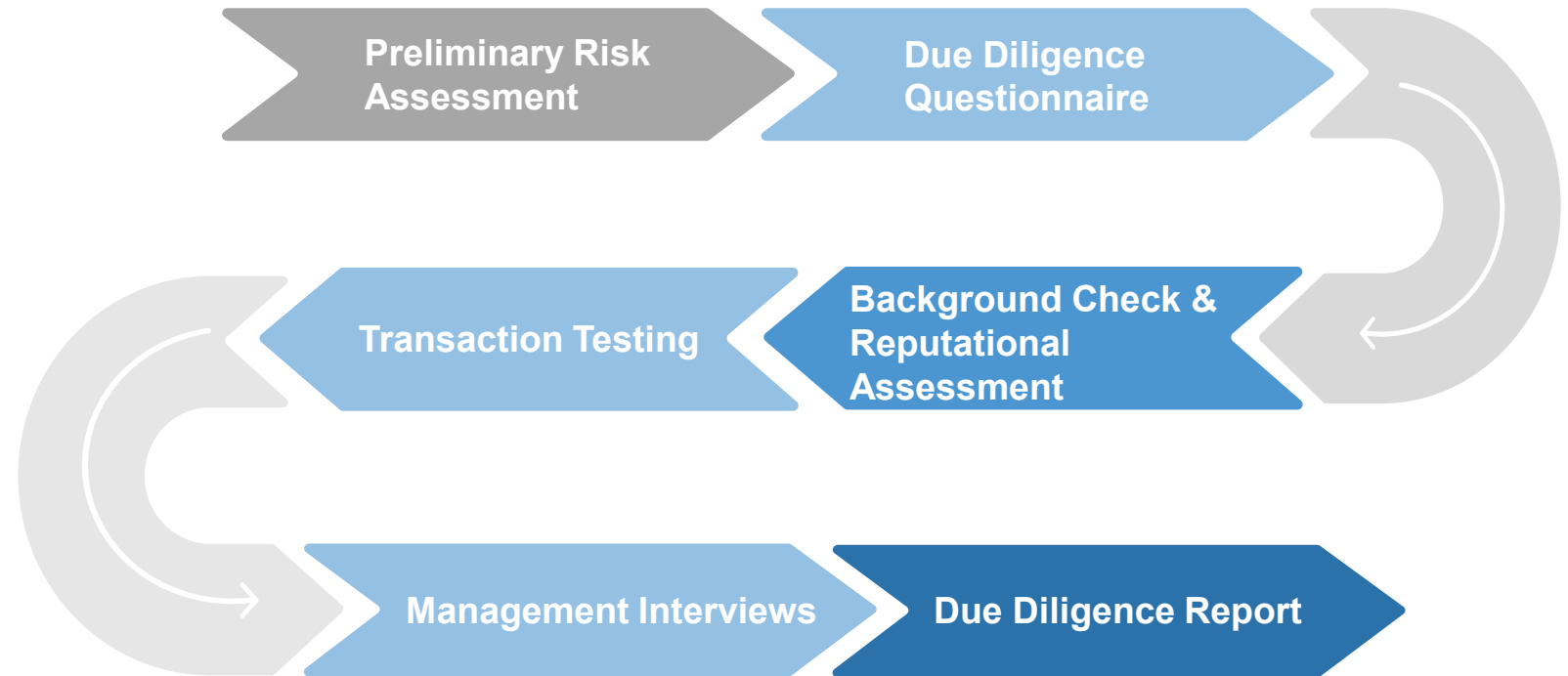
"[T]his policy will only apply to criminal conduct discovered in bona fide, arms-length M&A transactions."

# Trend: Enforcement Authority's Focus on Due Diligence (cont'd)

## *SEC also displayed its increased interest in the due diligence process*

- On March 6, 2023, *Flutter* resolved an SEC-only FCPA enforcement action arising out of conduct in Russia.
  - An Irish sports betting and gaming company, Flutter, paid nearly USD 9 million to Russian consultants between 2015 and 2020 in an apparently unsuccessful effort to legalize online poker in the country.
  - SEC alleged that Flutter *failed to perform risk-based diligence prior to hiring the consultants*.
  - To resolve the FCPA books-and-records and internal controls charges, and without admitting or denying the findings, Flutter agreed to pay a USD 4 million civil penalty.
- On April 26, 2023, SEC-only FCPA enforcement action was announced with *Frank's International*.
  - SEC alleged that Frank's International, a Dutch oilfield services provider, retained and paid substantial commissions to an agent while allegedly knowing the agent had close relationships with officials of Angola's state-owned oil company Sonangol and further that the agent did not have any relevant technical expertise. SEC asserted that *Frank's International did not perform any due diligence on the agent* and only created a backdated agreement long after engaging the agent.
  - Without admitting or denying SEC's allegations, Frank's International agreed to pay a USD 3 million civil penalty plus nearly USD 5 million in disgorgement and prejudgment interest.

# Trend: Overview of Compliance Due Diligence Steps



# Mitigation: Conducting Effective Due Diligence

## Credit for Conducting FCPA Due Diligence

- DOJ and SEC will give meaningful credit to companies who conduct *thorough risk-based* compliance due diligence on acquisition targets and, in appropriate circumstances, may decline to bring enforcement actions against companies that discover misconduct in acquired entities through due diligence.

## According to DOJ/SEC Guidance, sufficient due diligence may include:

- Review of the target's sales and financial data, its customer contracts, and third-party and distributor agreements.
- Performing a risk-based analysis of the target's customer base.
- Performing an audit of selected transactions entered into by the target.
- Engaging in discussions with the target's key executives and functional leaders regarding corruption risks, compliance efforts, and corruption-related issues that have surfaced in the past.

# Trend: Ephemeral Messaging

## Technology and Ephemeral Messaging

- “As a general rule, all corporations with robust compliance programs should have effective policies governing the use of personal devices and third-party messaging platforms for corporate communications, should provide clear training to employees about such policies, and should enforce such policies when violations are identified.” (Deputy Attorney General Lisa O. Monaco’s Remarks and Accompanying Memoranda on Corporate Criminal Enforcement (Oct. 28, 2021 and Sep. 15, 2022))

## In March 2023, DOJ updated Evaluation of Corporate Compliance Programs, a guidance document setting forth insider’s view of how DOJ Evaluates Corporate Compliance Programs

- The updated guidance instructs prosecutors to consider in corporate charging decisions how a company regulates (and then, importantly, enforces) limitations on the use of third-party messaging platforms for company-related communications.
- The greatest challenge our clients typically face, and to the disappointment of many, not addressed in this guidance, is the application of myriad privacy laws that vary from jurisdiction to jurisdiction and can render it very difficult to enforce compliance in the “Bring Your Own Device” culture that dominates multinationals.

## Mitigation

- DOJ is *in the process of developing* its views on companies’ use of ephemeral messaging. Nonetheless, authorities increasingly *expect companies to collect* evidence from third-party messaging platforms during investigations.
- Companies should have a robust policy regarding *technology and ephemeral messaging*, explicitly demanding employees to conduct business communications only through company-approved channels.
- Companies should *provide adequate training* to employees on the use of third-party messaging platforms.



# Trend: DOJ's Financial Incentive and Clawback Program

## DOJ's Pilot Program—Compensation Incentives and “Clawbacks”

- A March 2023 update to the previous DOJ guidance establishes a three-year pilot program under which companies facing a criminal resolution may *reduce their fines dollar-for-dollar by “clawing back” past compensation paid to employees* who engaged in the underlying misconduct, as well as the supervisors who failed adequately to supervise them.
  - The pilot program requires companies seeking a resolution to “implement compliance-related compensation criteria in their [employee] compensation and bonus system.”
  - In a *nod to the labor law difficulties* that may arise in the pursuit of clawbacks, especially internationally, the policy allows for *up to a 25% credit* for amounts sought by the company in good faith but *not successfully collected*.
  - The *Albemarle* resolution is the first company receiving “clawback credit” under the pilot program. Albemarle received a *credit of USD 763,453 for withholding bonuses* during the course of its internal investigation.
- ### Mitigation

  - State any clawback provisions clearly in employment policies and contracts and require employee acknowledgment at the outset of employment.
  - Consult with local labor law attorneys from relevant jurisdictions when implementing clawbacks.
  - Document all efforts to clawback, even if unsuccessful (DOJ may still allow partial credit for attempts).
  - Build compliance-focused KPIs to employee incentive structures, including both incentives (such as bonuses) and penalties (such as fines and clawbacks).

# Trend: Increasing Whistleblower Activity and Protections for Whistleblowers

## SEC Annual Report to Congress on the Whistleblower Program 2023

- In fiscal year 2023, SEC received **over 18,000 whistleblower tips**—the largest number of whistleblower tips received in a fiscal year.
- Whistleblower tips related to the FCPA **increased by 17%** in fiscal year 2023. SEC received **237 FCPA-related tips**—35 more than in fiscal year 2022.
- In fiscal year 2023, SEC awarded **~USD 600 million** to **68 whistleblowers**, the highest single-year fine total in the history of the program.
  - One award totaled **USD 279 million**, the largest single award in the history of the Program.

## The Whistleblower Program has become international

- In fiscal year 2023, whistleblower tips to SEC originated from non-U.S. countries, including Canada, the United Kingdom, Australia, Germany, and India.
- In May 2023, Germany passed the Whistleblower Protection Act, which goes far **beyond the minimum scope** set forth in the Whistleblower Directive 2019/1937. It extended whistleblowing protection to cover any conduct which, though not illegal, undermines the purpose of the legal provisions. Further, companies with **50 or more employees** in Germany must **establish internal reporting channels** for this purpose.

## Enforcement in January 2024

- On January 16, 2024, **J.P. Morgan Securities LLC** (“JPMS”) settled charges with SEC for obstructing advisory clients and brokerage customers from reporting potential securities law violations to SEC.
- SEC found that, between March 2020 and July 2023, JPMS routinely asked clients to sign confidential release agreements when they received a credit or settlement exceeding USD 1,000. These agreements only allowed responding to SEC inquiries and **prohibited clients from voluntarily contacting SEC**.
- Without admitting or denying the findings, **JPMS agreed** to be censured, cease violating the whistleblower protection rule, and pay the **USD 18 million civil penalty**.

# Mitigation: Implement an Effective Whistleblower Response Protocol

## Before reports are made, companies should ensure having a system in place to respond to whistleblowers and investigate allegations

- Ensure the policy clearly states that whistleblower protection applies *globally*.
- Review compliance and HR policies and procedures to ensure internal reporting is *easy, accessible, and perceived as a corporate priority*. Implement a comprehensive and organized system to catalog and track complaints.
- Ensure that there are *robust and comprehensive investigative protocols* pursuant to which investigations are handled by *appropriate personnel*.
- Make clear that all employees, including *foreign employees*, who report will be treated with respect. Adopt a strict “*no-retaliation policy*” and communicate the results of investigations to whistleblowers to the extent possible.
- SEC has chosen *120 days as a key milestone for investigations*: the Commission will not consider information for award eligibility unless the reporter also reports the same to SEC within 120 days after making an internal report. *Internal investigations that place a company in a position to make a disclosure decision within 120 days should be deemed presumptively reasonable*.
- *Consider retaining counsel*. Non-lawyer personnel conducting internal investigations (e.g., compliance or internal audit personnel or external investigators) are permitted to claim awards for information gleaned from investigations in certain circumstances.
- SEC has made clear that the *fact that a whistleblower is a foreign national is not a barrier* to receiving an award. In 2014, SEC awarded USD 30 million to a foreign whistleblower who provided SEC with key, original information about an ongoing fraud.

# Trend: World Bank Enforcements & Policy Developments

## The World Bank continues to investigate and take action vis-à-vis sanctionable practices

- **Sanctionable Practices:** The World Bank and other multilateral development banks (“**MDBs**”) target not just corruption and fraud but also “coercive,” “collusive,” and “obstructive” practices and conflicts of interest.
- **Cross-Debarment:** MDBs can recognize and enforce sanctions imposed by another MDB based on a 2010 agreement between MDBs. Several of the longest World Bank debarments were based on debarments by other MDBs.



### Select 2023 Debarments

- **Bidding Process Fraud:** Companies in Botswana, Kenya, and Vietnam have been debarred (for periods between 24-42 months) by the World Bank for misrepresenting their credentials and past experience during bids.
- **Invoicing Fraud:** Contractors in Bangladesh and Vanuatu have been debarred (for 15-22 months) for invoicing and seeking reimbursement of items that were not reimbursable.

### Key Takeaways

- Decline in the number of sanctions cases between FY 2019 and 2023.
- Likelihood of reduced debarment periods and other benefits for entities that cooperate/engage with the World Bank Integrity Vice Presidency.

### MDB General Principles for Business Integrity Programs

- Jointly released by 7 MDBs in March 2023.
- To be used as the **touchstone to evaluate the integrity programs** of entities that are investigated by MDBs.
- Akin to DOJ and SEC FCPA Resource Guide, DOJ’s “Evaluation of Corporate Compliance Programs” memorandum.

# Trend: Modernization of U.K. Corporate Prosecutory Enforcement Powers

## Economic Crime and Corporate Transparency Act 2023 (“ECCTA”)

- For decades, corporate prosecutions in the U.K., both for domestic and extraterritorial crime, have been hampered by the “identification doctrine,” under which a company could only be liable for a criminal offense involving a mental element if the requisite mens rea was established in respect of a person representing the “controlling mind and will” of the company – in practice, a board director.
- On October 26, 2023, the U.K. introduced the ECCTA, which introduces two critical changes that will make it easier for prosecutors to fix companies with criminal liability, affording them additional enforcement tools:

### Widening scope of individuals whose wrongdoing can be attributed to the company

- First, the ECCTA widens the scope of employees whose conduct can render the company liable to include “senior managers,” which will include any individual who plays a significant role in:
  - the making of decisions about how the whole or a substantial part of the activities of the body corporate or partnership are to be managed or organized, or
  - the actual managing or organizing of the whole or a substantial part of those activities.
- These new rules currently only apply to a specific list of offenses, such as false accounting, money laundering, bribery, or fraud. However, this list is apt to be extended to other offenses in the future.

### Introducing new offense of corporate failure to prevent fraud

- The ECCTA introduces a new corporate offense of “failure to prevent fraud,” similar to the model of section 7 of the UKBA or the offenses of failure to prevent facilitation of tax evasion. As in those cases, before this offense comes into force, guidance must be published, and it is anticipated that this will happen in 2024.
- Under the new offense, an organization (wherever incorporated) will be liable where a specified fraud offense is committed by an “associate” for the organization’s benefit (an employee, subsidiary or agent, or a person who otherwise performs services for or on behalf of the organization), and the organization did not have reasonable fraud prevention procedures in place.
- Degree of U.K. nexus required likely to be a key area of contention.



# Trend: Institutional Investor Claims Relating to Bribery and Corruption

## Civil claims made by institutional investors for alleged loss suffered in connection with bribery and corruption issues

- On September 28-29, 2022, 6 claims were filed in the High Court of England and Wales against **Glencore PLC** and others (including senior current and former Glencore officers) on behalf of over 300 claimants (including sovereign wealth funds and pension funds). A further claim was brought against the same entity on July 26, 2023, on behalf of additional claimants.
- The claimants allege that Glencore breached section 90A of the *Financial Services and Markets Act* (“FSMA”) 2000, which creates a cause of action for shareholders to claim against public companies in respect of misleading statements made in their published information.
- The claims broadly relate to losses alleged resulting from “*untrue statements*” and omissions in Glencore’s 2011 prospectus for its listing on the London Stock Exchange, as well as its 2013 prospectus for its merger with Xstrata.
- Glencore filed a defense on December 11, 2023, and denied “*that any of Glencore's board of directors ... was aware of any of the admitted conduct (or of any of the other misconduct alleged by the claimants) at any relevant time.*”
- Claimants will be required to prove **reasonable reliance** on the information in question, which can be a challenging evidential burden to meet.
- If these claims are successful, a new “follow-on” element will be introduced into the U.K. white collar enforcement environment.

GLENCORE



# Appendix: The FCPA



# Overview: FCPA

## What is the Foreign Corrupt Practices Act?

The FCPA was enacted in 1977 in the wake of reports that numerous U.S. businesses were making large payments to foreign officials to secure business.

- ***Anti-Bribery Provisions***: The FCPA prohibits corruptly giving, promising, or offering anything of value to a foreign government official, political party, or party official with the intent to influence that official in his or her official capacity or to secure an improper advantage in order to obtain or retain business.
- ***Accounting Provisions***: The FCPA also requires issuers to maintain accurate “books and records” and reasonably effective internal controls.



# Who is Covered by the FCPA?

- **Issuers:** Any company whose securities (including American Depositary Receipts and registered debt) are registered in the U.S. or that is required to file periodic reports with SEC.
  - The FCPA also applies to stockholders, officers, directors, employees, and agents acting on behalf of the issuer.
  - Issuers must adhere to both the FCPA's **Anti-Bribery** and **Accounting Provisions**.
- **Domestic Concerns:** Any individual who is a U.S. citizen, national, or resident of the U.S. (not just U.S. citizens), or any business organization that has its principal place of business in the U.S. or which is organized in the U.S.
  - The FCPA also applies to stockholders, officers, directors, employees, and agents acting on behalf of the Domestic Concern.
  - Domestic Concerns must adhere to the FCPA's **Anti-Bribery Provisions**.
- **Other Persons:** Anyone who takes any act in furtherance of a corrupt payment while within the territory of the U.S.
  - “Other Persons” must adhere to the FCPA's **Anti-Bribery Provisions**.

# Definition of “Foreign Official”

The FCPA prohibits corrupt payments to “foreign officials,” which is defined expansively to include:

- Any officer or employee (including low-level personnel) of a foreign government department or agency;
- Personnel of an “instrumentality” of a foreign government, which has been construed to include employees of government-owned or government-controlled businesses and enterprises;
- Personnel of public international organizations, such as the United Nations, World Bank or other international financial institutions, the Red Cross, and others;
- Political party officials and candidates; and
- Members of royal families.

## *Eleventh Circuit Adopts Broad Definition of “Instrumentality”*

In *U.S. v. Esquenazi*,\* the 11th Circuit defined an “instrumentality” as an entity that (1) is **controlled** by a foreign government and (2) performs a **function the government treats as its own**.

According to the court, characteristics of a “controlled” entity may include:

- Government’s formal **designation**;
- Government **ownership stake**;
- Government’s ability to **hire and fire the entity’s principals**;
- Extent to which the entity’s **profits go to the government**; and
- Extent to which **government funds** the entity.

Characteristics of an entity that performs a government function may include:

- Whether the entity has a **monopoly** over the function;
- Whether the entity receives **government subsidies**;
- Whether the entity provides **services to the public** at large; and
- Whether the public and the government **perceive** the entity to be performing a public function.



## FCPA: What Types of Payments are Prohibited?

- **The FCPA prohibits not only actual payments, but also any offer, promise, or authorization of the provision of anything of value.**
  - No payment needs to be made nor benefit bestowed for liability to attach.
  - An offer to make a prohibited payment or gift, even if rejected, is a violation of the FCPA.
- **The FCPA also prohibits indirect corrupt payments.**
  - The FCPA imposes liability if a U.S. company authorizes a payment to a third party while “knowing” that the third party will make a corrupt payment.
  - Third parties include local agents, consultants, attorneys, subsidiaries, etc.
- **Political or charitable contributions can violate the FCPA.**

# FCPA: What Constitutes a “Thing of Value”?

- There is no “de minimis” exception.
- It is not limited to tangible items of economic value.
- It can include anything a recipient would find interesting or useful, including:

- Gifts
- Sporting Event Tickets
- Entertainment
- Food and Wine
- Meals
- Internships
- Professional Training
- Trips
- Loans
- Employment
- Consulting Fees
- Mobile phones and electronic devices
- Education
- Political or Charitable Contributions

*“As part of an effective compliance program, a company should have clear and easily accessible guidelines and processes in place for gift-giving by the company’s directors, officers, employees, and agents.”*

*-A Resource Guide to the U.S. Foreign Corrupt Practices Act (p.16).*

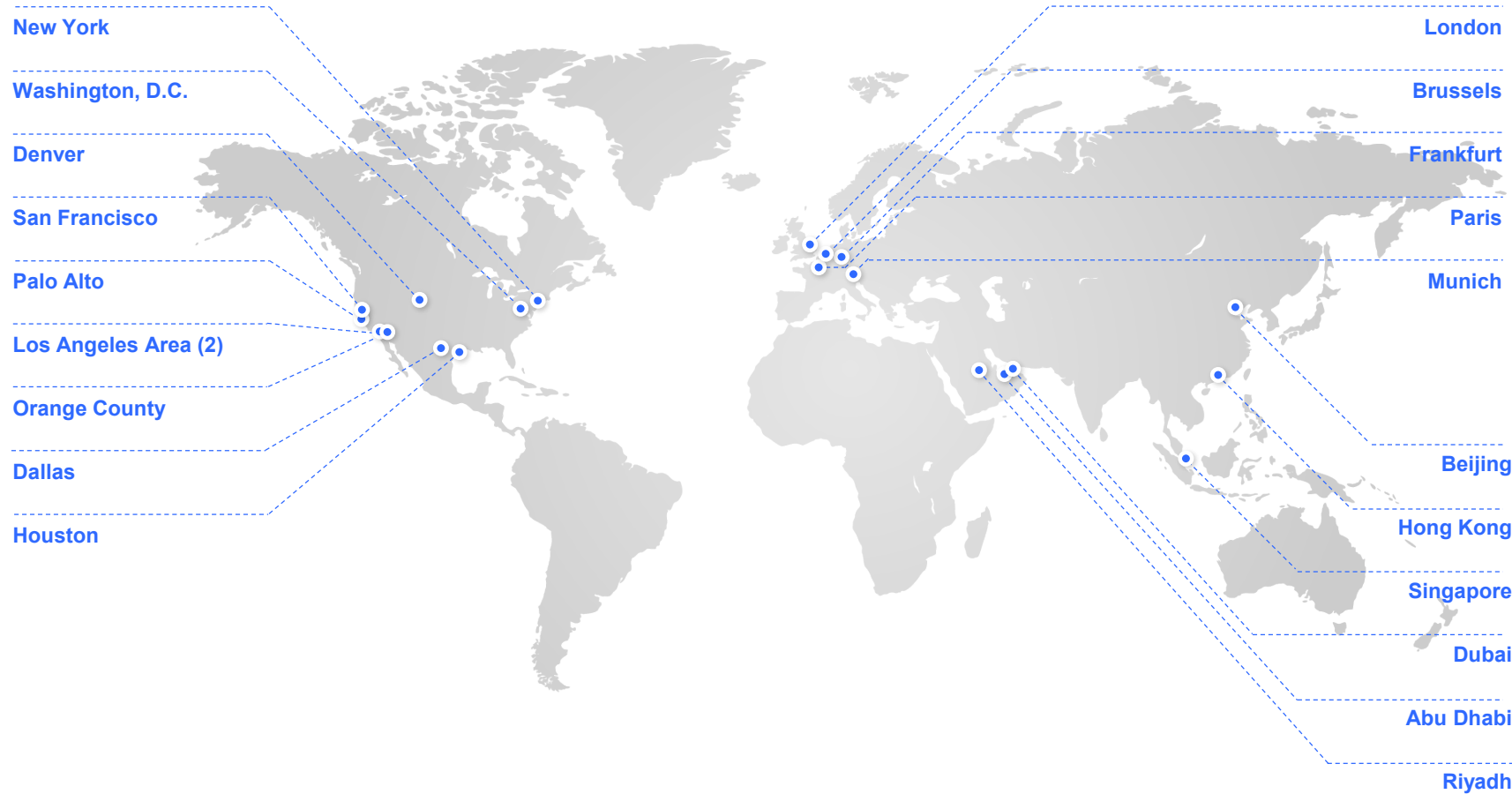


# Resources

## Resources

- [Gibson Dunn Anti-Corruption & FCPA Practice Group](#)
- [Gibson Dunn Webcasts \(CLE Credit Available\)](#)

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