

# Webcast: FCPA Trends in the Emerging Markets of Asia, the Middle East, and Africa

Kelly S. Austin

Peter Gray

Joel M. Cohen

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Most participants should anticipate receiving their certificate of attendance in three to four weeks following the webcast.

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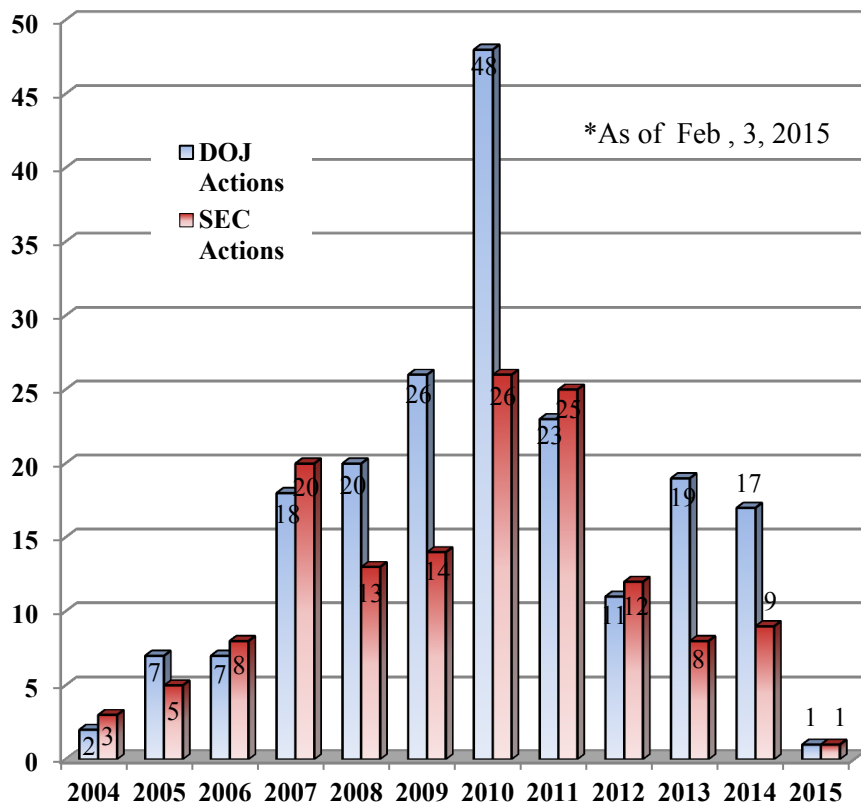


# Topics to Be Discussed

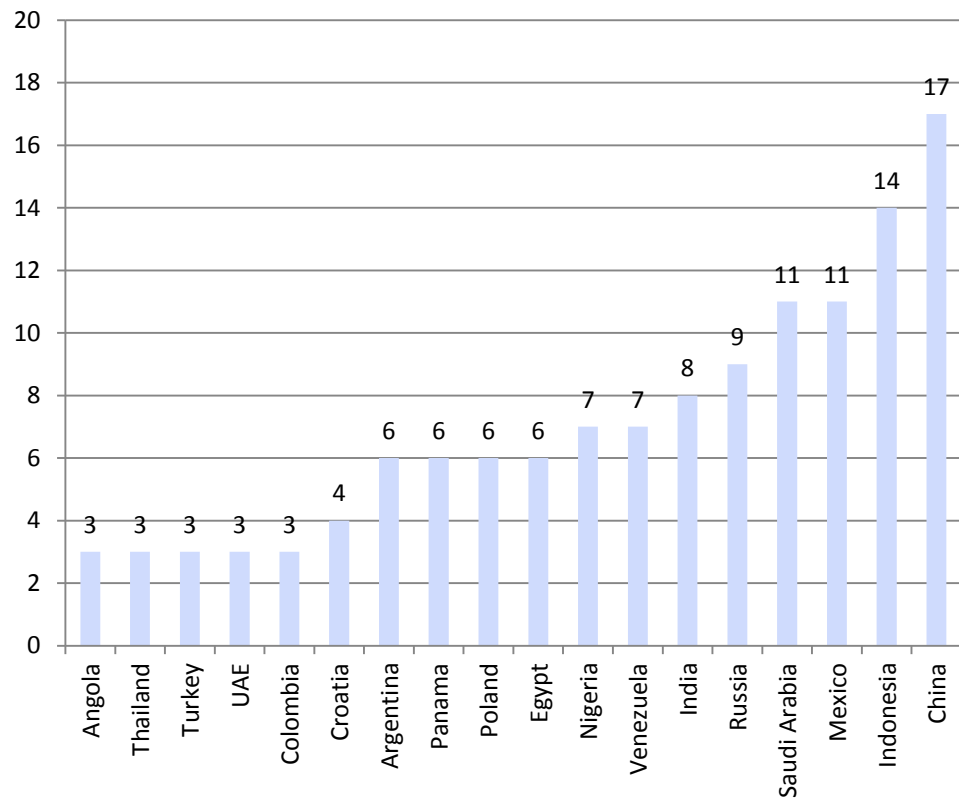
- **FCPA Enforcement Trends**
  - **Emerging Market Trends: China, the Middle East and Africa, India, and Indonesia**
    - China: Anti-Corruption Enforcement & Trends
    - The Middle East and Africa: Anti-Corruption Enforcement & Trends
    - India: Anti-Corruption Enforcement & Trends
    - Indonesia: Anti-Corruption Enforcement & Trends
  - **Mitigating Corruption Risks**
  - **Additional Resources**
- 

# Enforcement of the FCPA: Case Statistics

**Number of FCPA Enforcement Actions Per Year\***



**Countries Most Frequently Involved in FCPA Enforcement Actions Since 2012**



**Enforcement Actions by Region (2012-2014)**

Western Hemisphere: 42	East Asia/Pacific: 39
Africa: 26	Europe/Eurasia: 41
Near East: 32	South and Central Asia: 16



# Enforcement of the FCPA: Criminal Penalties

## Anti-Bribery Provisions

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

## Books-and-Records Provisions

- **Corporations:** Criminal penalties up to a \$25 million fine.
- **Individuals:** Up to 20 years' imprisonment, and a \$5 million fine.

**Average Total Value of Monetary Resolutions in Corporate FCPA Enforcement Actions (nearest \$10,000)**



## Money Matters

U.S. enforcement authorities have obtained over **\$6.6 billion** in penalties, fines and disgorgement under the FCPA since 2004.

Since 2004, in only two of ten years has the average value of a corporate FCPA enforcement action dipped below the **\$20 million** mark.

# Recent Blockbuster Enforcement Actions

Three of the top ten largest monetary settlements in FCPA history were reached in 2013 or 2014. All but two were reached in the past four years. DOJ and SEC pulled in \$900 million in fines, penalties, and disgorgement in the last two weeks of 2014 alone (*Avon* and *Alstom*).

No.	Company	Total Resolution	DOJ Component	SEC Component	Date
1	Siemens AG*	\$800,000,000	\$450,000,000	\$350,000,000	12/15/2008
2	Alstom S.A.	\$772,290,000	\$772,290,000	--	12/22/2014
3	KBR/Halliburton	\$579,000,000	\$402,000,000	\$177,000,000	2/11/2009
4	BAE Systems**	\$400,000,000	\$400,000,000	--	2/4/2010
5	Total S.A.	\$398,200,000	\$245,200,000	\$153,000,000	5/29/2013
6	Alcoa	\$384,000,000	\$223,000,000	\$161,000,000	1/9/2014
7	Snamprogetti/ENI	\$365,000,000	\$240,000,000	\$125,000,000	7/7/2010
8	Technip S.A.	\$338,000,000	\$240,000,000	\$98,000,000	6/28/2010
9	JGC Corp.	\$218,800,000	\$218,800,000	--	4/6/2011
10	Daimler AG	\$185,000,000	\$93,600,000	\$91,400,000	4/1/2010

\* Siemens's U.S. FCPA resolutions were coordinated with a €395 million (\$569 million) anti-corruption settlement with the Munich Public Prosecutor.

\*\* BAE pleaded guilty to non-FCPA conspiracy charges of making false statements and filing false export licenses, but the alleged false statements concerned the existence of the company's FCPA compliance program, and the publicly reported conduct concerned alleged corrupt payments to foreign officials.

# Financial Services Industry Examples

**As cases illustrate, the finance sector has been an area of continued focus for regulators.**

- **Allianz SE:** Allianz's Indonesian subsidiary allegedly made improper payments to employees of SOEs from 2001 to 2008 to obtain or retain almost 300 insurance contracts for large government projects. The company paid more than \$12 million to settle the charges.
- **Garth Peterson (Morgan Stanley):** Former Managing director of Morgan Stanley's real estate arm in China provided an executive of a Chinese state-owned entity with ownership interests in real estate in exchange for facilitating real estate transactions for the firm. While Mr. Peterson was charged as an individual, the SEC and DOJ both cited Morgan Stanley's robust FCPA compliance program as a factor in its decision not to prosecute the firm.
- **Omega Advisors:** The hedge fund entered into a non-prosecution agreement relating to its investment in a scheme to bribe officials with Azerbaijan's state-owned oil company. Omega acknowledged that one of its employees learned of the bribes prior to the company's investment. Omega lost its investment and paid a \$500,000 fine to settle the charges.
- **Sovereign Wealth Fund Inquiries:** In January 2011, financial institutions received letters from the SEC seeking information relating to transactions with sovereign wealth funds. The SEC requested information on investments by sovereign wealth funds, services provided to the funds, and FCPA compliance with respect to the funds. The investigation likely focused on whether improper payments were made to sovereign wealth fund managers to win investments at the height of the recent financial crisis. The Department of Justice has recently joined the industry probe.

# Global Corruption Landscape: The OECD Foreign Bribery Report

**The OECD has recently released an analysis of bribery of foreign public officials. The Report analyzed 427 enforcement actions brought by member countries and contains numerous findings indicative of the current corruption landscape.**

**75%**

75% of all cases involved agents or intermediaries, such as sales agents, brokers, subsidiary companies, or consulting firms.

**2/3**

Two-thirds of all cases occurred in four high-risk sectors: extractive (19%), construction (15%), transportation (15%), and information and communication (10%).

**53%**

53% of all cases reported involved corporate management or CEOs. 41% of all cases involved bribes paid or authorized by management-level employees, while 12% involved the company CEO.

**33%**

33% of cases were brought to the attention of authorities by the companies themselves. Of these, 31% resulted from internal audit findings, while 28% resulted from acquisition due diligence. Whistleblower-instigated cases accounted for only 2% of all enforcement actions.

SOURCE: OECD, FOREIGN BRIBERY REPORT,; AN ANALYSIS OF THE CRIME OF BRIBERY OF FOREIGN PUBLIC OFFICIALS, P. 8-9 (DEC. 2014)

# Dodd-Frank Act Compounds FCPA Risks

**Increasing whistleblower activity will likely lead to more FCPA-related investigations and heftier fines.**

## Legislation:

According to the whistleblower provisions of the Dodd-Frank Act (15 U.S.C. § 78u-6), the SEC will make a financial award (pay a bounty) to **whistleblowers** who (1) **voluntarily** (2) provide **original information** (3) to the Commission (4) that **leads to** (5) a “**successful enforcement [action]**.” The provisions also provide **protections from retaliation** against whistleblowers, although courts have declared that the anti-retaliation provisions do not apply to foreign whistleblowers in some situations.

## Statistics:

- **159** tips received by the Office of the Whistleblower in FY 2014 pertained to **FCPA allegations** (up from 149 in FY 2013).
- 2014 awards ranged from **\$150,000 to \$35 million** (highest ever award).
- Where disclosed, most awards have ranged from 20% to 30% of the amount recovered by the Commission.
- **More awards in FY 2014** than all prior years combined.
- Four of 14 awards to date (including the \$35 million award) have been to **foreign-based reporters**.

## Dodd-Frank Goes Global

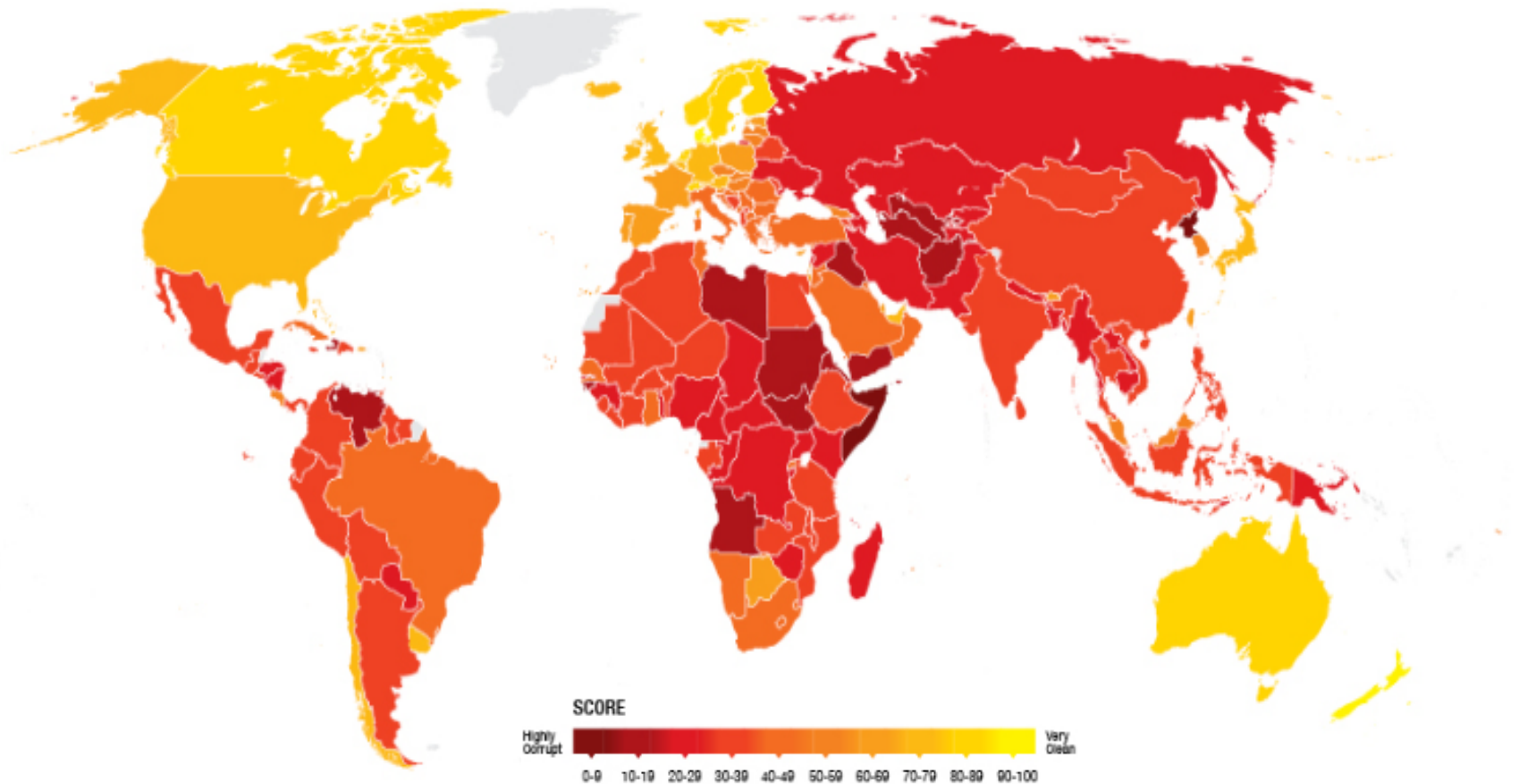
In FY 2014, the SEC Office of the Whistleblower received tips from 60 non-US countries:

- U.K.: 70 complaints
- India: 69 complaints
- Canada: 58 complaints
- China: 32 complaints
- S. Africa: 3 complaints
- Israel: 3 complaints
- UAE: 3 complaints
- Indonesia: 1 complaint

*The [whistleblower] program creates a powerful inducement for those aware of wrongdoing to break their silence and it has been very successful, even transformative, in its impact.*

Andrew Ceresney, SEC Director of Enforcement

# Emerging Market Trends: China, the Middle East and Africa, India, and Indonesia



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# China: Market Characteristics



**1.39 billion**

Estimated population of China in 2014. Median age (36.3).

**\$382.5 billion**

China's foreign trade in 2014.

**7.1%**

China's projected GDP growth rate for 2015. GDP is expected to grow **3.1%** in the U.S. and **3.8%** worldwide during 2015.



**\$2.34 trillion**

Total value of exports in 2014.

**1.01 billion**

Estimated size of China's workforce by 2016.

**\$119.6 billion**

Total inbound FDI in 2014.

Sources: World Population Statistics: China Population 2014, available at <http://www.worldpopulationstatistics.com/population-of-china-2014/>; CIA World Factbook: China, available at [https://www.cia.gov/library/publications/the-world-factbook/geos/countrytemplate\\_ch.html](https://www.cia.gov/library/publications/the-world-factbook/geos/countrytemplate_ch.html); General Administration of Customs: Access to Public Information - Customs Statistics, available at <http://www.customs.gov.cn/publish/portal0/tab49666/info729720.htm>; World Economic Outlook: Legacies, Clouds, Uncertainties (October 2014), available at <http://www.imf.org/external/pubs/ft/weo/2014/02/>; China Labor Workforce to hit 1.01 Billion Before Decline, Shanghai Daily (Sept. 15, 2012); Ministry of Commerce People's Republic of China: News, available at <http://www.mofcom.gov.cn/article/ae/ai/201501/20150100868311.shtml>.

# The Middle East: Market Characteristics



- The combined GDP of all Middle Eastern countries was nearly \$6.21 trillion in 2013.
- Annual GDP growth expected to reach 4.8% by 2018.
- Total FDI inflow into the GCC in 2013 was \$24 billion.
- Estimated population is 351.3 million

Sources: The World's Top Exports, *available at* <http://www.worldstopexports.com/top-middle-eastern-export-countries/1902>; D&B's Global Economic Outlook to 2018, *available at* <http://www.dnb.com/lc/credit-education/global-economic-outlook-to-2018.html#.VLS-3SuUeSo>; Report titled "World Investment Report 2014" by the United Nations Conference on Trade and Development, *available at* [http://unctad.org/en/publicationslibrary/wir2014\\_en.pdf](http://unctad.org/en/publicationslibrary/wir2014_en.pdf).



# Africa: Market Characteristics

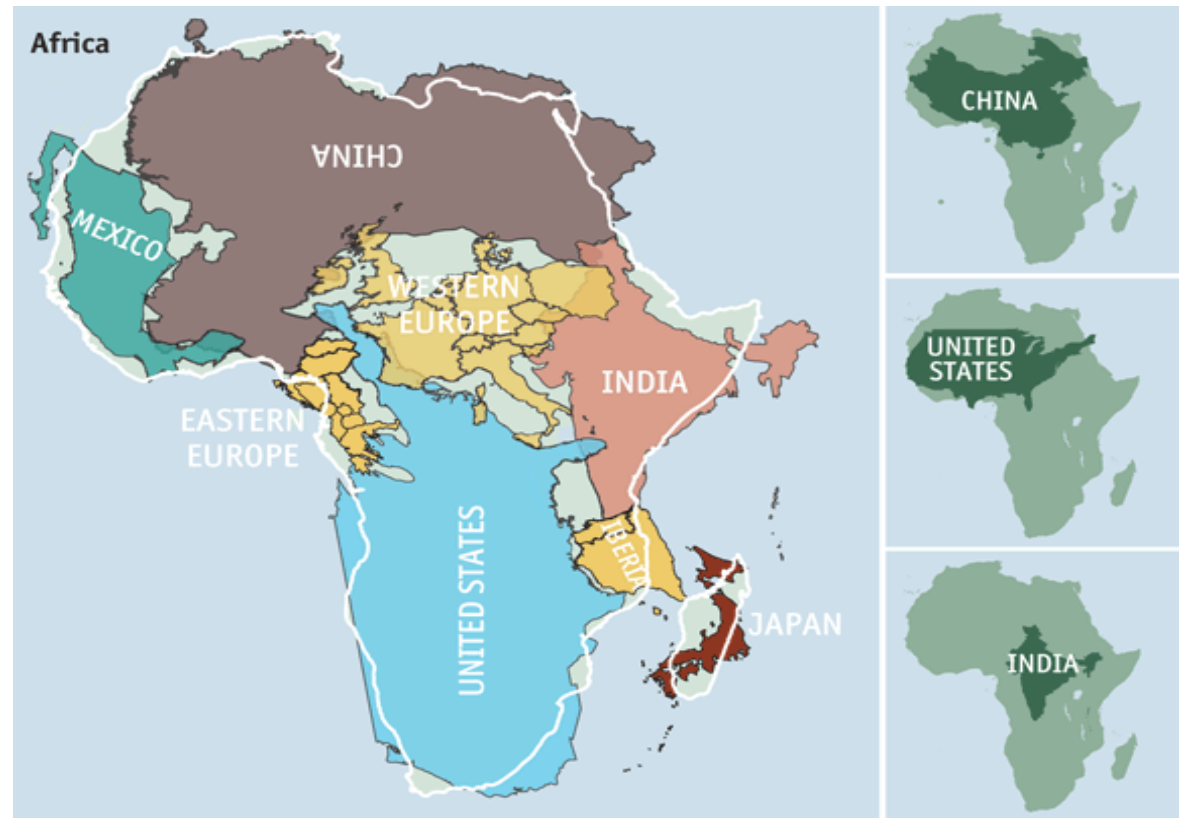


- The combined GDP of all African countries was \$1.6 trillion in 2013.
- Sub-Saharan economic growth expected to increase to 5.5% in 2015.
- Malawi, Mozambique, Angola, Ethiopia, and Zambia are expected to outperform other African countries in the period 2012-2017.
- FDI flows to African countries increased by 5% to US\$50 billion in 2012 even as global FDI fell by 18%.
- FDI outflows from African countries almost tripled in 2012, to \$14 billion.
- The population of Africa is estimated at approx. 1.1 billion.
- By 2050, Africa's population will double, to 2.4 billion.

Sources: "Regional Economic Outlook: Sub-Saharan Africa" by the International Monetary Fund, April 2014, *available at* <https://www.imf.org/external/pubs/ft/reo/2014/afr/eng/sreo0414.pdf>; Ernst & Young's Africa Attractiveness Survey 2013, *available at* [http://www.avca-africa.org/wp-content/uploads/2013/09/Africa\\_Attractiveness\\_Survey\\_2013\\_AU1582.pdf](http://www.avca-africa.org/wp-content/uploads/2013/09/Africa_Attractiveness_Survey_2013_AU1582.pdf); "Foreign direct investment to Africa increases, defying global trend for 2012" by the United Nations, June 2013, *available at* <http://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=136>; Generation 2030: Africa by UNICEF *available at* <http://data.unicef.org/gen2030/>.

# Africa: The True Size of Africa

COUNTRY	AREA x 1000 km <sup>2</sup>
China	9.597
USA	9.629
India	3.287
Mexico	1.964
Peru	1.285
France	633
Spain	506
Papua New Guinea	462
Sweden	441
Japan	378
Germany	357
Norway	324
Italy	301
New Zealand	270
United Kingdom	243
Nepal	147
Bangladesh	144
Greece	132
<b>TOTAL</b>	<b>30.102</b>
<b>AFRICA</b>	<b>30.221</b>



- Africa (30.2 million km<sup>2</sup>) is larger than the combination of China (9.6 million km<sup>2</sup>), the US (9.4 million km<sup>2</sup>), Western Europe (4.9 million km<sup>2</sup>), India (3.2 million km<sup>2</sup>), Argentina (2.8 million km<sup>2</sup>), three Scandinavian countries, and the British Isles.

# India: Market Characteristics



**1.24 billion**

Estimated population of India in 2014 is set to match/exceed China by 2028 (low median age 27).

**\$-6.95 billion**

India's 2014 foreign trade deficit.

**6.4%**

India's projected GDP growth rate for 2015 (5.4% in 2014). GDP expected to double by 2021.

**\$300.4 billion**

Total value of 2013-2014 exports (India calendar year).

**482 million**

Size of India's workforce in 2013.



“[T]he government machinery has geared up, and is now ready to change... If we have to change laws, we are ready. If we have to change rules, we are ready. If we have to change the system, we are ready.”

Prime Minister Narendra Modi, on his plans to make India a manufacturing power (12/29/2014).

Sources: CIA World Factbook: India, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/in.html>; UN: *India to be World's Most Populous Country by 2028*, BBC NEWS ASIA (June 14, 2013); Trading Economics, India Balance of Trade, available at <http://www.tradingeconomics.com/india/balance-of-trade>; IMF, World Economic Outlook Update, available at <http://www.imf.org/external/pubs/ft/weo/2014/update/02/#footT1>; *India's real GDP to touch \$2.5 trillion by 2021: PHD Chamber*, THE ECONOMIC TIMES (Jan. 8 2012); India Department of Commerce, Export: Country-wise, available at <http://www.commerce.nic.in/eidb/ecnt.asp>; The World Bank, Labor force, total, available at <http://data.worldbank.org/indicator/SL.TLF.TOTL.IN>; *Make in India: Narendra Modi Promises to Boost Manufacturing*, THE ECONOMIC TIMES (Dec. 29, 2014).

# Indonesia: Market Characteristics



**252.8 million**

Estimated population of Indonesia in 2014 (median age 29.2).

**2.8% of GDP**

Indonesia's estimated current account deficit in 2016.

**5.2%**

Indonesia's projected GDP growth rate for 2015 (projected to grow to 5.5% in 2016).



**\$148 billion**

Total value of 2014 exports (January to October 2014).

**121 million**

Size of Indonesia's workforce in 2014.

**\$18.44 billion**

Total inbound FDI in 2013.

Sources: World Population Review: Indonesia Population 2014, available at <http://worldpopulationreview.com/countries/indonesia-population/>; The World Bank Indonesia Economic Quarterly, December 2014: Delivering change, available at <http://www.worldbank.org/en/news/feature/2014/12/08/indonesia-economic-quarterly-december-2014>; The World Bank: Country Forecasts: Indonesia, available at <http://www.worldbank.org/en/publication/global-economic-prospects/regional-outlooks/eap#5>; Statistics Indonesia – Foreign Trade, available at <http://www.bps.go.id/eng/exim-frame.php?kat=2#grafik>; United Nations Conference on Trade and Development – Country Fact Sheets 2014: Indonesia, available at <http://unctad.org/en/pages/DIAE/World%20Investment%20Report/Country-Fact-Sheets.aspx>.

An aerial photograph of a massive concrete dam and its reservoir. The dam is a long, straight structure with a series of buttresses, stretching across a wide valley. The reservoir is a large body of water behind the dam. The surrounding landscape is hilly and appears to be covered in vegetation. The word "CHINA" is superimposed in the center of the image.

# CHINA

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# China's Corruption Landscape

**100th**

Despite strong rhetoric and a two-year anti-corruption campaign, recent CPI rankings show that China has fallen to 100<sup>th</sup>, its lowest ranking ever.

## China's CPI Rank (2008-2014)



**23,646**

officials convicted of corruption and bribery in 2014

**1/3**

Media reports indicate that nearly one-third of all party officials with ministerial rank or above have been investigated since the anti-corruption campaign began

**1%**

of officials at the vice-ministerial level or above have been arrested since the anti-corruption campaign began

**71,748**

officials disciplined for breaking Communist Party of China rules in 2014

# FCPA Enforcement Actions in China

**Since 2002, the DOJ and the SEC have brought enforcement actions against 30 corporations relating to business activities in China.**

## Enforcement Actions:

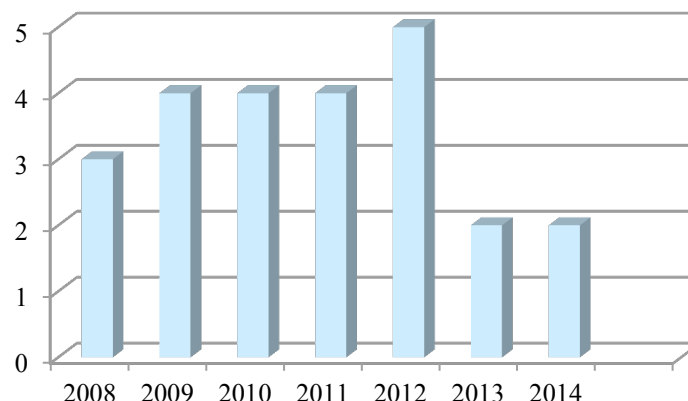
- InVision Technologies, 2004
- Diagnostic Products Corp., 2005
- Schnitzer Steel Industries, 2006
- Paradigm BV, 2007
- York International, 2007
- Alcatel-Lucent, 2007
- AGA Medical, 2008
- Faro Technologies, 2008
- Siemens AG, 2008
- ITT Corporation, 2009
- Avery Dennison, 2009
- Control Components, Inc., 2009
- UTStarcom, Inc., 2009
- Daimler AG, 2010
- Veraz Networks, Inc., 2010
- Alliance One International, 2010
- RAE Systems, Inc., 2010
- IBM Corp., 2011
- Maxwell Technologies, 2011
- Rockwell Automation, 2011
- Watts Water Technologies, Inc., 2011
- Biomet, Inc., 2012
- Pfizer/Wyeth, 2012
- Nordam Group, Inc., 2012
- Tyco, 2012
- Eli Lilly, 2012
- Keyuan Petrochemicals, Inc., 2013
- Diebold, Inc., 2013
- **Bruker Corp., 2014**
- **Avon Products (China) Co., Ltd, 2014**

**No. 2:** In the history of the FCPA, the number of enforcement actions involving conduct in China is second only to those involving conduct in Nigeria.

# FCPA Enforcement Actions

**There are at least 42 China-related investigations underway.**

Number of companies that resolved China-related DOJ/SEC enforcement actions from 2008 to 2014.



## Recurring risk patterns appear in ongoing China investigations:

Risk Areas	Company Disclosures
Pharmaceuticals/Life Science Sector Focus	AstraZeneca, Bristol-Myers Squibb, Eli Lilly, GlaxoSmithKline, Grifols, Sciclone
Involvement of Whistleblowers	Microsoft, NCR Corp.
Gifts to and Travel for Government Officials	BHP Billiton, Harris Corp., MTS Systems, NCR Corp., Qualcomm, Sciclone, SL Industries
Sales/Marketing/Procurement/Trading Practices	AstraZeneca, BMS, GSK, Grifols, Mead Johnson
Third Parties	GlaxoSmithKline, Harris Corp., Panasonic Avionics, PTC Inc., Rolls Royce, Sensata Technologies
Employee Hiring Practices	Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, JPMorgan Chase, Morgan Stanley, Qualcomm, UBS

## 42 Disclosed Investigations

21st Century Fox, AstraZeneca, BHP Billiton, Bristol-Myers Squibb, Citigroup, Credit Suisse, Delphi Automotive, Deutsche Bank, DreamWorks, Dun & Bradstreet, Eli Lilly, GlaxoSmithKline, Goldman Sachs, Grifols, Harris Corp., Ingersoll-Rand, Johnson Controls, JPMorgan Chase, Las Vegas Sands, Mead Johnson, Merck & Co. Inc., Microsoft, Morgan Stanley, MTS Systems, NCR Corp., Novartis, Panasonic Avionics, PTC, Qualcomm, Rolls Royce, Sanofi, Sciclone, Sensata Technologies, SL Industries, Sony Pictures, UBS, United Technologies Corporation, Wal-Mart, Walt Disney, Warner Bros, Wynn Resorts Limited, Nortek



# FCPA Enforcement Actions

## Two enforcement actions concerning China in 2014

### DOJ / SEC: Avon

- Avon's China subsidiary pleaded guilty to bribing Chinese officials and falsifying records, ending a six-year DOJ and SEC probe. Avon allegedly spent \$8 million to provide **gifts, cash, vacations, and meals and entertainment to Chinese officials** from 2004 to 2008, in order to obtain the right to conduct direct sales, maintain "guanxi," win local approvals and favorable judicial treatment, and avoid fines and negative press coverage.
- Employees inaccurately described the participation of government officials in **improper business hospitality** by using descriptions like "business entertainment" and "public relations entertainment." Personal trips for government officials (as well as their spouses and children) were described as "study trips" or "site visits" when officials were instead sightseeing or on vacation.



**Cost:** Avon agreed to pay more than \$135 million in criminal fines and regulatory penalties, and to implement an 18-month compliance monitorship. Avon has reportedly spent more than \$344 million on internal investigation costs alone, and has dealt with multiple shareholder lawsuits.

### SEC: Bruker Corp.

- Bruker Corp., a manufacturer of scientific instruments, allegedly failed to prevent and detect \$230,000 in **improper payments** that were falsely recorded as legitimate business and marketing expenses.
- Bruker allegedly paid for **leisure trips and shopping expenses** for Chinese officials responsible for buying the company's products.
- Bruker's payment of a Chinese official's purported training expenses was actually reimbursement for **sightseeing, tour tickets, shopping, and other leisure activities in Europe**.



**Cost:** Bruker agreed to pay a relatively modest \$2.4 million to settle FCPA accounting charges. By contrast, the company has disclosed that it recorded more than \$24 million from 2011 through 2014 for legal and other professional services incurred in relation to the investigation.

# FCPA Enforcement Actions

## Third-party risks highlighted in 2014 FCPA enforcement actions in China

Third-party risks remain a central area of concern for companies working in China, including inaccurate contracts, lack of due diligence, and improper payments disguised as expense reimbursements.

### Avon

- A consulting company was retained to provide various services to Avon China, which were memorialized in a “scant two-page contract,” and for which it received \$2,000 to \$7,000 per month plus expenses. Avon China did not conduct due diligence on the company, or require it to comply with Avon’s Code of Conduct, even though the company was retained specifically to interact with government officials on behalf of Avon China.
- An Avon China executive delivered cash to a consulting company, then sought reimbursement from Avon China by submitting “vague invoices” that falsely described the expenses as related to legitimate travel, entertainment, or public relations expenses. Additional monies were paid to the consultant even though no Avon China executives or employees knew of any legitimate services being provided by the consulting company.

### Bruker Corp.

- A Bruker office in China paid more than \$111,000 to Chinese government officials under 12 “suspicious collaboration agreements” contingent on SOEs providing research on Bruker products or using Bruker products in demonstration laboratories.
- The collaboration agreements did not specify the work product that the SOEs had to provide in order to be paid, and no work product was actually provided to the Bruker office by the SOEs.
- Certain collaboration agreements were executed directly with a Chinese official rather than the SOE itself, and in some cases Bruker’s office paid the official directly.

# Chinese Anti-Corruption Enforcement Agencies



**CPC  
Discipline and  
Inspection  
Committee**



**Procuratorate  
(Prosecutor's  
Office)**



**Public  
Security (Law  
Enforcement)**



**State Administration  
for Industry and  
Commerce (SAIC)**

<b>Enforcement Authority</b>	Internal party discipline	Criminal	Criminal	Administrative (commercial bribery); but can refer charges to criminal authorities upon evidence of a crime
<b>Investigating Powers (incl. Inspection, Raids)</b>	Yes	Yes	Yes	Yes
<b>Charging Powers (against Individuals or Companies)</b>	No; but can refer cases to Procuratorate	Yes	No; but can refer cases to Procuratorate	Yes
<b>Enforcing Penalties</b>	Quasi-judicial power (e.g., freezing bank accounts to maintain the status quo)	No; determined by courts	No; determined by courts	Yes; including fines, confiscation of illegal income, potential blacklisting by government agencies
<b>Other Enforcement Powers</b>	Investigates crimes concerning public officials; can use “ <i>Shuanggui</i> ” (“double-designation”) against public officials	Prosecutes all crimes	Investigate crimes not concerning public officials	Antitrust, consumer rights, business registration, trademark infringement, advertising, direct sales, and market and online transactions

# Chinese Anti-Corruption Campaign: Proposed Reforms

## Structural Reform

- *The Fourth Plenum Emphasized the Rule of Law*
  - Plans to improve court independence and reduce interference by local governments;
  - Officials who interfere with judicial cases will be tracked and publicly reported.
- *New Anti-Corruption Agency Planned*
  - Plans to establish a new anti-graft agency within the Supreme People's Procuratorate;
  - The agency will help the Procuratorate handle major cases and manage institutional obstacles.

## Legislative Reform

- *Proposed Amendments to Criminal Law Anti-Corruption Provisions*
  - Dispense with benchmark amounts in the sentencing of graft and bribery cases;
  - Add new crime for offering bribes to officials' close relatives or associates;
  - Add monetary fines for individuals convicted of various corruption and bribery offenses;
  - Add possible employment bans for individuals convicted of corruption.

Sources: China's Fourth Plenum Tightens Rule of Law, CNBC (Oct. 24, 2014), available at <http://www.cnbc.com/id/102117814#>; China to Set Up New Anti-Corruption Agency, Xinhua (Nov. 3, 2014), available at [http://news.xinhuanet.com/english/china/2014-11/03/c\\_133761968.htm](http://news.xinhuanet.com/english/china/2014-11/03/c_133761968.htm); *Amending Anti-Graft Clauses Is a Deterrent in Time*, Xinhua (Oct. 28, 2014), available at [http://news.xinhuanet.com/english/china/2014-10/28/c\\_133748763.htm](http://news.xinhuanet.com/english/china/2014-10/28/c_133748763.htm); *Proposed Amendments to China's Criminal Law Would Shake Up Anti-Graft*, FCPA Blog (Nov. 6, 2014), available at <http://www.fcpablog.com/blog/2014/11/6/proposed-amendments-to-chinas-criminal-law-would-shake-up-an.html>.

# Chinese Anti-Corruption Campaign: Domestic Enforcement

## By the Numbers:

- 31,338** Number of officials found guilty of corruption and bribery in China as of December 31, 2014.
- 77,606** Number of matters investigated involving “work-related crimes” (embezzlement, bribery, misappropriation, abuse of power, dereliction of duty, and malpractice) as of December 31, 2014.
- 102,168** Number of officials penalized for breaking party rules as of December 31, 2014.

## High-Level Officials Subject to Enforcement in 2014

- Former member of the CCP Politburo Standing Committee and former Minister of Public Security Zhou Yongkang
- Former Deputy Chairman of NDRC and former head of National Energy Administration Liu Tienan
- Former President Hu’s Top Aide Ling Jihua
- Former Deputy Chairman of Central Military Commission Xu Caihou
- Eight senior NDRC officials and six senior National Energy Administration officials investigated or detained

## Anti-Corruption Scope Expanded to Target SOEs

- CPC Central Discipline and Inspection Committee deployed inspection teams to investigate corruption at SOEs in a broad range of sectors, including Sinopec, PetroChina, CNPC, State Grid, and CCTV.

Sources: 2014年12月全国查处违反中央八项规定精神问题4238件, 中央纪委监察部网站(2015年1月5日), [http://www.ccdi.gov.cn/xwtt/201501/t20150105\\_49683.html](http://www.ccdi.gov.cn/xwtt/201501/t20150105_49683.html); *National Economic Planner Tops China’s Corruption Rankings*, WANTCHINATIMES (Oct. 9, 2014), <http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20141009000033&cid=1101>; *Senior NEA Official Investigated on Bribery Charges*, CHINA DAILY (Nov. 17, 2014); Jonathan Fenby, *Guest Post: China’s Anti-Corruption Drive could Boost State Sector*, FT (Nov. 24, 2014); *China’s Anti-Corruption Drive Targets Sinopec*, FT (Dec. 4, 2014); *China’s War on Graft Leads to Drop in Outbound Investment*, FT (Sept. 22, 2014); *Another CCTV Executive Detained by Party Graft Busters*, CAIXIN ONLINE (Aug. 18, 2014); Keira Lu Huang, *State Grid Shanghai Chief Feng Jun Detained in Corruption Sweep*, SCMP (Oct. 30, 2014); *2014 Third Central Round of Inspection Teams Fully Deployed*, CAIXIN ONLINE (Dec. 1, 2014); Guo Kai & James Bradbury, *Caixin Explains: Central Committee Discipline Inspection Teams*, CAIXIN ONLINE (July 29, 2014).

# Chinese Anti-Corruption Campaign: Extraterritorial Efforts

## International Cooperation

- ***The 2014 China APEC CEO Summit*** — Beijing Declaration on Fighting Corruption
  - Committed to collaboratively fight corruption, including through extradition, mutual legal assistance, and the recovery and return of corruption proceeds.
  - Create a regional anti-corruption network, ACT-NET, for information sharing.
- ***The 2014 Brisbane G-20 Summit*** — Anti-Corruption Action Plan
  - Calls for domestic laws that would reveal beneficial ownership behind shell companies.
  - Commits to collaborate internationally to “end impunity for corruption offenses.”

## Apprehension of Overseas Fugitives

- **“Operation Fox Hunt”**
  - A six-month campaign launched in July 2014 to apprehend corrupt Chinese officials at large overseas.
  - China believes that 18,000 corrupt officials have fled overseas in the past 20 years, absconding with ~\$129 billion
  - The campaign has netted almost 400 suspects to date.
- **Efforts to extradite overseas fugitives**
  - China historically lacked extradition treaties with the United States, Canada, and Australia.
  - Local courts and immigration channels used as alternatives to pursue fugitives in the United States.

### Deals Planned to Recover Illegal Assets from Abroad

“China will strengthen financial intelligence exchanges with the United States and Australia to track corrupt Chinese officials’ illegal assets and fight money laundering, a senior official from the Ministry of Justice said.”

“After the agreements are made, China will share intelligence with the US and Australia, which will also offer information to their enforcement agencies to conduct further investigations,” Zhang said. —China Daily 12/29/2014



# Multi-National Anti-Corruption Enforcement

**The GSK case exemplifies a new era of cross-border enforcement: expansive and robust, oftentimes with investigations that start locally and then extend worldwide.**

## CHINA

- **June 2013:** Changsha police announce that GSK officials are under investigation for alleged “economic crimes.”
- **July 2013:** Chinese central authorities announce that they have launched a wide-ranging probe into medicine costs at domestic and international drugmakers, and release details of an investigation into GSK bribery allegations.
- **May 2014:** Chinese police announce that their investigation has concluded that GSK and associated individuals engaged in bribery on a “massive scale.” They recommend that the company and executives, including Mark Reilly, the British former head of GSK’s China operations, be prosecuted. GSK says it will fully cooperate.
- **September 2014:** A Chinese court fines GSK’s Chinese unit a *record RMB 3 billion (~ \$489 million)* after it is found guilty of bribing non-government personnel in the country. Mark Reilly and four GSK China executives receive *suspended prison sentences of between two to four years*.

## WORLDWIDE

- **September 2013:** *U.S. authorities* are reportedly investigating GSK for FCPA-related violations in China and other countries. GSK states that it “proactively reached out to relevant regulators” when the China investigation began.
- **April 2014:** GSK says it is looking into bribery allegations in *Iraq, Jordan, and Lebanon*. Prosecutors in *Poland* also charge 11 doctors and a GSK regional manager in connection with alleged corruption.
- **May 2014:** The *U.K.’s SFO* confirms that it has launched a formal criminal investigation into GSK’s sales practices.

# China Enforcement Trend: Increasing Scrutiny of SOEs

**MNCs should be alert to scrutiny and follow-on risks arising from their business relationships with government agencies and SOEs that are facing corruption probes by the Chinese government.**

**Energy:** Top executives from **CNPC** and **PetroChina** were recently detained as part of graft probes. Chinese authorities are conducting investigations of other prominent state-owned energy companies, including **Sinopec Group**, **China Resources (Holdings) Co., Ltd.**, the **State Grid Corporation of China**, and **Southern Power Grid**.

**Logistics and Transportation:** Current and former senior executives of state-owned shipping giant **China Ocean Shipping (Group) Company (COSCO)** have been involved in numerous graft investigations. Recent investigations and convictions have also involved state-owned **China Shipping Development Company**. State-owned **China Southern Airlines** has removed four executives from their positions amidst police probes into “job-related crimes.”

**Banking:** The banking scandals that plagued 2013 continued into 2014. Probes by China’s National Audit Offices have found significant financial irregularities in branches of the **Bank of China** and **Agricultural Development Bank of China**.

**Telecommunications:** Recent investigations have ensnared executives at major Chinese telecommunications providers. Authorities have begun prosecuting senior executives of **China Unicom** for allegedly taking bribes, and senior executives at **China Telecom** are also the subjects of graft investigations. Media reports have indicated that an internal investigation at **Huawei** has uncovered corrupt practices.

## Key Lesson

All state-owned entities should be considered “high risk” for purposes of your compliance program and third-party due diligence procedures. Seek disclosure of pending compliance investigations from SOE partners and ensure all agreements with SOEs obligate them to comply with your compliance standards.



# China Enforcement Trend: Overlapping Regulatory Enforcement

**China's expanding regulatory dragnet may increase the risk that corruption investigations arise in tandem with other inquiries.**

## GlaxoSmithKline

### TAX EVASION

State media accused GSK China of failing to pay more than RMB 100 million (~\$16 million) in duties and taxes.

### PRICE FIXING

GSK was part of an industry-wide price-fixing probe conducted by the National Development and Reform Commission.

### CORRUPTION

A Chinese court fines GSK a record RMB 3 billion (~\$489 million) after it is found guilty of bribing non-government personnel in the country.

## Dumex/Danone

### PRICE FIXING

Fined by China's top economic planning body for price-fixing its infant milk formula products.

### CORRUPTION

CCTV report alleges that company employees gave "scholarship fees" of up to RMB 10,000 (~\$1,632) to hospital staff in exchange for increased sales.

# China Enforcement Trend: Increasing Challenges to Conducting Due Diligence

**Due diligence on third parties remains crucial to mitigating corruption risks. But in China, due diligence increasingly carries risks and challenges of its own.**

## Limited Publicly Available Information

- SAIC increasingly refuses third-party access to company records and government filings.
- Criminal records not publicly available.
- Few databases exist and none are comprehensive.

## PRC Data Privacy & State Secrets Laws May Constrain Due Diligence Efforts

- China does not have a comprehensive data privacy regime. A host of laws and sector-specific regulations may impact the legality of collecting personal data of potential commercial relevance.
- The PRC Criminal Law subjects state personnel in specified fields to criminal liability if they sell or illegally distribute personal data obtained during the course of their official duties. Data recipients may also be punished.
- Since 2012, over 3,000 people have been jailed on charges of selling personal information.
- Commercially relevant data may be classified as “state secrets,” making transmission overseas illegal.
- The PRC Law on Guarding State Secrets does not clearly define the meaning and scope of “state secrets.”

## ChinaWhys Case Highlights Potential Risks

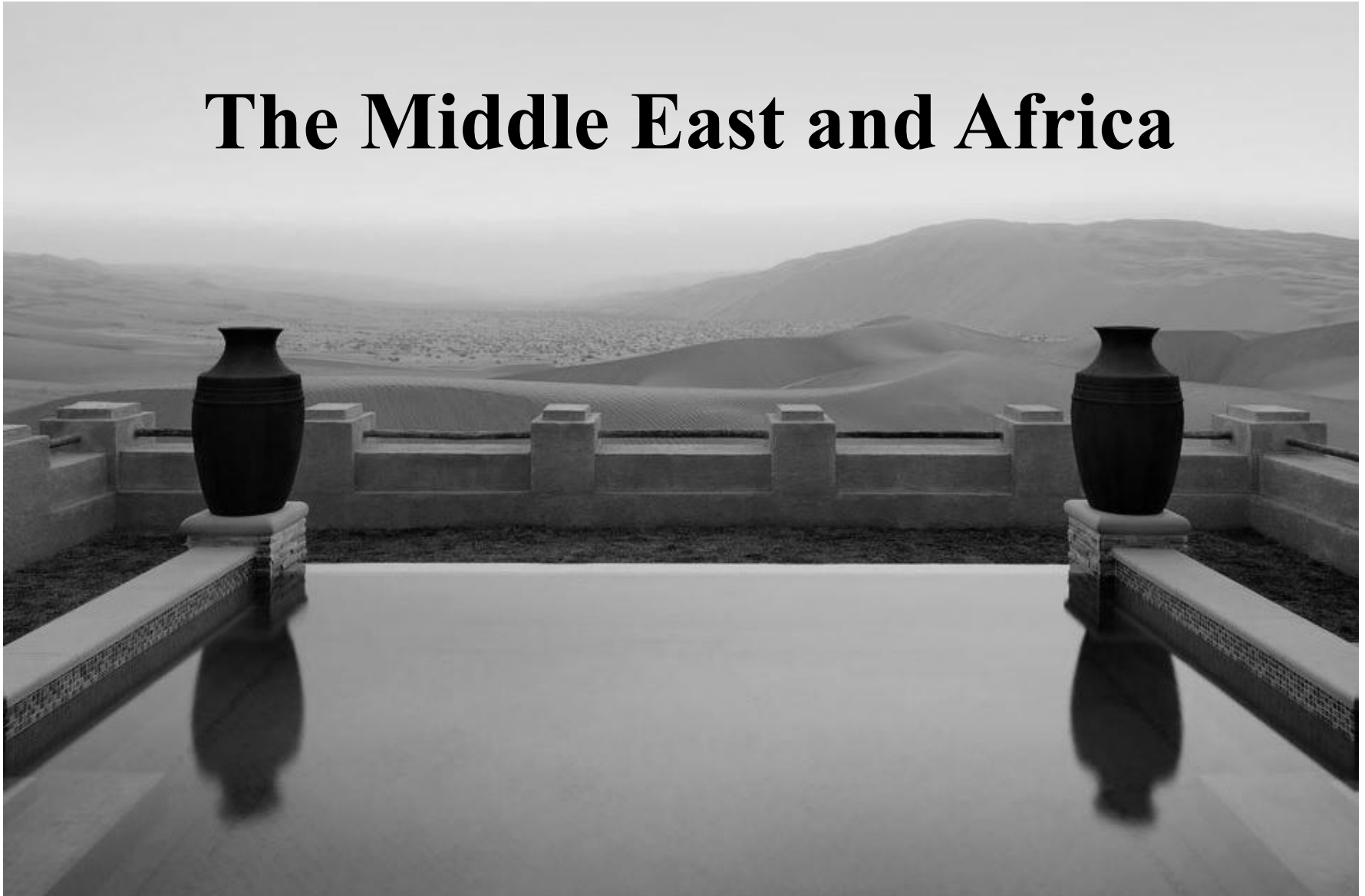
- Two corporate investigators were convicted in China in August 2014 of having illegally obtained information about Chinese citizens, including phone records and household registration data, which they resold to clients.
- ChinaWhys acknowledged having operated in a legal “grey area.”

# China Enforcement Trend: Increasing Challenges to Conducting Due Diligence (cont'd)

## Recommended Best Practices:

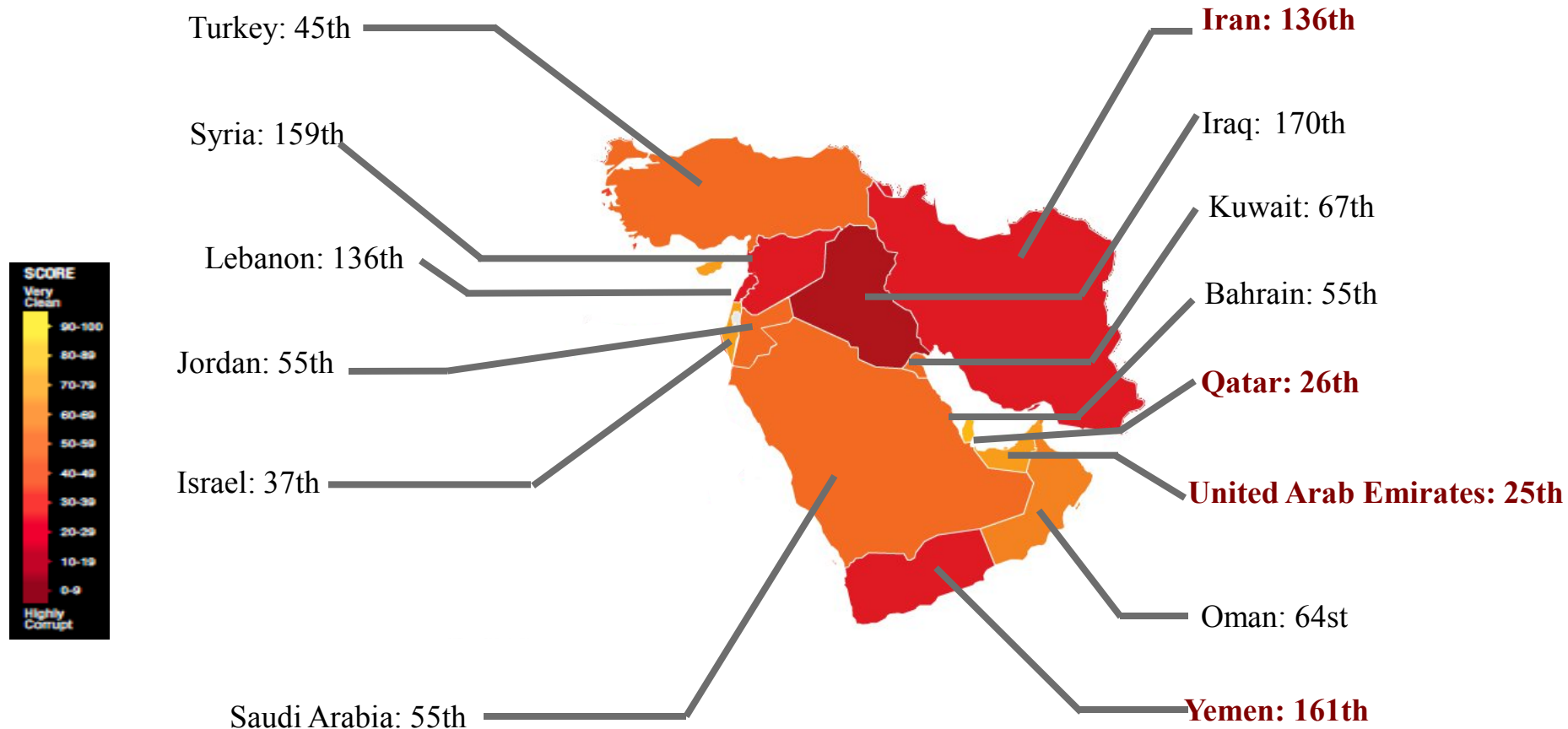
- ✓ Make the best use of publicly available and officially sourced information (e.g., official government websites, local press reports, blogs, and social media).
- ✓ Obtain reputational information (e.g., market feedback).
- ✓ Send questionnaires to potential partners inquiring about their compliance with anti-corruption laws and their involvement in anti-corruption investigations.
- ✓ Ensure that any investigator used for due diligence work in relation to potential acquisitions, joint venture partners, or third-party suppliers fully understands and will comply with all applicable laws and regulations.
- ✓ Insert specific provisions in contracts with third parties to better monitor third-party relationships (e.g., provisions regarding third parties' compliance with applicable anti-bribery laws and audit rights).
- ✓ In the M&A context, robust pre-acquisition or pre-investment diligence may not be possible in all transactions. In such cases, additional due diligence and the implementation of an effective compliance program following a transaction's close mitigate risk and may decrease the likelihood of an FCPA enforcement action.

# The Middle East and Africa



# The Middle East: Corruption Climate

## Transparency International Corruption Perceptions Index 2014



# The Middle East: Corruption Climate (cont'd)

**84%**

*Percentage of MENA countries that score below 50 in the Corruption Perceptions Index 2014, where 0 is highly corrupt and 100 very clean. This percentage is unchanged from 2013.*

**Nearly 20%**

*Percent of Middle Eastern respondents to PwC's Global Economic Crime Survey indicated their organization had been asked to pay a bribe.*

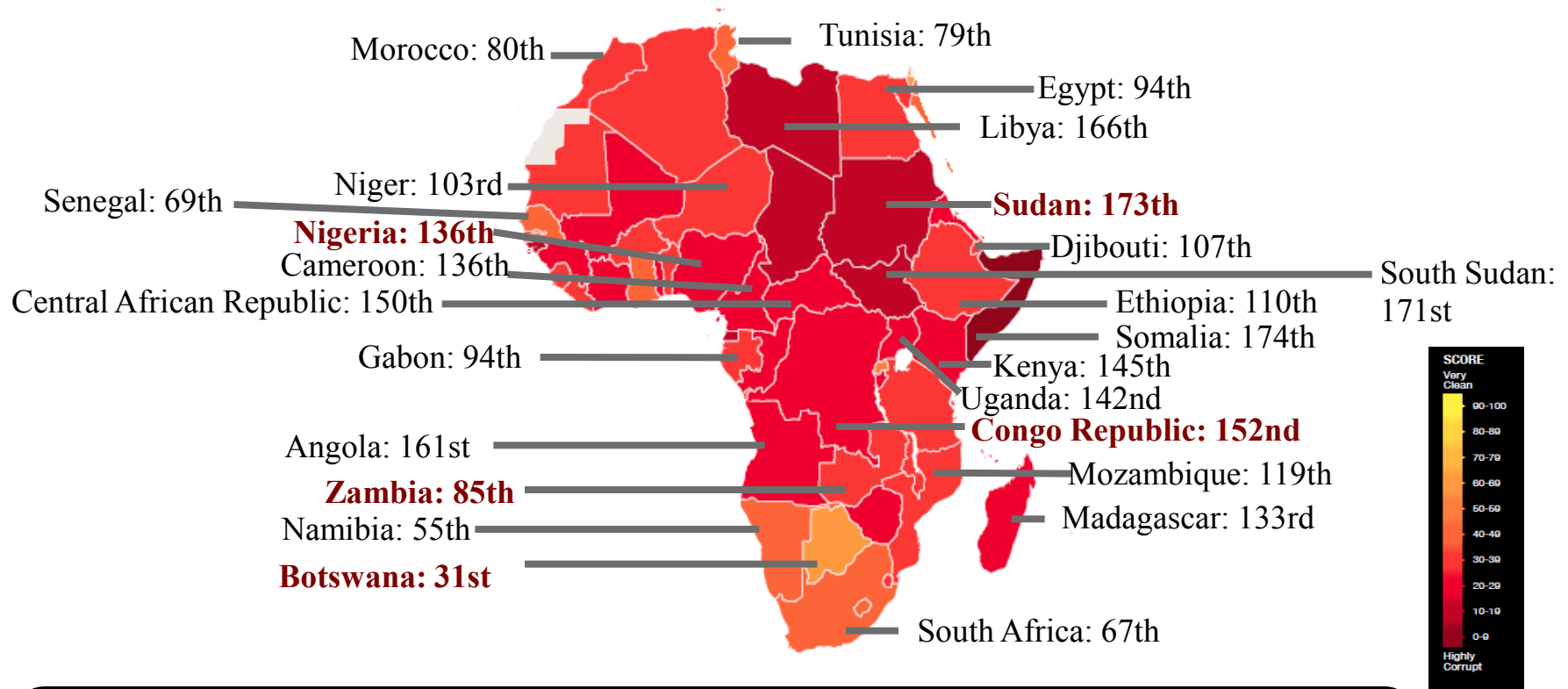
## Institutions perceived as most corrupt in the Middle East:

1. Political Parties
2. Public Officials / Civil Servants
3. Police
4. Media
5. Judiciary
6. Religious Institutions.



# Africa: Corruption Climate

## Transparency International Corruption Perceptions Index 2014



FCPA enforcement actions have criticized companies for failing to implement appropriate procedures “despite knowledge and awareness within the company that corruption and illicit payments were common practices in the foreign country where the unlawful payments were made.”

*SEC Complaint, Tyco (2006)*



# Africa: Corruption Climate (cont'd)

**Over  
50%**

*of South African respondents to PwC's Global Economic Crime Survey say they suffered bribery during 2013.*

**USD \$1.2-  
1.4 trillion**

*The amount estimated to have left Africa in illicit financial flows between 1980 and 2009 – roughly equal to Africa's current gross domestic product.*

**USD \$50  
billion**

*According to a UN-commissioned study, African economies lose an estimated \$50 billion annually due to criminal proceeds, including corruption of public officials.*

## Institutions perceived as most corrupt in Africa:

1. Political Parties
2. Public Officials / Civil Servants
3. Police
4. Media
5. Judiciary
6. Religious Institutions.



*We noted that there are both demand and supply sides to bribery, which is why the legislation in some developed countries against the giving of bribes by companies makes an important contribution to stemming corrupt practices in Africa.*

-Joint African Union Commission/United Nations Economic Commission for Africa, 2015.



# Middle East Case Study: Iraqi Corruption



- Ranked 170/174 in Transparency International's Corruption Perceptions Index.
- Corruption blamed for the failure of the armed forces to respond to the threat of ISIS/ISIL despite receiving more than US\$ 25 billion in training and equipment over the past decade.

- December 2014, Iraqi authorities announce the discovery of 50,000 “ghost soldiers” on the armed forces payroll. Ghost soldiers pay part of their wages to their commanding officers in return for remaining on the payroll while not actually showing up for duty.
- Commission for Public Integrity has increased its investigative ability, from opening 786 in 2004/5 to 11,671 in 2011. However, only 867 cases resulted in both conviction of an individual for corruption and which had their imposed sentence actually carried out.

Roughly 1.9 million Iraqi citizens paid bribes to civil servants in 2011.

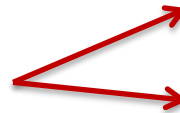
Source: United Nations Office on Drugs and Crime, Report on Iraq dated January 2013

Sources: The Economist 'Where Islamic State gets its money' (Jan. 4, 2015); The Independent 'Iraq's 50,000 'ghost soldiers' analysis: This is further proof of army corruption,' (Dec. 1, 2014); Reuters, 'Iraq says it found 50,000 'ghost soldiers' on payroll' (Dec. 1, 2014); United Nations Office on Drugs and Crime, 'Corruption and Integrity Challenges in the Public Sector of Iraq: An evidence-based study' (United Nations Office on Drugs and Crime, January 2013); Transparency International's Corruption Perceptions Index 2014.

# Middle East Case Study: Corruption in Turkey



As noted in our 2014 presentation, Turkish prosecutors detained dozens of people in December 2013 as part of investigations into two areas of alleged misconduct:



A state bank doing business with Iran

Widespread graft in the construction sector

- **Charges** include: money laundering, bribery and fraud.
- **Suspects** include: officials, politicians, the director of Halkbank, and the sons of three cabinet ministers. The original list grew to include 185 suspects, including former Ministers.



Turkish President Erdogan stated that he would not tolerate corruption, but accused the opposition of conducting a “dirty operation of dark alliances” from Turkey and abroad. Despite the calls for his resignation, President Erdogan reshuffled his government, sought to gain control of the police investigations, and had the prosecutors suspended from the corruption case.

Turkey was ranked 53 out of 175 countries in the Corruption Perceptions Index 2013.

# Middle East Case Study: Corruption in Turkey (cont'd)

Since the arrests in December 2013, President Erdogan has sought to derail the investigation by:

- claiming that it was part of a coup attempt by the Gulenist movement to topple the AK Party;
- arbitrarily dismissing or reassigning members of the police, judiciary, and prosecution; and
- charging the prosecutors involved in the original corruption probes with attempting a coup against the government.



Although 185 people formed part of the investigation in December 2013, all charges have since been dropped. A parliamentary committee investigating alleged corruption against former Ministers for the Interior, Economy, EU, and Housing voted against sending the former Ministers to a high court to answer the allegations. All nine members who voted against sending the former Ministers to a high court were members of the AK Party, as were the former Ministers being investigated. Parliament voted on the same lines as the committee in late night sessions on January 21, 2015.

Turkey was ranked 64 out of 175 countries in the Corruption Perceptions Index 2014, a fall of 11 places from 2013.

Sources: 'Turkey's Corruption Probe Turns Into Plot and Power for Erdogan,' Bloomberg (Jan. 9, 2015); Transparency International 'Greeting 2015: Is there any hope for those fighting corruption in Turkey?' (Jan. 13, 2015); Transparency International's Corruption Perceptions Index 2014; 'Turkish ruling party shaken by rebelling on ex-ministers' fate,' Digital Journal (Jan. 21, 2015).

# Middle East Case Study: Qatar and the World Cup

The decision to award Qatar the right to host the 2022 World Cup in December 2010 was instantly met by allegations of bribery by the Qatari bidding committee. FIFA launched an 18-month investigation into the allegations, spearheaded by American lawyer Michael Garcia.

The results of the 430-page report were summarized by the head of the adjudicatory arm of FIFA's ethics committee, Hans-Joachim Eckert, who said that although there were concerns over aspects of Qatar's bid, they were not serious enough to warrant reopening the process.



Hours after the report was published, Garcia reported Eckert to FIFA's appeals committee, stating that his summary "contained materially incomplete and erroneous representations." The appeals committee rejected the application, stating that the summary was only an opinion and, therefore, Garcia had no case. In response, Garcia promptly resigned from FIFA's ethics committee.

It seems, however, that the 2022 World Cup will go ahead in Qatar. FIFA's President, Sepp Blatter, announced in December 2014 that there would be no revote on the bid, notwithstanding the allegations of corruption.

It appears, however, that is not the end of the matter, as the corruption allegations have been reported to the Swiss authorities who have launched an investigation in addition to the investigation already being conducted by the FBI. In addition to the allegations of corruption, Qatar is facing increased scrutiny over allegations concerning the treatment of workers building the stadia to be used.

Sources: 'Fifa report into alleged corruption clears Qatar to host 2022 World Cup,' The Guardian (Nov. 13, 2014); 'Fifa dismissal of Michael Garcia's World Cup appeal is Orwellian farce,' The Guardian (Dec. 16, 2014); 'Michael Garcia quits Fifa ethics committee over handling of report,' The Guardian (Dec. 17, 2014); 'Sepp Blatter and the Qatar 2022 World Cup: too little, too late,' The Guardian (Dec. 23, 2014); 'Hear no evil: Football's governing body is struggling to silence its critics,' The Economist (Nov. 22, 2014).

# Africa: Corruption Dominates the Headlines

**Egypt** – Former President Hosni Mubarak was found guilty in May 2014 for the use of government funds to improve his private dwellings. His sentence was overturned by Egypt's high court on 13 January 2015 paving the way for his release from custody pending a retrial. His sons were also acquitted and released from custody on 26 January 2015. Many of those who protested against the Mubarak regime in the Arab Spring



In **South Africa**, police have opened an investigation into President Jacob Zuma's following allegations of corruption into a state funded \$24m upgrade of his house. A police ombudsman ruled in March 2014 that Zuma had "benefitted unduly" from the construction and ordered him to pay part of the cost. President Zuma has been accused of using his office to undermine the investigation against him



**Tunisia**, a March 2014 World Bank report on the activities of the former President Ben Ali has revealed that regulations were manipulated to such an extent that by the end of 2010 the President and his family were capturing over 21% of all private sector profits in the country. Although Ben Ali fled to Saudi Arabia, many of the regulations from his rule remain in place, stifling growth.

Sources: 'Egypt's high court overturns last conviction against Mubarak,' Reuters (Jan. 13, 2015) 'South Africa police probe Zuma for corruption,' Al Jazeera (Nov. 10, 2014); 'Zuma Accused of Undermining South African Corruption Probes,' Bloomberg (Jan. 15, 2015); 'All in the family: state capture in Tunisia, Volume 1,' World Bank (Mar. 1, 2014).



# Africa: Corruption Dominates the Headlines (cont'd)

**Malawi** – The Malawian High Court has cleared the way for former head of state, Bakili Muluzi, to stand trial in April for misappropriating about US\$11m in funds from international donors. The High Court ruled that evidence tendered by the main state witness was admissible in law and not mere hearsay, as had been argued by Muluzi's legal team.

The case has taken years to reach this point, but the Director of Legal at the Anti-Corruption Bureau has said that the clearance of the matter means that the bureau was now prepared to proceed with trial.



In **Tanzania**, the Minister of energy became the third top government figure to either resign or be removed from office over a multi-million-dollar energy corruption scandal following the discovery of around US\$120 million in fraudulent payments from state funds to a private company.



The **World Bank** has debarred the Chinese state-owned enterprise China International Water and Electric Corp. for a period of three years with conditional release. The debarment was the result of a negotiated settlement following an investigation into allegations of sanctionable practice in a hydropower project in Africa.

# Africa Case Study: Malawi's Cashgate Scandal

**Following the shooting of an anti-corruption official in September 2013, a scandal was uncovered whereby a government official had been exploiting a loophole in a computer-based financial information storage system to divert money from government coffers.**



In October 2013, Malawi's President, Joyce Banda, sacked her entire cabinet and announced the launch of a financial audit of all government departments to uncover further evidence of corruption. This investigation, which is being conducted with the assistance of the U.K. forensic audit firm Baker Tilly, has involved more than 100 civil servants, politicians, and business people so far.

The published audit report concludes that more than US\$30 million was looted from government coffers between April and September 2013. Some press reports, however, place the total amount as high as US\$60 million. The first conviction resulted in a sentence of three years and the second resulted in nine years of jail with hard labor.

Malawi fell in the Corruption Perceptions Index from 97th in 2013 to 110th in 2014. More importantly, international donors suspended pledged aid worth US\$ 150 million until President Banda instituted firmer anti-corruption measures. This is a significant sum, representing 40% of the country's GDP, and is seen as having played a large role in the failure of Joyce Banda to retain the Presidency in elections held in May 2014.

The new president, Peter Mutharika, vowed to make tackling corruption a priority. His wife, however, has faced calls to refund roughly \$22,000 that her Beautify Malawi Trust received from the National AIDs Commission despite carrying out no HIV/AIDs-related activities. An international donor has suspended a grant of US\$ 700 million to the Commission as a result.



# Africa Case Study: Madagascar – Opportunity for a clean sweep?

**Madagascar's five year transitional period following a military coup in 2009 was characterized by institutional decay and rampant corruption leading to the loss of 40% of the state budget in 2014.**

- In 2009, Madagascar suffered a military coup and led to the installation of a transitional regime. This precipitated a change from Madagascar being a “flawed democracy to an autocracy with rent-seeking tendencies.”
- 43% of firms surveyed for the 2009 IFC/World Bank Enterprise Survey said that corruption is a major constraint for doing business in Madagascar.
- Although improvements were made in the early 2000s with the creation of anti-corruption agencies and the drafting of new legislation, those efforts lost momentum with the advent of the political crisis in 2009. It has, however, left the country with a strong legislative base.
- President Rajaonarimampianina was elected in January 2014 and has vowed to make anti-corruption one of the priorities of his mandate and it has been announced that the anti-corruption agency is to be reformed. However, the agency will require resources to fulfil any new mandate as its resources have been systematically reduced since 2009.



# The Middle East and Africa: Anti-Corruption Enforcement Agencies and Developments

**Oman:** Oman ratified the UN Convention against Corruption in March 2014. It is expected that following its ratification of the UN Convention, Oman will seek to amend its laws to include a corporate offence for corruption in addition to the current personal offence.

**Kenya:** In November 2014, Kenya signed a Memorandum of Guidance with the DIFC Courts in Dubai. This marks the first time that the DIFC Courts have signed a Memorandum with an African country. The Memorandum will pave the way for easier enforcement of judgments between the two jurisdictions which will become increasingly important as Kenya is viewed as a gateway to East Africa with non-oil trade between Dubai and Kenya estimated at AED 4.5 billion.

**Saudi Arabia:** In March 2014 the Shura Council asked the anti-corruption agency, Nazaha, to speed up corruption trials and publicize the names and photos of officials found guilty of corruption.

**Morocco:** It has been reported in the African press that Morocco's anti-corruption authority, the Central Authority for the Prevention of Corruption, will announce a new strategy for tackling corruption. As the President of the Central Authority noted, "the strategic approach is lacking in Morocco. We wanted to do everything and we ended up with just a sprinkling."

**Nigeria:** The current and former chairman of the Code of Conduct Tribunal, an anti-corruption agency, are accused of corrupt practices with the current chairman under investigation by the Economic and Financial Crimes Commission.



# The Middle East: Anti-Corruption Measures



**Lebanon:** Lebanon introduced whistleblowing legislation in 2013 that has still not been passed by parliament. Civic groups, such as the Lebanon Transparency Association, have raised awareness campaigns to encourage lawmakers to act faster.

**Iran:** Allegations of corruption have surfaced amid an investigation into an alleged US\$34 billion fraud following the collapse of a construction company. The government has also launched an investigation into the disappearance of US\$22 billion under the previous government.



**Oman:** Oman's investigation into the oil sector has resulted in the trials of more than 35 civil servants and businessmen since 2013. Amongst those tried and convicted were the former Minister of Commerce and Industry, the undersecretary of the Ministry of Transport and Communication and the CEO of the Oman Oil Company. Sentences were imposed of up to 23 years in jail for bribery, abuse of office and money laundering.



## 2014 FCPA Enforcement Actions Relating to the Middle East and Africa



**Layne Christensen Company (2014)** was a case involving improper payments to foreign officials of several African countries to obtain beneficial treatment and reduce its tax liabilities. The company received approximately US\$3.9 million in unlawful benefits during a five year period from the bribes which were typically paid through either its African or Australian subsidiaries. Layne self reported the FCPA breaches and agreed to pay a roughly US\$4 million disgorgement as well as almost US\$1 million in prejudgment interest.



**FLIR Systems Inc. (2014)** was an enforcement action taken against two former employees for taking Saudi officials on a “world tour” to help secure business for the company. The two employees later falsified records in an attempt to hide their misconduct. The two consented to the entry of the order without admitting the findings and paid fines of US\$50,000 and US\$20,000 each, respectively.

# 2015 FCPA Enforcement Actions Relating to the Middle East and Africa



Florida-based engineering and construction firm PBSJ Corporation (now known as Atkins North America Holdings Corporation) has agreed to pay US\$3.4 million for violating the FCPA by paying bribes and employing foreign officials to win Qatari government contracts in the first AMEA enforcement action of the year.

The SEC also charged a former director of the firm, Walid Hatoum, with violating the FCPA's anti-bribery, internal accounting controls, and books and records provisions and with false records or offences. Hatoum agreed to pay a penalty of US\$50,000 without admitting or denying the findings.

The SEC investigation found that Hatoum had offered and authorized the payment of nearly US\$1.4 million in bribes that were disguised as 'agency fees' intended for a foreign public official who provided confidential information that assisted PBSJ in winning various Qatari government contracts. Hatoum also offered employment to a second foreign public official in return for assistance.

Rather than going to court, the SEC entered an administrative order against Hatoum and reached a Deferred Prosecution Agreement with the firm. The SEC emphasized that PBSJ took quick steps to end the misconduct after self reporting to the SEC and that the company voluntarily made witnesses available for interview, provided factual chronologies, internal summaries and full forensic images to cooperate with the SEC's investigation.



# Middle East Enforcement Trend: Improvement in Legal Frameworks and Enforcement

**In those countries where Western businesses are more likely to invest (i.e., the GCC countries and Israel), there are clear signs of improvements in transparency and anti-corruption enforcement. However, other traditionally large investor friendly countries, like Turkey, have recently slipped in how they handle corruption allegations.**

## Main Challenges:

- Historically, ***GCC governments*** have been major players in the economy rather than arms length regulators.
- Retention of ***local agents*** or sponsors may be a prerequisite for doing business in certain markets.
- Public sector fund and the ***ruling family's wealth*** are sometimes indistinguishable.
- Peculiar ***social and business customs***.

## Key Takeaways:

- Increased transparency and a cultural shift towards “arm’s length” business transactions coupled with a greater scrutiny on foreign companies seeking to invest locally.
- Local relationship-driven business culture increases the risk of FCPA and U.K. Bribery Act violations.
- Companies are advised to exercise caution and carry out due diligence before entering JVs or retaining agents or distributors.



# Africa Enforcement Trend

**Arab Spring countries and various sub-Saharan African countries have been taking serious steps to fight corruption and to trace assets of former and current officials.**

Although poverty, political instability and slow economic development are the main challenges facing Africa into 2015, corruption remains a major problem which exacerbates the others. The degrees to which the problem of corruption have been tackled, however, vary hugely across the continent.

So long as tackling corruption remains a key objective of foreign aid donors (in Malawi's case, they contribute as much as 40% of the government's budget) then the issue will continue to feature highly on the political agenda.

However, constant vigilance is required as too often promising anti-corruption initiatives peter out to nothing due to a lack of political will. Such examples can be seen from Egypt and Madagascar.

One of the best examples of how to tackle corruption on the continent comes from Rwanda which embarked on a wide ranging anti-corruption program in order to stamp it out. According to the World Bank, between 1996-2011 Rwanda improved its control of corruption score and moved from the 20th percentile to the 70th percentile. This success has been largely attributed to the imposition of a top-down approach by government with improved reporting methods and consistent follow through in prosecuting offenders.



## Key Takeaways

While a more pro-active approach towards corruption and its related offences has been taken by the governments, companies looking to do business and invest in Africa are advised to ensure that their anti-corruption policies and procedures are up-to-date. Companies are also advised to do extensive due diligence prior to committing funds to ensure compliance with the local regulatory regime.



# African Enforcement Trend: Growing Awareness

More than anything else, the biggest change in Africa is the growing awareness of the harmful consequences of engaging in corruption by both companies and citizens.

A survey of General Counsel by AlixPartners found that 56% of respondents thought that doing business in Africa posed significant risks to their businesses. The same survey found that 15% of the respondents' companies had pulled out of acquisition deals because of possible corruption at their target.



However, Africa cannot rely on multi-national companies seeking to comply with Western anti-corruption regimes to combat the prevalence of corruption on the continent. It also needs to invest in the creation of independent institutions that are capable of tackling corruption at a grass roots level. Too often has an anti-corruption agency been created, only to be starved of funds and hence is unable to fulfil its mandate due to a lack of political will.

Recognizing this, African anti-corruption agencies are increasingly banding together in associations such as the East-African Association of Anti-Corruption Authorities to increase training and development opportunities for their staff, collaborate on best working practices and increase cross border cooperation.

Increasingly, civil society groups are raising awareness of the costs of corruption and creating initiatives which force the state to respond such as the 'Black Monday Movement' in Uganda and the National Anti-Corruption Forum in South Africa.



# India

GIBSON DUNN

# India Corruption Landscape: Mixed Messages

**According to prominent metrics, India's corruption situation has improved:**



The country saw a modest jump in the latest results, claiming the 85th spot (up from 94th). India now ranks ahead of economic rival China.



According to the World Economic Forum's annual Global Competitiveness Report, India improved its ranking (out of 144 countries) in the areas of Irregular Diversion of Public Funds (60th, up from 98th), Irregular Payments (93rd, up from 110th) and Favoritism in Decisions of Government Officials (49th, up from 94th).

**However, corruption and bribery continue to present significant risks for businesses:**

**# 1**

According to one recent survey "Corruption, Bribery and Corporate Frauds" was considered the number one risk for companies, up from number four in the 2013 survey.

**70%**

**72%**

Another survey reported that 70% of Indian respondents feel that bribery and corruption are widespread, and 72% believe that management of their companies is likely to cut corners to meet targets.

# 2014 General Elections: Anti-Corruption Fervor Sweeps Narendra Modi into Power

**Anti-corruption promises figured prominently in Prime Minister Narendra Modi's 2014 campaign. Since taking office in May, some of the Modi administration actions include:**

## At a Glance

**Position:** 15th Prime Minister of India

**Birth:** Gujarat, Sept. 7, 1950  
—the first Prime Minister to be born in Independent India

**Party:** Bharatiya Janata Party

**Former:** Chief Minister, Gujarat (2001-2014)

**Recognition:** Named the 15th most powerful person in the world by *Forbes* magazine (2014).

- The administration's ***first large-scale corruption crackdown*** (August 2014), involving the raid of 20 locations in connection with the *Coalgate* scandal. Those arrested include the head of a state-owned bank.
- A review of ***all state-owned hospitals*** in a bid to end corruption in India's healthcare sector.
- A campaign to bring ***black money***—illicit funds stashed in offshore accounts —back to India and redistribute to the working class.

*“Corruption is troubling us. People are angry. I assure that we will fight corruption and work with all those against graft. Corruption has ruined the country. I promise that we will fight against corruption with full might.”*

—Prime Minister Narendra Modi (Aug. 11, 2014)

**Sources:** *The World's Most Powerful People*, FORBES (Nov. 5, 2014); Victor Mallet, *India Bank Chief Arrested in Bribery Probe*, FINANCIAL TIMES (Aug. 3, 2014); *India Reviews State Hospitals to End Widespread Corruption*, REUTERS (Aug. 23, 2014); Amit Chaturvedi, *Modi Government's First Decision: Special Investigation Team on Black Money*, NDTV (May 28, 2014); *Government to Fight Corruption with all its Might: PM Narendra Modi*, THE ECONOMIC TIMES (Aug. 12, 2014).



# PCA Amendments: Shift to Private Sector Enforcement

Parliament has introduced a bill that would substantially alter the country's 25-year-old anti-corruption law. The law figures to be a key piece of legislation for Prime Minister Modi and Parliament in 2015. Two key proposed amendments may have far-reaching effects on how multinational corporations conduct business:

- The amendments mandate fines for commercial organizations where any person associated with the organization *“offers, promises or gives a financial or other advantage to a public servant intending to obtain or retain business or some advantage in the conduct of business of the commercial organization.”* The definition of “commercial organization” is expansive, including any organization, wherever incorporated, that “carries on a business, or part of a business” inside of India.
- The bill also provides that, where a commercial organization is guilty of an offense, *every person who, at the time of the offense, “was in charge of” the conduct of the business shall be deemed guilty unless that person proves he or she did not know (or should not have known) about the conduct at issue.* Notably, the bill provides a defense where a commercial organization can show that it “had in place *adequate procedures* designed to prevent persons associated with it from undertaking such conduct.”

“[The PCA has] no direct provision prohibiting a private person from offering a bribe or engaging in other corrupt practices. Such a provision is required to ensure that all parties to a corrupt [act] are dealt with adequately. . . .”

-CVC, *National Anti-Corruption Strategy*, p. 9.

# Indian Anti-Corruption Laws: *The Companies Act*

India's new *Companies Act*, which came into effect on April 1, 2014, places additional obligations on companies and their management.

## Key Provisions

- § 128(1) Requires that every balance sheet or profit and loss statement present “*a true and fair view*” of the company’s affairs.
- § 134(5) Requires directors of listed companies to *certify annually* that their company has implemented internal financial controls and “*proper systems to ensure compliance*” with the provisions of all applicable laws and that such systems were adequate and operating effectively.”
- §§ 134(8), 447 *Significant penalties for fraud and non-compliance*, which include fines and prison for “officers of the company.”
- § 177(9)-(10) Directs listed companies to establish a “*vigil mechanism*” for directors and employees to report “*genuine concerns*.” The Act also protects against “*victimization*” of whistleblowers.
- § 245 Allows, for the first time, *class action lawsuits* against a company.

# Indian Anti-Corruption Laws: Lokpal Update

**India's historic anti-corruption movement lead to the passage of the *Lokpal and Lokayutkas Act (2012)*. Among other things, the law aims to:**

- Create an independent body (the “Lokpal”) with broad powers to *investigate corruption complaints against the highest political authorities*, including the Prime Minister;
- Enhance maximum punishment for corruption from *7 years to 10 years imprisonment*;
- Mandate that every state create a *local anti-corruption investigation agency* (“Lokayuktas”); and
- Allow the Lokpal to investigate any person (which includes legal entities) involved in *aiding violations of the PCA, bribe giving or taking, or conspiracy* related to any violation of the PCA.

★ Implementation of the law remains ongoing as lawmakers contemplate changes to the law's processes for selecting members of the Lokpal.

## Other Proposed Laws and Initiatives

- Law punishing Indian individuals who bribe foreign government officials.
- Revisions to the Penal Code that would prohibit commercial bribery.
- Stricter guidelines and transparency in public procurement.
- Sector integrity pacts obligating parties to government contracts to conduct business ethically.
- Enhanced whistleblower protection laws.



# Recent Examples of FCPA Enforcement Actions Relating to India

**Diageo (2011):** involving improper payments to government officials through its Indian subsidiaries for improving product placement in government-owned liquor stores and army canteens. Diageo paid \$11.3 million in disgorgement, pre-judgment interest of \$2 million, and a \$3 million civil penalty.

**Oracle (2012):** involving the creation of slush funds by the company's Indian subsidiary. The off-book funds were used to make payments to phony service vendors in violation of the FCPA's accounting provisions. Oracle paid a \$2 million civil penalty to settle the charges.

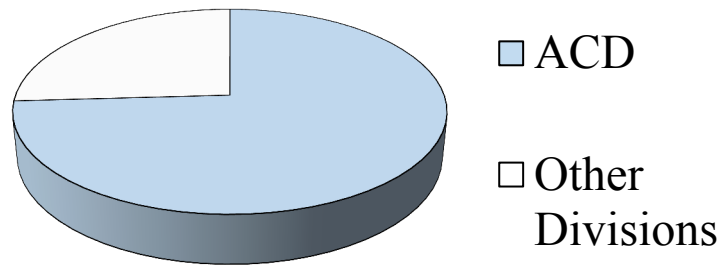
**Tyco (2012):** involving the company's German subsidiary using sales agents in India to make payments to Indian government officials in order to secure sales of its industrial valves. The improper payments were recorded as agent "commissions" in the company's books and records. Tyco paid approximately \$26.8 million to settle charges with the DOJ and the SEC.

**Dmitry Firtash, et. al (2014):** involving the alleged payment of \$18.5 million in bribes to state and central government officials in India to secure license approvals for a titanium mine project. According to the DOJ, six foreign nationals used U.S. banks to transmit funds used to bribe Indian officials. The individuals have been indicted, and the case remains ongoing.

# India Local Enforcement: By the Numbers

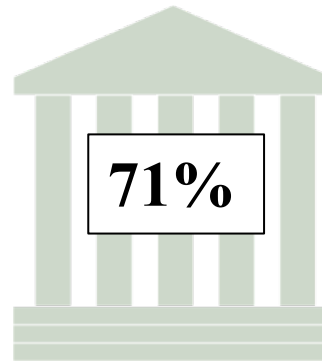
The latest statistics show that Indian authorities are focused on enforcement of the Prevention of Corruption Act.

## CBI Cases Registered (2013)



The *Anti-Corruption Division* handled around **75%** of all cases registered by the CBI in 2013. This is an increase from 70% in 2011.

According to the latest statistics, convictions under the Prevention of Corruption Act continue to increase. **Convictions against non-government individuals nearly doubled from 2012 to 2013.**



71%

In its latest report, the **CVC** stated that of the 9,366 CVC court cases pending, 6,617 involved the Prevention of Corruption Act (**71%**).

## PCA Convictions (2011-2013)

Year	Public Servants	Private Individuals
2011	334	300
2012	498	249
2013	597	489

Sources: CENTRAL BUREAU OF INVESTIGATION, ANNUAL REPORT (2013); CENTRAL BUREAU OF INVESTIGATION, ANNUAL REPORT (2012); CENTRAL VIGILANCE COMMISSION, ANNUAL REPORT (2012), CENTRAL VIGILANCE COMMISSION, ANNUAL REPORT (2013).

# India Corruption Trends: Lessons Learned from *Finmeccanica*

**Facts:** In February 2010, the Indian Air Force signed a deal with AugustaWestland, a subsidiary of Italian defense contractor Finmeccanica SpA., for the purchase of 12 military helicopters. After reports surfaced of possible bribes and kickbacks in the bidding process, Italian police arrested the CEO of Finmeccanica, while India's Ministry of Defense froze payments to the company. The CBI opened an independent investigation in 2013. The Italian court ultimately acquitted the CEO of the bribery charge, but sentenced him to two years imprisonment for "false bookkeeping." The CBI investigation remains ongoing. The case is illustrative of several trends in India anti-corruption enforcement efforts, namely:

- **Cross-Border Cooperation:** Indian officials were permitted to attend the Italian proceedings, and information sharing between the two countries was instrumental in both investigations.
- **Concurrent Investigations:** As *Finmeccanica* shows, Indian authorities will not shy away from conducting independent investigations into bribery allegations, even where investigations in other jurisdictions have ended.
- **Third-Party Risks:** The investigations focused on the role of third-party middlemen in arranging the alleged bribes. Following the close of the Italian case, Indian officials arrested a New Delhi-based attorney on allegations that he helped establish bank accounts and middlemen for the purpose of facilitating the payments.
- **Individual Prosecution:** Enforcement of anti-bribery laws are increasingly focused on those providing the payments, including corporations and individuals.
- **Integrity Pacts:** Indian government agencies and PSUs are increasingly requiring contractors to sign agreements obligating them to conduct business ethically. In the wake of the allegations, the Indian Ministry of Defense blacklisted Finmeccanica and AugustaWestland for breach of an integrity pact.



# India Corruption Trends: Local and Foreign Enforcement Agencies Target High-Risk Sectors

**Agencies in the U.S., India and elsewhere are increasingly focusing on traditionally high-risk sectors.**

## Examples:

- **Military and Defense:** *Finmeccanica, Rolls-Royce, Diageo*
- **Healthcare:** State-hospital review, 2014 inquiry into alleged bribes paid by pharmaceutical companies.
- **Mining and Natural Resources:** *Coalgate, Firtash* defendants
- **Infrastructure:** Alstom S.A. (U.K)
- **Finance:** Multiple arrests of state bank personnel, bribe-for-loan scandal

## 300 Doctors Summoned in Connection with Graft Inquiry

“The Medical Council of India has summoned about 300 doctors from across the country to Delhi to answer questions on an anonymous complaint that they had been bribed by a pharmaceutical firm. According to the complaint, the Ahmedabad-based pharma company has been paying doctors lakhs of rupees as well as gifting them cars and flats and sponsoring family foreign trips in return for prescribing its medicines even though cheaper alternatives from better known companies are available.”

-The Times of India 11/18/2014

## Key Lesson:

Take extra precautions when conducting business in high-risk sectors. Tailor your compliance program to account for the varied risks associated with each industry and always monitor employees and third parties operating in these areas.

*“The culture of contractors using anything and putting up a black top on roads and the same getting washed away in the first rains will not work ... Getting away after paying bribes will have to be checked.”*

*-Prime Minister Narendra Modi (8/19/2014)*

# India Corruption Trends: Enforcement of Foreign Anti-Bribery Laws Increases on a Global Scale

**As other countries implement FCPA-like laws to combat foreign bribery, India-related enforcement actions are likely to increase.**



**Canada:** In August 2013, Canadian prosecutors secured their first conviction of an individual and reported the decision under the Corruption of Foreign Public Officials Act. The case involved an agent of a technology company, who was convicted of conspiring to bribe officials of Air India and India's Minister of Civil Aviation in an effort to win a biometric security systems tender.



**United Kingdom:** After a five-year investigation, the U.K.'s Serious Fraud Office filed corruption charges in July 2014 against the U.K. subsidiary of Alstom S.A. for conduct in India, Poland and Tunisia. With respect to India, the company was charged with making approximately \$4.3 million in corrupt payments to secure contracts from a state-owned rail company.



**Italy:** On October 9, 2014, an Italian court acquitted the former head of defense contractor Finmeccanica SpA of international corruption charges related to a \$712 million deal to sell 12 helicopters to India in 2010. While the executive was cleared of the corruption charges, he was sentenced to two years in prison for false bookkeeping in connection with the deal.

## Key Lesson:

Adopt a principles-based approach to your compliance program. Focusing on one country's foreign bribery law in drafting policies may miss important nuances found in others.





# INDONESIA

# Recent Corruption Headlines

## Nominee for Indonesia Police Chief Named Corruption Suspect

“President Joko Widodo’s nominee for police chief was named a corruption suspect Tuesday, dealing a blow to the new leader.”

“Indonesia’s independent antigraft agency said Budi Gunawan, a three-star general and head of police training and education, was suspected of accepting bribes as a government official between 2003 and 2006.”

- The Wall Street Journal, 1/13/2015

## Indonesia to Revamp State Oil Firm in Bid to Fight Corruption

“Indonesia will overhaul national oil company PT Pertamina as the government seeks to improve the management of state-owned enterprises and deliver infrastructure projects after slashing subsidies for fuel.”

“The removal of fuel subsidies at the start of 2015 will also reduce opportunities for irregular transactions and... help curb what the government has described as an energy mafia.”

-TodayOnline, 1/20/2015

## Indonesia Loses \$4b Annually to Procurement Graft, Study Finds

“Indonesia loses \$4 billion every year due to poor procurement practices in the public sector, according to a recent study by consultant firm A.T. Kearney.”

“The study by Kearney found that around 30 percent of the cases handled by the Corruption Eradication Commission (KPK) over the past decade were related to poor procurement practices.”

- Jakarta Globe, 6/3/2014

## Indonesian KPK Proceeds with Investigation of Innospec Corruption Case

“The KPK on Monday proceeded with investigation into a bribery case in the import of leaded gasoline from Britain in 2004 to 2005.”

“A British court said that from 2002 to 2006, Innospec paid US\$11.7 million to its agent in Indonesia, PT Sugih Interjaya, which used the money to bribe Indonesian officials.”

- Antara News, 1/19/2015

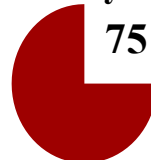


# Indonesia: Overview of Corruption Risks

- Indonesia ranked **107th** out of 175 countries in Transparency International's 2014 Corruption Perceptions Index. Indonesia's CPI Rank has not been higher than 100 in the last five years.
- Compared to other Southeast Asian countries, Indonesia ranks ***ahead*** of Vietnam, Laos, Myanmar, and Cambodia. Indonesia ranks ***behind*** Thailand, the Philippines, Malaysia, and Singapore.
- One study found that Indonesia loses ***\$4 billion to graft in the public procurement sector.***

## Results of Transparency International's *Global Corruption Barometer* (2013)

survey



Percentage of respondents who reported paying a bribe to a police officer within the preceding 12 months.

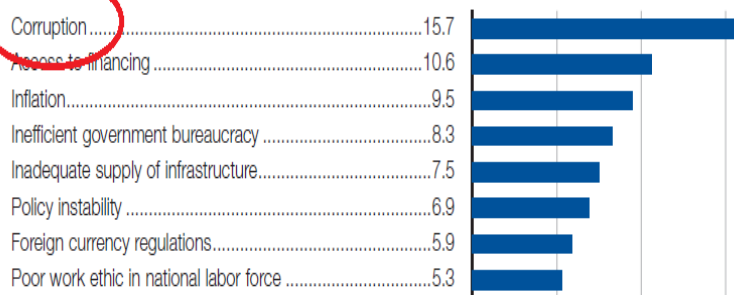


Percentage of respondents who feel that business in Indonesia is "extremely corrupt."



Percentage of respondents who feel the level of corruption has increased in Indonesia in the past two years.

## The most problematic factors for doing business



The World Economic Forum's *2014-2015 Global Competitiveness Report* ranks Indonesia 34th out of 144 countries in terms of economic competitiveness. Survey respondents perceived corruption as the most problematic barrier to doing business in Indonesia.

# Historic 2014 Presidential Elections: Widodo

## Elected on Anti-Corruption Pledges

**Newly elected President Joko Widodo has pledged to weed out corrupt practices and usher in a clean government, but he has already faced challenges.**

### Meet “Jokowi”

**Position:** 7th President of the Republic of Indonesia

**Birth:** 1961 in Surakarta, Central Java

**Party:** Indonesian Democratic Party of Struggle (PDIP)

**Former:** Mayor of Surakarta (2005-2012); Governor of Jakarta (2012-2014)



*“The KPK and the National Police must support each other in eradicating corruption. Let the KPK work, let the National Police work. There should be no entity in this country that feels it is more above the law than the other.”*

-President Widodo (Jan. 25, 2015)

- President Widodo was known for doggedly pursuing corrupt officials during his time as mayor of Surakarta and as Governor of Jakarta.
- He garnered praise following the presidential election when he subjected his cabinet nominees to intense vetting by Indonesian anti-corruption authorities. Several nominees were vetoed as a result.
- His clean image took a hit not long after assuming office when he nominated the subject of an ongoing corruption investigation to be the chief of the National Police.

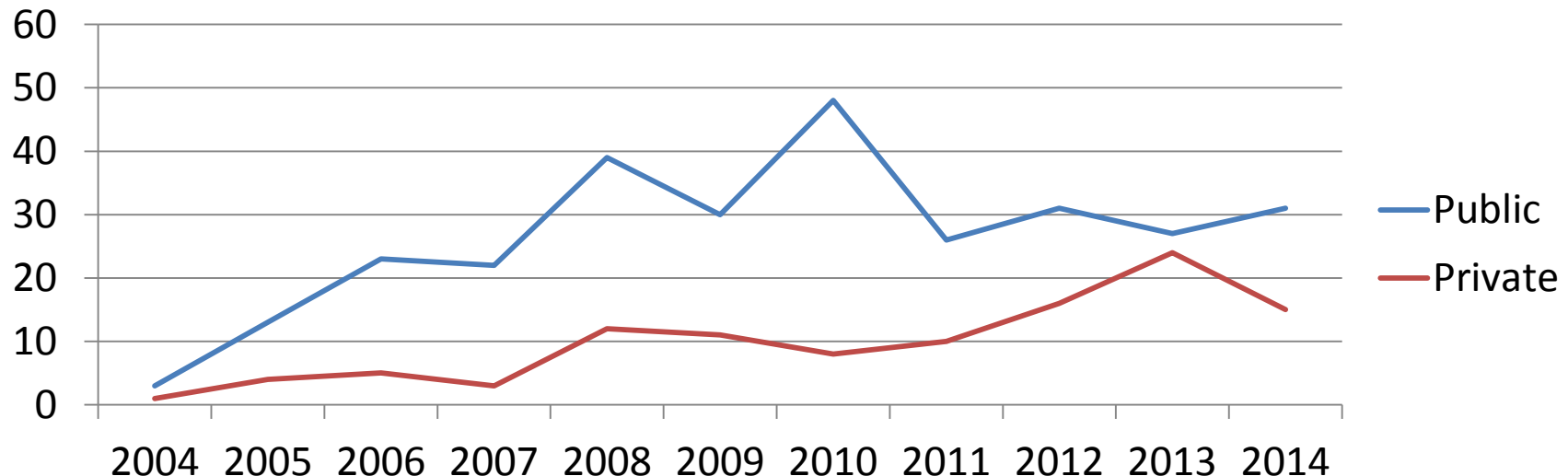
# Local Enforcement: Komisi Pemberantasan Korupsi (KPK)

The KPK was formed under Law No. 30/2002 on the Corruption Eradication Commission. The KPK's mandate includes:

- Coordinating and supervising state institutions to eliminate corruption;
- Conducting pre-investigations, investigations, and prosecutions;
- Conducting preventive actions; and
- Monitoring state governance.

*The KPK has won **guilty verdicts in all 236 cases it has fought**. Its arrests of cabinet ministers, parliamentarians, central bankers, CEOs, a judge and even a former beauty queen have exposed how widespread and systemic corruption is in Indonesia. **It has certainly made big ticket abuses of power far riskier in Indonesia.** --Reuters, Nov. 16, 2013*

**While enforcement has been erratic, corruption arrests are up over the past decade, including arrests of private sector offenders.**



# Local Enforcement: KPK Under Attack

**The KPK has historically been aggressive in targeting corrupt politicians, which has effectively made the agency a target for revenge-fueled regulatory inquiries and investigations. Indonesia's citizenry have largely sided with the KPK during these disputes, leading to large-scale demonstrations.**

**July 2014**

KPK begins investigating Police General Budi Gunawan after a wealth disclosure showed \$1.6 million in unaccounted-for assets.



**January 12, 2015**

Despite the investigation, Pres. Widodo nominates Gunawan to head the National Police. Parliament confirms the appointment amid public outcry.



**January 13, 2015**

KPK formally declares Gunawan a graft suspect for amassing \$7.6 million while serving in the National Police Headquarters from 2004-2006.



**January 21, 2015**

Gunawan files charges against three KPK commissioners for alleged "abuse of power." Rumors swirl that more charges against KPK are pending.



*President Widodo ran on a platform of anti-corruption and strong leadership and a steadfast will is urgently needed in this case to safeguard anti-corruption efforts in the country and ensure that no institution or entity can act with impunity nor attempt to influence or impede the work of the KPK.*

*-Transparency International, on the recent arrests of KPK commissioners (Jan. 26, 2015)*

# Recent FCPA Enforcement Actions Involving Indonesia Highlight Global Enforcement Trends

## **Alstom Executives (2013 - 2014) / Alstom (2014) / Marubeni Corporation (2014):**

Japanese commodity-trading firm, Marubeni Corporation, and Alstom SA, a Paris-based power-equipment maker, allegedly conspired with intermediaries to bribe a member of the Indonesian Parliament and officials at a state-owned electricity company.

- **State-Owned Companies:** Marubeni pleaded guilty to bribing Indonesian officials to win a US\$118 million contract to provide power-related services in Indonesia. It agreed to pay a criminal fine of US\$88 million.
- **Record Fines:** Alstom SA paid **US\$722 million** in criminal penalties to settle charges. The second-largest FCPA penalty paid to date.
- **Individual Enforcement:** Four current and former executives at an Alstom subsidiary and holding company were also charged with conspiracy to violate the FCPA. Three have pleaded guilty; the fourth also faces charges of money laundering, and is expected to begin trial in 2015.

## **Smith & Wesson (2014):**

**Defense Sector Risks:** Smith & Wesson Holding Corporation, a Massachusetts-based gunmaker, agreed to a US\$2 million settlement with the SEC to resolve FCPA offenses relating to bribes allegedly paid in Indonesia, Pakistan, and other countries to win gun sales to military and police forces. Smith & Wesson must report to the SEC on its FCPA compliance efforts for two years.

# Recent FCPA Enforcement Actions Involving Indonesia Highlight Global Enforcement Trends (cont'd)

## **Diebold (2013):**

**Continued Focus on Business Hospitality in Asia:** U.S. authorities alleged that the U.S.-based manufacturer made improper payments to state-owned banks in China and Indonesia to win ATM services contracts. In Indonesia, Diebold's subsidiary is alleged to have provided leisure trips and entertainment for government officials in exchange for business, and recorded these payments as "training" or other legitimate business expenditures. Diebold paid approximately \$48 million to resolve the matter.

## **Wyeth (2012):**

**The Ever-Present Third Party Risk:** The SEC alleged that the Indonesian subsidiary of the pharmaceutical giant gave cash, products, Blackberrys, cell phones, and phone cards to doctors and administrators of public hospitals. The subsidiary concealed the payments through fictitious invoices and collaboration with third parties. Wyeth disgorged \$18.8 million in profits to settle the allegations.

## **Tyco (2012):**

**High Risk Public Utilities Sector:** Tyco's Indonesian subsidiaries allegedly made payments, provided gifts, and sponsored international travel for employees of public water and electricity companies in exchange for public works contracts. The company paid \$26.8 million in fines and penalties.



# Interplay Between U.S. and Indonesian Enforcement

**As the globalization of corruption enforcement continues, conduct that would constitute a violation of the FCPA increasingly may lead to follow-on enforcement by Indonesian Authorities.**

## Innospec (2010)



On March 18, 2010, Innospec paid \$74.1 million to settle charges stemming in part from bribes paid to employees of an Indonesian state-owned oil refinery.



The DOJ, SEC and the UK's SFO acknowledged mutual cooperation on the investigation. On April 9, 2010, the Indonesian KPK began its own investigation into Innospec, which remains ongoing.

## Alstom (2013- 2014)



Alstom SA allegedly conspired to bribe a member of the Indonesian Parliament and officials at a state-owned electricity company in exchange for government contracts.



In April 2014, the KPK secured a guilty verdict against the parliamentarian in question, and indicated that it would continue its investigation into other suspects.

"I want to thank...the Corruption Eradication Commission in Indonesia; the Office of the Attorney General in Switzerland; the Serious Fraud Office in the United Kingdom; as well as authorities in Germany, Italy, Singapore, Saudi Arabia, Cyprus, and Taiwan, for their tireless efforts to advance this matter. The remarkable cross-border collaboration that these agencies made possible has led directly to today's historic resolution."

*-- Remarks for Deputy Attorney General James Cole Regarding Alstom's DOJ Bribery Plea*

# Indonesia Corruption Trends: Beware the Three “Ps”

## Police

**Multiple Levels:** Police at the National, Regency, District and municipal level all have jurisdiction to impose fines, conduct inspections, and issue permits. Constant touchpoints means constant corruption risk.

**Jurisdiction:** Indonesian police are often tasked with assisting with enforcement of immigration, labor and transportation laws.

**Security:** Police wield enormous power in rural areas, where business must rely on law enforcement for protection.

**Risk:** In a recent poll published by the Indonesian government, 32% of respondents said that bribing the police is normal.



GIBSON DUNN

## Permits

**Decentralization:** The Autonomy Laws decentralized Indonesia’s government at the turn of the century, giving broad powers to provincial authorities. This has led to increased permitting requirements and fees, particularly in rural provinces where officials look to increase revenue.

**Permit Society:** Indonesia is a permit-heavy country, with multiple permits and clearances required for most industries, including construction and extraction. Permits often require sign-off by multiple agencies at all levels, giving rise to increased corruption risk. Companies can be paralyzed by bribe requests.

**Illegal Permits:** Authorities often grant permits illegally, such as development rights or waste disposal on protected land. This creates an uneven playing field for law-abiding companies.

## Power Companies

**Risk:** Indonesia’s state-utility companies, PT Pertamina (“Pertamina”), Perusahaan Listrik Negara (“PLN”), and others have a monopoly on gas and electricity distribution in the country. It is a near certainty that any company operating in Indonesia will deal with these companies in some fashion.

**Corruption:** Pertamina and PLN have featured prominently in recent local corruption scandals. For example, the KPK investigated Pertamina in 2014 on suspicion of paying bribes to lawmakers.

**FCPA:** Bribes to PLN officials feature prominently in two recent FCPA enforcement actions (*Tyco* and *Marubeni/Alstom*).



# Indonesia Corruption Trends: Procurement Pitfalls

- ❖ Corruption in public procurement is pervasive. The KPK said that fully **60%** of the cases it was investigating in 2014 were related to procurement.
- ❖ Procurement risks were compounded by decentralization laws at the turn of the century, which handed power to local governments. The result is an *array of different procurement requirements* and a *weakening of central oversight*.
- ❖ Recent large-scale procurement scandals involve the *healthcare, transportation, energy* and *mining sectors*. Each of these is heavily regulated by agencies at multiple levels, and all involve significant interaction with state-owned entities.
- ❖ The implementation of the e-procurement system has saved an estimated **\$3.5 billion** of the state budget, but e-tendering is still not available in 19 regencies and 26% of national ministries.



One study found that Indonesia loses up to **\$4 billion** annually on public procurement graft.

## Procurement Best Practices

- Always use E-Procurement, when available.
- Tendering agents should be engaged only after thorough background checks and due diligence. Check local laws and tendering guideline to ensure use of third parties is not prohibited.
- Ensure submissions meet all technical requirements of the tender. Small errors are fertile ground for bribe requests. Submit comfortably within deadlines.
- Be especially careful when bidding on urgent purchases or requests connected to natural disasters.



# Indonesia Corruption Trends: Third Party Risks

**Third parties are a theme in every recent FCPA enforcement action involving conduct in Indonesia.**

**Smith & Wesson:** Alleged *improper payments to its third-party agent*, who offered to provide a portion of that money to Indonesian officials under the guise of *lab testing costs*.

**Alstom:** Retained *consultants* to serve as conduits for corrupt payments to government officials.

**Tyco:** Made payments to *sales agents*, who then passed them on to government officials.

**Wyeth:** Made payments to government hospital officials, and colluded with *distributors and vendors* to characterize the payments as marketing events.

## **Indonesia-specific risks include:**

**Culture and Language:** Local agents are often engaged to manage relationships with local officials, community leaders, and tribal elders. The line between public servant and community leader is often blurred.

**Immigration:** Indonesia's complex immigration scheme makes immigration agents enticing for companies employing expats. Watch for suspicious payments surrounding the KITAS work permit, travel permits (SKJ), and residency permits (KITAP).

**Ex-Bureaucracy:** Frequent regime changes, expanding/contracting governments and low salaries create an army of former civil servants seeking to cash in on government connections.

**Tax and Customs:** Complicated importation, VAT and corporate tax schemes often push companies to engage consultants. The lack of understanding regarding nuances of laws and processes often results in agents who are minimally supervised.

**Permits:** Local agents often offer to help companies navigate the country's confusing permitting requirements. Be mindful of permit-related conduct in rural locations. High risk permits include those involving construction (e.g., IMB) and the police (e.g., SKLD, STM, STNK).



# Mitigating Corruption Risks

# Risk Mitigation: Establish an Effective Compliance Program

**The greatest bulwark against corruption risk is an effective compliance program. Such programs are increasingly necessary in an age where U.S. and local enforcement agencies are increasingly scrutinizing internal controls when making enforcement decisions.**

## Increased Local Scrutiny:

**India:** The *Companies Act* and the proposed PCA amendments both require companies to implement robust internal controls designed to detect improper conduct.

*“We encourage companies to maintain robust compliance programs, to voluntarily disclose and eradicate misconduct when it is detected, and to cooperate in the government’s investigation. But we will not wait for companies to act responsibly.”*

-U.S. Assistant Attorney General Leslie R. Caldwell, speaking of the \$722 million Alstom settlement.

## “Basic elements” the DOJ and SEC consider when evaluating compliance programs:

- Tailored to Risks Faced by the Company
- Clear Compliance Policies
- Targeted Compliance Training
- Culture of Compliance – Tone and Messaging
- Third-Party Due Diligence
- Confidential Reporting of Misconduct
- Evolves with the Business and Market Risks
- Stern Consequences for Violations
- Sufficient Compliance Resources
- Independence of Compliance Function
- Financial Controls/Monitoring

## Marubeni: \$88 Million in Penalties

In justifying its large fine, the DOJ cited Marubeni’s *“lack of an effective compliance and ethics program at the time of the offense.”*

- Plea Agreement, *U.S. v. Marubeni Corp.*, No. 3:14-cr-00052-JBA (D. Conn. Mar. 19, 2014).



## Morgan Stanley: No Fines or Penalties

After considering all the available facts and circumstances, *including that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials*, the Department of Justice declined to bring any enforcement action against Morgan Stanley related to Peterson’s conduct. -DOJ Press Release (Apr. 25, 2012).



# Risk Mitigation Carefully Monitor High-Risk Third Parties

**Issues involving third parties have been at the core of recent enforcement actions conducted by the SEC, DOJ and local enforcement agencies. High-risk third parties may include:**

**China:** Consultants, Design Institutes, PR/Marketing Firms, Event Organizers, Travel Agents, Distributors.

**Indonesia:** Business development agents, customs agents, immigration agents, tendering agents.

**India:** Sales Agents, Distributors, Tendering/Procurement Agents, Government Liaison Agents, Logistics providers.

**Middle East:** Business development agents, customs agents, security firms, travel agencies.

**Africa:** Travel agencies, subsidiaries, joint venture partners.

## GSK Used Travel Agencies for China Bribes: Police

“Chinese police . . . accused British drugmaker GlaxoSmithKline of channeling bribes to Chinese officials and doctors through travel agencies to boost sales illegally and raise the price of its medicines in the country.”

“Gao Feng, head of the economic crimes investigation unit at China’s Ministry of Public Security, said since 2007, GSK had transferred as much as 3 billion yuan (\$489 million) to more than 700 travel agencies and consultancies over six years.”

-Reuters, 07/15/2013

## Lack of Due Diligence on Third Parties Factors into Alstom’s \$722 Million Fine

*“Alstom also knowingly failed to conduct adequate diligence when it executed new consultancy agreements with two of the consultants who had been originally retained by Alstom’s predecessor in Saudi Arabia. This is true despite raising a number of ‘red flags’ described in Alstom’s own compliance policies.”*

-Criminal Information, *U.S. v. Alstom S.A.* (2014)

# Carefully Monitor High-Risk Third Parties (cont'd)

## Actions

- Identify the specific *functions that are prone to corruption* and handled by third parties.
- ***Involve legal and compliance*** in contract negotiations/drafting to ensure that services are specifically and accurately described and allow for an efficient control (e.g., finance) to assess whether the services have actually been rendered and whether prices are reasonable in light of those services and are 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 ***interaction between sales force in emerging markets, involved 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 publically available tender materials or conducting audit reviews.

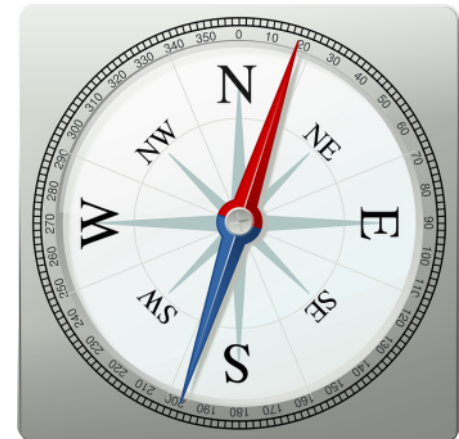
# Take Steps to Avoid Incurring Liability Through Acquisitions

**A recent DOJ Opinion Procedure Release highlighted steps companies may take to avoid FCPA violations in the context of acquisitions.**

A U.S. consumer products company told the DOJ it intended to acquire 100% of the shares of a foreign consumer products company and its subsidiary. In the course of pre-acquisition due diligence, the Company discovered over \$100,000 in transactions that raised compliance issues—the vast majority involving payments to foreign officials—and “substantial weaknesses” in accounting and recordkeeping. DOJ stated that it lacked jurisdiction to prosecute for the improper payments, and therefore would not take action, as none of the improper payments had a jurisdictional nexus to the U.S.

However, The November 7 Opinion Release reiterated DOJ/SEC guidance to:

- Conduct thorough ***risk-based*** FCPA and anti-corruption ***due diligence***;
- Implement the acquiring company’s ***code of conduct and anti-corruption policies*** as quickly as possible;
- Conduct FCPA and other ***relevant training*** for the acquired entities’ directors and employees, as well as third-party agents and partners;
- Conduct an FCPA-specific ***audit of the acquired entity*** as quickly as practicable; and
- ***Disclose*** any corrupt payments discovered during the due diligence process.



# Take Cues from the OECD Foreign Bribery Report

**The findings of the OECD Foreign Bribery Report are helpful in guiding companies to areas of traditional weakness in compliance programs.**

## FINDING

53% of all cases analyzed by the OECD involved bribes paid or authorized by management-level employees or CEOs.



## LESSON

Compliance training must occur at all levels, with enhanced programs for managers and executives. A zero-tolerance culture must be communicated from the top.

The majority of cases involved companies operating in high-risk sectors, such as extraction, construction and communication.



Know the risk profiles of the countries and sectors in which you operate. Tailor compliance programs to the realities of your business, taking extra care to discuss sector-specific risks with employees.

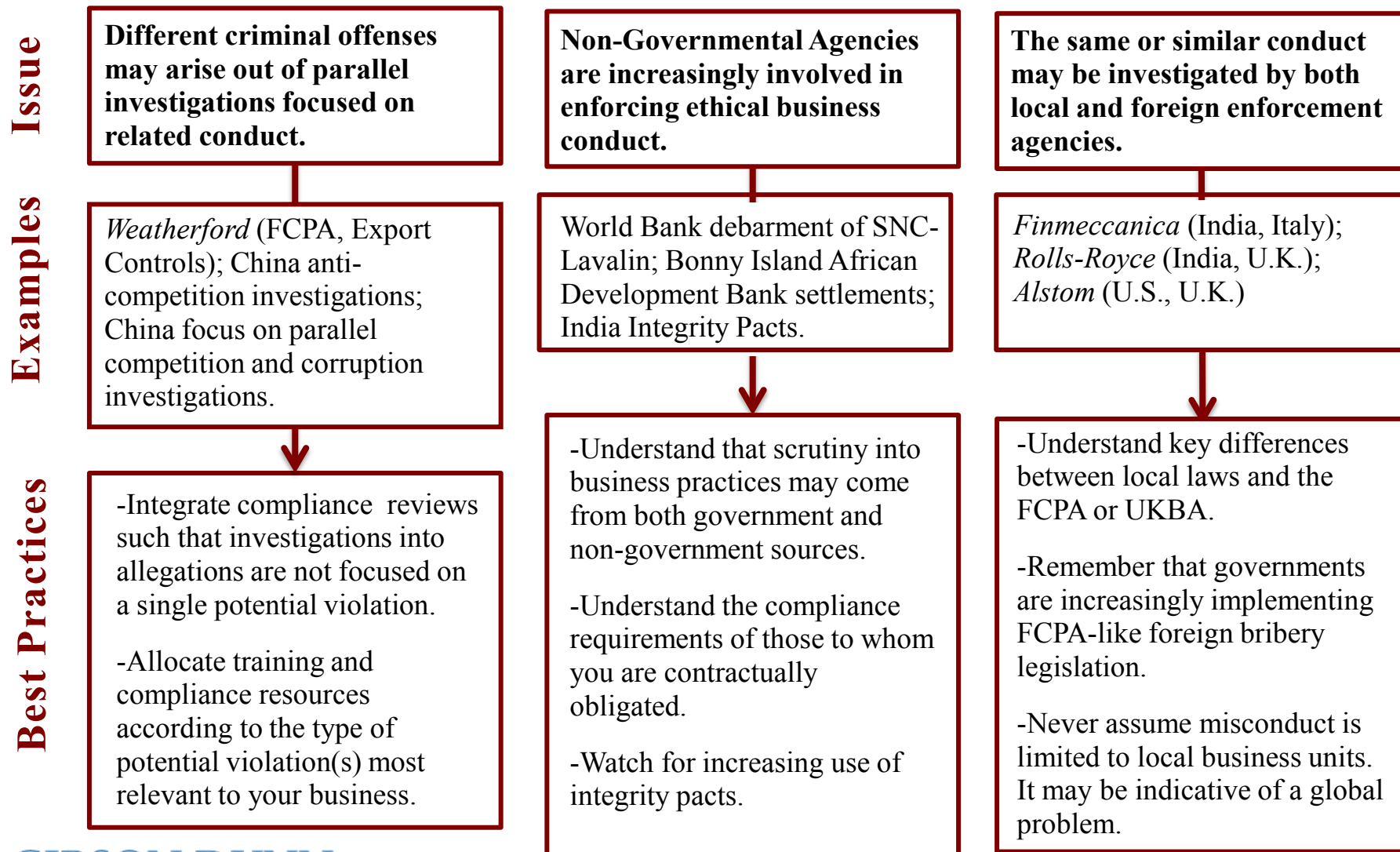
Almost 30% of cases analyzed were brought to the attention of authorities by the companies themselves following acquisition due diligence.



Conduct thorough due diligence on targets in high-risk sectors or countries. Knowing your acquisition may prevent inherited liability.

*“Anti-bribery risk assessments and compliance are equally critical on the demand side of a foreign bribery transaction. Governments should therefore ensure that public officials that have regular contact with business and the private sector are properly trained and informed of the risks and consequences of bribery.” -OECD Foreign Bribery Report, p. 35*

# Account for the Increasingly Complex Enforcement Environment



# Implement an Effective Whistleblower Response Protocol

**Before reports are made, companies should ensure that they have a system in place to respond to whistleblowers and investigate allegations.**

## BEST PRACTICES

- Review compliance & HR policies / procedures to ensure internal reporting is *easy, accessible and perceived as a corporate priority*. Implement a comprehensive and organized system to catalogue and track complaints.
- Ensure that there are *robust, comprehensive investigative protocols* pursuant to which investigations are handled by *appropriate personnel*.
- Make clear that all 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.
- The SEC has chosen *120 days as key milestones for investigations*, and the Commission will not consider information for award-eligibility unless the reporter waited at least 120 days after making an internal report. Internal investigations that place a company in position to make 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.
- Go beyond Dodd-Frank: In recent years, key markets such as *India* and *China* have implemented (or are considering) new whistleblower protection laws.



Whistleblowing in India exploded in 2014. In Dodd-Frank cases alone, India-based whistleblowers **increased from 18 in 2013 to 69 in 2014.**



# Contact Information



**Kelly S. Austin**

Partner

Hong Kong Office

Tel: +852.2214.3788

Fax: +852.2214.3710

[kaustin@gibsondunn.com](mailto:kaustin@gibsondunn.com)



**Peter Gray**

Partner

Dubai Office

Tel: +971 (0)4 704 6805

Fax: +971 (0)4 370 0388

[pgray@gibsondunn.com](mailto:pgray@gibsondunn.com)



**Joel M. Cohen**

Partner

New York Office

Tel: +1.212.351.2664

Fax: +1.212.351.5264

[jcohen@gibsondunn.com](mailto:jcohen@gibsondunn.com)

# Our Offices

## **Beijing**

Unit 1301, Tower I  
China Central Place  
No. 81 Jianguo Road  
Chaoyang District  
Beijing 100025, China

## **Brussels**

Avenue Louise 480  
1050 Brussels  
Belgium  
+32 (0)2 554 70 00

## **Century City**

2029 Century Park East  
Los Angeles, CA 90067-3026  
+1 310.552.8500

## **Dallas**

2100 McKinney Avenue  
Suite 1100  
Dallas, TX 75201-6912  
+1 214.698.3100

## **Denver**

1801 California Street  
Suite 4200  
Denver, CO 80202-2642  
+1 303.298.5700

## **Dubai**

The Exchange Building 5, Level 4  
Dubai International Finance  
Centre  
P.O. Box 506654  
Dubai, United Arab Emirates  
+971 (0)4 370 0311

## **Hong Kong**

32/F, Gloucester Tower  
The Landmark  
15 Queen's Road Central  
Hong Kong  
+852 2214 3700

## **London**

Telephone House  
2-4 Temple Avenue  
London EC4Y 0HB  
England  
+44 (0)20 7071 4000

## **Los Angeles**

333 South Grand Avenue  
Los Angeles, CA 90071-3197  
+1 213.229.7000

## **Munich**

Marstallstrasse 11  
D-80539 München  
Germany  
+49 89 189 33-0

## **New York**

200 Park Avenue  
New York, NY 10166-0193  
+1 212.351.4000

## **Orange County**

3161 Michelson Drive  
Irvine, CA 92612-4412  
+1 949.451.3800

## **Palo Alto**

1881 Page Mill Road  
Palo Alto, CA 94304-1125  
+1 650.849.5300

## **Paris**

166, rue du faubourg Saint Honoré  
75008 Paris  
France  
+33 (0)1 56 43 13 00

## **São Paulo**

Rua Funchal, 418, 35 andar  
Sao Paulo 04551-060  
Brazil  
+55 (11)3521.7160

## **San Francisco**

555 Mission Street  
San Francisco, CA 94105-2933  
+1 415.393.8200

## **Singapore**

One Raffles Quay  
Level #37-01, North Tower  
Singapore 048583  
+65.6507.3600

## **Washington, D.C.**

1050 Connecticut Avenue, N. W.  
Washington, D.C. 20036-5306  
+1 202.955.8500



# **Additional Reference Materials**

# Overview: FCPA

## What is the Foreign Corrupt Practices Act?

The FCPA was enacted in 1977 in the wake of reports that 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.

## Enforcement Agencies



### Department of Justice

- Criminal enforcement of the anti-bribery provisions
- Civil enforcement of anti-bribery provisions (except issuers)
- Criminal enforcement of the accounting provisions (books-and-records and internal controls)

### Securities and Exchange Commission

- Civil enforcement of the first anti-bribery provision (issuers)
- Civil enforcement of the accounting provisions (books-and-records and internal controls)



# Overview: FCPA

## Who is covered by the FCPA?

- **Issuers:** Any company whose securities (including level two and level three ADRs and registered debt) are registered in the United States or that is required to file periodic reports with the 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 United States (not just U.S. citizens), or any business organization that has its principal place of business in the United States or which is organized in the United States.
  - 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 United States.
  - “Other Persons” must adhere to the FCPA's *Anti-Bribery Provisions*.

# Definition of “Foreign Official”

**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
- Members of royal families

## *11th Circuit Adopts Broad Definition of “Instrumentality”*

In *U.S. v. Esquenazi*,\* the 11th Circuit recently defined an “instrumentality” as an entity that 1) is **controlled** by the 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 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.





# Overview: FCPA

## What Type 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 or 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. person 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 if made with corrupt intent.**

# 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 useful, including:

*“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)*

- Gifts
- Entertainment
- Food and Wine
- Meals
- Internships
- Professional Training
- Loans
- Event Tickets
- Political or Charitable Contributions
- Travel
- Employment
- Consulting Fees
- Electronic Items
- Education
- World Cup/Olympic Tickets



# FCPA Trend #1: Two 2014 Settlements Made Top 10 Resolution List

**Two of 10 corporate FCPA resolutions in 2014 made the list of top 10 monetary settlements in FCPA history.**

## **Alcoa (Jan. 9, 2014 – \$384 million)**

- The DOJ alleged a gain of over \$446 million from bribes paid in connection with a contract to supply aluminum to the Kingdom of Bahrain’s majority-owned smelter.
- According to the DOJ, Alcoa’s fines were significantly reduced in light of its financial condition and “extensive” cooperation.

## **Alstom S.A. (Dec. 22, 2014 – over \$772 million)**

- The DOJ alleges that Alstom “failed” to:
  - 1) Voluntarily disclose the conduct “even though it was aware of related misconduct at [a U.S. subsidiary].”
  - 2) Cooperate with DOJ’s investigation “until after the Department had publicly charged multiple Alstom executives and employees.”

## FCPA Trend #2: Increased Cross-Border Prosecutions

**Several recent FCPA enforcement actions involved cross-border prosecutions.**

### **GlaxoSmithKline Prosecution in China (Sep. 19, 2014)**

- GSK was fined a record 3 billion yuan (~ \$489 million) for allegedly bribing doctors to sell its drugs.
- Former GSK chief *Mark Reilly* and four other executives received suspended prison sentences ranging from two to four years.

### **U.K. Bribery Act Convictions (Dec. 8, 2014)**

- SFO's investigation uncovered serious accounting irregularities, false representations to investors, and false invoices.
- **Gary West**, Sustainable AgroEnergy plc's former Director and Chief Commercial Officer, and **Stuart Stone**, a sales agent of unregulated pension and investment products, were sentenced to four and six years, respectively.
- Stone's and West's criminal convictions were the first convictions under the U.K. Bribery Act.

## **FCPA Trend #3: Significant Role of Multilateral Development Banks**

**Recent FCPA enforcement actions illustrate the significant role of multilateral development banks in corruption investigations.**

### **African Development Bank Enforcement (Mar. 21, 2014)**

- **Kellogg Brown & Root LLC, Technip S.A. and JGC Corp.** paid \$6.6, \$5.3, and \$5.2 million, respectively, to settle corruption allegations in connection with the Bonny Island project.
- The African Development Bank had provided \$100 million in funding.

### **Alstom S.A. (Dec. 22, 2014)**

- Alstom has been subject to a monitorship imposed by the World Bank Integrity Vice Presidency (“INT”) since February 2012.
- In its 2014 DOJ settlement, there was no requirement for a separate monitor so long as INT “concludes that Alstom has implemented a Corporate Compliance Program that complies with the World Bank’s integrity compliance policies and practices.”
- Alstom is required to report annually to DOJ regarding its progress in implementing a compliance program.

# FCPA Trend #4: Shift in Post-Settlement Reporting Obligations

**Recent FCPA enforcement actions demonstrate a shift from monitorships to self-assessments or “hybrid” monitorships.**

## **Avon Products Inc. (Dec. 15, 2014)**

- Agreed to retain an independent compliance monitor for at least 18 months, and to periodically self-report on its compliance and remedial measures for the remainder of the DPA.

## **Alstom S.A. (Dec. 22, 2014)**

- DOJ agreed to rely on the monitorship imposed by the World Bank Integrity Vice Presidency (“INT”) since February 2012, so long as INT “concludes that Alstom has implemented a Corporate Compliance Program that complies with the World Bank’s integrity compliance policies and practices.”

## **Hewlett-Packard (Apr. 9, 2014)**

- Three-year self-assessment; HP will periodically report on the status of its remediation and implementation of compliance measures.

Only one independent monitor required in 10 corporate FCPA resolutions in 2014.



## **FCPA Trend #5: Cooperation and Self-Reporting Are Key to Obtaining Non-Prosecution Agreements**

### **Ralph Lauren (Apr. 22, 2013)**

- The SEC entered into its first NPA, requiring Ralph Lauren to disgorge \$734,846 in profits related to bribes to Argentinian officials from 2005 to 2009.
- Kara Brockmeyer, the SEC's FCPA Unit Chief, credited Ralph Lauren's self-policing, self-reporting, and cooperation for the resolution.

### **Hewlett-Packard Mexico, S. de R.L. de C.V. (Apr. 9, 2014)**

- One of three DOJ resolutions with an HP subsidiary; HP paid ~\$2.5 million in forfeiture for conduct related to Mexico.
- Among the facts considered in entering an NPA, was the subsidiary's and parent company's cooperation.

### **Bio-Rad (Nov. 3, 2014)**

- DOJ and SEC credited Bio-Rad's self-reporting and cooperation.
- Bio-Rad will not be criminally charged provided that it abides by the terms of the two-year NPA with DOJ, which included a \$14.35 million criminal penalty.
- Under the SEC agreement, Bio-Rad was required to pay \$40.7 million in disgorgement and prejudgment interest.

# FCPA Trend #6: Costs of Investigations on the Rise

**Costs of investigations often exceed the settlement itself.**

Matter	Year	Alleged Improper Payment	Settlement Cost	Investigation Cost
Stryker	2013	\$2.2 million	\$13.2 million	\$75 million
Bruker	2014	\$230,000	\$2.4 million	\$24 million
Avon	2014	\$8 million	\$135 million	\$344 million

## **Other costs of non-compliance:**

- Compliance monitorships
- Derivative lawsuits
- Class action lawsuits by investors
- Tax law implications regarding improper payments
- Loss of reputation or goodwill
- Negative effect on stock price
- Impact on mergers and acquisitions
- Difficulties in attracting directors, officers and other employees

## FCPA Trend #7: Derivative and Rule 10b-5 Actions Continue

- **Parker Drilling Company.** On July 31, 2014, the Fuchs Family Trust filed an action in Delaware Chancery Court to enforce its right to inspect Parker Drilling Company's books and records connected to Parker Drilling's April 2013 DOJ/SEC FCPA settlement.
- **Key Energy Services.** On Aug. 15, 2014, a class of Key Energy Services shareholders filed a securities fraud complaint in SDTX, alleging that the company fraudulently concealed from the market that it had been engaging in corrupt business practices in Russia.
- **Avon.** On Sept. 28, 2014, Judge Gardephe of SDNY dismissed without prejudice a securities fraud class action brought on behalf of a class of Avon shareholders. Judge Gardephe did permit plaintiffs an opportunity to amend, and amend they did on Oct. 24, 2014.
- **Alcoa.** On Oct. 22, 2014, Chief Judge Ambrose of WDPA gave preliminary approval to a proposed settlement agreement to resolve the 2012 lawsuit filed on behalf of shareholders of Alcoa Inc. This settlement also will resolve several derivative actions that had been pending in Pennsylvania state court.
- **Cobalt International Energy.** On Nov. 30, 2014, after announcing that it had received a "Wells Notice" indicating that SEC Staff were prepared to recommend charges against the company for alleged FCPA violations in Angola, a putative class of shareholders filed a securities fraud suit in SDTX.
- **Petrobras.** Between Dec. 8 and 24, 2014, Brazilian oil company Petrobras found itself a defendant in four separate securities fraud actions filed in SDNY. These lawsuits follow highly-publicized corruption investigations in Brazil and the United States.

# FCPA Trend #8: “Sweeps” and “Spinoffs”

**DOJ and the SEC continued to target industries via sweeps/spinoffs.**

**Bio-Rad** joined the long line of medical device manufacturers subject to FCPA enforcement actions.

## **Ukrainian VAT Investigation:**

- *Archer-Daniels-Midland Co.* (Dec. 20, 2013)
  - Charges centered on alleged improper payments to Ukrainian officials to secure the release of VAT refunds, which is the same subject of letters sent by the SEC to multiple companies doing business in Ukraine.

## **Financial Service Firm Hiring Practices:**

- Inquiries concerning financial service firm hiring practices, particularly as they relate to family members of government officials in China, continue to sweep throughout Wall Street.

*“[M]ost of what people think of ... as industry sweeps didn’t start out as industry sweeps. They started as a case or two cases and then it became clear that we had a problem. There are certain sectors that have been having recurrent issues. Very occasionally we will look at an industry where there are risk factors, and we will go out with a voluntary request to see whether there might be an issue there where we need to probe more carefully. And if there isn’t anything, that’s great. And if there is we’ll probe in targeted areas but given that we are a regulator, that is one proactive step we do take.”*

- Kara Brockmeyer  
Chief of the SEC’s FCPA Unit

# FCPA Trend #9: Continued Focus on Individuals

**After more than two years without SEC charges against an individual, SEC entered into a settled administrative proceeding in November 2014.**

## FLIR Systems Defendants

- The SEC alleged that *Stephen Timms* and *Yasser Ramahi*, former employees of Oregon-based defense contractor FLIR Systems Inc.'s Dubai office violated the anti-bribery and accounting provisions by providing a “world tour” and expensive gifts to Saudi government officials, and then trying to cover their tracks with false explanations and false documentation for the expenses.



## BizJet International Sales Executives

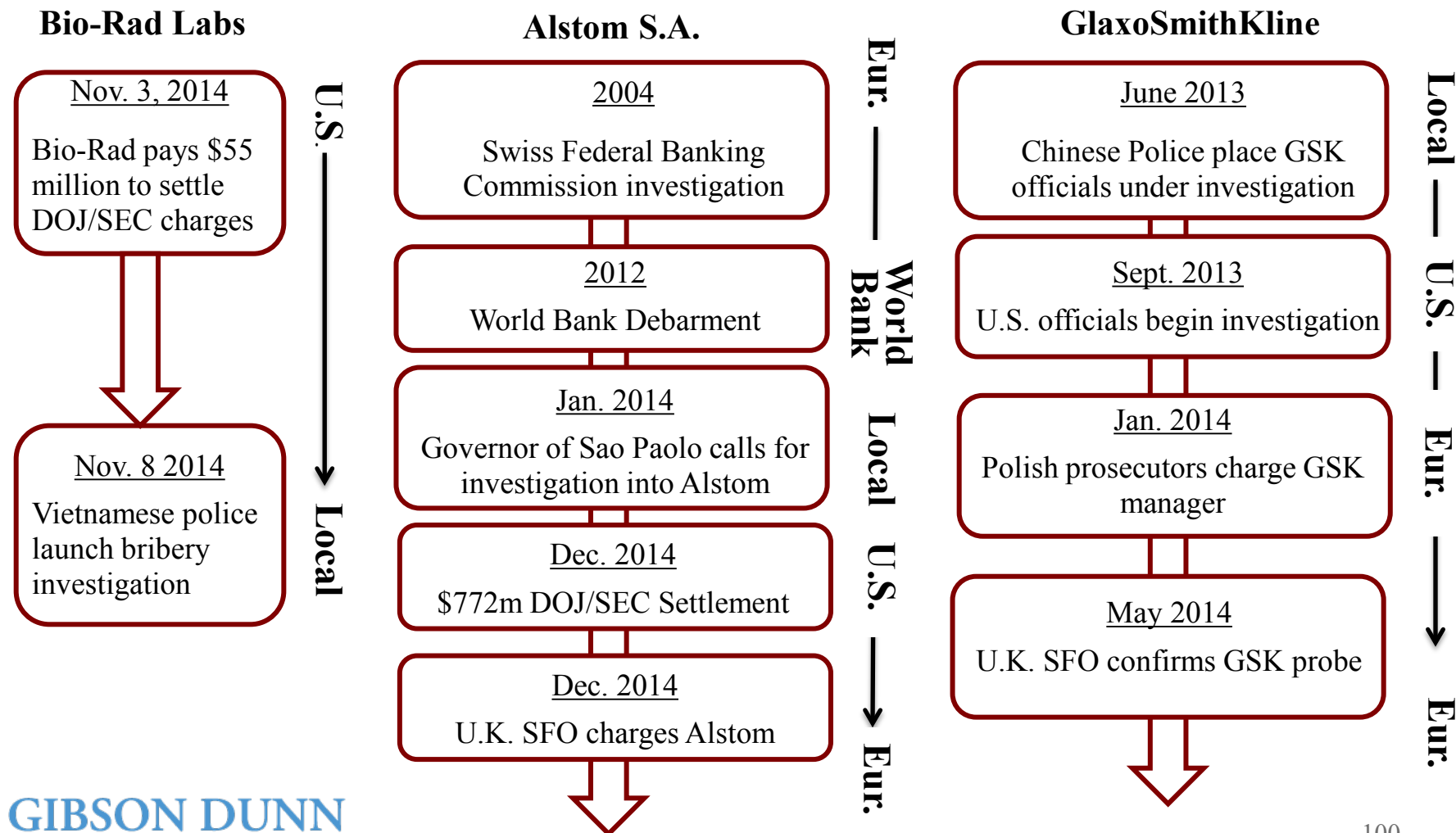
- Charges filed under seal against four defendants, including *Bernd Kowalewski*, in 2011 and 2012, but not announced until 2013 due to efforts by the DOJ to obtain custody over two foreign-located defendants before publicizing the charges.

## PetroTiger Defendants

- Charges filed against the former co-CEOs and general counsel of PetroTiger. According to the charging documents, the defendants collectively made four payments totaling more than \$330,000 to a Colombian state-owned petroleum company.
- One former co-CEO and the former general counsel have entered a guilty plea.

# FCPA Trend #10: Multinational Enforcement

As recent cases show, multinational enforcement may originate both from local enforcement agencies, as well as from nations with foreign bribery laws.





# Chinese Anti-Corruption Laws

Chinese law punishes *both* the giving and taking of bribes. Chinese criminal law includes provisions criminalizing three types of bribery:

1. **Official Bribery:** Criminalizes bribery of “state functionaries” or “government organs.” Harsh penalties applicable, including the death penalty. Accepting bribes of half a million yuan is considered a major bribery offense.
2. **Commercial Bribery:** Criminalizes bribery of “staff of a company or enterprise” and imposes record-keeping obligations. Employers are liable for the acts of their employees.
3. **Foreign Bribery:** In 2011, China amended its criminal law to criminalize bribery of “any foreign public official or official of an international public organization.”



# Indian Anti-Corruption Laws: The PCA

## Prevention of Corruption Act, 1988

- § 7 Prohibits Indian public servants from accepting “*any gratification*” for doing or forbearing an official act.
- § 11 Prohibits Indian public servants from accepting “*any valuable thing*” without consideration or adequate consideration.
- §§ 8-9 Prohibits any person from receiving “*gratification*” for illegally influencing an Indian public servant to do or forbear an official act.
- §§ 10 & 12 Prohibits *abetting any person* to violate the PCA.
- § 19 Government permission required to prosecute a public servant. (Defense personnel cannot be tried by ordinary criminal court.)

## Main PCA Enforcement Agencies



### Central Bureau of Investigation (“CBI”)

- Primary agency for investigating and prosecuting PCA violations in the Central Government. Investigations are largely handled through the CBI’s Anti-Corruption Bureau.



### Central Vigilance Commission (“CVC”)

- Oversees CBI investigations and Chief Vigilance Officers in government organizations.

# Indonesia: Local Law: The Law on Corruption Eradication (“LCE”) and Law on Anti-Bribery or Bribery Offences (“ABLBO”)

## **LCE Article 5 applies to any person(s) who:**

- Gives or promises something to a civil servant or state apparatus with the aim of persuading him/her to perform an action or not to perform an action because of his/her position in violation of his/her obligation; or
- Gives something to a civil servant or state apparatus because of or in relation to something in violation of his/her obligation whether or not it is done because of his/her position.

## **LCE Article 5 applies to any person(s):**

- Offering gifts/payments or promises to a civil servant with a view to abuse the power or authority vested in that post or position, or by the provision of gifts or promises is considered to have vested interests in the post or position.

## **LCE Article 10: Corporate Liability**

- Where a corrupt act is committed by or on behalf of a corporation, *lawsuits and sentences (fines only) may be applied to a corporation or its board of directors*. “Corporation” is defined as an organized collection of people and/or wealth and can be legal and non-legal bodies. “Board” is defined under the LCE as those who have authority to make decisions and policy for the corporation.

## **ABLBO Article 2 applies to:**

- Anyone who gives or promises something to someone with the aim of persuading him/her to perform an action or not to perform an action in his/her authority or obligation related to public interest.