

# Step toe

## FCPA/Anti-Corruption Developments: 2019 Year in Review

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## FCPA/Anti-Corruption Developments: 2019 Year in Review

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### Introduction

US Foreign Corrupt Practices Act (FCPA) enforcement authorities announced a steady stream of individual and corporate enforcement matters throughout 2019, some with eye-popping fines. Overall, the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) reported 50 FCPA-related actions (including 31 by the DOJ and 19 by the SEC) over the course of the year. The \$2.9 billion in total fines, penalties, and disgorgement imposed in corporate FCPA settlements in 2019 nearly matched the record-breaking \$2.91 billion imposed in 2018 in such matters. The DOJ also announced a slew of new charges against individuals and racked up a number of trial victories in existing cases.

Mega settlements reached by two companies made up nearly two-thirds of the \$2.9 billion total corporate penalties imposed in 2019. In the first quarter of the year, Mobile TeleSystems PJSC (MTS) agreed to pay \$850 million in penalties and disgorgement to resolve charges against it, joining the ranks of fellow companies Telia and VimpelCom among the top FCPA fines to date for conduct relating to the Uzbek telecommunications sector. In a strong book-end to the year, Telefonaktiebolaget LM Ericsson (Ericsson) and its subsidiary, Ericsson Egypt Ltd. (Ericsson Egypt), agreed to pay more than \$1 billion in penalties and disgorgement to resolve DOJ and SEC investigations for conduct in multiple countries.

Enforcement against individuals, especially by the DOJ, was also particularly robust in 2019. Overall, the DOJ and SEC brought actions against 27 individuals in 2019 (24 by the DOJ and six by the SEC, with three actions taken in parallel), up from just 13 such actions in 2018. This increase follows through on US authorities' repeated pronouncements in recent years that they would prioritize individual prosecutions, and this commitment is unlikely to diminish any time soon. As Assistant Attorney General Brian Benczkowski reported at a prominent FCPA conference in December 2019, "This number of individual prosecutions in 2019 is not an outlier or a statistical anomaly. Rather, it is part of the Department's continued dedication to holding

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individual wrongdoers accountable across the board.”<sup>2</sup> In addition to these newly filed charges, four individuals were convicted at trial.

US federal courts also issued a number of rulings in 2019 (including in non-FCPA cases) which could affect future FCPA cases, or the investigation thereof. In *Connolly*, for example, the court was critical of the government’s “outsourcing” of its investigation to company counsel without conducting its own parallel investigation. In *Ng Lap Seng*, the court distinguished the meaning of “official act” in the FCPA context from earlier jurisprudence in *McDonnell*. In *Hoskins*, the court defined the circumstances in which a non-US defendant can be held liable for corrupt acts taken outside US territory on the theory he was acting as an “agent” of a US company. And the Supreme Court has determined to resolve in *Liu* whether the SEC may seek disgorgement from a court as “equitable relief” for a securities violation.

International anti-corruption efforts also accelerated, including through new legislative developments across Europe and through a continued focus on anti-corruption enforcement in Latin America. The United States continued multijurisdictional enforcement with Brazilian authorities (in TechnipFMC plc (TFMC) and Samsung Heavy Industries Company Limited (Samsung Heavy Industries)) and, overall, international cooperation efforts were widespread. Notably, MTS featured cooperation across a plethora of jurisdictions including Austria, Belgium, Cyprus, France, Ireland, Isle of Man, Latvia, Luxembourg, the Netherlands, Norway, Sweden, Switzerland, and the United Kingdom. Investigation and enforcement by international financial institutions, particularly the World Bank, also remained active.

Whether 2020 will log any blockbuster FCPA settlements remains to be seen, but we expect that robust anti-corruption enforcement will continue—including through a continued focus on individual prosecutions. In addition, given the DOJ’s updated Guidance on Evaluating Corporate Compliance Programs and related training provided to DOJ prosecutors, companies should expect to see a more uniform and sophisticated review of their corporate compliance programs. Furthermore, companies engaged in projects financed by multilateral development banks should remain alert to the continued risks of multijurisdictional investigations and enforcement.

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<sup>2</sup> Transcript, Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the American Conference Institute’s 36th International Conference on the Foreign Corrupt Practices Act, Oxon Hill, MD (Dec. 4, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-american-conference>.

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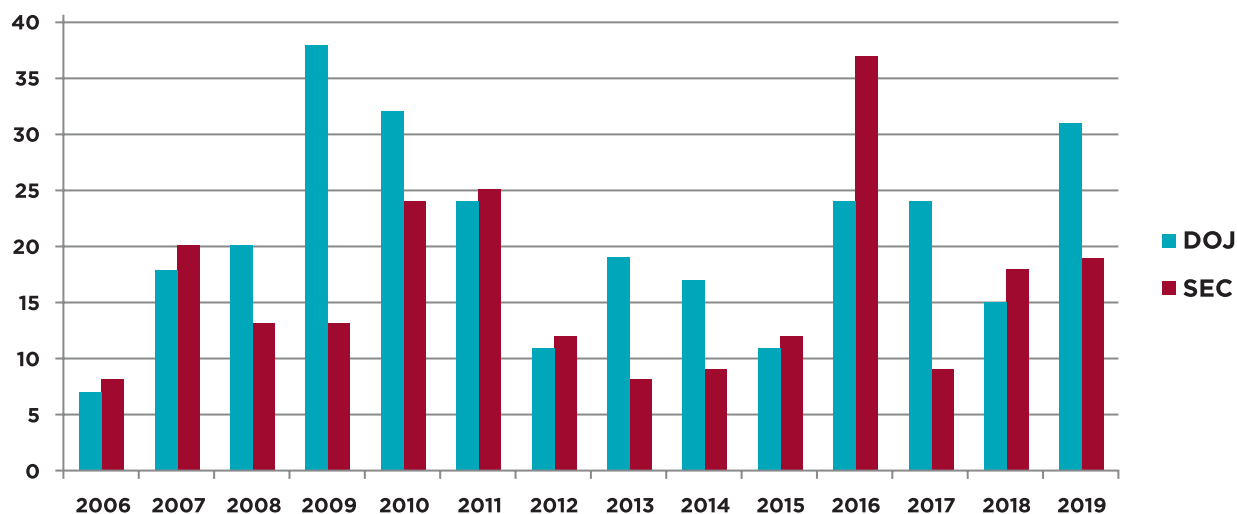
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## I. Enforcement Statistics and Trends

### A. Number of Enforcement Actions

With 50 reported FCPA-related actions against corporations and individuals, 2019 was the most active year for US FCPA enforcement since 2016, when the DOJ and SEC set enforcement records.<sup>3</sup> In 2019, the DOJ brought 31 enforcement actions against individuals and companies, while in 2018, it brought only 15, and in 2017, it brought 24. The SEC, on the other hand, brought 19 enforcement actions in 2019, compared to 18 in 2018 and only nine in 2017.<sup>4</sup> In contrast, 2016 saw 24 DOJ and 37 SEC FCPA enforcement actions.

**Number of Reported Corporate and Individual Prosecutions, 2006-2019**



Fourteen companies faced charges from the DOJ, the SEC, or both in 2019. This is a slight decrease from 2018, in which 16 companies faced charges. These companies were in the telecommunications, oil and gas, financial services, technology, retail, medical goods and services providers, and engineering sectors (among others). The DOJ and SEC brought six parallel corporate enforcement actions, compared to four

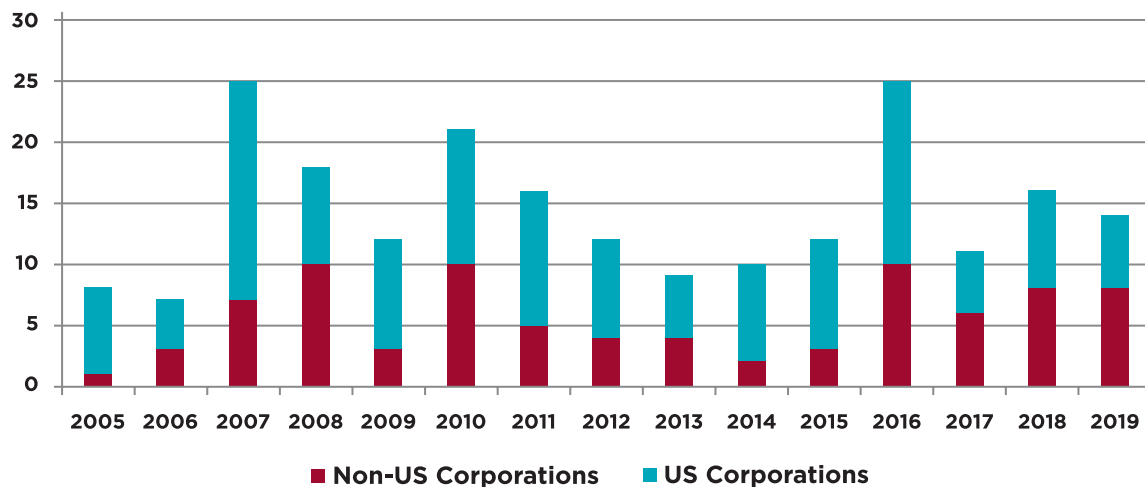
<sup>3</sup> Step toe's methodology takes into account charges brought in 2019 or unreported prior to 2019. With respect to charges brought against companies and individuals, the methodology counts charges involving violations of the FCPA and for conspiracy to violate the FCPA. These statistics do not include non-FCPA foreign corruption-related charges against individuals (such as money laundering charges against corrupt foreign officials), although we discuss such cases herein in Section V, *infra*.

<sup>4</sup> The DOJ and SEC brought a total of 20 corporate FCPA enforcement actions (counting actions against more than one member of the same corporate family, such as those against Ericsson and MTS subsidiaries, as a single action). The 20 corporate enforcement actions include six parallel enforcement actions by the DOJ and SEC against the same companies (*Ericsson*, *Fresenius Medical Care AG & Co. KGaA* (FMC), *Microsoft Corporation* (Microsoft), *MTS*, *TFMC*, *Walmart Inc.* (Walmart)) (excluding declinations under the DOJ FCPA Corporate Enforcement Policy), one separate action by the DOJ (*Samsung Heavy Industries*), and another seven separate actions by the SEC (*Barclays PLC* (Barclays), *Cognizant Technology Solutions* (Cognizant), *Deutsche Bank AG* (Deutsche Bank), *Juniper Networks* (Juniper), *Quad/Graphics* (Quad), *Telefônica Brasil S.A.* (Telefônica), *Westport Fuel Systems, Inc.* (Westport)).



in 2018 and three in 2017. Six of the 14 companies facing charges in 2019 were US-based corporations, while eight were foreign firms:<sup>5</sup>

## Continued Focus on Foreign Corporations, 2005-2019



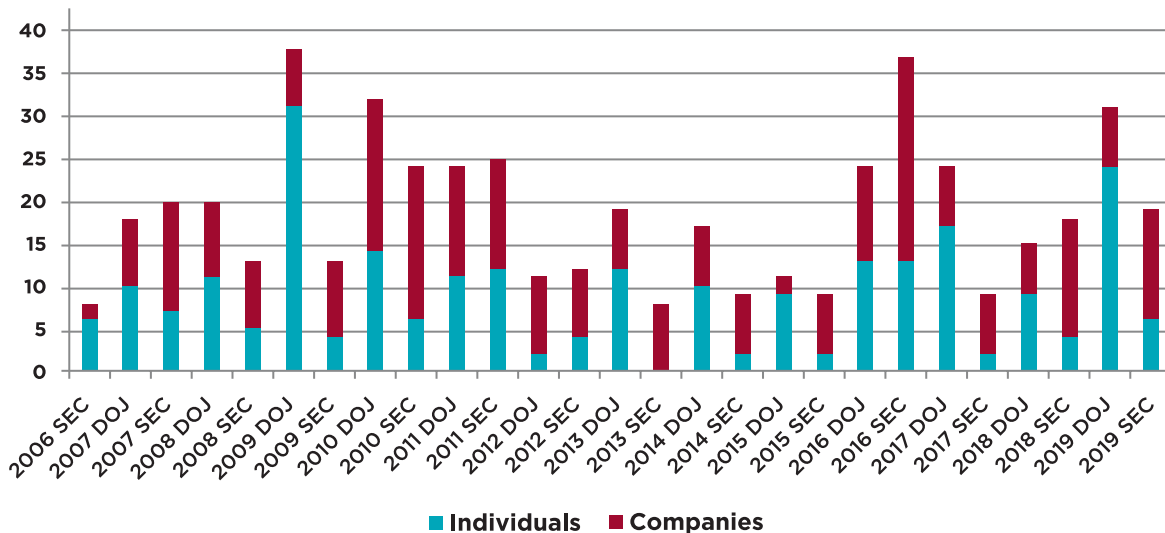
In total, US enforcement authorities brought charges against 27 individuals in 30 actions in 2019. Of these, the DOJ brought 24 actions, while the SEC brought six (three of which were brought in parallel against individuals who also were subject to DOJ charges). The number of charges brought against individuals is a significant increase (especially by the DOJ) from the 13 enforcement actions that were brought in 2018 (during which nine actions were brought by the DOJ and four by the SEC). This increase is in keeping with US authorities’ repeated pronouncements in recent years that prosecuting individuals is a priority.<sup>6</sup> As Assistant Attorney General Brian Benczkowski reported at the 36<sup>th</sup> International Conference on the FCPA, this trend is likely to continue.<sup>7</sup>

<sup>5</sup> For purposes of Steptoe’s count, the US-based companies include Cognizant, Juniper, Microsoft, Quad, TFMC, and Walmart. Although TFMC is a global company headquartered in London, Houston, and Paris, it is included as a US-based corporation for the purpose of these statistics. One of TFMC’s predecessor companies, FMC Technologies Inc., was based in the United States, and was involved in the alleged misconduct. In addition, TFMC’s wholly-owned US subsidiary, Technip USA, Inc., also settled charges with US authorities in 2019 for related conduct.

<sup>6</sup> See, e.g., Memorandum from Sally Quillian Yates, Deputy Attorney General, US DEP’T OF JUSTICE (Sept. 9, 2015) (Yates Memo), <http://www.justice.gov/dag/file/769036/download> (last accessed Jan. 5, 2020); Transcript, Attorney General Jeff Sessions Delivers Remarks at the Ethics and Compliance Initiative Annual Conference, Washington, D.C. (Apr. 24, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual>. This policy was reiterated in remarks made by Deputy Attorney General Rod Rosenstein at American Conference Institute’s 35<sup>th</sup> International Conference on the Foreign Corrupt Practices Act (FCPA) in 2018 and associated revisions to the DOJ’s Justice Manual (formerly the US Attorney’s Manual). See Transcript, Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute’s 35th International Conference on the Foreign Corrupt Practices Act, Oxon Hill, MD (Nov. 29, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>.

<sup>7</sup> Transcript, Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the American Conference Institute’s 36th International Conference on the Foreign Corrupt Practices Act, Oxon Hill, MD (Dec. 4, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-american-conference> (“This number of individual prosecutions in 2019 is not an outlier or a statistical anomaly. Rather, it is part of the Department’s continued dedication to holding individual wrongdoers accountable across the board.”).

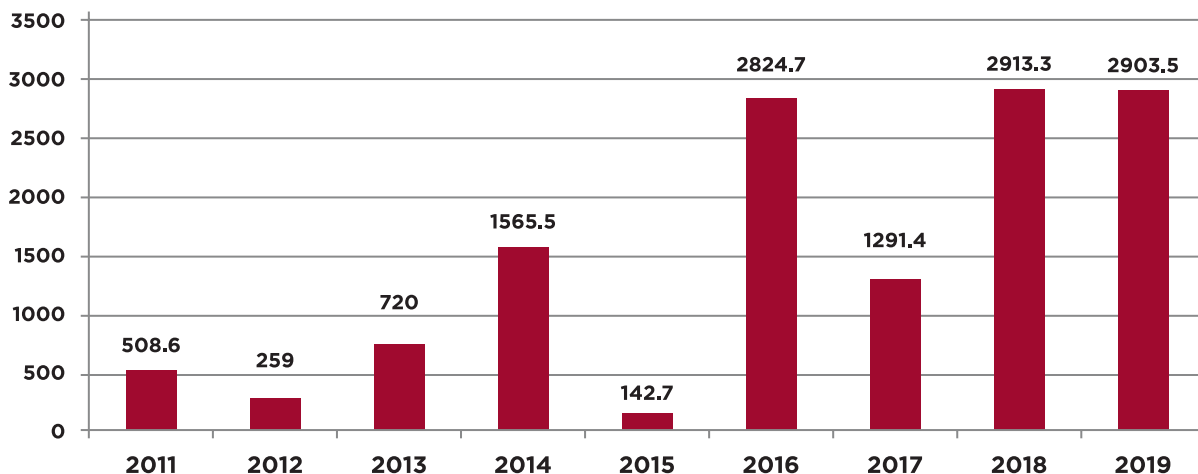
## Number of Reported Prosecutions, 2006-2019



The DOJ also issued two formal declinations this year under the FCPA Corporate Enforcement Policy, in addition to the corporate enforcement actions noted above. Both declinations (*Cognizant* and *Quad*) were issued in parallel with related SEC actions and credited disgorgement the companies agreed to pay to the SEC.<sup>8</sup>

### B. Monetary Sanctions<sup>9</sup>

#### FCPA Corporate Fines, 2011-2019 (Millions USD)



The aggregate dollar value of monetary sanctions imposed by the DOJ and the SEC for FCPA-related offenses in 2019 was approximately \$2.9 billion—\$2.65 billion of which was payable to the US Treasury.<sup>10</sup> This aggregate amount of \$2.9 billion is just slightly lower than 2018’s record high of approximately \$2.91 billion, of which

<sup>8</sup> As noted above, for the purpose of these statistics we have considered these actions to be SEC enforcement actions only (and not parallel actions). For a discussion of these cases, see Section IV, *infra*.

<sup>9</sup> All values reported in US Dollars unless otherwise specified.

<sup>10</sup> The totals include penalties, disgorgement and interest. The difference between fines imposed and paid to the US Treasury reflects credits to payments to other authorities.

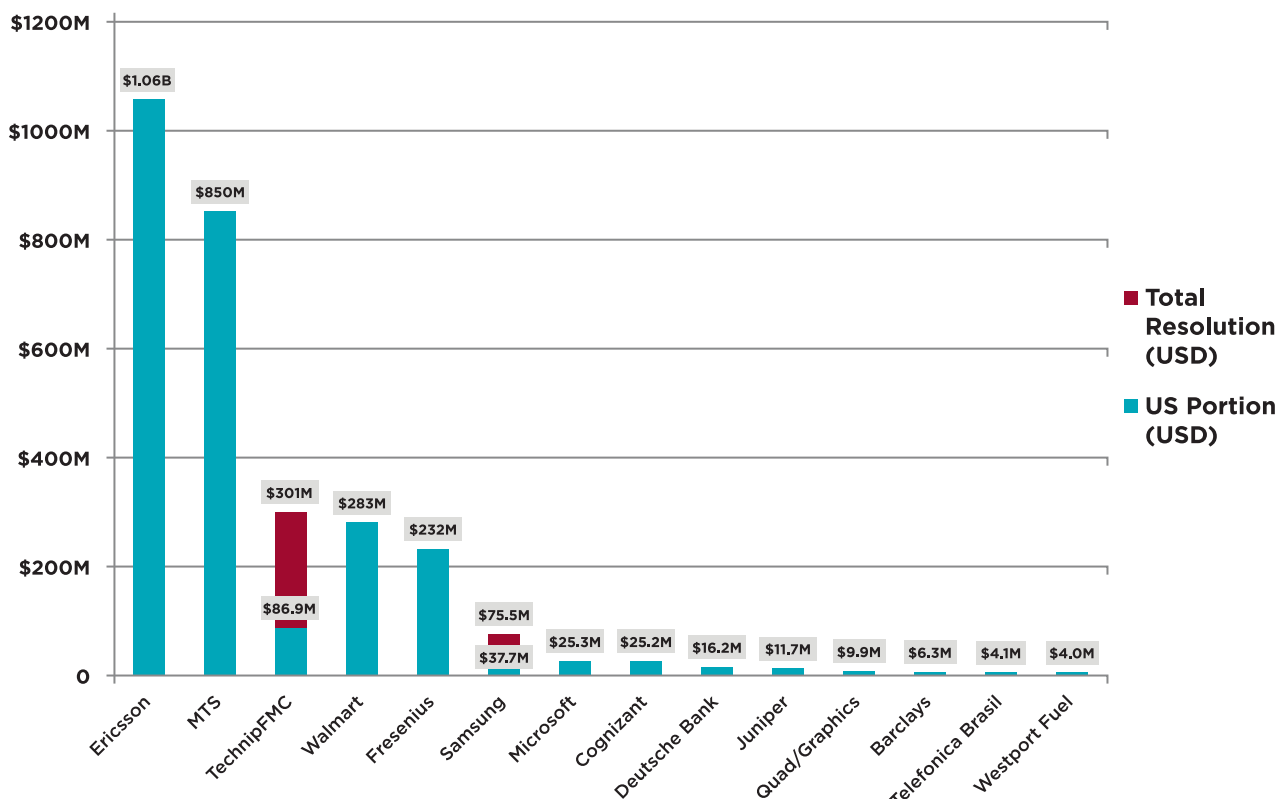
\$1.95 billion was payable to the US Treasury. Mega settlements involving just two companies, Ericsson and MTS, made up nearly two-thirds of this total.

The *Ericsson* settlement involved charges of conspiracy to violate the FCPA’s anti-bribery, books and records, and internal control provisions. The underlying conduct, which involved the company’s alleged use of third parties and provision of travel and entertainment to officials and their families to win business and obtain insider information, allegedly spanned five countries and more than seventeen years. Ericsson paid approximately \$1.06 billion in penalties, disgorgement, and prejudgment interest, all of which was paid to the US Treasury.

The second highest settlement in 2019, *MTS*, followed on the heels of other notable FCPA enforcement actions in the Uzbek telecom sector (including *VimpelCom* in 2016 and *Telia* in 2017), all of which involved payments to the same Uzbek official, Gulnara Karimova. MTS agreed to pay \$850 million to resolve the charges, also all payable to the US Treasury.

Even the smallest settlements from 2019 were still substantial—over \$4 million each. Those matters include, for example, *Telefônica*, which settled with the SEC for violating the FCPA’s accounting provisions in connection with providing World Cup and Confederation Cup tickets to government officials, and *Westport*, which also settled with the SEC for anti-bribery, books and records, and internal control violations in connection with a bribery scheme involving its shares in a Chinese joint venture to secure business and a cash dividend payment.

## 2019 FCPA Corporate Enforcement Resolutions



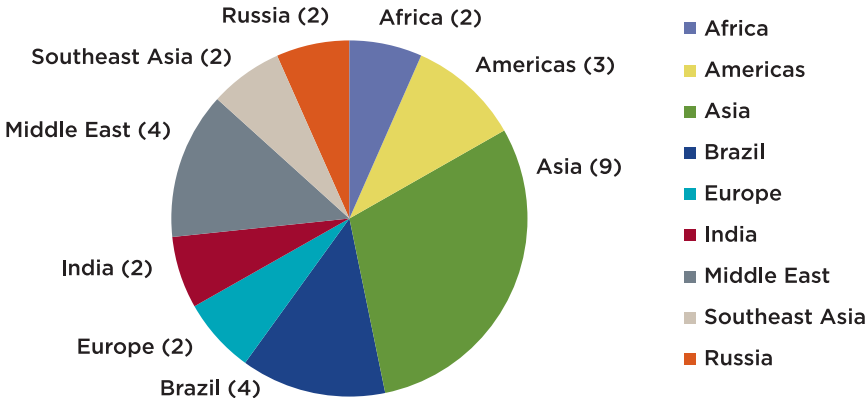
Two enforcement actions from 2019 involved multijurisdictional enforcement, both with Brazilian authorities. In *TFMC*, the company agreed to pay approximately \$214 million of its \$301.2 million total penalty to Brazilian authorities. And in *Samsung Heavy Industries*, the company agreed to pay half of its \$75 million penalty to Brazilian authorities. In addition to acknowledging assistance from Brazilian authorities, the DOJ also acknowledged assistance from authorities in Monaco and Switzerland in conducting its investigation of Samsung Heavy Industries.

There were several other notable examples of international cooperation in 2019. For example, with respect to *MTS*, US authorities acknowledged assistance from authorities in Austria, Belgium, Cyprus, France, Ireland, Isle of Man, Latvia, Luxembourg, the Netherlands, Norway, Sweden, Switzerland, and the United Kingdom. The DOJ and SEC also credited Brazil, India, and Mexico with help in their investigation of Walmart, and the SEC acknowledged Canadian assistance in its investigation of Westport.

**C. Geography of Conduct**

Consistent with past years, FCPA corporate enforcement activity in 2019 was based on misconduct that occurred in diverse jurisdictions. Asia (including China, Indonesia, Thailand, Uzbekistan, and Vietnam) continued to be the most common venue for misconduct. India also continued to be a common venue in 2019, as did Brazil. Other misconduct in the Americas in 2019 took place in Mexico and Peru. In Europe, other than in Russia, misconduct occurred in Bosnia, Hungary, Serbia, Spain, and Turkey. Within the Middle East, misconduct occurred in Iraq, Kuwait, and Saudi Arabia. And in Africa, countries in which misconduct occurred were Angola, Benin, Burkina Faso, Cameroon, Chad, Djibouti, Gabon, the Ivory Coast, Morocco, Niger, and Senegal.<sup>11</sup>

**2019 Locus of Corrupt Conduct Cited in Corporate Cases**



<sup>11</sup> Many enforcement actions are listed as occurring in more than one location due to the global nature of the underlying conduct. For example, conduct alleged in *Ericsson* (Africa, Asia, Middle East, Southeast Asia); Walmart (Brazil, Middle East); *FMC* (Africa, Americas, Asia, Europe, and Middle East); *Microsoft* (Europe, Middle East, Southeast Asia); *Deutsche Bank* (Asia, Russia); *Juniper* (Asia, Russia); and *Quad* (Americas, Asia) all crossed regional boundaries. Our methodology includes only one enforcement action counted per region where misconduct occurred in more than one country per region. In *FMC*, for example, misconduct occurred in Angola, Turkey, Saudi Arabia, Morocco, Benin, Burkina Faso, Cameroon, the Ivory Coast, Niger, Gabon, Chad and Senegal, Spain, Bosnia, China, Serbia, and Mexico. Accordingly, our methodology treats this misconduct as occurring in five regions reflected in the graph (Africa, Americas, Asia, Europe, and the Middle East).

## D. Nature of Conduct

Enforcement actions brought in 2019 involved a variety of conduct. Alleged payment schemes included: bid rigging and discounts (*Microsoft*), sham consulting agreements (*FMC* and *Ericsson*), provision or purchase of shares in joint ventures (*FMC* and *MTS*), gifts and travel (*FMC* and *Ericsson*), and payments through charities and other third parties (*FMC* and *Ericsson*), among others. The *Walmart* matter involved allegations of internal control deficiencies surrounding the engagement of third-party intermediaries to obtain store permits and licenses.

Enforcement authorities also brought an enforcement action that raised the interesting question of who constitutes a foreign official for purposes of the FCPA. In *MTS*, authorities alleged that the telecommunications company paid bribes to a former foreign official and daughter of the former president of Uzbekistan, Gulnara Karimova, who had influence over the Uzbek governmental body that regulated the telecom industry, to use her influence to enter the Uzbek market, gain valuable telecom assets, and continue operating in Uzbekistan. However, Karimova did not hold a formal role in the Uzbek telecom sector. Although she held government positions (unrelated to the telecom sector), her influence appears to have stemmed from her family connections.

Of the seven corporate enforcement actions the DOJ brought in 2019, six of which were brought in parallel with the SEC, two (*Samsung Heavy Industries* and *TFMC*) involved allegations with a familiar fact pattern—conspiring to bribe executives of Brazil’s state-controlled oil company, *Petróleo Brasileiro S.A.—Petrobras* (*Petrobras*). As discussed in the Steptoe’s [2018 FCPA/Anti-Corruption Year in Review](#), the DOJ and SEC have brought numerous enforcement actions involving payments to *Petrobras* officials.

For its part, the SEC continued to rely on the FCPA accounting provisions when bringing enforcement actions in 2019, as it did in 2018, but it also made more use of the FCPA’s anti-bribery provisions than in 2018. All 13 of the corporate enforcement actions brought by the SEC in 2019 alleged both books and records and internal control violations. Seven of those (including three not brought in parallel with the DOJ) also included anti-bribery violations—an increase from 2018, in which only three of the SEC’s 14 corporate enforcement actions alleged anti-bribery violations.

Several of the 2019 SEC enforcement actions highlight emerging and continuing trends that are worth watching. First, the SEC has continued to support alleged accounting violations by citing payments to private customers (in addition to government officials). For example, the SEC alleged that *Microsoft*’s subsidiaries provided improper travel and gifts to employees of non-government customers, that *Barclays PLC* (*Barclays*) hired relatives and friends of executives of non-government clients to win investment banking business, and that a *Quad* subsidiary approved sham invoices from third-party vendors to make improper “commission” payments to private customers. This underscores that the FCPA’s books and records provisions are not limited to payments to foreign officials and instead extend to all transactions and expenditures of issuers.

Second, the *Quad* action serves as a reminder of the risks associated with mergers and acquisitions. According to the SEC, Quad/Graphics was a small company with a domestic focus before 2010, when, as a result of an acquisition, it became a large international company. The SEC alleged that the company failed to implement adequate anti-corruption policies, procedures, controls, training, resources, and audits to address the increased risks presented by its expansion. This case and others like it from past years reinforce the need for acquiring companies to conduct appropriate due diligence and carry out prompt testing, training, and integration.

Third, the SEC has continued to bring enforcement actions against financial institutions based on their hiring practices in the Asia-Pacific region, following resolutions reached in recent years with JPMorgan, BNY Mellon, and Credit Suisse. In 2019, Barclays and Deutsche Bank settled SEC accounting charges relating to the hiring of friends and relatives of foreign officials.

Finally, the *Quad* action alleges accounting violations based in part on concealment of sanctions and export violations related to commercial transactions in Cuba. These allegations are reminiscent of an action brought by the SEC against Weatherford International LTD. in 2013 alleging FCPA accounting violations based in part on improper recording of commercial transactions with Cuba, Iran, Syria, and Sudan in violation of economic sanctions and export control laws.

## **E. Monitors**

The DOJ and SEC imposed four compliance monitors in 2019. This is an increase from only two in 2018 and matches the number imposed in 2017. Of the companies that received the five highest penalty amounts in 2019, four received monitors—Ericsson, MTS, Walmart, and FMC. US authorities cited to their assessment of the current state of the companies' compliance programs in supporting their decisions to impose or not impose a monitor in these cases.

Ericsson and MTS each received a monitor for a period of three years. In instituting that requirement, in both cases, the DOJ stated that the companies' compliance programs had not yet been fully implemented or tested and that a monitor was necessary to reduce the risk of misconduct.

With respect to Walmart, which received a monitor for two years, the DOJ acknowledged that the company had engaged in significant remedial measures but determined that a monitor was necessary to ensure its compliance program was operating effectively and adequately. In imposing a two-year monitor on FMC, the DOJ stated that misconduct had occurred at the company until 2016 and that a compliance monitor was necessary to prevent a recurrence of the conduct at issue.

The company that paid the third highest penalty amount in 2019 (\$301 million, \$87 million of which was payable to the US Treasury), TFMC, did not receive a monitor, although it was required to self-report to DOJ for three years. The DOJ cited the company's compliance and remediation efforts in its determination that a monitor was not necessary. TFMC's avoidance of a monitor, despite the high penalties and serious misconduct at issue in that case, is consistent with DOJ's 2018 guidance

on the use of corporate monitors (addressed in our [2018 FCPA/Anti-Corruption Year in Review](#)) which evaluates, among other factors, a corporation's investment in its compliance program and internal control systems and whether the company has implemented an effective compliance program at the time of resolution.

## II. FCPA Policy Developments

### A. DOJ Revised Corporate Compliance Guidance

On April 30, 2019, the DOJ Criminal Division [announced](#) the publication of an updated [Guidance on Evaluating Corporate Compliance Programs](#) (2019 Guidance). We examined the 2019 Guidance in detail in our May 9, 2019 International Law Advisory, titled [DOJ Revamps Corporate Compliance Program Guidance, Broadens Application](#).

As analyzed in our Advisory, the 2019 Guidance reorganizes and expands on some aspects of prior DOJ guidance in this area. For example, the 2019 Guidance has been reorganized around three “fundamental” questions:

1. Is the compliance program well designed?
2. Is the program being applied earnestly and in good faith (a question the DOJ re-frames as whether the program is “being implemented effectively”)?
3. Does the program work in practice?

The 2019 Guidance then details relevant factors for assessing those questions.

In his remarks at the American Conference Institute’s 36th International Conference on the Foreign Corrupt Practices Act in December 2019, Assistant Attorney General Brian Benczkowski noted the importance of the guidance to “convey to the bar and corporate community that [the DOJ] place[s] a significant value on compliance program investment and improvement” and “will approach compliance program evaluation in a thoughtful way that is guided by much more than 20/20 hindsight.”<sup>12</sup> He further noted that the DOJ has provided “enhanced compliance training” to prosecutors, aimed at “giving them a more sophisticated understanding of compliance program design and the challenges to effective implementation.”<sup>13</sup>

While the 2019 Guidance does not define groundbreaking expectations for those actively engaged in the compliance profession (particularly those familiar with FCPA compliance expectations), the 2019 Guidance is useful in consolidating expectations set forth in various compliance-related guidance materials (including the Justice Manual, United States Sentencing Guidelines (USSG), FCPA Resource Guide, and Organization for Economic Co-operation and Development (OECD) guidance, as well as more recent DOJ guidance on the selection of monitors) in

<sup>12</sup> Transcript, Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the American Conference Institute’s 36th International Conference on the Foreign Corrupt Practices Act, Oxon Hill, MD (Dec. 4, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-american-conference> (last accessed Dec. 22, 2019).

<sup>13</sup> *Id.*



one document, which compliance professionals can reference in formulating and evaluating corporate compliance programs.

## **B. DOJ FCPA Corporate Enforcement Policy**

On November 20, 2019 the Fraud Section of the DOJ's Criminal Division announced changes to its [FCPA Corporate Enforcement Policy](#) (the Policy), which was explored further in our [2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview](#) and our [International Law Advisory](#) about the Policy. The Policy creates a presumption that a company meeting all standards for “voluntary self-disclosure, full cooperation, and timely and appropriate remediation” will have its matter resolved through a public declination with disgorgement, absent certain aggravating factors. The November 2019 update clarifies the standards regarding voluntary disclosure and cooperation.

To receive credit for voluntary disclosure previously, a company had to disclose “all relevant facts known to it, including all relevant facts about all individuals substantially involved in or responsible for the violation of law.”<sup>14</sup> The November 2019 update now requires disclosure of “all relevant facts known to [the company] *at the time of the disclosure*, including as to any individuals substantially involved in or responsible for the *misconduct at issue*.”<sup>15</sup> The DOJ recognizes in a new footnote that “a company may not be in a position to know all relevant facts at the time of a voluntary self-disclosure, especially where only preliminary investigative efforts have been possible.”<sup>16</sup> The Policy also states that a company should inform the DOJ when disclosure is based on preliminary investigative efforts.<sup>17</sup> These changes stress the importance the DOJ places on prompt disclosure, even when a company has not yet been able to conduct a thorough internal investigation into any suspected misconduct.

Similarly, to receive full cooperation credit in the past, the requirement was that a company that “is or should be aware of opportunities for the [DOJ] to obtain relevant evidence not in the company’s possession and not otherwise known to the [DOJ] . . . must identify those opportunities to the [DOJ].” Now a company must simply identify to the DOJ any relevant evidence that it is aware of that is not in its possession.<sup>18</sup> This revision removes language about information in another’s possession that the company “should be aware of,” thereby removing some uncertainty when evaluating a company’s cooperation.

## **C. DOJ Inability to Pay Memorandum**

On October 8, 2019, the DOJ published a [memorandum](#) regarding “Evaluating a Business Organization’s Inability to Pay a Criminal Fine or Criminal Monetary Penalty”

<sup>14</sup> The addition of the words “substantially” and “or responsible for” in the prior requirement for voluntary disclosure credit occurred on March 12, 2019.

<sup>15</sup> DOJ Justice Manual, 9-47.120 – FCPA Corporate Enforcement Policy § 3.a. (updated Nov. 2019), <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977> (last accessed Jan. 6, 2020).

<sup>16</sup> *Id.* at n.1.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* § 3.b.

(Inability-to-Pay Memorandum).<sup>19</sup> The Inability-to-Pay Memorandum is intended as a guide to help DOJ attorneys assess a business entity’s claim that it is unable to pay an otherwise appropriate criminal fine or monetary penalty.<sup>20</sup> Before the DOJ will consider an assertion that an entity is unable to pay, the entity and the DOJ must agree on the form of the corporate criminal resolution (e.g., deferred prosecution agreement (DPA), plea agreement, etc.) and any applicable monetary penalty based on the law and facts.<sup>21</sup>

The business entity asserting an inability to pay has the burden of establishing that inability and must cooperate fully with prosecutors’ inquiries regarding the entity’s ability to pay, including completing the Inability-to-Pay Questionnaire attached as Attachment A to the Inability-to-Pay Memorandum.<sup>22</sup>

The Inability-to-Pay Memorandum lays out the legal considerations under 18 U.S.C. §§ 3572(a) and 3572(b) and the federal Sentencing Guidelines that courts must consider when analyzing an inability-to-pay position, including whether to impose a criminal fine, the amount of the fine, the payment method, and the impact any fine will have on the defendant’s ability to pay restitution to victims.<sup>23</sup> The memorandum then discusses the practical factors that should be considered when assessing an entity’s ability to pay a criminal fine, starting with an analysis of the entity’s financial situation to determine whether payment is feasible without creating concerns over insolvency.<sup>24</sup> The guidance notes that prosecutors generally will need to consult an accounting expert as part of the process. Where “legitimate questions exist” concerning the entity’s ability to pay, prosecutors will consider additional factors, including:

- How the entity ended up in its current financial condition<sup>25</sup>
- Whether the entity has access to alternative sources of capital to pay the fine<sup>26</sup>
- Whether paying the fine will have collateral consequences, like the entity’s ability to fund pension obligations or satisfy other legal requirements, cause layoffs or product shortages, or significantly disrupt marketplace competition<sup>27</sup>
- Whether the proposed monetary penalty will impair the entity’s ability to pay restitution to its victims<sup>28</sup>

If DOJ attorneys believe an organization is unable to pay a penalty, then the handling attorney must recommend an adjustment to the amount of the penalty or an installment schedule to the extent needed to avoid (1) threatening the entity’s

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<sup>19</sup> DOJ Memorandum, Evaluating a Business Organization’s Inability to Pay a Criminal Fine or Criminal Monetary Penalty (Oct. 8, 2019), <https://www.justice.gov/opa/speech/file/1207576/download>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 2 (citing 18 U.S.C. §§ 3572(a), 3572(b); U.S.S.G. §§ 8C2.7, 8C2.9, 8C3.3).

<sup>24</sup> *Id.* at 3.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

viability as a going concern and (2) preventing the entity from making proper restitution to its victims.<sup>29</sup>

#### **D. DOJ Cooperation with SEC**

On October 3, 2019, US Attorney General William P. Barr spoke at the SEC's Criminal Coordination Conference about cooperation between the DOJ and SEC regarding financial crimes.<sup>30</sup> Attorney General Barr highlighted three areas in which "the deepening and increasingly productive relationship between the SEC and the DOJ" are most apparent:

1. A successful record of joint enforcement, including in 2019 in relation to MTS (an FCPA matter) and Power Traders Press (an investment fraud prosecution)
2. The agencies' joint efforts to avoid creating "arbitrary and unnecessary barriers to economic growth," as reflected in the DOJ's policy against piling-on and in several matters in which the DOJ or SEC has credited amounts a defendant has paid to the other authority in reaching a resolution<sup>31</sup>
3. The agencies' efforts in promoting ethical business practices and strong governance, as reflected in the agencies co-chairing the Financial Fraud Working Group and joint publication of the 2012 Resource Guide to the FCPA, which we examined in our [2012 FCPA Year in Review](#) and "[Guidance on the Guidance](#)"

In relation to the final point, Attorney General Barr also noted the DOJ's declination of certain matters under the FCPA's Corporate Enforcement Policy in part based on parallel SEC resolutions (such as in the *Cognizant* and *Dun & Bradstreet* matters).

#### **E. SEC Whistleblower Award Program**

As noted in our [2018 FCPA/Anti-Corruption Year in Review](#) the SEC proposed on June 28, 2018 amendments to section 21F of the Exchange Act, which requires the SEC to provide an award to whistleblowers who provide the SEC with original information about a violation of the securities laws that leads to successful enforcement by the SEC in a covered judicial, administrative, or related action.<sup>32</sup>

Under the proposed rule, the award amounts would consider deferred prosecution and non-prosecution agreements entered into by the DOJ and state attorneys general when calculating whistleblower awards, potentially expanding

<sup>29</sup> *Id.* Criminal Division Attorneys also may make an adjustment to avoid "significant adverse collateral consequence" that, "while severe, may not necessarily threaten the continued viability of the organization." *Id.* at n.4.

<sup>30</sup> William P. Barr, U.S. Attorney General, *Remarks at the U.S. Securities and Exchange Commission's Criminal Coordination Conference* (Oct. 3, 2019), <https://www.justice.gov/opa/speech/us-attorney-general-william-p-barr-delivers-remarks-us-securities-and-exchange-commission>.

<sup>31</sup> Memorandum from Rod J. Rosenstein, Deputy Atty Gen. US DOJ., to Heads of Dep't Components US Atty's, Policy on Coordination of Corporate Resolution (May 9, 2018), <https://www.justice.gov/opa/speech/file/1061186/download>; see also Lucinda A. Low, et al., *Sportsmanlike Conduct? DOJ Announces Policy to Avoid 'Piling On' Monetary Sanctions in Corporate Resolutions*, STEPTOE & JOHNSON LLP INT'L L. ADVISORY (May 14, 2018), <https://www.step toe.com/en/news-publications/sportsmanlike-conduct-doj-announces-policy-to-avoid-piling-on-monetary-sanctions-in-corporate-resolutions.html>.

<sup>32</sup> SEC Press Release No. 2018-120, *SEC Proposes Whistleblower Rule Amendments* (June 28, 2018), <https://www.sec.gov/news/press-release/2018-120>.

award amounts significantly.<sup>33</sup> The proposed rule also changes some of the mechanisms for setting a whistleblower award by allowing the SEC to adjust award amounts upward from \$2 million (subject to a 30% statutory maximum) for low penalty cases and downward (subject to a 10% statutory minimum) to no less than \$30 million for exceedingly high penalty cases.<sup>34</sup>

Although the public comment period for the proposed rule was scheduled to end September 18, 2018, it has continued through 2019, as the SEC posted public comments through at least January 8, 2020.<sup>35</sup> Despite extending the time for public comment, the SEC anticipates adopting the new rules in fiscal year 2020.<sup>36</sup>

## F. CFTC Leniency Program

On March 6, 2019, the US Commodity Futures Trading Commission (CFTC) issued an [advisory](#) on “Self Reporting and Cooperation for [Commodity Exchange Act] CEA Violations Involving Foreign Corrupt Practices” (2019 Enforcement Advisory).<sup>37</sup> The 2019 Enforcement Advisory is the most recent in a series of advisories by the CFTC Division of Enforcement that address how the Division will evaluate individuals’ and companies’ cooperation with its investigations.

The 2019 Enforcement Advisory applies to individuals and companies not registered or required to be registered with CFTC that (1) voluntarily and timely disclose Commodity Exchange Act violations involving foreign corrupt practices, (2) fully cooperate with the CFTC’s Division of Enforcement after the disclosure, and (3) appropriately remediate any violations.<sup>38</sup> If those conditions are met, and no other aggravating circumstances about the offense’s seriousness or offender exist, CFTC’s Enforcement Division “will apply a presumption that it will recommend to the [CFTC] a resolution with no civil monetary penalty.”<sup>39</sup> Aggravating circumstances include (1) the involvement of executive- or senior-level management, (2) the pervasiveness of the misconduct within the company, or (3) whether the wrongdoer has engaged in similar misconduct previously.<sup>40</sup>

Even if the CFTC’s Enforcement Division recommends a resolution with no civil monetary penalty, payment of all disgorgement, forfeiture, and restitution resulting from the misconduct still would be required in addition to any other available remedies, including any civil monetary penalties owed by companies or individuals implicated in the misconduct that did not submit a voluntary disclosure.<sup>41</sup>

<sup>33</sup> See Whistleblower Program Rules, 83 Fed. Reg. 34,702 (proposed July 20, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-07-20/pdf/2018-14411.pdf>.

<sup>34</sup> 17 C.F.R. §§ 240.21F-3; 240.21F-5 (2018).

<sup>35</sup> See SEC Comments on Proposed Rule: Amendments to the Commission’s Whistleblower Program Rules, <https://www.sec.gov/comments/s7-16-18/s71618.htm> (last accessed Jan. 16, 2020).

<sup>36</sup> 2019 Annual Report to Congress on the Dodd-Frank Whistleblower Program, SEC (Nov. 15, 2019), <https://www.sec.gov/files/sec-2019-annual%20report-whistleblower%20program.pdf>.

<sup>37</sup> CFTC Press Release No. 7884-19, CFTC Division of Enforcement Issues Advisory on Violations of the Commodity Exchange Act Involving Foreign Corrupt Practices (Mar. 6, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7884-19>.

<sup>38</sup> CFTC Enforcement Advisory, Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices (Mar. 6, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7884-19>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

During a May 16, 2019 speech at the American Conference Institute's New York Conference on the FCPA, CFTC Director of Enforcement James McDonald clarified that the Division is "not looking to bring actions under the FCPA" but rather is focusing on foreign corrupt practices that violate US commodities laws.<sup>42</sup>

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<sup>42</sup> Nicole Di Schino, *CFTC's Director of Enforcement Explains Decision to Regulate Foreign Corruption*, Anti-Corruption Report (May 29, 2019), <https://www.anti-corruption.com/2745406/cftcs-director-of-enforcement-explains-decision-to-regulate-foreign-corruption.html>.

## III. Significant Judicial Decisions in FCPA Matters and Related Civil Collateral Litigation

US federal courts issued a number of significant rulings in 2019, including in individual FCPA cases, as well as in non-FCPA prosecutions and collateral litigation that could affect future FCPA cases or the investigation thereof.

### A. Significant Judicial Decisions in FCPA Matters

#### 1. *United States v. Ng Lap Seng*

In August 2019, the Second Circuit upheld Ng Lap Seng’s conviction on various bribery, conspiracy, and money laundering charges.<sup>43</sup> Central to the court’s decision was the conclusion that for acts of bribery under 18 U.S.C. § 666<sup>44</sup> and the FCPA, the term “official act”—in the context of a *quid pro quo*—was not limited to the 18 U.S.C. § 201(a)(3) definition of an official act as construed by the Supreme Court in *McDonnell v. United States*.<sup>45</sup>

Ng, a Chinese national and Macau businessman, paid two senior United Nations diplomats, including John Ashe who served as President of the General Assembly, to help procure a contract with the UN to hold an annual conference at one of his properties.<sup>46</sup> The scheme essentially involved payment to the diplomats for their efforts, including public support, internal advocacy, and other activities, to help secure the contract. Ng was convicted in July 2017, sentenced to 48 months imprisonment and ordered to pay fines, forfeiture, and restitution.<sup>47</sup> Ng challenged the conviction on a number of grounds, including the definition of “organization” with respect to § 666, the scope of an “official act” *quid pro quo*, and various jury instruction-related issues.<sup>48</sup>

In affirming Ng’s conviction, the Second Circuit distinguished *McDonnell*, in which the Supreme Court vacated and remanded the conviction of former Virginia Governor Bob McDonnell on the basis that the “official act” standard in 18 USC § 201(a)(3) was not met. In doing so, the Second Circuit clarified that bribery in the context of the FCPA is broader than the “official act” definition in § 201(a)(3).<sup>49</sup> The FCPA, for example, includes language proscribing not only influencing or inducing an official’s decisions or actions, but also “securing any improper advantage” or an official using influence with a foreign government.<sup>50</sup> Because the FCPA defines a

<sup>43</sup> *United States v. Ng Lap Seng*, 934 F.3d 110 (2d Cir. 2019).

<sup>44</sup> This statute targets theft or bribery concerning programs receiving federal funds.

<sup>45</sup> *McDonnell v. United States*, 136 S. Ct. 2355 (2016). *McDonnell*’s application to the FCPA in this case was previously discussed in our [2017 Year-in-Review](#).

<sup>46</sup> *Ng Lap Seng*, 934 F.3d at 117-21.

<sup>47</sup> *Id.* at 121. Ng’s conviction and sentencing were discussed in our [2018 Year-in-Review](#).

<sup>48</sup> *Id.* at 116.

<sup>49</sup> *McDonnell v. United States*, 136 S. Ct. 2355 (2016). For the Second Circuit’s interpretation of *McDonnell*, see *Ng Lap Seng*, 934 F.3d at 130-31.

<sup>50</sup> See 15 U.S.C. §§ 78dd-2(a)(1), 15 U.S.C. §§ 78dd-3(a)(1).

broader list of “quos” than the “official act” standard at issue in *McDonnell* under § 201(a)(3), the Second Circuit upheld Ng’s conviction.

## 2. ***United States v. Hoskins***

On November 8, 2019, a jury found Lawrence Hoskins, a former senior executive at Alstom S.A. (Alstom), guilty for his role in a multi-year, multimillion-dollar foreign bribery scheme and a related money laundering scheme.<sup>51</sup> Hoskins was convicted on six counts of violating the FCPA, three counts of money laundering, and two counts of conspiracy for allegedly hiring two consultants to bribe Indonesian officials to obtain an \$18 million contract with Indonesia’s state-owned electricity company.

Last year, the US Court of Appeals for the Second Circuit ruled that Hoskins—a UK citizen who was employed by a UK subsidiary and acted entirely outside the United States—could not be found liable for conspiring to violate or aiding and abetting a violation of the FCPA’s anti-bribery provisions unless he came within the jurisdictional scope of the statute.<sup>52</sup> This meant that Hoskins had to have acted as an agent, employee, officer, director, or shareholder of the US subsidiary or committed a crime within the territory of the United States.<sup>53</sup> For additional background concerning the 2018 ruling, please see the [2018 FCPA/Anti-Corruption Year in Review](#), [2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview](#) and [Steptoe’s International Law Advisory](#).

As a result, the DOJ’s case against Hoskins turned primarily on whether he acted as an “agent” of Alstom’s US-based subsidiary (Alstom US). Specifically, the DOJ alleged that Hoskins violated the FCPA by directing and authorizing corrupt payments by Alstom US to Indonesian officials. The DOJ’s theory was that, even though Hoskins was employed by a non-US entity, he nevertheless acted as an agent of the US subsidiary.

During pre-trial motions, the parties sharply disagreed about the jury instruction defining the term “agent,” as the FCPA does not define the term. Although the parties agreed that the definition “should be drawn from traditional agency law principles, and include[ ] an element of ‘control,’” they disputed the precise instructions that should be provided to the jury.<sup>54</sup> In response to an August 2019 defense motion, the court declined to decide on the precise contours of the jury instruction but determined that it would follow the Second Circuit’s clear statement and “the understanding of the parties that the principal is to be in control of the undertaking.”<sup>55</sup> In doing so, the court rejected the defendant’s proposed instruction that the principal must control the agent, which according to the court would wrongly suggest to the jury that a higher level of generalized control over the

<sup>51</sup> *United States v. Hoskins*, No. 3:12cr238 (JBA), 2019 WL 7207280 (D. Conn. Nov. 8, 2019).

<sup>52</sup> *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018). *But see United States v. Firtash*, 392 F.Supp.3d 872, 891-92 (N.D. Ill. 2019) (district court in Seventh Circuit declining to follow Second Circuit’s decision in *Hoskins* in denying foreign defendants’ motion to dismiss FCPA charges). So far, the Court of Appeals for the Seventh Circuit has not weighed in on this issue, nor have other appellate courts outside the Second Circuit. It remains an unsettled question in most federal jurisdictions whether the DOJ can use conspiracy charges to reach foreign, non-issuer defendants who do not otherwise fall within the FCPA’s jurisdiction (i.e., as directors, officers, shareholders, employees, or agents of an issuer or domestic concern or based on alleged corrupt acts taken while in US territory).

<sup>53</sup> *Id.* at 96.

<sup>54</sup> *United States v. Hoskins*, No. 3:12cr238 (JBA), 2019 WL 3996634, at \*1 (D. Conn. Aug. 23, 2019).

<sup>55</sup> *Id.* at \*2.

agent was required.<sup>56</sup> Rather, the court found that “the control need only be over ‘the agent’s actions taken on the principal’s behalf.’” As such, the court’s final jury instruction at trial stated that “[t]o create an agency relationship, there must be, one, a manifestation by the principal that the agent will act for it; two, acceptance by the agent of the undertaking; and, three, an understanding between the agent and the principal that the principal will be in control of the undertaking.”<sup>57</sup> Further, the agency relationship does not require a formal agreement and can be “inferred circumstantially from the words and actions of the parties.”<sup>58</sup>

Ultimately, the DOJ persuaded the jury that Hoskins had acted as an agent of the US subsidiary. This jury verdict is a significant victory for the government in light of the Second Circuit’s ruling last year limiting the DOJ’s use of conspiracy and complicity theories against non-US defendants who acted entirely outside US territory. The DOJ is left with considerable room to continue prosecuting non-US persons as officers, directors, shareholders, employees, or agents of a US domestic concern or issuer, even when the defendant took no corrupt acts within US territory.

## **B. Significant Judicial Decisions Relevant to FCPA Investigations and Enforcement**

### **1. *United States v. Connolly***

A ruling in May from the Southern District of New York carries potentially important implications for large-scale internal investigations conducted in coordination with the US government. In *United States v. Connolly*, the court held that employee statements given during an internal investigation may be inadmissible at later trial, if the conduct of the investigation is attributable to the government.<sup>59</sup>

The factual history of the case originates in a US government investigation into alleged manipulation of the London Inter-Bank Offered Rate (LIBOR). As part of that investigation, several US agencies informed Deutsche Bank (DB) that its LIBOR-related practices were being investigated.<sup>60</sup> At the government’s demand, DB appointed outside counsel to conduct an internal investigation into the matter. In addition to counsel’s robust cooperation with the government in an effort to secure cooperation credit, the investigation also involved “considerable direction by” the US government.<sup>61</sup> For example, the government directed that DB’s counsel interview specific personnel (including instructing a DB lawyer to approach one interview “as if he were a prosecutor”), produce certain documents before interviewing a particular employee, and share its findings . . . on a regular basis.”<sup>62</sup> One of those employees, Gavin Campbell Black (who was ultimately terminated and indicted) sought relief on the grounds that his interview statements were “fairly attributable to the government” and “compelled,” in violation of his right against self-incrimination.<sup>63</sup>

<sup>56</sup> *Id.*

<sup>57</sup> See *United States v. Hoskins*, No. 3:12-cr-238 (JBA), 2019 WL 7207278, at \*5 (D. Conn. Nov. 29, 2019).

<sup>58</sup> *Here’s the ‘agent’ instruction from US v. Hoskins*, FCPA BLOG (Dec. 20, 2019), <https://fcgablog.com/2019/12/20/heres-the-agent-instruction-from-us-v-hoskins/> (last accessed Jan. 13, 2019) (quoting the jury instructions).

<sup>59</sup> *United States v. Connolly*, No. 16 Cr. 0370 (CM), 2019 WL 2120523 (S.D.N.Y. May 2, 2019), *appeal filed*, No. 19-3944 (2d Cir. Nov. 22, 2019).

<sup>60</sup> *Id.* at \*2.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* \*3-9, \*14.

<sup>63</sup> *Id.* \*9-12.



In *Connolly*, Chief Judge McMahon ruled that Black had in fact been compelled to participate in interviews that were fairly attributable to the government.<sup>64</sup> In reaching this conclusion, the court found it “critically important” that the government did not conduct its own parallel investigation, but instead “outsourced” and relied on DB’s investigation and downloads as a foundation for its own investigation.<sup>65</sup> And even though the judge did not vacate Black’s conviction or dismiss the indictment—because independently sourced evidence against Black was sufficient to support his conviction—the potential implications for internal investigations are clear. When the government effectively outsources its investigative responsibility to a company or directs the company’s investigation,<sup>66</sup> the investigation may be deemed “attributable to the government” and evidence derived from interviews may well be inadmissible.

In a session on the “FCPA Year in Review” at the 36<sup>th</sup> International Conference on the Foreign Corrupt Practices Act, Charles Cain, Chief of the SEC FCPA Unit, and Christopher Cestaro, Acting Chief of the DOJ FCPA Unit, both suggested that, while *Connolly* serves as a good reminder for properly conducting investigations, the agencies would continue to seek to obtain the benefits of cooperation while ensuring they are not directing internal investigations.<sup>67</sup>

## 2. *Liu v. SEC*

On November 1, 2019, the US Supreme Court granted a writ of certiorari to review the Ninth Circuit case, *Liu v. SEC*.<sup>68</sup> The case will resolve a key question that could have a significant impact on how the SEC seeks remedies in future FCPA cases: whether the SEC may seek disgorgement from a court as “equitable relief” for a securities law violation.

As we explained in our [2017 FCPA/Anti-Corruption Mid-Year Review](#) and Steptoe’s [International Law Advisory](#) on *Kokesh*,<sup>69</sup> the Supreme Court explicitly left open the question of “whether courts possess authority to order disgorgement in SEC enforcement proceedings” in footnote 3 to that decision.

The case is currently set for argument on March 3, 2020.

### C. Significant Civil Collateral Litigation

FCPA investigations again resulted in significant collateral civil litigation last year. These suits included shareholder class actions, claims of defamation and retaliation, restitution, civil RICO, breach of contract, and other civil matters. A brief survey of certain of these cases follows.

#### 1. General Cable Corporation

General Cable Corporation (GC) reached a settlement with the DOJ and SEC in December 2016 related to FCPA violations allegedly committed through certain of its

<sup>64</sup> *Id.* at 14.

<sup>65</sup> *Id.* at 9-12.

<sup>66</sup> The court noted that outside counsel “did everything that the Government could, should, and would have done had the Government been doing its own work.” *Connolly*, 2019 WL 2120523, at \*12.

<sup>67</sup> There is no transcript available for these particular remarks, but Steptoe lawyers in attendance confirm them.

<sup>68</sup> *Liu v. Sec. & Exch. Comm’n*, No. 18-1501, 2019 WL 5659111 (Mem.) (U.S. Nov. 1, 2019).

<sup>69</sup> *Kokesh v. Sec. & Exch. Comm’n*, 137 S. Ct. 1635, 1640-41, 1644-45 (2017).

foreign entities.<sup>70</sup> The settlement required GC to establish an FCPA monitoring and compliance program.<sup>71</sup> From 2012 through 2016, GC regularly submitted SEC filings, informing investors of its financial performance, compliance program, and risks associated with its overall business.

In 2017, a class of shareholders filed suit against GC, alleging that GC and its executives made false and misleading statements about the company's compliance program, the risks that the company faced in overseas markets, and the effectiveness of its internal accounting controls.<sup>72</sup> In an order dated April 30, 2019, Judge William O. Bertelsman granted GC's motion to dismiss, holding that GC's representations regarding its compliance program were not actionable because they contained no assurances that the system was effective.<sup>73</sup> The court disagreed with the shareholders' allegation that GC should have disclosed that its overseas operations would fail if it could not rely on corrupt business practices, finding that the shareholders alleged no facts that GC knew this was the case and, thus, did not have a duty to disclose this as a risk. Finally, the court ruled that the shareholders failed to adequately plead that GC knew that its statements about the efficacy of its internal accounting controls were false.

## 2. OZ Africa Management

On August 29, 2019, Judge Garaufis, of the US District Court for the Eastern District of New York, issued a significant FCPA-related ruling arising from restitution claims under the Mandatory Victims Restitution Act (the MVRA).<sup>74</sup> The suit relates to a \$412 million settlement in 2016 among the DOJ, SEC and Och-Ziff Capital Management Group LLC, the parent company of OZ Africa Management GP, LLC, in which OZ Africa pled guilty to various FCPA violations.<sup>75</sup> The settlement papers detail a two-year scheme in which Och-Ziff agents bribed Congolese officials in exchange for beneficial court rulings. The scheme caused another entity to cede control over a Congolese mine to OZ Africa.<sup>76</sup> The former investors of this entity allege that with the loss of the mine, they lost a promising opportunity and any potential value therefrom. The former investors sought restitution to "make them whole" and claimed that their stakes in the Congolese mine would have been worth \$1.8 billion had development proceeded without Och-Ziff's corrupt practices.<sup>77</sup> However, Judge Garaufis stated that restitution should be calculated based "on the value of these mining rights, as of either 2006-2008 or the present day," rather than on their "full projected value."<sup>78</sup>

<sup>70</sup> Press Release, *General Cable Corporation Agrees to Pay \$20 Million Penalty for Foreign Bribery Schemes in Asia and Africa*, U.S. DEP'T OF JUSTICE, OFFICE OF PUB. AFFAIRS (Dec. 29, 2016), <https://www.justice.gov/opa/pr/general-cable-corporation-agrees-pay-20-million-penalty-foreign-bribery-schemes-asia-and>.

<sup>71</sup> *Id.*

<sup>72</sup> *Doshi v. Gen. Cable Corp.*, 386 F. Supp. 3d 815, 820 (E.D. Ky. 2019).

<sup>73</sup> *Id.*

<sup>74</sup> Mem. & Order, *United States v. OZ Africa Mgmt. Grp., LLC*, 16-515 (NGG) (E.D.N.Y. Aug. 29, 2019), ECF No. 51.

<sup>75</sup> DOJ Press Release, *Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay \$213 Million Criminal Fine* (Sept. 29, 2016), U.S. DEP'T OF JUSTICE, <https://www.justice.gov/opa/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213>; Press Release, *Och-Ziff Hedge Fund Settles FCPA Charges* (Sept. 29, 2016), <https://www.sec.gov/news/pressrelease/2016-203.html>.

<sup>76</sup> Deferred Prosecution Agreement, *United States v. Och-Ziff Capital Mgmt. Grp., LLC*, Cr. No. 16-516 (NGG), A-8 (E.D.N.Y. Sept. 29, 2016), <https://www.justice.gov/criminal-fraud/file/900261/download>.

<sup>77</sup> Mem. & Order, *United States v. OZ Africa Mgmt. Grp., LLC*, 16-515 (E.D.N.Y. Aug. 29, 2019), ECF No. 51.

<sup>78</sup> *Id.* at 9.

Och-Ziff is seeking additional details on individual claimants that the company claims is vital to calculating restitution payments.<sup>79</sup>

The September 29, 2016 plea agreement entered by OZ Africa provided that it would pay “any fine or restitution imposed by the [c]ourt.”<sup>80</sup> On February 20, 2018, two weeks before OZ Africa was scheduled to be sentenced, the former investors filed a motion “requesting confirmation of victim status” and an award of restitution pursuant to the MVRA.<sup>81</sup> The court held that the former investors qualify as victims under the MVRA because they incurred significant losses as a result of the bribes paid by OZ Africa to Congolese officials to secure control of a Congolese mine<sup>82</sup> and that these allegations were sufficient to support OZ Africa’s restitution claim.

### **3. ZimmerBiomet Holdings**

On October 8, 2019, the US Court of Appeals for the Seventh Circuit affirmed a lower court ruling granting Biomet’s motion for summary judgment against an employee alleging defamation after his name was implicated in an FCPA investigation.<sup>83</sup> In 2012 and 2017, the DOJ investigated Biomet for FCPA violations relating to a Latin American subsidiary that had bribed doctors.<sup>84</sup> Biomet entered into deferred prosecution agreements with the DOJ in 2012 and 2017.<sup>85</sup> As part of the 2012 agreement, Biomet distributed a Restricted Parties List (RPL) of individuals who posed a risk to its compliance with anti-corruption and anti-bribery laws.<sup>86</sup> The list included former employee Alejandro Yeatts and a notation regarding his suspension in connection with the corruption investigation of Biomet’s Latin American subsidiary.<sup>87</sup> After Biomet terminated Yeatts, he sued for defamation based on his inclusion on the RPL.<sup>88</sup> The Seventh Circuit held that Biomet’s statement that Yeatts was suspended from his job was true and could not support a defamation claim.<sup>89</sup> The Court also held that Biomet’s assessment that Yeatts posed a risk to its compliance program was an opinion and could also not support a defamation claim.<sup>90</sup>

### **4. Bio-Rad Laboratories**

On February 26, 2019, the US Court of Appeals for the Ninth Circuit considered an appeal of an approximately \$11 million jury verdict in favor of a former general counsel in a whistleblower retaliation law suit under the Sarbanes-Oxley Act (SOX), the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), and California common law.<sup>91</sup> In May of 2015, Sanford Wadler, the former general

<sup>79</sup> Reenat Sinay, *Och-Ziff Wants Details on Investors’ Restitution Claim*, LAW360 (Dec. 10, 2019), <https://www.law360.com/articles/1226996/och-ziff-wants-details-on-investors-restitution-claim> (last accessed Jan. 15, 2020).

<sup>80</sup> *Id.* at 2.

<sup>81</sup> *Id.* at 3.

<sup>82</sup> *Id.*

<sup>83</sup> *Yeatts v. Zimmer Biomet Holdings, Inc.*, 940 F.3d 354, 360 (7th Cir. 2019).

<sup>84</sup> *Id.* at 357.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 358.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 360.

<sup>90</sup> *Id.*

<sup>91</sup> See *Wadler v. Bio-Rad Labs., Inc.*, 916 F.3d 1176 (9th Cir. 2019).

counsel of Bio-Rad Laboratories, Inc., filed suit in the US District Court for the Northern District of California following termination of his employment at Bio-Rad Laboratories. Wadler asserted, and the jury found, that Bio-Rad Laboratories and its CEO Norman Schwartz (the Defendants) had violated SOX, the Dodd-Frank Act, and California public policy by terminating Wadler’s employment in retaliation for his internal report that he believed the company had engaged in violations of the FCPA.

On appeal, the Defendants argued that the district court had erred in instructing the jury that the statutory provisions of the FCPA constituted “rules and regulations” of the SEC for purposes of whether Wadler engaged in “protected activity” under SOX.<sup>92</sup> This instruction stated that “under ‘the rules and regulations of the [SEC] applicable to Bio-Rad,’ it is unlawful to (1) bribe a foreign official; (2) fail to keep accurate and reasonably detailed books and records; (3) knowingly falsify books and records; and (4) knowingly circumvent a system of internal accounting controls.”<sup>93</sup> On appeal, Bio-Rad argued that this instruction was in error because the FCPA is not a rule or regulation of the SEC and is instead a statute. The panel, reviewing *de novo*, agreed, concluding that “§ 806’s text is clear: an FCPA provision is not a ‘rule or regulation of the [SEC].’”<sup>94</sup> In reaching this finding, the Court explained that the plain meaning of “rule or regulation” in the context of SOX is that these words refer only to *administrative* rules or regulations.<sup>95</sup> Accordingly, the panel determined that the jury instruction was given in error and remanded the case to the district court to determine whether a new trial was warranted.<sup>96</sup> The Ninth’s Circuit’s reading of what constitutes an SEC “rule or regulation” may make it more difficult for plaintiffs to show they engaged in protected activity under SOX when reporting FCPA-related concerns.<sup>97</sup>

The panel did not directly review the issue of privilege raised at trial. Specifically, Bio-Rad moved to exclude evidence it claimed was shielded by California’s stringent protections of attorney-client privilege.<sup>98</sup> Bio-Rad argued that Wadler’s claims were “inextricabl[y] intertwined” with Bio-Rad’s privileged and confidential information<sup>99</sup> and that it was Wadler’s burden to show that a fair trial was possible without the disclosure of such information. In response, the SEC filed an amicus brief arguing that SEC regulations implementing SOX’s up-the-ladder reporting requirements for issuers’ counsel preempt conflicting state ethical rules regarding the disclosure of attorney-client communications.<sup>100</sup> Based on Bio-Rad’s express and implied waivers of certain privileged communications, as well as a finding of federal pre-emption, the district court denied Bio-Rad’s motion and permitted Wadler to rely on privileged

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<sup>92</sup> *Id.* at 1181.

<sup>93</sup> *Id.* at 1184.

<sup>94</sup> *Id.* at 1186.

<sup>95</sup> *Id.*

<sup>96</sup> Because the Ninth Circuit found that the jury, if properly instructed, could permissibly find in favor of Wadler based on the falsification of books and records theory, since it is also an SEC regulation (17 C.F.R. § 240.13b2-1), the Ninth Circuit declined to direct a verdict in favor of Wadler.

<sup>97</sup> This may ultimately be an artful pleading issue, as the FCPA’s accounting provisions have associated SEC rules and regulations.

<sup>98</sup> See *Wadler v. Bio-Rad Labs., Inc.*, 212 F. Supp. 3d 829, 833 (N.D. Cal. 2016).

<sup>99</sup> *Id.* at 837.

<sup>100</sup> *Id.* at 843.

communications throughout the trial.<sup>101</sup> The Ninth Circuit did not address this issue directly on appeal.<sup>102</sup>

## 5. Misonix

In April 2019, a judge in the Eastern District of New York issued a significant Order in the ongoing litigation between Cikel (Beijing) Science & Technology Co., Ltd. (Cikel) and Misonix, Inc. (Misonix).<sup>103</sup> The court held that documents related to, and prepared by, outside counsel during an internal investigation would, for the most part, be protected by privilege in subsequent litigation. As noted in our [2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview](#), the *Cikel* case commenced in 2017 when Cikel, a Chinese medical device distributor and marketer, sued Misonix, a US medical device manufacturer, for breach of contract springing from the termination of a multi-year distribution agreement.<sup>104</sup> Cikel alleged that Misonix had wrongfully terminated the agreement. Misonix contended that the agreement was terminated following an investigation that raised concerns about Cikel's business practices vis-à-vis the FCPA and that resulted in Misonix's disclosure of its investigation to the DOJ and SEC and in an SEC filing.<sup>105</sup>

During discovery, Cikel moved to compel the production of documents from the Misonix internal investigation.<sup>106</sup> Misonix argued that materials from the investigation conducted by outside counsel were protected by both attorney-client privilege and the work-product doctrine. Although Cikel countered that Misonix had hired outside counsel to conduct an internal investigation and not for legal advice,<sup>107</sup> the court dismissed Cikel's argument in reliance on the Supreme Court's decision in *Upjohn Co. v. United States* and a case from the Southern District of New York with parallel facts (*In re General Motors Ignition Switch Litig.*). It concluded that communications with counsel conducting the investigation were protected, as they stemmed from the provision of legal advice.<sup>108</sup> Similarly, the court held that documents prepared attendant to the investigation, given its nature, were done in anticipation of the litigation, and therefore protected by the attorney work product doctrine.<sup>109</sup>

The court also ordered Misonix to produce for the court's *in camera* review certain third-party communications, however—namely emails listed on its privilege log exclusively between non-lawyers.<sup>110</sup> It also ordered Misonix to amend its privilege log to list materials counsel prepared during the investigation.<sup>111</sup> The court also ordered

<sup>101</sup> *Id.* at 849.

<sup>102</sup> The Ninth Circuit noted in its opinion that “[i]n a memorandum disposition filed this date, we conclude that the instructional error was not harmless as to the SOX claim” and “also reject Bio-Rad’s challenges to the district court’s evidentiary rulings and the sufficiency of the evidence.” *Wadler*, 916 F.3d at 1182. However, this contemporaneously filed memorandum also does not address the issue of privileged communications.

<sup>103</sup> Order, *Cikel (Beijing) Science & Technology Co., Ltd. v. Misonix, Inc.*, 17-cv-1642-ADS-SIL (E.D.N.Y. Apr. 11, 2019).

<sup>104</sup> Order, *Cikel (Beijing) Science & Technology Co., Ltd. v. Misonix, Inc. et. al.*, No. 2:17-cv-01642-ADS-SIL (E.D.N.Y. Oct. 7, 2017).

<sup>105</sup> *Id.* The SEC has ended its investigation and taken no further action. See Mengqi Sun, *Misonix Says SEC Ends Probe With No Plans for Enforcement Action*, WALL STREET J. (June 24, 2019), <https://www.wsj.com/articles/misonix-says-sec-ends-probe-with-no-plans-for-enforcement-action-11561409664>.

<sup>106</sup> Order, *Cikel (Beijing) Science & Technology Co., Ltd. v. Misonix, Inc.*, 17-cv-1642-ADS-SIL, at 8 (E.D.N.Y. Apr. 11, 2019).

<sup>107</sup> *Id.* at 13-15.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 15,16.

<sup>110</sup> *Id.* at 17.

<sup>111</sup> *Id.* at 18.

that any documents provided to the SEC must also be produced.<sup>112</sup> The case is ongoing, but the implications of the April order and memorandum are instructive. Although communications with outside investigative counsel for the purpose of rendering or receiving legal advice and investigative work product produced in anticipation of litigation remain protected, the case is a reminder of the waiver limitations on privilege, including where investigations by enforcement authorities are involved.

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<sup>112</sup> *Id.* at 19.

## IV. 2019 FCPA Corporate Settlements

### A. DOJ Corporate Enforcement Policy Declinations

#### 1. Cognizant Technology Solutions Corporation

On February 13, 2019, the DOJ issued a declination to Cognizant Technology Solutions Corporation (Cognizant) for payments made to Indian government officials in connection with the construction and operation of its Indian commercial facilities.<sup>113</sup> For a discussion of the underlying facts of this matter, see Section IV.D.1, *infra*.

#### 2. Quad/Graphics Inc.

On September 19, 2019, the DOJ issued a declination to Quad/Graphics Inc. (Quad) under the FCPA Corporate Enforcement Policy for violations of the anti-bribery provisions by Quad's Peruvian and Chinese subsidiaries.<sup>114</sup> For a discussion of the underlying facts of this matter, see Section IV.D.7, *infra*.

### B. DOJ Corporate Enforcement Actions

#### 1. Samsung Heavy Industries Company Limited

On November 22, 2019, the DOJ announced that it had entered into a deferred prosecution agreement with Samsung Heavy Industries Company Limited (Samsung Heavy Industries), a South Korea-based engineering company, based on charges that the company conspired to violate the anti-bribery provisions of the FCPA.<sup>115</sup>

According to the agreement, from 2007 through approximately 2013, Samsung Heavy Industries, through employees based in its office in Houston as well as in South Korea,<sup>116</sup> conspired with a Houston-based offshore oil drilling company to bribe executives of Brazil's state-controlled oil company, Petrobras, in order to ensure that the offshore oil drilling company obtained a lucrative Petrobras contract (which would result in its procurement of an offshore oil drillship from Samsung Heavy Industries). As part of the scheme (similar to many other *Lava Jato* (Car Wash) schemes that have been prosecuted in recent years by the US and/or Brazil), Samsung Heavy Industries agreed to pay \$20 million in commission fees to intermediary companies owned by its Brazilian agents, intending that the fees be

<sup>113</sup> See DOJ Declination Letter, Cognizant Technology Solutions Corp. (Feb. 13, 2019), <https://www.justice.gov/criminal-fraud/file/1132666/download>.

<sup>114</sup> See DOJ Declination Letter, Quad/Graphics Inc. (Sept. 19, 2019), <https://www.justice.gov/criminal-fraud/file/1205341/download>.

<sup>115</sup> See DOJ Deferred Prosecution Agreement, *United States v. Samsung Heavy Indus. Co. Ltd.* (Nov. 22, 2019), <https://www.justice.gov/opa/press-release/file/1219891/download>.

<sup>116</sup> The case was brought under 15 U.S.C. 78 dd-3, which requires acts in furtherance of a bribe "while in the territory" of the United States. The DPA points to numerous actions that were taken by company personnel based in Houston involving the third parties, including acts relating to their hiring and payment, to satisfy this requirement.

passed on as bribes to two senior Petrobras executives. The agents then made the payments through a series of transactions involving sham agreements with shell companies.

Samsung Heavy Industries agreed to pay approximately \$75 million in criminal penalties, half of which was paid to the United States and half of which was paid to Brazilian authorities. The penalty was reduced based on Samsung Heavy Industries' remediation and cooperation—although full cooperation credit was not provided based on the company's failure to meet certain DOJ deadlines. The company is also required to report to the DOJ on enhancements to its compliance program for a period of three years. Enforcement authorities in Brazil, Monaco, and Switzerland were credited with providing investigation assistance.

## **C. SEC Enforcement Actions**

### **1. Telefônica Brasil S.A.**

On May 9, 2019, Telefônica Brasil S.A. (Telefônica), a Brazilian telecommunications company with American Depositary Receipts traded on the NYSE, resolved SEC allegations related to violations of the FCPA's accounting provisions associated with a hospitality program during the 2014 World Cup and the 2013 Confederations Cup in Brazil.

The SEC's order alleged that Telefônica provided tickets and hospitality to government officials who were directly involved with, or in a position to influence, legislative actions, regulatory approvals, and business dealings involving the company.<sup>117</sup> In total, Telefônica allegedly provided World Cup tickets and related hospitality to 93 government officials,<sup>118</sup> and Confederations Cup tickets and related hospitality to approximately 34 government officials.<sup>119</sup> The tickets and hospitality had an average cost of more than \$3,000 per guest. In some cases, more than one ticket was provided to a given official so that the official could invite relatives or friends.<sup>120</sup> Recipients included federal congressmen and senators, mayors, ambassadors, and other government officials.<sup>121</sup> The misconduct allegedly occurred between 2012 and 2014.

According to the Order, Telefônica violated the FCPA's internal control provisions by failing to devise and maintain sufficient internal controls over the hospitality program. Telefônica violated the FCPA's books and records provisions by recording the tickets and hospitality as "general advertising and publicity expenses" when "in fact...[they] were given to government officials."<sup>122</sup> Without admitting to or denying the allegations, Telefônica agreed to a cease-and-desist order and to pay a \$4.125 million civil money penalty to resolve the charges.

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<sup>117</sup> Order Instituting Cease-and-Desist Proceedings, *In the Matter of Telefônica Brasil*, SEC Exch. Act Release No. 85819, Accounting and Auditing Enforcement 2 (May 9, 2019) <https://www.sec.gov/litigation/admin/2019/34-85819.pdf>.

<sup>118</sup> *Id.* ¶ 8.

<sup>119</sup> *Id.* ¶ 12.

<sup>120</sup> *Id.* ¶ 8.

<sup>121</sup> *Id.* ¶ 9.

<sup>122</sup> *Id.* ¶ 18.



The SEC considered the remedial acts promptly undertaken by Telefônica and its cooperation throughout the investigation, including enhancing its internal accounting controls and compliance functions and adopting a new anti-corruption policy and compliance structure.<sup>123</sup>

## 2. Deutsche Bank AG

On August 22, 2019, continuing the trend of FCPA cases involving hiring by financial institutions (such as JPMorgan and BNY Mellon) Deutsche Bank AG (Deutsche Bank) agreed to an SEC cease-and-desist order to resolve alleged violations of the FCPA's books and records and internal control provisions related to certain hiring practices in the Asia-Pacific region and Russia between 2006 and 2014.<sup>124</sup> Deutsche Bank is a multinational financial services company incorporated and domiciled in Germany and listed on the New York Stock Exchange.<sup>125</sup>

According to the SEC order, Deutsche Bank allegedly hired relatives at the request of foreign officials employed by entities from which Deutsche Bank sought business in China and Russia. The order alleged that certain Deutsche Bank Asia-Pacific employees circumvented Deutsche Bank's hiring policies and procedures, including by arranging for Deutsche Bank's joint venture to hire various referral candidates who failed to satisfy Deutsche Bank's hiring standards.

Deutsche Bank employees in Russia allegedly hired candidates that had been referred to it by senior Russian government officials and executives of Russian state-owned enterprise (SOEs), despite concerns expressed by Deutsche Bank hiring personnel about the qualifications of the candidates. The SEC further alleged that Deutsche Bank personnel in Russia took one referral hire and her father, a Russian SOE executive, on a hunting and fishing trip that should not have been recorded as a legitimate business expense. The order alleged that the referral hires in China and Russia resulted in Deutsche Bank winning contracts with Chinese and Russian SOEs and the Russian government.

Deutsche Bank did not admit or deny the allegations in the SEC order.<sup>126</sup> To resolve the SEC's investigation, it agreed to pay \$16,178,850 in disgorgement (\$10.76 million), prejudgment interest (\$2.39 million), and a civil penalty (\$3 million).<sup>127</sup> The SEC considered Deutsche Bank's cooperation and remedial efforts in the cease-and-desist order.<sup>128</sup> Remedial efforts included, among others, enhancing Deutsche Bank's internal accounting controls, anti-corruption compliance program, and training; improving its global procedures for vetting and monitoring candidates referred by clients, potential clients, and government officials; and making personnel and staffing changes.<sup>129</sup>

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<sup>123</sup> *Id.* ¶ 20.

<sup>124</sup> See Order Instituting Cease-and-Desist Proceedings, *In re Deutsche Bank AG*, SEC Exch. Act Release No. 86,740 (Aug. 22, 2019), <https://www.sec.gov/litigation/admin/2019/34-86740.pdf>.

<sup>125</sup> See *id.* ¶ 4.

<sup>126</sup> See *id.* § II.

<sup>127</sup> See *id.* § IV.B.

<sup>128</sup> See *id.* ¶ 43.

<sup>129</sup> See *id.* ¶ 45.

### 3. Juniper Networks, Inc.

On August 29, 2019, the SEC issued a cease-and-desist order against Juniper Networks, Inc. (Juniper) alleging books and records and internal control violations related to conduct by Juniper’s subsidiaries operating in Russia, JNN Development Corp. (JNN), as well as in Hong Kong, Juniper Networks R&D Ltd., and China, Juniper Networks Shanghai Ltd. (together, Juniper China), between 2008 and 2013.<sup>130</sup> Juniper is a California-based networking equipment products and services provider that is listed on the New York Stock Exchange.<sup>131</sup>

According to the SEC order, sales employees in JNN’s Russian representative office secretly agreed with third party channel partners to increase discounts on sales made through the channel partners.<sup>132</sup> But instead of passing those discounts on to the end customers, the sales employees and channel partners allegedly agreed to divert the increased discounts to “common funds” held by the channel partners for travel and marketing expenses.<sup>133</sup> The JNN employees involved falsely told senior management that the increased discounts were needed for competitive reasons.<sup>134</sup> According to the SEC, the transactions were structured as additional discounts to keep the funds off Juniper’s books so that the JNN employees and the channel partners could use the funds without obtaining proper internal approvals.<sup>135</sup> The diverted money allegedly was used to fund trips for end customer employees, including foreign officials, that were inconsistent with Juniper’s policies, had little to no legitimate business purpose, and were predominantly leisure in nature.<sup>136</sup> For example, the order states that, although Juniper had no facilities there, trips included visits to Italy, Portugal, and various US cities and involved sightseeing tours, visits to amusement parks, and meals and entertainment for customers and, in some cases, their family members. Internal communications allegedly suggested that the purpose of certain trips was to “speed up” bookings and to avoid the loss of sales. In late 2009, a senior manager at the time discovered the off-book accounts funded by improper discounts and instructed the employees involved to discontinue their actions. The SEC considered this remediation ineffective, as the employees continued the conduct until 2013.<sup>137</sup>

From 2009 to 2013, Juniper China employees allegedly falsified trip agendas to obtain approval and pay for excessive travel and entertainment of customers, including foreign officials, in violation of Juniper’s policies.<sup>138</sup> Further, Juniper’s legal staff responsible for approving the hospitality allegedly approved the expenses after they had been incurred despite Juniper’s policy that hospitality must receive pre-approval.<sup>139</sup>

<sup>130</sup> See Order Instituting Cease-and-Desist Proceedings, *In re Juniper Networks, Inc.*, SEC Exch. Act Release No. 86,812 (Aug. 29, 2019), <https://www.sec.gov/litigation/admin/2019/34-86812.pdf>.

<sup>131</sup> See *id.* ¶ 5.

<sup>132</sup> See *id.* ¶¶ 2, 9.

<sup>133</sup> See *id.*

<sup>134</sup> See *id.* ¶ 9.

<sup>135</sup> See *id.* ¶ 10.

<sup>136</sup> See *id.* ¶ 11.

<sup>137</sup> See *id.* ¶ 12.

<sup>138</sup> See *id.* ¶¶ 14-15.

<sup>139</sup> See *id.* ¶ 15.

Juniper did not admit or deny the allegations in the SEC order,<sup>140</sup> but it agreed to pay \$11.75 million in disgorgement (\$4 million), prejudgment interest (\$1.25 million), and a civil penalty (\$6.5 million) to resolve the charges.<sup>141</sup> The SEC considered Juniper's cooperation, including the timely disclosure of facts discovered during an internal investigation initiated after learning of the SEC's investigation and its remedial efforts in the cease and desist order.<sup>142</sup> Juniper's remedial efforts included, among others, enhancing the company's policies, procedures, and internal controls; requiring compliance pre-approval of non-standard discounts and of certain higher-risk third-party expenditures; improving the company's compliance function by centralizing the department through an empowered chief compliance officer; establishing an independent and expert investigations function; requiring escalation of serious issues to Juniper's board of directors; and conducting additional anti-corruption trainings.<sup>143</sup>

#### **4. Westport Fuel Systems, Inc.**

On September 27, 2019, the SEC issued a cease and desist order against Westport Fuel Systems, Inc. (Westport) and its former chief executive officer, Nancy Gougarty, alleging anti-bribery, books and records, and internal control violations related to conduct by Westport, acting through Gougarty and others, in China between 2013 and 2016.<sup>144</sup> Westport is a Vancouver-based Canadian clean fuel technology company that is listed on the NASDAQ and the Toronto Stock Exchange.<sup>145</sup> Further, Westport wholly owns a subsidiary in Hong Kong, which in turn held a stake in a Chinese joint venture (JV) with a Chinese state-owned entity (SOE-1) and a Hong Kong conglomerate.<sup>146</sup>

According to the SEC order, Westport engaged in a bribery scheme involving transferring its shares in a Chinese JV to secure business and a cash dividend payment. Specifically, in March 2013, SOE-1 proposed taking the JV public in China at the direction of the Chinese government official.<sup>147</sup> The JV's manager misrepresented to Westport that the JV would need to be restructured so that SOE-1 held a majority interest in the JV to file for an initial public offering under Chinese law.<sup>148</sup> To accomplish that, Westport and the Hong Kong conglomerate would transfer some of their shares to SOE-1 and a Chinese private equity fund (in which the government official held a financial interest).<sup>149</sup>

Early in the negotiations regarding the JV's restructuring, Westport allegedly learned that the government official had a significant financial interest in the Chinese private equity fund set to receive the transferred shares.<sup>150</sup> On Gougarty's

<sup>140</sup> See *id.* § II.

<sup>141</sup> See *id.* § IV.B.

<sup>142</sup> See *id.* ¶ 20.

<sup>143</sup> See *id.* ¶ 21.

<sup>144</sup> See Order Instituting Cease-and-Desist Proceedings, *In re Westport Fuel Systems, Inc. and Nancy Gougarty*, SEC Exch. Act Release No. 87,138 (Sept. 27, 2019), <https://www.sec.gov/litigation/admin/2019/34-87138.pdf>.

<sup>145</sup> See *id.* ¶ 4.

<sup>146</sup> See *id.*

<sup>147</sup> See *id.* ¶ 6.

<sup>148</sup> See *id.*

<sup>149</sup> See *id.*

<sup>150</sup> See *id.* ¶ 10.

recommendation, Westport allegedly conditioned the share transfer on Westport securing a long-term sales agreement with the JV.<sup>151</sup> As the negotiations progressed, Westport faced growing financial pressure as its performance dipped due to falling oil prices, which made Westport willing to accept a lower price for the transferred shares despite knowing that the government official sought a low valuation to “‘make quick and big money’ outside the scrutiny of [the] Chinese regulators.”<sup>152</sup> After the transaction closed (which included the share transfer, execution of a long-term supply agreement with the JV, and a cash dividend of 20% above what was provided for in the JV agreement), Westport and Gougarty allegedly falsified internal books and records and public filings to hide the private equity fund’s involvement in the transaction, contrary to Westport’s internal controls and procedures.<sup>153</sup> In addition, Gougarty allegedly executed a false certification to Westport’s outside auditors concerning Westport’s internal controls (charges against Gougarty are described in more detail at Section V.K, *infra*).

The SEC noted that, while Westport’s policies required due diligence to be conducted when engaging third-party vendors and required anti-corruption clauses to be included in vendor contracts, the company’s policies failed to require due diligence to be conducted when engaging in a business transaction with an entity in which a government official may hold an interest and failed to require the use of anti-corruption clauses when engaging in such transactions.<sup>154</sup>

Westport did not admit or deny the allegations in the SEC order.<sup>155</sup> To resolve the SEC’s investigation, it agreed to pay \$4.05 million in disgorgement (\$2.35 million), prejudgment interest (\$196,000), and a civil penalty (\$1.5 million) to resolve the charges.<sup>156</sup> Gougarty also agreed to pay a \$120,000 civil money penalty.<sup>157</sup> The SEC considered Westport’s cooperation and remedial efforts in the cease-and-desist order.<sup>158</sup> Remedial efforts included, among others, enhancing Westport’s anti-bribery and anti-corruption and compliance policies, procedures, and training programs; establishing specific internal controls for transactions involving foreign entities or government officials; and mandating due diligence for those transactions.<sup>159</sup> Westport also agreed to self-report to the SEC on its compliance and remedial measures for a two-year period.

## 5. Barclays PLC

On September 27, 2019, Barclays PLC (Barclays), a bank holding company headquartered in London, settled charges with the SEC related to books and records and internal control violations of the FCPA associated with hiring the relatives and friends of foreign government officials (so called “relationship hires”) in order to

<sup>151</sup> See *id.* ¶ 11.

<sup>152</sup> See *id.* ¶ 12.

<sup>153</sup> See *id.* ¶¶ 18-21.

<sup>154</sup> See *id.* ¶ 16.

<sup>155</sup> See *id.* § II.

<sup>156</sup> See *id.* § IV.D.

<sup>157</sup> See *id.* § IV ¶ E.

<sup>158</sup> See *id.* ¶ 28.

<sup>159</sup> See *id.* ¶ 29.

obtain or retain investment banking business.<sup>160</sup> Barclays agreed to a cease-and-desist order and to pay more than \$6 million to resolve the charges.<sup>161</sup>

The SEC order alleged that between 2009 and 2013, Barclays Asia Pacific Region (APAC) provided “valuable employment” to more than 100 “relatives and friends of government officials and executives of non-government clients” to win investment banking business.<sup>162</sup> These relationship hires allegedly were made through an unofficial internship program, a formal internship program, and a “graduate program,” as well as into permanent positions.<sup>163</sup>

Although Barclays’ anti-corruption policy prohibited providing employment in exchange for business, the SEC found that Barclays failed to implement training, monitoring, and other internal accounting controls around its hiring practices sufficient to provide reasonable assurances that its employees did not engage in transactions in violation of corporate policy.<sup>164</sup> For example, Barclays APAC bankers and compliance personnel allegedly lacked familiarity with and understanding of Barclays’ anti-bribery and corruption policies, particularly as those policies related to hiring.<sup>165</sup> In addition, Barclays APAC employees allegedly falsified corporate records to conceal the true source of certain candidates and the reason for hiring them from the compliance department.<sup>166</sup> In some instances, relationship hires were made without consulting the compliance department. In others, compliance allegedly approved hires even when it knew business was pending or being sought, including in circumstances where employees identified that the justification for the hire was the potential for future business.<sup>167</sup> The SEC noted that in some cases candidates were hired despite performing poorly in interviews or otherwise falling below the bank’s standards.<sup>168</sup>

Barclays voluntarily disclosed these relationship hires to the SEC. In addition, the SEC considered the company’s cooperation and remedial acts, including strengthening its compliance program and firing senior executives and other employees involved in the misconduct, when determining whether to accept Barclay’s offer of settlement.<sup>169</sup> Barclays did not admit or deny the allegations, but agreed to pay \$3.82 million in disgorgement, \$984,040 in prejudgment interest, and a \$1.5 million civil penalty—totaling more than \$6.3 million.

## **D. Parallel DOJ/SEC Enforcement Actions**

### **1. Cognizant Technology Solutions Corporation**

On February 15, 2019, the SEC settled charges that a New Jersey-based corporation, Cognizant Technology Solutions Corporation (Cognizant), violated the

<sup>160</sup> See SEC Press Release, *SEC Charges Barclays with FCPA Violations Related to Its Hiring Practices* (Sept. 27, 2019), <https://www.sec.gov/enforce/34-87132-s>.

<sup>161</sup> *Id.*

<sup>162</sup> Order Instituting Cease-and-Desist Proceedings, *In the Matter of Barclays PLC*, SEC Exch. Act Release No. 87132 2 Accounting and Auditing Enforcement (Sept. 27, 2019), <https://www.sec.gov/litigation/admin/2019/34-87132.pd>.

<sup>163</sup> *Id.* ¶ 3.

<sup>164</sup> *Id.* ¶¶ 4 and 41-42.

<sup>165</sup> *Id.* ¶ 8.

<sup>166</sup> *Id.* ¶ 14.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* ¶ 29, 35.

<sup>169</sup> *Id.* ¶ 43.

FCPA's anti-bribery, books and records, and internal accounting control provisions when it authorized a contractor and other third parties to make payments to Indian government officials in connection with the planning, construction, and operation of Cognizant's commercial facilities in India.<sup>170</sup> Just two days earlier, on February 13, the DOJ issued a declination to Cognizant in a related matter.<sup>171</sup>

According to the SEC's cease-and-desist order, Cognizant paid approximately \$3.6 million in bribes to Indian officials between 2012 and 2016 in order to obtain permits and operating licenses for its Indian commercial facilities. The majority of payments were made through Cognizant's contractor and approved by senior executives within Cognizant's US headquarters and/or by Cognizant's Indian subsidiary. The payments were not accurately reflected in Cognizant's consolidated books and records (the contractor was reimbursed through a series of "sham change order requests," while payments for operating licenses were disguised as generic payments to third parties such as "liaison," "consulting," or "miscellaneous" charges).<sup>172</sup> Nor were sufficient accounting controls in place to prevent the misconduct—according to the SEC, "[the] conduct took place in an environment in which Cognizant failed to adequately enforce its corporate anti-bribery and anti-corruption policies."<sup>173</sup>

Cognizant did not admit or deny the allegations contained in the SEC Order but agreed to pay approximately \$19 million in disgorgement and prejudgment interest (including disgorgement to the DOJ relating to its declination), in addition to a \$6 million penalty, to settle the charges. Cognizant was also subject to a two-year reporting term on the status of its remediation and compliance measures. The SEC considered Cognizant's voluntary disclosure of the conduct, cooperation, and remedial actions (including terminating officers and employees, appointing new senior executives, enhancing its compliance function and related controls) in accepting Cognizant's settlement offer. Meanwhile, the DOJ declined to prosecute Cognizant based on the company's voluntary self-disclosure, investigation, cooperation, the nature and seriousness of the offense, lack of prior criminal history, the existence of a pre-existing compliance program (and steps taken to enhance that program), full remediation, adequacy of civil remedies, and assistance in identifying culpable individuals.

Three former Cognizant executives, Gordon Coburn (former President), Steven E. Schwartz (former Chief Legal Officer), and Sridhar Thiruvengadam (former Chief Operating Officer) were also charged in connection with the misconduct, as discussed in more detail at Section V.B, *infra*.

## 2. Mobile TeleSystems PJSC

On March 6 and 7, 2019, following on the heels of other notable FCPA enforcement actions in the Uzbek telecom sector, including VimpelCom in 2016 and Telia in 2017

<sup>170</sup> See Order Instituting Cease-and-Desist Proceedings, *In re Cognizant Technology Solutions Corporation*, SEC Exch. Act Release No. 85,149 (Feb. 15, 2019), <https://www.sec.gov/litigation/admin/2019/34-85149.pdf>.

<sup>171</sup> See DOJ Declination Letter, Cognizant Technology Solutions Corp. (Feb. 13, 2019), <https://www.justice.gov/criminal-fraud/file/1132666/download>.

<sup>172</sup> *Id.* at ¶¶12-17.

<sup>173</sup> *Id.* at ¶3.

(involving payments to the same Uzbek official, Gulnara Karimova), the DOJ and SEC announced that Mobile TeleSystems PJSC (MTS), a Russian corporation, had entered into resolutions relating to charges that the company conspired to violate the anti-bribery and books and records provisions of the FCPA and violated the FCPA's internal control provisions.<sup>174</sup> In a related matter, MTS' Uzbek subsidiary, Kolorit Dizayn Ink LLC (Kolorit), entered into a plea agreement with the DOJ based on a charge that it conspired to violate the FCPA's anti-bribery and books and records provisions.<sup>175</sup>

According to these agreements, from 2004 to 2012, MTS and its related entities paid more than \$420 million in bribes to the benefit of the Uzbek official, Karimova, in order to enter and operate in the Uzbek telecommunications market. Bribes were paid through the purchase of stakes in, or acquisition of, shell companies which Karimova beneficially owned (this included MTS paying an inflated price to acquire Kolorit, an advertising company with no connection to the telecommunications sector), and through donations to charities or sponsorships affiliated with Karimova (including payments which were made in violation of internal procedures requiring pre-approval). When MTS declined to make additional payments, Karimova retaliated by working to expropriate MTS' Uzbek subsidiary, JZ Uzdunrobita (Uzdunrobita). Throughout this period, MTS also worked under a "lax internal control environment [which] included a failure to require approval for certain transactions and a failure to comply with the established management approval requirements with respect to other transactions" (including failing to perform adequate due diligence on third parties and lacking adequate payment controls and an internal audit function).<sup>176</sup> Furthermore, MTS failed to follow corporate procedures with respect to public statements made during the relevant period and improperly recorded the payments in its books and records.

The case raises an important issue as to how US enforcement authorities apply the requirement for there to be a "foreign official" for the FCPA's anti-bribery provisions to be implicated. Karimova, who was also involved in the VimpelCom and Telia matters, is a former Uzbek official and the daughter of the former president of Uzbekistan. Although Karimova served as the Deputy Minister of Foreign Affairs for Cultural Issues and as an Ambassador to the United Nations, the SEC and DOJ have not alleged that she held a formal role in the Uzbek telecom sector (rather, she "had influence over decisions made by [the Uzbek Agency for Communications and Information (UzACI)].").<sup>177</sup> That influence, however, did not appear to derive from her official positions but from her status as a family member. Nevertheless, US prosecutors treated it as satisfying that element of the FCPA. In contrast, a Swedish district court examining charges against Telia executives for similar payments determined that Swedish prosecutors had not established that Karimova was a public

<sup>174</sup> See DOJ Deferred Prosecution Agreement, *United States v. Mobile TeleSystems PJSC* (Feb. 22, 2019), <https://www.justice.gov/opa/press-release/file/1141631/download>; Order Instituting Cease-and-Desist Proceedings, *In re Mobile TeleSystems PJSC*, SEC Exch. Act Release No. 85,261 (Mar. 6, 2019), <https://www.sec.gov/litigation/admin/2019/34-85261.pdf>.

<sup>175</sup> See DOJ Plea Agreement, *United States v. Kolorit Dizayn Ink Ltd. Liab. Co.* (S.D.N.Y. Feb. 22, 2019), <https://www.justice.gov/opa/press-release/file/1141621/download>.

<sup>176</sup> DOJ Deferred Prosecution Agreement, *United States v. Mobile TeleSystems PJSC* (Feb. 22, 2019), ¶ 75, <https://www.justice.gov/opa/press-release/file/1141631/download>.

<sup>177</sup> *Id.* ¶ 7.

official under Sweden’s Bribery Act and Penal Code.<sup>178</sup> In the United States, charges have been unsealed against Karimova and Bekhzod Akhmedov, a former Uzdunrobita executive, for their role in the misconduct—Akhmedov was charged with conspiracy to violate the FCPA as well as with FCPA violations, while both defendants were charged with conspiracy to commit money laundering for transferring funds with an intent to promote the bribery scheme and knowing and attempting to conceal the fact that funds were the proceeds of illegal activity (for a discussion of these charges, see Section V.D, *infra*).

MTS agreed to pay a total of \$850 million, including a \$100 million civil penalty to the SEC and approximately \$750 million to the DOJ (including approximately \$40.5 million in criminal fines and forfeiture on behalf of Kolorit). In resolving the charges, the DOJ considered, among other things, that MTS did not voluntarily disclose the conduct (but did ultimately provide authorities with all facts known to it) and did not receive credit for cooperation or remediation (based on its delays in producing materials, refusing to support interviews with current employees and for failing to take adequate disciplinary measures for responsible employees). MTS was also credited with taking steps to implement adequate anti-corruption controls. Under the terms of the agreements, MTS will be subject to the oversight of an independent compliance monitor for three years.

### **3. Fresenius Medical Care AG & Co. KGaA**

On March 29, 2019, the SEC and DOJ announced that Fresenius Medical Care AG & Co. KGaA (FMC), a German medical product and services provider, agreed to pay over \$231 million to resolve parallel investigations spanning 17 countries and involving allegations that the company violated the FCPA’s anti-bribery, books and records, and internal accounting controls provisions.<sup>179</sup>

The settled charges arose from various payment schemes to publicly-employed health or other government officials resulting in nearly \$30 million in improper payments from 2007÷2016. Allegations involved a remarkably diverse array of payment schemes that varied from country to country, including, for example: the provision of shares in joint ventures (in Angola and Turkey); sham contracts or commission agreements (in Angola, Saudi Arabia, Morocco, and West Africa); sham consulting agreements (in Angola, Saudi Arabia, Spain, West Africa, and Bosnia); improper “bonus” payments (in China); improper payments through distributors and agents (in Saudi Arabia, Serbia, and Mexico); payments through third-party freight and logistics companies (in Saudi Arabia); payments through charities run by doctors (in Saudi Arabia and Spain); gifts (in Saudi Arabia and Spain); and travel sponsorships (including luxurious travel with no business or educational justification and travel to medical conferences in Saudi Arabia, Spain, and Serbia).

<sup>178</sup> See James Thomas, *Telia pays US\$208.5 million in disgorgement to the Netherlands*, GLOBAL INVESTIGATIONS REV., Just Anti-Corruption (Mar. 19, 2019), <https://globalinvestigationsreview.com/article/1189010/telia-pays-ususd2085-million-in-disgorgement-to-the-netherlands>.

<sup>179</sup> See Order Instituting Cease-and-Desist Proceedings, *In re Fresenius Medical Care AG & Co. KGaA*, SEC Exch. Act Release No. 85,468 (Mar. 29, 2019), <https://www.sec.gov/litigation/admin/2019/34-85468.pdf>; DOJ Non-Prosecution Agreement, *Fresenius Medical Care AG & Co. KGaA* (Feb. 25, 2019), <https://www.justice.gov/criminal-fraud/file/1150566/download>.



Notably, anti-bribery charges were based only on FMC’s conduct in Angola, Saudi Arabia, and West Africa (in the latter case, for the SEC only)<sup>180</sup> while books and records and internal control violations served as the basis for allegations for the remaining countries. Improper payments, including improper payments made by distributors (which were then consolidated into FMC’s records), were not accurately recorded. Nor were sufficient accounting controls in place to prevent the misconduct—according to the SEC, FMC “failed to properly assess and manage its worldwide risks and devoted insufficient resources to compliance” and “[i]n many instances, senior management actively thwarted compliance efforts, personally engaging in corruption schemes and directing employees to destroy records of the misconduct.”<sup>181</sup>

FMC agreed to pay a criminal penalty of just under \$85 million to the DOJ as well as to disgorge \$147 million to the SEC. FMC will also be required to engage an independent compliance monitor for two years, followed by a period of self-monitoring. Although FMC received a reduction in criminal penalties for voluntarily disclosing the conduct, providing the DOJ with all information known, and engaging in remedial measures (including enhancing its compliance program), it received only partial credit for its cooperation because it “did not timely respond to requests by the Department and, at times, did not provide fulsome responses to requests for information.”<sup>182</sup> In calculating criminal penalties, the DOJ also considered the nature and seriousness of the misconduct, including the amount of payments, number of jurisdictions in which misconduct occurred, and pervasiveness of the misconduct (including the involvement of high-level executives). German authorities are reportedly investigating several FMC employees for related conduct.<sup>183</sup>

#### 4. Walmart Inc.

On June 20, 2019, Walmart Inc. (Walmart) entered into a non-prosecution agreement with the DOJ and agreed to a cease-and-desist order with the SEC to resolve allegations of internal control and recordkeeping deficiencies related to the engagement by Walmart subsidiaries of third-party intermediaries in Mexico, Brazil, India, and China to obtain permits and licenses to open new stores.<sup>184</sup> A Brazilian subsidiary also pleaded guilty to one count of knowingly and willfully causing Walmart to maintain false books, records, and accounts.<sup>185</sup>

<sup>180</sup> Jurisdiction for these charges was based on the fact that “FMC employees and agents utilized the means and instrumentalities of U.S. interstate commerce, including the use of internet-based email accounts hosted by numerous service providers located in the United States.” Order Instituting Cease-and-Desist Proceedings, *In re Fresenius Medical Care AG & Co. KGaA*, SEC Exch. Act Release No. 85,468 at ¶1 (Mar. 29, 2019), <https://www.sec.gov/litigation/admin/2019/34-85468.pdf>.

<sup>181</sup> Order Instituting Cease-and-Desist Proceedings, *In re Fresenius Medical Care AG & Co. KGaA*, SEC Exch. Act Release No. 85,468 at ¶5 (Mar. 29, 2019), <https://www.sec.gov/litigation/admin/2019/34-85468.pdf>.

<sup>182</sup> DOJ Non-Prosecution Agreement, *Fresenius Medical Care AG & Co. KGaA*, at 1-2 (Feb. 25, 2019), <https://www.justice.gov/criminal-fraud/file/1150566/download>.

<sup>183</sup> Ian Johnson, *German prosecutors probe dialysis firm Fresenius*, DEUTSCHE WELLE (Oct. 21, 2019), <https://www.dw.com/en/german-prosecutors-probe-dialysis-firm-fresenius/a-50922473>.

<sup>184</sup> DOJ Non-Prosecution Agreement, *Walmart Inc.* (June 20, 2019), <https://www.justice.gov/opa/press-release/file/1175791/download>; Order Instituting Cease-and-Desist Proceedings, *In Matter of Walmart, Inc.*, Sec. Exch. Act of 1934 Release, No 86159 (June 20, 2019), <https://www.sec.gov/litigation/admin/2019/34-86159.pdf>.

<sup>185</sup> See DOJ Plea Agreement, *United States v. WMT Brasilia S.a.r.l.* (June 20, 2019), <https://www.justice.gov/opa/press-release/file/1175771/download>.

As part of the DOJ non-prosecution agreement, Walmart agreed to pay a monetary penalty of \$137.9 million. In light of the company's cooperation and remediation, the penalty reflects a discount of 25% off of the US Sentencing Guidelines fine range for alleged conduct in Brazil, China, and India, and 20% off of the fine range for alleged conduct in Mexico.<sup>186</sup> A portion of the amount paid to the DOJ, \$724,898, was paid by Walmart Brazil.<sup>187</sup> Walmart also agreed to retain an independent corporate compliance monitor for two years.<sup>188</sup> To settle the SEC's charges, Walmart agreed to pay \$144.6 million in disgorgement and pre-judgment interest.<sup>189</sup>

## 5. Technip FMC

On June 25, 2019, TechnipFMC plc (TFMC), an issuer and global provider of oil and gas technology and services, and its wholly-owned US subsidiary, Technip USA, Inc. (Technip USA) agreed to settle charges with US and Brazilian enforcement authorities in connection with two alleged multi-year foreign bribery schemes involving TFMC's predecessor companies, Technip S.A. (Technip) and FMC Technologies, Inc. (FMC), which merged in 2017.<sup>190</sup>

To resolve the DOJ's investigation, TFMC and Technip USA agreed to pay a combined total criminal fine of \$296.1 million as part of TFMC's DPA<sup>191</sup> and Technip USA's plea agreement.<sup>192</sup> TFMC admitted to two counts of conspiring to violate the FCPA's anti-bribery provisions in connection with conduct in Brazil and Iraq, and Technip USA admitted to one count of conspiring to violate the FCPA's anti-bribery provisions in connection with conduct in Brazil.

In addition, TFMC agreed to an SEC cease-and-desist order on September 19, 2019 relating to conduct of its predecessor company FMC in Iraq that allegedly violated the FCPA's anti-bribery, books and records, and internal accounting controls provisions. As part of the settlement, TFMC agreed to pay disgorgement of \$4.3 million and prejudgment interest of \$734,712. No civil penalty was imposed based on the \$296.184 million criminal fine imposed as part of the DOJ resolution.<sup>193</sup>

<sup>186</sup> See DOJ Non-Prosecution Agreement, *Walmart Inc.* 6 (June 20, 2010), <https://www.justice.gov/opa/press-release/file/1175791/download>.

<sup>187</sup> See DOJ Press Release, *Walmart Inc. and Brazil-Based Subsidiary Agree to Pay \$137 Million to Resolve Foreign Corrupt Practices Act Case* (June 20, 2019), <https://www.justice.gov/opa/pr/walmart-inc-and-brazil-based-subsidiary-agree-pay-137-million-resolve-foreign-corrupt>.

<sup>188</sup> See DOJ Non-Prosecution Agreement, *Walmart Inc.* 3 (June 20, 2010), <https://www.justice.gov/opa/press-release/file/1175791/download>.

<sup>189</sup> Order Instituting Cease-and-Desist Proceedings, *In Matter of Walmart, Inc.*, Sec. Exch. Act of 1934 Release, No 86159 14 (June 20, 2019), <https://www.sec.gov/litigation/admin/2019/34-86159.pdf>.

<sup>190</sup> See DOJ Press Release, *TechnipFMC Plc and U.S.-Based Subsidiary Agree to Pay Over \$296 Million in Global Penalties to Resolve Foreign Bribery Case*, OFFICE OF PUB. AFFAIRS (June 25, 2019), <https://www.justice.gov/opa/pr/technipfmc-plc-and-us-based-subsidiary-agree-pay-over-296-million-global-penalties-resolve>.

<sup>191</sup> Deferred Prosecution Agreement, *United States v. TechnipFMC plc*, Case No. 19-cr-278-KAM (June 25, 2019), <https://www.justice.gov/opa/press-release/file/1177316/download>.

<sup>192</sup> Plea Agreement, *United States v. Technip USA, Inc.*, Case No. 19-cr-279-KAM (June 25, 2019), <https://www.justice.gov/opa/press-release/file/1177306/download>.

<sup>193</sup> See SEC Press Release, *SEC Charges Global Oil and Gas Services Company with Violations of the FCPA* (Sept. 19, 2019), <https://www.sec.gov/enforce/34-87055-s>; Order Instituting Cease-and-Desist Proceedings, *In re TechnipFMC plc.*, Sec. Exch. Act of 1934 Release No. 87,055 (Sept. 23, 2019), <https://www.sec.gov/litigation/admin/2019/34-87055.pdf>.

Technip USA was a shareholder in a JV with Keppel Offshore & Marine Ltd. (KOM) in Brazil, established in or about 2003 for the purpose of bidding on oil and gas projects, notably with Brazilian government-controlled oil company Petróleo Brasileiro S.A. – Petrobras (Petrobras). TFMC and Technip USA admitted that, between approximately 2003 and 2014, they caused Technip, its subsidiaries and co-conspirators, including KOM, to make more than \$69 million in corrupt payments to a consultant, with knowledge that a portion of these payments would be used to pay bribes to Petrobras officials, the Workers’ Party, and Workers’ Party candidates for the purpose of securing offshore oil and gas projects.<sup>194</sup> Technip and its subsidiaries earned approximately \$135.7 million in profits from the resulting contracts.<sup>195</sup> KOM and its US subsidiary, Keppel Offshore & Marine USA, Inc., had previously agreed to pay a penalty of more than \$422 million to settle related charges with enforcement authorities in the United States, Brazil, and Singapore in December 2017, as noted in Steptoe’s [2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview](#).

As part of TFMC’s three-year DPA, TFMC also admitted to conduct by its other predecessor company, FMC, between 2008 and 2013, involving a conspiracy to pay and payment of bribes to Iraqi officials during a period that FMC was a US-headquartered issuer. FMC funneled payments through a Monaco-based intermediary, which provided oil and gas sales and marketing services, and various sub-agents to obtain seven contracts for FMC and related entities to provide metering technologies for oil and gas production measurements to the Iraqi government. FMC earned profits of approximately \$5.3 million from the resulting contracts.<sup>196</sup> While the Monaco-based intermediary was not named in the DOJ or SEC settlement papers, FMC’s Form 10-Q filed with the SEC in April 2016 suggests that the intermediary may be Unaoil S.A.M.<sup>197</sup>

Technip had previously resolved FCPA charges with the DOJ in 2010 in connection with bribes paid to Nigerian government officials.<sup>198</sup> As a result of Technip’s recidivism, the fine was assessed near the midpoint of the applicable US Sentencing Guidelines fine range. However, while TFMC and Technip USA did not receive voluntary disclosure credit, the companies received full cooperation and remediation credit, resulting in a 25% reduction of the fine. In addition, based on the companies’ remediation efforts and the state of their compliance program, the DOJ decided

<sup>194</sup> Deferred Prosecution Agreement, *United States v. TechnipFMC plc*, Case No.19-cr-278-KAM, ¶ 2, (June 25, 2019), <https://www.justice.gov/opa/press-release/file/1177316/download>; Information, *United States v. TechnipFMC plc*, Case No. 19-cr-278-KAM, ¶ 37, <https://www.justice.gov/opa/press-release/file/1177321/download>; Plea Agreement, *United States v. Technip USA, Inc.*, Case No. 19-cr-279-KAM, ¶ 1, (June 25, 2019), <https://www.justice.gov/opa/press-release/file/1177306/download>; Information, *United States v. Technip USA, Inc.*, Case No. 19-cr-279-KAM, ¶ 15, (June 25, 2019), <https://www.justice.gov/opa/press-release/file/1177311/download>.

<sup>195</sup> Information, *United States v. TechnipFMC plc*, Case No. 19-cr-278-KAM, ¶ 38, <https://www.justice.gov/opa/press-release/file/1177321/download>; Information, *United States v. Technip USA, Inc.*, Case No. 19-cr-279-KAM, ¶ 16, <https://www.justice.gov/opa/press-release/file/1177311/download>.

<sup>196</sup> Information, *United States v. TechnipFMC plc*, Case No. 19-cr-278-KAM, ¶¶ 57-58, <https://www.justice.gov/opa/press-release/file/1177321/download>.

<sup>197</sup> FMC reported in its Form 10-Q that it received an inquiry from the DOJ in connection with an FCPA investigation into whether certain services Unaoil S.A.M. provided its clients, including FMC. See FMC Technologies, Inc., Form 10-Q (Apr. 28, 2016), <https://www.sec.gov/Archives/edgar/data/1135152/000113515216000043/fmc20160331-10q.htm>.

<sup>198</sup> See DOJ Press Release, *Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty*, OFFICE OF PUB. AFFAIRS (June 28, 2010), <https://www.justice.gov/opa/pr/technip-sa-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-240-million>.

that an independent compliance monitor was unnecessary, although the companies are required to self-report to the DOJ for three years on their compliance and remediation efforts. Of the \$296.18 million total criminal fine imposed on the TFMC and Technip USA, \$81.85 million was payable to the US Treasury. Up to \$214.33 million paid by TFMC to the Brazilian authorities as part of their resolution will be credited by the DOJ towards satisfaction of the total criminal fine.<sup>199</sup>

According to a statement published by TFMC on June 25, 2019, the company continues to cooperate with an ongoing investigation by the French Parquet National Financier (PNF) in connection with projects and Equatorial Guinea and Ghana.<sup>200</sup>

## 6. Microsoft Corporation

On July 22, 2019, the SEC issued a cease-and-desist order against Microsoft Corporation (Microsoft) related to allegations that Microsoft violated the FCPA's books and records and internal control provisions in connection with four different foreign-based subsidiaries' operations in Hungary, Saudi Arabia, Thailand, and Turkey.<sup>201</sup> Without admitting or denying the allegations, Microsoft agreed to pay more than \$16 million to settle the SEC's charges.<sup>202</sup> In addition, Microsoft Magyarország Számítástechnikai Szolgáltató és Kereskedelmi Kft. (Microsoft Hungary), a wholly-owned subsidiary of Microsoft, entered into a non-prosecution agreement with the DOJ to resolve potential FCPA violations arising out of a bid rigging and bribery scheme in connection with the sale of Microsoft software licenses to Hungarian government agencies.<sup>203</sup> Microsoft Hungary agreed to pay a criminal fine of \$8.75 million in connection with the non-prosecution agreement.<sup>204</sup>

According to the SEC Order and the DOJ's NPA,<sup>205</sup> from at least 2013 through 2015, Microsoft Hungary provided discounts on software licenses to its resellers, distributors, and other third parties that went beyond the standard approved discounts.<sup>206</sup> The discounts were used to fund improper payments intended for foreign government officials to secure software license sales for Microsoft.<sup>207</sup> The SEC noted that senior executives in Hungary approved the "excessive discounts" based on "vague justifications without ensuring [the discounts] were passed on to

<sup>199</sup> Deferred Prosecution Agreement, *United States v. TechnipFMC plc*, Case No. 19-cr-278-KAM, ¶¶ 4 and 7, (June 25, 2019), <https://www.justice.gov/opa/press-release/file/1177316/download>; Plea Agreement, *United States v. Technip USA, Inc.*, Case No. 19-cr-279-KAM, ¶¶ 6 and 16, (June 25, 2019), <https://www.justice.gov/opa/press-release/file/1177306/download>.

<sup>200</sup> See TFMC Press Release, *TechnipFMC Reaches Global Resolution of U.S. and Brazilian Legacy Investigations* (June 25, 2019), <https://www.technipfmc.com/en/media/press-releases/2019/06/technipfmc-reaches-global-resolution-of-us-and-brazilian-legacy-investigations>.

<sup>201</sup> SEC Press Release, *SEC Charges Microsoft Corporation with FCPA Violations* (July 22, 2019), <https://www.sec.gov/enforce/34-86421-s-0>.

<sup>202</sup> *Id.*

<sup>203</sup> DOJ Press Release, *Hungary Subsidiary of Microsoft Corporation Agrees to Pay \$8.7 Million in Criminal Penalties to Resolve Foreign Bribery Case* (July 22, 2019), <https://www.justice.gov/opa/pr/hungary-subsidiary-microsoft-corporation-agrees-pay-87-million-criminal-penalties-resolve>.

<sup>204</sup> *Id.*

<sup>205</sup> See DOJ Non-Prosecution Agreement, *Microsoft Magyarország Számítástechnikai Szolgáltató és Kereskedelmi Kft* ¶¶ 12-43 (July 22, 2019), <https://www.justice.gov/opa/press-release/file/1185686/download>.

<sup>206</sup> See Order Instituting Cease-and-Desist Proceedings, *In Matter of Microsoft Corporation*, Sec. Exch. Act of 1934 Release, No 86421 ¶¶ 2, 16-23 (July 22, 2020) <https://www.sec.gov/litigation/admin/2019/34-86421.pdf>.

<sup>207</sup> *Id.*

the end government customers.”<sup>208</sup> In addition, Microsoft Hungary made payments to certain subcontractors in connection with the company’s service agreements with government end customers, in some cases without performing due diligence, without evidence of services provided by the subcontractors, or based on false descriptions of services performed.<sup>209</sup>

The SEC also found that from 2012 through 2015, Microsoft’s subsidiaries in Saudi Arabia and Thailand provided improper travel and gifts to foreign government officials and employees of non-government customers funded through slush funds maintained by Microsoft’s vendors and resellers.<sup>210</sup> And it found that in 2014, Microsoft’s subsidiary in Turkey provided an excessive discount to an unauthorized third party in a licensing transaction for which Microsoft’s records did not reflect any services provided and without evidence that the additional discount was passed on to the Turkish government end user.<sup>211</sup>

The SEC found that Microsoft failed to make and keep adequate documentation related to third-party vendors, consultants, distributors, and resellers and failed to devise and maintain a sufficient system of internal accounting controls throughout the relevant period.<sup>212</sup> The DOJ found that Microsoft Hungary knowingly and willfully caused Microsoft to record improper payments as legitimate discounts in its books, records, and accounts.<sup>213</sup>

Microsoft agreed to pay \$16.56 million in disgorgement and pre-judgment interest to the SEC,<sup>214</sup> and Microsoft Hungary agreed to pay a \$8.75 million penalty to the DOJ.<sup>215</sup> Although Microsoft Hungary did not receive voluntary disclosure credit, it received credit for its cooperation and remedial efforts, resulting in a DPA and a 25% discount off the bottom of the US Sentencing Guidelines fine range. The SEC and the DOJ considered Microsoft’s remedial measures when resolving the charges, including that it enhanced its internal accounting controls and compliance program, took disciplinary action against four MS Hungary employees, terminated four Hungarian licensing partners, enacted new discount transparency and pass-through requirements, created an expanded transaction monitoring initiative at the regional level, and developed and used data analytics to help identify high-risk transactions.<sup>216</sup> As a result of these efforts and the companies’ agreement to self-report for three years to the DOJ on their compliance program and remediation efforts, no independent compliance monitor was required.

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<sup>208</sup> *Id.* ¶ 2.

<sup>209</sup> *Id.* ¶ 16-23.

<sup>210</sup> See Order Instituting Cease-and-Desist Proceedings, *In Matter of Microsoft Corporation*, Sec. Exch. Act of 1934 Release, No 86421 ¶¶ 3, 24-26 (July 22, 2019), <https://www.sec.gov/litigation/admin/2019/34-86421.pdf>.

<sup>211</sup> *Id.* ¶¶ 3, 27.

<sup>212</sup> *Id.* ¶ 4.

<sup>213</sup> DOJ Non-Prosecution Agreement, *Microsoft Magyarország Szamitastechnikai Szolgaltat6 es Kereskedelmi Kft* ¶ 21 (July 22, 2019), <https://www.justice.gov/opa/press-release/file/1185686/download>.

<sup>214</sup> See Order Instituting Cease-and-Desist Proceedings, *In Matter of Microsoft Corporation*, Sec. Exch. Act of 1934 Release, No 86421 ¶ 9 (July 22, 2019) <https://www.sec.gov/litigation/admin/2019/34-86421.pdf>.

<sup>215</sup> DOJ Non-Prosecution Agreement, *Microsoft Magyarország Szamitastechnikai Szolgaltat6 es Kereskedelmi Kft* 5 (July 22, 2019), <https://www.justice.gov/opa/press-release/file/1185686/download>. The SEC did not impose a civil penalty based upon the DOJ’s imposition of a criminal penalty.

<sup>216</sup> See Order Instituting Cease-and-Desist Proceedings, *In Matter of Microsoft Corporation*, Sec. Exch. Act of 1934 Release, No 86421 ¶¶ 33 (July 22, 2019) <https://www.sec.gov/litigation/admin/2019/34-86421.pdf>; DOJ Non-Prosecution Agreement, *Microsoft Magyarország Szamitastechnikai Szolgaltat6 es Kereskedelmi Kft* 2 (July 22, 2019) <https://www.justice.gov/opa/press-release/file/1185686/download>.

## 7. Quad/Graphics Inc.

On September 26, 2019, the SEC issued a cease-and-desist order against Quad/Graphics Inc. (Quad) alleging anti-bribery, books and records, and internal control violations related to conduct by Quad’s subsidiary in Peru, Quad/Graphics Peru S.A. (Quad Peru), between 2011 and 2016 and its subsidiary in China, Quad/Tech Shanghai Trading Company, Ltd. (Quad China), between 2010 and 2015.<sup>217</sup> A week earlier, the DOJ issued a declination in a related matter.<sup>218</sup> Quad is a Wisconsin-based marketing solutions and printing services provider that has been listed on the New York Stock Exchange since 2010.<sup>219</sup>

According to the SEC order, as a result of a July 2010 acquisition, Quad grew from a small, private company with a domestic focus into a large, publicly traded company with a major international presence. Despite this, Quad allegedly failed to implement adequate anti-corruption policies, procedures, controls, training, resources, or auditing to address these increased risks.<sup>220</sup>

Following the acquisition, Quad allegedly engaged in multiple bribery schemes through its subsidiaries in Peru and China to secure business by paying or promising more than a million dollars in bribes.<sup>221</sup> Specifically, the order alleged that Quad Peru approved sham invoices from third-party vendors to make improper “commission” payments to government officials and private customers to secure contracts with those recipients and avoid defaults under existing contracts.<sup>222</sup> Quad failed to conduct due diligence on the sham vendors, several of which shared the same business address and had no real operations. The order alleged that Quad paid the vendors despite the presence of various red flags, like the invoices having the same date or dollar totals and no supporting documentation and falsely reported the expenses in its books and records as “pre-press,” packaging, or other services that were not performed by the vendors.<sup>223</sup> Payments allegedly continued for years after a finance manager reported concerns to a US finance executive.<sup>224</sup>

Similarly, the order alleged that Quad Peru engaged in a judicial bribery scheme with the help of a local law firm in connection with Quad Peru’s challenge to a value-added tax assessment and related fines totaling \$12 million.<sup>225</sup> Quad Peru allegedly used sham invoices from vendors, as well as an invoice for “extraordinary fees” issued by its law firm, to fund the judicial bribes.<sup>226</sup>

Separately, the order alleged that, following the acquisition of Quad Peru’s predecessor entity by Quad in 2010, Quad Peru continued to do business with Cuba

<sup>217</sup> See Order Instituting Cease-and-Desist Proceedings, *In re Quad/Graphics, Inc.*, SEC Exch. Act Release No. 87,128 (Sept. 26, 2019), <https://www.sec.gov/litigation/admin/2019/34-87128.pdf>.

<sup>218</sup> DOJ Declination Letter, Quad/Graphics Inc. (Sept. 19, 2019), <https://www.justice.gov/criminal-fraud/file/1205341/download>.

<sup>219</sup> See Order Instituting Cease-and-Desist Proceedings, *In re Quad/Graphics, Inc.*, SEC Exch. Act Release No. 87,128 ¶ 3 (Sept. 26, 2019), <https://www.sec.gov/litigation/admin/2019/34-87128.pdf>.

<sup>220</sup> See *id.* ¶ 6.

<sup>221</sup> See *id.* ¶ 1.

<sup>222</sup> See *id.* ¶¶ 8-11, 18.

<sup>223</sup> See *id.* ¶¶ 16, 19.

<sup>224</sup> See *id.* ¶¶ 13, 16.

<sup>225</sup> See *id.* ¶¶ 21, 23.

<sup>226</sup> See *id.* ¶¶ 29-32.

in violation of US economic sanctions and export control laws. In particular, Quad Peru made sales to a purported customer that allegedly was used as a pass-through entity for sales to Cuba. The SEC alleged that Quad Peru concealed the transactions in Quad’s emails, contracts, shipping documents, invoices, and journal entries, causing such books and records to be inaccurate. Even after learning of certain prohibited sales to Cuba, US executives allegedly failed to implement adequate internal accounting controls and trade compliance measures to prevent further prohibited transactions with sanctioned countries and persons.<sup>227</sup>

In addition, from 2010 to 2015 Quad China allegedly used sham sales agents to pay bribes to employees of state-owned entities and private customers in China to win business.<sup>228</sup> In particular, Quad China allegedly paid phony commissions, which were described as “technical service fees,” to sales agents that amounted to 2% of the sales order value, which the sales agents would use to make illicit payments.<sup>229</sup> The “commissions” were falsely recorded in Quad’s books and records.<sup>230</sup> The SEC found that Quad failed to maintain sufficient internal controls to detect or prevent the improper payments: Quad China did not conduct due diligence on the sham sales agents or require proof that any services were actually performed, and Quad failed to oversee and audit Quad China’s activities.<sup>231</sup>

Quad did not admit or deny the allegations in the SEC order,<sup>232</sup> but it agreed to pay \$9.89 million in disgorgement (\$6.93 million), prejudgment interest (\$959,160), and a civil penalty (\$2 million) to resolve the charges.<sup>233</sup> The SEC premised the anti-bribery charges on the theory that the Quad subsidiaries acted as “agents” of Quad when engaging in the misconduct. The SEC considered Quad’s self-disclosure, cooperation, and remedial efforts in the cease-and-desist order.<sup>234</sup> Remedial efforts included, among others, terminating the employees involved in the misconduct; enhancing the resources and role of Quad’s compliance function; and improving Quad’s internal policies, procedures, and controls based on a root-cause analysis.<sup>235</sup> Quad also agreed to self-report to the SEC for a one-year period on the status of its compliance and remediation efforts. The DOJ’s decision to decline prosecution was based on Quad’s identification, self-disclosure, and investigation of the misconduct; full cooperation; and remediation (including enhancing its compliance program, terminating the employees involved in the misconduct, and ending its relationships with the third parties involved). Quad agreed to disgorge nearly \$7 million in profits to the SEC.

## **8. Telefonaktiebolaget LM Ericsson and Ericsson Egypt Ltd.**

On December 6, 2019, the DOJ and SEC announced the long-awaited resolution of the case against the telecommunications firm Telefonaktiebolaget LM Ericsson (Ericsson), assessing penalties that vaulted the company into the top ten

<sup>227</sup> See *id.* ¶¶ 37-50.

<sup>228</sup> See *id.* ¶ 51.

<sup>229</sup> See *id.* ¶ 55.

<sup>230</sup> See *id.* ¶ 58.

<sup>231</sup> See *id.* ¶ 58.

<sup>232</sup> See *id.* § II.

<sup>233</sup> See *id.* § IV.C.

<sup>234</sup> See *id.* ¶ 63.

<sup>235</sup> See *id.* ¶ 64.

enforcement cases historically.<sup>236</sup> Ericsson's Deferred Prosecution Agreement with the DOJ was based on charges of conspiracy to violate the anti-bribery provisions (for conduct in Djibouti), as well as the FCPA's books and records and internal control provisions (for conduct in Djibouti, China, Indonesia, Vietnam, and Kuwait). The DOJ settlement included a related action against Ericsson's subsidiary, Ericsson Egypt Ltd. (Ericsson Egypt) which pleaded guilty to charges that it conspired to violate the FCPA's anti-bribery provisions for conduct in Djibouti.<sup>237</sup> Meanwhile, the SEC charged Ericsson with violations of the FCPA's anti-bribery provisions (for conduct in Djibouti, China, and Saudi Arabia) in addition to books and records and internal control violations (for conduct in Djibouti, China, Saudi Arabia, Vietnam, Indonesia, and Kuwait).

Ericsson's conduct, which spanned five countries over 17 years, involved the use of sham arrangements with third parties as well as luxurious travel and entertainment for officials and their families in an effort to win business and obtain insider information. According to the DOJ and SEC, sham consultants were hired in Djibouti, Saudi Arabia,<sup>238</sup> China, Vietnam, and Indonesia. In many cases, high level executives circumvented controls and ignored red flags in engaging these third parties, which were then used to create a slush fund. In Djibouti, for example, due diligence failed to disclose that a consultant was an official's wife. Fake invoices were subsequently used to further bribe payments to the official. In Saudi Arabia, the company ignored significant red flags with respect to two consultants, who were paid approximately \$40 million in "corporate marketing fees." In China, policies restricting the use of agents were circumvented (allowing the company to hire third parties with connections to officials). Similar arrangements existed in Vietnam, Indonesia, and Kuwait.

In Saudi Arabia and China, Ericsson sponsored trips for officials that were "purely for sightseeing and had no legitimate business purpose."<sup>239</sup> This included, for example, a 16-day trip for a delegation of Chinese government officials and high-level employees of a state-owned telecom company to visit Canada, the United States, and the Caribbean. The delegation spent only two hours meeting at Ericsson's Canadian offices before departing for the remainder of the trip, which included a luxury cruise to Barbados, St. Lucia, Antigua, and St. Martin. Other examples of these lavish expenses included a month-long trip for a Saudi Arabian official and seven family members, trips to Paris, and spa and shopping trips.

Payments to third parties were falsely or misleadingly characterized in Ericsson's books and records, and Ericsson was charged with having knowingly and willfully failed to implement adequate controls surrounding its use of third parties. This included Ericsson's failure to implement controls: (1) requiring employees to properly document and account for payments to third parties; (2) requiring adequate due

<sup>236</sup> DOJ Deferred Prosecution Agreement, *United States v. Telefonaktiebolaget LM Ericsson* (Nov. 26, 2019), <https://www.justice.gov/criminal-fraud/file/1226521/download>; Complaint, *SEC v. Telefonaktiebolaget LM Ericsson*, Case No. 1:19-cv-11214, ¶ 53 (S.D.N.Y. Dec. 6, 2019), <https://www.sec.gov/litigation/complaints/2019/comp-pr2019-254.pdf>.

<sup>237</sup> See DOJ Plea Agreement, *United States v. Ericsson Egypt Ltd.* (Nov. 26, 2019), <https://www.justice.gov/criminal-fraud/file/1226516/download>.

<sup>238</sup> The DOJ's DPA did not address conduct in Saudi Arabia.

<sup>239</sup> Complaint, *SEC v. Telefonaktiebolaget LM Ericsson*, Case No. 1:19-cv-11214 (S.D.N.Y. Dec. 6, 2019), <https://www.sec.gov/litigation/complaints/2019/comp-pr2019-254.pdf>.



diligence when retaining third parties; (3) requiring that due diligence be completed prior to allowing a third party to begin services; (4) requiring that payments to third parties be commensurate with services performed; (5) prohibiting certain payment structures with third parties, including advance payments; and (6) requiring oversight over retaining and paying third parties.

Ericsson paid record fines relating to the conduct described above, totaling approximately \$1.06 billion. This included a \$520 million criminal penalty to the DOJ (including a \$9.8 million criminal penalty for Ericsson Egypt) and \$539 million in disgorgement and prejudgment interest to the SEC. Although Ericsson received partial credit for its cooperation, the company failed to voluntarily disclose the conduct, delayed producing certain materials, and did not fully remediate. In addition to the payments described above, Ericsson is subject to a three-year monitorship. Sweden is reportedly investigating the company.<sup>240</sup>

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<sup>240</sup> Simon Johnson, *Sweden opens Ericsson bribery probe after U.S. settlement: paper*, REUTERS (Dec. 12, 2019), <https://www.reuters.com/article/us-usa-ericsson-sweden/sweden-opens-ericsson-bribery-probe-after-u-s-settlement-paper-idUSKBNIYG248>.

## V. 2019 Individual Enforcement Actions

This section covers both new FCPA charges that were filed against individuals in 2019 by the DOJ and SEC as well as significant updates in cases we have covered in prior years. As in past years, FCPA charges against alleged bribe payers—which included company owners and executives, investment bankers, intermediaries and consultants, and others—were often accompanied by related charges, such as conspiracy to violate the FCPA, money laundering, wire fraud, securities fraud, and federal program fraud. Following its trend from recent years, the DOJ continues to bring money laundering charges against foreign officials who allegedly received bribes and laundered this money using the US financial system. These cases are also covered in this section.

Both the DOJ and the SEC have continued to focus efforts on foreign individuals. Some of these charges were connected to significant, ongoing DOJ investigations of alleged bribery schemes involving PDVSA and PetroEcuador officials, both of which included a number of new indictments this year. In fact, the majority of the DOJ's FCPA and related cases this past year have been against foreign executives and high-level foreign officials spanning the globe.

The DOJ continues to prosecute individuals associated with companies that already have been subject to FCPA enforcement, such as executives of Cognizant, MTS, Westport, Braskem, Transport Logistics International (TLI), Keppel Offshore & Marine Ltd. (KOM), Alstom S.A. (Alstom), and Insurance Corporation of Barbados Limited (ICBL) (the latter a formal declination with disgorgement). The DOJ also is prosecuting a number of individuals independent (at least to date) of corporate enforcement (such as in the PDVSA and Petroecuador matters, as well as a number of others described below). In some cases, public reports suggest that investigations against the associated companies are ongoing, indicating that additional corporate enforcement may still follow.

This has been a particularly busy year for individual prosecutions, and the DOJ has touted the fact that its FCPA Unit has announced more charges this year than any other year in history and beat out records it previously set in 2017 and 2018.<sup>241</sup> The DOJ has affirmed its willingness to dedicate the significant resources required to try cases in challenging matters, and has highlighted that the FCPA Unit's trial record in 2019 matched its prior "high water mark for trials ending in conviction."<sup>242</sup>

In total there were five FCPA trials in 2019 and the beginning of 2020 (Ematum/MAM, *Hoskins*, Haiti Port Development, *Lambert*, and *Inniss*). The DOJ obtained convictions in four of these cases, with Boustani in the Ematum/MAM matter being acquitted. In contrast with the DOJ's important victory in the *Hoskins* trial, in which a

<sup>241</sup> Transcript, Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the American Conference Institute's 36th International Conference on the Foreign Corrupt Practices Act, Oxon Hill, MD (Dec. 4, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-american-conference>

<sup>242</sup> *Id.*

non-US defendant was convicted for entirely ex-US conduct on the basis he acted as an “agent” of a domestic concern (as described at Section III.A.2, *supra*) the *Boustani* case is noteworthy because it highlights some of the challenges the DOJ still faces in prosecuting foreign individuals operating abroad and proving the extraterritorial application of US law. As one juror commented after trial, “We couldn’t find any evidence of a tie to the Eastern District of New York. That’s why we acquitted.”<sup>243</sup>

With two FCPA trials of individuals already scheduled for this coming year related to the Cognizant and Unaoil matters, 2020 is likely to be another active year for individual FCPA enforcement.

### **A. Lyon Associates: Frank James Lyon and Master Halbert**

On January 22, 2019 in the District of Hawaii, Frank James Lyon, the owner of Lyon Associates, Inc., an engineering and consulting company, entered into a cooperation agreement and pleaded guilty to conspiracy to violate the anti-bribery provisions of the FCPA and to committing federal program fraud.<sup>244</sup> Lyon admitted that between 2006 and 2016, he and his co-conspirators paid bribes to foreign officials in the Federated States of Micronesia and to Hawaii state officials.<sup>245</sup>

As part of his cooperation agreement, Lyon agreed to provide information that he conspired to bribe Master Halbert, a Micronesian public official, and others, in order to obtain and retain contracts for his company. These contracts were valued at more than \$10 million.<sup>246</sup> In May 2019, Lyon was sentenced to 30 months in prison, three years supervised release, and a \$100 special assessment.<sup>247</sup>

In a related matter, a criminal complaint was filed on January 24, 2019 against Halbert.<sup>248</sup> He was charged with one count of conspiracy to commit money laundering.<sup>249</sup> On April 2, 2019, he pleaded guilty to the money laundering charge and in his admissions stated he had helped Lyon’s company secure contracts in return for bribes.<sup>250</sup> On September 27, 2019, he was sentenced to 18 months in prison and three years of supervised release.<sup>251</sup>

### **B. Cognizant: Sridhar Thiruvengadam, Gordon Coburn, and Steven Schwartz**

In Sections IV.A.1 and IV.D.1, *supra*, we reported on allegations that Cognizant, through its largest subsidiary, Cognizant India, violated the FCPA’s anti-bribery, books and records, and internal control provisions by authorizing and reimbursing contractors for bribes to Indian government officials.

<sup>243</sup> Stewart Bishop, *Boustani Acquitted In \$2B Mozambique Loan Fraud Case*, LAW 360 (Dec. 2, 2019), <https://www.law360.com/articles/1221333/boustani-acquitted-in-2b-mozambique-loan-fraud-case>.

<sup>244</sup> DOJ Press Release, *U.S. Executive Sentenced to Prison for Role in Conspiracy to Violate Foreign Corrupt Practices Act*, OFFICE OF PUB. AFFAIRS (May 14, 2019), <https://www.justice.gov/opa/pr/us-executive-sentenced-prison-role-conspiracy-violate-foreign-corrupt-practices-act>.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Docket, *United States v. Lyon*, No. 1:19-cr-00008 (D. Haw.)

<sup>248</sup> Criminal Complaint, *United States v. Halbert*, No. 1:19-cr-00031-SOM (D. Haw. Jan. 24, 2019).

<sup>249</sup> *Id.*

<sup>250</sup> Memorandum of Plea Agreement, *United States v. Halbert*, No. 1:19-cr-00031-SOM (D. Haw. Apr. 2, 2019), <https://www.justice.gov/criminal-fraud/file/1224726/download>.

<sup>251</sup> Judgment, *United States v. Halbert*, No. 1:19-cr-00031-SOM (D. Haw. Sept. 27, 2019).

On September 13, 2019 the SEC settled charges with Sridhar Thiruvengadam, the former Chief Operating Officer of Cognizant, for violating the FCPA's internal accounting controls and record-keeping provisions.<sup>252</sup> Without admitting or denying the findings, Thiruvengadam agreed to pay a civil penalty of \$50,000.

The SEC filed a civil complaint in federal court against Gordon J. Coburn, the former president of Cognizant, and Steven E. Schwartz, the former Chief Legal Officer of Cognizant, alleging violations of the FCPA anti-bribery and accounting provisions.<sup>253</sup> The DOJ filed a 12-count criminal indictment against Coburn and Schwartz in the District of New Jersey for criminal violations of the anti-bribery and accounting provisions of the FCPA.<sup>254</sup> In the civil matter, the District of New Jersey granted the United States' Motion to Intervene and for a Stay on November 14, 2019, pending the conclusion of criminal proceedings.<sup>255</sup> Both Coburn and Schwartz continue to deny any wrongdoing and most recently filed motions to dismiss the criminal indictment on November 15, 2019.<sup>256</sup> The trial in this matter is currently scheduled for September 2020.

### C. PDVSA Individuals

In our [2016 FCPA/Anti-Corruption Year in Review](#), [2017 FCPA/Anti-corruption Year in Review & 2018 Q1 Preview](#), and [2018 FCPA/Anti-Corruption Year in Review](#), we reported on ongoing developments in the investigation of an alleged bribery scheme to obtain and extend contracts from Venezuelan state-owned oil company Petróleos de Venezuela S.A. (PDVSA).

Several guilty pleas were entered in 2019 and the defendants are pending sentencing. On February 26, 2019, charges were filed in Florida against Rafael Enrique Pinto-Franceschi (Pinto) and Franz Herman Muller-Huber (Muller).<sup>257</sup> The case was transferred to the Southern District of Texas on February 28, 2019 due to related cases.<sup>258</sup> On July 31, 2019, Pinto pleaded guilty to one count of conspiracy to violate the FCPA and one count of conspiracy to commit wire fraud.<sup>259</sup> On August 21, 2019 Muller also pleaded guilty to one count of conspiracy to violate the FCPA and one count of conspiracy to commit wire fraud. Sentencing for both Muller and Pinto is scheduled for February 20, 2020.<sup>260</sup>

On May 29, 2019, Jose Manuel Gonzalez Testino pleaded guilty in the Southern District of Texas to one count of conspiracy to violate the FCPA, one count of violating the FCPA, and one count of failing to report foreign bank accounts.<sup>261</sup>

<sup>252</sup> SEC Press Release, *SEC Settles FCPA Charges Against Former Chief Operating Officer of Cognizant* (Sept. 13, 2019), <https://www.sec.gov/enforce/34-86963-s>.

<sup>253</sup> Complaint, *SEC v. Coburn*, Case No. 19-cv-5820 (D.N.J. Feb. 15, 2019), <https://www.sec.gov/litigation/complaints/2019/comp-pr2019-12.pdf>.

<sup>254</sup> Indictment, *United States v. Coburn*, No. 19-cr-120, (D.N.J. Feb. 14, 2019), <https://www.justice.gov/criminal-fraud/file/1133531/download>.

<sup>255</sup> Docket, *SEC v. Coburn*, Case No. 19-cv-5820 (D.N.J.) (Gordon J. Coburn & Steven E. Schwartz).

<sup>256</sup> Docket, *United States v. Coburn*, Case No. 2:19-cr-00120 (D.N.J.) (Gordon J. Coburn & Steven E. Schwartz).

<sup>257</sup> Indictment, *United States v. Pinto-Franceschi and Muller-Huber*, Case No. 1:19-mj-02252-JG (S.D. Fla. Feb. 26, 2019).

<sup>258</sup> *United States v. Pinto-Franceschi and Muller-Huber*, Case No. 4:19-CR-00135 (S.D. Tex. Feb. 21, 2019).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> DOJ Press Release, *Business Executive Pleads Guilty to Foreign Bribery Charges in Connection with Venezuela Bribery Scheme*, OFFICE OF PUB. AFFAIRS (May 29, 2019), <https://www.justice.gov/opa/pr/business-executive-pleads-guilty-foreign-bribery-charges-connection-venezuela-bribery-scheme>.

According to admissions made in connection with his guilty plea, beginning in or around 2012 and continuing through at least 2018, Gonzalez and a co-conspirator paid at least \$629,000 in bribes to a former PDVSA official in exchange for favorable business treatment.<sup>262</sup> Sentencing is scheduled for February 19, 2020.<sup>263</sup>

In addition to ongoing sentencing, new indictments have also been issued in this matter. On April 24, 2019, the government filed a superseding indictment against Nervis Gerardo Villalobos-Cardenas, Alejandro Isturiz-Chiesa, Rafael Ernesto Reiter-Munoz, and three new defendants: Javier Alvarado-Ochoa, Daisy T. Rafoi-Bleuler, and Paulo J.D.C. Casqueiro-Murta.<sup>264</sup> On September 4, 2019 the court ordered that the superseding indictment in this matter be unsealed; however, much of the docket currently remains under seal.<sup>265</sup>

#### **D. MTS: Gulnara Karimova and Bekhzod Akhmedov**

As described in Section IV.D.2, *supra*, the DOJ and SEC have concluded their investigation of conduct by MTS in the Uzbek telecommunications sector. The investigation of MTS, as with several telecommunication companies, arises out of a wider investigation into a company linked to Gulnara Karimova, the daughter of former Uzbek President Islam Karimov. MTS entered into a deferred prosecution agreement in the Southern District of New York and entered resolutions with the DOJ and SEC to pay a combined total penalty of \$850 million for its misconduct.<sup>266</sup>

On March 7, 2019, Karimova and Bekhzod Akhmedov, a former Uzbek executive at Uzdunrobita, an Uzbekistan telecommunications company that worked with Mobile Telesystems, were indicted in the Southern District of New York.<sup>267</sup> Karimova is charged with one count of conspiracy to commit money laundering and Akhmedov is charged with one count of conspiracy to violate the FCPA, two counts of violating the FCPA, and one count of conspiracy to commit money laundering.<sup>268</sup> The indictment alleges that Akhmedov conspired with telecom companies and others to pay Karimova more than \$865 million in bribes, and that both conspired with others to launder and conceal those funds.<sup>269</sup>

#### **E. Ematum/MAM Individuals**

On December 19, 2018, three former London-based investment bankers from Credit Suisse (Andrew Pearse, Surjan Singh, and Detelina Subeva), three former senior Mozambican government officials (Manuel Chang, Antonio do Rosario, and Teofilo Nhangumele), and two executives of United Arab Emirates-based shipbuilding company Privinvest Group (Jean Boustani and Najib Allam) were

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<sup>262</sup> *Id.*

<sup>263</sup> Docket, *United States v. Gonzalez-Testino*, Case No. 4:19-CR-00341 (S.D. Tex. May 14, 2019) (Jose Manuel Gonzalez-Testino). See also Docket, *United States v. Gonzalez-Testino*, Case No. 1:18-MJ-03171 (S.D. Fla.) (Jose Manuel Gonzalez-Testino).

<sup>264</sup> Docket, *United States v. De Leon-Perez et al.*, Case No. 4:17-cr-00514 (S.D. Tex. Aug. 23, 2017) (Daisy T. Rafoi-Bleuler, Nervis Gerardo Villalobos-Cardenas, Alejandro Isturiz-Chiesa, Rafael Ernesto Reiter-Munoz, Paulo J.D.C. Casqueiro-Murta & Javier Alvarado-Ochoa).

<sup>265</sup> *Id.*

<sup>266</sup> See Section IV.D.2, *supra*.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

indicted in the Eastern District of New York for their roles in an alleged \$2 billion fraud and money laundering scheme.<sup>270</sup> The indictment alleged that these individuals had arranged for \$2 billion in loans to be made to three companies owned by the Mozambican government (Proindicus S.A., Empresa Moçambicana de Atum, S.A. (EMATUM) and Mozambique Asset Management (MAM), that they had defrauded investors in these Mozambican companies through their misrepresentations, and that they had diverted at least \$200 million from the loans for use in bribes and kickbacks.<sup>271</sup>

In the indictment, the three investment bankers at Credit Suisse, Andrew Pearse, Surjan Singh, and Detelina Subeva, were each charged with one count of conspiracy to violate the anti-bribery and internal control provisions of the FCPA for allegedly facilitating bribe payments to the Mozambican government officials and circumventing the internal accounting controls of the investment bank.<sup>272</sup> In addition, Pearse, Singh, and Subeva were charged with one count of conspiracy to commit wire fraud and one count of conspiracy to commit money laundering.<sup>273</sup> All three were arrested in the United Kingdom on January 3, 2019, pursuant to provisional arrest warrants issued at the request of the United States.<sup>274</sup> Subeva pleaded guilty to one count of money laundering on May 20, 2019. Pearse pleaded guilty on July 21, 2019 to one count of wire fraud conspiracy. Singh pleaded guilty to one count of conspiracy to commit money laundering on September 6, 2019. The US continues to seek the arrest or extradition of the Mozambican government officials and shipbuilding executive Allam for related money-laundering charges.<sup>275</sup>

Shipbuilding executive Jean Boustani—who was charged with conspiracy to commit wire fraud, conspiracy to commit securities fraud, and conspiracy to commit money laundering—went forward with a jury trial.<sup>276</sup> On December 2, 2019, he was found not guilty on all counts.<sup>277</sup>

## **F. Haiti Port Development: Roger Richard Bony and Joseph Baptiste**

As reported in our [2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview](#), retired US Army Colonel Joseph Baptiste was indicted for conspiracy to violate the FCPA and the Travel Act, violating the Travel Act, and conspiracy to commit money

<sup>270</sup> Indictment, *United States v. Boustani et al.*, Case No. 18-cr-00681 (E.D.N.Y. Dec. 19, 2018), <https://www.justice.gov/opa/press-release/file/1141826/download>.

<sup>271</sup> *Id.*

<sup>272</sup> DOJ Press Release, *Mozambique's Former Finance Minister Indicted Alongside Other Former Mozambican Officials, Business Executives, and Investment Bankers in Alleged \$2 Billion Fraud and Money Laundering Scheme that Victimized U.S. Investors* (Mar. 7, 2019), <https://www.justice.gov/opa/pr/mozambique-s-former-finance-minister-indicted-alongside-other-former-mozambican-officials>.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> DOJ Press Release No. 19-201, *Mozambique's Former Finance Minister Indicted Alongside Other Former Mozambican Officials, Business Executives, and Investment Bankers in Alleged \$2 Billion Fraud and Money Laundering Scheme that Victimized U.S. Investors*, <https://www.justice.gov/opa/pr/mozambique-s-former-finance-minister-indicted-alongside-other-former-mozambican-officials> (Mar. 7, 2019); Mogomotsi Magome, *Shipbuilding Executive Found Not Guilty in Mozambique Debt Fraud Trial*, WALL ST. J. (Dec. 2, 2019) (Manuel Chang), <https://www.wsj.com/articles/shipbuilding-executive-found-not-guilty-in-mozambique-debt-fraud-trial-11575310415> (last accessed Dec. 13, 2019).

<sup>276</sup> *Id.*; Superseding Indictment, *United States v. Boustani*, No. 1:18-cr-00681-WFK (E.D.N.Y. Aug. 16, 2019).

<sup>277</sup> *Id.*

laundering.<sup>278</sup> As reported in our [2018 FCPA/Anti-Corruption Year in Review](#), the DOJ filed a superseding indictment charging Roger Richard Boncy with the same crimes and adding him as a co-conspirator to the case on October 30, 2018.<sup>279</sup> According to the DOJ, Baptiste and Boncy solicited bribes from undercover FBI agents in connection with a proposed project to develop a port in Haiti.<sup>280</sup>

On June 20, 2019, after a two-week trial, Baptiste and Boncy were both convicted of one count of conspiracy to violate the FCPA and the Travel Act.<sup>281</sup> Baptiste was also convicted of one count of violating the Travel Act and one count of conspiracy to commit money laundering.<sup>282</sup> Boncy was acquitted on these two charges.<sup>283</sup> Both Boncy and Baptiste have filed motions for new trials.<sup>284</sup> The motions are pending.

### **G. Robin Longoria**

On August 29, 2019, Robin Longoria of Mansfield, Texas, a manager of an international program at an Ohio-based adoption agency, pleaded guilty to one count of conspiracy to violate the FCPA, to commit wire fraud, and to commit visa fraud.<sup>285</sup> Longoria admitted to playing a part in a conspiracy in which judges and other court officials in Africa were paid bribes to corrupt the adoption process.<sup>286</sup> Longoria admitted that she caused bribes to be paid to court registrars and Ugandan High court judges to corruptly influence the court registrars to assign particular cases to “adoption-friendly” judges and to corruptly influence the judges to grant the US. clients of the adoption agency guardianship rights over Ugandan children.<sup>287</sup> Longoria also admitted to creating false documents for submission to the United States State Department to mislead it in its adjudication of visa applications for the Ugandan children being considered for adoption.<sup>288</sup> Sentencing is currently set for March 2, 2020.

### **H. Corpoelec: Luis Alberto Chacin Haddad, Jesus Ramon Veroes, Luis Alfredo Motta Dominguez, and Eustiquio Jose Lugo Gomez**

On March 15, 2019, a criminal complaint was filed against Jesus Ramon Veroes of Venezuela and Luis Alberto Chacin Haddad of Miami, Florida for their roles in laundering the proceeds of violations of the FCPA in connection with bribes to award business to US-based companies from Venezuela’s state-owned and state-controlled electricity company, Corporación Eléctrica Nacional, S.A. (Corpoelec).<sup>289</sup> Chacin owns

<sup>278</sup> Indictment, *United States v. Baptiste*, No.17-cr-10305-ADB (D. Mass. Oct. 4, 2017).

<sup>279</sup> DOJ Press Release, *Businessman Indicted for Conspiring to Bribe Senior Government Officials of the Republic of Haiti* (Oct. 30, 2018), <https://www.justice.gov/opa/pr/businessman-indicted-conspiring-bribe-senior-government-officialsrepublic-haiti> (last accessed Jan. 16, 2019).

<sup>280</sup> DOJ Press Release, *Two Businessmen Convicted of International Bribery Offenses* (June 20, 2019), <https://www.justice.gov/opa/pr/two-businessmen-convicted-international-bribery-offenses-0> (last accessed Dec. 15, 2019).

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> Motion for Acquittal, *United States v. Boncy*, No. 17-cr-10305-ADB (D. Mass. Aug. 26, 2019).

<sup>284</sup> *Id.*

<sup>285</sup> DOJ Press Release, *Texas Woman Pleads Guilty to Conspiracy to Facilitate Adoptions From Uganda Through Bribery and Fraud* (Aug. 29, 2019), <https://www.justice.gov/opa/pr/texas-woman-pleads-guilty-conspiracy-facilitate-adoptions-uganda-through-bribery-and-fraud> (last accessed Dec. 15, 2019).

<sup>286</sup> *Id.*

<sup>287</sup> Information, *United States v. Longoria*, No. 1:19-cr-00482 (N.D. Ohio Aug. 29, 2019).

<sup>288</sup> *Id.*

<sup>289</sup> Complaint, *United States v. Jesus Ramon Veroes*, No. 19-MJ-02352-JJO (S.D. Fla. Mar. 15, 2019).

and manages several business in Miami, including two companies that were awarded business under the scheme.<sup>290</sup> Veroes is a relative of the president of a third company involved in the scheme.<sup>291</sup>

Veroes and Chacin each pleaded guilty to one count of conspiracy to commit felony violations of the FCPA on June 24, 2019.<sup>292</sup> As part of the plea agreement, Veroes and Chacin admitted that they agreed with each other and with other co-conspirators to bribe foreign officials at Corpoelec to award nearly \$60 million in procurement contracts to Florida-based companies.<sup>293</sup> Veroes and Chacin will each be required to forfeit \$5.5 million in profits from the corruptly obtained contracts, as well as real property in Florida.<sup>294</sup>

On September 25, 2019, Chacin was sentenced to just over four years in prison for his role in the scheme. Chacin's cooperation with the United States government led to charges being filed against Venezuela's minister of electrical energy, who led the utility, and its procurement director.<sup>295</sup> Veroes was also sentenced to four years in prison on October 29, 2019.<sup>296</sup> Veroes faces two years of supervised release following his time in prison.<sup>297</sup>

In related proceedings, on June 27, 2019, Luis Alfredo Motta Dominguez (Motta), the former head of Corpoelec, Venezuela's state-owned electricity company, and Eustiquio Jose Lugo Gomez (Lugo), another Corpoelec executive were charged by DOJ with seven counts of money laundering and one count of conspiracy to commit money laundering.<sup>298</sup> The indictment alleges that from January 2016 through December 2018, Motta and Lugo conspired to launder proceeds of a bribery scheme to and from bank accounts located in the United States.<sup>299</sup>

## I. TechnipFMC: Zwi Skornicki

As described in Section IV.D.5, *supra*, in June 2019, TFMC, a global oil and gas services company, agreed to pay a combined total criminal fine of more than \$296 million to resolve foreign bribery charges in the United States and Brazil.<sup>300</sup> According to the DOJ, the charges stem from two bribery schemes orchestrated by the company: the first, a scheme to bribe Brazilian officials, and the second, a scheme to bribe Iraqi officials. TFMC's former consultant and Brazilian national, Zwi Skornicki, pleaded guilty to a one-count criminal information charging him with conspiracy to

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<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> Plea Agreement, *United States v. Jesus Ramon Veroes*, No. 19-MJ-02352-JJO (S.D. Fla. June 24, 2019).

<sup>293</sup> DOJ Press Release, *Two Former Venezuelan Officials Charged and Two Businessmen Plead Guilty in Connection with Venezuela Bribery Scheme* (June 27, 2019), <https://www.justice.gov/opa/pr/two-former-venezuelan-officials-charged-and-two-businessmen-plead-guilty-connection-venezuela> (last accessed Dec. 15, 2019).

<sup>294</sup> *Id.*

<sup>295</sup> Nathan Hale, *Miami Man Gets 4 Years for Bribing Venezuelan Officials*, LAW360 (Sept. 25, 2019), <https://www.law360.com/articles/1202576> (last accessed Dec. 15, 2019).

<sup>296</sup> Nathan Hale, *Venezuelan National Gets 4 Years for Bribery Scheme*, LAW360 (Oct. 29, 2019), <https://www.law360.com/articles/1214463/venezuelan-national-gets-4-years-for-bribery-scheme> (last accessed Dec. 15, 2019).

<sup>297</sup> *Id.*

<sup>298</sup> See Indictment, *United States v. Motta Dominguez et al.*, No. 1:19-cr-20388 (S.D. Fla. June 27, 2019).

<sup>299</sup> *Id.*

<sup>300</sup> DOJ Press Release, *Technipfmc PLC and U.S.-Based Subsidiary Agree to Pay Over \$296 Million in Global Criminal Fines to Resolve Foreign Bribery Case* (June 25, 2019), <https://www.justice.gov/usao-edny/pr/technipfmc-plc-and-us-based-subsidiary-agree-pay-over-296-million-global-criminal-fines> (last accessed Dec. 16, 2019).



violate the FCPA's anti-bribery provisions.<sup>301</sup> Skornicki admitted that between 2001 and 2014 he conspired to pay more than \$55 million in illegal bribes to officials at Petrobras, a Brazilian state-controlled oil company, and the Brazilian Workers' Party to win contracts related to oil and gas projects.<sup>302</sup> In an effort to facilitate the illegal payments and to conceal the scheme, TFMC and Technip USA created and executed false agreements with consulting companies controlled by Skornicki.<sup>303</sup> Skornicki subsequently used portions of the purported consulting payments to pay bribes.<sup>304</sup> At the time of this report, Skornicki awaits a 2020 sentencing date.

According to media reports, Skornicki was convicted on corruption charges in Brazil in 2016.<sup>305</sup> Skornicki was required to pay a penalty upwards of \$24 million to Brazilian authorities and was originally sentenced to more than 15 years in prison on those charges.<sup>306</sup> According to local reports, however, his sentence was later reduced to six months' home confinement pursuant to a cooperation agreement.<sup>307</sup> Although this is a rare occurrence, Skornicki's consecutive prosecutions in Brazil and the United States is part of a recent trend of successive prosecutions in multiple countries.<sup>308</sup>

#### **J. PetroEcuador: Armengol Alfonso Cevallos Diaz, Jose Melquiades Cisneros Alarcon, Frank Roberto Chatburn-Ripalda**

As reported in [Steptoe's 2018 FCPA/Anti-Corruption Year in Review](#), six individuals were charged in 2018 in connection with the DOJ's investigation of a scheme to bribe officials of PetroEcuador, Ecuador's state-owned oil company, in exchange for contracts.<sup>309</sup> On May 9, 2019, two additional Ecuadorian citizens, Armengol Alfonso Cevallos Diaz and Jose Melquiades Cisneros Alarcon, were indicted for conspiracy to violate the FCPA, conspiracy to commit money laundering, and nine counts of money laundering in connection with the DOJ's expanding prosecution involving bribery at PetroEcuador.<sup>310</sup> Diaz and Alcaron allegedly assisted with laundering and paying \$4 million in bribes to PetroEcuador officials.<sup>311</sup>

To date, the DOJ's investigation has yielded four guilty pleas, including Frank Roberto Chatburn-Ripalda (Chatburn). As discussed in the [2018 FCPA/Anti-Corruption Year in Review](#), Chatburn was set to go to trial in September 2019 for his role in an alleged scheme to bribe officials of PetroEcuador, Ecuador's state-owned oil company, in exchange for government contracts. On October 11, 2019, however,

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<sup>301</sup> *Id.*

<sup>302</sup> See Criminal Information, CR. No. 19-277 (KAM), *United States v. Zwi Skornicki*.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> Jody Godoy, *FCPA Policy Benefits Open to Repeat Bribery Offenders*, LAW360 (July 9, 2019), <https://www.law360.com/articles/1173737/fcpa-policy-benefits-open-to-repeat-bribery-offenders> (last accessed Jan. 17, 2020).

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> Kathleen Hamann and Timothy Malley, *Double jeopardy ruling sends "alarming" message*, GLOBAL INVESTIGATIONS REV., Just Anti-Corruption (July 19, 2019) <https://globalinvestigationsreview.com/article/jac/1195268/double-jeopardy-ruling-sends-%E2%80%9Calarming%E2%80%9D-message>.

<sup>309</sup> See also DOJ Press Release, *Financial Advisor Pleads Guilty to Money Laundering Charge in Connection With Bribery Scheme Involving Ecuadorian Official* (Sept. 11, 2018), <https://www.justice.gov/opa/pr/financial-advisor-pleads-guilty-moneylaundering-charge-connection-bribery-scheme-involving> (last accessed Dec. 15, 2019).

<sup>310</sup> Indictment, *United States v. Diaz*, 1:19-cr-20284-RS (S.D. Fla. May 9, 2019); Richard L. Cassin, *Two more charged with FCPA conspiracy in PetroEcuador bribe case*, FCPABLOG (July 2, 2019), <https://fcpablog.com/2019/07/02/two-more-charged-with-fcpa-conspiracy-in-petroecuador-bribe/> (last accessed Dec. 15, 2019).

<sup>311</sup> *Id.*

Chatburn pleaded guilty to one count of conspiracy to commit money laundering. As part of his plea agreement with federal prosecutors, Chatburn agreed to forfeit over \$870,000.<sup>312</sup> Prosecutors, in turn, agreed to seek a three-point reduction in the sentencing guidelines on the basis of his acceptance of responsibility.<sup>313</sup> On December 18, 2019, Chatburn was sentenced to three and a half years in prison followed by three years of supervised release. He was also fined an additional \$40,000.<sup>314</sup>

### **K. Westport: Nancy Gougarty**

On September 27, 2019, the SEC announced that Westport, a Canadian clean fuel technology company, and its former CEO, Nancy Gougarty, agreed to pay more than \$4.1 million to resolve charges that the company paid bribes to a Chinese government official.<sup>315</sup> According to the SEC, in 2016, Gougarty engaged in a scheme to bribe a Chinese government official to obtain business and a cash dividend by transferring shares of stock in Westport's Chinese joint venture to a private equity fund in which the government official held a financial interest.<sup>316</sup>

Without admitting or denying the SEC's findings, Gougarty, as well as Westport, consented to a cease-and-desist order.<sup>317</sup> The SEC Order regarding Westport is discussed in Section IV.C.4, *supra*. According to the SEC's order, Gougarty circumvented Westport's internal accounting controls and signed a false certification regarding the sufficiency of the company's controls, according to the order.<sup>318</sup> Gougarty agreed to pay a civil penalty of \$120,000.<sup>319</sup>

### **L. Unaoil: Cyrus Ahsani, Saman Ahsani, and Steven Hunter**

On October 30, 2019, the DOJ announced that Cyrus Ahsani and Saman Ahsani, the former CEO and COO of Monaco-based Unaoil, each pleaded guilty in March 2019 to one count of conspiracy to violate the FCPA.<sup>320</sup> According to the DOJ, from 1999 to 2016, the former Unaoil officers schemed to facilitate millions of dollars in bribe payments to officials in multiple countries to secure oil and gas contracts.<sup>321</sup> Further, the Ahsanis allegedly laundered the proceeds of their bribery schemes in an effort to promote and conceal the schemes and to obstruct the government's investigations.<sup>322</sup> In addition, on August 2, 2018, Steven Hunter, Unaoil's former business development director, also pleaded guilty to one count of conspiracy to violate the FCPA in connection with the bribery scheme.<sup>323</sup> According to the DOJ,

<sup>312</sup> See Plea Agreement, *United States v. Chatburn Ripalda et al.*, No. 1:18-cr-20312 (S.D. Fla. Oct. 11, 2019).

<sup>313</sup> *Id.*

<sup>314</sup> See Judgment, *United States v. Chatburn Ripalda et al.*, No. 1:18-cr-20312 (S.D. Fla. Dec. 18, 2019).

<sup>315</sup> SEC Press Release, *SEC Charges Canadian Clean Fuel Technology Company and Former CEO with FCPA Violations* (Sept. 27, 2019), <https://www.sec.gov/news/press-release/2019-197> (last accessed Dec. 15, 2019).

<sup>316</sup> *Id.*

<sup>317</sup> Order Instituting Cease-and-Desist Proceedings, *In re Westport Fuel Systems, Inc. and Nancy Gougarty*, SEC Exch. Act Release No. 87138 (Sept. 27, 2019), <https://www.sec.gov/litigation/admin/2019/34-87138.pdf>.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> DOJ Press Release, *Oil Executives Plead Guilty for Roles in Bribery Scheme Involving Foreign Officials* (Oct. 30, 2019), <https://www.justice.gov/opa/pr/oil-executives-plead-guilty-roles-bribery-scheme-involving-foreign-officials> (last accessed Dec. 16, 2019).

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

from 2009 to 2015, Hunter facilitated bribe payments to Libyan officials.<sup>324</sup> Cyrus and Saman Ahsani are currently scheduled to be sentenced on April 20, 2020, and Hunter's sentencing is scheduled for March 13, 2020.<sup>325</sup> The UK's investigation of Unaoil executives has also progressed in 2019, as described in Section VIII.A, *infra*. On July 15, 2019, Unaoil's former partner in Iraq pleaded guilty to five offences of conspiracy to give corrupt payment as part of the SFO's ongoing investigation<sup>326</sup> and the criminal trial of three other individuals associated with Unaoil is scheduled to begin on January 20, 2020 at Southwark Crown Court.

### **M. Herbalife: Jerry Li and Mary Yang**

As reported in our [2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview](#), on January 20, 2018, Herbalife Ltd. disclosed that the SEC had requested documents and other information related to the company's anti-corruption compliance in China.<sup>327</sup> On November 14, 2019, the SEC filed a civil complaint against Yanliang (Jerry) Li, the former managing director of Herbalife's Chinese subsidiary, charging him with FCPA violations in connection with the bribery of Chinese government officials.<sup>328</sup> The complaint alleged that Jerry Li, from 2006 to 2016, directed a scheme to bribe Chinese officials in order to obtain direct selling licenses and limit government investigation of Herbalife's Chinese subsidiary.<sup>329</sup>

In a related proceeding, on October 22, 2019, the DOJ filed an indictment against Jerry Li as well as Hongwei (Mary) Yang, the former head of the external affairs department, charging them with conspiring to violate the FCPA by bribing Chinese government officials.<sup>330</sup> Jerry Li was also charged with one count of perjury in connection with the SEC's investigation, and one count of destruction of records in federal investigations in connection with the SEC and DOJ's investigation.<sup>331</sup>

### **N. Braskem: Jose Carlos Grubisich**

On February 27, 2019, Jose Carlos Grubisich—the former CEO of Brazil-based petrochemical company Braskem S.A. (Braskem)<sup>332</sup>—was charged with violations of the FCPA and with money laundering arising from the alleged diversion of about \$250 million to a secret slush fund used, in part, to bribe Brazilian government

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> SFO, *Former Unaoil executive pleads guilty to conspiracy to give corrupt payments* (July 19, 2019) <https://www.sfo.gov.uk/2019/07/19/former-unaoil-executive-pleads-guilty-to-conspiracy-to-give-corrupt-payments/> (last accessed December 16, 2019).

<sup>327</sup> Austen Hufford, *SEC Questions Herbalife Over China Anti-Corruption Efforts*, WALL STREET JOURNAL (Jan. 20, 2017), <https://www.wsj.com/articles/sec-questions-herbalife-over-china-anti-corruption-efforts-1484924135> (last accessed Apr. 4, 2018).

<sup>328</sup> Indictment, *SEC v. Li*, No. 19-cv-10562 (S.D.N.Y. Nov. 14, 2019); see also SEC Litigation Release No. 24666, *SEC Charges Former Executive with FCPA Violations* (Nov. 15 2019), <https://www.sec.gov/litigation/litreleases/2019/lr24666.htm> (last accessed Dec. 12, 2019).

<sup>329</sup> Indictment, *SEC v. Li*, No. 19-cv-10562 (S.D.N.Y. Nov. 14, 2019). Direct sales licenses were also a central issue in the Avon case, as discussed in our [2014 FCPA Year in Review](#).

<sup>330</sup> Indictment, *United States v. Li*, No. 1:19-CR-00760 (S.D.N.Y. Oct. 22, 2019); see also DOJ Press Release No. 19-1,249, *Two Former Executives of the China Subsidiary of a Multi-Level Marketing Company Charged for Scheme to Pay Foreign Bribes and Circumvent Internal Accounting Controls* (Nov. 14, 2019), <https://www.justice.gov/opa/pr/two-former-executives-china-subsidiary-multi-level-marketing-company-charged-scheme-pay> (last accessed Dec. 12, 2019).

<sup>331</sup> Indictment, *United States v. Li*, No. 1:19-CR-00760 (S.D.N.Y. Oct. 22, 2019).

<sup>332</sup> Charges against Odebrecht and Braskem are discuss in more detail in our [2016 FCPA Year in Review](#).

officials for business.<sup>333</sup> Grubisich was arrested on November 20, 2019.<sup>334</sup> The indictment, which was unsealed the same day, alleged that Braskem together with Odebrecht—a Brazilian holding company with a controlling interest in Braskem—had set up a secret financial structure that “effectively functioned as a stand-alone bribe department within Odebrecht” responsible for laundering and paying out bribes to Brazilian government officials and political parties.<sup>335</sup> As part of this scheme, for which Odebrecht and Braskem were both prosecuted in 2016, Grubisich and multiple unnamed co-conspirators allegedly created a slush fund that was used to pay bribes and agreed to falsify books and records, and Grubisich allegedly approved bribe negotiations and bribe payments.<sup>336</sup> On December 12, 2019, Grubisich was granted bail in return for \$30 million—that is, about half his wealth.<sup>337</sup>

### O. 1MDB: Tim Leissner and Ng Chong Hwa (Roger Ng)

As reported in our [2018 FCPA/Anti-Corruption Year in Review](#), Tim Leissner, a former executive at Goldman Sachs Group Inc., pleaded guilty in 2018 to a two-count criminal information charging him with conspiring to launder money and conspiring to violate the FCPA by bribing various Malaysian and Abu Dhabi officials and circumventing Goldman Sachs’ internal accounting controls in connection with the 1MDB scandal.<sup>338</sup> Sentencing has been set for June 11, 2020.

On December 16, 2019, the SEC announced charges against Leissner for violating the anti-bribery, internal accounting controls, and books and records provisions of the FCPA in connection with his participation in the corrupt scheme.<sup>339</sup> A settlement order was issued the same day.<sup>340</sup>

According to the SEC’s order, Leissner obtained millions of dollars by paying unlawful bribes to high-ranking government officials in Abu Dhabi and Malaysia to obtain business from 1Malaysia Development Berhad (1MDB), a Malaysian government-owned investment fund, which included underwriting \$6.5 billion in bond offerings. The settlement includes a permanent ban from the securities industry.<sup>341</sup> Leissner has also agreed to disgorgement of \$43.7 million, which will be offset by amounts paid as part of the resolution of the DOJ’s criminal action.<sup>342</sup>

<sup>333</sup> Indictment, *United States v. Grubisich*, No. 19-CR-102 (RJD) (E.D.N.Y. Feb. 27, 2019), <https://www.justice.gov/usao-edny/press-release/file/1218786/download>.

<sup>334</sup> DOJ Press Release No. 19-1278, *Former Chief Executive Officer of a Brazilian Petrochemical Company Charged for His Role in a Scheme to Pay Bribes to Brazilian Officials and to Falsify Company Books and Records* (Nov. 20, 2019), <https://www.justice.gov/opa/pr/former-chief-executive-officer-brazilian-petrochemical-company-charged-his-role-scheme-pay> (last accessed Dec. 12, 2019).

<sup>335</sup> Indictment ¶ 18, *United States v. Grubisich*, No. 19-CR-102 (RJD) (E.D.N.Y. Feb. 27, 2019).

<sup>336</sup> *Id.* ¶¶ 20-21.

<sup>337</sup> Jody Godoy, *Ex-Braskem Exec Granted \$30M Bail In Bribery Case*, LAW360 (Dec. 12, 2019), [https://www.law360.com/whitecollar/articles/1227974/ex-braskem-exec-granted-30m-bail-in-bribery-case?nl\\_pk=68fd5cae-c0a6-4c2f-a308-8a532192cccc&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=whitecollar](https://www.law360.com/whitecollar/articles/1227974/ex-braskem-exec-granted-30m-bail-in-bribery-case?nl_pk=68fd5cae-c0a6-4c2f-a308-8a532192cccc&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar) (last accessed Dec. 13, 2019); cf. Criminal Minute Entry, *United States v. Grubisich*, No. 19-CR-102 (RJD) (E.D.N.Y. Dec. 12, 2019).

<sup>338</sup> Information, *United States v. Leissner*, No. 18-cr-00439 (MKB) (E.D.N.Y. Aug. 28, 2018), <https://www.justice.gov/opa/press-release/file/1106936/download>.

<sup>339</sup> SEC Press Release, *SEC Charges Former Goldman Sachs Executive with FCPA Violations*, (Dec. 16, 2019), <https://www.sec.gov/news/press-release/2019-260>.

Order, *In the Matter of Tim Leissner*, File No. 3-19619 (Dec. 16, 2019), <https://www.sec.gov/litigation/admin/2019/34-87750.pdf>.

<sup>340</sup> Order, *In the Matter of Tim Leissner*, File No. 3-19619 (Dec. 16, 2019).

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

As reported in our [2018 FCPA/Anti-Corruption Year in Review](#), in October 2018, Roger Ng was indicted for conspiring to violate the FCPA by bribing multiple Malaysian and Abu Dhabi officials, as well as conspiring to launder billions of dollars embezzled from 1MDB.<sup>343</sup> In May 2019, Ng was extradited from Malaysia to the United States.

#### **P. Transport Logistics International: Mark Lambert**

As reported in our [2018 FCPA/Anti-Corruption Year in Review](#), Mark Lambert, the former co-president of Transport Logistics International (TLI), was indicted on 11 counts, including one count of conspiracy to violate the FCPA and to commit wire fraud, seven counts of violating the FCPA, two counts of wire fraud, and one count of international promotion of money laundering, related to a scheme involving the alleged bribery of an official at a subsidiary of Russia's State Atomic Energy Corporation (RUSATOM).<sup>344</sup> In October 2018, the DOJ offered Lambert a plea deal, which he rejected.<sup>345</sup>

According to evidence presented at trial, Lambert conspired with others at TLI to make corrupt payments to Vadim Mikerin, a Russian official at the RUSATOM subsidiary, to secure transportation contracts for nuclear fuel. To conceal the payments, fake invoices were prepared that described services that were never provided by TLI.<sup>346</sup> After a three-week trial, on November 22, 2019, Lambert was found guilty of four counts of violating the FCPA, two counts of wire fraud, and one count of conspiracy to violate the FCPA and commit wire fraud.<sup>347</sup> Sentencing has been scheduled for March 9, 2020.<sup>348</sup>

#### **Q. Donville Inniss, Ingrid Innes, and Alex Tasker**

As discussed in the [2018 FCPA/Anti-Corruption Year in Review](#), the trial of Donville Inniss was originally scheduled for October of 2019. Inniss was charged with conspiracy to commit money laundering and money laundering for allegedly accepting \$36,000 in bribes in exchange for facilitating contracts between the Barbados Investment and Development Corporation, a government agency, and the Insurance Corporation of Barbados Limited (ICBL). After a two-day trial Inniss was found guilty on all counts on January 16, 2020.<sup>349</sup> Trial dates have not yet been set for former ICBL executives Ingrid Innes and Alex Tasker, who are facing charges for the same crimes.

<sup>343</sup> Indictment, *United States v. Low Taek Jho and Ng Chong Hwa*, No. 18-cr-00538 (MKB) (E.D.N.Y. Oct. 3, 2018), <https://www.justice.gov/opa/pressrelease/file/1106931/download>.

<sup>344</sup> Indictment, *United States v. Lambert*, No. 8:18-CR-00012 (D. Md. Jan. 10, 2018), <https://www.justice.gov/criminal-fraud/file/1044676/download>.

<sup>345</sup> Joint Status Report, *United States v. Lambert*, No. 8:18-CR-00012 (D. Md. Nov. 7, 2018), <https://www.courtlistener.com/docket/6298585/40/united-states-v-lambert/>.

<sup>346</sup> DOJ Press Release, *Former President of Transportation Company Found Guilty of Violating the Foreign Corrupt Practices Act and Other Crimes*, (Nov. 22, 2019), <https://www.justice.gov/opa/pr/former-president-transportation-company-found-guilty-violating-foreign-corrupt-practices-act>.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> DOJ Press Release, *Former Member of Barbados Parliament and Minister of Industry Found Guilty of Receiving and Laundering Bribes from Barbadian Insurance Company* (Jan. 16, 2020), <https://www.justice.gov/opa/pr/former-member-barbados-parliament-and-minister-industry-found-guilty-receiving-and-laundering>.

## R. Alex Nain Saab Moran and Alvaro Pulido Vargas

On July 25, 2019, Colombian businessmen Alex Nain Saab Moran (Saab) and Alvaro Pulido Vargas (Pulido) were each indicted in the Southern District of Florida on one count of conspiracy to commit money laundering and seven counts of money laundering.<sup>350</sup> The indictment alleges that between 2011 and 2015, Saab and Pulido bribed Venezuelan officials with payments for shipments of construction materials that were never actually sent to the country to secure a contract with the government to build low-income housing.<sup>351</sup> The indictment seeks forfeiture of over \$350 million in funds alleged to have been transferred out of Venezuela and through the United States pursuant to the scheme.<sup>352</sup>

On the same day as Saab and Pulido were indicted, the US Department of Treasury, Office of Foreign Assets Control (OFAC) announced sanctions against Saab, Pulido and associated parties.<sup>353</sup> The sanctions designated all US-based property and interests in property in which Saab, Pulido, and any other named party has at least a fifty percent interest as blocked and reportable to OFAC. The sanctions prohibit dealings with US persons or within (or transiting) the US that involve any blocked property or named party.

## S. Patrick Ho

As reported in our [2018 FCPA/Anti-Corruption Year in Review](#), former Hong Kong Secretary for Home Affairs Chi Ping Patrick Ho was convicted in December 2018 on charges of violating the FCPA, money laundering and conspiracy for his role in bribing officials in Chad and Uganda in exchange for contracts with a Chinese energy company. On March 25, 2019, US District Judge Loretta A. Preska sentenced Patrick Ho to three years in prison.<sup>354</sup>

## T. Keppel Offshore & Marine Ltd.: Jeffrey Shui Chow

Jeffrey Shui Chow, who, as discussed in our [2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview](#), pleaded guilty to one count of conspiracy for his role in the Keppel Offshore & Marine Ltd. (KOM) bribery scheme, was sentenced to time served and probation on November 18, 2019.<sup>355</sup>

## U. Ng Lap Seng

As discussed in detail at Section III.A.1, *supra*, the Second Circuit made a significant ruling in 2019, affirming Ng Lap Seng's conviction on various bribery,

<sup>350</sup> See Indictment, *United States v. Saab Moran et al.*, No. 1:19-cr-20450-RNS-1 (S.D. Fla. July 25, 2019); DOJ Press Release, *Two Columbia Businessmen Charged with Money Laundering in Connection with Venezuela Bribery Scheme* (July 25, 2019), <https://www.justice.gov/opa/pr/two-colombian-businessmen-charged-money-laundering-connection-venezuela-bribery-scheme>.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> See OFAC Press Release, *Treasury Disrupts Corruption Network Stealing From Venezuela's Food Distribution Program, CLAP* (July 25, 2019), <https://home.treasury.gov/news/press-releases/sm741>.

<sup>354</sup> DOJ Press Release, *Patrick Ho, Former Head Of Organization Backed By Chinese Energy Conglomerate, Sentenced To 3 Years In Prison For International Bribery And Money Laundering Offenses* (Mar. 25, 2019), <https://www.justice.gov/usao-sdny/pr/patrick-ho-former-head-organization-backed-chinese-energy-conglomerate-sentenced-3>.

<sup>355</sup> Judgement, *United States v. Jeffery Chow*, No. 17-cr-00466 (KAM) (E.D.N.Y. Nov. 18, 2019) (ECF No. 29).

conspiracy, and money laundering charges and distinguishing the term “official act” in the FCPA context from prior jurisprudence in *McDonnell v. United States*.

## **V. Alstom S.A.: Lawrence Hoskins**

As discussed in detail at Section III.A.2, *supra*, a jury found Lawrence Hoskins, a former senior executive at Alstom, guilty for his role in a foreign bribery scheme. The DOJ’s case against Hoskins turned primarily on whether he acted as an “agent” of Alstom’s US-based subsidiary.

## VI. New FCPA Investigations

A total of eight new FCPA investigations were disclosed in 2019, which is down from 20 in 2017, and ten in 2018. These new, publicly announced investigations cover a number of industries, including aviation, energy and extractives, among other industries.

### A. Aviation

The aviation industry historically has not been as much of an FCPA hotspot as some others, but that does not mean market players in this industry are flying under the radar. On July 10, 2019, AAR Corp. filed a Form 8-K disclosing that the company had informed the DOJ, SEC, and the UK Serious Fraud Office (SFO) of an internal investigation of possible FCPA violations relating to the company's activities in Nepal and South Africa.<sup>356</sup> On Aug. 15, 2019, the Colombian airline, Avianca Holdings S.A., also disclosed that it had informed the DOJ and SEC of an internal investigation to determine whether the company's business practices whereby company employees (possibly including members of senior management and the board of directors) gave free and discounted airline tickets and upgrades to government employees in certain countries, had violated the FCPA and other anti-corruption laws.<sup>357</sup>

### B. Energy and Extractives

Several investigations were disclosed by energy and extractive companies relating to Monaco-based intermediary Unaoil S.A.M. (Unaoil). Among others, on April 30, 2019, Baker Hughes, LLC, disclosed that it received a document request from the DOJ in March 2019 related to certain of its operations in Iraq and its dealings with Unaoil Limited and its affiliates.<sup>358</sup> ABB Ltd., which previously disclosed that it had informed the DOJ, SEC, and the SFO of its internal investigation regarding past dealings with Unaoil and its subsidiaries (as reported in our [2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview](#)), filed a Form 20-F on March 28, 2019, stating that based on findings during an internal investigation, the company had informed the DOJ, SEC, various authorities in South Africa and other countries, and certain multilateral financial institutions of potential suspect payments and other compliance concerns in connection with the company's dealings with Eskom, a South African utility company.<sup>359</sup>

<sup>356</sup> AAR Corp., Form 8-K (July 10, 2019), [https://www.sec.gov/Archives/edgar/data/1750/000110465919039824/a19-12637\\_18k.htm](https://www.sec.gov/Archives/edgar/data/1750/000110465919039824/a19-12637_18k.htm) (last accessed Jan. 7, 2019).

<sup>357</sup> Avianca Holdings S.A., Form 6-K (Aug. 15, 2019), <https://www.sec.gov/Archives/edgar/data/1575969/000119312519221753/d792613dex991.htm> (last accessed Jan. 7, 2019) (noting that the company has also disclosed the investigation to the Colombian Financial Superintendence).

<sup>358</sup> Baker Hughes, a GE company LLC, Form 10-Q (Apr. 30, 2019), <https://www.sec.gov/ix?doc=/Archives/edgar/data/808362/000080836219000011/bhgellc-2019033110xq.htm> (last accessed Jan. 7, 2019).

<sup>359</sup> ABB Ltd., Form 20-F (Mar. 28, 2019), <https://www.sec.gov/Archives/edgar/data/1091587/000141057819000158/maindocument001.htm> (last accessed Jan. 7, 2019) (noting that many of the authorities "have expressed an interest in, or commenced an investigation into, these matters;" it is not clear at this moment if the DOJ and SEC are also investigating the company's Eskom-related dealings).



## C. Technology

The technology industry continued to be a focus of FCPA-related activity, with two new investigations disclosed in 2019. Gartner, Inc. (Gartner), a Stamford, Connecticut-based research and advisory firm, disclosed in its Form 10-K filed on February 22, 2019, that a South African government commission had been established to review a wide range of issues related to the country's revenue service, including the procurement and fulfillment of consulting agreements that Gartner entered into with the revenue service through a sales agent, and that the commission had recommended that the revenue service explore lawful options to invalidate the agreements. Gartner stated that it had initiated an internal investigation regarding this matter and also disclosed its investigation to DOJ and SEC.<sup>360</sup>

In addition, Internet Gold Golden Lines Ltd. (Internet Gold), a communication service group based in Israel, disclosed in its Form 20-F filed on May 15, 2019 that the SEC had issued a Formal Order of Private Investigation with respect to the company in March 2019, regarding possible violations of the FCPA with respect to facts uncovered in criminal investigations in Israel regarding whether the company's subsidiaries and parent company violated Israeli securities laws.<sup>361</sup>

## D. Other Industries

On July 26, 2019, the Minnesota-based multinational manufacturer, 3M Company, filed a Form 10-Q disclosing that the company had informed the DOJ and SEC of an internal investigation relating to certain travel activities and related funding and record keeping issues arising from marketing efforts by certain business groups based in China.<sup>362</sup>

<sup>360</sup> Gartner, Inc., Form 10-K (Feb. 22, 2019), <https://www.sec.gov/Archives/edgar/data/749251/000074925119000005/it-12312018x10k.htm> (last accessed Jan. 8, 2019).

<sup>361</sup> Internet Gold Golden Lines Ltd., Form 20-F (May 15, 2019), [https://www.sec.gov/Archives/edgar/data/1090159/000121390019008849/f20f2018\\_internetgold.htm](https://www.sec.gov/Archives/edgar/data/1090159/000121390019008849/f20f2018_internetgold.htm) (last accessed Jan. 8, 2019).

<sup>362</sup> 3M Company, Form 10-Q (July 26, 2019), <https://www.sec.gov/ix?doc=/Archives/edgar/data/66740/000155837019006397/mmm-20190630x10q.htm>

## VII. World Bank and Other International Financial Institutions

### A. The World Bank

The Integrity Vice Presidency (INT) of the World Bank continued to actively investigate fraud and corruption in World Bank-financed projects. During fiscal year 2019 (FY2019), the World Bank received 2,461 complaints, leading to 346 preliminary investigations, and ultimately resulting in 49 investigations.<sup>363</sup> Of the 47 completed investigations, 37 cases were referred for sanctions to the Office of Suspension and Debarment (OSD).<sup>364</sup>

OSD temporarily debarred 24 firms and 10 individuals, of which 19 did not appeal and were subsequently sanctioned by OSD.<sup>365</sup> In an unusual move, the OSD dismissed four of the cases that INT submitted, as there was insufficient evidence to corroborate any of the allegations. Consistent with the previous years, allegations of fraud were the most common sanctionable practice: 77% of the cases reviewed by OSD included at least one claim of fraud.

The numbers of settlements submitted by INT to OSD dropped from 23 in FY2018 to 16 in FY2019.<sup>366</sup> Noteworthy cases of FY2019 included a successful settlement with an affiliate of Odebrecht, the Brazilian large multinational construction and engineering company which settled a major FCPA case in 2018,<sup>367</sup> under a Latin American water project.<sup>368</sup> The five contracts under investigation amounted to a total of USD 520 million. The company failed to disclose fees paid to its agents during the tender prequalification and bidding process. The settlement agreement included a three-year period of debarment for the company and its affiliates. In connection with the same project, the World Bank also debarred two subsidiaries of Veolia, for two years in the case of its French subsidiary, and for one year in the case of its Brazilian subsidiary<sup>369</sup> for fraudulent and collusive practices during the bidding process.

<sup>363</sup> World Bank Group Sanctions System Annual Report FY19 8, <http://documents.worldbank.org/curated/en/782941570732184391/pdf/World-Bank-Group-Sanctions-System-Annual-Report-FY19.pdf> (last accessed Jan. 2, 2020).

<sup>364</sup> *Id.*

<sup>365</sup> *Id.* at 37.

<sup>366</sup> *Id.* at 61.

<sup>367</sup> For a discussion of the FCPA charges against Odebrecht, see our [2018 FCPA Year in Review](#).

<sup>368</sup> Press Release, *World Bank Group Announces Settlement with Brazilian Subsidiary of Odebrecht* (Jan. 29, 2019), <https://www.worldbank.org/en/news/press-release/2019/01/29/world-bank-group-announces-settlement-with-brazilian-subsidiary-of-odebrecht> (last accessed Jan. 2, 2020).

<sup>369</sup> Press Release, *World Bank Group Announces Debarment of French and Brazilian Subsidiaries of Veolia Water Technologies* (May 29, 2019), <https://www.worldbank.org/en/news/press-release/2019/05/29/world-bank-group-announces-debarment-of-french-and-brazilian-subsidiaries-of-veolia-water-technologies> (last accessed Jan. 2, 2020).

The Sanctions Board sanctioned 14 firms and individuals in FY2019.<sup>370</sup> In six of those cases, the respondents were charged with fraudulent misconduct, whereas the number of cases including corruption allegations dropped from six in FY2018 to only one case in FY2019. On the other hand, in an increase from prior years, the Sanctions Board resolved four cases involving alleged collusion.

In the post-sanctions phase, the Integrity Compliance Officer engaged with over 90 sanctioned firms and individuals and released 23 firms and/or individuals from sanctions.<sup>371</sup>

## **B. Other International Financial Institutions**

In September 2019, the Inter-American Development Bank (IDB) announced a six-year debarment of CNO S.A., a subsidiary of Odebrecht involved in corrupt practices in Venezuela and Brazil. Sanctions extended to 60 subsidiaries of Odebrecht: 19 are subject to debarment and 41 to conditional non-debarment. From 2007 until 2015, Odebrecht companies allegedly paid a total of USD 118 million in bribes to public officials related to two IDB-funded projects. As part of the settlement, Odebrecht agreed to make a total contribution of USD 50 million to NGOs and charities starting in 2024.<sup>372</sup>

Another settlement involved the European Investment Bank (EIB) and Volkswagen AG (Volkswagen) on December 19, 2019 and related to gas emissions levels allegedly reported to the EIB in or around 2009 in connection with obtaining loans.<sup>373</sup> As part of the settlement, Volkswagen agreed to pay EUR 10 million to environment and/or sustainability projects in Europe.<sup>374</sup>

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<sup>370</sup> World Bank Group Sanctions System Annual Report FY19 8, <http://documents.worldbank.org/curated/en/782941570732184391/pdf/World-Bank-Group-Sanctions-System-Annual-Report-FY19.pdf> (last accessed Jan. 2, 2020).

<sup>371</sup> *Id.*

<sup>372</sup> Inter-American Development Bank News Release, *Odebrecht Reaches Settlement Agreement with IDB Group Resulting in Sanctions* (Sept. 4, 2019), <https://www.iadb.org/en/news/odebrecht-reaches-settlement-agreement-idb-group-resulting-sanctions-0> (last accessed Jan. 2, 2020).

<sup>373</sup> European Investment Bank Press Release, *Agreement reached between the European Investment Bank and Volkswagen AG in relation to EIB loan "Antrieb RDI"* (Dec. 19, 2018), <https://www.eib.org/en/press/news/agreement-reached-between-the-european-investment-bank-and-volkswagen-ag-in-relation-to-eib-loan-antrieb-rdi> (last accessed Jan. 2, 2020).

<sup>374</sup> *Id.*

## VIII. International Developments

The recent trend of increasing anti-corruption legislative and enforcement activity outside the United States has continued in 2019. Below, we discuss notable worldwide anti-corruption developments.

### A. United Kingdom

Having experienced mixed fortunes during 2018, the SFO had little in the way of high-profile success during 2019. The SFO's year was defined mostly by acquittals, the closure of investigations, a lack of visible progress in other long-running investigations, and the publication of several external reports into SFO staffing and case progression that highlighted room for improvement.

As noted in our [2018 FCPA/Anti-Corruption Year in Review](#), a number of high-profile and long-running SFO investigations appear to have stalled, particularly the investigations into Kazakh mining group Eurasian Natural Resources Corporation (ENRC) and the Airbus subsidiary GPT. At the end of 2019 it is not clear that either case is closer to resolution.

The ENRC investigation instead has spawned myriad separate proceedings. In March 2019 ENRC brought a claim against the SFO for £70 million in respect of legal costs resulting from the original SFO investigation. ENRC's claim accuses the SFO of misfeasance in public office, arguing that the SFO induced the law firm Dechert (which previously represented ENRC) and a partner at Dechert into acting in breach of contract and/or fiduciary duties owed to ENRC.<sup>375</sup>

Three months after the issuance of ENRC's claim, in July 2019, the SFO halted its independent inquiry into its handling of the investigation following allegations that it had improperly gathered evidence concerning ENRC.

In August 2019, ENRC applied to the High Court for a judicial review, alleging that the SFO's decision to suspend its independent inquiry was "unlawful, unreasonable, disproportionate and unfair."<sup>376</sup> A month earlier ENRC also commenced a High Court claim against the former prime minister of Kazakhstan, Akezhan Kazhegeldin, accusing him of leaking confidential and privileged information to both the SFO and litigation opponents.<sup>377</sup>

The investigation into GPT, initiated in 2012 amid accusations of £14 million in bribes being paid to secure a £2 billion contract with the Saudi Arabian National Guard, also appears to have advanced little during 2019. In June 2019 GPT's annual

<sup>375</sup> Max Walters, *ENRC targets SFO in £70m 'privilege breach' claim*, LAW GAZETTE (Mar. 27, 2019), <https://www.lawgazette.co.uk/law/enrc-targets-sfo-in-70m-privilege-breach-claim-/5069769.article> (last accessed Nov. 21, 2019).

<sup>376</sup> Jemma Slingo, *ENRC mounts more legal action against SFO*, LAW GAZETTE (Aug. 14, 2019), <https://www.lawgazette.co.uk/news/enrc-mounts-more-legal-action-against-sfo/5101148.article> (last accessed November 21, 2019).

<sup>377</sup> Dean Seal, *ENRC Sues Ex-PM Of Kazakhstan In Widening War With SFO*, LAW360 (July 25, 2019), <https://www.law360.com/articles/1181746/enrc-sues-ex-pm-of-kazakhstan-in-widening-war-with-sfo> (last accessed Nov. 22, 2019).

report announced that the company would go out of business on December 31, 2019—likely a result of the UK Ministry of Defence awarding GPT’s sole contract to a different military contractor.<sup>378</sup>

On October 14, 2019, Transparency International UK wrote to Attorney General Geoffrey Cox expressing concern over the timeliness of the investigation into GPT.<sup>379</sup> Transparency International UK called on the Attorney General to update Parliament, as a matter of urgency, as to the reasons for the delay. On November 4, 2019, Cox noted that “This case is being investigated by the Serious Fraud Office which investigates and prosecutes allegations of the most serious or complex fraud, bribery and corruption.” Cox stated that the allegations were challenging to investigate, that the case was particularly complex, that the investigation was ongoing, and that it would take time. As a result, he declined to comment further on it.<sup>380</sup>

A number of ongoing investigations were ended by the SFO during 2019. On October 18, 2019, the SFO concluded its investigation into the manipulation of the LIBOR with no further charges being brought.<sup>381</sup> Charges of conspiracy to defraud had been brought against a total of 13 individuals, with the most recent trial concluding on April 6, 2017, with the acquittal of two individuals. Elements of an SFO investigation into manipulation of the Euro Interbank Offered Rate (EURIBOR) do, however, remain active. In April 2019, two former Barclays traders were convicted of conspiring to rig EURIBOR, with one trader being acquitted.<sup>382</sup>

As we discussed in our [2018 FCPA/Anti-Corruption Year in Review](#), on February 22, 2019, the SFO announced the closure of both the Rolls-Royce and GlaxoSmithKline (GSK) investigations, citing “insufficient evidence to provide realistic prospect of conviction” and the “public interest” as the reasons behind its decisions. The SFO noted that its investigation into Rolls-Royce had resulted in a DPA but confirmed that no individuals at Rolls-Royce would face prosecution.

Following on from the high-profile failure of the SFO’s case against three former Tesco executives, discussed in our [2018 FCPA/Anti-Corruption Year in Review](#), on July 16, 2019, the SFO suffered a further setback when three employees of metals company Sarclad were acquitted of bribery charges by a jury at Southwark Crown Court.<sup>383</sup> The SFO then confirmed that Sarclad was the name of the company previously known only as XYZ Ltd, which had entered into a DPA with the SFO in 2016. Continued difficulty securing convictions ultimately may lead more companies to challenge the SFO and scrutinize the case against them before engaging in

<sup>378</sup> Rob Evans and David Pegg, *Airbus shuts down subsidiary at center of bribery investigation*, GUARDIAN (June 23, 2019), <https://www.theguardian.com/business/2019/jun/23/airbus-shuts-down-subsidiary-at-centre-of-bribery-investigation> (last accessed Nov. 21, 2019)

<sup>379</sup> Transparency International UK, *Serious concerns over delay to corruption probe [sic] into Airbus subsidiary* (Oct. 14, 2019) <https://www.transparency.org.uk/press-releases/airbus-gpt-corruption-investigation-delay-serious-fraud-office/> (last accessed November 21, 2019)

<sup>380</sup> UK Parliament, *GPT Special Project Management: Written question - 7186*, <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-10-29/7186> (last accessed Jan. 3, 2020)

<sup>381</sup> SFO, *SFO concludes investigation into LIBOR manipulation* (Oct. 18, 2019), <https://www.sfo.gov.uk/2019/10/18/sfo-concludes-investigation-into-libor-manipulation/> (last accessed Nov. 22, 2019).

<sup>382</sup> Andy Verity, *Former Barclays traders jailed over Euribor rate-rigging*, BBC (Apr. 1, 2019), <https://www.bbc.co.uk/news/business-47779993> (last accessed Jan. 3, 2020).

<sup>383</sup> SFO, *Sarclad Ltd* (Sept. 3, 2019), <https://www.sfo.gov.uk/cases/sarclad-ltd/> (last accessed Nov. 22, 2019).

settlement discussions with the SFO. Indeed, while the UK subsidiary of Alstom, the French rail and power company, was found guilty in November 2019 of paying a €2.4 million bribe to secure a Tunisian tram contract and fined £15 million, ending a decade-long SFO investigation, three other charges in respect of other transport projects did not result in convictions.

The SFO did find some success with regards to individual convictions during 2019. On February 6, 2019, the former global head of sales for Petrofac International Limited pleaded guilty to eleven counts of bribery, with sentencing to occur at a later date.<sup>384</sup> Additionally, on July 15, 2019, Unaoil's former partner in Iraq pleaded guilty to five offences of conspiracy to give corrupt payment as part of the SFO's ongoing investigation into Unaoil.<sup>385</sup> The criminal trial of three other individuals associated with Unaoil is scheduled to begin on January 20, 2020 at Southwark Crown Court.

While various investigations were brought to a close during 2019, there has been relatively little cheer with regards to the opening of any new, high profile investigations besides the opening of investigations into the De La Rue group, the world's biggest printer of banknotes, over suspected corruption in South Sudan<sup>386</sup> and the Glencore group of companies into suspected bribery, respectively.<sup>387</sup> Indeed, a November 2019 article in *Bloomberg Businessweek*, entitled "Activists Worry Britain's Financial Watchdog Is Losing Its Zeal" focused on this particular issue, quoting Susan Hawley, the executive director of Spotlight on Corruption, as saying "[the SFO is] focusing on small cases, and you're left asking, 'where is the ambition?'"<sup>388</sup> Anti-corruption campaigner Bill Browder also stated that "[w]hite-collar crime enforcement in the UK is a total disaster." With regards the UK Bribery Act 2010 (the Act) itself, however, on March 14, 2019, a House of Lords Select Committee found the Act to be a model piece of legislation. It made certain recommendations for clarifying the accompanying guidance, including the provision of further examples as to what would constitute a good defense to the corporate offence of failing to prevent bribery. The Committee also recommended that the UK government delay no further in reaching a decision as to whether to extend the failure to prevent offence to other economic crimes.<sup>389</sup>

On July 12, 2019, the UK government's Economic Crime Strategic Board published an Economic Crime Plan for 2019 to 2022. The plan sets out seven priority areas that include improving systems for transparency of ownership of legal entities and legal arrangements, pursuing better sharing of information across

<sup>384</sup> SFO, *Former senior executive convicted in Petrofac investigation* (Feb. 7, 2019), <https://www.sfo.gov.uk/2019/02/07/former-senior-executive-convicted-in-petrofac-investigation/> (last accessed December 12, 2019).

<sup>385</sup> SFO, *Former Unaoil executive pleads guilty to conspiracy to give corrupt payments* (July 19, 2019), <https://www.sfo.gov.uk/2019/07/19/former-unaoil-executive-pleads-guilty-to-conspiracy-to-give-corrupt-payments/> (last accessed Dec. 16, 2019).

<sup>386</sup> SFO, *De La Rue plc* (July 23, 2019), <https://www.sfo.gov.uk/2019/07/23/de-la-rue-plc/> (last accessed Dec. 12, 2019).

<sup>387</sup> SFO, *SFO confirms investigation into suspected bribery at Glencore group of companies* (Dec. 5, 2019), <https://www.sfo.gov.uk/2019/12/05/sfo-confirms-investigation-into-suspected-bribery-at-glencore-group-of-companies/> (last accessed Dec. 20, 2019)

<sup>388</sup> Franz Wild, *Activists Worry Britain's Financial Watchdog Is Losing Its Zeal*, BLOOMBERG BUSINESSWEEK (Nov. 14, 2019), <https://www.bloomberg.com/news/articles/2019-11-14/activists-worry-britain-s-serious-fraud-office-is-losing-its-zeal> (last accessed Nov. 22, 2019)

<sup>389</sup> House of Lords, *The Bribery Act 2010: post-legislative scrutiny* (Mar. 14, 2019), <https://publications.parliament.uk/pa/ld201719/ldselect/ldbriact/303/303.pdf> (last accessed Dec. 12, 2019)

the public and private sectors and developing a better understanding of the threat posed by economic crime.<sup>390</sup>

During 2019 two external reports were published that painted the SFO in a somewhat mixed light. Following a request by SFO Director Lisa Osofsky for an independent assessment of staff engagement, on July 22, 2019, the HM Crown Prosecution Service Inspectorate (HMCPsi) published a report entitled “Serious Fraud Office Leadership Review” that highlighted a number of organizational failures.<sup>391</sup>

On October 8, 2019, HMCPsi published a second report on the SFO focusing on case progression systems and processes between case acceptance and charging.<sup>392</sup> As part of the report, HMCPsi selected six cases at random, spoke to staff and case managers and reviewed key documents and processes. The report found that cases are accepted by the SFO for investigation in a timely manner but then subject to delays thereafter—often due to either a delay in allocation of a case controller and suitable team or a delay in the SFO digital forensic unit processing the relevant digital material. The report also found inconsistencies in treatment of unused material and application of internal casework processes. It noted, however, the recent adoption by the SFO of a new case management system that hopefully will address some of the concerns identified. The report stated that it should not be read negatively or lead to a conclusion that the SFO is ineffective when it is not, notwithstanding the ways in which the organization might improve.

Among the more positive developments for the SFO in the last 12 months was the completion of two further deferred prosecution agreements (DPA). On July 4, 2019, the SFO received court approval for a DPA with Serco Geografix Ltd (Serco), ending an investigation that commenced in November 2013.<sup>393</sup> Serco had committed three offenses of fraud and two of false accounting in connection with a scheme to dishonestly mislead the Ministry of Justice (MOJ) as to the extent of profits made by its parent company, Serco Limited, for the provision of electronic monitoring services. According to the SFO, this deception prevented the MOJ from seeking to limit future profits or seek more favorable terms during contract renegotiations. The DPA required Serco to pay a financial penalty of £19.2 million and also £3.7 million in costs incurred by the SFO. These payments were in addition to compensation of £12.8 million previously paid to the MOJ by Serco in 2013 as part of a civil settlement. Additionally, under the terms of the DPA for the next three years Serco must cooperate fully with the SFO and other foreign and domestic regulatory authorities, reporting any evidence of fraud and both enhancing and reporting annually on the effectiveness of its ethics and compliance program. On December 16, 2019, the SFO announced that it has charged two individuals with fraud and false accounting in relation to this investigation.

<sup>390</sup> GOV.UK, *Economic Crime Plan 2019 to 2022* (Sept. 13, 2019), <https://www.gov.uk/government/publications/economic-crime-plan-2019-to-2022> (last accessed Dec. 12, 2019).

<sup>391</sup> HM Crown Prosecution Service Inspectorate, *Serious Fraud Office Leadership Review* (July 22, 2019), <https://www.justiceinspectorates.gov.uk/hmcp/inspections/serious-fraud-office-leadership-review/> (last accessed Nov. 22, 2019).

<sup>392</sup> HM Crown Prosecution Service Inspectorate, *Case Progression in the Serious Fraud Office* (Oct. 8, 2019), <https://www.justiceinspectorates.gov.uk/hmcp/inspections/case-progression-sfo-oct-19/> (last accessed Nov. 22, 2019).

<sup>393</sup> SFO, *SFO completes DPA with Serco Geografix Ltd* (July 4, 2019), <https://www.sfo.gov.uk/2019/07/04/sfo-completes-dpa-with-serco-geografix-ltd/> (last accessed Nov. 21, 2019).

On December 20, 2019, the SFO also announced that it had reached a DPA with Güralp Systems Ltd (Güralp) in relation to conspiracy to make corrupt payments to a South Korean public official and a failure to prevent bribery by its employees in relation to payments made between 2002 and 2015. As a result of this DPA, Güralp agreed to pay a total of £2,069,861 in disgorgement of gross profits. Three individuals were, however, acquitted of conspiracy to make corrupt payments in relation to payments made to a South Korean public official between 2002 and 2015.<sup>394</sup>

One area of uncertainty over the last few years has been the extent of cooperation the SFO requires of corporate entities in order to consider eligibility for cooperation credit when making decisions to charge or enter into a DPA. In trying to meet the level of cooperation expected by the SFO, the only guidance available to corporate entities to assist them in understanding what was required was the (limited) DPAs agreed to date, speeches, and guidance such as the DPA Code of Practice. The SFO brought some clarity to this area on August 6, 2019 when it released its “Corporate Cooperation Guidance.”<sup>395</sup> Much of the guidance is as expected and foreshadowed by prior speeches. Cooperation must exceed mere compliance with law and may include actions such as providing material promptly and in a useful structured manner, identifying material in the possession of third parties, creating and maintaining an audit trail of the acquisition and handling of hard copy and physical material, providing records that show relevant money flows and consulting with the SFO prior to interviewing potential witnesses or suspects or taking personnel/HR actions. While this additional written clarification should be useful to corporate entities, certain elements of the guidance do not accord with expectations in the United States and might therefore pose issues in cross-border investigations. For instance, approval from US regulatory bodies is not required before interviewing witnesses or suspects, although US authorities do expect “de-confliction” where requested by the DOJ to receive credit for full cooperation. Additionally, larger strategic issues such as the timing of any self-reporting to the SFO and the impact from a cross-border perspective of any waiver of privilege will, of course, still need to be considered.

## **B. Continental Europe**

### **1. France**

Since the adoption of a new anti-corruption law, nicknamed Sapin II, in December 2016, which entered into force in June 2017,<sup>396</sup> France has continued to implement its provisions, notably to secure a Convention Judiciaire d’Intérêt Public (CJIP) or French DPA. While 2018 saw four corruption-related CJIPs, including a coordinated settlement with US authorities, in 2019, the French PNF secured only one corruption-related CJIP in addition to two CJIPs for fiscal fraud.

<sup>394</sup> SFO, *Three individuals acquitted as SFO confirms DPA with Güralp Systems Ltd* (Dec. 20, 2019), <https://www.sfo.gov.uk/2019/12/20/three-individuals-acquitted-as-sfo-confirms-dpa-with-guralp-systems-ltd/> (last accessed Dec. 20, 2019).

<sup>395</sup> SFO, *Corporate Co-operation Guidance* (Aug. 16, 2019), <https://www.sfo.gov.uk/download/corporate-co-operation-guidance/> (last accessed Nov. 22, 2019).

<sup>396</sup> See our 2016 FCPA Year in Review, 2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview, and the [FCPA/Anti-Corruption Developments: 2018 FCPA/Anti-Corruption Year in Review](#) for a discussion of France’s anti-corruption efforts in recent years.



On November 28, 2019, the PNF and French engineering firm SAS Egis Avia (Egis Avia) entered into a CJIP to settle charges of corruption of a foreign public agent between 2009 and 2011 in connection with a contract for the modernization of the Oran airport in Algeria. The alleged conduct involved a €390,640 fictitious contract Egis Avia entered into with consulting firm Amphora Consultants, incorporated in the British Virgin Islands, which was allegedly used as a conduit to pass on funds to Algerian intermediaries, including the son of the Algerian Interior Minister at the time, to help Egis Avia obtain the Oran airport contract. As part of the CJIP, approved by the Paris High Court on December 10, 2019, Egis Avia agreed to pay a penalty of €2,600,000. The penalty was mitigated by the company's current management's active cooperation in the negotiation phase and the age of the conduct at issue.<sup>397</sup>

The two CJIPs entered into in 2019 for fiscal fraud included the larger CJIP with SARL Google France and Google Ireland Limited, signed on September 3 and approved by the Paris High Court on September 12,<sup>398</sup> in which the companies agreed to pay a total penalty of €500 million for allegedly evading €189,528,428 of taxes between 2011 and 2018; and the CJIP with Carmignac Gestion SA, signed on June 20, 2019 and approved by the Paris High Court on June 28, 2019,<sup>399</sup> pursuant to which the company agreed to pay a penalty of €30 million for allegedly evading €11,143,832 of taxes between 2010 and 2014.

2019 also saw the first decision by the Sanctions Commission set up within the French Anti-Corruption Agency (*Agence Française Anticorruption*, AFA) to issue sanctions under Article 17 of Sapin II for failure to comply with the law's requirements regarding anti-corruption compliance programs. Under Article 17, which requires certain companies with at least 500 employees and a turnover of more than €100 million to take measures to prevent and detect corruption, the AFA is charged with monitoring compliance and may refer its findings to the Sanctions Commission. As of the end of 2018, the AFA had conducted a total of 53 inspections according to its latest annual report of activity.<sup>400</sup>

On July 4, 2019, the Sanctions Commission issued its first decision in response to the AFA's referral of "Company S" made in March 13, 2019 based on its initial inspection from late 2017 and updated following its assessment of Company S's responses provided in September 2018. The Sanctions Commission found that the shortcomings identified by the AFA had been remediated by the company in 2018 and in the first half of 2019, as a result of which no injunction or sanction was

<sup>397</sup> CJIP PNF 14 153 000 230 (Nov. 28, 2019), <https://www.agence-francaise-anticorruption.gouv.fr/files/files/cjipEGIS.PDF> (last accessed Dec. 24, 2019); ordinance of validation of the CJIP, Cour d'appel de Paris, P 14 153 000 230 (Dec. 10, 2019), [https://www.agence-francaise-anticorruption.gouv.fr/files/files/Ordonnance\\_de\\_validationCJIEGIS.pdf](https://www.agence-francaise-anticorruption.gouv.fr/files/files/Ordonnance_de_validationCJIEGIS.pdf) (last accessed Dec. 24, 2019).

<sup>398</sup> CJIP PNF 15 162 000 335 (Sept. 3, 2019), [https://www.agence-francaise-anticorruption.gouv.fr/files/files/190903\\_CJIP.pdf](https://www.agence-francaise-anticorruption.gouv.fr/files/files/190903_CJIP.pdf) (last accessed Dec. 24, 2019); ordinance of validation of the CJIP, Cour d'appel de Paris, P 15 162 000 335 (Sept. 12, 2019), [https://www.agence-francaise-anticorruption.gouv.fr/files/files/190912\\_Ordo\\_validation\\_sign%C3%A9e%20\(2\).pdf](https://www.agence-francaise-anticorruption.gouv.fr/files/files/190912_Ordo_validation_sign%C3%A9e%20(2).pdf) (last accessed Dec. 24, 2019).

<sup>399</sup> CJIP PNF 17 044 000 327 (June 20, 2019), [https://www.agence-francaise-anticorruption.gouv.fr/files/files/carmignac%20gestion\\_CJIP.pdf](https://www.agence-francaise-anticorruption.gouv.fr/files/files/carmignac%20gestion_CJIP.pdf) (last accessed Dec. 24, 2019); ordinance of validation of the CJIP, Cour d'appel de Paris, P 17 044 000 327 (June 28, 2019), [https://www.agence-francaise-anticorruption.gouv.fr/files/files/carmignac%20gestion%20Ordonnance\\_%20validation\\_CJIP.pdf](https://www.agence-francaise-anticorruption.gouv.fr/files/files/carmignac%20gestion%20Ordonnance_%20validation_CJIP.pdf) (last accessed Dec. 24, 2019).

<sup>400</sup> *Rapport Annuel D'Activité*, AFA (2018), [https://www.agence-francaise-anticorruption.gouv.fr/files/files/RA%20Annuel%20AFA\\_WEB\\_0.pdf](https://www.agence-francaise-anticorruption.gouv.fr/files/files/RA%20Annuel%20AFA_WEB_0.pdf) (last accessed Dec. 24, 2019). The Annual Report for 2019 is not yet available.

imposed.<sup>401</sup> While the decision was anonymized, referring simply to “Company S,” French company Sonepar, involved in the distribution of electronic products, identified itself following the publication of the decision on July 10, 2019 by means of a press release.<sup>402</sup>

Overall, the decision suggests the Sanctions Commission’s willingness to consider remediation efforts by the company under inspection up to the date of its decision, considering the company’s compliance program as it then stands, thus giving companies the opportunity to address swiftly shortcomings identified in an AFA inspection in order to avoid a sanction.

French prosecutors continue to target current and former high-level politicians in France in connection with their anti-corruption efforts. While the preliminary inquiry opened in 2018 into allegations that the French President’s chief of staff, Alexis Kohler, violated conflict of interest rules while serving at the Ministry of the Economy and Finance, was closed in August 2019,<sup>403</sup> the proceedings against former French President Nicolas Sarkozy for corruption, illegal campaign financing, and misappropriation of Libyan public funds are ongoing.<sup>404</sup>

## 2. Germany

In August 2019, the German Ministry of Justice and Consumer Protection presented a draft legislation for the Corporate Sanctions Act establishing criminal liability for corporations in Germany. So far, Germany has not enacted a corporate criminal law and companies cannot be held criminally liable, although they have equivalent liability on a civil and administrative basis.<sup>405</sup> If enacted, the new law would apply to all legal persons based or doing business in Germany. Among other things, the draft legislation includes an increase in the potential fines to 10% of the annual revenues of companies whose revenues exceed €100 million. The German parliament is expected to adopt the draft legislation in the coming year.

Meanwhile, German prosecuting authorities are currently investigating Fresenius Medical Care AG & Co. KGaA (FMC) after it entered into settlements totalling USD 231.7 million with the SEC and DOJ to resolve bribery allegations.<sup>406</sup> The bribery allegations being investigated by the German authorities relate to several employees of FMC and are mainly derived from the findings of the SEC and DOJ, including that,

<sup>401</sup> *Commission de Sanctions Décision No. 19-01, AFA (July 4, 2019)*, <https://www.agence-francaise-anticorruption.gouv.fr/files/files/DECISION%2019-01%20COMMISSION%20DES%20SANCTIONS%20ANONYMISEE.pdf> (last accessed Dec. 24, 2019).

<sup>402</sup> *Sonepar becomes first French company officially ruled Sapin II compliant*, SONEPAR (July 10, 2019), <https://www.sonepar.com/newsroom/press/press-detail/news/sonepar-becomes-first-french-company-officially-ruled-sapin-ii-compliant.html> (last accessed Dec. 24, 2019).

<sup>403</sup> *L’enquête du Parquet national financier sur Alexis Kohler classée sans suite*, LE MONDE (Aug. 22, 2019), [https://www.lemonde.fr/police-justice/article/2019/08/22/l-enquete-du-parquet-national-financier-sur-alexis-kohler-classee-sans-suite\\_5501635\\_1653578.html](https://www.lemonde.fr/police-justice/article/2019/08/22/l-enquete-du-parquet-national-financier-sur-alexis-kohler-classee-sans-suite_5501635_1653578.html) (last accessed Dec. 24, 2019).

<sup>404</sup> *Soupçons de financement libyen : le camp Sarkozy tente d’invalider l’enquête judiciaire*, LE MONDE (Oct.17, 2019), [https://www.lemonde.fr/politique/article/2019/10/17/soupcons-de-financement-libyen-le-camp-sarkozy-tente-d-invalider-l-enquete-judiciaire\\_6015830\\_823448.html](https://www.lemonde.fr/politique/article/2019/10/17/soupcons-de-financement-libyen-le-camp-sarkozy-tente-d-invalider-l-enquete-judiciaire_6015830_823448.html) (last accessed Dec. 24, 2019).

<sup>405</sup> Emily Casswell, *New German law expected to transform corporate investigations*, GLOBAL INVESTIGATIONS REV. (Aug. 30, 2019), <https://globalinvestigationsreview.com/article/1196780/new-german-law-expected-to-transform-corporate-investigations> (last accessed Jan. 2, 2020)

<sup>406</sup> FMC paid USD 84.7 million under a non-prosecution agreement with the DOJ and USD 147 million after an administrative order by the SEC.

between 2007 and 2016, doctors and clinic personnel systematically bribed public officials in 17 countries. FMC itself voluntarily informed the German authorities and has since fully co-operated with the authorities.

In December 2019 the German authorities closed their investigation against two employees of Deutsche Bank related to money laundering and tax evasion on the basis of a lack of corroborating evidence.<sup>407</sup>

### 3. Italy

On January 31, 2019, Italy's anti-corruption law No 3/2019 on "Measures to fight crimes against the public administration as well as on the matter of statute of limitations and transparency of political parties and movements" entered into force. This new law introduces important measures affecting Italian criminal law (such as a life-long prohibition on dealing with public administrations, a life-long disqualification from holding public office for individuals sentenced for a corruption-related crime to longer than two years, and increased penalties for certain crimes against the public administration) and significantly amends Legislative Decree No 231/2001 with respect to corporate liability (including by increasing the duration of restraining measures applicable to certain crimes against the public administration).

Meanwhile, the Milan trial concerning Eni and Royal Dutch Shell's business activities in Nigeria is still ongoing. Eni and Shell, as well as senior executives from both companies currently on trial, deny wrongdoing. Shell announced in October, 2019 that US prosecutors had dropped a related investigation "based on the facts available... including the ongoing legal proceedings in Europe."<sup>408</sup>

Also in relation to Eni, Italian prosecutors have been conducting an investigation into allegations of corruption involving the oil and gas major in the Republic of Congo and some company executives (including the CEO, Claudio Descalzi) between 2013 to 2015. The case reportedly concerns agreements between Eni's subsidiary in the Congo and the local Ministry of hydrocarbons for exploration and production permits as well as separate allegations that Descalzi failed to declare conflicts of interest. Eni and the individuals under investigation have denied any wrongdoing. Prosecutors have recently added Descalzi's wife to the list of suspects and issued search warrants for their homes in Italy.<sup>409</sup>

In the long-running case involving allegations that Saipem paid intermediaries about 198 million euros to secure energy contracts with Algeria's state-owned Sonatrach, prosecutors appealed the court of first instance's September 2018 ruling (which fined Saipem 400,000 euros, sentenced its former CEO Pietro Tali to prison, and ordered that 198 million euros be seized from Saipem, while acquitting Eni and

<sup>407</sup> Deutsche Bank Media Release, *Criminal investigations into Deutsche Bank employees in connection with "Regula" closed* (Dec. 6, 2019), [https://www.db.com/newsroom\\_news/2019/criminal-investigations-into-deutsche-bank-employees-in-connection-with-regula-closed-en-11655.htm](https://www.db.com/newsroom_news/2019/criminal-investigations-into-deutsche-bank-employees-in-connection-with-regula-closed-en-11655.htm) (last accessed Jan. 2, 2020)

<sup>408</sup> Michael Griffiths, *Shell announces end to DOJ bribery probe*, GLOBAL INVESTIGATIONS REV., Just Anti-Corruption (Oct. 3, 2019), <https://globalinvestigationsreview.com/article/jac/1209197/shell-announces-end-to-doj-bribery-probe>.

<sup>409</sup> Joe Bavier, Emilio Parodi and Stephen Jewkes, *Congo Republic president's adviser awarded oil licenses at heart of Eni probe*, REUTERS (Oct. 10, 2019), <https://uk.reuters.com/article/us-eni-congorepublic-insight/congo-republic-presidents-adviser-awarded-oil-licenses-at-heart-of-eni-probe-idUKKBN1WP1Q1>, and *Milan prosecutors investigate Eni CEO's wife*, GLOBAL INVESTIGATIONS REV. (Sept. 30, 2019), <https://globalinvestigationsreview.com/short-cut/2019/september/30>.

its former CEO Paolo Scaroni). Prosecutors sought a prison sentence for Scaroni, a fine of 900,000 euros for Eni, and the seizure of assets worth 197 million euros. In a January 15, 2020 ruling, an Italian appeals court acquitted Eni and its former subsidiary Saipem of corruption and lifted the asset seizure order against Saipem.<sup>410</sup>

Finally, the Italian National Anti-Corruption Authority (ANAC) has imposed a penalty for retaliation against a whistleblower for the first time since the country's whistleblower protection legislation took force in 2018. The legislation aims to strengthen the existing protection available in the public sector and to introduce protection in the private sector, in line with the adoption by the EU Council of the EU-wide Whistleblower Protection Directive on October 7, 2019 (the Directive). The Directive sets out certain standards across Europe for the protection of whistleblowers and provides whistleblowers (and their colleagues or family members) with legal protection against all forms of retaliation (such as dismissal, demotion, or intimidation). EU Member States are due to transpose the Directive into national legislation by May 15, 2021.<sup>411</sup>

#### 4. Greece

On July 1, 2019, the new Greek Criminal Code<sup>412</sup> and the new Greek Code of Criminal Procedure<sup>413</sup> entered into force and created a unified framework for the prosecution of corruption offences. As a result, the main active bribery offence was converted from a felony to a misdemeanor. The OECD Working Group on Bribery expressed concerns that the new rules could be in breach of the OECD's Anti-Bribery Convention and that they may have unintended far-reaching consequences, such as the closure of ongoing corruption-related investigations and prosecutions, the possible hindrance of international cooperation in future cases and/or the implementation of shorter limitation periods.<sup>414</sup> The new legislation also introduced the possibility of plea bargaining. While the plea bargaining is designed for the pre-trial procedure, it may also take place at the trial stage.

In July 2019, the Court of Appeal in Athens convicted former Johnson & Johnson executives in connection with a long-running investigation into allegations that the company bribed medical professionals to secure contracts in Greece. Prosecutors alleged that employees of Johnson & Johnson and other medical device companies made corrupt payments to Greek healthcare professionals to secure contracts for the sale of orthopedic products between 2000 and 2006.<sup>415</sup>

<sup>410</sup> *Italian appeals court acquits Saipem, Eni in Algerian graft case*, REUTERS (January 15, 2020) <https://www.reuters.com/article/saipem-algeria-corruption/update-1-italian-appeals-court-acquits-saipem-eni-in-algerian-graft-case-idUSL8N29K4ZN>.

<sup>411</sup> Vera Cherepanova, *Italy (finally) protects a whistleblower, issues first penalty for retaliation*, FCPA BLOG (Oct. 17, 2019), <https://fcpablog.com/2019/10/17/italy-finally-protects-a-whistleblower-issues-first-penalty-for-retaliation/>.

<sup>412</sup> Law No. 4619/2019 of June 11, 2019, [https://www.kodiko.gr/nomologia/document\\_navigation/529099](https://www.kodiko.gr/nomologia/document_navigation/529099) (last accessed Dec. 12, 2019).

<sup>413</sup> Law No. 4620/2019 of June 11, 2019, [https://www.kodiko.gr/nomologia/document\\_navigation/530491](https://www.kodiko.gr/nomologia/document_navigation/530491) (last accessed Dec. 12, 2019).

<sup>414</sup> OECD, *OECD very concerned that active bribery is no longer a felony in Greece* (July 10, 2019), <https://www.oecd.org/greece/oecd-very-concerned-that-active-bribery-is-no-longer-a-felony-in-greece.htm> (last accessed Dec. 12, 2019).

<sup>415</sup> James Thomas and Marieke Breijer, *Greece convicts three UK nationals in Johnson & Johnson bribery case*, GLOBAL INVESTIGATIONS REV. (July 29, 2019), <https://globalinvestigationsreview.com/article/1195671/greece-convicts-three-uk-nationals-in-johnson-johnson-bribery-case> (last accessed Dec. 23, 2019).

Finally, an Athens court found 22 former employees of German engineering company, Siemens, and Greek telecommunications company, OTE, guilty of bribery. Several individuals, including Siemens' CEO Heinrich von Pierer were sentenced to terms of imprisonment of up to 15 years. The case relates to bribes estimated at 70 million euros paid by Siemens in 1997 to secure a contract with the then state-owned telecoms provider, OTE.<sup>416</sup>

## 5. Hungary

On August 23, 2019, the Office of the Prosecutor General of Hungary announced that it was considering acting against Microsoft Hungary following a report received from the US DOJ that Microsoft Hungary used third-party agents to negotiate contracts with government agencies for software and services, which were heavily discounted by Microsoft's parent company. These savings, however, were not passed on to the purchaser, and were instead "used to make improper payments." As part of an NPA with the US DOJ, Microsoft Hungary admitted to violating the FCPA.

Ten days after the announcement by the Office of the Prosecutor General of Hungary, the Organization for Economic Co-operation and Development (OECD) highlighted in a report that the Hungarian prosecutor's office had failed to convict a single company on foreign bribery offences since the organization's first report into the country's justice system in 2003.<sup>417</sup>

## 6. Romania

In 2018, the Romanian parliament approved changes to the criminal code. The changes are intended to decriminalize low-level corruption including that cases involving less than \$475 would be exempt from prosecution, people older than 60 would only serve one-third of their sentence, and the maximum jail time would be reduced from seven to five years. The changes were also intended to shorten the statutes of limitations resulting in the closure of several ongoing cases. In a non-binding referendum, the Romanian people expressed their disapproval with the changes to the anti-corruption laws by an emergency decree.<sup>418</sup> Shortly after the referendum, in July 2019, the Romanian Constitutional Court declared the changes made to the criminal code as unconstitutional.

On May 26, 2019, the Supreme Court of Romania upheld an earlier conviction of Liviu Dragnea, the Chief of Romania's Ruling Party, in relation to corruption charges. He was previously sentenced to three years and six months in jail for having procured jobs at a child protection agency for two women working in his party.

<sup>416</sup> Ioanna Mandrou, *Court finds 22 guilty in Siemens bribery trial*, ekathimerini.com (Nov. 19, 2019), <http://www.ekathimerini.com/246614/article/ekathimerini/news/court-finds-22-guilty-in-siemens-bribery-trial> (last accessed Dec. 12, 2019).

<sup>417</sup> Sam Fry, *Microsoft unlikely to face bribery enforcement action in Hungary*, GLOBAL INVESTIGATIONS REV. (Sept. 10, 2019), <https://globalinvestigationsreview.com/article/1197386/microsoft-unlikely-to-face-bribery-enforcement-action-in-hungary> (last accessed Dec. 23, 2019).

<sup>418</sup> European Commission, *Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism*, 4 (Oct. 22, 2019), [https://ec.europa.eu/info/sites/info/files/progress-report-romania-2019-com-2019-499\\_en.pdf](https://ec.europa.eu/info/sites/info/files/progress-report-romania-2019-com-2019-499_en.pdf).

## 7. Sweden

In November 2019, Sweden's criminal code was amended to significantly increase the potential penalties for committing foreign bribery. From January 1, 2020, Swedish courts will be able to hand down a maximum fine of 500 million krona (USD 53 million) against large companies: an increase from the previous cap of 10 million krona (USD 1 million). Large companies are defined as those which are publicly listed or fulfil two out of three criteria, including having 50 or more employees, a balance sheet in excess of 40 million krona, or a net turnover in excess of 80 million krona. Under the amended criminal code, prosecutors will also be able to levy fines of up to three million krona (USD 318,000) on a company without initiating legal proceedings if they can prove an individual acting for the company has committed a criminal offence. The law also removes a prerequisite that prosecutors must secure the conviction of a company employee who took part in the scheme before pursuing the corporate. It also states that fines against companies will not constitute a criminal conviction.<sup>419</sup>

In February, a Swedish district court examining charges against Telia executives for payments to Gulnara Karimova, a former Uzbek official and daughter of the former president of Uzbekistan, determined that Swedish prosecutors had not established that Karimova was a public official under Sweden's Bribery Act and Penal Code.<sup>420</sup> This ruling is contrast with the position taken by US enforcement authorities in an enforcement action against MTS (see Section IV.D.2, *supra*), which also involved payments to Karimova.

As noted in Section IV.D.8, *supra*, Sweden is also reportedly investigation Ericsson following the company's settlement with US enforcement authorities.<sup>421</sup>

## 8. Switzerland

Switzerland continues to be considered as one of the least corrupt countries according to Transparency International's Corruption Perception Index.<sup>422</sup>

The investigation by the Swiss Office of the Attorney General (OAG) into Fifa's decision to award the 2018 and 2022 World Cups to Russia and Qatar, respectively, continues. In June, 2019, a court in Bellinzona ordered that the Swiss attorney general, Michael Lauber, a prosecutor, and a former chief prosecutor be recused from the FIFA investigation for reasons including that Lauber and the chief

<sup>419</sup> Will Barbieri, *Swedish companies to face larger penalties for foreign bribery*, GLOBAL INVESTIGATIONS REV. (Dec. 19, 2019), <https://globalinvestigationsreview.com/article/1212289/swedish-companies-to-face-larger-penalties-for-foreign-bribery> (last accessed Dec. 23, 2019).

<sup>420</sup> See James Thomas, *Telia pays US\$208.5 million in disgorgement to the Netherlands*, GLOBAL INVESTIGATIONS REV., Just Anti-Corruption (Mar. 19, 2019), <https://globalinvestigationsreview.com/article/1189010/telia-pays-ususd2085-million-in-disgorgement-to-the-netherlands>.

<sup>421</sup> Simon Johnson, *Sweden opens Ericsson bribery probe after U.S. settlement: paper*, REUTERS (Dec. 12, 2019), <https://www.reuters.com/article/us-usa-ericsson-sweden/sweden-opens-ericsson-bribery-probe-after-u-s-settlement-paper-idUSKBNIYG248>.

<sup>422</sup> *Switzerland ranks sixth in Transparency International's Corruption Perception Index 2018 slightly lower than in 2017 (third)*, [https://www.transparency.org/news/feature/cpi\\_2018\\_global\\_analysis](https://www.transparency.org/news/feature/cpi_2018_global_analysis) (last accessed Jan. 2, 2020); *How Corruption Weakens Democracy*, TRANSPARENCY INT'L (Jan. 29, 2019), [https://www.transparency.org/news/feature/cpi\\_2018\\_global\\_analysis](https://www.transparency.org/news/feature/cpi_2018_global_analysis).

prosecutor breached procedural rules by attending and failing to report meetings with FIFA president Gianni Infantino.<sup>423</sup>

In August 2019, Beny Steinmetz, an Israeli billionaire, was indicted for allegedly paying bribes to foreign officials and forgery in Guinea between 2005 and 2010 to win mining licenses.<sup>424</sup> Steinmetz allegedly paid bribes totalling USD 10 million, partially through Swiss bank accounts, to one of the wives of the former President of Guinea, Lansana Conte, in order to oust one of his competitors. According to the indictment he further used forged documents and false invoices to hide the bribes.<sup>425</sup> His company, the Beny-Steinmetz Group Resources (BSGR), was largely operating from Geneva. After a six-year investigation by Swiss prosecutors, Steinmetz and his two associates face charges of corruption and forgery in Geneva and could be sentenced to prison terms of between two to 10 years if convicted. In 2016 Israeli authorities detained Steinmetz; however, they released him shortly after. Steinmetz denies the charges made by Swiss prosecutors.

### C. Russia

In 2019, Russia's Ministry of Labor and Social Protection issued three publications with guidance for businesses and other organizations on anti-corruption issues.<sup>426</sup> The longest document, entitled "Measures to prevent corruption in organizations," guides organizations through the process of establishing and implementing anti-corruption policies.<sup>427</sup> The document states that implementing measures to prevent corruption "significantly" reduces the risk that liability for bribing officials, including foreign officials, would apply to the organization.<sup>428</sup> Additionally, it recommends that anti-corruption standards within an organization focus not on preventing the receipt of any and all gifts, but on certain categories of gift-givers, as well as the cost of the gift.<sup>429</sup> The second publication, entitled "Recommendations on the procedure for assessing corruption risks in organizations," helps organizations identify business processes that carry the greatest risk of corruption.<sup>430</sup> It recommends beginning the assessment with activities involving the distribution of benefits, governmental cooperation, or access to restricted information, or where corruption has occurred in the past.<sup>431</sup> The third and shortest publication, "Memorandum: Establishing the duties of an organization's employees related to the prevention of corruption, liability, and incentives," briefly

<sup>423</sup> James Thomas, *Swiss AG barred from Fifa investigation*, GLOBAL INVESTIGATIONS REV. (June 19, 2019), <https://globalinvestigationsreview.com/article/1194199/swiss-ag-barred-from-fifa-investigation> (last accessed Dec. 23, 2019).

<sup>424</sup> Sam Fry, *Steinmetz to fight Swiss corruption charges*, GLOBAL INVESTIGATIONS REV. (Aug. 13, 2019), <https://globalinvestigationsreview.com/article/1196282/steinmetz-to-fight-swiss-corruption-charges> (last accessed Jan. 2, 2020)

<sup>425</sup> Richard L. Cassin, *Beny Steinmetz indicted in Switzerland for bribery*, FCPA BLOG (Aug. 14, 2019), <https://fcpablog.com/2019/08/14/beny-steinmetz-indicted-in-switzerland-for-bribery/> (last accessed Jan. 2, 2020).

<sup>426</sup> While all three documents are only dated "2019," the Ministry's webpage on which they are posted says it was last updated in Sept. 2019 (<https://rosmintrud.ru/ministry/programms/anticorruption/015>), and news articles covering the publications were first issued in Sept. 2019 (see, e.g., <https://www.audit-it.ru/news/personnel/996487.html>, <http://www.consultant.ru/law/review/207397354.html>) (last accessed Dec. 26, 2019).

<sup>427</sup> *Меры по предупреждению коррупции в организациях* (2019), <https://rosmintrud.ru/uploads/magic/ru-RU/Ministry-0-106-src-1568817692.8748.pdf> (last accessed Dec. 26, 2019).

<sup>428</sup> *Id.* at 3.

<sup>429</sup> *Id.* at 24.

<sup>430</sup> *Рекомендации по порядку проведения оценки коррупционных рисков в организации* (2019), <https://rosmintrud.ru/uploads/magic/ru-RU/Ministry-0-106-src-1568817604.7941.pdf> (last accessed Dec. 26, 2019).

<sup>431</sup> *Id.* at 3.

covers a range of topics from the inclusion of anti-corruption provisions in employment contracts to the role of incentives in anti-corruption policies.<sup>432</sup>

## D. Asia Pacific

### 1. China

During 2019, rule-making activities in the anti-corruption area were less frequent and primarily related to the Supervision Law promulgated in 2018. In spite of the declared “overwhelming victory” of the anti-corruption campaign,<sup>433</sup> President Xi emphasized that the campaign would continue to “strengthen and further” the progress made so far.<sup>434</sup> In connection with developments in the Belt & Road Initiative, the Chinese government continues to promote international cooperation on anti-corruption enforcement and there has been an increase in repatriation of fugitive Chinese government officials. Also of note is that Chinese companies, striving to expand in overseas markets, have been active in adopting internal compliance programs, policies and procedures.

The new Foreign Investment Law, effective January 1, 2020, provides that China may take reciprocal measures if a country or region adopts prohibitive or restrictive measures against Chinese investments.<sup>435</sup> While likely driven by considerations other than corruption (e.g., US foreign investment review legislation CFIUS and FIRMMA), this authorization’s likely anti-corruption impact rests on whether the “China Initiative” led by the US DOJ, which specifically targets Chinese companies for FCPA investigation and prosecution, will be considered as prohibitive or restrictive measures, against which the Chinese government can respond with anti-corruption enforcement against US companies. It remains to be seen how this will affect foreign businesses operating in China.

#### a. The Powerful NSC

As previously reported, a new National Supervision Commission (NSC) was created to lead anti-corruption efforts and the Supervision Law sets out the powers of the NSC and outlines certain procedures that are required to be followed in supervision work to ensure due process. The NSC has a broad range of powers to supervise, investigate, and discipline personnel with public duties, including civil servants, personnel engaged in public affairs and other officials. Also, the NSC is designated to be the authority to coordinate anti-corruption international cooperation. The NSC, and its local branches, share offices and work together with the China Communist Party Commission for Discipline Inspection (CCDI), which is charged with investigating and dealing with violations of laws, regulations, and Party rules by CCP officials.

<sup>432</sup> Памятка: Закрепление обязанностей работников организации, связанных с предупреждением коррупции, ответственность и стимулирование (2019), <https://rosmintrud.ru/uploads/magic/ru-RU/Ministry-0-106-src-1568817742.8173.pdf> (last accessed Dec. 26, 2019).

<sup>433</sup> *Anti-corruption Campaign Has Achieved Overwhelming Victory-What is the Take on This and What are the Next Steps*, NAT’L SUPERVISION COMM’N (Jan. 14, 2019), [http://www.ccdi.gov.cn/yaowen/201901/t20190114\\_187048.html](http://www.ccdi.gov.cn/yaowen/201901/t20190114_187048.html) (last accessed Jan. 3, 2020).

<sup>434</sup> *Id.*

<sup>435</sup> Art. 40, *PRC Foreign Investment Law*, National People’s Congress (promulgated on Mar. 15, 2019 and effective on Jan. 1, 2020), translated version is available at [http://www.fdi.gov.cn/1800000121\\_39\\_4872\\_0\\_7.html](http://www.fdi.gov.cn/1800000121_39_4872_0_7.html).



During 2019, the NSC issued jointly with the CCDI non-public rules and regulations. For example, in the summer of 2019, the CCDI and the NSC jointly issued two regulations: Regulation on the Supervision and Enforcement Work by the Supervisory Authorities, an implementing measure for the Supervision Law; and Provisions on the Handling of Fugitives Pursuit and Criminal Proceeds Recovery and other Foreign-Related Anticorruption Matters by the Disciplinary Inspection and Supervisory Authorities (Trial), the first guidance document on cross-border pursuit of fugitives and recovery of corruption proceeds. The contents of both documents have not yet been made available to the public. However, the limited publicly available information indicates that both documents address and provide clarifications regarding NSC's authority, and lay out requirements or procedures for NSC's enforcement actions.<sup>436</sup> In October 2019, the Standing Committee of National People's Congress granted the NSC power to issue administrative regulations in connection with the Supervision Law.<sup>437</sup> As such, more rule-making activities in this regard are expected in 2020.

Anti-corruption enforcement, led by the geared-up NSC, maintained strong momentum in 2019, albeit with certain shifts in the focus of enforcement. A targeted crackdown took place in the financial sector in 2019. As of November 21, 2019, more than 47 key officials in a wide array of financial sectors, including banking, insurance, trust, and asset management companies, as well as financial regulators, were reported to have been subject to investigations.<sup>438</sup> Also, there are signs of enhanced enforcement against bribe-givers. Up to now, enforcement against bribe-givers has been less stringent than on bribe-takers.<sup>439</sup> Recently, however, the Chinese government has paid more attention to bribe-givers and called for the "punishment of both those who take bribes and those who offer them."<sup>440</sup> Aided by Article 22 of the Supervision Law, which arms supervisory commissions with the power to detain bribe-giver suspects associated with investigations of bribe-takers, recent cases reported by the NSC and the official media outlets in 2019 show strengthened enforcement actions against bribe-givers.<sup>441</sup>

<sup>436</sup> Issuance of the Regulation on the Supervision and Enforcement Work by the Supervisory Authorities, CCDI AND NSC (July 15, 2019), [http://www.ccdi.gov.cn/toutiao/201907/t20190715\\_197112.html](http://www.ccdi.gov.cn/toutiao/201907/t20190715_197112.html); Issuance of the "Provisions on the Handling of Fugitives Pursuit and Criminal Proceeds Recovery and other Foreign-related Anticorruption Matters by the Disciplinary Inspection and Supervisory Authorities (Trial)," CCDI AND NSC (Aug. 20, 2019), [http://www.ccdi.gov.cn/toutiao/201908/t20190820\\_199081.html](http://www.ccdi.gov.cn/toutiao/201908/t20190820_199081.html).

<sup>437</sup> Decision of the Standing Committee of the National People's Congress on Developing Supervisory Regulations by the National Supervisory Commission, Standing Committee of the National People's Congress (Oct. 26, 2019), [http://www.gov.cn/xinwen/2019-10/26/content\\_5445370.htm](http://www.gov.cn/xinwen/2019-10/26/content_5445370.htm).

<sup>438</sup> Senior Financial Officials Caught This Year, PAPER (Nov. 21, 2019), [https://finance.sina.com.cn/money/bank/bank\\_hydt/2019-11-21/doc-iihnzhfz0686858.shtml](https://finance.sina.com.cn/money/bank/bank_hydt/2019-11-21/doc-iihnzhfz0686858.shtml) (last accessed Jan. 3, 2020).

<sup>439</sup> See, e.g., Yang Wenming, *Comprehensive Anti-corruption; Bribe-giving Shall Also Be Investigated*, PEOPLE'S DAILY (Dec. 22, 2017), <http://legal.people.com.cn/n1/2017/1222/c42510-29722309.html> (last accessed Jan. 3, 2020).

<sup>440</sup> Xi Jinping, *Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era*, Speech at the 19<sup>th</sup> National Congress of the Communist Party of China (Oct. 18, 2017), [http://www.xinhuanet.com/english/download/Xi\\_Jinping%27s\\_report\\_at\\_19th\\_CPC\\_National\\_Congress.pdf](http://www.xinhuanet.com/english/download/Xi_Jinping%27s_report_at_19th_CPC_National_Congress.pdf) (last accessed Jan. 3, 2020).

<sup>441</sup> See, e.g., *Escalated Processing, Detention of both Bribe-taker and Bribe-giver, First Cracking Down "Protection Umbrella" Case of Sanming Municipal Supervision Commission* (Jan. 20, 2019) [http://www.ccdi.gov.cn/yaowen/201901/t20190116\\_187207.html](http://www.ccdi.gov.cn/yaowen/201901/t20190116_187207.html) (last accessed Jan. 3, 2020); *Order Sustained in Appeal in Guangdong's First Severe Penalty Case on Bribe-giving*, China Central Radio and Television report (Sept. 4, 2019), [http://www.sohu.com/a/338677992\\_362042](http://www.sohu.com/a/338677992_362042) (last accessed Jan. 3, 2020).

## b. International Cooperation and Regulatory Compliance by Chinese Companies

China's continued support for the Belt and Road Initiative has led to the promotion of increased international cooperation on anti-corruption. President Xi Jinping again urged international cooperation in anti-corruption enforcement at the 2019 Belt and Road Forum.<sup>442</sup>

On October 17, 2019, the United Nations and China signed an Anti-Corruption Cooperation Agreement.<sup>443</sup> This memorandum of understanding allows the United Nations Office on Drugs and Crime (UNODC) and the National Commission of Supervision of the People's Republic of China to strengthen their cooperation in the fight against corruption and in the implementation of the UN Convention Against Corruption. Prevention, criminal justice responses to corruption offenses, law enforcement cooperation, and stolen asset recovery will be among the key factors of the cooperation. The signed agreement is intended to further facilitate the dialogue and cooperation among all member countries of the UN Convention Against Corruption.

To better facilitate its efforts in repatriating fugitives, China signed new extradition or criminal judicial assistance treaties with four countries in 2019, all of which are participating countries in the Belt and Road Initiative. China has such treaties with 77 countries.<sup>444</sup> The campaign for repatriation of fugitive officials, known as the "Sky Net" Campaign, continued in 2019. According to reports, the "Sky Net 2019" Campaign has led to the capture of 1,634 fugitive government officials, and successful retrieval of illegal gains in a total amount of RMB 2.954 billion (approximately USD 424 million).<sup>445</sup>

China also reinforced its anti-corruption commitments in relation to the overseas operations of Chinese companies, including state-owned enterprises. The "Beijing Initiative for the Clean Silk Road" was launched during the 2019 Belt & Road Forum.<sup>446</sup> In October 2019, the NSC hosted a 15-day anti-corruption training program for African government officials,<sup>447</sup> during which it was stated that the Chinese government requires Chinese companies operating in Africa to refrain from bribery.<sup>448</sup> It will be interesting to monitor the enforcement during 2020 of Article 164 of the PRC Criminal Law, which criminalizes bribery of foreign government officials.

<sup>442</sup> Xi Jinping, *Together to create a bright future for the Belt and Road Initiative*, Keynote Speech at the Opening Ceremony of the Second Belt and Road Forum for International Cooperation (Apr. 26, 2019), [http://www.xinhuanet.com/world/2019-04/26/c\\_1210119584.htm](http://www.xinhuanet.com/world/2019-04/26/c_1210119584.htm).

<sup>443</sup> United Nations Office on Drugs and Crime Press Release, *The United Nations and China sign agreement on combating corruption* (Oct. 17, 2019), <https://www.unodc.org/unodc/en/frontpage/2019/October/the-united-nations-and-china-sign-agreement-on-combating-corruption.html> (last accessed Jan. 2, 2020).

<sup>444</sup> *What's the Take on The Signing of Anti-Corruption Document with the United Nation by the NSC for the First Time*, CENT. COMM'N FOR DISCIPLINE INSPECTION (Oct. 22, 2019), [http://www.ccdi.gov.cn/special/bwzp/201910/t20191022\\_202855.html](http://www.ccdi.gov.cn/special/bwzp/201910/t20191022_202855.html) (last accessed Jan. 3, 2020).

<sup>445</sup> "Sky Net 2019" Campaign has Fruitful Results: Repatriation of 1,634 Fugitive Officials between January and October 2019, with Retrieval of Illegal Gains in amount of RMB 2.954 Billion, CENT. COMM'N FOR DISCIPLINE INSPECTION (Dec. 9, 2019), [http://www.ccdi.gov.cn/toutiao/201912/t20191209\\_205744.html](http://www.ccdi.gov.cn/toutiao/201912/t20191209_205744.html) (last accessed Jan. 3, 2020).

<sup>446</sup> *Beijing Initiative for the Clean Silk Road*, Central Commission for Discipline Inspection (Apr. 26, 2019), [http://www.ccdi.gov.cn/yaowen/201904/t20190426\\_192942.html](http://www.ccdi.gov.cn/yaowen/201904/t20190426_192942.html) (last accessed Jan. 3, 2020).

<sup>447</sup> *CCDI/NSC Report on Anti-corruption Training Program for African Countries*, CENT. COMM'N FOR DISCIPLINE INSPECTION (Oct. 31, 2019), [http://www.ccdi.gov.cn/yaowen/201910/t20191031\\_203344.html](http://www.ccdi.gov.cn/yaowen/201910/t20191031_203344.html) (last accessed Jan. 3, 2020).

<sup>448</sup> *Id.*

As regulatory compliance by Chinese companies becomes increasingly an international topic, the Chinese government has promoted and encouraged corporate compliance by issuing two key guidelines that drove internal company compliance activities in 2019. As a result of these guidelines which are set forth in more detail below, a key agenda for many state-owned enterprises in 2019 has been to adopt a comprehensive compliance program, and many have adopted new compliance policies and procedures as a result of the guidelines.<sup>449</sup>

The Guidelines on the Compliance Management for Central State-owned Enterprises (For Trial Implementation) (Central SOEs Guidelines), require Central SOEs to speed up the establishment and improvement of compliance management systems, and make compliance a component of both management and employee performance reviews.<sup>450</sup> The Central SOEs Guidelines emphasize “key fields, key processes and key personnel,” set forth compliance management responsibilities for various positions, and require the establishment of Compliance Committees.<sup>451</sup> The other guidelines, the Guidelines for the Compliance Management of Enterprises’ Overseas Operations (Overseas Operations Guidelines) apply to “enterprises domiciled in China, their overseas subsidiaries, branches, representative offices and other overseas establishments that engage in foreign trade, overseas investment, overseas project contracting and other relevant overseas business.”<sup>452</sup>

Coincident with these guidelines’ publication, another noteworthy development for Chinese companies is the self-inspection and self-reporting by China’s internet and high-tech sectors, which hit a peak in 2019. According to local media, in the first seven months of 2019, over 110 bribery cases were uncovered concerning eight major internet companies, far exceeding the levels of previous years, and more than 220 employees were terminated or handed over to the police authorities as a result.<sup>453</sup>

It also remains to be seen how the Chinese government will use the Foreign Investment Law to react to any enforcement action taken by the US Government under the “China Initiative” announced in November 2018. The Foreign Investment Law, which governs foreign investment in China, provides the Chinese government with the authority to take reciprocal measures against prohibitive, restrictive or other similar measures adopted by a country or region that discriminate against investments from China. The US DOJ’s “China Initiative” includes a mandate to “identify FCPA cases involving Chinese companies that compete with American businesses.”<sup>454</sup> Following its announcement, US Attorney General William Barr declared in June 2019 that the DOJ must “continue to pursue, and indeed step up,

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<sup>449</sup> See, e.g., the China National Nuclear Corporation (Notice available at <http://www.cnncc.com.cn/cnncc/300555/300557/528129/index.html>); the China State Shipbuilding Corporation (Notice available at <http://mini.eastday.com/mobile/190925073258535.html>); the State Grid Company (Notice available at [http://www.md.sgcc.com.cn/html/main/col9/2019-05/31/20190531165523601782595\\_1.html](http://www.md.sgcc.com.cn/html/main/col9/2019-05/31/20190531165523601782595_1.html)).

<sup>450</sup> Arts 4, 23, *Guidelines on the Compliance Management for Central State-owned Enterprises* (For Trial Implementation), Guo Zi Fa Rule [2018] No. 106 (Nov. 2, 2018).

<sup>451</sup> *Id.* Arts. 5 to 10.

<sup>452</sup> Art. 2, *Guidelines for the Compliance Management of Enterprises’ Overseas Operation*, Fa Gai Wai Zi [2018] No. 1916, Dec. 26, 2018.

<sup>453</sup> *90% of the Risks Come from Third Parties*, Sohu (Aug. 29, 2019), [http://www.sohu.com/a/337360863\\_161795](http://www.sohu.com/a/337360863_161795) (last accessed Jan. 3, 2020).

<sup>454</sup> See DOJ Press Release, *Attorney General Jeff Session’s China Initiative Fact Sheet*, U.S. DOJ (Nov. 1, 2018), <https://www.justice.gov/opa/speech/file/1107256/download>.

our China initiative.”<sup>455</sup> Companies conducting internal investigations in cooperation with the DOJ face challenges posed by the PRC International Criminal Judicial Assistance Law and other laws such as the PRC Guarding State Secrets Law, which further complicate the process by limiting information collection and transfer.<sup>456</sup> Without a defined scope or any explanation on what may constitute “prohibitive, restrictive or other similar measures against investments from China,” whether any FCPA enforcement action targeting Chinese companies under the “China Initiative” may trigger tit-for-tat anti-corruption enforcement by the Chinese government remains uncharted waters. If the DOJ increases FCPA enforcement actions against Chinese companies, it cannot be ruled out that the Chinese government may take countermeasures, such as an enhanced or expanded use of mechanisms in its state secrets and cybersecurity laws, to block the production and cross-border transfer of relevant documents hosted in China. The Chinese government may also bring anti-corruption enforcement actions against US companies with operations in China. In any event, recent amendments to the PRC Criminal Procedure Law suggest that Chinese authorities are ramping up anti-bribery enforcement efforts.

## 2. South Korea

In 2019, South Korea continued to act against high profile individuals allegedly guilty of bribery offences, adding to its list of former South Korean government officials indicted in 2017 and 2018.

In August 2019, a South Korea Supreme Court ruling ordered retrials of South Korea’s former President Park Geun-hye and Samsung’s vice president, Lee Jae-yong, following their sentencing in 2018 and 2017, respectively, for bribery.<sup>457</sup> The Supreme Court ruled that the Seoul High Court narrowly construed what constituted a bribe and omitted to consider certain gifts provided as bribes, and ordered a retrial at the lower court. As we detailed in our [2018 FCPA/Anti-Corruption Year in Review](#), Park was sentenced to 24 years in prison and was ordered to pay \$16.9 million for receiving more than \$20 million in bribes. Park could face a longer jail sentence following retrial. As noted in Steptoe’s [2017 FCPA/Anti-Corruption Year in Review & 2018 Q1 Preview](#), Lee was sentenced in 2017 for five years imprisonment on bribery and embezzlement charges but was released from jail in February 2018 after his sentence was suspended by the appeals court. Lee risks returning to prison if the lower court reconsiders the value of bribes paid to be higher.

In May 2019, the former Vice Justice Minister of South Korea, Kim Hak-ui, who also held office in the Justice Ministry during Park’s administration, was arrested for alleged bribery offences. Kim allegedly received kickbacks totaling over KRW 130 million (approx. USD 110,000) between 2006 and 2008, sexual entertainment on

<sup>455</sup> See William P. Barr, Att’y Gen., *Opening Remarks at the U.S. Attorney’s Conference*, U.S. DOJ (June 26, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-opening-remarks-us-attorneys-conference>.

<sup>456</sup> Article 4, *PRC Law on International Criminal Judicial Assistance*, the Standing Committee of National People’s Congress, promulgated by and effective on Oct. 26, 2018; see also, *PRC Law on Guarding State Secrets*, the Standing Committee of National People’s Congress, promulgated on Apr. 29, 2010 and effective on Oct. 1, 2010.

<sup>457</sup> *S Korea ex-leader Park and Samsung heir Lee face bribery retrials*, BBC News (Aug. 29, 2019), <https://www.bbc.co.uk/news/world-asia-49507401> (last accessed Dec. 16, 2019).

over 100 occasions paid for by business associates, and a further KRW 40 million (approx. USD 35,000) from a businessman. Kim was previously cleared of the bribery and sexual allegations against him, first made in March 2013, due to a lack of evidence following two police investigations conducted in 2013 and 2014.<sup>458</sup> Kim is due to face trial.

As part of its continuing efforts to sanction high-ranking government officials involved in corrupt practices, in December 2019, the South Korean parliament passed a bill to establish an independent anti-corruption agency dedicated to investigating corruption allegations made against senior public officials.<sup>459</sup> The agency will be granted power to investigate allegations of corruption made against the president, lawmakers, top court justices and prosecutors, and indict police, prosecutors, and judges. President Moon Jae-in's controversial bill, which formed an integral part of his election campaign, was the subject of large-scale protests by supporters of the opposition party. Despite the opposition party's attempts to block passage of the bill, the new anti-corruption agency is expected to be established in July 2020.<sup>460</sup>

### 3. India

Following India's efforts over recent years to combat corruption, including an overhaul of its anti-corruption laws through the introduction of the Prevention of Corruption (Amendment) Act of 2018, the country has seen improvements in its corruption rankings on international indices<sup>461</sup> and continues to implement anti-corruption measures.

On March 19, 2019, India appointed former Indian Supreme Court Justice, Shri Pinaki Chandra Ghose, as its first anti-corruption ombudsman<sup>462</sup> (i.e., Chairman of the *Lokpal*, India's anti-corruption agency, which is formed of a chairperson and eight judicial and non-judicial members). The Lokpal Act, which was passed in 2013, grants the Lokpal power to investigate corruption allegations made against any public entities and officials, including the Prime Minister. The Lokpal has power of superintendence over all other central investigation agencies in India, including the Central Bureau of Investigation. This is a welcome development given that the Lokpal Act was passed six years ago and little action had been taken by the Indian government to form a committee to appoint the first Lokpal until it was ordered to do so by the Indian Supreme Court in January 2019.

<sup>458</sup> Bahk Eun-ji, *Ex-vice justice minister arrested for alleged bribery*, KOREA TIMES (May 17, 2019), [https://www.koreatimes.co.kr/www/nation/2019/05/251\\_269055.html](https://www.koreatimes.co.kr/www/nation/2019/05/251_269055.html) (last accessed Dec. 16, 2019).

<sup>459</sup> Song Jung-a, *South Korea passes bill to set up anti-corruption agency*, FINANCIAL TIMES (Dec. 30, 2019), <https://www.ft.com/content/11b3f736-2aec-11ea-bc77-65e4aa615551> (last accessed Jan. 3, 2020).

<sup>460</sup> (4th LD) *Parliament passes corruption probe unit bill amid opposition lawmakers' protest*, YONHAP NEWS AGENCY (Dec. 30, 2019), <https://en.yna.co.kr/view/AEN20191230004454315> (last accessed Jan. 3, 2020).

<sup>461</sup> For example, India ranked 78 out of 180 on the Transparency International Corruption Perceptions Index 2018 as compared to 94 out of 177 on the Transparency International Corruption Perceptions Index 2013 (see Transparency International Corruption Perceptions Index 2018, <https://www.transparency.org/cpi2018> (last accessed Dec. 16, 2019), and Transparency International Corruption Perceptions Index 2013, <https://www.transparency.org/cpi2013/results> (last accessed Dec. 16, 2019)).

<sup>462</sup> Prabhjote Gill, *India's gets its first anti-corruption ombudsman*, BUSINESS INSIDER (Mar. 20, 2019), <https://www.businessinsider.in/what-is-lokpal-chaired-by-panaki-chandra-ghose/articleshow/68491453.cms> (last accessed Dec. 16, 2019).

The Indian government also passed the Finance Act 2019 (the FA 2019)<sup>463</sup>, which aims to tighten the existing anti-money laundering provisions under the Prevention of Money Laundering Act 2002 (the PMLA 2002). The FA 2019 amends eight provisions of the PMLA 2002, which were widely considered to be ambiguous and confusing. Most notably, the new legislation widens the meaning of “proceeds of crime” to include not only property derived or obtained as a result of the scheduled offence under the PMLA 2002 but also any property derived or obtained as a result of criminal activity relating to the scheduled offence<sup>464</sup>. The amendments also will allow the Directorate of Enforcement to more easily investigate and enforce money laundering and terrorist financing offences, including by levying stricter due diligence screening and reporting obligations on certain reporting entities.

#### 4. Japan

Japan finds itself under the anti-bribery microscope in the lead-up to the 2020 Olympics. In June 2019, the OECD Working Group on Bribery issued a report criticizing Japan’s efforts to combat bribery of foreign public officials.<sup>465</sup> The OECD was concerned about Japan’s “alarmingly low” number of corporate prosecutions, which was not commensurate with its size, export-oriented economy, and high-risk regions and sectors. The OECD further identified a “major loophole” in Japan’s anti-corruption legislation, the Unfair Competition Prevention Law (UCPL), which requires the involvement of a Japanese national for jurisdiction to attach over bribery of a foreign public official abroad. The OECD encouraged “urgent review” to broaden the legislative framework for establishing jurisdiction, as well as providing for extension of the statute of limitations and increasing the penalties for offences. The OECD also called for more proactive detection, investigation, and prosecution of foreign bribery, through the use of Japan’s AML system, recommending mandatory reporting for suspected money laundering predicated on foreign bribery. It labeled as “incompatible” Japan’s recognition of “economic harm to a company” as a justification for bribery, as set forth in the Guidelines for the Prevention of Bribery of Foreign Public Officials by the Ministry of Economy, Trade and Industry (METI).

The OECD did praise the progress Japan made since its 2013 evaluation, specifically Japan’s 2017 criminalization of the laundering of proceeds of foreign bribery and the 2018 sentencing mitigation credit allowed for cooperating in other individual prosecutions. It is expected that Japan will try to implement the OECD recommendations in light of the scrutiny it is anticipating from other intergovernmental organizations, including the Financial Action Task Force and the Asia/Pacific Group on Money Laundering, particularly as the 2020 Olympics approach. Notably, in March 2019, the president of the Japanese Olympic Committee, Tsunekazu Takeda, announced his retirement following allegations of bribery in

<sup>463</sup> See *The Finance (No. 2) Act, 2019*, Part XIII at 70, GAZETTE OF INDIA (Aug. 1, 2019), <http://egazette.nic.in/WriteReadData/2019/209695.pdf> (last accessed Dec. 16, 2019).

<sup>464</sup> See *id.* § 192 at 70.

<sup>465</sup> OECD Working Group on Bribery, *Japan: Implementing the OECD Anti Bribery* (7 Mar. 2019), <http://www.oecd.org/daf/anti-bribery/japan-oecdanti-briberyconvention.htm>.

connection with Tokyo's successful bid for the 2020 Games, which resulted in the launching of an investigation into Takeda's actions by French authorities.<sup>466</sup>

## 5. Hong Kong

Hong Kong has conducted its own "princeling" investigations, leading the Independent Commission Against Corruption (ICAC), now in its 45<sup>th</sup> year, to charge JPMorgan's former Asia investment banking vice chair, Catherine Leung Kar-cheung, with two counts of bribery for allegedly trying to hire the son of the chairman of a logistics company to reward the chairman for "showing favor" to JPMorgan for his company's IPO.<sup>467</sup> The "client referral" program, in place since 2007, allegedly allowed senior staff at or above the rank of executive director or managing director to refer candidates to JPMorgan for the junior post of analyst or associate. Ms. Kar-cheung is due to stand trial in February 2020.<sup>468</sup>

The Hong Kong Court of Final Appeal quashed the 2017 conviction of former Hong Kong Chief Executive, Donald Tsang, for failing to disclose a property deal he had with a business tycoon, who was applying for a digital radio license at the time.<sup>469</sup> Tsang appealed his conviction twice, resulting first in a reduced sentence from 20 to 12 months in jail, but had been released due to his ill health. The Court found the jury instructions inadequate in instructing the jurors to decide whether Tsang had a motive for not disclosing the deal. In another high-profile ICAC prosecution, thirteen employees of a construction consulting firm were sentenced for falsifying results of concrete tests for the Hong Kong-Zhuhai-Macao Bridge, a mega-project connecting cities across the Pearl River Delta region. Six of the employees were sentenced to prison terms of up to two years.<sup>470</sup>

The 2019 Hong Kong protests have as their root the introduction of an extradition bill, the Fugitive Offenders and Mutual Legal Assistance in Criminal Legislation (Amendment) Bill, introduced by the Hong Kong government.<sup>471</sup> The now-withdrawn bill<sup>472</sup> would have allowed case-by-case extradition of individuals wanted by territories with which Hong Kong does not have extradition agreements, including Taiwan and mainland China, upon the order of Hong Kong's Chief Executive. It is thought by some commentators that the Bill arose in connection with China's anti-graft campaign, when the lack of a formal extradition mechanism contributed to the

<sup>466</sup> Alastair Gale, *Japan's Olympic Chief, Focus of Bribery Probe, to Step Down*, WALL STREET J. (Mar. 19, 2019), <https://www.wsj.com/articles/japans-olympic-chief-focus-of-bribery-probe-to-step-down-11552990248> (last accessed Jan. 2, 2020).

<sup>467</sup> ICAC Press Release, *Ex-managing director of investment bank charged with bribery over IPO of logistics company*, Hong Kong Independent Commission Against Corruption (May 16, 2019), [https://www.icac.org.hk/en/press/index\\_id\\_731.html](https://www.icac.org.hk/en/press/index_id_731.html).

<sup>468</sup> For a discussion of US enforcement charges against JPMorgan, see our [2016 FCPA/Anti-Corruption Year in Review](#).

<sup>469</sup> *HKSAR vs. Donald Tsang Yam-kuen, In the Court of Final Appeal of the Hong Kong Special Administrative Region Final Appeal No. 29 of 2018 (CRIMINAL)* (2019), [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=122716](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=122716).

<sup>470</sup> Cannix Yau, *Mainland Chinese contractor cited in graft case linked to Hong Kong-Zhuhai-Macao bridge*, S. CHINA MORNING POST (May 26, 2017), <https://www.scmp.com/news/hong-kong/politics/article/2095805/construction-and-certification-industries-under-threat-after>.

<sup>471</sup> Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill (2019), <https://www.legco.gov.hk/yr18-19/english/bills/b201903291.pdf>.

<sup>472</sup> Justin Solomon, *Hong Kong Extradition Bill officially withdrawn*, ABC NEWS (Oct. 23, 2019), <https://abcnews.go.com/International/hong-kong-extradition-bill-officially-withdrawn/story?id=66464962>.

alleged, extrajudicial removal from Hong Kong of individuals who were wanted in China.<sup>473</sup>

## 6. Indonesia

In July 2019, the Corruption Eradication Commission (KPK) lost its first case since its establishment in 2003. Two of three judges of the Supreme Court voted to acquit the former chair of the Indonesian Bank Restructuring Agency, Syafruddin Arsyad Temenggung, who had been convicted and sentenced to 15 years in prison for approving the discharge of a debt owed by a businessman, costing the Indonesian government over USD 300 million.<sup>474</sup> The first-ever loss is significant because the case involved more than twice the amount of funds involved in any of the more than 500 prior cases the KPK had brought to conviction in the special anti-corruption court system, all of which had been upheld by the Supreme Court. It also focused concerns regarding Indonesia's anti-corruption law, which does not require prosecutors to prove the defendant's intent to enrich, just a loss to the state through an illegal act.

There is some concern that the loss signals a further weakening of the KPK, following the passage of legislative amendments in September 2019.<sup>475</sup> These amendments curtailed the KPK's wiretap authority, allowed cases to be dropped if an investigation is not complete within two years, imposed an ethics code on KPK employees and commissioners written and enforced by a Supervisory Board aligned with the current president, and reclassified those KPK employees as civil servants, and thus, less independent from government. The KPK's commissioners are due to be replaced in 2020, and questions have arisen regarding the announced appointees which included a police officer who had been dismissed by the KPK for misconduct. Passage of the amendments triggered widespread protests,<sup>476</sup> but to date, they have not been repealed.

In contrast to the impression of apparent weakening of the KPK was its pursuit of corporate criminal liability<sup>477</sup> in February 2019, against PT Nusa Konstruksi Enjiniring, Tbk, a publicly traded construction company, which was declared guilty of corruption in a number of government construction projects.<sup>478</sup> Additionally, the KPK arrested two police officers in December 2019 who were suspected in a 2017 acid attack against an investigator leading a probe involving 80 individuals, including officials, legislators, and private companies, who had pocketed more than a third of the funds

<sup>473</sup> David Lague, James Pomfret and Greg Torode, *How murder, kidnappings and miscalculation set off Hong Kong's revolt*, REUTERS (Dec. 20, 2019), <https://www.reuters.com/investigates/special-report/hongkong-protests-extradition-narrative/>.

<sup>474</sup> Decision No. 1555 K/PID SUS/2019; see also Matthew Stephenson, *Guest Post: Indonesian Anticorruption Institutions at Risk, Part 1: The Significance of the KPK's First Acquittal*, GLOBAL ANTICORRUPTION BLOG (Oct. 2, 2019), <https://globalanticorruptionblog.com/tag/syafruddin-arsyad-temenggung/>.

<sup>475</sup> Transparency International Secretariat, *AN OPINION POLL ON CORRUPTION IN THE MIDDLE EAST AND NORTH AFRICA WILL BE RELEASED ON DECEMBER 11*, TRANSPARENCY INT'L (Dec. 4, 2019), [https://www.transparency.org/news/pressrelease/president\\_of\\_indonesia\\_urged\\_to%20reject\\_revision\\_of\\_anti\\_corruption\\_law](https://www.transparency.org/news/pressrelease/president_of_indonesia_urged_to%20reject_revision_of_anti_corruption_law).

<sup>476</sup> Kafil Yamin, *Two die in student protests sparked by corruption law*, UNIV. WORLD NEWS (Oct. 2, 2019), <https://www.universityworldnews.com/post.php?story=20191002172556682>.

<sup>477</sup> Indonesia does not generally apply corporate criminal liability but only for certain types of criminal offenses, which include corruption. Article 1 paragraph (3) of the Law No. 31 of 1999 on Eradication of Corruption Criminal Offenses as amended by Law No. 20 of 2001, articles 2, 3, and 20.

<sup>478</sup> NKE was fined approximately USD 48,631 and ordered to pay approximately USD 6 million in restitution to the state.



paid for an electronic identity card system.<sup>479</sup> Those convicted included the former Speaker of the Indonesian Parliament, Setya Novanto, who was sentenced to 15 years for his involvement in that theft of public money in 2018.

## 7. Thailand

Thailand is ranked 99 of 180 countries in Transparency International's most recent Corruption Perceptions Index,<sup>480</sup> and corruption is regarded as "pervasive" even though the country has laws and enforcement mechanisms in place to combat corruption.<sup>481</sup> Indicative of Thailand's exercise of its anti-corruption enforcement was the response by Thailand's National Anti-Corruption Commission (NACC) that it was "unaware of the case" involving Microsoft's July 2019 guilty plea and settlement of FCPA charges, accepting and acknowledging illegal payments made on its behalf to Thai banking officials.<sup>482</sup> The Secretary-General of the Anti-Corruption Organization of Thailand, a private sector anti-corruption watchdog group, has urged the NACC to investigate the charges and not to turn a blind eye now that the issues are public knowledge, but there have been no further reports.

Thailand followed on from Japan's prosecution of Mitsubishi Hitachi Power Systems and three of its senior executives in 2018 and 2019,<sup>483</sup> when the NACC announced in November 2019 that it had sufficient evidence to conclude that four top officials of state-owned Sino-Thai Construction and Engineering demanded payment of approximately USD 659,000 from the Japanese construction company to allow the use of a dock to transport equipment for construction of a power plant.<sup>484</sup> The Sino-Thai officials could be relieved of their duty or face disciplinary action, NACC said, adding that it would submit its report to the attorney general to adjudicate the case.

## 8. Vietnam

Effective August 15, 2019, Vietnam issued new regulations<sup>485</sup> to implement its 2018 Anti-Corruption Law,<sup>486</sup> which took effect in July 2019. The new regulations impose requirements on the public sector, but also extend to publicly-held companies, credit institutions, and fund-raising charities. The new regulations require these entities

<sup>479</sup> The Associated Press, *Indonesia Arrests 2 Policemen Suspected in Acid Attack*, N.Y. TIMES (Dec. 27, 2019), <https://www.nytimes.com/aponline/2019/12/27/world/asia/ap-as-indonesia-corruption.html>.

<sup>480</sup> *Corruption Perceptions Index 2018*, TRANSPARENCY INT'L <https://www.transparency.org/country/THA>.

<sup>481</sup> *Thailand Corruption Report*. GAN INTEGRITY (Updated Sept. 2017), <https://www.ganintegrity.com/portal/country-profiles/thailand/>.

<sup>482</sup> Joseph O'Connor and Son Nguyen. *Microsoft accepts charges of corrupt payments in Thailand as it makes a deal with US investigators*, THAI EXAMINER (July 25, 2019), <https://www.thaia Examiner.com/thai-news-foreigners/2019/07/25/thailand-corruption-microsoft-firm-corrupt-payments-thai-government/>; Office of Public Affairs. *Hungary Subsidiary of Microsoft Corporation Agrees to Pay \$8.7 Million in Criminal Penalties to Resolve Foreign Bribery Case*, U.S. DEP'T OF JUSTICE (July 22, 2019), <https://www.justice.gov/opa/pr/hungary-subsidiary-microsoft-corporation-agrees-pay-87-million-criminal-penalties-resolve>

<sup>483</sup> Kyodo News and Online Reporters. *Japanese exec sentenced for bribing Thai official*. BANGKOK POST (Sept. 13, 2019), <https://www.bangkokpost.com/thailand/general/1749469/japanese-exec-sentenced-for-bribing-thai-official>.

<sup>484</sup> Reuters, *Shares in Sino-Thai plunge after anti-graft body corruption allegation*, CNBC (Nov. 13, 2019), <https://www.cnbc.com/2019/11/13/reuters-america-shares-in-sino-thai-plunge-after-anti-graft-body-corruption-allegation.html>.

<sup>485</sup> Decree No. 59/2019/ND-CP dated July 1, 2019, <https://www.vietnam-briefing.com/news/vietnam-new-laws-effect-2019.html/>.

<sup>486</sup> Decree No. 36/2018/QH14 dated November 20, 2018, <https://thuvienphapluat.vn/van-ban/EN/Tai-chinh-nha-nuoc/Law-36-2018-QH14-on-anti-corruption/405127/tieng-anh.aspx>.

to establish and implement anti-corruption compliance programs, with specific terms, and provide for periodic inspection by the government with remediation for shortcomings. While administrative penalties can be imposed, there is no corporate criminal liability under Vietnamese law. Nor do the regulations specify the criminal fines or penalties for individuals who allow corruption to occur. Public officials are now subject to reporting requirements for giving or receiving gifts, regardless of value, for an improper purpose (*i.e.*, bribery and corruption) and new limits are imposed on their joining commercial entities following resignation or retirement from government.

In keeping with Vietnam's antigraft effort,<sup>487</sup> in the largest anti-corruption case in Vietnamese history, a former communications minister, Nguyen Bac Son, was sentenced to life in prison on December 28, 2019 upon his conviction at trial for receiving USD3.2 million in bribes to approve a deal by Mobifone, the state-owned telecommunications company.<sup>488</sup> Prosecutors had asked for the death penalty but Son returned the money upon announcement of the verdict. His then-deputy, Truong Minh Tuan, was sentenced to 14 years, and 11 other officials involved in the scheme received sentences of between two and 23 years. The bribe-payor, the brother of the richest man in Vietnam, was also convicted and sentenced to three years.

## 9. Taiwan

The prosecutions of two public officials were among the more notable enforcement actions against corruption in Taiwan in 2019. The first of the two matters involved the expansion project of the Taoyuan airport. The director of construction and an engineer allegedly requested kickbacks relating to maintenance of airport terminals and construction of a new terminal from the general contractor. Both were prosecuted for corruption, and legal proceedings of matter are ongoing.<sup>489</sup> In another matter, the secretary was indicted for corruption. The legal proceedings in this matter are currently ongoing.<sup>490</sup> Aside from the two referenced matters, enforcement by local authorities involved several matters relating to other local and regional permit- and license-related bribery and attempted bribery.

Taiwan ranked 31 out of 180 countries in the latest Transparency International CPI.<sup>491</sup> While legislatively there was not much to update in 2019, the Economic Crimes Prevention Office of the Taiwanese Ministry of Justice Investigation Bureau emphasized its prioritization of corporate corruption matters in December, specifically relating to four areas: securities-related violations (including manipulation of share prices, insider trading, false reporting, etc.), financial

<sup>487</sup> Despite its efforts to combat corruption since 2016, Vietnam dropped two points in the Corruption Perception Index, ranked 117 of 180 countries, with a score of 33; *Corruption Perceptions Index 2018: Corruption in Vietnam's public sector is still perceived as highly serious*, TRANSPARENCY INT'L (Jan. 29, 2019), <https://towardstransparency.vn/en/cpi-vietnam-2018-en/>.

<sup>488</sup> Hanoi Newsroom. *Vietnam court sentences ex-minister to life in MobiFone corruption scandal*, REUTERS (Dec. 28, 2019), <https://www.reuters.com/article/us-vietnam-corruption/vietnam-court-sentences-ex-minister-to-life-in-mobifone-corruption-scandal-idUSKBN1YW02M>.

<sup>489</sup> Ceng Jian You. *Taoji Second Terminal Expansion Case Explodes Corruption, Chief Taoji Receives 2.54 Million Rebate*, UDN (Dec. 12, 2019), <https://udn.com/news/story/7321/4221507>.

<sup>490</sup> *Former Taoyuan County Mayor's accompanying secretary involved in BMW and 10 million bribes sued for corruption*, APPLE DAILY (Mar. 3, 2019), <https://tw.appledaily.com/new/realtime/20190313/1532319/>.

<sup>491</sup> *Corruption Perceptions Index 2018 - Taiwan Profile*, TRANSPARENCY INT'L, <https://www.transparency.org/country/TWN> (last accessed Dec. 16, 2019).

corruption crimes (individual liability of those in charge of financial institutions, etc.), disgorgement of assets (including embezzlement and other illegal violation of duties), and business secrets-related matters (industrial espionage, etc.).<sup>492</sup>

## 10. The Philippines

Under the direction of President Rodrigo Duterte, a drastic and severe campaign against corruption continued in the Philippines in 2019, and the country improved from 111 to 99 out of 180 countries ranked in Transparency International's Corruption Perception Index.<sup>493</sup> However, it is unclear whether the tactics used by the Duterte administration can bring long-lasting or structural changes to the country, as corruption remains pervasive in the Philippines.<sup>494</sup>

In September, President Duterte turned his focus to corruption of customs brokers by firing 64 customs employees, as part of his administration's efforts to stop the flow of methamphetamine from entering the country. Further, Duterte's administration also has plans to transition from a "net taxation system where production is taxed to a "gross taxation" system that taxes income as well as funds in estates and trusts to further assist the country's efforts against corruption.<sup>495</sup>

## 11. Malaysia

Malaysia ranked 61 out of 180 countries in the 2018 Transparency International Corruption Perception Index.<sup>496</sup> While its CPI ranking remained relatively unchanged from the previous year, the country saw improvements in other rankings including the World Bank's Doing Business Rankings<sup>497</sup> and the Democracy Index.<sup>498</sup> The Director-General of the National Governance, Integrity and Anti-Corruption Centre (GIACC), Tan Sri Abu Kassim Mohamed, attributed this change to the country's sustained efforts to fight corruption.<sup>499</sup> Further, the government rolled out a National Anti-Corruption Plan in January 2019, requiring government agencies to each set a practical goal based on initiatives to be taken to address corruption, integrity, and governance issues.<sup>500</sup>

IMDB (One Malaysia Development Bank) remained on the front pages in 2019, with the US DOJ's USD 700 million settlement with Jho Low and others, including

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<sup>492</sup> North American IP News. *The Bureau of Investigation and Bribery of the Public Sector Not only Locks Four Types of Corporate Corruption*, UDN (Dec. 27, 2019), <https://udn.com/news/story/6871/4252075>.

<sup>493</sup> *Corruption Perceptions Index 2018 - Philippines Profile*, TRANSPARENCY INT'L, <https://www.transparency.org/country/PHL>.

<sup>494</sup> Panos Mourdoukoutas. *Duterte's Philippines Is Getting Less Corrupt, The Wrong Way* FORBES (Feb. 2, 2019), <https://www.forbes.com/sites/panosmourdoukoutas/2019/02/02/dutertes-philippines-is-getting-less-corrupt-the-wrong-way/#3ae4c3ef3220>.

<sup>495</sup> Jennings, Ralphm. *Will Philippines New Plan to Fight Some of Asia's Worst Corruption Work?*, VOICE OF AM. (Sept. 18, 2019), <https://www.voanews.com/east-asia-pacific/will-philippines-new-plan-fight-some-asias-worst-corruption-work>.

<sup>496</sup> *Corruption Perceptions Index 2018 - Malaysia Profile*, TRANSPARENCY INT'L, <https://www.transparency.org/country/MYS>.

<sup>497</sup> *Ease of Doing Business rankings*, WORLD BANK GROUP, <https://www.doingbusiness.org/en/rankings>.

<sup>498</sup> *Democracy Index*, THE ECONOMIST, <https://www.eiu.com/topic/democracy-index>.

<sup>499</sup> Hana Naz Harun. *Malaysia's war against corruption paying dividends*. NEW STRAITS TIMES (Sept. 17, 2019), <https://www.nst.com.my/news/nation/2019/09/522088/malaysias-war-against-corruption-paying-dividends>.

<sup>500</sup> *National Anti-Corruption plan 2019-2023*, MALAYSIAN ANTI-CORRUPTION COMM'N (Jan. 29, 2019), <https://www.sprm.gov.my/index.php/en/arkib-berita-sprm/3227-national-anti-corruption-plan-2019-2023-nacp-2019-2023>.

his family.<sup>501</sup> The GIACC also acted on several lower-profile corruption matters domestically, including the prosecution of six officials from Roads Transport Department for allegedly accepting bribes,<sup>502</sup> and the indictment of a businessman who allegedly bribed various government officials relating to a construction project.<sup>503</sup> In early 2020, reports have also surfaced of alleged retaliation against former Malaysian Anti-Corruption Commission (MACC) chief Abu Kassim Mohamed for investigating the Prime Minister for money-laundering and misconduct.<sup>504</sup>

On July 22 2019, the Securities Commission Malaysia (the Securities Commission) announced that it would implement an action plan to strengthen standards of corporate governance to prevent corruption, misconduct and fraud in Malaysia.<sup>505</sup> The Securities Commission's recommendations build on new corporate liability provisions of the amended Malaysian Anti-Corruption Commission Act (the MACC Act) which come into effect in June 2020, and include a requirement that companies listed in Malaysia put in place anti-corruption measures. The Malaysian Anti-Corruption Commission is expected to begin enforcing the new corporate liability provisions from June 2020.

## 12. Australia

Political developments slowed Australia's efforts to amend its anti-corruption laws in the last year. As detailed in our [2018 FCPA/Anti-Corruption Year in Review](#), the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (the 2017 Bill) was put before the Australian Parliament in November 2017 and aimed to align Australia's foreign bribery laws more closely with the US and UK anti-corruption frameworks. However, the 2017 Bill did not fully progress through the Australian Parliament during an 18-month period and was subsequently taken off the table due to the Australian general elections.<sup>506</sup>

In November 2019, the draft law was reintroduced to the country's Senate as the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (the 2019 Bill) and is currently going through parliament. Although the final wording of the legislation will not be available until the 2019 bill has been passed, the 2019 bill is expected to closely mirror the 2017 Bill. As discussed in our [2018 FCPA/Anti-Corruption Year in Review](#), the new anti-corruption legislation will introduce a new corporate offence of failing to prevent bribery, including an associated "adequate procedures" defense, and will introduce a DPA scheme that closely reflects UK-

<sup>501</sup> Office of Public Affairs. *United States Reaches Settlement to Recover More Than \$700 Million in Assets Allegedly Traceable to Corruption Involving Malaysian Sovereign Wealth Fund*, U.S. DEP'T OF JUSTICE (Oct. 30, 2019), <https://www.justice.gov/opa/pr/united-states-reaches-settlement-recover-more-700-million-assets-allegedly-traceable>.

<sup>502</sup> N.Trisha, *Six more JPJ officers charged*, STAR MALAYSIA (July 26, 2019), <https://www.sprm.gov.my/images/NewspaperClipping/Six-more-JPJ-officers-charged.pdf>.

<sup>503</sup> Kuala Lumpur. *Gnanaraja Slapped with 68 Chargers*, NEW STRAITS TIMES (Apr. 9, 2019), <https://www.sprm.gov.my/images/NewspaperClipping/Gnanaraja-slapped-with-68-charges.pdf>.

<sup>504</sup> *Abu Kassim tried to pass 1MDB probe papers to US Attorney's Office in 2015: Fairfax CEO*, MALASIAKINI (Jan. 10, 2020), <https://www.malaysiakini.com/news/506599>.

<sup>505</sup> *SC to Implement Anti-Corruption Action Plan*, Media Releases and Announcements of Securities Commission Malaysia (July 22, 2019), <https://www.sc.com.my/resources/media-releases-and-announcements/sc-to-implement-anti-corruption-action-plan>.

<sup>506</sup> Sam Fry, *Australia presents long-awaited corruption bill*, GLOBAL INVESTIGATIONS REV. (Nov. 28, 2019), <https://globalinvestigationsreview.com/article/1211440/australia-presents-long-awaited-corruption-bill> (last accessed Dec. 16, 2019).

and US-style DPAs. The bill also does not appear to remove Australia’s facilitating payments exception.

To assist companies to comply with the new anti-corruption law, the Australian Attorney General has published accompanying draft guidance on the steps companies can take to prevent bribery of foreign public officials<sup>507</sup>. This guidance, like the UK Ministry of Justice’s guidance on the UK Bribery Act 2010, sets out six broad principles that aim to guide companies of all sizes and in all sectors in their implementation of effective and proportionate procedures to prevent bribery in a flexible and tailored manner.

On December 2, 2019, the Australian government introduced a bill to Senate that, if approved, would eliminate an admission of guilt as a pre-requisite for authorities being able to offer deferred prosecution agreements to companies accused of serious wrongdoing. Other amendments include introducing the new corporate offence of failure to prevent foreign bribery and broadening the existing definition of a foreign official to include those running for office.<sup>508</sup>

As we detailed in our [2018 FCPA/Anti-Corruption Year in Review](#), the Australian Senate approved new Commonwealth whistleblower laws that aim to strengthen the protections afforded to whistleblowers, including the ability for whistleblowers to pursue a claim for compensation when a company fails to prevent a third party from victimizing the whistleblower. The Treasury Laws Amendment (Enhanced Whistleblower Protections) Act 2019 came into effect on July 1, 2019 and requires public and certain large private companies to implement compliant whistleblower policies by January 1, 2020. Whistleblower reforms in the public sector are also anticipated following judicial criticism of the currently limited protections afforded to public servant whistleblowers.

## **E. Latin America**

### **1. Brazil**

During the first year of Jair Bolsonaro’s presidency, the fight against corruption continued to take the center stage of Brazilian politics, now reinforced by attempts at legislative reforms and structural changes that also target money laundering.

With President Bolsonaro’s support, Justice Minister Sergio Moro - known for his leading role in the Car Wash Operation—prepared a combination of legal and regulatory provisions that became known as the “Anticrime Package” (Package), aimed at increasing pressure to combat crime in general by amending several different penal statutes. Minister Moro campaigned before Congress and in media outlets to have the Package approved. The proposed bill included heightened sanctions in the case of organized crime, violent crimes and corruption. It also tried to regulate the use of plea bargain agreements in Brazil and to grant protection to

<sup>507</sup> See Attorney-General’s Department Consultation Draft, *Draft guidance on the steps a body corporate can take to prevent an associate from bribing foreign public officials* (Nov. 2019), <https://www.ag.gov.au/Consultations/Documents/draft-guidance-on-adequate-procedures-to-prevent-the-commission-of-foreign-bribery/Draft-guidance-on-adequate-procedures-to-prevent-the-commission-of-foreign-bribery.pdf> (last accessed Dec. 16, 2019).

<sup>508</sup> Will Neal, *Australia rejigs proposed DPA structure*, GLOBAL INVESTIGATIONS REV. (Dec. 5, 2019), <https://globalinvestigationsreview.com/article/1211766/australia-rejigs-proposed-dpa-structure> (last accessed Dec. 23, 2019).

whistleblowers. Congress approved a new version of the bill, rejecting, however, among other measures, the terms proposed for plea bargains under Brazilian law. The topic remains a priority for the Brazilian administration and may be included in future bills to be proposed before Congress. On the other hand, President Bolsonaro sanctioned Decree 10, 153 on December 3, 2019 to grant protection for whistleblowers within the scope of federal public administration.

The Package also tried—without success—to resolve the uncertainty around imprisonment after a second-level judicial decision (*segunda instancia*). This controversial topic was the subject of heated debates in Brazil earlier in the year, when the Supreme Court (STF) decided on the constitutionality of imprisonment while there are still further appeals possible. A narrow majority (6 vs. 5) of justices concluded that defendants can only be imprisoned after all appeals have been exhausted. The decision had a direct impact over politics in the country, and an indirect impact over Operation Car Wash efforts. On the grounds that his conviction was not final, former president Luis Inacio Lula da Silva was released from jail on November 8, 2019 the day after the STF's decision. Other individuals convicted as part of Car Wash investigations also benefited from the court's decision, including former politicians and businessmen. The Brazilian Congress is now considering introducing new legislation that would allow the possibility of imprisonment after the first appeal.

Despite the STF's decision, Operation Car Wash moved forward during its fifth year. In March 2019, under the scope of Operation Car Wash in Rio de Janeiro, former president Michel Temer was provisionally arrested based on alleged wrongdoing in connection with Eletronuclear contracts, along with former Minister and the former governor of Rio de Janeiro, Moreira Franco. Another four governors of Rio de Janeiro have also been arrested on corruption charges.

Notwithstanding its national and local investigation efforts, Operation Car Wash itself is also subject to criticism. In early June, Intercept published a series of reports with alleged extracts of leaked conversations between public prosecutors investigating corruption cases and then-Judge Moro, who was overseeing the cases; these reports indicated to many that Judge Moro had crossed a line in his dealings with the prosecutors and compromised his judicial independence.

The judicial branch in Brazil is also under heightened scrutiny due to allegations of excessive judicial activism and corruption of high-court justices. In Congress, representatives have tried to create a parliamentary investigation commission (CPI) dubbed *Lava Toga* (Judge robe wash, in reference to operation Car Wash). Critics of the CPI claim investigations against the judiciary may have a chilling effect over judges' efforts to fight corruption.

In terms of anti-money laundering policies, in November, the STF allowed the sharing of confidential information between entities dedicated to financial oversight, such as the Brazilian revenue service (*Receita Federal*) and the Council for the Control of Financial Activities (COAF). In December, Congress approved a Provisional Measure issued by the President, subordinating COAF to the Central Bank.

The STF decision entitling the Federal Police—in addition to the Brazilian Federal Prosecutors—to negotiate plea bargain agreements, opened a new route for defendants and cooperating individuals to reach agreements. The combination of the political and popular opinion environment and the legal and regulatory developments indicated above, lead us to believe that the Operation Lava Jato investigations will continue to increase.

Finally, on November 12, 2019, the STF voted unanimously to stop the case of a Brazilian defendant who was previously convicted of money laundering in Switzerland. This case supports the proposition that the STF is committed to the principle of double jeopardy.<sup>509</sup>

## 2. Argentina

During the presidency of Mauricio Macri, Argentina’s government released a decree for a five-year National Anti-Corruption Plan on April 10, 2019.<sup>510</sup> The plan that was promoted by the Argentinian Anti-Corruption Office and the Secretariat for Institutional Strengthening includes 250 initiatives and is based on three fundamental pillars: the promotion of integrity and transparency; the control and punishment of corruption in the administrative authorities; and the promotion of sectoral anti-corruption policies by all ministries and decentralized agencies of the national Executive Power.<sup>511</sup> The decree also established an Advisory Council responsible for overseeing and ensuring the implementation of the Anti-Corruption Plan.

On May 21, 2019, the first of 11 cases against Cristina Fernandez Kirchner, former president and current vice-president of Argentina, went to trial. While in office (2007-2015), Ms. Kirchner allegedly received bribes from construction companies in exchange for 51 government contracts worth USD 1 billion.<sup>512</sup> These investigations were part of the “notebook” scandal, a publication of written notes taken by the chauffeur of Ms. Kirchner’s former planning minister who allegedly picked up and delivered cash payments to various government officials including Ms. Kirchner.<sup>513</sup> As a former congresswoman and current vice-president Ms. Kirchner enjoys immunity from imprisonment but not from prosecution. Even though the charges against her could lead to a ten-year prison sentence, it remains unlikely that two-thirds of the Argentinean Senate would vote to lift her immunity.

<sup>509</sup> Sam Fry, *Brazil rules in favour of double jeopardy principle*, GLOBAL INVESTIGATIONS REV. (Nov. 14, 2019), <https://globalinvestigationsreview.com/article/1210928/brazil-rules-in-favour-of-double-jeopardy-principle>.

<sup>510</sup> *National Anti-Corruption Plan, Decree 258/2019*, Official Bulletin of the Republic of Argentina (Apr. 10, 2019), <https://www.boletinoficial.gob.ar/detalleAviso/primera/205233/20190411>.

<sup>511</sup> Hartmann, Carlos. *Laura Alonso: Este es el inicio del “Nunca más” de la corrupción en la Argentina*, LA PRENSA (Apr. 22, 2019), <http://www.laprensa.com.ar/475642-Laura-Alonso-Este-es-el-inicio-del-Nunca-mas-de-la-corrupcion-en-la-Argentina.note.aspx>; Fernando Goldaracena, Vanina Caniza, and Luis Dates, *Argentina: National Anti-Corruption Plan*, GLOBAL COMPLIANCE NEWS (Apr.26, 2019), <https://globalcompliancenews.com/argentina-national-anti-corruption-plan-20190411/>.

<sup>512</sup> *Fernández de Kirchner angrily denies graft claims as she testifies in court*, BUENOS AIRES TIMES (Dec. 2, 2019), <https://www.batimes.com.ar/news/argentina/cfk-testifies-in-court-for-the-first-time-against-corruption-charges.phtml>.

<sup>513</sup> *Argentina: ex-president Cristina Fernández charged in bribery scandal*, GUARDIAN (Sept. 17, 2018), <https://www.theguardian.com/world/2018/sep/17/cristina-fernandez-indicted-argentina-president-corruption>.

During Mr. Macri's presidency, Argentina moved up 20 places in Transparency International's Corruption Perception Index.<sup>514</sup> It remains to be seen whether the new administration strengthens the fight against corruption and the promotion of transparency.

### 3. Peru

Peru has continued its efforts to investigate and prosecute corruption. Three former Peruvian presidents are currently under investigation for taking bribes from the Brazilian construction company Odebrecht.

Former president, Alejandro Toledo (2001-2006) was arrested in the United States following an extradition request from Peru for allegedly receiving USD 20 million from Brazilian companies Camargo Correa and Odebrecht for the construction of the Interoceanic Highway. Following a US District Judge order, Mr. Toledo was released on bail on October 22, 2019. He is currently under house arrest facing an extradition case.

On April 17, 2019, former president Alan Garcia (1985-1990 and 2006-2011) took his own life before police came to arrest him for allegations of bribery. Shortly thereafter, another former president, Pedro Pablo Kuczynski, was placed under pre-trial detention for having allegedly received bribes from Odebrecht. Similarly, former president Ollanta Humala Tasso (2011-2016) spent nine months in pre-trial detention before he was released on appeal.<sup>515</sup> Odebrecht allegedly paid USD three million to support Mr. Humala's presidential campaign. In July 2019, the homes of Peru's former first lady and Mr. Humala's wife, Nadine Heredia (2011-2016), and two former energy ministers were raided in relation to the construction of the Gasoducto Sur pipeline.

In November 2019, the daughter of former president Alberto Fujimori, Keiko Fujimori, was released from prison after a decision by Peru's Constitutional Court.<sup>516</sup> Ms. Fujimori spent 13 months in prison after a pre-trial sentence in October 2018. She was also accused of having received illegal campaign contributions from Odebrecht.

### 4. Mexico

Mexico's new president, Andrés Manuel López Obrador, known as AMLO, who took office on December 1, 2018, campaigned on an anti-corruption platform, and identified the fight against corruption as a key priority of his government.<sup>517</sup> While legal reforms adopted in 2015 and 2016, creating the National Anti-Corruption System (*Sistema Nacional Anticorrupción*, or SNA), strengthened Mexico's anti-

<sup>514</sup> In the latest Corruption Perception Index, Argentina holds rank 85 out of 180; while in 2014, before Macri took office, Argentina only ranked 107 out of 174; *Corruption Perceptions Index 2018 - Argentina Profile*, TRANSPARENCY INT'L, <https://www.transparency.org/cpi2018>; *Corruption Perceptions Index 2014 - Argentina Profile*, TRANSPARENCY INT'L, <https://www.transparency.org/cpi2014/results>.

<sup>515</sup> *Peruvian judge orders ex-President Kuczynski to pre-trial jail for three years*, REUTERS (Apr. 19, 2019), <https://www.reuters.com/article/us-peru-corruption/peruvian-judge-orders-ex-president-kuczynski-to-pre-trial-jail-for-three-years-idUSKCN1RV1AZ>.

<sup>516</sup> Paul Mackessey, *Keiko Fujimori Ordered Freed from Jail*, ANTI-CORRUPTION DIGEST (Dec. 3, 2019), <https://anticorruptiondigest.com/2019/12/03/keiko-fujimori-ordered-freed-from-jail/#axzz69hNXOhOA>.

<sup>517</sup> See Mexican Government's Press Release; see also *Discurso de Andrés Manuel López Obrador, Presidente de los Estados Unidos Mexicanos*, (Dec. 1, 2018), <https://www.gob.mx/presidencia/articulos/discurso-de-andres-manuel-lopez-obrador-presidente-de-los-estados-unidos-mexicanos?idiom=es>.



corruption framework, implementation and enforcement have been slow. However, since the beginning of AMLO's term as president, the country appointed its first specialized chief anti-corruption prosecutor, Luz Mijangos Borja, and charges were brought against former high-ranking officials of Mexico's state-run oil company Petróleos Mexicanos (Pemex) in connection with the Odebrecht investigation, marking the country's first major anti-corruption prosecution.

Mexican authorities had been investigating Odebrecht, a Brazilian construction firm with operations across Latin America and implicated in Brazil's large-scale Operation Car Wash, at least since 2017,<sup>518</sup> although the previous administration had failed to bring charges in connection with the probe.<sup>519</sup> However, since May 2019, Mexico's prosecution authority (*Fiscalía General de la República*, or FGR) and financial intelligence unit (*Unidad de Inteligencia Financiera*, or UIF) have taken actions against former Pemex CEO, Emilio Lozoya, and current CEO of Mexican steel manufacturer Altos Hornos de Mexico (AHMSA), Alonso Ancira, in connection with bribery charges, including by freezing assets<sup>520</sup> and issuing arrest warrants.<sup>521</sup> In particular, Lozoya, a long-time ally of former president Enrique Peña Nieto, is alleged to have received bribes from Odebrecht during his tenure as Pemex CEO from 2012 to 2016,<sup>522</sup> and from AHMSA through an Odebrecht subsidiary in connection with Pemex's acquisition of a fertilizer plant from AHMSA for an over-inflated price.<sup>523</sup>

While these actions are broadly seen as an important step towards greater enforcement of anti-corruption legislation in Mexico, the significance and long-term implications of this first major prosecution will largely depend on the judiciary's ability to bring those accountable to justice. As of November 10, 2019, Lozoya has evaded his arrest warrant, as is the case with Pemex's former head of security, General Eduardo León Trauwitz, who is accused of coordinating and benefiting from oil theft and whose whereabouts are unknown.<sup>524</sup>

## 5. Other Developments in Latin America

On May 13, 2019, Ecuador's president Lenin Moreno created the Commission of International Experts to Fight Corruption in Ecuador (CEICCE). The CEICCE is made

<sup>518</sup> See our [FCPA/Anti-Corruption Developments: 2018 FCPA/Anti-Corruption Year in Review](#) for a discussion of Mexico's investigation of Odebrecht in 2018.

<sup>519</sup> Azam Ahmed, *Mexico Could Press Bribery Charges. It Just Hasn't*, NEW YORK TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/world/americas/mexico-odebrecht-investigation.html>.

<sup>520</sup> UIF Press Release, *Congela UIF cuentas que presuntamente son derivadas de actos de corrupción*, SEC'Y FINANCE & PUBLIC CREDIT (May 27, 2019), [https://www.uif.gob.mx/work/models/uif/comunicados/UIF\\_009.pdf](https://www.uif.gob.mx/work/models/uif/comunicados/UIF_009.pdf).

<sup>521</sup> Press Release, *Comunicado FGR 258/19. La Fiscalía General de la República Informa de la detención de Alonso "N" en España*, FGR (May 28, 2019), <https://www.gob.mx/fgr/prensa/comunicado-fgr-258-19-la-fiscalia-general-de-la-republica-informa-de-la-detencion-de-alonso-n-en-espana>; Press Release, *Comunicado FGR 323/19. La Fiscalía General de la República informa*, FGR (July 5, 2019), <https://www.gob.mx/fgr/prensa/comunicado-fgr-323-19-la-fiscalia-general-de-la-republica-informa-207702?idiom=es>.

<sup>522</sup> *Emilio Lozoya: Former Mexican oil chief accused of corruption*, BBC (July 6, 2019), <https://www.bbc.com/news/world-latin-america-48891030>.

<sup>523</sup> Kirk Semple and Azam Ahmed, *Mexico Charges Former Oil Official With Bribery in Anticorruption Drive*, NEW YORK TIMES (May 28, 2019), <https://www.nytimes.com/2019/05/28/world/americas/mexico-corruption-prosecution-oil-company.html>.

<sup>524</sup> Kevin Sieff, *A general was the leading suspect in the biggest anti-corruption case in Mexico. Then he disappeared*, WASHINGTON POST (Nov. 10, 2019), [https://www.washingtonpost.com/world/the\\_americas/a-general-was-the-leading-suspect-in-the-biggest-anti-corruption-case-in-mexico-then-he-disappeared/2019/11/10/e6f91f2c-f4e9-11e9-b2d2-1f37c9d82dbb\\_story.html](https://www.washingtonpost.com/world/the_americas/a-general-was-the-leading-suspect-in-the-biggest-anti-corruption-case-in-mexico-then-he-disappeared/2019/11/10/e6f91f2c-f4e9-11e9-b2d2-1f37c9d82dbb_story.html).

up of five international experts and its purpose is to strengthen public institutions and avoid corrupt practices.

Earlier this year, Luis Gustavo Moreno Rivera, former National Director of Anti-Corruption in Colombia was sentenced to four years in prison in the United States for accepting a cash bribe while at a Miami shopping mall.<sup>525</sup> Mr. Moreno, who pleaded guilty, solicited USD 132,000 in return for confidential information regarding an investigation against former governor of the Cordoba region, Alejandro Lyons Muskus.

## **F. Africa**

### **1. South Africa**

Following a steady decline in the country's Transparency International corruption perception ranking in recent years,<sup>526</sup> the election by South African parliament of new president Cyril Ramaphosa on February 15, 2018 marks the country's renewed commitment to fighting corruption. In his state of the nation address on February 16, 2018, Ramaphosa vowed to turn the tide of corruption in the country's public institutions, emphasizing the role of the Commission of Inquiry into State Capture, and committed to equally fighting corruption, fraud and collusion in the private sector.<sup>527</sup>

The Commission of Inquiry into State Capture was set up by presidential proclamation on January 23, 2018 to inquire into allegations of state capture, corruption and fraud in the public sector, including allegations of undue influence exercised by the Gupta family, an Indian family with significant business ties in South Africa, over the administration of former president Jacob Zuma. While the commission, headed by Deputy Chief Justice Raymond Zondo, does not have prosecutorial powers, it can refer matters for prosecution or further investigation.<sup>528</sup> The commission, which started hearing testimony in August 2018 and whose work is ongoing, so far has heard from a variety of sources, including high-ranking politicians and government officials, notably former president Zuma, former government ministers and former officials of state-owned enterprises (SOEs).

While the commission's work has yet to result in prosecutions, on October 10, 2019, the US Department of the Treasury's Office of Foreign Assets Control (OFAC) designated members of the Gupta family and a close business associate under the Global Magnitsky Human Rights Accountability Act for their involvement in a

<sup>525</sup> *Colombia's Luis Gustavo Moreno Rivera Gets Four Years in U.S. Prison*, ANTI-CORRUPTION DIGEST (Jan. 8, 2019), <https://anticorruptiondigest.com/2019/01/08/colombias-luis-gustavo-moreno-rivera-gets-four-years-in-u-s-prison/#axzz69d8Eq2GA>.

<sup>526</sup> South Africa's global ranking in Transparency International's Corruption Perception Index has consistently declined since 2015, going from 61 in 2015 to 73 in 2018, and its score remained below 50 throughout this period, varying from 43 to 45. Transparency International's Corruption Perception Index ranks countries and territories by their perceived levels of public sector corruption, using a scale of 0 to 100 to score countries, where 0 is highly corrupt and 100 is very clean, and ranking them by highest to lowest score. Source: *Corruption Perceptions Index 2018 – South Africa Profile*, TRANSPARENCY INT'L, <https://www.transparency.org/cpi2018>.

<sup>527</sup> President Ramaphosa Transcript, *President Cyril Ramaphosa: 2018 State of the Nation Address*, S. African Gov't (Feb. 16, 2018), <https://www.gov.za/speeches/president-cyril-ramaphosa-2018-state-nation-address-16-feb-2018-0000>.

<sup>528</sup> *Proclamation No. 3 of 2018 by the President of the Republic of South Africa*, GOV'T GAZETTE (Jan. 25, 2018), [https://www.sastatecapture.org.za/uploads/Terms\\_Of\\_Reference.pdf](https://www.sastatecapture.org.za/uploads/Terms_Of_Reference.pdf).

significant corruption network in South Africa. The individuals designated were implicated in several corrupt schemes, allegedly leveraging their political connections to obtain government contracts and misappropriate state assets estimated at hundreds of millions of dollars.<sup>529</sup> According to a statement released by South Africa's Department of Justice and Constitutional Development on the same day, the OFAC designations were part of a collaborative effort between authorities of the two countries.<sup>530</sup> Notably missing from the OFAC designations were public officials, state-owned enterprises (SOEs) and multinational companies implicated in corrupt schemes involving the Gupta family and subject to ongoing investigations in South Africa.

Meanwhile, the criminal proceeding against former President Zuma for alleged corruption related to South Africa's arms deal with French arms company Thales remains ongoing. The charges of corruption, racketeering, fraud and tax evasion, initially brought against Zuma and Thales over a decade ago and reinstated in March 2018, have been mired in procedural wrangling. The trial is currently scheduled for April 2020, although both Zuma and Thales expressed an intention to appeal the decision of the Pietermaritzburg High Court dismissing application to drop the charges permanently.<sup>531</sup>

## 2. Other Developments in Africa

2019 has also seen other countries in Africa stepping-up anti-corruption enforcement efforts. In particular, Namibia has recently charged high-ranking public officials in connection with a corruption scandal in its fishing industry. The scandal first came to light through a whistleblower leak that became public in November 2019, and involves Icelandic fisheries company, Samherji, which allegedly paid bribes of around USD 6.8 million to public officials in Namibia in exchange for fishing rights. In response to the leaks, Namibian authorities brought charges of fraud, money laundering and tax evasion against six individuals, including two former ministers, implicated in the scheme.<sup>532</sup> Repercussions of this scandal can already be seen across different jurisdictions, as Norwegian authorities investigate the alleged role played by the country's largest bank, DNB, in processing payments from Samherji to Namibia,<sup>533</sup> and Angolan authorities investigate the alleged involvement of a former fishing minister in the scheme.<sup>534</sup>

In addition, since Angola's former president, José Eduardo dos Santos, stepped down in 2017 after 38 years in power, his successor, João Lourenço, has publicly

<sup>529</sup> Press Release, *Treasury Sanctions Members of a Significant Corruption Network in South Africa*, U.S. DEP'T OF TREASURY (Oct. 10, 2019), <https://home.treasury.gov/news/press-releases/sm789>.

<sup>530</sup> Media Statements, *Interests of Justice have no Borders*, S. AFRICA DEP'T OF JUSTICE & CONSTITUTIONAL DEV. (Oct. 10, 2019), [https://www.justice.gov.za/m\\_statements/2019/20191010-USAsanctions.html](https://www.justice.gov.za/m_statements/2019/20191010-USAsanctions.html).

<sup>531</sup> Rebeca Davis, *Zuma launches latest appeal to can corruption trial*, DAILY MAVERICK (Nov. 5, 2019), <https://www.dailymaverick.co.za/article/2019-11-05-zuma-launches-latest-appeal-to-can-corruption-trial/>.

<sup>532</sup> Nyasha Nyaungwa, *Namibian ex-ministers enmeshed in fish scandal in jail for New Year*, REUTERS (Dec. 27, 2019), <https://www.reuters.com/article/us-namibia-iceland/namibian-ex-ministers-enmeshed-in-fish-scandal-in-jail-for-new-year-idUSKBN1YVOYB>.

<sup>533</sup> Richard Milne, *Norway probes DNB bank over Icelandic fisheries scandal*, FINANCIAL TIMES (Nov. 29, 2019), <https://www.ft.com/content/b243f97e-1293-11ea-a7e6-62bf4f9e548a>.

<sup>534</sup> Tim Cocks, *Angola opens case against ex-minister over Namibia fishing bribe scandal*, REUTERS (Dec. 11, 2019), <https://www.reuters.com/article/namibia-iceland-angola/angola-opens-case-against-ex-minister-over-namibia-fishing-bribe-scandal-idUSL8N28L4L5>.

vowed to combat corruption in the country.<sup>535</sup> Angolan authorities have stepped-up anti-corruption enforcement in 2019, notably by bringing corruption charges against José Filomeno dos Santos, son of former president and former head of the country's sovereign wealth fund, and against the former governor of the National Bank of Angola,<sup>536</sup> and by freezing an estimated USD 1 billion worth of assets belonging to Isabel dos Santos, daughter of former president and former head of Sonangol, the state-owned oil company.<sup>537</sup> However, it remains to be seen whether the anti-corruption drive will reach beyond the dos Santos clan.

## G. Canada

On January 11, 2019, a court in Ontario convicted two individuals in connection with a failed scheme to bribe Air India officials, namely Shailesh Govindia, a UK national and an agent for Cryptometrics, and Robert Barra, a US national and former chief executive of Cryptometrics.<sup>538</sup> Govindia and Barra were each sentenced to two-and-a-half years in prison for agreeing to pay bribes.<sup>539</sup> Although there reportedly was no evidence to show a bribe was paid and no contract was awarded to Cryptometrics by Air India, the judge found that there was enough evidence to show that the defendants had knowledge that a potential recipient of the bribes, the Indian Minister of Civil Aviation, was a “foreign public official” under Canada’s Corruption of Foreign Public Officials Act (CFPOA).<sup>540</sup> In arriving at his judgment, the judge found a conversation about the bribery scheme recorded by a co-defendant was reliable to prove the allegation beyond a reasonable doubt.<sup>541</sup> The judge also explicitly discounted Govindia’s assertion that he simply was trying to secure a \$500,000 consulting fee in a dishonest way and was not really serious about agreeing to bribe the minister.<sup>542</sup> Govindia and Barra’s convictions resulted from the second ever trial under the CFPOA.<sup>543</sup>

On February 1, 2019 and with a week before his trial commenced, former SNC-Lavalin CEO Pierre Duhaime pleaded guilty to helping a public servant commit a breach of trust.<sup>544</sup> In exchange for his plea, 14 other charges facing Duhaime were dropped.<sup>545</sup> Duhaime was sentenced to 20 months’ house arrest and 240 hours

<sup>535</sup> Henrique Almeida, *Angola Vows to Fight ‘Cancer’ of Corruption as Economy Recovers*, BLOOMBERG (Nov. 22, 2018), <https://www.bloomberg.com/news/articles/2018-11-22/angola-vows-to-fight-cancer-of-corruption-as-economy-recovers>.

<sup>536</sup> Noah Browning, *Angolan ex-president’s son on trial in rare corruption case*, REUTERS (Dec. 10, 2019), <https://www.reuters.com/article/angola-court-corruption/angolan-ex-presidents-son-on-trial-in-rare-corruption-case-idUSL8N28K2EP>.

<sup>537</sup> Andrew Meldrum, *Isabel dos Santos slams Angolan court for seizing \$1 billion*, ASSOCIATED PRESS (Jan. 1, 2020), <https://apnews.com/16042a6337c77ab88e3805efe9af7e01>.

<sup>538</sup> Marieke Breijer, *Two convicted in Cryptometrics foreign bribery case*, GLOBAL INVESTIGATIONS REV. (Feb. 5, 2019), <https://globalinvestigationsreview.com/article/1179949/two-convicted-in-cryptometrics-foreign-bribery-case> (last accessed Nov. 26, 2019).

<sup>539</sup> WAITHERA JUNGHAE, *PAIR IN CRYPTOMETRICS FOREIGN BRIBERY CASE SENTENCED*, GLOBAL INVESTIGATIONS REV. (Mar. 25, 2019), <https://globalinvestigationsreview.com/article/1189209/pair-in-cryptometrics-foreign-bribery-case-sentenced> (last accessed Nov. 26, 2019).

<sup>540</sup> Norm Keith, *Canada convicts American and Brit for CFPOA offenses*, FCPA BLOG (Mar. 21, 2019), <https://fcpcbog.com/2019/03/21/canada-convicts-american-and-brit-for-cfpoa-offenses/> (last accessed Nov. 26, 2019).

<sup>541</sup> *Id.*

<sup>542</sup> *Id.*

<sup>543</sup> *Id.*

<sup>544</sup> *Former SNC-Lavalin CEO pleads guilty in superhospital fraud case*, CBC NEWS (Feb. 1, 2019), <https://www.cbc.ca/news/canada/montreal/snc-lavalin-ceo-guilty-fraud-pierre-duhaime-1.5001839> (last accessed Feb. 27, 2019).

<sup>545</sup> *Id.*

of community service, and ordered to make a \$200,000 donation to a fund that compensates victims of crime. In mid-December 2019, another former SNC-Lavalin executive, Sami Bebawi, was found guilty by a Quebec jury of five charges, including fraud, corruption of foreign officials, and money laundering, for his role in the Libyan bribery scheme.<sup>546</sup> On January 10, 2020, Bebawi was sentenced to eight and a half years in prison after prosecutors recommended Bebawi be sentenced to nine years in prison, while Bebawi argued that he be sentenced to only six years.<sup>547</sup> Prosecutors also reportedly plan to seek a fine as part of Bebawi's sentence, but the exact amount and arguments in support of a fine have not yet been heard by the sentencing court.<sup>548</sup>

And to see 2019 out, on December 18, 2019, a division of SNC-Lavalin Group Inc. pleaded guilty to fraud in relation to the company's activities in Libya, ending the criminal case into the company. According to an agreed statement of facts, SNC-Lavalin Construction paid \$127 million to two shell companies between 2001 and 2011. Those two companies then paid bribes to win SNC-Lavalin contracts in Libya, including \$47 million of that money being paid to reward Saadi Gadhafi, son of the late dictator Moammar Gadhafi, for helping SNC-Lavalin secure lucrative construction projects.<sup>549</sup> This case had, earlier in the year, attracted significant political attention and comment when it was revealed in a report published by Canada's Conflict of Interest and Ethics Commissioner on August 14, 2019 that Prime Minister Justin Trudeau had repeatedly lobbied for a settlement in the ongoing SNC-Lavalin bribery case. The report found that Prime Minister Trudeau made repeated attempts to persuade former justice minister to offer the company a deferred prosecution agreement.<sup>550</sup>

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<sup>546</sup> Ian Austen, *Corruption Case That Tarnished Trudeau Ends With SNC-Lavalin's Guilty Plea*, NEW YORK TIMES (Dec. 18, 2019), <https://www.nytimes.com/2019/12/18/world/canada/snc-lavalin-guilty-trudeau.html> (last accessed Jan. 3, 2020).

<sup>547</sup> Jesse Feith, *SNC-Lavalin: Sami Bebawi sentenced to 8½ years for fraud, corruption*, MONTREAL GAZETTE (Jan. 10, 2020), <https://montrealgazette.com/news/local-news/snc-lavalin-sami-bebawi-sentenced-to-8-5-years-in-prison-for-fraud-corruption> (last accessed Jan. 13, 2020); Jesse Feith, *SNC-Lavalin: Crown seeks nine-year prison term for Sami Bebawi*, MONTREAL GAZETTE (Dec. 19, 2019), <https://montrealgazette.com/news/local-news/snc-lavalin-crown-seeks-nine-year-prison-term-for-sami-bebawi> (last accessed Jan. 3, 2020).

<sup>548</sup> *Id.*

<sup>549</sup> *SNC-Lavalin pleads guilty to fraud for past work in Libya, will pay \$280M fine*, ETHIX BASE (Dec. 19, 2019), <https://ethixbase.com/eanews/canada-snc-lavalin-pleads-guilty-to-fraud-for-past-work-in-libya-will-pay-280m-fine/> (last accessed Dec. 20, 2019).

<sup>550</sup> Sam Fry, *Ethics watchdog finds Trudeau interfered in SNC-Lavalin bribery case*, GLOBAL INVESTIGATIONS REV. (Aug. 15, 2019), <https://globalinvestigationsreview.com/article/1196382/ethics-watchdog-finds-trudeau-interfered-in-snc-lavalin-bribery-case> (last accessed Dec. 23, 2019).

## IX. Conclusion

In 2019, we saw some of the largest corporate fines in the history of FCPA enforcement, continued extensive cooperation from non-US authorities, and two significant multi-jurisdictional resolutions. We also saw active DOJ prosecutions of individuals—both in the form of new filed charges and trials in ongoing matters—and judicial confirmation of the law’s wide jurisdictional reach. The DOJ also continued to refine its enforcement policies and heighten its compliance program expectations. At the same time, the trend of increasing non-US enforcement in anti-corruption matters, as well as active enforcement by the World Bank and other international financial institutions, continued in 2019. As these trends are unlikely to diminish in the near term, continued attention to anti-corruption compliance enhancements, as well as appropriate investigations of potential violations and remediation, should remain high on the list of corporate compliance priorities for 2020.