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### Viral: The Impact of Investigative Journalism and Social Media on Anticorruption Enforcement and Investor-State Relations in Emerging Markets

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ARTICLE

**VIRAL: THE IMPACT OF INVESTIGATIVE JOURNALISM AND SOCIAL MEDIA ON ANTICORRUPTION ENFORCEMENT AND INVESTOR-STATE RELATIONS IN EMERGING MARKETS**

REAGAN DEMAS\*

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INTRODUCTION

On April 3, 2016, news broke that data leaked from the Panamanian law firm Mossack Fonseca revealed that several world leaders had been engaged in tax evasion, corruption, and money laundering.<sup>1</sup> Within a few days, a popular American publication claimed that the Panama Papers had broken the internet because discussion on the trove of documents using the hashtag #PanamaPapers was trending on social media platforms such as Twitter, Facebook, and Reddit.<sup>2</sup>

A year later, the *Mail & Guardian*, a popular South African newspaper, noted that the hashtag #Guptaleaks and the term “state capture” had gone viral on South African social media as the public reacted to allegations of corruption involving then President Jacob Zuma and the influential Gupta family.<sup>3</sup>

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1. Steph Solis, *#PanamaPapers Corruption Scandal Breaks the Internet*, USA TODAY (Apr. 29, 2016, 8:36 PM), <https://www.usatoday.com/story/news/world/2016/04/03/panama-papers-investigation-trending/82590686>.

2. *Id.*

3. *Why You Should Care About the #GuptaLeaks—an International View*, MAIL & GUARDIAN (Aug. 9, 2017), <https://mg.co.za/article/2017-08-09-why-you-should-care-about-the-guptaleaks-an-international-view>.

The Panama Papers, the Gupta leaks, and similar large-scale corruption scandals of the past decade, which were unraveled by investigative journalists and amplified by social media, sent shock waves around the world. As more information was uncovered about allegedly improper deals and transactions, companies and investors across the globe scrambled to determine whether they were implicated in these scandals. Had they relied on business partners now identified as improperly connected to government officials to secure investment? What would be the resultant legal liability risks for the investor in his or her home or host country?<sup>4</sup> Was the government official who had approved the investment in an emerging-market country, or who was managing the investor-state relationship, now *persona non grata*? And if so, what did that mean for the investment?

Companies cannot predict and plan for every potential challenge that may affect their investments, particularly when doing business with a public or state-owned entity. Companies investing in emerging markets must assess a variety of factors that will condition the return on their investment, and therefore set the go or no-go call on making such investments. The host country's level of corruption, strength of legal system, and political stability all affect firms' investment decisions. While emerging markets and developing economies can offer some of the best returns on corporate investment, they tend to be characterized by, or are often associated with, higher levels of public corruption and political risk.<sup>5</sup> The conflicts that result from corruption in investor-state business relations often play out in public, are challenging to resolve amicably, and can have ripple effects on investors even outside the host country.

Reduced levels of corruption can have a positive effect on inflows of foreign direct investments (FDIs), which can themselves increase national resources and significantly contribute to economic development.<sup>6</sup> On the one hand, anticorruption exposés publicized by the media can increase transparency and promote accountability for public officials and private actors involved in acts of bribery and corruption and other financial crimes. On the other hand, sensational reporting or civil society anticorruption movements that break along primarily political lines can increase investors' risk aversion for economies in need of foreign investment, particularly in asset- and resource-intensive sectors such as infrastructure projects. Encouraging investment remains key, and media coverage marked by a presump-

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4. By host country, the author refers to the country receiving a foreign direct investment.

5. See Weiling Jiang et al., *Political Risk Management of Foreign Direct Investment in Infrastructure Projects: Bibliometric-Qualitative Analyses of Research in Developing Countries*, ENG'G, CONSTR. & ARCHITECTURAL MGMT. (Nov. 26, 2019), [https://www.researchgate.net/publication/337969192\\_Political\\_risk\\_management\\_of\\_foreign\\_direct\\_investment\\_in\\_infrastructure\\_projects\\_Bibliometric-qualitative\\_analyses\\_of\\_research\\_in\\_developing\\_countries](https://www.researchgate.net/publication/337969192_Political_risk_management_of_foreign_direct_investment_in_infrastructure_projects_Bibliometric-qualitative_analyses_of_research_in_developing_countries).

6. See Reagan R. Demas, *Moment of Truth: Development in Sub-Saharan Africa and Critical Alterations Needed in Application of the Foreign Corrupt Practices Act and Other Anti-Corruption Initiatives*, 26 AM. U. INT'L L. REV. 315, 336–37 (2011).

tion of guilt for foreign investors doing business with targeted governments—even in the absence of established wrongdoing—does not help achieve that goal. Nevertheless, modern anticorruption movements, mobilizing social media tools that amplify the voice of civil society, may be precisely what is needed to achieve accountability for corrupt officials and investors who participate in corruption and to mitigate corruption’s suppressing impact on investment.

To minimize both corruption and political risk at an early stage, investing companies usually engage in extensive due diligence of potential public and state-owned business partners, craft contractual protections (e.g., audit or termination rights, change-of-law, and alternative dispute resolution provisions), design robust corporate compliance programs, or purchase political-risk insurance. While these mitigants can increase an investor’s comfort level, they cannot immunize a company from the collateral damage of public corruption scandals, particularly when high-profile cases implicate a counterparty.

For the past decade in particular, companies have had to account for, and respond to, the impact of investigative journalism and social media campaigns on their business.<sup>7</sup> For companies trying to comply with anti-bribery and anticorruption laws and regulations, it is difficult to anticipate when and where the next corruption scandal—and the anticorruption sweeps the scandal will prompt—will arise. It is also difficult to understand how newly uncovered allegations of impropriety will affect the companies’ operations across the world.

First, this article identifies the rise of investigative journalism and social media as new tools for detecting bribery and corruption and raising awareness about them. Second, it explains how these new tools can increase the risk of investor-state conflict and enforcement against companies. Finally, it provides practical tips for companies to (i) anticipate and engage alongside large-scale anticorruption initiatives in emerging markets prompted by investigative journalism and (ii) manage the resulting conflict that may arise in relation to business conducted with public or state-owned counterparties tainted by corruption allegations.

## PART I: THE ROLE OF INVESTIGATIVE JOURNALISM AND SOCIAL MEDIA IN THE FIGHT AGAINST CORRUPTION

Mitigating risks related to corruption in emerging markets is a key consideration for investors.<sup>8</sup> This article argues that as companies strategize

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7. See recent investigations of the International Consortium of Investigative Journalists including the 2020 “Luanda Leaks,” the 2019 “Mauritius Leaks” and “Bribery Division,” and the 2018 “West Africa Leaks.”

8. See, e.g., Lindsay B. Arrieta, *Attacking Bribery at Its Core: Shifting Focus to the Demand Side of the Bribery Equation*, 45 PUB. CONT. L.J., 587, 606 (2016) (“A study analyzing the impact of foreign bribery laws on foreign investment illustrated that ‘laws against bribery abroad

on how to manage business in these economies, they must account for the increasingly important role that investigative journalism and social media play in detecting and disseminating allegations of corruption and in raising the likelihood of anticorruption enforcement by competent regulators. These new forms of civic investigations tend to shape public opinion, and they have created new compliance standards at times more stringent than existing legal requirements.

A. *The Rise of Media in Detecting Corruption and as a Catalyst of Anticorruption Enforcement*

Over the last two decades, free mass media, investigative journalism, and anticorruption advocacy led by civil society have played an increasingly important role in shaping domestic and cross-border efforts to root out bribery and corruption. Sometimes referred to as the “fourth estate,” free mass media can serve as an institution of checks and balances that monitors public officials’ and corporations’ compliance with domestic and international law.<sup>9</sup>

Cross-border fact-finding and advocacy efforts have provided concrete examples of international cooperation leading to financial and economic crime being brought to the attention of the public and regulators.<sup>10</sup> For example, anticorruption enforcers in the United States are attentive to media alerts from host countries that may implicate regulated companies in the United States, amplifying the impact of local allegations, which can quickly have a global impact.<sup>11</sup> In the United States and other jurisdictions, regulators also increasingly rely on the social media posts and accounts of companies’ employees and affiliates during anticorruption investigations to assess companies’ liability, no longer limiting the reach of their investigations to traditional email review.<sup>12</sup>

In this article, we define the term “media” broadly to encompass both traditional forms of reporting and new horizontal forms of information shar-

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appear to be effective in making investors more sensitive to host country corruption, but only when the laws are in place and coordinated in multiple countries.” (quoting Alvaro Cuervo-Cazurra, *The Effectiveness of Laws Against Bribery Abroad*, 39 J. INT’L BUS. STUD. 634, 635 (2008)).

9. Christopher Starke et al., *Free to Expose Corruption: The Impact of Media Freedom, Internet Access, and Governmental Online Service Delivery on Corruption*, 10 INT’L J. COMM’N 4702, 4703 (2016).

10. See Org. for Econ. Coop. & Dev. [OECD], *The Role of the Media and Investigative Journalism in Combating Terrorism* (Abstract) (2018) [hereinafter OECD Report] (“International consortiums of investigative journalists are an example of an international cooperation that leads to tangible results in bringing financial and economic crime to the attention of the public and law enforcement authorities.”). See, for example, platforms such as the Organised Crime and Corruption Reporting Project, the Global Investigative Journalism Network, or the International Consortium of Investigative Journalists.

11. Client confidential matters.

12. Client confidential matters.

ing through social media and networks. *Merriam-Webster* defines *social media* as “forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos).”<sup>13</sup> Social media also include globally popular messaging applications such as Kik, WhatsApp, and Telegram, which make it possible for information to spread quickly, even where populations are geographically, culturally, or politically distant.<sup>14</sup> Further, we define *corruption*, in accordance with the US Foreign Corrupt Practices Act (FCPA),<sup>15</sup> as giving, offering, or promising anything of value to a government official in order to obtain or retain an improper business advantage.

The Organisation for Economic Co-operation and Development (OECD) has recognized that media reporting and investigative journalism by affiliated and independent journalists and nongovernmental organizations are “an essential—albeit untapped—source of detection in corruption cases” and are “among the most important sources of public awareness-raising on corruption.”<sup>16</sup> Today more than ever, open data has allowed investigative journalists to gain access to enormous volumes of information and to process it through transnational networks of professionals, facilitating new forms of large-scale nongovernmental investigations.<sup>17</sup> Findings of such initiatives have raised awareness and democratized information about both public and private corruption networks.

On April 3, 2016, the International Consortium of Investigative Journalists (ICIJ) released one of the largest information leaks in history, from the law firm Mossack Fonseca, exposing the offshore holdings of 140 current and former world leaders.<sup>18</sup> The same day, more than one hundred

13. See *Social Media*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/social%20media> (last visited July 30, 2020); see also Lori McCay-Peet & Anabel Quan-Haase, *A Model of Social Media Engagement: User Profiles, Gratifications, and Experiences*, THE SAGE HANDBOOK OF SOCIAL MEDIA RESEARCH METHODS 6 (2016) (“Social media are web-based services that allow individuals, communities, and organizations to collaborate, connect, interact, and build community by enabling them to create, co-create, modifies, share, and engage with user-generated content that is easily accessible.”); Caleb T. Carr & Rebecca A. Hayes, *Social Media: Defining, Developing, and Divining*, ATL. J. OF COMM’N 46, 50 (2015) (“Social media are Internet-based channels that allow users to opportunistically interact and selectively self-present, either in real-time or asynchronously, with both broad and narrow audiences who derive value from user-generated content and the perception of interaction with others.”).

14. See generally Benedict Evans, *WhatsApp—the Biggest Social Network You’ve Never Heard Of*, FORBES (Oct. 19, 2012, 5:09 AM), <https://www.forbes.com/sites/benedictevans/2012/10/19/whatsapp-the-biggest-social-network-youve-never-heard-of/#21bf365472eb>.

15. 15 U.S.C. §§ 78dd-1 to -3.

16. OECD Report, *supra* note 10, at 4 (“Media reporting in general, and especially investigative journalism by affiliated or independent journalists, or indeed non-governmental organisations (NGOs), are among the most important sources of public awareness-raising on corruption.”).

17. *Id.*

18. *A New ICIJ Investigation Exposes a Rogue Offshore Industry*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 3, 2016), <https://www.icij.org/investigations/panama-papers/new-icij-investigation-exposes-rogue-offshore-industry>.

news organizations internationally shared the findings of this unprecedented initiative.<sup>19</sup> The investigation involved over 350 reporters from eighty countries, who teased through approximately 11.5 million documents covering a forty-year period from the late 1970s through 2017.<sup>20</sup> Among many other secrets, the Panama Papers exposed the existence of offshore companies controlled by the then prime ministers of Iceland and Pakistan, the king of Saudi Arabia, and the children of the president of Azerbaijan.<sup>21</sup> ICIJ described this project as “the largest cross-border media collaboration ever undertaken,” involving journalists working in more than twenty-five languages.<sup>22</sup>

Since 2016, the ICIJ has published results from other large-scale investigations into offshore activities, including the following:

- The Paradise Papers (2017): a global investigation into the offshore activities of more than 120 political and world leaders and their financiers and the tax engineering of more than one hundred multinational companies, based on a leak of 13.4 million documents;<sup>23</sup>
- West Africa Leaks (2018): a regional investigation uncovering secretive companies and bank accounts of West African politicians and corporate executives, based on a leak of 27.5 million documents;<sup>24</sup>
- Bribery Division (2019): a regional investigation using leaked files from the Brazilian firm Odebrecht, exposing details of prominent figures and public works projects embroiled in Latin America’s cash-for-contracts scandal;<sup>25</sup> and
- FinCEN Files (2020): a cross-border investigation in cooperation with BuzzFeed News and other media partners into more than 2,100 suspicious activity reports filed between 2000 and 2017 by global banks to the Financial Crimes Enforcement Network (FinCEN), the US Treasury Department’s intelligence unit.<sup>26</sup>

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19. *Id.*

20. Will Fitzgibbon, *Panama Papers FAQ: All You Need to Know About the 2016 Investigation*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Aug. 21, 2019), <https://www.icij.org/investigations/panama-papers/panama-papers-faq-all-you-need-to-know-about-the-2016-investigation>.

21. *A New ICIJ Investigation Exposes a Rogue Offshore Industry*, *supra* note 18.

22. *Id.*

23. *Paradise Papers: Secrets of the Global Elite*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS, <https://www.icij.org/investigations/paradise-papers/> (last visited July 14, 2020); *see also About the Paradise Papers Investigation*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Nov. 5, 2017), <https://www.icij.org/investigations/paradise-papers/about>.

24. *West Africa Leaks*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS, <https://www.icij.org/investigations/west-africa-leaks> (last visited July 14, 2020).

25. *Bribery Division*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS, <https://www.icij.org/investigations/bribery-division> (last visited July 30, 2020).

26. Will Fitzgibbon et al., *What Is the FinCEN Files Investigation?*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Sept. 20, 2020), <https://www.icij.org/investigations/fincen-files/what-is-the-fincen-files-investigation>; Fergus Shiel & Ben Hallman, *Suspicious Activity Reports*, *Ex-*



In June 2018, the ICIJ also published news stories from a new leak of 1.25 million files from Mossack Fonseca.<sup>27</sup>

Increased internet access and new technologies of information and communication (TICs) have also enabled “civic technology movements” to arise, some entirely dedicated to sustaining anticorruption efforts.<sup>28</sup> These grassroots, tech-savvy movements are often leaderless and nonhierarchical.<sup>29</sup> The Nigerian civic organization BudgIT illustrates this trend. Founded in 2011, BudgIT utilizes technological tools to simplify the budget and matters of public spending for citizens, with the primary aim of raising standards of transparency and accountability in government.<sup>30</sup>

Social media platforms are also proving to be instrumental for civil society-led anticorruption initiatives, as illustrated by the experience of Russian activist and blogger Alexei Navalny who was poisoned with a nerve agent in August 2020.<sup>31</sup> In 2008, the former anticorruption lawyer started blogging about alleged malpractice and corruption at Russian state-owned corporations and among senior government officials, leveraging social media to share his views.<sup>32</sup> Navalny rapidly earned international recognition for his advocacy. In 2010, he was awarded a Yale World Fellowship, during which he shed light on corruption charges against the Russian oil and gas company Transneft.<sup>33</sup> Since then, Navalny has gained popular support, coordinating mass rallies gathering thousands of protesters denouncing Russia’s public corruption apparatus. The anticorruption campaigner has become a prominent opposition figure; he attempted to run for Russia’s

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*plained*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Sept. 20, 2020), <https://www.icij.org/investigations/fincen-files/suspicious-activity-reports-explained>.

27. Amy Wilson-Chapman et al., *What Happened After the Panama Papers*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 3, 2019), <https://www.icij.org/investigations/panama-papers/panama-papers-faq-all-you-need-to-know-about-the-2016-investigation>.

28. Starke et al., *supra* note 9, at 4706.

29. Lovell Fernandez, *A Survey of Corruption and Anti-Corruption Initiatives in Africa*, 2 J. ANTI-CORRUPTION L. 31, 54 (2018).

30. *See About Us*, BUDGIT, <https://yourbudgit.com/about-us/> (last visited July 14, 2020); *see also* Fernandez, *supra* note 29, at 54.

31. *See* Michael Schwartz, *Alexei Navalny, Russian Dissident, Says He Can Walk and Speak Now*, N.Y. TIMES (Sept. 19, 2020), <https://www.nytimes.com/2020/09/19/world/europe/navalny-russian-dissident-recovery.html>.

32. *See Alexei Navalny: Russia’s Vociferous Putin Critic*, BBC (Sept. 2, 2020), <https://www.bbc.com/news/world-europe-16057045>; Madeleine Roache, *Why Does Alexei Navalny Rattle the Kremlin?*, AL JAZEERA (July 29, 2019), <https://www.aljazeera.com/news/2019/07/alexei-navalny-rattle-kremlin-190730011624727.html>; *see also* Lawrence J. Trautman, *Following the Money: Lessons from the Panama Papers, Part 1: Tip of the Iceberg*, 121 PA. ST. L. REV. 807, 859–60 (2017) (citing Paul M. Healy & Karthik Ramanna, *When the Crowd Fights Corruption*, 91 HARV. BUS. REV. 1 (2013)).

33. *See Alexey Navalny, Politician and Head of Anti-Corruption Foundation*, YALE MAURICE R. GREENBERG WORLD FELLOWS PROGRAM, <https://worldfellows.yale.edu/person/alexey-navalny> (last visited Sept. 27, 2020); *see also* Michael Weiss, *What the Aleksei Navalny Case Says About Life in Putin’s Russia: How a LiveJournal Blogger Became the Russian President’s Worst Enemy*, ATLANTIC (Apr. 22, 2013), <https://www.theatlantic.com/international/archive/2013/04/what-the-aleksei-navalny-case-says-about-life-in-putins-russia/275175>.

presidency against Vladimir Putin in 2018, and he faced criminal prosecution denounced as politically motivated.<sup>34</sup>

Platforms exclusively dedicated to sharing information on corruption have also emerged, such as the website IPaidABribe.com, created by Janaagraha's Centre for Citizenship and Democracy, where anonymous users can report on the nature, number, pattern, types, location, frequency, and values of actual bribes they have paid or resisted.<sup>35</sup>

Investigative journalism and social media advocacy have shaped a new wave of anticorruption prosecution and oriented cross-border enforcement efforts. While the media have no formal enforcement powers to sanction public officials, they function as a watchdog, holding public figures accountable, particularly political leaders who derive their legitimacy from democratic approval.<sup>36</sup>

The release of the Panama Papers, for example, prompted an almost immediate coordination of global enforcement efforts. On April 16, 2016, less than two weeks following the release of the first wave of findings, the *Guardian* reported that tax investigators from twenty-eight countries gathered in Paris, France, to launch an unprecedented international inquiry.<sup>37</sup> The ICIJ has reported that at least eighty-two countries have launched investigations in connection with this release.<sup>38</sup>

Furthermore, the release of the papers had immediate repercussions for elected officials of several countries. The day following the release of the Panama Papers, thousands of protesters gathered in front of Iceland's parliament, throwing yogurt, bananas, and eggs while calling for the resignation of Prime Minister Sigmundur David Gunnlaugsson. Two days after the investigation's release, Minister Gunnlaugsson announced that he would step down.<sup>39</sup> Similarly, a few days after the release of the papers, allegations of misconduct arose against Clive Khulubuse Zuma—the nephew of former South African President Jacob Zuma—in connection with his business dealings in the oil industry of the Democratic Republic of Congo,

34. Roache, *supra* note 32.

35. See Trautman, *supra* note 32, at 861; see also Stephanie Storm, *Web Sites Shine Light on Petty Bribery Worldwide*, N.Y. TIMES (Mar. 6, 2012), <https://www.nytimes.com/2012/03/07/business/web-sites-shine-light-on-petty-bribery-worldwide.html>.

36. See Nils Köbis & Christopher Starke, *Why Did the Panama Papers (Not) Shatter the World? The Relationship Between Journalism and Corruption*, INTERDISC. CORRUPTION RSCH. NETWORK 69, 71–72 (2017).

37. See Trautman, *supra* note 32, at 839 (citing Holly Watt, *Panama Papers: Global Tax Officials to Launch Unprecedented Inquiry*, GUARDIAN (Apr. 12, 2016), <https://www.theguardian.com/news/2016/apr/12/panama-papers-global-tax-officials-inquiry-paris-meeting>).

38. Int'l Consortium of Investigative Journalists, *What Happened with the Panama Papers*, YOUTUBE (Apr. 2, 2019), <https://www.youtube.com/watch?v=O6pJblCF8t4>.

39. *Id.* See also Will Fitzgibbon, *The Panama Papers Revisited: Yogurt, Bananas, Small Moustaches, and Fonts*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 3, 2018), <https://www.icij.org/investigations/panama-papers/panama-papers-revisited-yogurt-bananas-small-moustaches-fonts>.

where South Africa had sent peacekeepers. The accusations inflamed public opinion and contributed to the precipitation of impeachment proceedings over allegations that he misappropriated public funds.<sup>40</sup> The investigation also shed light on the offshore holdings of Pakistan's Prime Minister Nawaz Sharif, which prompted the Supreme Court of Pakistan to open a corruption probe into Sharif and two of his children.<sup>41</sup>

While they are powerful tools in the modern fight against corruption, investigative journalism and new media advocacy can also have negative side effects and generate collateral damage. They can lead the public to condemn investors that have not engaged in illegal activities simply because they did business with a regime later denounced by civil society as "corrupt." Investors who do business with regimes later tainted by corruption scandals can be viewed *ipso facto* as complicit in corruption, even absent factual evidence. Broad-brush advocacy campaigns, while effective at holding those who work with corrupt regimes accountable, can cause even compliance-minded investors to rethink potential investments in emerging markets for fear that the regimes in those countries may later be exposed as corrupt and the investor could be viewed as part of a large-scale public corruption scheme merely based on an investment. Any effects of civil society movements that discourage investors with high compliance IQ from investing in emerging markets should be minimized.

### B. *The Impact of Media and Anticorruption Investigations on Corporate Image and Legitimacy*

Anticorruption investigations and advocacy led by civil society and social media also influence the public's opinion on certain corporate practices, forcing companies to review their procedures in order to be seen in a positive light and to avoid being swept into corruption scandals either as active participants, unknowing beneficiaries, or innocent collateral damage.<sup>42</sup> Media coverage shapes public opinion and affects corporate image.<sup>43</sup> More importantly, media can give or deny legitimacy to corporate actors. As several commentators have argued, "Legitimacy theory posits that in order for companies to continue their business operations, their values must

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40. See Trautman, *supra* note 32, at 821–22.

41. The ICIJ reported that Sharif's daughter submitted a document to the court that claimed she was not the owner of an offshore company under scrutiny, leading to online ridicule of the proffered evidence under the hashtag #fontgate. See Fitzgibbon, *supra* note 39.

42. Today's social media tools are channels that allow civil society to collectively express itself with much more force and vigor. Whereas historically a news outlet might attempt to run a story that might not be widely read or be squashed by officials or a concerned editor, social media-fueled movements are unimpeded by such guardrails or gatekeepers.

43. Muhammad Azizul Islam et al., *Anti-bribery Disclosures: A Response to Networked Governance*, 42 ACCOUNTING FORUM 3, 4 (2018) ("Prior research suggests that media coverage influences public opinion and public policy development. Similarly, in business, the media in its variety of forms (business press, web and visual medium) has a marked influence on establishing and influencing the corporate image, agenda and practices." (internal citations omitted)).

remain congruent with the value system of the society.”<sup>44</sup> To be viewed as legitimate economic actors, investors need to maintain support from various stakeholders, including their own employees, shareholders, and members of the communities in which they operate. To maintain this support, investors’ activities must be consistent with stakeholder values.<sup>45</sup> Corruption scandals thus create legitimacy threats.<sup>46</sup>

The challenge for corporate actors is to keep up with the different values of various stakeholders. Stakeholder reactions to corruption allegations released on social media can be swift, inflamed by inaccurate perceptions, and clouded by political biases. Reactions can conflate criminal activity with legal activity. Social media– and civil society–led movements are important new weapons in the corruption fight, but they often are blunt anticorruption instruments that are ill-equipped to navigate the subtleties of the law, discern motives, or draw nuanced distinctions where “gray area” exists.

For investors in emerging markets, the challenge of aligning with stakeholder values is often most acute in the selection of business partners. While certain business partners might have passed muster at the time of contract formation and may not have raised compliance concerns in the course of due diligence, allegations can later arise regarding the legitimacy of these partners and their connections to government officials.

In South Africa, for example, following a series of scandals, the surname “Gupta” became a household name associated with corruption of public officials. Among other things, the Gupta family is alleged to have set up a series of intermediary companies to serve partner roles with multinational companies seeking business in South Africa. A November 2016 report on “state capture” describes the Guptas’ ties to former President Jacob Zuma and other officials, and alleges that the Guptas were involved in improper awarding of state contracts to entities affiliated with the family.<sup>47</sup> The situation escalated after emails were leaked from a Gupta server, and the media have relied on the so-called #GuptaLeaks to expose corruption in South Africa and demand change.<sup>48</sup>

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44. *Id.* at 5.

45. *Id.* (“When corporate activities are inconsistent with community expectations, a legitimacy threat arises. Legitimacy theory provides the theoretical lens to examine the interaction between companies’ reporting media and its physical and social environment.” (citation omitted)).

46. *Id.* (“When a corporation is publicly linked to a major incident with negative social or environmental implications, a legitimacy threat arises and corporate executives respond via different communication strategies to inform the public of the organisation’s legitimacy seeking activities.” (internal citation omitted)).

47. PUBLIC PROTECTOR SOUTH AFRICA, REPORT NO. 6 OF 2016/17, STATE OF CAPTURE 29–30 (2016).

48. See Ed Cropley et al., *FBI Opens Investigation into South Africa’s Guptas*, REUTERS (Oct. 19, 2017), <https://www.reuters.com/article/us-safrica-politics/fbi-opens-investigation-into-south-africas-guptas-ft-idUSKBN1CO0R1>; Norimitsu Onishi & Selam Gebrekidan, *In Gupta*

Association with the Guptas quickly became one of the fastest ways for a private actor to lose legitimacy. As the extent of the Gupta empire and the names of companies affiliated with the family were gradually uncovered, it became clear that the Guptas had interests in a range of industries, including mining, media, and technology.<sup>49</sup> The site Guptaleaks.com maintained a list of companies affiliated with the Guptas. Media articles would routinely disclose the names of new entities found to have ties to the family.<sup>50</sup>

This meant that investors had to explain, in light of the South African state-capture scandal, why they had done business with these entities, even where, at the time of the relevant transactions, public records might not have indicated that the entities were affiliated with the Guptas or that the Guptas were engaged in misconduct. The movement even expanded to question foreign investors who had no link to the Guptas but who had financially benefited from business conducted with South African state-owned entities. These questions were based on the perception and civil society determination that the Zuma regime and Zuma's "cronies" running state enterprises were corrupt, which thereby created a presumption of guilt for any investor who financially benefited.<sup>51</sup>

Having to prove compliance post scandal is all the more challenging because investors have limited tools to evaluate the risk of corruption prior to the publication of an enforcement action or the sharing of leaks. Effectively measuring and comparing national levels of corruption in advance of an investment presents methodological difficulties. Companies often rely on corruption indexes measuring levels of perceived corruption rather than actual or real-time corruption. Such indicators tend to aggregate data from qualitative field research and can reinforce existing perception biases, which is especially damaging for emerging and developing economies look-

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*Brothers' Rise and Fall, the Tale of a Sullied A.N.C.*, N.Y. TIMES (Dec. 22, 2018), <https://www.nytimes.com/2018/12/22/world/africa/gupta-zuma-south-africa-corruption.html>.

49. Jaclyn Jaeger, *South Africa Gupta Saga: A Long List of Compliance Failures*, COMPLIANCE WEEK (Nov. 7, 2017), <https://www.complianceweek.com/south-africa-gupta-saga-a-long-list-of-compliance-failures/2471.article> ("At the center of it all is South Africa's Gupta family, who gained notoriety after whistleblower accusations surfaced that the Gupta's family empire—with business interests in computers, technology, mining, air travel, energy, and media—for years has been using their close, personal ties with President Jacob Zuma to control state business.").

50. See, e.g., Amil Umraw, *FBI to Probe Guptas' U.S. Links*, HUFFINGTON POST (Oct. 19, 2017), [https://www.huffingtonpost.co.uk/2017/10/19/fbi-to-probe-guptas-u-s-links\\_a\\_23248444](https://www.huffingtonpost.co.uk/2017/10/19/fbi-to-probe-guptas-u-s-links_a_23248444) (discussing links between the Guptas and Texas-based company Brookfield Consultants); Franz Wild, *KPMG Watched as Guptas Moved South Africa Public Funds for Wedding*, BLOOMBERG (June 30, 2017), <https://www.bloomberg.com/news/articles/2017-06-30/kpmg-watched-as-guptas-moved-s-africa-public-funds-for-wedding> (mentioning links between the Guptas and a number of entities, including Accurate Investments Ltd., Linkway Trading, and Estina Dairy Farm).

51. TimesLive, *How Zuma Is Still Hurting SA*, SUNDAY TIMES (Mar. 31, 2018), <https://www.timeslive.co.za/politics/2018-03-30-how-zuma-is-still-hurting-sa>.

ing to shed stereotypical conceptions that can have long-lasting negative consequences.<sup>52</sup>

Investors in emerging markets can be caught in the crossfire following widely disseminated allegations of misconduct by public officials. Investors who dealt with disgraced government officials can be presumptively viewed as having participated in, or been aware of, any misconduct. Further, actions by investors that do not constitute violations of law can nonetheless be seen as improper by the public in the wake of a corruption scandal. Another risk for investors is that these corruption campaigns raise the risk of prosecution or investigation, even for those companies who are unfairly associated with wrongdoing.

## PART II: HOW THE MEDIA AND CIVIL SOCIETY ORGANIZATIONS HAVE INCREASED THE RISK OF ANTICORRUPTION ENFORCEMENT BY HOST AND HOME STATES

The rise in anticorruption investigative journalism and social media advocacy correlates with the rise of large global settlements involving multinational companies charged by regulators with paying government officials bribes. These large settlements have shed light on the fact that enforcement of laws prohibiting investor and corporate corruption is largely left to a handful of countries, which often are not the countries whose officials have accepted bribes.

Social media and investigative journalism have thus risen to prominence in the fight against corruption in part because they give a voice to frustration regarding the gap left in corruption enforcement by “naming and shaming” bad actors with political capital, thus raising awareness on the demand side of corruption (i.e. when public officials solicit the payment of bribes by private actors). These tools put pressure on governments to enforce their anticorruption laws. The problem, however, is that governments eager to gain legitimacy following massive leaks can then engage in large anticorruption sweeps that affect the investments of both legitimate investors and persons engaging in misconduct.

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52. Indeed, research has shown that there can be significant discrepancies between the manner in which indicators and indices measure corruption in a country and the actual corruption in the country. Some have argued that cultural, political, and economic biases impact corruption perception, believing that factors such as “economic development, democratic institutions or Protestant traditions[ ] systematically bias corruption perception indices downward from corruption experience.” See Dilyan Donchev & Gergely Ujhelyi, *What Do Corruption Indices Measure?*, 26 *ECON. & POL.* 309, 309 (2014), <https://uh.edu/~gujhelyi/cormeasures.pdf>. Other research argues that corruption rankings are often misinterpreted as measuring a country’s actual performance though they do not adequately capture year-to-year change in the country’s attitude toward corruption. See Debora Valentina Malito, Eur. Univ. Inst., *Measuring Corruption Indicators and Indices*, at 18, Working Paper RSCAS 2014/13 (2014), [https://cadmus.eui.eu/bitstream/handle/1814/29872/RSCAS\\_2014\\_13.pdf](https://cadmus.eui.eu/bitstream/handle/1814/29872/RSCAS_2014_13.pdf).

A. *The Supply Side Focus of Most Anticorruption Enforcement Efforts*

Over the last two decades, the extraterritorial enforcement of antibribery and anticorruption legislation has drastically increased, exposing large-scale corruption schemes and forcing multinational companies to enter into large settlement agreements with regulators. Such extraterritorial enforcement efforts have historically been led by US regulators through the prosecution of FCPA violations, although prosecutions by other countries have grown substantially over the past decade.<sup>53</sup> More jurisdictions have since adopted and begun enforcing similar antibribery and anticorruption legislation, and cooperation between regulators across jurisdictions (sharing information and launching joint prosecutions) has become increasingly important.<sup>54</sup>

The largest global antibribery and anticorruption settlements reached to date resulted from enforcement actions launched by US, European, and Brazilian regulators. For example, in January 2020, the US Department of Justice (DOJ) announced it had entered into the “largest global foreign bribery resolution to date” with the French aviation company Airbus SE.<sup>55</sup> The company agreed to pay combined penalties of more than \$3.9 billion to settle foreign bribery charges (among others) with the French, UK, and US authorities. The charges arose in connection with the company’s use of third-party intermediaries to bribe foreign government officials to obtain improper business advantages from 2008 to 2015. Similarly, in 2016, Brazil construction giant Odebrecht S.A. and its petrochemical unit, Braskem S.A., agreed to pay \$3.5 billion for a global settlement with authorities in the United States, Brazil, and Switzerland for failing to disclose acts of bribery and cover-ups investigated as part of Brazil’s Operation Car

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53. Enforcement of Anti-Bribery & Anti-Corruption Legislation Globally (2005–2015) Infographic, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/insights/infographics/enforcement-anti-bribery-anti-corruption-legislation-globally>.

54. Rachel Brewster & Christine Dryden, *Building Multilateral Anticorruption Enforcement: Analogies Between International Trade & Anti-Bribery Law*, 57 VA. J. INT’L L. 221, 254 (2018) (discussing examples of cooperation by authorities in Germany, the U.K., and France with U.S. authorities and arguing that “some OECD governments are already increasing their domestic enforcement of foreign bribery law to compete with American prosecutors.”); see also Helen Chan, *INSIGHT: Regulators Launch International Crackdown on Corruption*, REUTERS (Sept. 11, 2018), <https://www.reuters.com/article/bc-finreg-corruption-crackdown/insight-regulators-launch-international-crackdown-on-corruption-idUSKCN1LQ2JL> (“A drive to crack down on corruption is taking the business world by storm, as more jurisdictions adopt new anti-bribery regimes or step up enforcement of existing ones. As countries with established regulatory regimes remain active in enforcement, other countries plagued with bribery problems are undertaking determined efforts to change their reputations.”)

55. Press Release, U.S. Dep’t of Just., Airbus Agrees to Pay over \$3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (Jan. 31, 2020), <https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case>.

Wash—a long-running probe by Brazilian prosecutors into the state-owned energy company Petrobras.<sup>56</sup>

With the exception of Brazil, the vast majority of large anticorruption settlements reached over the last decade did not stem from enforcement actions launched by the host country and did not lead to prosecution of public officials or recovery for the countries where the misconduct occurred. This is because laws such as the FCPA target companies or individuals that pay bribes, meaning that they focus on the supply side of the bribery transaction.<sup>57</sup> But a bribery transaction involves not only supply-side participants, such as investors paying bribes, but also demand-side participants, such as the public officials who demand or receive bribes.<sup>58</sup>

The large global anticorruption settlements of the past decade highlight the gap between enforcement targeting bribery demand (recipients of bribery, also known as passive bribery) and enforcement targeting the supply side (givers of bribes, or active bribery).

### *B. Increased Pressure for Demand-Side Enforcement by Host States*

Over the past decade there has been increased criticism of the current global system of anticorruption enforcement as being overly focused on the supply side of bribery and not sufficiently focused on the injury to those most affected by corruption.<sup>59</sup> One article has argued that

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56. Press Release, U.S. Dep't of Just., Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016), <https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve>.

57. Thomas Firestone & Maria Piontkovska, *Two to Tango: Attacking the Demand Side of Bribery*, AM. INT. (Dec. 17, 2018), <https://www.the-american-interest.com/2018/12/17/two-to-tango-attacking-the-demand-side-of-bribery> (“[B]ribe demands remain a significant problem for many honest companies. Unfortunately, the FCPA, which has proven to be such a valuable tool in combatting corruption, only criminalizes the giving or offering of bribes, not demanding or receiving them. This omission makes it difficult for U.S. authorities to prosecute the foreign kleptocrats who drive so much international corruption, and places U.S. law at odds with the international standards that the United States has itself partly spawned.”).

58. Arrieta, *supra* note 8, at 590 (“Demand-side bribery (passive bribery) applies to those individuals—often public officials or government employees—who solicit or accept the prohibited payments. A bribe may be required or demanded to execute a public function, to expedite a business transaction requiring government authorization (e.g., approving a license), or to grant an advantage (e.g., awarding a government contract).”).

59. Firestone & Piontkovska, *supra* note 57 (citing Org. for Econ. Coop. & Dev. [OECD], *Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End?* (2018), <https://www.oecd.org/corruption/Foreign-Bribery-Enforcement-What-Happens-to-the-Public-Officials-on-the-Receiving-End.pdf>) (“While it is impossible to know who initiates most bribe situations, the giver or the receiver, one thing is clear: No bribe can take place without both. As the OECD has noted, ‘To have a globally effective overall enforcement system, both the supply-side participants (i.e., the bribers) and the demand-side participants (i.e., the public officials) of bribery transactions must face genuine risks of prosecution and sanctions.’ It is for this reason that international anti-corruption conventions frequently encourage state parties to address both sides of bribery through their national legislation.”).



[s]upply-side foreign bribery laws are not designed to benefit the countries where the bribes are taking place—they are designed to punish the act of paying a bribe. Thus, the harm inflicted on the host country, where the bribe occurs, is not remedied by this statutory mechanism. Proceeds or disgorgements obtained through enforcement proceedings are rarely shared with the host country, either because there is no formal sharing agreement in place or due to concern that the host country may have been complicit in the corrupt activity.<sup>60</sup>

In other words, the increase in large anticorruption prosecutions punishing the supply side of bribery has not been matched by an increase in prosecution of allegedly corrupt public officials.<sup>61</sup> This is because the prosecution of public officials involved in schemes is often left to the host country. However, where impediments to rule of law exist, these prosecutions are rare.<sup>62</sup> The dearth of enforcement at the host-country level has resulted in a movement led by nongovernmental organizations, civil society, and media to detect corruption and expose misconduct in the public and private sector and to put pressure on local governments to take action. Social media and investigative journalism have thus become tools to pressure host-country governments to confront the demand side of bribery.<sup>63</sup>

Once governments are under pressure to address corruption, they often engage in anticorruption enforcement activity to retain legitimacy. In July 2014, for instance, the Chinese government launched Operation Fox Hunt, “a cross-border law enforcement operation in pursuit of corrupt Chinese officials who had fled China, allegedly taking with them billions of dollars in public funds.”<sup>64</sup> Commentators have generally argued that Operation Fox Hunt, in addition to addressing corruption, served as a tool to address criticism of the ruling party. As one noted, “China’s Communist Party appears to be using such anti-corruption initiatives to confront the party’s credibility

60. Arrieta, *supra* note 8, at 602 (internal citations omitted).

61. *Id.* (“[T]he accountability mechanisms on each side of the bribery transaction are not distributed proportionately.”).

62. Lucinda A. Low et al., *The ‘Demand Side’ of Transnational Bribery and Corruption: Why Leveling the Playing Field on the Supply Side Isn’t Enough*, 84 *FORDHAM L. REV.* 563, 580 (2015) (“Under the current system, the prosecution of the solicitation or acceptance of a bribe by a public official of a particular country is left to that country, except in the unusual cases where movement of the proceeds of the bribery to another country enables that country to prosecute the individual using other legal tools.”).

63. Islam, *supra* note 43, at 5 (“The media also has a role in checking the supply of bribery by naming and shaming transgressors when they report incidents of social contraventions (e.g. bribery). According to Stapenhurst (2000, p. 4) ‘mere inquiries by reporters about apparent wrongdoing can elicit pre-emptive responses by authorities eager to protect public image on their institutions before any allegations have been aired.’”); *see also* Gavin du Venage, *Social Media Shines a Light on Corruption in Africa*, *NATIONAL* (Oct. 2, 2018), <https://www.thenational.ae/business/technology/social-media-shines-a-light-on-corruption-in-africa-1.775929> (reporting on the use of social media by activists in Africa and arguing that it has led to greater public awareness and outrage over stolen money, which in turn is driving leaders to fight corruption).

64. Arrieta, *supra* note 8, at 597.

and legitimacy crisis. Fears of losing control and social instability, along with economic concerns, likely motivated this movement.”<sup>65</sup>

Often an incoming government or administration will also feel pressure to gain credibility by engaging in anticorruption enforcement as a means of distancing itself from its predecessors. In Angola, public outrage quickly grew following the Luanda Leaks, the release of a trove of documents by the ICIJ in January 2020 that revealed allegedly improper dealings involving Isabel Dos Santos, Africa’s richest woman and daughter of the former president.<sup>66</sup> Within days, Angolan authorities announced a corruption probe and stated that Dos Santos was among a handful of formal suspects.<sup>67</sup> The announcement marked a clear rift between the Dos Santos family and the current president. The current president, while having been selected as a successor by Dos Santos’s father, has made it a point since coming into power in 2017 to distance himself from his predecessor and be seen as engaging in anticorruption efforts.<sup>68</sup>

Social media play a critical role in bypassing traditional channels through which information is shared and amplified—channels that can more easily be manipulated by repressive regimes, well-connected corrupt officials, and well-placed cronies of those officials. Advocacy movements utilizing social media take on a life of their own, often uncontrolled by the subjects of the movement’s wrath or those who launch the movements. These movements challenge the traditional protective mechanisms to control public messaging and reporting that corrupt officials relied upon historically; the movements also pose risks to investors doing business with emerging-market governments. Investors must recognize and mitigate the new risk of enforcement by host countries while recognizing the preexisting and growing risk of enforcement by home states.

### PART III: RECOMMENDATIONS FOR MITIGATING AND MANAGING INVESTOR-STATE CONFLICTS IN A NEW ERA OF CORRUPTION RISK AND ACCOUNTABILITY

Allegations of corruption may prompt a public or state-owned entity to review its contract with a foreign investor. The host country may also launch an investigation into the activities of the investor or require the investor to provide documents or information to support an investigation into

65. *Id.* at 598.

66. *Isabel dos Santos: Africa’s Richest Woman Accused of Fraud*, BBC (Jan. 23, 2020), <https://www.bbc.com/news/world-africa-51218501>.

67. Colin Dwyer, *Africa’s Richest Woman Now Formally a Suspect in Angolan Corruption*, NPR (Jan. 23, 2020), <https://www.npr.org/2020/01/23/798865636/africas-richest-woman-now-formally-a-suspect-in-angolan-corruption-probe>.

68. Andrew Harding, *Angola’s João Lourenço—the Man Taking on Isabel Dos Santos*, BBC (Jan. 27, 2020), <https://www.bbc.com/news/world-africa-51221737>; David Pilling, *Africa: Can João Lourenço Cure Angola of Its Crony Capitalism?*, FIN. TIMES (July 8, 2019), <https://www.ft.com/content/9ccc1df0-9f0d-11e9-9c06-a4640c9feebb>.

the conduct of government officials. Association in the media between alleged corrupt conduct and a foreign investor may result in reputational harm and may also attract the attention of regulators in other parts of the world, who may begin parallel proceedings against the entity. To mitigate increased risks of enforcement prompted by the work of investigative journalists or social media campaigns, investors in emerging markets must take steps to vet opportunities and perform due diligence in advance, prevent misconduct in the first place, manage corruption-related disputes with the host state, and develop an exit strategy.

This section outlines best practices for companies investing in emerging markets and partnering with public or state-owned entities to manage the risk of conflict and liability raised by new forms of anticorruption campaigns in host countries. It first discusses the design and implementation of an effective compliance program, including recommended steps for identifying and managing local business partners who pose the most significant anticorruption risk in investor-state relationships, as well as best practices for managing the relationship with a state-owned entity or other public counterpart to avoid corruption-related conflict. The section then provides advice for managing enforcement actions that may arise in the wake of a highly publicized corruption scandal. Additionally, it discusses the importance of exit strategies for investors in emerging markets. Finally, this section provides recommendations on how investors can prepare for the impact of corruption-related disputes with host states on enforcement actions in other jurisdictions.

A. *The Need for Investors to Develop and Implement Effective Compliance Programs*

Investors in high-risk jurisdictions should approach investment in emerging markets with a plan in place to thwart misconduct. That is the critical function of an investor's compliance program. An effective compliance program enables companies to prevent, detect, and address compliance risks, therefore limiting the risk that investors are affected by corruption scandals in a host country. Further, regulators around the world expect companies to put in place processes and procedures to prevent corruption and often take into account the implementation of such programs in enforcement decisions. The US Sentencing Guidelines, the guidance to the UK Bribery Act, the guidelines for compliance programs under Brazil's Clean Company Act, France's Law on Transparency, the *Good Practice Guidance* by the OECD, the US DOJ's compliance program evaluation guidance, and the US Department of Treasury's *Framework for OFAC Compliance Com-*

mitments all outline expectations regarding corporate compliance programs.<sup>69</sup>

A robust corporate compliance program should be structured around five essential elements: (1) leadership, (2) risk assessment, (3) standards and controls, (4) training and communication, and (5) oversight.<sup>70</sup> Recommendations for investors regarding each of these elements are detailed below.

### 1. Leadership

An investing company's senior management must make the company's commitment to compliance clear to all stakeholders, including personnel, agents, and public officials in the host country. When companies invest in emerging markets, this tone from the top is all the more important to avoid the impression that the rules or standards are different in the host market, or that employees can engage in whatever they perceive the local practice to be in terms of engagement with public officials. Behavior of political figures and investor leaders that is out of line with stakeholders' compliance expectations, when publicized on social media, can exacerbate growing frustration and anger toward those seen as improperly benefiting from the country's wealth.<sup>71</sup>

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69. U.S. SENT'G GUIDELINES MANUAL § 2B4.1 (U.S. SENT'G COMM'N 2018); MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE ON PROCEDURES WHICH RELEVANT COMMERCIAL ORGANISATIONS CAN PUT INTO PLACE TO PREVENT PERSONS ASSOCIATED WITH THEM FROM BRIBING (SECTION 9 OF THE BRIBERY ACT), 2011 (U.K.), <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>; Lei No. L12846 [Clean Company Act], de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U], Agosto 2013 (Braz.), [http://www.planalto.gov.br/ccivil\\_03/\\_ato2011-2014/2013/lei/l12846.html](http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12846.html); Loi 2016-1691 du 9 décembre 2016 [Sapin II], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], Dec. 10, 2016 (Fr.); Org. for Econ. Coop. & Dev. [OECD], *Good Practice Guidance on Internal Controls, Ethics, and Compliance* (Feb. 18, 2010), <https://www.oecd.org/daf/anti-bribery/44884389.pdf>; CRIM. DIV., U.S. DEP'T OF JUST., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS (June 2020); OFF. OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF TREASURY, A FRAMEWORK FOR OFAC COMPLIANCE COMMITMENTS (2019).

70. Baker & McKenzie, *5 Essential Elements of Compliance* (2012), [https://www.bakermckenzie.com/~/\\_media/Files/BDSUploads/Documents/global%20corporate%20compliance/br\\_compliance\\_fiveessentialelements\\_12.pdf](https://www.bakermckenzie.com/~/_media/Files/BDSUploads/Documents/global%20corporate%20compliance/br_compliance_fiveessentialelements_12.pdf).

71. For instance, leaked videos of Karim Keita, son of Malian president Ibrahim Boubacar Keita, at a party on a luxury yacht were widely circulated on social media and contributed to anger expressed during antigovernment protests, eventually leading to Karim Keita's resignation on July 13, 2020, from his position as chair of the parliament's defense committee. See News Wires, *Embattled Mali President's Son Quits Role in Parliament amid Protests*, FRANCE24 (July 13, 2020), <https://www.france24.com/en/20200713-mali-frees-detained-opposition-figures-on-fourth-day-of-unrest-in-capital-bamako>. President Ibrahim Boubacar Keita was eventually ousted via a coup in August 2020, following months of protests. See Ruth Maclean, *Mali's President Exits After Being Arrested in Military Coup*, N.Y. TIMES (Aug. 19, 2020), <https://www.nytimes.com/2020/08/18/world/africa/mali-mutiny-coup.html>.

## 2. *Risk Assessment*

Investors should thoroughly assess compliance risks both at the time of their investment decision and on a periodic basis thereafter.<sup>72</sup> Enforcement authorities expect companies to evaluate business risks by region, transaction, and industry before making the decision to invest in a host country. Risk assessment allows investors to structure their investments to best mitigate corruption risk.

In addition, once allegations of corruption arise in the host country that affect the investor's industry, state-owned entities with whom the investor does business, or officials in a position to improperly influence the investor's business, investors should consider conducting a practical risk-based compliance assessment of their operations to ensure that their dealings are not tainted by any alleged misconduct.

## 3. *Standards and Protocols*

Both enforcement authorities and civil society expect that companies investing in emerging markets will have policies in place that prohibit corruption. However, a code of conduct alone does not meet the heightened compliance expectations of the past decade. In addition to written policies, investors need to have protocols to implement concrete action.

Of utmost importance, a company investing in a high-risk jurisdiction must have protocols for vetting the entities with which it deals as part of its standards and controls. Corrupt transactions often involve third parties (agents, consultants, joint venture partners, etc.) who act as a liaison between the giver and the receiver of a bribe.<sup>73</sup> The investor needs to engage in a thorough due diligence review of business partners and, in certain circumstances, customers. Given the potentially significant damage to a company's reputation by association, companies should screen their business-partner and customer lists for organizations that have been implicated in recent corruption scandals, and they should scrutinize indirect beneficiaries. Further, companies should thoroughly map a customer's or partner's connections to political parties and public figures and take appropriate steps to mitigate identified risks.<sup>74</sup>

For all third parties, companies should be able to document how the business partner was selected, demonstrate a clear business justification for hiring the partner, confirm bona fide tasks performed commensurate with compensation, and establish that all applicable controls and procedures were properly followed. These processes will help an investor respond to any claims that partners were selected because of their connections to gov-

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72. See U.S. DEP'T OF JUST. & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, SECOND EDITION 59, 62, 66 (July 2020).

73. *Id.* at 22–23.

74. *Id.* at 63.

ernment officials or to facilitate illegal activities by corrupt officials. Another standard practice should be to incorporate in agreements with third parties, agents, or business partners clauses granting the investor audit rights and requiring the partner to disclose allegations or problems and to cooperate in any corruption investigation by the investor.

Standards and protocols in the context of a contractual relationship with a state-owned or public entity should include protocols for regular engagement with the host country. The investor and the state should agree in the contract to engage in frequent performance reviews. These reviews enable the investor to create a record that it has complied with its contractual obligations. Allegations of corruption are often bolstered by claims that the foreign party did not perform or provided poor services, and that bribery of officials enabled performance issues to go unchecked.

Frequent performance reviews also serve to create a framework and periodicity to manage conflict amicably. Regular meetings enable the parties to quickly identify concerns regarding a party's ability to report progress, allow each side to understand the pressures and deadlines that the counterparty faces (such as a state-owned entity's need to provide internal reports), and permit the parties to test various solutions to issues that arise.

Frequent and transparent touchpoints serve to build trust with an incoming administration. As noted above, a new administration may be suspicious of deals entered into by predecessors, particularly when those predecessors have been the subject of corruption allegations. Accordingly, it is important for the investor to be able to quickly demonstrate that it has complied, and intends to maintain compliance, with relevant laws and the terms of any agreement. Transparent meetings with a new administration will also serve to educate the government partner on the project, its current status, and ongoing challenges. Additionally, the meetings may serve to clear up any misinformation. The investor should take the opportunity to provide an overview of compliance policies and procedures for the project and take note of any new policy orientations that could affect the business relationship.

#### *4. Training and Communication*

Investors should prepare to conduct regular training for officers, employees, and third parties on compliance expectations, the company's code of conduct, and applicable anticorruption laws. Additionally, as noted above, an investor should regularly communicate with government counterparts regarding the investor's policies and obligations (e.g., reminding the government counterparts that the investor is subject to the FCPA).

Training should be customized by region, country, industry, area of compliance, and audience. For example, there should be more frequent trainings for employees that regularly interact with government officials. In

higher-risk situations, live training should be encouraged as opposed to webinars or online training. Employees and third parties should have access to training in a language that they understand, and the training should provide recommendations on how to address cultural practices relevant to the market (e.g., cultural expectations around gift giving, public procurement, or hospitality).<sup>75</sup>

### 5. *Oversight*

Companies should also engage in appropriate ongoing monitoring of their projects or operations in the host country. This may require conducting regular audits and setting up a compliance hotline that employees, agents, and business partners can use to anonymously report compliance concerns.<sup>76</sup>

Investors should also confirm full compliance with local content regulations.<sup>77</sup> In many emerging markets, foreign investors are increasingly required to partner with a local entity to do business in the host country or to obtain government contracts.<sup>78</sup> Local content regulations vary from one country to the next, but often put investors in the position of needing to partner with politically well-connected individuals or parties who will add minimal value to a project, elevating corruption risk.<sup>79</sup> Yet, noncompliance with local content laws can lead to criticism that a foreign investor is not complying with its obligations, which can eventually lead to a dispute with the host state. Foreign investors should devote adequate resources to ensuring that they understand the local legal framework and can meaningfully

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75. *Id.* at 32, 34, 60.

76. Kobi Kastiel, *Elements of an Effective Whistleblower Hotline*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (Oct. 25, 2014), <https://corpgov.law.harvard.edu/2014/10/25/elements-of-an-effective-whistleblower-hotline>.

77. The OECD defines local content requirements as “policies imposed by governments that require firms to use domestically-manufactured goods or domestically-supplied services in order to operate in an economy.” Org. for Econ. Coop. & Dev. [OECD], *Local Content Requirements Impact the Global Economy*, <https://www.oecd.org/trade/topics/local-content-requirements> (last visited July 29, 2020).

78. *Id.* (“There has been a substantial increase in the use of these measures in recent years, as governments try to achieve a variety of policy objectives that target employment, industrial, and technological development goals.”); see also Hanna Deringer et al., *The Economic Impact of Local Content Requirements: A Case Study of Heavy Vehicles*, EUR. CTR. FOR INT’L POL. ECON. (Jan. 2018), <https://ecipe.org/publications/the-economic-impact-of-local-content-requirements> (noting that countries with significant activity in LCRs are Argentina, Brazil, China, India, Indonesia, Russia, Saudi Arabia, and the United States and arguing that “[b]y imposing LCRs governments might try to promote general political goals like maintaining or improving the domestic employment, attracting FDI and companies from high-value added and R&D intense industries, and increasing the access to foreign technology”).

79. See Babafemi Oyewole (Consultant), *Overview of Local Content Regulatory Frameworks in Selected ECCAS Countries*, U.N. Doc. UNCTAD/DITC/COM/INF/2018/4 (May 2018) (analyzing the use of local content policies as a development strategy aimed at increasing the benefits from the oil and gas and mining sector, and examining the local content frameworks of Angola, Chad, Congo, Equatorial Guinea, and Gabon).

contribute to the local economy without finding themselves in improper business partnerships.

Finally, as part of oversight and monitoring activities, investors should implement a mechanism to promptly review and resolve claims related to overcharges or improper invoicing. Should the state-owned entity or public actor come under scrutiny, these claims will raise concerns and attract media attention that could implicate the investor.

Once tied to a contractual agreement with a public or state-owned entity, corruption scandals affecting a counterparty will affect the value of a company's investment and could create long-term reputational damage. Corporate actors can and should take concrete steps to mitigate risks when they build a compliance program. Taking these steps—if coupled with additional assurances from enforcement agencies that these steps will in fact shield investors from legal liability or enforcement action—will also serve to encourage foreign investment in emerging markets, where this investment is most needed.

While an effective compliance program is key to preventing violations of corruption laws and promptly addressing allegations of misconduct, it cannot fully eliminate risk. Poor conflict management could influence a company's long-term investment prospects in the host country. Companies should also develop strategies for responding to disputes with the host country in the aftermath of a corruption scandal or in the context of an anticorruption sweep.

*B. The Need for Investors to Develop Greater Understanding of the Various Government Institutions That Could Be Involved in a Corruption-Related Dispute or Enforcement Action*

After allegations of bribery or corruption arise in the media, a variety of state actors may be involved in reviewing an investor's work or investigating the agency or state-owned entity about which allegations have arisen. Understanding the functions of these players will inform an investor's strategy and response. Notably, once investors obtain an accurate understanding of the source and motivations behind a set of allegations, they can determine the extent to which they should cooperate, explore options for exiting the investment, commence legal proceedings against the host state, or consider other options to address the conflict. A media strategy to minimize potential public-relations risk can also be developed.

One key action is to determine the authority of the state actor and the enforcement tools at its disposal (i.e., whether it can issue subpoenas, order damages, and seize property, or whether it merely conducts hearings and issues findings and recommendations). In South Africa, for instance, the Judicial Commission of Inquiry into Allegations of State Capture, Corruption, and Fraud in the Public Sector including Organs of the State ("State



Capture Commission”) has reviewed dealings involving a number of state-owned entities, such as the national airline, the railway agency, and the utility companies.<sup>80</sup> In the course of these investigations, the commission has sought testimony from a number of private entities that did business with these state-owned entities. However, actively engaging in and cooperating with commission proceedings does not mean that a company will avoid a subsequent investigation by the Directorate for Priority Crime Investigation, the arm of the South African police service responsible for investigating serious corruption.<sup>81</sup> Commissions of inquiry are established by the president of South Africa to seek out facts and make nonbinding recommendations to the president. They do not make binding decisions but can bring detrimental consequences on foreign investors.<sup>82</sup>

Investors should also understand whether information and documentation shared in the course of an investigation will be made public. The State Capture Commission, for instance, issues media notices informing the public of upcoming hearings. The press has access to the hearings, and videos and transcripts are publicly available.<sup>83</sup> This means that documents and information that may include trade secrets or information about revenues can become widely known once shared with the State Capture Commission and similar bodies.

Anticorruption commissions and tribunals may not always be fair arbiters of justice. These bodies may be politically motivated, and host-country leaders may use the bodies to neutralize the opposition, obtain legitimacy by distancing themselves from corrupt officials in prior administrations, or blame foreign investors for what may primarily (although not exclusively) be internally driven corruption challenges. The public hearings can devolve into spectacles designed to score political points and satiate civil society’s desire to hold parties publicly accountable.

In Cameroon, for instance, following pressure by international financial backers, the government launched “the Epervier Operation” to address the rampant corruption in the country.<sup>84</sup> Starting in 2006, the anticorruption drive has led to the arrests of senior civil servants and former ministers. However, the criteria for pursuing investigations is unclear, legal proceedings lack transparency, and commentators have argued that the anticorruption

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80. Terms of Reference of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of the State, GN 3 of GG 41403 (Jan. 25, 2018), [https://sastatecapture.org.za/uploads/Terms\\_Of\\_Reference.pdf](https://sastatecapture.org.za/uploads/Terms_Of_Reference.pdf).

81. The South African Police Service Amendment Act 57 of 2008 §§ 17B, 17D.

82. The State Capture Commission, like all other commissions of inquiry in South Africa, is a statutory creation and was appointed by former President Jacob Zuma under section 84(2)(f) of the Constitution of the Republic of South Africa. S. AFR. CONST. § 84(2)(f), 1996.

83. *See Media Statements*, COMM’N OF INQUIRY INTO STATE CAPTURE, <https://sastatecapture.org.za/site/media/statements> (last visited July 28, 2020).

84. INT’L CRISIS GRP., CAMEROON: THE DANGERS OF A FRACTURING REGIME, AFRICA REPORT N°161 (June 24, 2020), <https://www.refworld.org/pdfid/4c2848b62.pdf>.

tion enforcement mechanism has been used as a political tool to jail influential politicians perceived as threats to the regime.<sup>85</sup>

Thus, an investor's strategy in responding to a public inquiry or potential enforcement action must be informed by an assessment of whether the process will be fair or politically motivated. Even ethical investors with robust compliance programs in place must carefully navigate the risks of disclosure and engagement with host state regulatory authorities. Where enforcement of corruption laws is arbitrary, that represents a challenge for investors and constitutes another significant factor in determining whether to invest. Commissions and proceedings should be organized to best protect the rule of law and not be allowed to be used for political means, which ultimately stymies economic development by discouraging foreign investors.<sup>86</sup> Uncertainty regarding how disputes in the wake of a corruption scandal would be handled—particularly where the consequences could be global (for example, home-country prosecutions and global reputational damage)—poses a serious threat to investors.

The private investor should also understand whether its state-actor counterpart is in a position to understand the technical aspects of any project. A public department conducting an internal review of its procurement or other contracting decisions may be able to determine with ease whether the technical requirements of a project warranted issuing a request for proposal to only a few private entities or even a single entity. In contrast, in an investigation by a prosecutor or politically appointed commission, the investor may need to spend time and resources explaining the technical aspects of a project to demonstrate that the selection process, and the ultimate execution of the project, were not tainted by misconduct.

In addition, investors seeking to make high returns on projects or investments involving governments and state-owned entities in emerging markets should be prepared to defend those profits, which can be viewed through the lens of corruption scandals as exploitative windfalls obtained at the expense of the host country.

Even after conducting a careful evaluation of the state actors investigating or reviewing the investor's activities, an investor can get caught up in actions by the host country that are unfair or politically motivated. Advance consideration of an exit strategy is important.

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85. *Id.* at 6 (“With the ongoing Epervier operation, the president kills several birds with one stone: he rebuilds political legitimacy in the fight against corruption by dismissing those of dubious character, and reinforces his power via the elimination of those considered too ambitious. He could also be clearing the way for a potential successor.”).

86. Demas, *supra* note 6, at 340–44.

### C. *The Need for Investors to Have an Exit Option*

An investor in emerging markets should never be caught without the ability to exit, or without the ability to repatriate its funds, people, and product. Such safeguards protect investors both financially and legally, as nonrepatriated assets are subject to seizure or attachment in lawsuits or other dispute proceedings.

Public corruption scandals, when played out but unresolved, are likely to alter and possibly completely freeze a company's business projects or operations with a public agent or state-owned entity. If the company's relationship with its public or state-owned counterparty becomes adversarial, it may have no choice but to seek compensation and resolution of the dispute through the fora of investor-state dispute settlement. Investor-state arbitration can be costly and unpredictable and can damage the long-term investment prospects of a foreign company in the host country.<sup>87</sup> As a result, some scholars and practitioners see more value in interest-based dispute-resolution processes, such as mediation (or conciliation), which is a party-driven negotiation that may be more likely to preserve the parties' relations—a crucial consideration when an international investor has illiquid or nonremovable capital in the host country.<sup>88</sup>

Nevertheless, in the context of large-scale public corruption scandals (for example, those in Brazil and South Africa), it can be challenging to fully resolve investor-state disputes through these interest-based processes. Political considerations, coupled with the demands of civil society and the power of social media to drive narratives, often require public commissions and at times what seem like inquisitorial proceedings, which can turn into primarily political processes that make it challenging (if not impossible) to achieve true interest-based resolution.<sup>89</sup>

Ideally, the investor and the state can limit their conflict to a purely contractual dispute and explore contractual remedies, including damages payment. However, while payment of damages helps achieve reconciliation in traditional interest-based dispute resolution, in social media-driven scandals, such steps can be counterproductive—viewed as admissions of guilt—

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87. See, e.g., *Mediation of Investor-State Conflicts*, 127 HARV. L. REV. 2543, 2548 (June 20, 2014); Jacqueline M. Nolan-Haley, *Mediators in Arbitration*, OXFORD HANDBOOK OF INT'L ARB. (forthcoming 2020) (manuscript at 3), <https://ssrn.com/abstract=3467670>; see also Daniel Weinstein & Mushegh Manukyan, *Making Mediation More Attractive for Investor-State Disputes*, KLUWER ARB. BLOG (Mar. 26, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/03/26/making-mediation-more-attractive-for-investor-state-disputes>.

88. See Weinstein & Munukyan, *supra* note 87.

89. Client confidential matters. See also James M. Claxton, *Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds?*, 20 PEPP. DISP. RESOL. L.J. 78, 85 (Apr. 4, 2020) (summarizing report that found “states are more reluctant to settle disputes than investors and that the main reason for their reluctance is a preference to defer responsibility for deciding disputes to third-party adjudicators. Underlying this concern is fear of allegations or prosecution for corruption, fear of public criticism, and fear of setting a settlement precedent that might encourage other investors to make claims”).

and can result in only more calls for criminal prosecution or other corporate or individual liability for the investor.<sup>90</sup> In the context of some social media–driven corruption scandals, no good deed of the investor seeking to respond transparently and conciliatorily goes unpunished.

*D. The Need for Investors to Consider the Impact of Corruption Scandals and Associated Disputes with Host Countries on Potential Enforcement Actions in Other Jurisdictions*

Corruption scandals in a host country can lead to civil or criminal corruption enforcement against investors in a number of other jurisdictions because of the broad jurisdictional reach of anticorruption laws like the FCPA and the UK Bribery Act, as well as the increasing cooperation among regulators around the world.<sup>91</sup> Considering the impact of these growing scandals on an investor’s liability around the world is crucial.

The most important step for ethical companies and investors caught up in a corruption scandal is to identify the scope of any violations and remediate them promptly and thoroughly. Under most extraterritorial bribery statutes—including the FCPA—disclosure of violations to regulators is not legally required, and failure to do so voluntarily in the absence of a legal requirement is not considered unethical or inappropriate (as long as potential violations are identified and fully remedied). However, voluntary disclosure of violations remains an option, and reporting of corruption allegations and the widespread dissemination of such allegations through social media affect an investor’s voluntary disclosure calculus. Voluntary self-disclosure of potential violations of antibribery and anticorruption laws, cooperation, and timely remediation may allow companies to receive cooperation credit and reduce their risk of criminal prosecution in their home countries or other active enforcement states. In the United States, the DOJ’s “Principles of Federal Prosecution of Business Organizations,” “FCPA Corporate Enforcement Policy,” and *Resource Guide to the U.S. FCPA* delineate the requirements that a company must meet to earn credit for self-disclosure of potential FCPA violations.<sup>92</sup> Similarly, in the United Kingdom, the *Corporate Co-operation Guidance*, released in August 2019, pro-

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90. Client confidential matters.

91. Org. for Econ. Coop. & Dev. [OECD], *Resolving Foreign Bribery with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (2019), <https://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf>; Agustin Flah et al., World Bank, *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (2014), <https://star.worldbank.org/sites/star/files/9781464800863.pdf>; ALL. FOR INTEGRITY, COMPLIANCE BULLETIN 1: THE EXTRA-TERRITORIAL REACH OF US, UK AND GERMAN ANTI-BRIBERY LAW, [https://www.allianceforintegrity.org/wAssets/docs/publications/Compliance-Bulletin/AfIn\\_ComplianceBulletin\\_01.pdf](https://www.allianceforintegrity.org/wAssets/docs/publications/Compliance-Bulletin/AfIn_ComplianceBulletin_01.pdf).

92. Full cooperation with U.S. authorities can, among other benefits, create a presumption of criminal declination (absent aggravating circumstances) and a reduction of up to 50 percent of the low end of the fine range of the U.S. Sentencing Guidelines. See U.S. DEP’T OF JUST., *supra* note 72, at 52; U.S. Dep’t of Just., Just. Manual § 9-47.120 (2019).

vides a roadmap for companies seeking cooperation credit from the Serious Fraud Office, consistent with its *Guidance on Corporate Prosecutions*.

To receive credit for voluntarily self-disclosing evidence of misconduct, companies must come forward early, i.e., soon after becoming aware of a potential bribery or corruption violation. Under the US “FCPA Corporate Enforcement Policy,” voluntary disclosure must occur “prior to an imminent threat of disclosure or government investigation.”<sup>93</sup> Similarly, the UK *Corporate Co-operation Guidance* requires companies to self-report “within a reasonable time of the suspicions coming to light.”<sup>94</sup>

Investigative journalism and anticorruption advocacy campaigns can significantly increase regulators’ likelihood of independently detecting issues in both an investor’s home and host country. The media, particularly social media platforms such as Facebook and Twitter, can relay findings of anticorruption investigations led by journalists or civil society almost instantly.<sup>95</sup> Once incriminating information appears in the public domain—even where that information may not be fully accurate or complete—companies must react quickly as the time window for voluntary self-disclosure (and its associated benefits) vanishes rapidly. Further, social media’s global publicizing of corruption scandals often requires investors to take a consistent global approach to voluntary disclosure and the amount of information it discloses to regulators, which complicates investors’ risk calculation given the differences across jurisdictions between enforcement agencies, cooperation benefits, and disclosure ramifications.

Investigative journalism and the media are therefore growing exogenous forces that can compel companies to look into allegations of misconduct promptly and hasten companies’ engagement with regulators around the world. Companies considering voluntary disclosure to authorities therefore must weigh various factors, including but not limited to the likelihood that regulators will independently discover the information, the likelihood of prosecution, the risk of civil litigation, the number of jurisdictions at

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93. U.S. Dep’t of Just., Just. Manual, *supra* note 92 (referring to U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g)(1) (U.S. SENTENCING COMM’N 2018)).

94. *Corporate Co-operation Guidance*, SERIOUS FRAUD OFFICE 1 (Aug. 2019), <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/corporate-co-operation-guidance>.

95. See Chandan Kumar Jha & Sudipta Sarangi, *Social Media, Internet, and Corruption*, 39 INFO. ECON. & POL’Y, 2, 21 (2016) (“Social media can affect corruption not only by facilitating the transmission of user-generated information, but also by facilitating the sharing of, and thereby enabling corruption related news coming from a free press to reach a larger audience.”); U.N. Convention Against Corruption, *Reporting on Corruption: A Research Tool for Governments and Journalists*, 3 (Jan. 2014), [http://www.unodc.org/documents/congress/background-information/Corruption/Resource\\_Tool\\_for\\_Governments\\_and\\_Journalists.pdf](http://www.unodc.org/documents/congress/background-information/Corruption/Resource_Tool_for_Governments_and_Journalists.pdf) (“Investigative reports shared through Twitter, Facebook and other social media are used to galvanize the public in protest against blatant corruption.”).

play, and the impact of a voluntary disclosure on the company's business, executives, liabilities, and reputation.<sup>96</sup>

In highly politicized regulatory environments pressured by civil society anticorruption movements, it can also be difficult to ensure that information disclosed to regulators will remain confidential and not appear in the media or other public forums—resulting in negative collateral consequences for the investor. Information shared in one jurisdiction should not contradict information shared in another, and an investor should approach any ostensibly confidential proceeding with caution and view guarantees of confidentiality with a healthy skepticism.

An investor should ensure that other jurisdictions consider any corruption-related investigation that the investor's host country conducted and any related penalties or damages already paid in the host country. As the European Union and the United States increase extraterritorial enforcement of their anticorruption laws in emerging markets, companies should leverage investigations conducted by host countries to limit liability in their home countries. With increased information sharing through cross-border cooperation by enforcement authorities, internet resources, and social media networks, it is increasingly challenging for investors to handle corruption scandals regionally or on a piecemeal basis. A global strategy is critical when managing today's globalized corruption scandals and associated disputes.<sup>97</sup>

## CONCLUSION

Investigative journalism and anticorruption campaigns leveraging social media and new TICs have shed light on large-scale corruption scandals, shaping both foreign investors' cost-benefit analysis when investing in emerging markets and regulators' priorities when enforcing antibribery and anticorruption laws in both home and host countries.

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96. Self-reporting is not a guarantee of nonprosecution. It may, for example, expose executives and senior employees to individual prosecutions, it does not shield a company from civil charges, it can erode the company's attorney-client privilege, and it can prompt authorities to scrutinize the companies' business operations beyond the scope of the information it voluntarily disclosed.

97. For instance, companies should ensure that a settlement in one jurisdiction is informed by settlements made in another. Negotiating global settlements has become increasingly common in anticorruption enforcement. As noted above, in 2020, Airbus settled charges that it had violated anticorruption laws of France, the U.K., and the U.S. and entered into a global settlement of approximately \$4 billion. See Press Release, *supra* note 55. Following Operation Car Wash in Brazil, a number of companies and individuals resolved corruption allegations with Brazilian authorities as well as authorities in other jurisdictions. In 2016, Odebrecht/Braskem entered into a global settlement of approximately US\$3.5 billion with authorities in Brazil, Switzerland, and the U.S. See Press Release, *supra* note 56. Similarly, in 2018, Petróleo Brasileiro resolved corruption charges with both U.S. and Brazil authorities. See Press Release, U.S. Dep't of Just., Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than \$850 Million for FCPA Violations (Sept. 27, 2018), <https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations>.

Foreign investors doing (or contemplating) business with public or state-owned entities in emerging markets should strategically consider how these new trends may affect the stability of their investment and long-term relations with the host country. Investors should take into account past, current, and potential future anticorruption investigations led by journalists and civil society as significant data points when measuring potential bribery and corruption risk in emerging markets, where regulators have historically been less prone to sanction the demand side of bribery and corruption.

As experiences in various emerging markets have demonstrated, large-scale public corruption scandals widely driven and disseminated by journalists and social media can taint foreign investors' reputations and threaten the future of ongoing business relationships with public or state-owned entities—even in circumstances where an investor has committed no wrong. To limit the risk of negative corruption-related media attention and related enforcement or disputes, investors should go into a host country with an effective compliance program designed to tackle corruption risk associated with the country, industry, and anticipated transactions. Further, should a dispute arise with the host state, investors should adopt a strategic approach to engaging with domestic enforcement mechanisms, one that considers global implications and appropriate remediation measures.