Foreword

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ALTHOUGH TAKING A stand against corruption is a popular and universal theme around the world, effective legislation and enforcement remain a global challenge. The impetus to eradicate corruption, and its omnipresent variety, bribery, is a practical one: corruption hinders economic growth and development, undermines democratic and legal institutions, distorts competition, and adds uncertainty to business dealings. Indeed, there is a yin and yang to corruption; its causes are also reflected in its effects: lack of confidence in public institutions, abuse of power, lack of transparency, and a weak civil society. Fortunately, a steadily growing global commitment to anti-corruption enforcement provides a way forward. Substantial progress, however, requires political will and practical recognition by regulators and enforcers around the world. That is why this thoughtful and uniquely comprehensive publication is both well-timed and important. This book provides a framework for analyzing corruption, along with an impressive catalog of key features and comparisons of anti-corruption regimes from a wide range of countries. More importantly, the book also offers wide-ranging practical advice, ranging from internal investigations and monitoring to data privacy and the relationship between corruption and human trafficking.

Since 1977, the Foreign Corrupt Practices Act ("FCPA") has set the bar for anti-corruption enforcement around the globe. Although the FCPA recently turned forty, large FCPA settlements with the U.S. Department of Justice continue to make international headlines. The FCPA has evolved to keep pace with the increased sophistication of corruption and bribery schemes. For example, in 2018, along with the implementation of a new

corporate enforcement and cooperation policy (which is detailed in Chapters 26, 27, and 28), FCPA enforcement actions generated nearly $600 million in corporate criminal fines and penalties.[1] In short, the FCPA remains, as the book's co-editor T. Markus Funk puts it in Chapter 1, "the world's preeminent anti-bribery/anti-corruption enforcement tool."

Nevertheless, as the book's title acknowledges, extraterritorial anti-corruption efforts cannot be left solely to U.S. enforcement. After all, most crimes are local. Bribery, whether domestic or foreign, is no different. Bribery and corruption are two of the most universal criminal phenomena, leaving no corner of the globe unaffected. As interested observers and defenders of the rule of law, credit should be given to ongoing efforts by the American Bar Association through its Criminal Justice Section Global Anti-Corruption Committee, as well as this book's editors and contributors, to elevate the discourse beyond the usual suspects—the FCPA and the United Kingdom's Bribery Act.

Helpfully, this book features detailed summaries authored by in-the-trenches experts on jurisdictions ranging from Australia to the UK. (Chapters 1-17). Some examples illustrate this noteworthy effort to examine corruption enforcement from a global perspective. Germany exemplifies a jurisdiction with a remarkably robust anti-bribery regime with significant extra-territorial reach. Germany also provides an example of an anti-corruption law that is at least as powerful as the FCPA and the UK Bribery Act (both in its coverage and enforcement). Yet, a quick online search underscores that the German law has largely been ignored by the English-language commentators who have what appears to be a near-surgical focus on the legislation from the United States and the United Kingdom.[2] In Chapter 8, authors Michael Malterer and Raphael Won-Pil Suh discuss Germany's increasing enforcement activity, most recently the passage of the landmark German Anti-Corruption Law (*Gesetz zur Bekämpfung der Korruption*) in November 2015. Indeed, according to the Organization for Economic Cooperation and Development (OECD), during the years 1999 - 2017, Germany led all other countries in sanctions of individuals and entities for foreign bribery offenses.[3] While the United States sanctioned a total of 224 individuals and companies, the German authorities sanctioned 327. Even though U.S. authorities sanctioned 114 more "legal persons" than Germany, this apparent anomaly largely results from the German law's rejection of a legal framework that permits criminal prosecution of a company. Put another way, and as the U.S. authorities have acknowledged through their shifting prosecution priorities, it is individuals, rather than companies, who actually commit crimes of corruption and, accordingly, must be prioritized as prosecution targets.

The United Arab Emirates (UAE) provides another example of enhanced attention to corruption. As contributing authors Lamia Matta and Ibtissem Lassoued discuss in

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[1] Fraud Section, Criminal Div., U.S. Dep't of Justice, Fraud Section Year in Review 2018 5 (2018), available at https://www.justice.gov/criminal-fraud/file/1123566/download.

[2] *But see* T. Markus Funk, *Germany's Foreign Anti-Bribery Efforts: Second-Tier No More*, 1 Zeitschrift für Deutsches und Amerikanisches Recht, 24, 24-25 (2014) ("The ... OECD report heaped effusive praise on Germany's recent efforts to investigate and prosecute corruption. And those enforcement efforts have, indeed, been impressive."), available at https://www.perkinscoie.com/images/content/3/2/v2/32500/04-09-2014-funk.pdf.pdf.

[3] OECD, 2017 Enforcement of the Anti-Bribery Convention 5-6 tbl.1A (2018), http://www.oecd.org/daf/anti-bribery/OECD-WGB-Enforcement-Data-2018-ENG.pdf.

Chapter 16, the UAE first passed anti-bribery legislation in the late 1980s. In recent years, the UAE has enhanced penalties and expanded the scope of enforcement. Now the UAE is positioned to be a true anti-corruption leader in the Middle East. A recent enforcement action demonstrates willingness to prosecute corruption. In August 2018, the manager of a government entity was sentenced to an eighteen-month prison term and fined approximately $1.3 million as a result of her demand for bribes from domestic and foreign companies seeking construction contracts.

A final example is Indonesia. Contributors Kevin Feldis, Laode Syarif, Rasamala Aritonang, and Lakso Anindito explain in Chapter 11 that Indonesia continues to face challenges in enforcing anti-corruption legislation. However, the country has recently demonstrated an increased commitment to prosecuting those responsible for graft and bribery by prosecuting over 300 public officials for serious (though mostly domestic) corruption in the last five years.

An understanding of recent developments in anti-corruption enforcement goes beyond country-specific legislation. The World Bank Group, for example, is a key player in transnational efforts to eliminate corruption. In Chapter 23, contributors Pascale Hélène Dubois, Paul Ezzeddin, and Collin David Swan discuss how important the anti-corruption fight is to the World Bank, which works to promote economic development and reduce poverty in member countries. Because corruption removes resources from the World Bank's efforts to eliminate poverty, the World Bank has continued to enhance its efforts—especially in recent years—to fight corruption. One of the World Bank's key methods of fighting corruption is through its Office of Suspension and Debarment. A November 2015 report by the Office of Suspension and Debarment stated that the World Bank imposed 368 sanctions on firms and individuals from 2007 through June 2015. (Curiously, though, the world's largest global development bank has not explicitly deemed that using trafficked or child labor is an offense that will lead to debarment, despite various anti-trafficking pronouncements;[4] hopefully, a welcome change in their approach is on the horizon.)

Chapter 21 examines the centrality of third parties in most bribery schemes. Significant swaths of many companies' international operations rely heavily on third parties. There are many reasons for this, but it is primarily because the use of third parties can create efficiencies that a company's employees cannot. However, the use of third parties overseas also carries significant risks of corruption—and liability. Recent studies by KPMG and the OECD reveal that the use of third parties to conduct international business accounts for some 75% of foreign anti-corruption misconduct.

Turning from the "how" to the "why," this book—particularly in Chapters 21 and 29—makes the important point that bribery not only takes many forms, but also occurs for many reasons. A "one size fits all" approach does not apply to either corruption or bribery. Of course, in many instances people pay bribes and engage in related corrupt activities for personal gain, to win contracts, to avoid expenses, or, relatedly, to curry favor with high-ranking government officials. In other words, bribes are often viewed as a cheap shortcut or accelerant to improve business or the bottom line. But bribes can also arise in other contexts.

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[4] *See, e.g.*, Megumi Makisaka, *Human Trafficking: A Brief Overview*, Social Development Notes No. 122 (detailing "The World Bank Contribution to Fighting Human Trafficking") (December 2009), available at http://siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362-1239390842422/6012763-1239905793229/Human_Trafficking.pdf.

One such instance is in human trafficking, for which bribery and corruption go hand in hand—as analyzed by the book's co-editor T. Markus Funk in Chapter 29. Although there is certainly bribery without trafficking, trafficking almost never occurs without bribery and corruption: illegal payments to immigration officials, factory inspectors, and police.

In sum, although the FCPA remains the benchmark when it comes to anti-corruption enforcement, it is far from the only legislation triggered by bribery and corruption. Other countries and institutions are increasingly stepping up the effective enforcement of their own anti-corruption legislation. As Chapter 18 (penned jointly by co-editors Andrew S. Boutros and T. Markus Funk) points out, one method is a "carbon copy" prosecution: one country prosecutes a case involving the same set of facts as a previous enforcement action brought by another country. In other instances, cross-border enforcement actions are coordinated, whereby one jurisdiction takes the lead or both sovereigns decide to act in tandem.

Helpfully, the book contains subject-specific chapters covering important topics ranging from investigation basics (Chapter 19), mutual legal assistance treaties and letters rogatory (Chapter 20), effective third party due diligence (Chapter 21), privacy and data security (Chapter 22), monitorships (Chapter 24), voluntary disclosures (Chapter 25), deferred/non-prosecution/corporate integrity agreements (Chapter 26), company cooperation and the U.S. Sentencing Guidelines (Chapter 27), and the link between labor trafficking and corruption (Chapter 29).

The broader point, then, is that *From Baksheesh to Bribery* admirably and effectively breaks from the prevailing parochialism in addressing corruption and bribery. Funk and Boutros and their various expert contributors have undertaken a scholarly examination that finds no equal in terms of its breadth and depth, and, as a bonus, provides a very accessible go-to resource for in-house and law firm practitioners, legislators, enforcement officials, courts, and others interested in understanding the issue from a macro-perspective. It is my hope that as these dynamics become better understood, bribery and corruption will increasingly find no quarter in jurisdictions around the globe.