Global Feature

GLOBAL CRIMINAL RISK

Trends and Strategies to Mitigate Vulnerabilities

Written by Stephen L Hill, Jr and Maxwell Carr-Howard // Art by Marc Aspinall

Experts predict that the world population will grow by 1 billion people over the next 15 years, exponentially increasing demand for energy, food and water. The overwhelming majority of that growth will happen outside of the United States. In response, US-based companies will certainly continue to see dramatic growth in the global flow of ideas, goods, services and people. Current trends already show this rapid expansion of truly global businesses with multinational centers of control and operations.

Top Left: *The World Bank Building in Washington D.C. designed by Kohn Pedersen Fox*

More and more US lawyers and compliance personnel will find that their work increasingly concentrates on conduct occurring outside of US territorial borders. If history is any guide, their efforts to identify and remediate legal risk generated by criminal conduct in these new environs will come up short.

The traditional approach to assessing the legal risk of liability for a criminal violation will fail (and already is failing) because it does not adequately consider the chasm generated by two nearly opposite and often inconsistent forces: primary actors creating global enforcement trends, and national strategic approaches designed to address the sponsor nation's legal, cultural and political interests. If the two forces are not appreciated and addressed equally, any business hoping to take advantage of global opportunities will face enormous and unforeseen legal consequences.

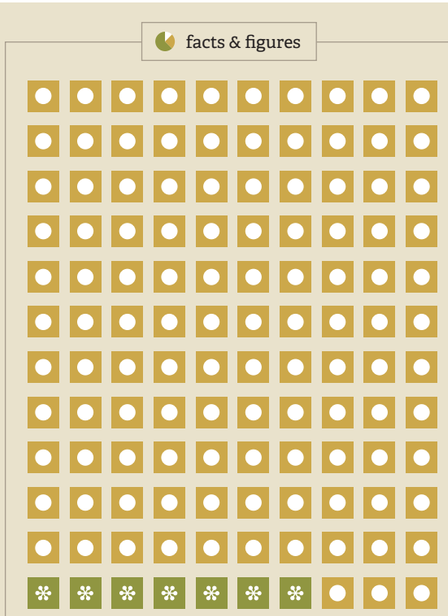
The Global Criminal Enforcement Top Three: the US, the UK, and Everyone Else

Efforts to investigate and prosecute corruption have expanded greatly. A recent report concluded corruption had cost the European Union's member nations $162.16 billion a year. The World Bank estimates the annual worldwide bribery figure at $1 trillion. Although every large nation has anti-corruption laws—supplemented by dozens of international conventions against corruption, treaties, mutual legal assistance agreements, and so forth—two nations' aggressive approaches stand out. The United States, since the 1970s, and the United Kingdom, beginning in 2010 (albeit in a slightly less dramatic fashion), have used very broad jurisdictional authority to spearhead the global policing of corruption.

Their extraordinary reach makes the US and the UK, along with their cross-border enforcement partners, the "primary actors" for this global approach. What sets these nations apart is their routine use of four "tools" that allow them to influence criminal enforcement policies well beyond their shores.

First, their use of extraterritorial jurisdiction, both over their own citizens and over companies with a significant presence within their borders, enables them to reach everyone who does business with their citizens literally anywhere in the world. Second, they advocate for voluntary cooperation but have also expressed a willingness to encourage or even force that cooperation through economic and political leverage. Numerous countries at risk for corruption have consequently been "deputized" to provide information about their citizens' criminal activity, thereby maximizing the reach of the US and the UK.

facts & figures



A recent report concluded corruption had cost the European Union's member nations $162.16 billion a year. That's about **6%** *of the annual* **$1 trillion** *in bribery that takes place worldwide according to The World Bank's most recent estimates.*

Third, the US (less so the UK) has the intent and means to use technology as an investigative tool to master the "big data" generated by a worldwide financial crime scene. Finally, building a global response to criminal activity is not cheap, and the primary actors—again, the US in particular—appear willing to use their financial resources to put it in place. (Although after the initial implementation of this framework, fines, penalties and settlements ultimately make the effort financially self-sufficient.)

Globalization, particularly the free movement of financial assets, has led to a steady escalation in other global criminal activity where again, the primary actors have enormous influence beyond their geography. Money laundering, cybercrimes, export-import controls, and securities fraud have seen global policing efforts increase in ways similar to the fight against corruption.

These global approaches are supplemented by international frameworks, such as the United Nations Convention Against Corruption (signed by 168 countries), that adopt roughly the same approaches, but rely on a patchwork of participating nations to provide the underlying criminal enforcement. International organizations like the World Bank regularly use the sanction of debarment, seek restitution, and refer to nation partners for criminal investigation and prosecution.

There are, of course, notable additions to the primary actors' impact where regional enforcement approaches against criminal and pseudo-criminal activity operate in comparable ways but generally are limited in their jurisdictional approaches. The regional approaches in many ways present their own set of challenges for the practitioner and compliance official, as sometimes lawful conduct in one region may still be reached for criminal exposure if designated individuals and their transactions are the focus of the sanctions efforts.

The work of the legal counsel and compliance officer is made somewhat easier by the patterns and related predictability of the primary actors' global criminal investigations and prosecutions (or, in some cases, decisions not to prosecute). An analytical approach, which considers several factors, such as enforcement priorities, dedication of investigative and prosecutorial resources, and convictions for the specific criminal theory of liability, holds red flags that can be used to forecast future enforcement efforts.

US law enforcement officials have, for decades, followed a policy that announced the laws they would investigate and prosecute as priorities, the means they would use for such efforts, and the conduct that would remediate criminal legal exposure. Analysis for the likelihood of criminal prosecution in the United States is made easier by comparing the relevant facts of the current matter under review with the Department of Justice's Principles of Federal Prosecution of Business Organizations. The United Kingdom's recent interest in deferred prosecution agreements and credit for voluntary disclosure arguably points toward the development of an enforcement culture similar to the one in the United States.

The 180-Degree Shift in Attitude is Illustrated by China and Switzerland

Despite these relatively familiar laws and related enforcement patterns, practitioners have been transfixed by China's incredibly aggressive recent enforcement of their own anti-corruption laws targeting multinational pharmaceutical companies, which included the arrests of foreign nationals. Why? Because in many ways, the change in course for anti-corruption enforcement in China could not be predicted using a legal risk model based on historical enforcement.

It is not enough to simply evaluate risk for exposure to criminal enforcement by examining a venue's historical approach. Strategic factors that may lead to a change in policymakers' attitudes must also be considered.

In the past, legal observers would have characterized China's anti-corruption efforts as primarily focusing on its own government officials. The alarm bells rang loudly when the spotlight suddenly shined most brightly on foreign pharmaceutical companies and their leadership. The change was arguably unexpected given the official and unofficial welcome sign for international business partners put out more than a decade ago. We may never know exactly what prompted the shift, and cases against Chinese officials are still announced frequently, but there is no question that those calculating legal risk in China had to change their views overnight because of the apparent change in enforcement priorities.

Equally extraordinary is the policy and attitudinal shift by nations heretofore less than fully cooperative with tax evasion enforcement. Countries previously offering a tax haven as a legal right of privacy, most notably Switzerland, have made strategic decisions to withdraw those protections in order to avoid conflict with major enforcement initiatives by the United States, United Kingdom, and enforcement allies, as well as to afford banks headquartered there continued access to international finance platforms.

This change in course has surprised more than a few lawyers. As recently as the start of this year, very few colleagues in the Swiss legal community saw this sea change coming, in part because of the legal protections afforded bank accounts and the personnel administering them for more than 50 years. Yet government officials, as well as representatives of banks and other institutions providing private banking services, came to grips with the consequences of going it alone in an otherwise interconnected global financial network. Once more, the primary actors have used a combination of global enforcement capabilities and economic pressure to change legal exposure in ways that historical analysis didn't anticipate.

One lesson from these reversals: It is not enough to simply evaluate risk for exposure to criminal enforcement by examining a venue's historical approach. Strategic factors that may lead to a change in policymakers' attitudes must also be considered.

A Recent Trend Toward More Cross-Border Enforcement Activity By Individual Nations

Although the primary actors will undoubtedly continue their global policing efforts, many individual nations have ramped up extraterritorial criminal anti-corruption cases based on strong connections to their own jurisdictions, including the *Alston Network Schweiz AG* case in Switzerland (allegations of bribes by a French company's Swiss subsidiary to secure contracts in Malaysia, Tunisia and Latvia), the Italian prosecution of *Pirelli* (the bribing of a French official to secure authorization to do

business in France), the *Statoil* matter in Norway (allegations of a Norwegian petroleum company bribing an Iranian official), and the *Siemens* case in Germany (a German company allegedly made payments across a number of countries).

Other jurisdictions are expanding their criminal enforcement tools and ramping up their anti-corruption efforts. France, spurred by homegrown corruption scandals, formed a new enforcement capability housed in the Central Office Against Corruption, Financial and Fiscal Offenses. Several countries, including Italy, Austria and Ukraine, have recently passed new anti-corruption laws, while even more countries have prospective legislation under consideration.

It is likely that this trend of activity by individual nations will increase, if for no other reason than wanting to collect their share of the large and recent corruption-related settlements (approximately $6.9 billion between 1999 and 2012). These actions are even more likely if they can be done as follow-on actions after the United States or United Kingdom has gained helpful resolutions. This appears to be what Nigeria did in 2010, after an earlier settlement with Siemens in 2008 raised the organization's corruption profile.

The Gap Between the Two Approaches Threatens Disclosure Benefits and Privilege Protections

The difference in the two approaches raises two significant issues for the cross-border practitioner. The first is that the decision to make a voluntary disclosure can be a tricky one in the cross-border criminal context because some countries may credit such activity, while others simply use it as direct evidence of criminality. This is not a hypothetical concern. In this day and age, it may be a significant issue because of the tendency to start an investigation before anyone has taken the time to determine whether there is a voluntary disclosure credit in the host country or elsewhere.

For example, disclosures under the United Kingdom's recent establishment of a deferred prosecution agreement regime could possibly make the case for a subsequent debarment under the European Union's laws. Collecting the information necessary for attorneys to counsel clients could also raise concerns about whether the information can be tracked in a privileged fashion. In the cross-border investigation, it is best to keep in mind that the relevant privilege can change as the investigation moves across lines on a map.

With these two challenges in mind, before an effort has been undertaken to collect any information that might be used to assess legal risk, the following preliminary issues should be considered:

- Will the investigation likely involve two or more jurisdictions that treat privileges, particularly legal ones, differently than one another?
- Do the jurisdictions where the conduct took place take different positions on any credit given for voluntary disclosure and cooperation?
- What kind of legal exposure would the client face in the event that the disclosed information is shared with other jurisdictions through cooperative efforts or treaty obligations?
- Although counsel may ultimately give the same advice regardless of these considerations, there is a benefit to surfacing these issues and the possible outcomes sooner rather than later in the legal review.

The Best Course for Risk Analysis in Cross-Border Situations

As a result of these trends, the lawyer's role as a legal risk counselor is going to have to accommodate and appreciate the tension between the primary actors generating common legal standards and related enforcement regimes, while at the same time identifying the national interests of the host nation that may increase the likelihood of a much stricter and more challenging environment for clients.

The lawyer's role as a legal risk counselor is going to have to accommodate and appreciate the tension between the primary actors generating common legal standards and related enforcement regimes, while at the same time identifying the national interests of the host nation that may increase the likelihood of a much stricter and more challenging environment for clients.

The lawyer's ability to assess and address potential criminal activity in far-flung places through investigations is made more difficult by several local challenges, including privacy and data protections that limit access to, and portability of, the collected information, lack of investigative resources on the ground, cultural and language differences between the investigated and the investigator and, perhaps most importantly, the local enforcement personnel's varied and inconsistent approaches to common theories of criminal liability.

Investigative Considerations Generated by the Primary Enforcement Actors

Although not entirely predictable, let's assume the primary actors continue to demonstrate a willingness to view their role as the world's policemen in a borderless precinct. If we do, criminal risk identification and remediation must, at a minimum, ask whether a client's conduct falls within the priority enforcement interests and jurisdiction for one of the global enforcement actors. If the answer is yes, these questions should be considered:

- Does it appear that privilege and disclosure positions are aligned among the various jurisdictions where the conduct may have occurred?
- Are there potential violations of the relevant laws of the primary actor nation?
- Assuming there is a possible criminal violation, have one or more global enforcement actors taken prior enforcement actions that can be used to analyze the likelihood of prosecution?
- Does the conduct in question suggest that one of the actors may have a unique interest in the global prosecution to the exclusion of others' participation?
- If the matter does not involve facts and issues that limit the enforcement to one country, is there the possibility of follow-on or multiple prosecutions for the same conduct?
- Are there any factual, legal or policy reasons for risk mitigation, including, but not limited to, voluntary disclosure and cooperation?

The Careful Risk Analysis Will Think About Local National Enforcement

On the other hand, legal risk analysis in the criminal space should utilize local resources to avoid being on the wrong side of a significant change in enforcement attitudes and policies. The legal officer responsible for assessing legal risk should have counsel on the team who can answer the following questions:

- What are the local laws governing the activity?
- Does the investigation follow a primary actor enforcement action, and were there any factual and/or legal admissions made during the initial phase that could be used to support a new matter in a separate jurisdiction?
- Does the jurisdiction in which the client is operating have a highly competitive marketplace for its business activity that may result in an investigative tip by the competitor?
- Does the client have a dynamic relationship with employees and vendors that could lead to an investigative referral?
- Are there historical enforcement actions in the jurisdiction, particularly with similar organizations, and/or conduct that is currently under review that can be used to evaluate the likelihood of prosecution?
- What were the policy reasons for historical enforcement activity and are there reasons for changes in these approaches, likely based on local factors such as political and economic considerations of the venue?
- Are criminal investigations normally resolved in some type of settled resolution?
- What are local counsel's views on the impact of local cultural, economic and political influences on enforcement activity, and are these factors likely to change historical enforcement patterns and policies?
- What does local counsel tell you about current thinking, both formal and informal, within the local law enforcement community regarding crediting the individual and/or organization that does its own investigation and voluntarily discloses the conduct, and that has or would undertake remedial activity?

Author Biographies

***Stephen L Hill, Jr**, a former United States Attorney for the Western District of Missouri, is a member of Dentons' Litigation and Disputes Resolution practice with a focus on white collar defense and responding to government investigations. In his role, Steve is regularly part of an international team of lawyers that counsel organizations and their leadership on cross-border investigations. During his service as United States Attorney, he advised US Attorney General Janet Reno, Deputy Attorney General Eric Holder, and the Justice Department on corporate prosecution policies as part of his tenure on the Attorney General's Advisory Committee.*

***Maxwell Carr-Howard**, a former Assistant United States Attorney, is a member of Dentons' Litigation and Disputes Resolution practice. He focuses on cross-border compliance, multinational investigations, and white collar criminal defense. Max provides in-depth support for global corporations and regularly joins his international colleagues "on the ground" to counsel organizations with major operations outside of the United States, providing in-person support for compliance enhancement and investigations aligned to the growing complexity of multiple anti-corruption and data privacy rules. He also regularly defends corporations and individuals against cases brought by the Department of Justice and the Securities and Exchange Commission.*