

## ANTI-CORRUPTION IN THE BRICS COUNTRIES

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*Corruption is a global challenge which may impact negatively on economic growth and sustainable development of the BRICS countries (Brazil, Russia, India, China and South Africa). All of these five countries have been held back by corruption, in varying ways, but their rising importance to the global economic system ensures the spotlight now shines brighter than ever on them. Yet some of the BRICS countries have handled the issue better than others. According to Transparency International's Corruption Perception Index (2017), in the BRICS bloc of major emerging economies, South Africa is ranked the best (71<sup>st</sup>), followed by China (77<sup>th</sup>) and India (81<sup>st</sup>), with Brazil is 96<sup>th</sup> and Russia 135<sup>th</sup> out of 180 countries. These five nations support the strengthening of international cooperation against corruption, including through the BRICS Anti-Corruption Working Group, as well as on matters related to asset recovery and persons sought for corruption. This article provides a detailed analysis of anti-corruption legislation of four of the BRICS countries (Brazil, South Africa, China and India), as well as a brief overview of the efforts of these countries in the fight against corruption.*

*Keywords: anti-corruption; bribery; crime; law; liability; transparency.*

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## Introduction

The story of the BRICS countries (Brazil, Russia, India, China and South Africa) begins with Goldman Sachs chief economist Jim O'Neill, who wrote a paper in 2001 arguing that these countries (originally the BRIC countries, for South Africa did not become a member of the bloc until 2010) were the emerging superstars most likely to dominate the 21<sup>st</sup> century globalized economy. The high economic growth of the BRICS economies and their demographic dividends indicate a structural edge possessed by the BRICS economies relative to the rest of the world. In 2015, with 53.4 percent of the world's population, the BRICS countries accounted for a total nominal GDP of US\$16.92 trillion – equivalent to 23.1 percent of global GDP. In the same year, BRICS accounted for 19.1 percent of world exports and, between 2006 and 2015, intra-BRICS trade increased 163 percent, from US\$93 billion to US\$244 billion.<sup>1</sup> BRICS can be broken into two groups, those that took advantage of globalization's march to integrate themselves into global supply chains (primarily China and India) and those that took advantage of globalization to sell their abundant natural resources (primarily Brazil, Russia and South Africa).

All of these five countries have been held back by corruption, in varying ways, but their rising importance to the global economic system ensures the spotlight now shines brighter than ever on them. Yet some of the BRICS countries have handled this issue better than others.

In Transparency International's (TI) Corruption Perceptions Index 2016 South Africa fared the best among the BRICS countries at 64<sup>th</sup> place, but its score of 45 is still below the midpoint. Nevertheless, South Africa has improved its score steadily from 42 in 2012. Brazil, China and India are tied at 79<sup>th</sup> place with a score of 40; Brazil and China have had their scores fluctuate up and down since 2012. But India has

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<sup>1</sup> Geethanjali Nataraj, *India Takes the Lead in BRICS*, East Asia Forum, 8 October 2016 (Mar. 4, 2018), available at <http://www.eastasiaforum.org/2016/10/08/indias-takes-the-lead-of-brics/>.

made consistent gains over its score of 36 in 2012. Russia came in at 131<sup>st</sup> place with a score of 29, well below the global average of 43.<sup>2</sup>

According to Transparency International's Corruption Perception Index (CPI) for 2017, among the BRICS bloc of major emerging economies, South Africa is ranked the best (71<sup>st</sup> out of 180 countries), followed by China (77<sup>th</sup>) and India (81<sup>st</sup>), while Brazil is ranked 96<sup>th</sup> and Russia 135<sup>th</sup>.<sup>3</sup> The Transparency International's CPI ranks countries and territories based on how corrupt their public sector is perceived to be. A country or territory's score indicates the perceived level of public sector corruption on a scale of 0 (highly corrupt) to 100 (very clean).

Significant success in the fight against corruption was achieved by China. At the 19<sup>th</sup> National Congress of the Chinese Communist Party, held between 18 and 24 October 2017, the Central Commission for Discipline Inspection (CCDI), China's top anti-graft watchdog, reported its work over the past five years. Since President Xi Jinping came to power in 2012, the CCDI has undertaken a massive campaign against corruption and extravagance within the Communist Party, reportedly jailing or otherwise punishing nearly 1.4 million party members. From December 2012 to October 2017, 18 sitting Central Committee members of the Chinese Communist Party – almost 9 percent of the total – were detained for alleged corruption. To date, 6 have been formally tried, convicted and sentenced to jail terms ranging from 12 years to life. They are among the highest profile victims of Xi Jinping's historic anti-corruption campaign, which has ended the careers of more than 150 government ministers, army generals and state-owned enterprise executives (see Fig. 1).<sup>4</sup>

China has stepped up efforts in international cooperation to hunt down corrupt officials. Up to the present time, China has signed extradition treaties with 48 countries including France, Spain and Italy, and engaged in 15 multilateral anti-graft mechanisms with organizations including the UN, the Asia-Pacific Economic Cooperation (APEC), the Group of Twenty (G20) and the BRICS grouping. China chaired the Anti-Corruption Working Group of the G20 in 2016, and a series of significant achievements have been accomplished under China's leadership.<sup>5</sup>

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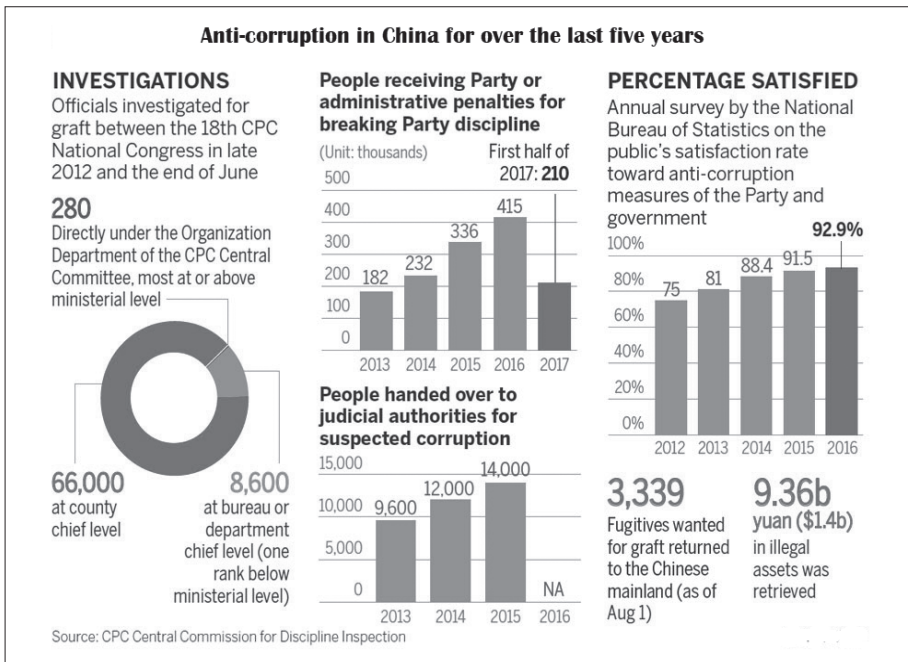
<sup>2</sup> Corruption Perceptions Index 2016, Transparency International (Mar. 4, 2018), available at [https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](https://www.transparency.org/news/feature/corruption_perceptions_index_2016).

<sup>3</sup> Corruption Perceptions Index 2017, Transparency International (Mar. 4, 2018), available at [https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2017](https://www.transparency.org/news/feature/corruption_perceptions_index_2017).

<sup>4</sup> Tom Mitchell, *China Anti-Corruption Purge Hits Central Committee Members*, Financial Times, 18 October 2017 (Mar. 4, 2018), available at <https://www.ft.com/content/51ea866e-b314-11e7-a398-73d59db9e399>.

<sup>5</sup> Lin Xuedan, *China Ramps Up Overseas Hunt of Fugitive Officials*, Kabar, 6 March 2017 (Mar. 4, 2018), available at <http://kabar.kg/eng/news/peoples-daily-china-ramps-up-overseas-hunt-of-fugitive-officials/>.

**Fig. 1: Anti-Corruption in China for the Last 5 Years**



A total of 2,566 fugitives, including 410 former officials and 39 on the 100 most-wanted list, have been extradited or repatriated to China from 72 countries since 2014. Most of the fugitives had fled to developed countries, including Canada, the United States and Australia, but a few also took refuge in Africa. Also, 8.6 billion yuan (US\$1.2 billion) in illegal assets have been seized. The anti-graft campaign has effectively stopped corrupt officials from fleeing overseas. The number of those who fled abroad dropped significantly over the period 2014 –2016, from 101 to 19.<sup>6</sup>

In addition, a new anti-corruption agency, the National Supervision Commission, will be set up under a new law and will share responsibility and personnel with the CCDI in 2018. The new agency is aimed at broadening the anti-corruption campaign to all public servants exercising public power, beyond the CCDI's jurisdiction over only Party members.

For the past three years, Brazil has been gripped by a scandal which started with the state-owned oil company Petrobras and grew to entangle people at the very top of business – and even presidents. In January 2018, an appeals court panel upheld a corruption conviction against former Brazilian president Luiz Inácio Lula da Silva,

<sup>6</sup> Xinhua, *China Captures 2,566 Fugitives Abroad in Anti-Graft Campaign*, China Daily, 25 March 2017 (Mar. 4, 2018), available at [http://www.chinadaily.com.cn/china/2017-03/25/content\\_28678703.htm](http://www.chinadaily.com.cn/china/2017-03/25/content_28678703.htm).

who had been sentenced by a lower court, and increased the penalty from nine and a half years to twelve years and one month. The year before, Silva was found guilty of receiving a seaside duplex apartment worth approximately US\$755,000 from a construction company called OAS. Prosecutors said the gift was part of a multi-billion dollar bribe scheme controlled by the ex-president at Petrobras.<sup>7</sup>

In India, the BJP-led National Democratic Alliance came to power in the 2014 Lok Sabha elections on the main platform plank of fighting against corruption. Criticizing the previous Congress-led United Progressive Alliance government over a string of corruption cases such as 2G spectrum, coal allocation and CWG scams in the run-up to the elections, Prime Minister Narendra Modi's refrain had been to check corruption if his government came to power. Judging by a survey report from Transparency International, it is clear that Prime Minister Modi's efforts have started to bear fruit. The report "People and Corruption: Asia Pacific – Global Corruption Barometer" concluded that India was the most corrupt country in Asia; it also concluded that the people were optimistic about the efforts being made by the government to root out corruption. Nearly seven in ten people who had accessed public services had to pay a bribe (69 percent) in India.<sup>8</sup>

According to the EY Europe, Middle East, India and Africa (EMEIA) Fraud Survey 2017, India ranks ninth among 41 countries in bribery and corrupt practices in businesses. Nearly 78 percent of respondents said that bribery and corrupt practices happen widely in business. The ranking has improved marginally from the survey findings in 2015 when India was in sixth position, owing to better regulatory scrutiny and emphasis on transparency and governance.<sup>9</sup>

Former South African president Jacob Zuma, 75, will face charges of fraud, racketeering, corruption and money laundering, according to the National Prosecuting Authority. The charges relate to a US\$2.5 billion arms deal in the 1990s, when Zuma was deputy president. In a separate case, South African authorities are seeking to arrest members of the Gupta business family, which allegedly used its connections to Zuma to influence government cabinet appointments and win state contracts. Additionally, a judicial panel is preparing to view allegations of corruption at high levels of the South African government during Zuma's years in office.<sup>10</sup>

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<sup>7</sup> Dom Phillips, *Brazilian Court Upholds Corruption Conviction for Ex-President Lula*, The Guardian, 24 January 2018 (Mar. 4, 2018), available at <https://www.theguardian.com/world/2018/jan/24/brazilian-court-upholds-corruption-conviction-for-ex-president-lula>.

<sup>8</sup> Kumar Shakti Shekhar, *India Most Corrupt Nation in Asia, Most Indians Believe PM Modi is Checking It*, India Today, 6 June 2017 (Mar. 4, 2018), available at <https://www.indiatoday.in/india/story/india-most-corrupt-nation-in-asia-pm-narendra-modi-bjp-981310-2017-06-06>.

<sup>9</sup> EMEIA Fraud Survey 2017, at 4, 6 (Mar. 4, 2018), available at [http://www.ey.com/Publication/vwLUAssets/EY\\_-\\_EMEIA\\_Fraud\\_Survey\\_2017/\\$FILE/ey-emeia-fraud-survey-2017.pdf](http://www.ey.com/Publication/vwLUAssets/EY_-_EMEIA_Fraud_Survey_2017/$FILE/ey-emeia-fraud-survey-2017.pdf).

<sup>10</sup> Samuel Rubinfeld, *Corruption Currents: South Africa Charges Former President Zuma*, The Wall Street Journal, 16 March 2018 (Mar. 4, 2018), available at <https://blogs.wsj.com/riskandcompliance/2018/03/16/corruption-currents-south-africa-charges-former-president-zuma/>.

Despite the regular improvement in anti-corruption legislation in Russia,<sup>11</sup> law enforcement practice in this area is changing only slowly. The share of corruption crimes in the total volume of registered crimes does not exceed 1.5 percent, which amounts to around 20 crimes per 100,000 people. Among the categories of corruption crimes, bribery and fraud prevail. In 2016, 32,900 corruption crimes were registered (+1.4% by 2015), and the amount of material damage they caused exceeded 78 billion rubles. However, in 2017 the number of corruption crimes decreased by 10 percent (to 29,600), and the amount of damage by 49.5 percent (to 39.6 billion rubles).<sup>12</sup> The observed tendency to reduce the number of recorded corruption crimes<sup>13</sup> did not reflect the real scale of this phenomenon, given its high latency. This conclusion correlates with the assessment of Transparency International and sociological surveys.

In order to get the full picture of the existing anti-corruption policy of the BRICS countries, let us turn to an analysis of their legislation.

## 1. Anti-Corruption in Brazil

Brazil has signed the following international conventions in the area of anti-corruption: the United Nations Convention against Corruption was ratified on 18 May 2005 and promulgated through Presidential Decree No. 5,687 of 31 January 2006 (UN Convention). The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was ratified on 15 June 2000 and promulgated by Presidential Decree No. 3,678 of 30 November 2000 (OECD Convention).

The main laws relating to anti-bribery and anti-corruption in Brazil are: Decree-Law No. 2848 of 7 December 1940 (Criminal Code), Law No. 8,429 of 2 June 1992 (Administrative Improbability Law) and Law No. 12,846 of 1 August 2013 (Anti-Corruption Law). Such laws cover not only anti-bribery and anti-corruption, but also a number of related crimes and violations, such as bid rigging and fraud in government contracts. Note that Brazilian law does not adopt corporate criminal liability for corruption-related offences. The liability of companies for such offences arises in the civil and administrative law spheres.

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<sup>11</sup> See, Сухаренко А.Н. Антикоррупционная политика России: состояние и проблемы // Юридический мир. 2013. № 5. С. 15–19 [Alexander N. Sukharenko, *Anti-Corruption Policy of Russia: State and Problems*, 5 *The Legal World* 15 (2013)]; Куракин А.В., Сухаренко А.Н. Противодействие коррупции в финансово-бюджетной сфере // Российская юстиция. 2017. № 1. С. 48–52 [Alexey V. Kurakin & Alexander N. Sukharenko, *Counteraction to Corruption in the Financial and Budgetary Sphere*, 1 *Russian Justice* 48 (2017)].

<sup>12</sup> Состояние преступности в России за 2017 г. [*The State of Crime in Russia for 2017*] (Moscow: Ministry of Internal Affairs of the Russian Federation, 2018).

<sup>13</sup> Илий С.К. Анализ основных тенденций коррупционной преступности в России // Всероссийский криминологический журнал. 2016. № 3. С. 531–543 [Sergey K. Ilii, *Analysis of the Main Trends of Corruption Crime in Russia*, 3 *All-Russian Criminological Journal* 531 (2016)].

There are no official guidelines regarding the interpretation and enforcement of the Criminal Code, the Administrative Improbability Law and the Anti-Corruption Law by Brazilian courts. In 2015, the Federal Public Prosecutor's Office (MPF) issued the MPF Calculation Manual on Fighting Corruption, with recommendations to federal prosecutors on how to calculate damages and fines when filing lawsuits to enforce the Administrative Improbability Law.

Concerning the Anti-Corruption Law, the Brazilian Federal Executive Branch issued Decree No. 8,420 of 18 March 2015 (Anti-Corruption Decree), regulating, among other things, the sixteen criteria to be used by Brazilian authorities to assess anti-corruption compliance programs when enforcing the Anti-Corruption Law in administrative proceedings. The Anti-Corruption Decree also contains guidance on the calculation of administrative fines by authorities, in the form of percentages that authorities can add or subtract based on certain findings. The final percentage represents a share of a company's gross revenues in the year preceding the filing of the administrative proceeding, in order to reach the amount of the fine.

The Federal General Comptroller's Office (currently known as the Ministry of Transparency, Auditing and General-Comptroller or CGU) has also published certain non-binding guidelines on matters related to the administrative enforcement of the Anti-Corruption Law and corruption prevention in the public and private sectors. In 2016, the CGU issued the "Manual on the Administrative Liability of Legal Entities" to provide details on the administrative proceedings to enforce the Anti-Corruption Law. The Manual includes an overview of the legal principles applicable to administrative proceedings, details in the procedural rules applicable to the enforcement of the Anti-Corruption Law, and the calculation of applicable penalties.<sup>14</sup>

Bribery is defined in Sec. 333 of the Criminal Code as, "to promise, offer or give any undue advantage to a public agent in order to make him do, omit or delay any official act." The Criminal Code does not contain a specific definition of a bribe or of an undue advantage. Due to the language adopted by the Criminal Code, Brazilians refer to this crime as "active corruption."

In 2002, because of Brazil's signing of the OECD Convention, the Criminal Code was amended to include the crime of active corruption of a foreign government official in connection with an international commercial transaction (Sec. 337-B). The definition of this crime mirrors the definition of active bribery described above.

The Administrative Improbability Law sets forth that an improbity violation occurs if a public agent receives, for oneself or to a third party, money, a movable or immovable asset, or any other economic advantage, directly or indirectly, on a basis of commission, percentage, gratification or gift, from one who has a direct or indirect interest that may be attained or supported by an action or omission related to the responsibilities of the public agent (Sec. 9, item I of the Administrative Improbability Law).

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<sup>14</sup> *Anti-Corruption in Brazil in Anti-Corruption 2018* (London: Chambers, 2018).

The Anti-Corruption Law establishes that a violation against the government occurs if companies “promise, offer or give, directly or indirectly, an undue advantage to a public agent, or to a related third party” (Sec. 5, item I). Violations also include to finance, cover the costs of, sponsor or in any way subsidize, the undue advantage (item II) or to use an intermediary to conceal the real identity of the beneficiary of the conduct (item III). The Anti-Corruption Law does not define undue advantage.

Brazilian law does not contain exceptions for facilitation payments. The receipt of a bribe is also a crime in accordance with the Criminal Code: “to request or receive, for oneself or to a third party, directly or indirectly, even outside of office or before entering it, but in connection to it, an undue advantage, or accept a promise of such advantage” (Sec. 317). Due to the language adopted by the Criminal Code, Brazilians refer to this crime as “passive corruption.”

The failure to prevent bribery is not an autonomous offence. However, the failure to prevent bribery may amount to a bribery offence when one has a legal obligation of care, protection or surveillance, when one has in some way undertaken the responsibility to prevent the result, or when one has created the risk of the occurrence of the crime with one’s previous behavior. The failure (omission) is relevant for criminal purposes only if the agent refrains, through fault or willful misconduct, from taking action when the action is feasible for him or her.

Brazilian law does not define, criminalize or establish particular criminal or civil sanctions in respect of commercial or private bribery, although in certain specific circumstances the practice can constitute the crimes of larceny or unfair competition.

Larceny is defined in Sec. 171 of the Criminal Code as to “obtain, for oneself or for others, an unlawful advantage, to the detriment of another person, inducing or maintaining someone in error, by means of artifice, deception, or any other fraudulent means.” Unfair competition is defined in Law No. 9,279 of 14 May 1999 (Industrial Property Law) as follows: “A crime of unfair competition occurs when someone: ...IX – gives or promises money or other benefit to an employee of a competitor, so that the employee, disregarding his duties, provides him with an advantage” (Sec. 195, item IX). In the civil sphere, commercial or private bribery may be treated in a civil lawsuit (or employment lawsuit, as the case may be) as a wrongful act that can result in compensation of damages pursuant to Law No. 10,406 of 10 January 2002 (Civil Code).

Bribery is a crime that requires willful intent, by either act or omission of an individual (Sec. 18, § 1 of the Criminal Code). The motive behind the bribery offence does not need to be proven, except with respect to the part of the definition requiring that the bribe is promised, offered or given by the agent to induce a certain behavior in the public agent. The prosecution does not need to prove that the individual gained anything from bribing the public agent or that the public agent actually made, omitted or delayed an official act. Nonetheless, if the public agent does



perform, omit or delay any official act, disregarding a duty, the judge may aggravate the sentence by one third (Sec. 333, the sole para. of the Criminal Code).

With respect to civil infractions, the Administrative Improbability Law requires an agent, a cause and the illegal result (unlawful enrichment of public officials, harm to the principles of government or to public assets), combined with willful intent or gross negligence, as the case may be. In order to apply to a company or private individual, the Administrative Improbability Law requires that the company or individual either induces or colludes with the public agent, or obtains a benefit from the infraction (Sec. 3 of the Administrative Improbability Law).

Pursuant to the Anti-Corruption Law, an infraction occurs if the promise, offer or payment of an undue advantage is made to a public official or a related third party in the interest or to the benefit of the corporate entity, whether exclusive or not (Secs. 2 and 5 of the Anti-Corruption Law). Note that the Anti-Corruption Law became effective on 29 January 2014 (Sec. 31 of the Anti-Corruption Law) and therefore should not apply to violations that took place before that date. The definition of domestic public official is provided by the Administrative Improbability Law as “anyone who performs, even if temporarily or without pay, by election, appointment, designation, hiring or any other type of vesting or bond, a mandate, an office, an employment, or a function” in any governmental entity or government-controlled entity, by any of the federal entities or branches of Brazil, as well as public foundations or state-owned or state-controlled companies (Sec. 2 of the Administrative Improbability Law).

The statute of limitations for the crime of bribery is sixteen years (sec. 109, item II of the Criminal Code). According to the Criminal Code, the sixteen years start to count from the date of the crime, which is whenever the crime is completed in all its aspects (Sec. 111, item I).

The statute of limitations for violations of the Administrative Improbability Law is either: (i) five years counting from the end of the term of office of the implicated public official; longer, if the statute of limitations for legal disciplinary measures applicable to the public official is longer; or (ii) if the affected governmental entity renders accounts, five years counting from the final date of the rendering of accounts (Sec. 23, items I to III of the Administrative Improbability Law).

The statute of limitations for the infractions of the Anti-Corruption Law is five years. The five years start to count from the date the public authority becomes aware of the violation, or in case of a permanent or continued infraction, from the date the illegal activities have ceased (Sec. 25 of the Anti-Corruption Law). The Criminal Code applies to any crime performed on Brazilian territory (Sec. 5), and to certain crimes performed outside of Brazil, including the crime of corruption of a foreign government official in connection with an international commercial transaction. The Administrative Improbability Law applies only in Brazil and with respect to Brazilian public agents. The Anti-Corruption Law applies both to domestic public agents and to foreign public agents with an extraterritorial reach, as it applies to infractions

committed by Brazilian corporate entities against foreign governments, even when committed abroad (Sec. 28).

Only individuals can be held liable for crimes in connection with bribery and corruption in Brazil. The Brazilian Constitution provides that “no punishment shall pass over the individual that received the sentence, but the damages and the loss of assets may, in accordance to the law, be extended and enforced against successors until the limit of the transferred assets” (Sec. 5, item XLV of the Constitution of the Republic of Brazil).

The penalties on conviction for bribery, including active corruption and passive corruption, are closed imprisonment of between two and twelve years and fines (Secs. 317 and 333). The penalties on conviction for bribery in an international commercial transaction are closed imprisonment of between one and eight years and fines (Sec. 337-B). If the public agent (domestic or foreign) does perform, omit or delay any official act, disregarding a duty, the judge may aggravate the sentence of the agent and of the public agent by a third (Sec. 317, § 1; Sec. 333, sole para.; and Sec. 337-B, sole para.). If the public agent performs or does not perform or delays an official act, disregarding a duty, at the request or influence of someone else, the penalty for the public agent is semi-open imprisonment of between three months and one year, or a fine (Sec. 317, § 2).

The sanctions that are set forth in the Anti-Corruption Law are the following: administrative fines ranging from 0.1% to 20% of the entity’s gross revenue in the year prior to the initiation of the administrative proceeding, which should never be less than the advantage amount obtained through the unlawful act. If it is not possible to estimate the gross revenue, such fine shall be fixed in an amount between BRL6,000 and BRL60 million.

The Anti-Corruption Law also provides an administrative reputational sanction consisting of the obligatory extraordinary publication of the condemnatory decision, at the implicated entity’s own expense, in all of the following: a widely circulated newspaper within the area where the infraction was committed and where the legal entity does business, or in a national newspaper; a public notice in the entity’s place of business, where it can be seen by the public, for a minimum of 30 days; and a highlighted position on the website of the entity, for 30 days.

## **2. Anti-Corruption in South Africa**

South Africa is a signatory state to the following international conventions: the United Nations Convention against Corruption (ratified by South Africa in 2004); the Organization for Economic Cooperation and Development Convention against the Bribery of Foreign Public Officials in International Business Transactions (signed by South Africa in 2007) and the African Union Convention on Preventing and Combating Corruption (ratified by South Africa in 2005).

The main legislation relating to anti-bribery and anti-corruption in South Africa is as follows:

- the Prevention and Combating of Corrupt Activities Act No. 12 of 2004 (PCCA), whose objective is to create measures and standards for the prevention of corrupt activities in the public and private sectors;
- the Prevention of Organized Crime Act 121 of 1998 (POCA), whose objective is to combat money laundering and organized crime, and to place an obligation on certain persons to report specific information relating to known or suspected criminal activities; and the Financial Intelligence Centre Act 38 of 2001 (FICA), whose objective is to establish a strong regulatory framework for the prevention and combating of money laundering and financial terrorism, i.e. the financing of terrorist and related activities.<sup>15</sup>

It is important to note that the PCCA is the primary piece of legislation dealing with corrupt activities and offences in South Africa.

Section 3 of the PCCA creates one general offence of corruption, and Secs. 4 to 16 create several specific offences relating to corruption and bribery, including the offence of corrupt activities relating to public officers, foreign public officers, agents, members of a legislative or prosecuting authority, judicial officers, witnesses and evidential material, contracts, procuring and withdrawal of tenders, and unauthorized gratification (i.e. advantage or benefit) by or to a party in an employment relationship. The underlying principle of all of these offences is that an offence is committed when any person, directly or indirectly, improperly offers any benefit to any other person to influence that person in the performance of his or her duties or functions, or to induce that person to do or not do anything.

The PCCA applies to the actions of corrupt public officials (public officials such as, for example, employees of a public body) as well as to corrupt activities that occur in the private sector, such as the offer or receipt of an unauthorized gratification by any person who is a party to a contractual or employment relationship, in a manner which can improperly influence the execution and procurement of contracts. As such, a person acting in this manner will be found guilty of an offence under Sec. 12 of the PCCA.

The PCCA defines a public official or officer as any person who is a member, officer, employee or servant of a public body, and includes any person in the public service or any person receiving any remuneration from public funds or, where the public body is a corporation, the person who is incorporated as such. However, the definition does not include a member of the legislative authority, a judicial officer or a member of the prosecuting authority.

The PCCA accordingly makes it an offence for public officials to accept or offer any gratification in order to act in a manner that may amount to abuse of power

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<sup>15</sup> *Anti-Corruption in South Africa in Anti-Corruption 2018, supra note 14.*

or unauthorized exercise of power. Section 4 of the PCCA provides that “an act” by a public official includes: voting at any meeting of a public body; performing or not adequately performing any official functions; expediting, delaying, hindering or preventing the performance of an official act; aiding, assisting or favoring any particular person in the transaction of any business with a public body; aiding or assisting in procuring or preventing the passing of any vote or the granting of any contract or advantage in favor of any person in relation to the transaction of any business with a public body; showing any favor or disfavor to any person in performing a function as a public officer; diverting, for purposes unrelated to those for which they were intended, any property belonging to the state which such officer received by virtue of his or her position for purposes of administration, custody or for any other reason, to another person; or exerting any improper influence over the decision-making of any person performing functions in a public body.

The PCCA does not contain a specific reference to the term “bribery” but provides instead (in Sec. 3) that any person who directly or indirectly accepts, gives, agrees or offers to accept or give any “gratification,” whether for the benefit of himself or herself or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner that amounts to the illegal misuse or unauthorized exercise of any power, function or duties, or that amounts to the abuse of authority, breach of trust or improper inducement to undertake to do or not to do anything, is guilty of the offence of corruption. This is the general offence of corruption created by Sec. 3 of the PCCA.

The term “gratification” is very widely defined in the PCCA, to include the following: money, whether cash or otherwise; any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage; the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage; any office, status, honor, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation; any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part; any forbearance to demand any money or money’s worth or valuable thing; any other service or favor or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, including the exercise or the forbearance from the exercise of any right or any official power or duty; any right or privilege; any real or pretended aid, vote, consent, influence or abstention from voting; or any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage.

As noted above, the term “gratification” is very widely defined under the PCCA, and extends to cover hospitality or promotional expenses, if such expenses result in a person being improperly influenced or induced to undertake to do or

not do anything. It is, however, generally accepted that reasonable hospitality or promotional expenditures may be acceptable, particularly in a corporate or business environment. In the context of hospitality and promotional expenses, it is necessary to consider the nature of the gift or hospitality offered or given, to whom it is given, and the time and circumstances under which it is being offered or given in order to determine whether or not an offence of corruption is committed within the meaning of a general offence of corruption as defined in Sec. 3 of the PCCA.

Facilitation payments are not mentioned explicitly in the PCCA but, given that the term "gratification" includes "money, whether in cash or otherwise including any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage," facilitation payments are likely to qualify as corruption where such payments are offered, given or accepted by any person in a manner that amounts to the improper influence or inducement to do or not to do anything.

The general offence of corruption created by Sec. 3 of the PCCA makes provision not only for a gratification that is offered or given to a person but also a gratification that is accepted by any person, whether for his or her benefit or for the benefit of another person. Therefore, the receipt of a bribe (or gratification) constitutes an offence of corruption.

Furthermore, under Sec. 4 of the POCA, a person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and who enters into an agreement or engages in any arrangement or transaction with anyone in connection with that property or performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect of enabling or assisting the commission of an offence either by concealing the nature of the property or by avoiding prosecution, shall be guilty of an offence.

Failing to prevent bribery is an offence, although this is achieved indirectly through the creation of a reporting duty in the PCCA. Section 34 of the PCCA imposes an obligation to report corrupt transactions by providing that any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed an offence of corruption, including the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of ZAR100,000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to the police official in the Directorate for Priority Crime Investigation. A person who fails to comply with the duty to report corrupt activities under Sec. 34 of the PCCA is guilty of an offence.

It should be noted that an additional reporting obligation is created under FICA, Sec. 29(1)(a) of which requires a person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or ought reasonably to have known or suspected that the business has received or is about

to receive the proceeds of unlawful activities, to report to the Financial Intelligence Centre – within the prescribed period of time after the knowledge was acquired or the suspicion arose – the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.

Section 10 of the PCCA makes it an offence to improperly offer or receive gratification in an employment relationship. Furthermore, Sec. 12 of the PCCA extends the scope of the Act to private contractual relationships in terms of which any person who directly or indirectly accepts, gives, agrees or offers to accept or give any gratification, in order to improperly influence in any way the promotion, execution or procurement of any contract, is guilty of the offence of corrupt activities relating to contracts.

The Guide expresses the relevant principles by stating, quite simply, that it is a crime for anyone to offer or accept money or favors to influence who gets a contract, or to dishonestly fix the price or other money relating to a contract.

Section 35 of the PCCA provides that the Act applies to any activity that occurs outside of South Africa, even if the activity in question is not an offence in the place it is committed.

The PCCA will find application where the person to be charged with an offence under the Act: is a South African citizen; is ordinarily resident in South Africa; was arrested in South Africa; is a company, incorporated or registered under any law in South Africa; or is anybody of person, corporate or unincorporated in South Africa.

The Act furthermore provides that an activity that constitutes an offence in terms of the PCCA and that was committed outside of South Africa by an individual who does not fall into the categories listed above shall nevertheless be deemed to have been committed in South Africa if the activity concerned affects or is intended to affect a public body, a business or another person in South Africa; if the person who committed the offence is found to be in South Africa; and if that person is for one or another reason not extradited by South Africa.

Finally, the Act provides that an alleged offence committed outside the Republic by a foreign official shall be deemed to have been committed in the Republic of South Africa.

The Criminal Procedure Act 51 of 1977 makes provision for the prosecution of corporations and members of associations. Section 332 of the Act provides that, for purposes of imposing criminal liability on a corporate body, any act performed with or without intent, by or on the instruction of or with permission – express or implied – given by a director or servant of that corporate body in the exercise of his powers or in the performance of his duties as such director or servant, or in furthering or endeavoring to further the interests of that corporate body, shall be deemed to have been performed by that corporate body. The effect of this is that the corporate body in question will be held liable for acts or omissions committed by its directors or servants.

Depending on the type of offence committed and the monetary value of the offence, a person convicted under the PCCA may be liable for a fine or imprisonment. Section 26 of the PCCA gives authority to the High Court, Magistrate's Courts and Regional Courts to impose a fine or imprisonment up to a period prescribed by the PCCA; the High Court has the authority to impose up to a period of life imprisonment. In addition to any fine a court may also impose, a fine equal to five times the value of the gratification involved in the offence may be imposed as well. The prohibition applies to both individuals and companies.

Where an offence under the PCCA relates to corruption pertaining to private commercial contracts or to the procuring or withdrawal of tenders, a court may order the particulars of the offender to be placed on the Register of Tender Defaulters. The Register is held within the office of the National Treasury and is a public document, whose purpose is to inform the public sector of individuals or entities that have been convicted of corrupt activities, and to prevent them from supplying goods and services to the public sector while listed on the Register.

Under the PCCA, the National Director of Public Prosecutions has the power to initiate investigations if he or she believes that a person may be in possession of information relevant to the commission or intended commission of an alleged offence, or that any person or enterprise may be in possession, custody or control of any documentary material relevant to such alleged offence. The aforesaid investigation may be instituted prior to any civil or criminal proceedings.

### **3. Anti-Corruption in China (PRC)**

The PRC is a party to the United Nations Convention against Corruption. The primary anti-corruption legislation in China include the Criminal Law (as amended from time to time) and the Anti-Unfair Competition Law (AUCL). Other legislation (e.g. the Charity Law) also contain provisions relating to anti-corruption. Detailed rules on anti-corruption are set out in subsidiary regulations, judicial interpretations and prosecution guidelines.

In relation to the Criminal Law, the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP) have, respectively and jointly, published various guidelines and interpretations relating to criminal actions against corruption activities, including, e.g., the Interpretation of Several Issues concerning the Application of Law in Handling Criminal Cases Related to Graft and Bribery jointly published by the SPC and SPP in 2016 (2016 Interpretation), the Interpretation of Several Issues concerning the Application of Law in Handling Criminal Cases of Bribery jointly published by the SPC and SPP in 2012 (2012 Interpretation), and the Opinions on Several Issues concerning the Application of Law in Handling Criminal Cases of Commercial Bribery jointly published by the SPC and SPP in 2008 (2008 Opinions).<sup>16</sup>

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<sup>16</sup> *Anti-Corruption in China in Anti-Corruption 2018*, supra note 14; *A Guide to Anti-Corruption Legislation in Asia Pacific* 13–21 (5<sup>th</sup> ed., London: Clifford Chance, 2018).

A bribe under the Criminal Law refers to money or property in kind provided in exchange for “illegitimate benefits.” It also refers to money or property in kind solicited or received by the relevant individuals or entities for the purpose of securing or providing benefits for others by taking advantage of their positions. The 2016 Interpretation further clarifies that bribes can take the forms of cash, property and other benefits such as house renovation, discharge of debts, membership services and travel.

Under the AUCL and the AIC Measures (which only addresses private-sector bribery), a bribe may take the form of money or property in kind provided to an entity or an individual under the guise of promotional expenditures, advertising fees, sponsorship, research fees, service fees, consulting fees, commissions, reimbursement of out-of-pocket expenses, or other forms such as overseas trips.

Whether hospitality and promotional expenditures are treated as bribes depends on their nature, value and purpose. For example, under the 2008 Opinions, whether a gift is treated as a bribe or a legitimate benefit depends on the following factors: the background against which the gift is provided (e.g. whether the parties are relatives or friends, and the history of their personal relationship); the value of the gift; the timing, form and context of the gift; and whether the gift provider requests the receiver to act in a certain way in his or her relevant position or whether the receiver takes advantage of his or her position in the relevant entity.

Similarly, the AIC Measures exempt advertising gifts of nominal value provided in accordance with the relevant market practice but prohibit bribes offered under the guise of promotional expenditures. In practice, excessive or lavish hospitality/promotional expenditures may probably be regarded as bribes, depending on the overall circumstances. There are no specific provisions or exemptions under the Criminal Law or the AUCL in relation to facilitation payments.

The receipt of a bribe is an offence under both the Criminal Law and the AUCL. There are no specific provisions penalizing the failure to prevent bribery under either the Criminal Law or the AUCL. Private sector bribery is prohibited under PRC law. Under Art. 163 of the Criminal Law, it is a criminal offence for any individual from a private entity (or any non-public official from a public entity) to solicit or accept money or property in kind for the purpose of securing or providing benefits for others by taking advantage of his or her position. Article 164 of the Criminal Law further provides that it is a criminal offence for any individual or entity to provide money or property in kind to any individual from a private entity (or any non-public official from a public entity) with the intention of seeking illegitimate benefits. Furthermore, the AUCL also covers private sector bribery: Art. 8 of the AUCL prohibits any individual or entity from secretly giving or accepting kickbacks off the books.

For the criminal offences of giving and accepting bribes, a key test is whether they were given or received for the purpose of securing illegitimate benefits. “Seeking illegitimate benefits” means “that a briber seeks interests in violation of laws, regulations, rules or policies, or requests the counterparty to provide help or



convenient conditions in violation of laws, regulations, rules, policies and the industry standards” or that “in bidding, government procurement or other commercial activities, a briber provides the relevant person with money or property in order to gain competitive advantage contrary to the principle of equality and fairness.” That said, the specific tests for each type of corruption offence vary, and under some circumstances, a corruption offence may be established without satisfying the above test (e.g. giving or accepting kickbacks to or by government officials in commercial transactions in violation of relevant regulations may constitute bribery even without satisfying the test of “seeking illegitimate benefits”).

Article 87 of the Criminal Law provides that the limitation period applicable to a particular criminal offence depends on its maximum sentence. Specifically: a five-year limitation period applies to a criminal offence with the maximum sentence of less than five years of imprisonment; a ten-year limitation period applies to a criminal offence with the maximum sentence of five to ten years of imprisonment; a fifteen-year limitation period applies to a criminal offence with the maximum sentence of ten to fifteen years of imprisonment; and a twenty-year limitation period applies to a criminal offence with the maximum sentence of life imprisonment or the death penalty unless this is extended with the SPP’s specific approval.

The maximum penalty for corruption-related offences, depending on their seriousness, ranges from three years of imprisonment to the death penalty. Therefore, the corresponding statutory limitation period ranges from five years to twenty years.

The Criminal Law has extraterritorial effect. If a PRC citizen commits a crime under the Criminal Law outside the territory of the PRC, the Criminal Law is applicable to the PRC citizen. However, if the maximum sentence of such a crime under the Criminal Law is under three years of imprisonment, the prosecution may be exempted, save that such an exemption does not apply to PRC public officials or military members.

Furthermore, if (i) a foreigner commits a criminal offence under the Criminal Law outside the territory of the PRC; (ii) that offence harms the interest of the PRC or its citizens; and (iii) the minimum sentence for that offence under the Criminal Law is no less than three years, the Criminal Law is also applicable, unless the offence is not punishable under the law of the place where it is committed.

The AUCL may also have extraterritorial affect when, for example, both the commercial bribery payer and the receiver are incorporated in the PRC. However, in practice, it is still not very common for PRC enforcement agencies to investigate overseas transactions.

Under the Criminal Law: in the event that an individual commits an offence, that individual is liable for the offence; in the event that an entity commits an offence, the entity will be liable for that offence, and the directly responsible person in charge and other persons who are also directly responsible for the wrongdoing may also be held personally liable.

PRC law is not perfectly clear regarding the circumstances under which offences committed by an individual will be attributed to his or her affiliated legal entity, except for the following rules set out by the SPC: (i) if an individual establishes a company solely for the purpose of committing crimes, or the main activities of a company after its establishment are criminal activities, the relevant individual, not the company, would be liable for such crimes; and (ii) if an individual commits a crime in the name of a company without the authorization of that company and takes illegal benefits as his or her own assets, the relevant crimes should be regarded as crimes committed by that individual.

Under the AUCL and the AIC Measures, an employer is vicariously liable for commercial bribes offered or accepted by its employees for the purpose of selling or purchasing goods for the employer.

Penalties for individual perpetrators under the Criminal Law include: bribing public officials or entities could result in criminal detention, imprisonment of up to life imprisonment, confiscation of property, and/or criminal fine; bribing non-public officials could result in criminal detention, imprisonment of up to ten years, and/or criminal fine; accepting bribes by public officials could result in criminal detention, imprisonment of up to life imprisonment or the death penalty, confiscation of property, and/or criminal fine; and accepting bribes by non-public officials could result in criminal detention, imprisonment of up to fifteen years, and/or confiscation of property.

Penalties for individual perpetrators under the AUCL include an administrative fine ranging from RMB10,000 (approx. US\$1,500) to RMB200,000 (approx. US\$30,000) and confiscation of illegal income.

Penalties for perpetrators that are legal entities include unlimited criminal fines under the Criminal Law and/or an administrative fine ranging from RMB10,000 (approx. US\$1,500) to RMB200,000 (approx. US\$30,000) and confiscation of illegal income.

The People's Procuratorates and the Public Security Bureaus are primarily responsible for investigating and prosecuting corruption activities under the Criminal Law. The State Administration of Industry and Commerce (SAIC) and its local branches (collectively as AICs) are primarily responsible for enforcing the AUCL and investigating commercial bribery.

#### **4. Anti-Corruption in India**

The primary anti-corruption legislation in India include the Indian Penal Code 1860 (IPC) and the Prevention of Corruption Act 1988 (PCA). The term "bribery" has not been defined under the PCA. However, it has been defined specifically in the context of offences relating to elections under the IPC as an act of giving gratification to any person with the object of inducing him or her or any other personnel to exercise any electoral right or of rewarding any person for having exercised any such right. The PCA criminalizes the receipt or solicitation of illegal gratification by "public servants"

and the payment of such gratification by other persons as a motive for the public servant doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his or her official functions, any favor or disfavor to any person or for rendering or attempting to render any service or disservice to any person.<sup>17</sup>

The term “gratification” is not restricted to pecuniary gratifications or those quantifiable in money, but can include anything that would satisfy an “appetite” or “desire.” The term can cover even insignificant amounts paid to influence a public servant, so long as it is beyond the legal remuneration to which the public servant is entitled. The provisions of the PCA Amendment Bill, as they currently stand, seek to further expand the scope of the offences.

The expression “public servant” has a wide import under the PCA and includes not only persons in the service or pay of the government or remunerated by the government for the performance of any public duty but also persons in the service or pay of a local authority or of a corporation established by or under central, provincial or state legislation or an authority or a body owned, controlled or aided by the government or a government company; judges, court appointed arbitrators, senior office bearers of certain registered cooperative societies that receive or have in the past received, any financial aid from any government of India or from any corporation owned, controlled or aided by the government.

“Government company” here means any company in which at least 51 percent of the paid-up share capital is held by the central government or any state government (or both), as well as the subsidiaries of such a company.

There are no Indian laws that apply to bribery of foreign public officials. While there is no specific law covering “private sector bribery,” the Companies Act 2013 contemplates punishments for “fraud.”

The PCA extends to Indian citizens outside India. A reading of the provisions of the PCA along with the statement of its extent makes it clear that this statute applies to situations where an Indian “public servant” accepts illegal gratification from any person whether in India or abroad. The PCA does not apply to the payment of bribes to foreign public officials.

The PCA presumes to be a bribe the act of giving or offering to give any gratification or any valuable thing by an accused as a motive or reward to a public official for doing or forbearing to do any official act without consideration or for a consideration which he or she knows to be inadequate, unless the contrary is proved. The intent with which the gratification or valuable thing was given or attempted to be given to the public official is crucial.

There is no *de minimis* threshold regarding the receipt of offerings by public officials. However, conduct rules applicable to some kinds of public officials permit them to accept gifts and hospitality within certain prescribed limits and accordingly

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<sup>17</sup> A Guide to Anti-Corruption Legislation in Asia Pacific, *supra* note 16, at 93–103.

gifts and hospitality that meet such criteria are permitted. Such limits vary depending on the rules applicable to the public official in each case. For example, the All India Services (Conduct) Rules 1968 have been amended by the All India Services (Conduct) Amendment Rules 2015 (Amendment Rules 2015) to increase the threshold of the value of gifts permitted to be accepted by the member of the service. The Amendment Rules 2015 applicable to some officials provide an exception for the receipt of "casual meals" or "casual lifts" or gifts worth up to a *de minimis* amount of INR5,000 rupees (approx. US\$77) as against the earlier amount of INR1,000 rupees (approx. US\$16).

According to the PCA, whoever accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or herself or for any other person, any gratification whatsoever as a motive or reward in order, by corrupt or illegal means, to influence a public servant or taking gratification for the exercise of personal influence with a public servant will be considered guilty of an offence. Any person guilty of specific influence peddling will be punishable irrespective of whether such person exercised the influence on the public official directly or through another person.

The payer of the illegal gratification as an "abettor" will also be punishable. The offence of abetment is an independent, distinct and substantive offence. The *mens rea* or mental state of the bribe giver is important, and it is irrelevant that the public servant had no authority to commit the particular offence or refused to accept the bribe. The mere offering of illegal gratification with the objective of offering gratification is considered sufficient to aggravate the offence, even if no money or other compensation is produced.

Indian law does not hold a company liable for the acts of its subsidiaries. In the case of a conviction of a company, all officers in charge of the company at the time when the offence was committed will be held to be officers in default and shall be liable for the acts of the company. Payments made to get even lawful things done promptly are prohibited and the PCA has been enforced with respect to facilitation payments. The Supreme Court of India has held that it has "little hesitation in taking the view that 'speed money' is the key to getting lawful things done in good time and 'operation signature' be it on a gate pass or a pro forma, can delay the movement of goods, the economics whereof induces investment in bribery," and that, if speed payments are allowed, "delay will deliberately be caused in order to invite payment of a bribe to accelerate it again" (*Som Prakash v. State of Delhi*, AIR 1974 Supreme Court 989).

## Conclusion

Since its inception, BRICS has expanded its activities in two main streams of work: (i) coordination in meetings and international organizations; and (ii) the development of an agenda for multisectorial cooperation among its members. In relation to the BRICS coordination in international fora and organizations, the mechanism focuses on the economic-financial and political governance spheres. As

to the first, the BRICS agenda prioritized G-20 cooperation, including the IMF reform. In the political realm, BRICS advocate the reform of the United Nations and of its Security Council, aiming for more inclusive representation and more democratic international governance. Moreover, BRICS maintain a constant dialogue on the main issues on the international agenda.

In June 2015, at the Ufa Summit, the BRICS members reaffirmed their commitment against corruption. This commitment was based on their acknowledgement that

corruption including illicit money and financial flows, and ill-gotten wealth stashed in foreign jurisdictions is a global challenge which may impact negatively on economic growth and sustainable development.

The BRICS member countries also cited the United Nations Convention against Corruption (UNCAC) as the basis on which to act. The UNCAC is a global, legally binding international anti-corruption convention. It is the core basis for the Anti-Corruption Plan, as it includes a detailed list of standards, rules and measures that states are offered to use in order to fight corruption and also offers a mechanism of implementation.

At the 2015 Ufa BRICS Summit, the Anti-Corruption Working Group was created to combat corruption that will

work for the inclusion of crime prevention and criminal justice issues among the long-term priorities of the UN agenda.

During India's 2016 presidency, the BRICS Senior Members met three times to discuss anti-corruption: March 16 in Paris, June 8 in London and October 17 in Paris.<sup>18</sup>

Corruption, including illicit money and financial flows, and ill-gotten wealth stashed in foreign jurisdictions, is a global challenge which may impact negatively on economic growth and sustainable development,

said the BRICS Leaders Xiamen Declaration, released after the 9<sup>th</sup> BRICS summit in the southeastern Chinese city of Xiamen (September 2017). The BRICS countries would strive to coordinate their approach in this regard and encourage a stronger global commitment to preventing and combating corruption on the basis of the United Nations Convention against Corruption (2003) and other relevant international legal instruments.<sup>19</sup>

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<sup>18</sup> 2016 BRICS Goa Summit Final Compliance Report 31 (Toronto: BRICS Research Group, 2017).

<sup>19</sup> BRICS Leaders Xiamen Declaration, Xiamen, China, 4 September 2017 (Mar. 4, 2018), available at <http://www.dirco.gov.za/docs/2017/brics0904.htm>.

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