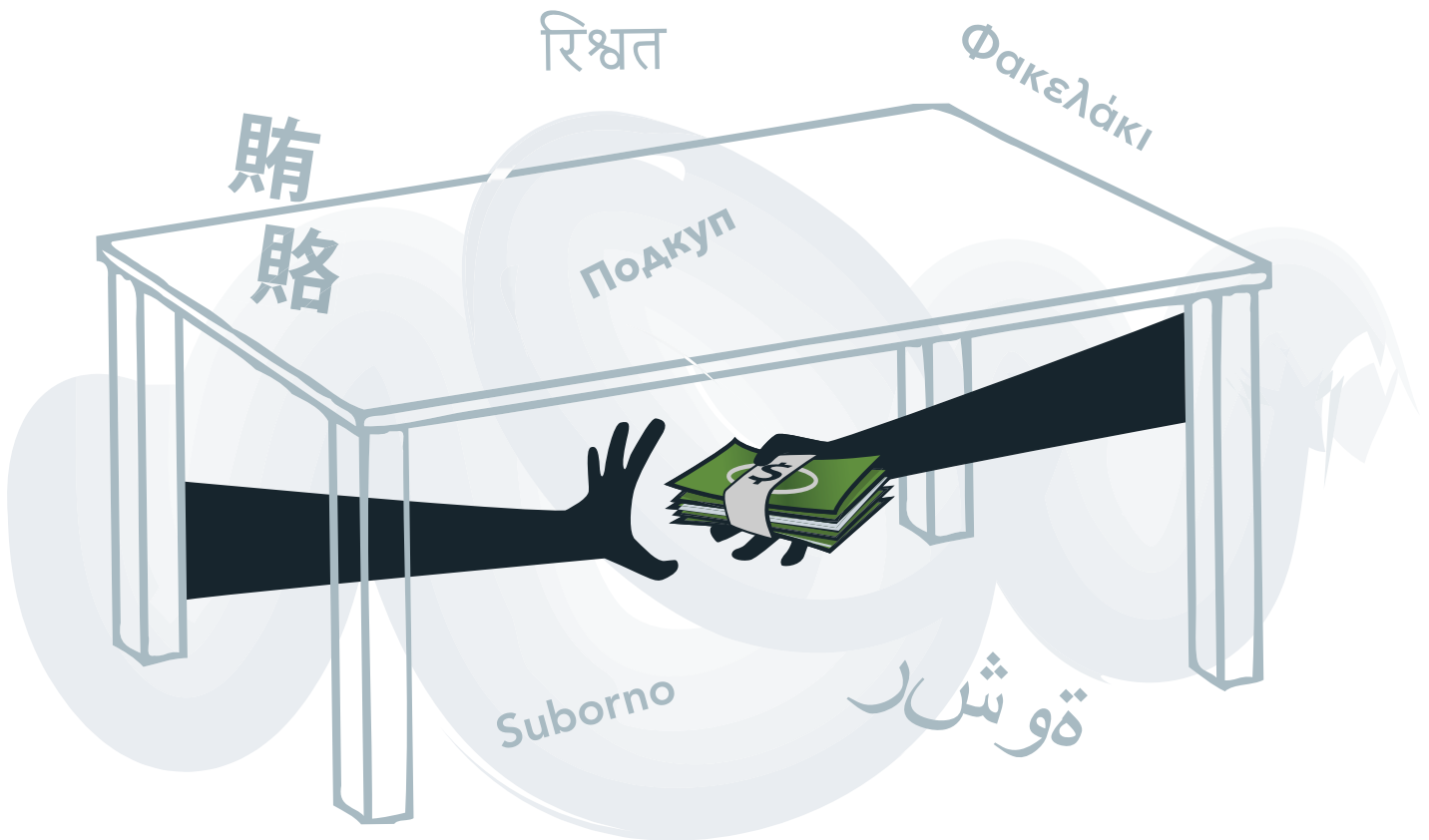




Overcoming the Cross-Border FCPA Foreign Language Barrier

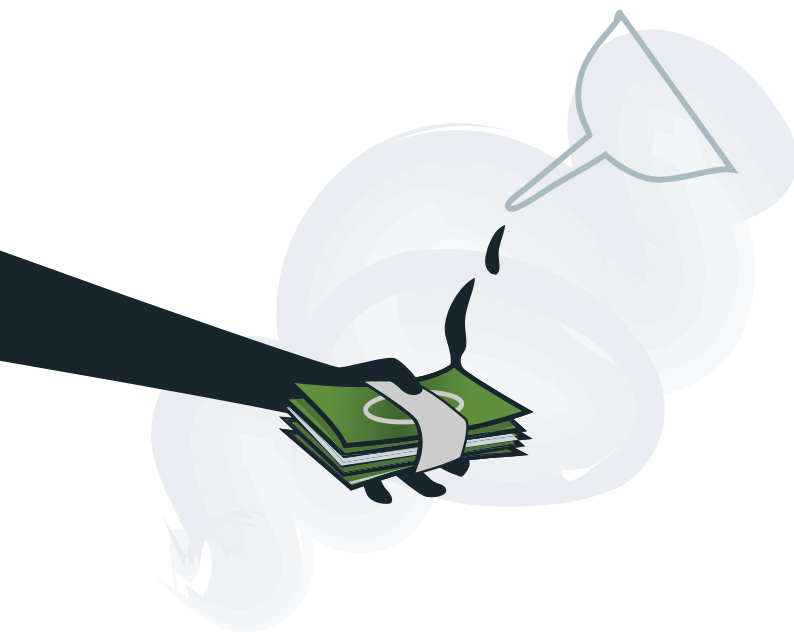
By Patrick Oot and Scott Herber



The Obama administration has targeted global corruption with significant resources and plans to step up global FCPA enforcement through continued work with key allies and partners, including in the Open Government Partnership, the G-7, the G-20, and the OECD Working Group on Bribery, to improve transparency, integrity, and accountability worldwide.

On September 24, 2014, The White House released *The U.S. Global Anticorruption Agenda*. According to the fact sheet, since 2009, the United States has resolved criminal cases against more than 50 corporations worldwide with penalties of approximately \$3 billion, and it has convicted more than 50 individuals, including CEOs, CFOs, and other high-level corporate executives, for FCPA and FCPA-related crimes. The continued globalization of business, coupled with the growing mountain of Electronically Stored Information (“ESI”) has caused a spike in the investigative demands for, and monitoring of, ESI located in foreign jurisdictions. Moreover, foreign-based investigations require legal teams to manage unique technology challenges in contrast to traditional preserve-collect-review and produce strategies. Beyond

cross-border data transfer issues, counsel should account for foreign legal traditions, cultures and languages by developing action plans that deploy the right people, process and technology to manage volumes of foreign language data. Language tools can support an effective and speedy investigative response. Tools coupled with a robust compliance and monitoring program might just be the ticket to swift matter resolution.



CHINA GENERATES SIGNIFICANT FCPA VOLUME

While some issuers don't disclose jurisdictional information about where potential FCPA violations might have occurred, and many companies don't disclose every country involved, 46 different countries were identified or reported by name in connection with the [July 2014 Corporate Investigations List](#). China leads with 39 mentions – more than four times the next two countries, Russia and Brazil. *InsideCounsel* recently reported that of third parties “are responsible for the vast majority of FCPA violations of companies doing business in China.”

In 2013, government inquiries sought information related to the hiring preferences financial services organizations provided to family members of Chinese government officials in an effort to gain business advantage. For example, Goldman Sachs recently released in a 10-Q quarterly filing that regulators were reviewing its hiring practices in Asia.

Even so, multi-national cross-border investigations are commonplace in the FCPA landscape. For example, HP recently pleaded guilty to FCPA violations for bribery allegations in Mexico, Russia and Poland. According to the SEC, an HP subsidiary created a slush fund and numerous shell companies to funnel money in order to secure multibillion dollar Russian contracts. In addition, in Mexico, a company executive directly paid consulting firms that were tied with government officials to win favor in an IT contract. And, in Poland, the company provided a government official with Las Vegas travel and supplied him with “bags of cash” on multiple occasions. HP paid fines of \$74.2 million to resolve the DOJ's criminal case and \$29

million in disgorgement.

International anti-bribery investigations are not expected to wane anytime soon. In fact, some countries have enacted their own anti-bribery laws. For example, Brazil recently passed a new anti-bribery law that took effect in January 2014. *The Clean Company Act*, targets allegations and claims of corruption throughout the country. The Organization for Economic Cooperation and Development (OECD) and its supporting nations, applaud the new law with additional backing from participants in Brazilian treaties and associations. In addition, the U.K. recently instituted guidelines for the nation's businesses to follow the Bribery Act, a law passed in 2013 that updated bribery regulations dating back to 1889.

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COMPREHENSIVE TRANSLATED LITIGATION HOLD NOTICES: CRUCIAL TO PROTECT DATA AND REPUTATION

Just like traditional litigation, preservation is crucial in foreign investigations. Preserving evidence is an early factor regulators consider in cooperation credit. While many companies rely on template hold notice in U.S.-based litigation matters, multi-national organizations might consider alternatives when dealing with cross-border investigations. Simply, counsel should consider language barriers and cultural differences when sending preservation notices to foreign custodians. Legal hold notices often contain very specific instructions and unfortunately, initial

translations lack precision. For the message to get across accurately, the translator must possess some understanding of legal issues.

Attorneys might want to consider obtaining hold notices retranslated back into English to provide a better perspective of a foreign custodian's perception. Counsel might consider multiple translations.

Each country has its own innuendo and code for bribery and corruption, making it easy for non-native speakers to miss the true nature of illicit conversations.

Jerami Kemnitz, Senior Discovery Counsel and Global Head of eDiscovery at Wells Fargo, reflects on his experience managing global investigations while in private practice. He states, "You have a limited number of touch points with foreign employees or custodians. Attorneys should consider efficient and effective communication methods to develop meaningful contact that is substantive, but also helps you build trust and rapport."

Because of the time and expense in conducting interviews for preservation and collection, counsel should make every effort to bridge the language, culture and legal tradition gaps before meeting a foreign employee in person. The employee should understand her obligations and the attorney must identify relevant information held by the employee. Thus, an early and specific litigation hold



notice coupled with an acknowledgment and confirmation by the employee indicating that she understands the retention obligations are crucial for a productive and efficient discovery interview.

DECIPHERING THE CULTURE CODE TO CAPTURE FOREIGN SLANG

A non-native attorney may experience initial difficulty when translating and identifying local bribery and corruption lingo during the discovery and investigative process. Each country has its own innuendo and code for bribery and corruption, making it easy for non-native speakers to miss the true nature of illicit conversations. While attorneys might have experience using keyword search terms in U.S.-based litigation, investigations and legal research, counsel cannot simply use the Internet to look up translations. An equipped investigating attorney must consider context and content equivalent local slang. For example, Malaysians use “coffee money” and Mexicans use the term “money under the table” to reference bribes. Unless an attorney can decipher the culture code for each country, an investigation might miss key foreign language documents that might help your case. Even worse, if the key foreign language documents are produced from other sources outside the target organization, but not the target itself, that organization may lose valuable cooperation credit because regulators might consider the act of non-disclosure as an attempt to bury evidence.

“A lawyer can’t assume that the relevant English words will translate into the foreign language with precision and accuracy by just using a foreign dictionary,” said Kemnitz. “When dealing with cross-border discovery firms should consider historical and cultural differences, language nuances, dialect, or slang. An accurate translation is essential to ensure regulators won’t question your investigative process.”

Kemnitz recommends interviews with native-speakers who understand the language and lingo particular to that case or inquiry to drill down and develop the proper search criteria using appropriate terminology. Typically, he prefers to consult with industry contacts, government employees, or company government affairs representatives in the jurisdiction of interest instead of non-local legal counterparts.



FOREIGN SEARCHING 101

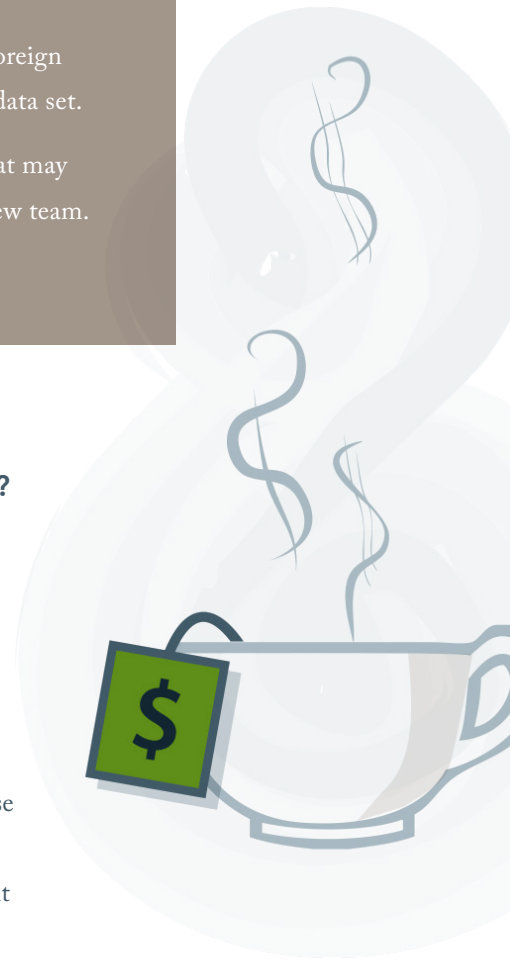
To mitigate risk, in-house counsel may consider using the following three-step conceptual workflow for foreign language translation in investigations and discovery:

1. Ask outside counsel to help identify the keyword search terms or phrases for the matter or case in English. Then search the translated content for the keywords. Many firms have developed expertise in identifying specific types of corruption.
2. Using a similar process, identify keyword search terms in the native foreign language, then run a search for those terms in your foreign language data set.
3. Compare both sets of results to identify any additional documents that may need translation and placement in the English review set for the review team.

ALPHABET SOUP – IN GREEK, CYRILLIC, LOGOGRAMS AND CUNEIFORM?

When dealing with cross-border matters, it's not uncommon to come across languages that are not based on the Latin alphabet. It's not every day that U.S.-based litigators read Cyrillic and Chinese characters, which can further complicate the investigative process.

“Even with help from an information technology employee and an interpreter, review of email folders to identify important documents in languages like Chinese or Russian presents a difficult challenge to English-native speakers that don't understand local practice,” says Kemnitz. “The Microsoft Outlook interface might look familiar, but the sub folders are really hard to navigate. Counsel needs to leave a trail of bread crumbs to remember the way in and out.”



Kemnitz contrasts his experience in dealing with Russian and Chinese languages with a trip to a foreign country like Germany with a Latin-based alphabet. “While you may not understand the language, in Germany, you can at least read the street signs, pronounce the names and remember the words. However, in Russia, one must look at the characters on the street signs and memorize them like a phone number to avoid getting lost. But in an investigation, it’s nearly impossible to memorize key phrases in such a short time. Data translation is important early in the case, it can make an investigation much easier to manage.”

LEVERAGE TECHNOLOGY FOR QUICKER RESPONSE

While translation tends to be an afterthought at the beginning of an investigation, counsel should consider focusing on translation early in the matter – at the very same time as he or she develops a strategic preservation plan – and definitely before a preliminary meeting with regulators. For example, in *U.S. v. Mosquera* the court ruled that “translations of critical documents are much more than a convenience.” Furthermore, the case notes, “[P]roper handling of translation hinges on a variety of factors, including ... the complexity of the proceedings,’ and it is the trial judge who is in the best position to determine if translation services are needed.” Waiting until the last minute may cause avoidable delays and eat up time for quality control when preparing document productions for regulators.

Planning ahead to streamline the cross-border litigation foreign language eDiscovery translation process can save an organization time and money. Even a small advantage or percentage saved can represent a solid gain for a company under investigation. Simply put, the costs are staggering.

FTI Consulting, a DC-based consulting firm that often partners with law firms to manage data during an investigation recently published a whitepaper on FCPA investigations. In, *The Experts Weigh In: E-Discovery Strategies For International Anti-Bribery Investigations*, FTI reported the results of a survey where 40% of respondents indicated that their organization spent more than \$500,000 on electronic discovery for multinational matters and investigation, and 33% responded that they could not quantify the amount spent. Even though expenses can start to wane at the

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end of an investigation, costs can still be substantial. For example, *The Wall Street Journal* recently reported that Wal-Mart has estimated that it will spend between \$200 and \$240 million on FCPA and related compliance costs this fiscal year. Counsel should take every opportunity to save both time and costs when expenses run so high.

Using Machine Translation to translate a large data population into English allows a litigation and investigation team to obtain early insight into the documents and makes them readily available to easily review at will. This can be significantly less expensive than in-country attorney review and gives you more control. Even if an organization must meet foreign blocking statute requirements and inspect and review foreign documents on location, counsel will most likely still want them translated into English so documents can be quickly found in response to requests.

CONCLUSION

Dealing with ESI in a foreign country can be complicated, but doesn't have to involve cloak and dagger schemes to gain access to foreign data. Early translation strategy with increased response times, cost savings and matter comprehension can all be factors leading to matter closure and success for an organization. The right law firm and translation partner can help make that happen.

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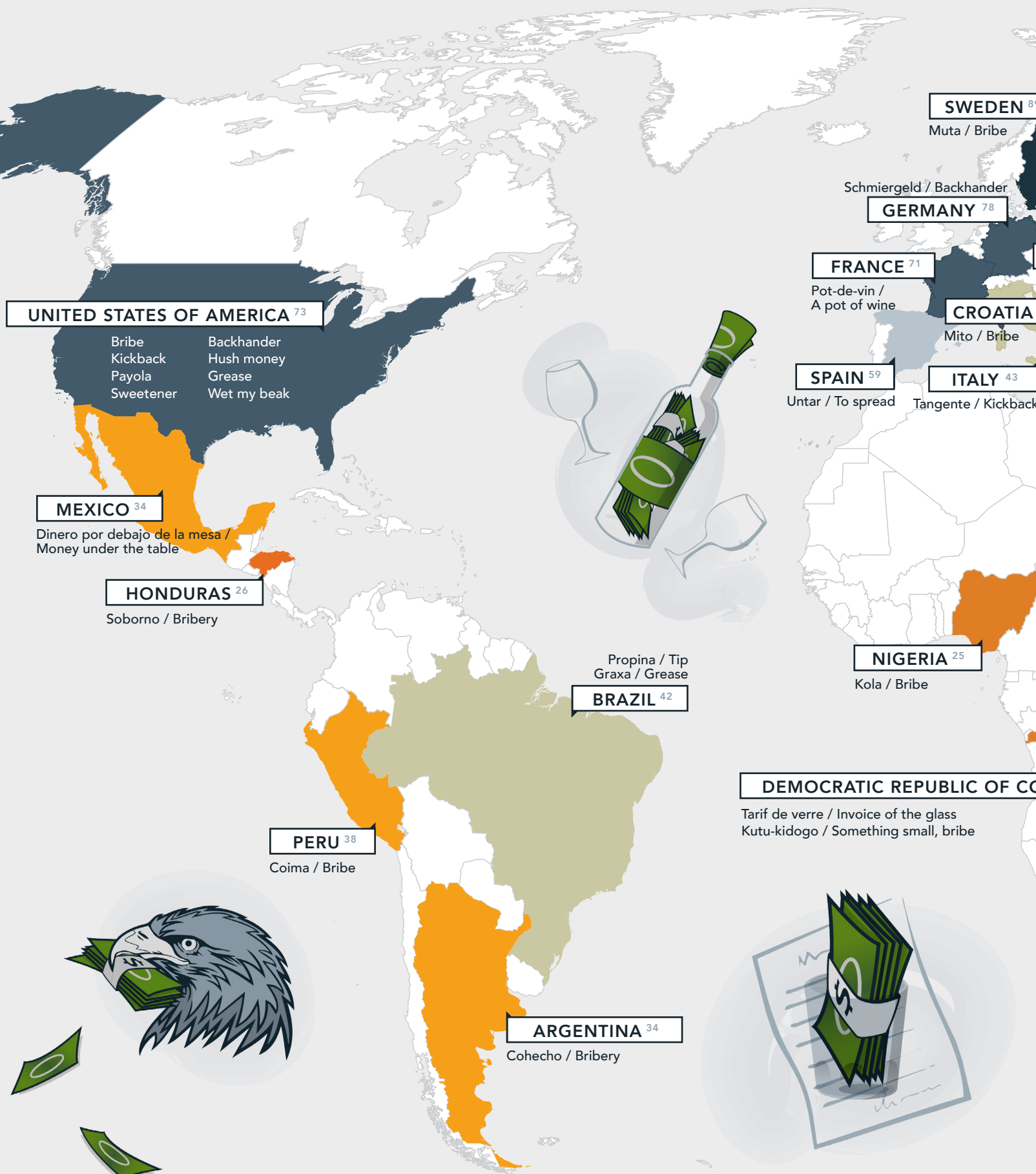
Patrick is a Partner in the Washington, D.C. office of Shook, Hardy and Bacon L.L.P. where he leads the practice on e-compliance and digital investigations. He is one of the few compliance and e-discovery attorneys in the nation that possesses the tripartite experience of an in-house corporate counsel from a *Fortune* 20 organization; a senior attorney at The Securities and Exchange Commission; and a partner in a national law firm. Patrick currently advises financial services clients on compliance and investigations; advises firm clients on cross-border data issues; and works with clients to develop world-class global compliance programs.



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Terms of Corruption



UNITED STATES OF AMERICA 73

Bribe
Kickback
Payola
Sweetener
Backhanders
Hush money
Grease
Wet my beak

MEXICO 34

Dinero por debajo de la mesa /
Money under the table

HONDURAS 26

Soborno / Bribery

PERU 38

Coima / Bribe

ARGENTINA 34

Cohecho / Bribery

Propina / Tip
Graxa / Grease

BRAZIL 42

NIGERIA 25

Kola / Bribe

DEMOCRATIC REPUBLIC OF CONGO

Tarif de verre / Invoice of the glass
Kutu-kidogo / Something small, bribe

SWEDEN 89

Muta / Bribe

GERMANY 78

Schmiergeld / Backhanders

FRANCE 71

Pot-de-vin /
A pot of wine

CROATIA

Mito / Bribe

SPAIN 59

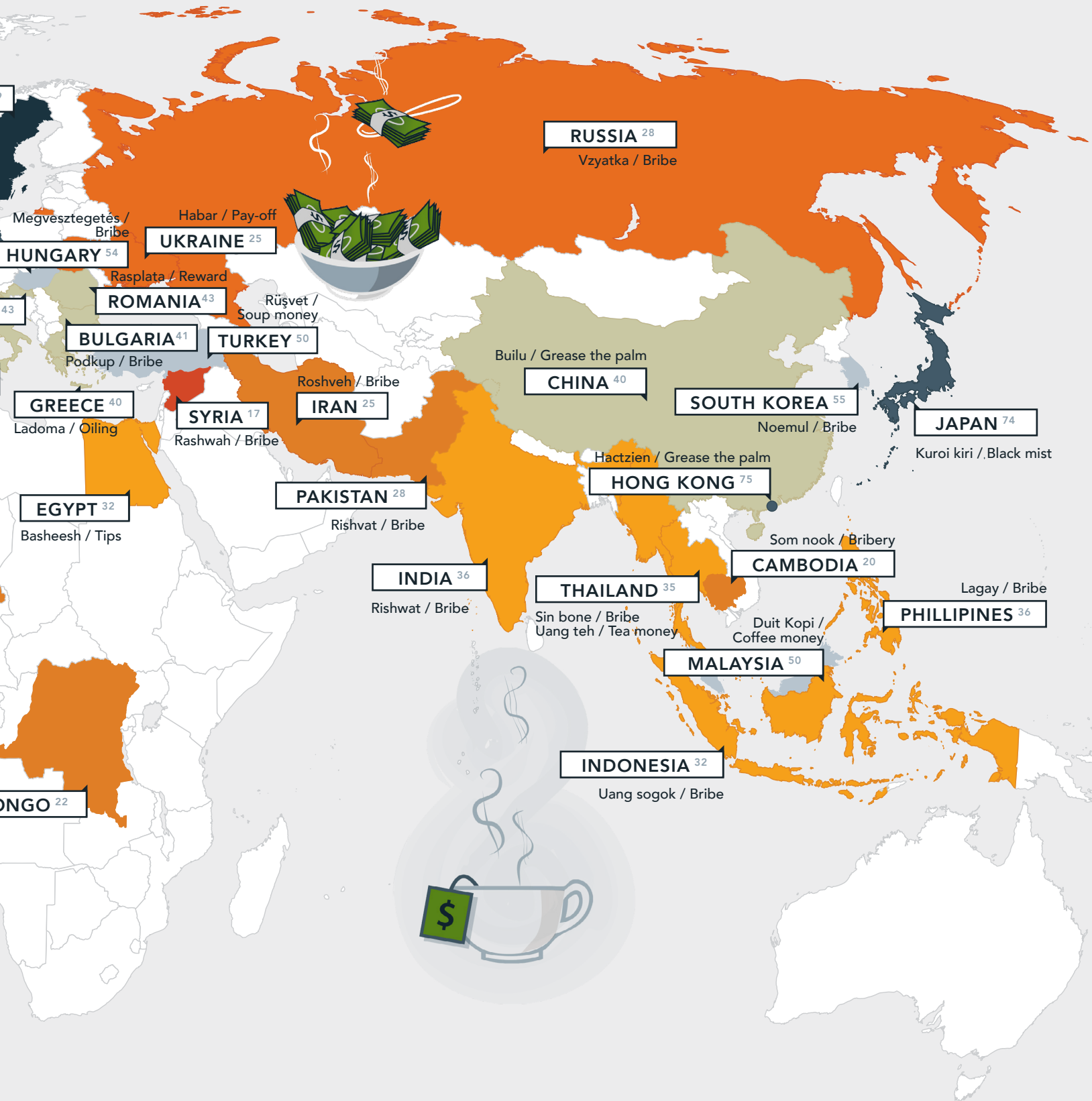
Untar / To spread

ITALY 43

Tangente / Kickback

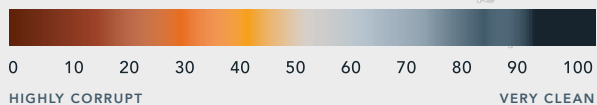
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