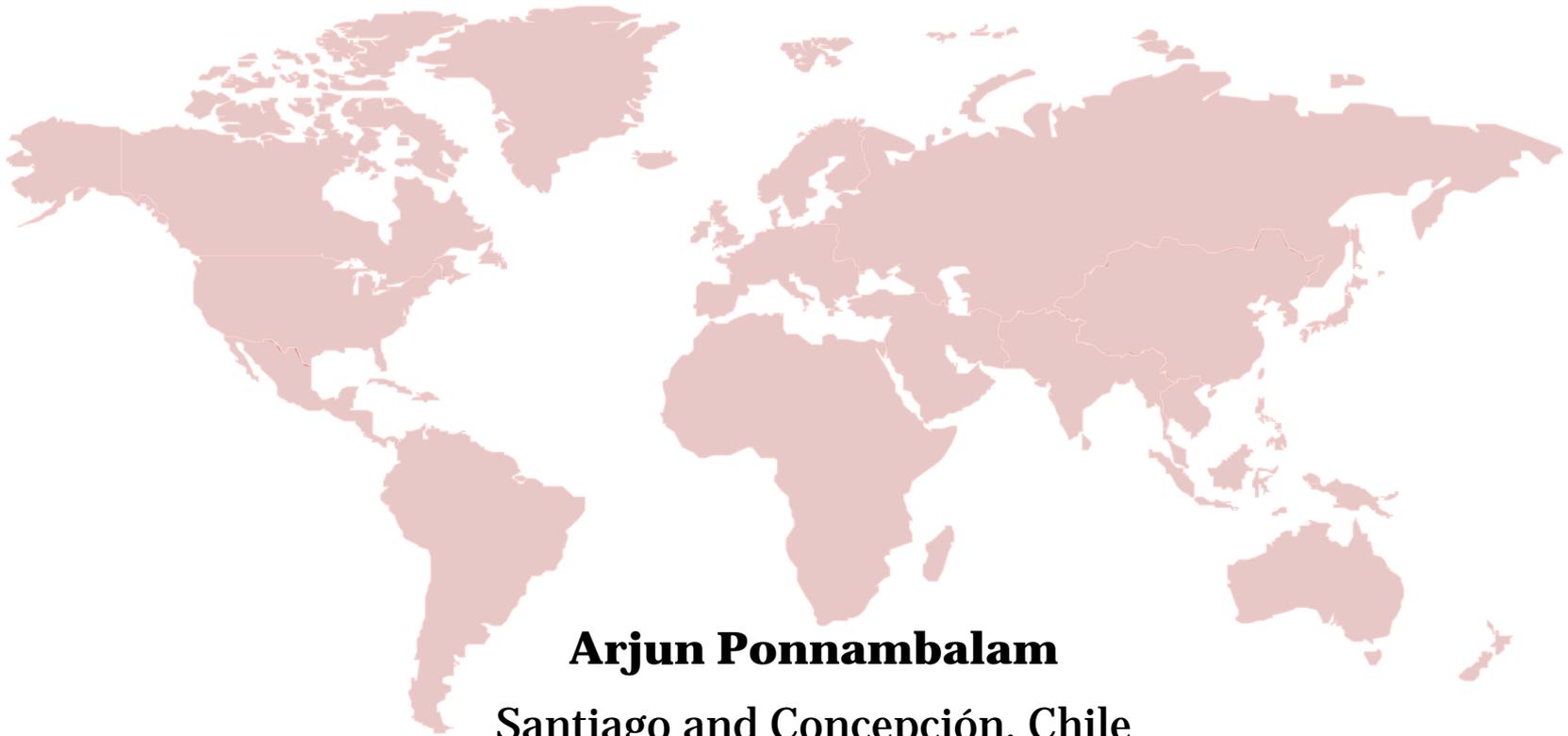# The International Anti-corruption Architecture and How Companies Can Mitigate Risk
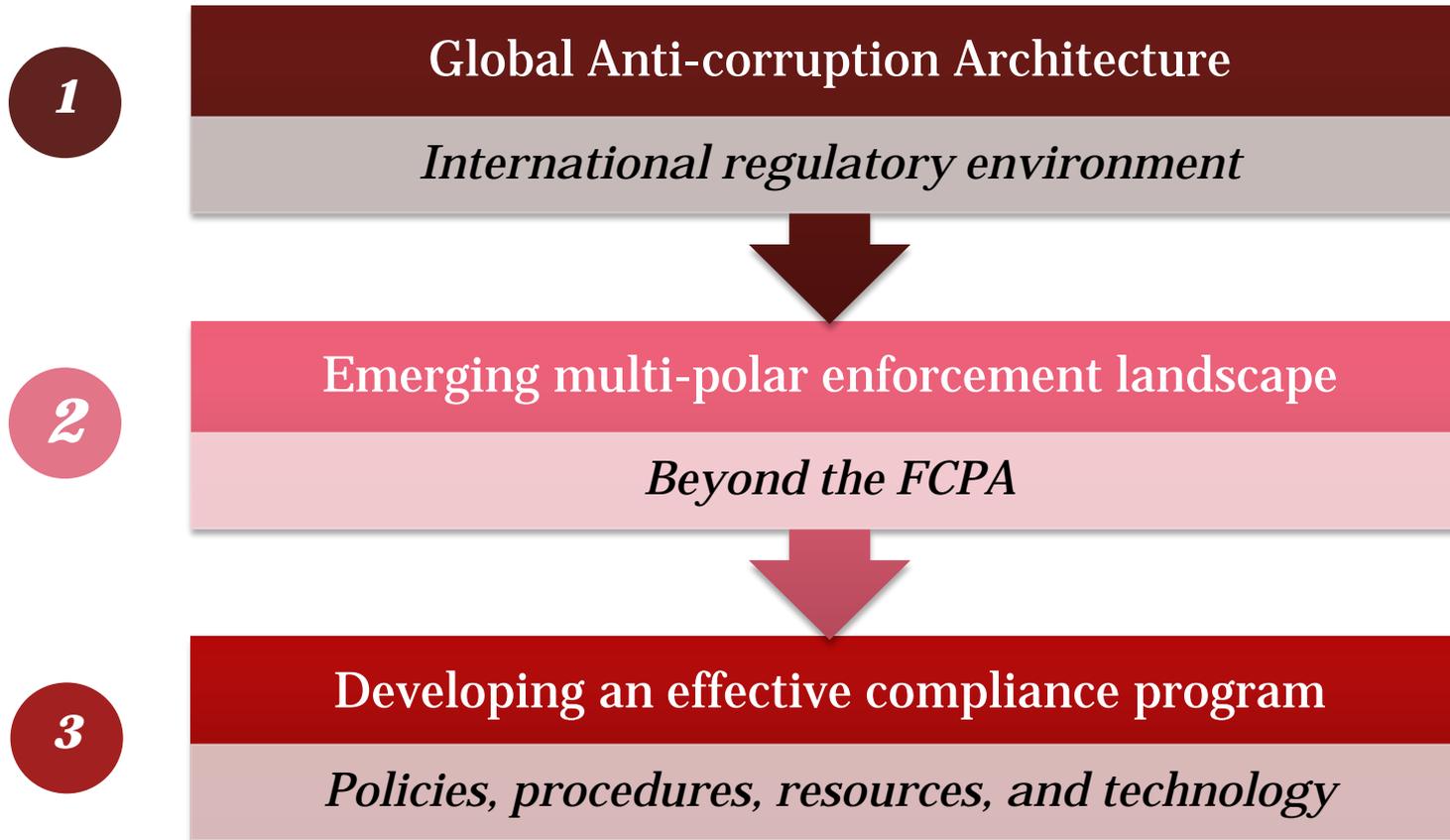
Arjun Ponnambalam

Santiago and Concepción, Chile

July 8-9, 2014

Agenda

1

Global Anti-corruption Architecture

International regulatory environment

2

Emerging multi-polar enforcement landscape

Beyond the FCPA

3

Developing an effective compliance program

Policies, procedures, resources, and technology

1 **Global Anti-corruption Architecture**

Global Anti-Corruption Architecture

- 1977 - U.S. implemented anti-corruption legislation to outlaw bribery in business transactions overseas (Foreign Corrupt Practice Act – FCPA)

- U.S. businesses pressured United States government to globalize the anti-corruption regulatory regime in order to "level the playing field"

- 1993 - Founding of Transparency International; put pressure on international community to create global treaty architecture

- Mid 1990's - Normative movement began; explosion of international instruments and declarations "outlawing" corruption.

Key milestones in the modern anti-corruption movement

1977
US Foreign Corrupt Practices Act (FCPA)

1980s
Despite limited enforcement of the FCPA, business pressure to "level the playing field"

1993
Transparency International founded

1997
Inter-American Convention Against Corruption enters into force

1999
OECD Anti-Bribery Convention enters into force

2002
Council of Europe Criminal Law Convention on Corruption enters into force

2003
Council of Europe Civil Law Convention enters into force
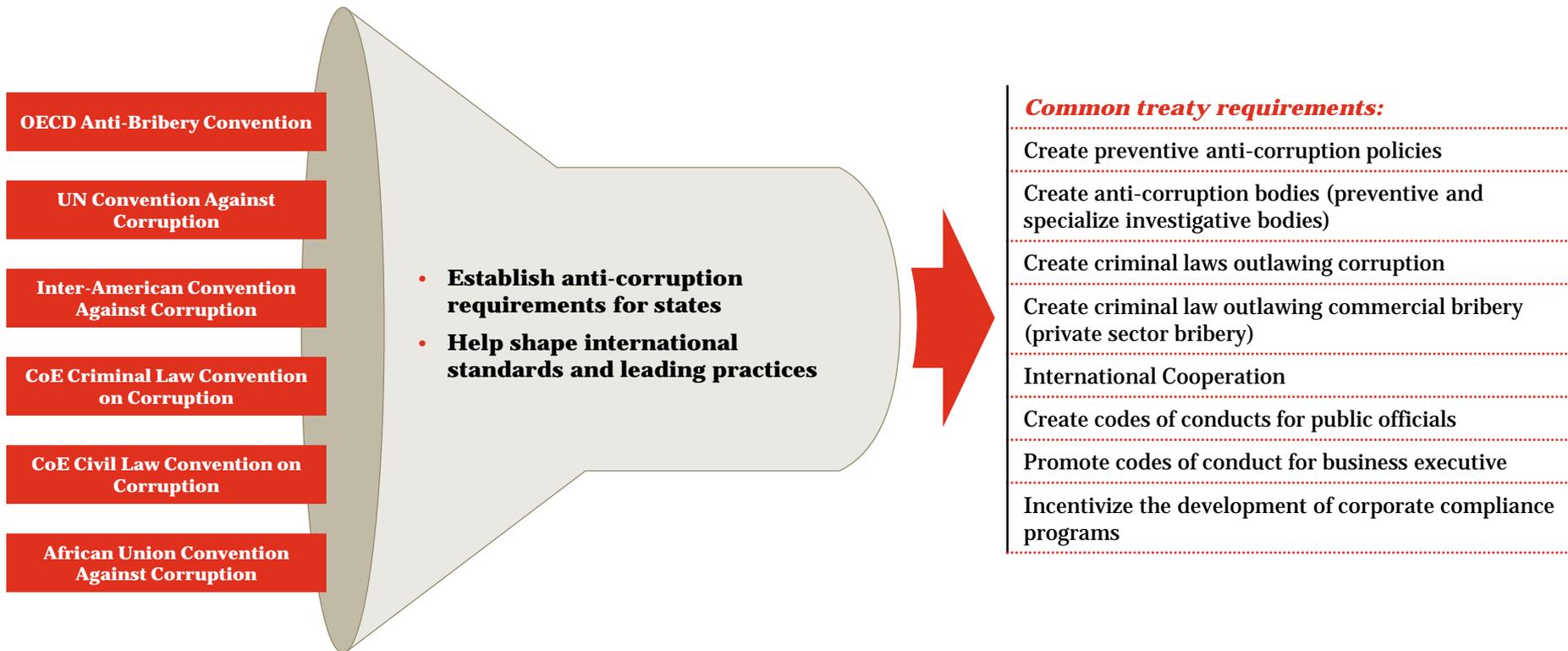
2005
United Nations Convention Against Corruption enters into force

2006
African Union Convention on Preventing and Combating Corruption enters into force

Global Anti-Corruption Architecture

What do anti-corruption treaties require states to do?

OECD Anti-Bribery Convention

UN Convention Against Corruption

Inter-American Convention Against Corruption

CoE Criminal Law Convention on Corruption

CoE Civil Law Convention on Corruption

African Union Convention Against Corruption

- Establish anti-corruption requirements for states
- Help shape international standards and leading practices

Common treaty requirements:

Create preventive anti-corruption policies

Create anti-corruption bodies (preventive and specialize investigative bodies)

Create criminal laws outlawing corruption

Create criminal law outlawing commercial bribery (private sector bribery)

International Cooperation

Create codes of conducts for public officials

Promote codes of conduct for business executive

Incentivize the development of corporate compliance programs

Global Anti-Corruption Architecture

How do anti-corruption treaties impact business?

International Treaty Enforcement

International Treaties

- Signed and ratified by states
- Require state action to implement

Domestic Law

- Created by individual states
- Often benchmarked against international standards

Enforcement

- Civil and criminal enforcement
- Subject to state jurisdiction limits
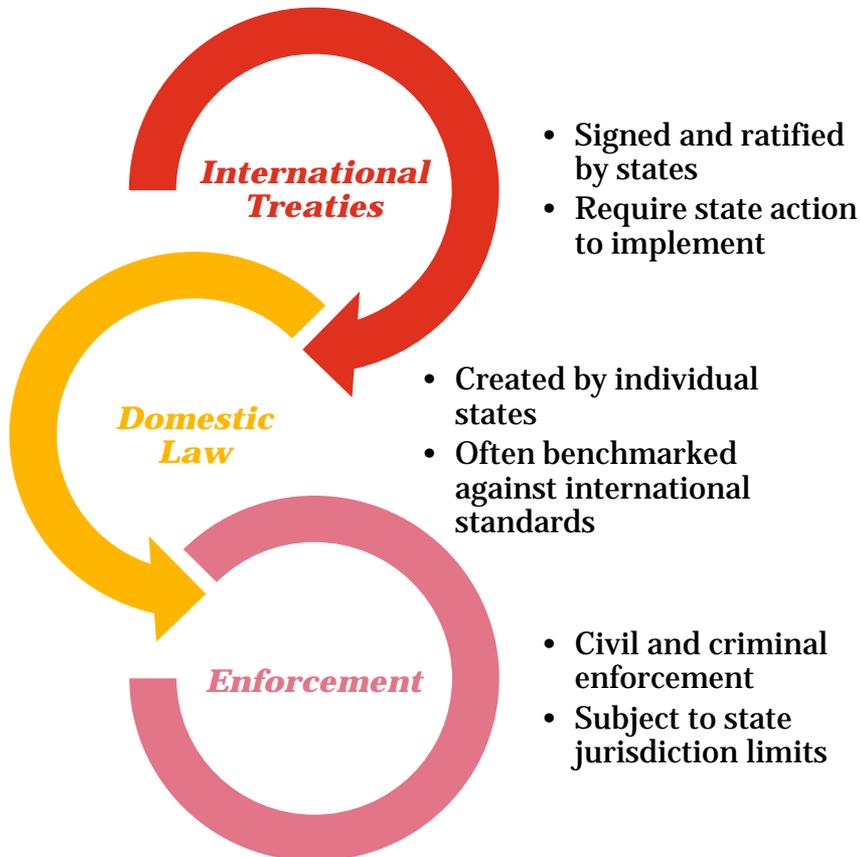
Multilateral Development Bank Enforcement

Multilateral Development Banks

- Five major MDBs
- Very active in anti-corruption enforcement

Enforcement

- Administrative sanctions process
- Enforcement not tied to state jurisdictions
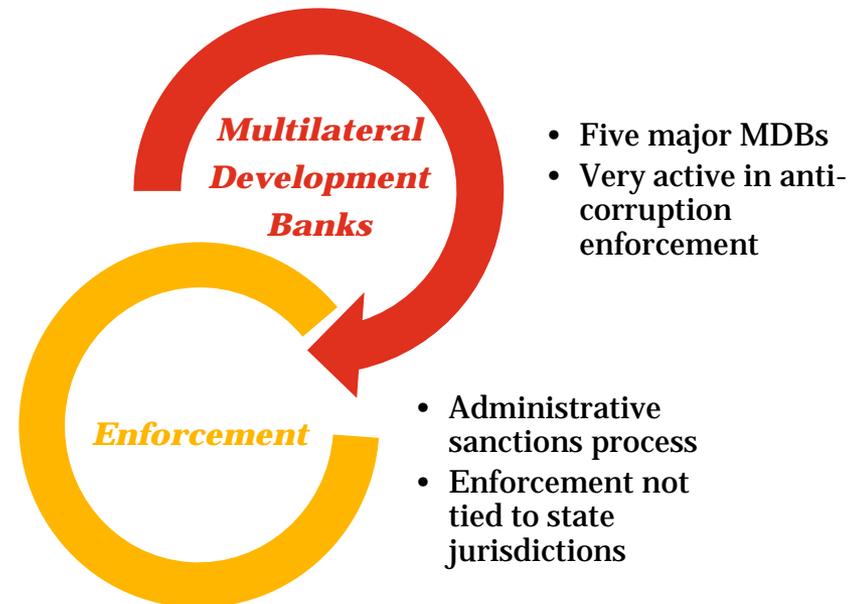
2 Emerging multi-polar enforcement landscape

Emerging Multi-polar Enforcement Landscape

Finland
Penal Code Chapter 9,16, 40

United Kingdom
U.K. Bribery Act (UKBA)

Germany
Criminal Code Sections 299 and 331
EU Corruption Act
International Corruption Act

Canada
Corruption of Foreign Public
Officials Act

Austria
Austrian Criminal Code Section
304-305

Switzerland
Swiss Penal Code Section 322

United States
Foreign Corrupt Practices Act
(FCPA)

Chile
Criminal Code 248, 251
Legal Entities Criminal Liability Law

Australia
Criminal Code Act Section 70

Brazil
Clean Companies Act

Emerging Multi-polar Enforcement Landscape

Rise of Non-State Regulators

African Development Bank

Asian Development Bank

European Bank for Reconstruction and Development

Inter-American Development Bank

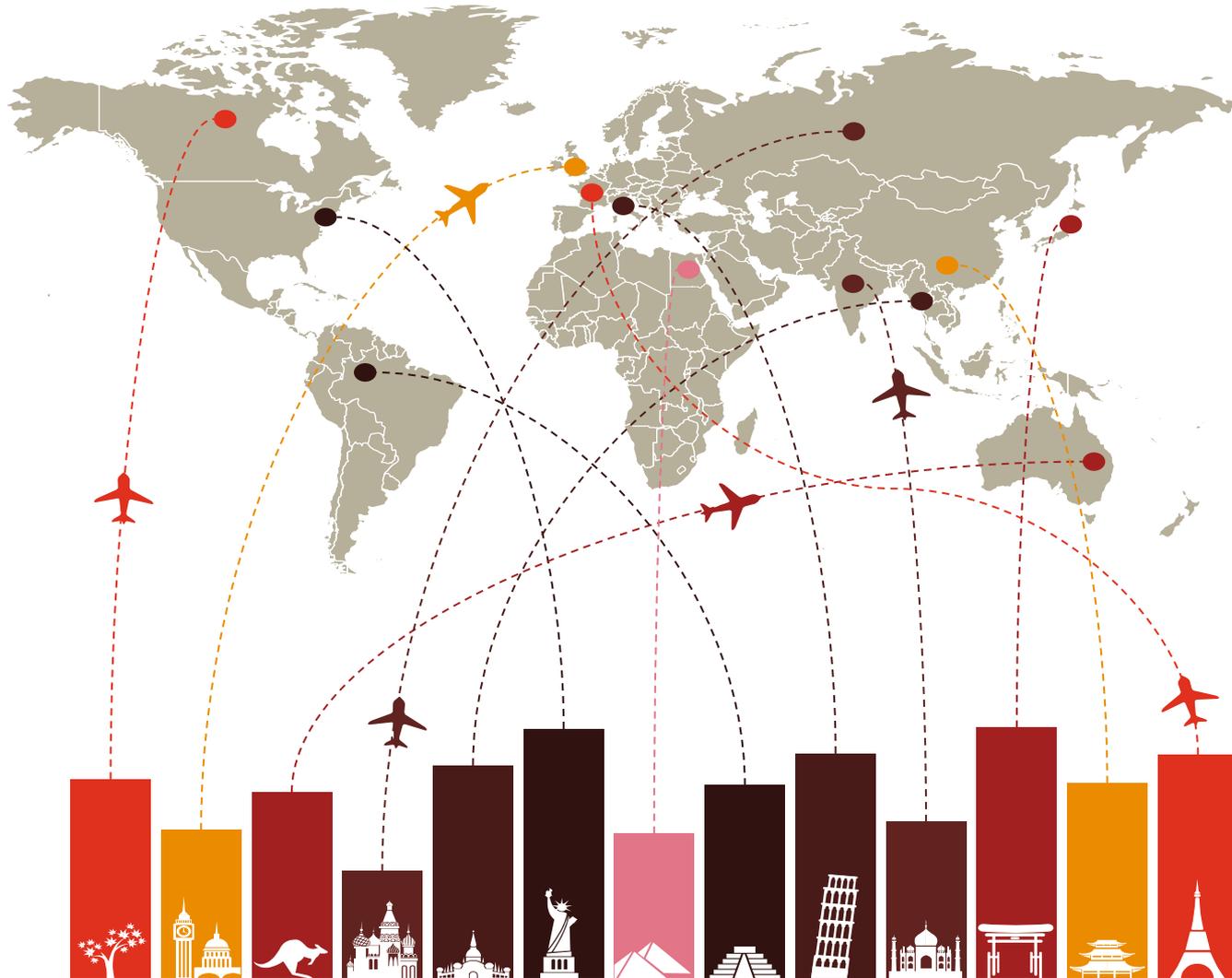The World Bank

Global Enforcement

Emerging Multi-polar Enforcement Landscape

Multilateral Development Banks – Assessing Your Risk

MDB Risk

01 — Ubiquity of MDB Funding

Do you know whether your project is MDB-financed?

MDBs operate across the full range of emerging markets – precisely the markets leading companies are targeting for growth. MDBs are particularly active in financing infrastructure, energy & mining, water & sanitation, health, transportation, and agriculture projects.

02 — Unique Sanctions Regime

Do you know how to navigate the MDB sanctions process?

The MDB sanctions process is distinct from national law, and is unique to the MDBs themselves. This presents unique challenges for companies caught in the cross-hairs. Notable process features include (1) broad definitions of sanctionable practices, (2) permissive consideration of evidence, and (3) lower standards of proof characteristic of an administrative adjudicative process.

03 — Referral Reports

Are you aware of potential criminal and civil liability?

MDB investigators routinely collaborate with and refer cases to national law enforcement authorities, which can lead to concurrent investigations and overlapping civil and criminal liability.

04 — Cross-Debarment

How would cross-debarment impact your global operations?

Debarment by one MDB may result in automatic debarment by other MDBs. US and foreign government agencies are also increasingly respecting MDB debarments in their own procurement processes.

Emerging Multi-polar Enforcement Landscape
Transboundary Cooperation

3

Developing and effective compliance program

Developing an Effective Compliance Program
Compliance Guidance and Standards

	USSG	FCPA	UK Bribery Act	TI	OECD	WEF-PACI	WBG-ICG

I. Anti-Corruption Program
  a. Bribes
  b. Political Contributions
  c. Charitable Contributions
  d. Facilitation Payments
  e. Gifts, Hospitality, Expenses
	(a);
	(b)(1)
		1, 3	1	1, 2, 3, 4	A) 2, 5	1, 2, 3, 4	1, 4

II. Organization and Responsibilities	(a)(2); (b)(2), (3)	2, 6	2	5.1	A) 1, 3, 4	5.1	2
III. Risk Assessment	(b)(5)	4	3	3.2, 4	A	3.2, 4	3
IV. Business Relationships	N/A	11, 12	4	5.2	A) 6	5.2	5
V. Human Resources /Disciplinary Actions	(b)(6), (7)	10	1	5.3	A) 10	5.3	8, 10
VI. Raising Concerns and Seeking Guidance	(b)(5)	9	5	5.5	A) 11	5.5	9
VII. Communication and Training	(a)(1); (b)(4), (6)	8	5	5.6	A) 8, 9	5.4, 5.6	7
VIII. Internal Controls and Audit	(b)(7)	7	1, 6	5.7	A) 7	5.7	6
IX. Monitoring and Review	(b)(5), (7)	5, 13	6	5.8, 5.9	A) 12	5.8	3

Developing an Effective Compliance Program

How can companies operate and grow their business while remaining in compliance with a growing variety of anti-corruption laws and regulations?

Developing an Effective Compliance Program

Policies

Policies
- Code of conduct
- Risk assessment
- Tone from the top
- Properly tailored

Procedures
- Anti-corruption controls
- Documentation procedures
- Standardized contracting

Technology
- Storing, organizing, retrieving data
- Flagging anomalous transactions
- Responding to complaints
- Complying with privacy laws

Resources
- Strategic allocation
- Internal investigations
- Due diligence
- Periodic audits

Effective Compliance Program

Policies

Procedures

Technology

Resources

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Effective Compliance Program

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Procedures

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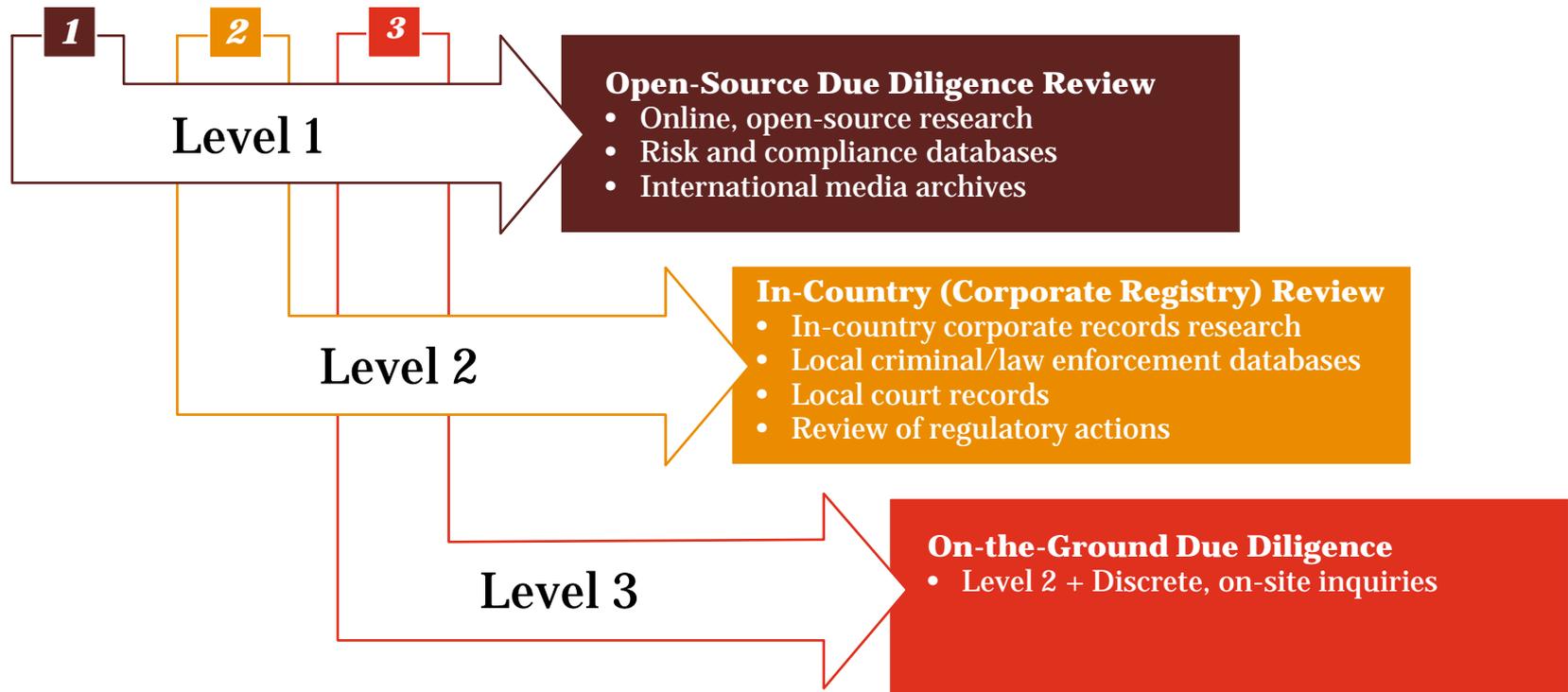- Responding to complaints
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Resources
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16

Developing an Effective Compliance Program

Resources

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Policies · *Procedures* · *Resources* · *Technology*

Effective Compliance Program

Developing an Effective Compliance Program

Resources

Due Diligence

1 **2** **3**

Level 1

Open-Source Due Diligence Review
- Online, open-source research
- Risk and compliance databases
- International media archives

Level 2

In-Country (Corporate Registry) Review
- In-country corporate records research
- Local criminal/law enforcement databases
- Local court records
- Review of regulatory actions

Level 3

On-the-Ground Due Diligence
- Level 2 + Discrete, on-site inquiries

Developing an Effective Compliance Program

Technology

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Effective Compliance Program

Policies

Procedures

Technology

Resources

Questions?