Emerging Legal Issues in Multi-Jurisdictional Enforcement Actions

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HIGHLIGHTS

- 443 individuals and 158 entities have been sanctioned in criminal proceedings for foreign bribery between the time the Convention entered into force in 1999 and the end of 2016.
- At least 125 of the sanctioned individuals were sentenced to prison for foreign bribery.
- At least 53 individuals and 95 entities have been sanctioned in administrative and civil proceedings for foreign bribery in 4 Parties.
- At least 121 individuals and 235 entities have been sanctioned in criminal, administrative and civil cases for other offences related to foreign bribery, such as money laundering or false accounting, in 8 Parties.
- Over 500 investigations are ongoing in 29 Parties. Prosecutions are ongoing against 125 individuals and 19 entities in 11 Parties for offences under the Convention.

2016 IN A NUTSHELL

- Countries appear to be cooperating more on foreign bribery cases, with press releases showing more than 40% of the resolutions in US foreign bribery cases involved co-operation with foreign law enforcement agencies, well up from 10 years ago.
- Three countries adopted key law reforms that are expected to support more effective anti-bribery law enforcement. Reforms include the introduction of negotiated settlements, broadened jurisdiction, enhanced whistle-blowers’ protection and amended laws on the liability of legal persons.
- Two countries – Austria and Israel – were added to the list of WGB members that have imposed sanctions for foreign bribery. Nevertheless, 22 WGB members have never imposed a sanction for foreign bribery.

By ratifying the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention), the Parties to the Convention pledge to work together to fight foreign bribery. Based on information provided by Parties to the Convention, this report reviews the enforcement efforts until end-2016. More information about the implementation and enforcement of the Anti-Bribery Convention is available online at www.oecd.org/corruption.

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The Parties to the Convention on Combating Bribery of Public Officials in International Business Transactions (henceforth, the Convention) have committed to enforcing their foreign bribery laws and to cooperating with each other in the fight against foreign bribery. This report sheds light on how they have been living up to these commitments in the area of enforcement of anti-bribery laws.

The report begins with a review of law reforms made by Parties in 2016 that may influence enforcement outcomes (Section A). It then reviews the enforcement experiences of the Parties over the period starting with the entry into force of the Convention on Combating Bribery of Public Officials in 1999 to the end of 2016 (Section B). This is based on a database on foreign bribery enforcement that the OECD Working Group on Bribery (WGB) has been collecting since 2009.

The review shows that the enforcement outcomes have been highly variable among Parties, with some showing active enforcement and others essentially no enforcement. Section C provides tables summarising the enforcement data contributed by the 41 WGB members whose legislation implementing the Convention had entered into force by the end of 2016. These data show that, although progress is slow and uneven, a growing number of countries are now actively enforcing their foreign bribery laws. Section D of the report describes the emerging trend toward international co-operation in anti-bribery enforcement and toward multi-jurisdictional cases. This trend is an encouraging development in anti-bribery enforcement, one that is actively supported and advanced by WGB projects.

A. Strengthening the legal foundations for anti-bribery enforcement

The Convention creates a solid legal foundation for countries’ fight against foreign bribery. Over the past 18 years, monitoring by the WGB has motivated countries to take concrete action to fight foreign bribery and corruption, including refining anti-foreign bribery laws and enforcement practices.

A fundamental step in this process involves establishing a legal framework that permits effective enforcement of foreign bribery laws. If countries do not have laws in place that allow them to investigate and successfully prosecute perpetrators of this complex, multi-jurisdictional crime, then active and effective enforcement will not be possible. Adequate laws – including in such areas as the definition of the offence, the scope of liability for both individuals and entities (e.g. corporations), jurisdiction and statutes of limitations – are a necessary pre-condition to effective enforcement.

Although not the main focus of the present report, these laws are nevertheless an essential part of the backdrop for the enforcement outcomes reported here. Box 1 highlights legal reforms that were adopted in 2016 and that are expected to support more active enforcement of foreign bribery laws. The new laws in France, the Netherlands and the Slovak Republic aim to strengthen the legal foundations for anti-bribery enforcement. These new laws – like all of the laws relevant for foreign bribery of the WGB members – will be monitored by the WGB in order to determine whether further adjustments are needed and to learn from these countries’ experiences.

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Box 1. Key law reforms adopted in 2016

Key law reforms adopted by Working Group members that are expected to enhance anti-foreign bribery law enforcement include:

**France.** The *Loi Sapin II*, adopted in December 2016, seeks to promote transparency, anti-corruption and the modernisation of the economy. Specific measures include: creation of a national anti-corruption agency; the introduction of new negotiated settlements similar to deferred prosecution agreements; new or redefined offences and penalties; a requirement that companies with more than 500 employees establish and implement anti-corruption compliance measures. Several elements of this new law reflected pressure applied by the WGB in the course of its monitoring of the French legal framework relevant for foreign bribery.

**Netherlands.** The Dutch Whistleblower Authority Act (*Wet Huis voor Klokkenluiders*) entered into force on 1 July 2016. The purpose of the Act is to improve ways to report a concern about wrongdoing within organisations and to offer better protection to those who do so. The Act also provides for the establishment of a Whistleblower Authority which can provide advice to those who have concerns about possible wrongdoings. The Whistleblower Authority can also carry out investigations as a result of a report about wrongdoing.

**Slovak Republic.** A new Law on the Criminal Liability of Legal Persons entered into force on 1 July 2016. The law aims to respond to WGB recommendations that the Slovak Republic establish the liability of legal persons for bribery of a foreign public official. Also entering into force were amendments to the Slovak Republic’s foreign bribery offence, which seek *inter alia* to address WGB recommendations to amend the definition of foreign public official.

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**B. Key findings on enforcement activities**

Two Parties have recently joined the list of jurisdictions that have sanctioned foreign bribery: Austria (which sanctioned an individual) and Israel (which sanctioned a legal person in 2016). This brings to 20 the total number of WGB members that have sanctioned foreign bribery at least once.

In spite of this progress, the data indicate that 21 of the Parties whose implementing legislation has entered into force have never sanctioned an individual or an entity for foreign bribery.

The data also show that 443 individuals and 158 entities have been sanctioned under criminal proceedings for foreign bribery in 20 Parties between the time the Convention entered into force and the end of 2016. Out of these 20 Parties, 11 have sanctioned both companies and individuals, 7 have sanctioned only individuals, and 2 have sanctioned only companies.

Four parties have sanctioned 53 individuals and 95 entities in administrative and civil proceedings for foreign bribery.

Eight Parties have also sanctioned individuals or legal persons for other offences related to foreign bribery in international business transactions (e.g. offences under Articles 7 and 8 of the Anti-Bribery Convention, including accounting offences, breach of trust, or money laundering).

Although many countries limit or prohibit sharing information about investigations, many countries have provided estimates and additional information about investigations of the crime of foreign bribery and related offences (e.g. the number of ongoing investigations and ongoing criminal proceedings). Some have also voluntarily provided information on sanctions, including the size

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2 This individual was an intermediary in an arms deal. He was sanctioned in 2013.
range of fines and prison terms and exclusions or limitations on access to public procurement contracts or benefits. This voluntary information shows the following:

- **Ongoing investigations:** In 2016, there were over 500 ongoing investigations of foreign bribery in 29 Parties to the Anti-Bribery Convention. This is an increase of about 100 investigations, relative to the 2015 data. In addition, at least 87 investigations in 8 countries involved books and records, internal controls and money laundering with foreign bribery as a predicate offence. It is worth noting that each country has its own definition of what constitutes an investigation and that, as mentioned earlier, many countries are legally barred from reporting detailed information on investigations.

- **Criminal proceedings:** At least 144 criminal proceedings (against 125 individuals and 19 entities) are ongoing in 12 Parties. Again, this is an increase over the 2015 numbers, where a total of 128 criminal proceedings were reported against 115 individuals and 13 entities.

- **Prison terms:** Out of the 441 individuals sanctioned\(^3\) for foreign bribery under criminal proceedings, at least 125 individuals have been sentenced to prison terms in 11 Parties. Some Parties provided information on the length of the sentences. For the non-suspended sentences where information is available, 5 were for prison terms of more than 5 years, 19 were for less than 1 year and 41 were in the 1-5 year range.

### C. Comparative tables on enforcement outcomes

This section provides more detailed, country-by-country enforcement data. The data distinguish foreign bribery from other related offences—in particular accounting misconduct related to the bribery of foreign public officials or concealing bribery. Enforcement data on cases against individuals and entities are recorded separately. The ‘Annex on Methodology’ provides further information on the data.

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\(^3\) This number includes both imposed and agreed sanctions.
<table>
<thead>
<tr>
<th>Party to the Convention</th>
<th>% share of world exports(^1)</th>
<th>Sanctioned</th>
<th>Acquitted</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Individual</td>
<td>Legal Person</td>
</tr>
<tr>
<td>Argentina</td>
<td>.32</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Australia</td>
<td>1.52</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Austria</td>
<td>.99</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Belgium</td>
<td>2.02</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>Brazil</td>
<td>1.17</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>.14</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Canada</td>
<td>2.45</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Chile</td>
<td>.38</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Colombia</td>
<td>.24</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>.82</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Denmark</td>
<td>.83</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Estonia</td>
<td>.09</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Finland</td>
<td>.43</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>France</td>
<td>3.66</td>
<td>8</td>
<td>0</td>
</tr>
<tr>
<td>Germany</td>
<td>7.85</td>
<td>57 (+187 agreed sanctions(^2))</td>
<td>13(^3)</td>
</tr>
<tr>
<td>Greece</td>
<td>.32</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Hungary</td>
<td>.63</td>
<td>26</td>
<td>0</td>
</tr>
<tr>
<td>Iceland</td>
<td>.04</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Ireland</td>
<td>1.68</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Israel(^4)</td>
<td>.39</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Italy</td>
<td>2.73</td>
<td>11 (including plea agreements(^5))</td>
<td>5 (including plea agreements(^5))</td>
</tr>
<tr>
<td>Japan</td>
<td>4.21</td>
<td>10</td>
<td>2</td>
</tr>
<tr>
<td>Korea</td>
<td>3.04</td>
<td>19</td>
<td>6</td>
</tr>
<tr>
<td>Latvia</td>
<td>.07</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>.58</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Mexico</td>
<td>1.88</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Netherlands</td>
<td>3.24</td>
<td>0</td>
<td>1 (+3 out of court settlements)</td>
</tr>
<tr>
<td>New Zealand</td>
<td>.22</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Norway</td>
<td>.77</td>
<td>3 (+3 decisions of “påtaleunnlatelse”(^6))</td>
<td>3 (including penalty notices(^7))</td>
</tr>
<tr>
<td>Poland</td>
<td>1.23</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Portugal</td>
<td>.42</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Russian Federation</td>
<td>2.17</td>
<td>No information</td>
<td>No information</td>
</tr>
<tr>
<td>Slovak Republic</td>
<td>.44</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Slovenia</td>
<td>.17</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

\(^1\) Exports from 1997
\(^2\) Included in 1997
\(^3\) Included in 1998
\(^4\) Including plea agreements in 1998
\(^5\) Including plea agreements in 1999
\(^6\) “Påtaleunnlatelse” is a legal term in Norway.
\(^7\) Including penalty notices in 1999

Table 1A. Decisions on criminal foreign bribery cases (1999 to December 2016)
controls provisions of the FCPA are not
of paragraph 69 of Norway’s CPA. A decision of "påtaleunnlatelse" is a penal
r of administrative and civil actions of the US Department of Justice and the US Securities and Exchange
- imposed
rt judgement under paragraph 258 of the CPA
G. The number of sanctions relates to cantonal foreign bribery cases as far as reported
ctions,

<p>| | | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>South Africa</td>
<td>.54</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Spain</td>
<td>2.02</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Sweden</td>
<td>1.18</td>
<td>6</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Switzerland²</td>
<td>1.97</td>
<td>6</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>Turkey</td>
<td>.99</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>3.47</td>
<td>12</td>
<td>3 (+2 DPAs)</td>
<td>7</td>
</tr>
<tr>
<td>United States³</td>
<td>9.51</td>
<td>81 (+1 DPA/NPA)</td>
<td>42 (+67 DPAs/NPAs³)</td>
<td>4</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>70.98</td>
<td>443 persons sanctioned, including plea agreements and agreed sanctions</td>
<td>158 legal persons sanctioned, including plea agreements and DPAs/NPAs</td>
<td>62</td>
</tr>
</tbody>
</table>

1. 2016 export data provided by the OECD Economics Directorate.
2. Sanctions ordered by the application of paragraph 153a of the German Code of Criminal Procedure.
3. In Germany, the liability of legal persons is an administrative liability but legal persons are sanctioned in connection with a criminal offence in the context of a criminal case.
4. The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.
5. The applicable procedure is called “patteggiamento”.
6. Prosecutorial decisions of "påtaleunnlatelse" taken in application of paragraph 69 of Norway’s CPA. A decision of "påtaleunnlatelse" is a penal sanction according to Norwegian Penal law and implies an admission of guilt from the accused person. There are no monetary sanctions, confiscation measures, or prison sentences attached to these decisions.
7. These legal persons have been sanctioned (to both a fine and confiscation measures) through penalty notices under paragraph 258 of the CPA without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.
8. In Switzerland, data are not collected at the federal level, and the Office of the Attorney General of Switzerland (OAG) does not have the authority to require the cantons to report the relevant data to the OAG. The number of sanctions relates to cantonal foreign bribery cases as far as reported by the competent cantonal authorities (and therefore known at the federal level). In addition, the numbers reported here do not take into account the exemption from punishment according to Art. 53 of the Swiss Criminal Code (SCC) that are a means of dismissing proceedings.
9. This row records the number of criminal cases prosecuted by the US Department of Justice either for violations of the anti-bribery provisions of the FCPA, or for violations of both the anti-bribery provisions and the books and records and internal controls provisions of the FCPA. Therefore, criminal sanctions that have been imposed exclusively for violations of the books and records and internal controls provisions of the FCPA are not captured.
10. “DPAs” and "NPAs" are "Deferred Prosecution Agreements" and "Non Prosecution Agreements" that have been entered into between the US Department of Justice and the persons sanctioned.

**Table 1B. Decisions on administrative and civil foreign bribery cases**²³
(1999 to December 2016)

<table>
<thead>
<tr>
<th>Party to the Convention</th>
<th>% share of world exports⁴</th>
<th>Number of individuals and legal persons sanctioned or found not liable</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Individual</td>
</tr>
<tr>
<td>Germany</td>
<td>7.85</td>
<td>2</td>
</tr>
<tr>
<td>Japan</td>
<td>4.21</td>
<td>0</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>3.47</td>
<td>0</td>
</tr>
<tr>
<td>United States³</td>
<td>9.51</td>
<td>51</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>---</td>
<td>53 (including settlements)</td>
</tr>
</tbody>
</table>

1. Only those countries that have reported additional sanctions ordered under administrative and/or civil procedures have been listed under the “Administrative and Civil Cases”.
2. 2016 export data provided by the OECD Economics Directorate.
3. This row records the number of administrative and civil actions of the US Department of Justice and the US Securities and Exchange Commission (SEC) that have led to sanctions either for violations of the anti-bribery provisions of the FCPA, or for violations of both the anti-bribery provisions and the books and records and internal controls provisions of the FCPA. Therefore, civil sanctions that have been imposed exclusively for violations of the books and records and internal controls provisions of the FCPA are not captured by the Table.
4. Several persons sanctioned in civil proceedings have also been sanctioned in criminal proceedings.
Table 2A. Decisions on criminal cases for other offences related to foreign bribery¹
(1999 to December 2016)

<table>
<thead>
<tr>
<th>Party to the Convention</th>
<th>% share of world exports²</th>
<th>Sanctioned</th>
<th>Acquitted</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Individual</td>
<td>Legal Person</td>
</tr>
<tr>
<td>Finland</td>
<td>0.43</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Germany</td>
<td>7.85</td>
<td>22 (+12 agreed sanctions)</td>
<td>3</td>
</tr>
<tr>
<td>Italy</td>
<td>2.73</td>
<td>6</td>
<td>2 (including plea agreement)</td>
</tr>
<tr>
<td>Netherlands</td>
<td>3.24</td>
<td>0</td>
<td>1 agreed sanction</td>
</tr>
<tr>
<td>Sweden</td>
<td>1.18</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Switzerland</td>
<td>1.97</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>3.47</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>United States</td>
<td>9.51</td>
<td>14</td>
<td>20 (including plea agreements +65 DPAs/NPAs)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>30.38</td>
<td>56</td>
<td>94</td>
</tr>
</tbody>
</table>

¹ Only those countries that have reported criminal sanctions for offences related to foreign bribery have been listed under the "Criminal Sanctions for Other Offences Related to Foreign Bribery". "Other offences related to foreign bribery" includes offences falling under Articles 7 (Money Laundering) and Article 8 (Accounting) of the Convention. Examples include books and records violations, failure to implement sufficient internal controls, abus de biens sociaux (misuse of company assets), and Untreue (breach of trust based on a failure to supervise).

² 2016 export data provided by the OECD Economics Department.

Table 2B. Decisions on administrative/civil cases for other offences related to foreign bribery¹
(1999 to December 2016)

<table>
<thead>
<tr>
<th>Party to the Convention</th>
<th>% share of world exports³</th>
<th>Sanctioned</th>
<th>Found not liable</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Individual</td>
<td>Legal Person</td>
</tr>
<tr>
<td>Germany</td>
<td>7.85</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>United States</td>
<td>9.51</td>
<td>61</td>
<td>138 (+3 DPAs/NPAs)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>17.36</td>
<td>65</td>
<td>141</td>
</tr>
</tbody>
</table>

¹ Only those countries that have reported administrative/civil sanctions for offences related to foreign bribery have been listed under the "Administrative/Civil Sanctions for Other Offences Related to Foreign Bribery". "Other offences related to foreign bribery" include offences falling under Articles 7 (Money Laundering) and Article 8 (Accounting) of the Convention. Examples include books and records violations, failure to implement sufficient internal controls, abus de biens sociaux (misuse of company assets), and Untreue (breach of trust based on a failure to supervise).

³ 2016 export data provided by the OECD Economics Department.
D. Special focus: International co-operation in anti-bribery law enforcement

1. Article 9 of the Convention commits Parties to providing “prompt and effective legal assistance to another Party.” 4 Foreign bribery enforcement actions undertaken in 2016 suggest that such co-operation is becoming a reality. OECD data on completed cases that ended with a sanction for foreign bribery show that, for the 26 bribery schemes 5 in the database, 11 were based on investigations that benefitted from publicly-acknowledged co-operation across international borders.

2. More insights on international co-operation in foreign bribery law enforcement can be found in the detailed press releases available on the websites of the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC). This information suggests that, at least for these two law enforcement authorities, co-operation has increased dramatically over the last 10 years. In 2016, 42% of the bribery schemes whose resolutions are described on the DOJ and SEC websites involved international co-operation. This percentage is calculated by examining all the explicit acknowledgements of foreign law enforcement authorities contained in the DOJ and SEC press releases for 2016. The full list of the 2016 press releases’ references to foreign law enforcement authorities and financial supervisory authorities is presented in Box 2. Of the 31 foreign, cooperating government institutions that were mentioned in these press releases, 13 were judicial/enforcement institutions and 18 were financial supervisors. 6 This is in marked contrast to the situation in 2006. In that year, DOJ and SEC press releases for only 1 out of 13 foreign bribery schemes sanctioned that year acknowledged foreign law enforcement authorities. 7

3. This co-operation is based on both on formal institutional arrangements for the coordination of law enforcement activities 8 (e.g. signing mutual legal assistance treaties) and on the human/social connections across the various law enforcement communities in order to facilitate contacts and communication. The WGB hosts biannual meetings of law enforcement authorities that support both formal and informal co-operation.

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4 The complete text of Article 9 is: “1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance. 2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention. 3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.”

5 The Oxford English Dictionary defines ‘scheme’ as a “systematic plan or arrangement for attaining some particular object or putting a particular idea into effect.” Foreign bribery can involve multiple individuals and corporate defendants, various intermediaries and offshore transactions. A bribery scheme refers to what may be a series of crimes by various natural and legal persons (possibly involving separate prosecutions and resolutions) that are linked by planning, coordination and/or objectives, https://en.oxforddictionaries.com/definition/scheme.

6 These numbers may not add up to the references in Box 2 because several law enforcement agencies and financial supervisory authorities are mentioned several times in the press releases.

7 The references in this press release were to the Costa Rican Office of the Attorney General and the Fiscalia de Delitos Economicos, Corrupcion y Tributarios in Costa Rica.

4. Other examples of cross-jurisdiction interaction among law enforcement authorities can be found in the multi-jurisdictional bribery cases involving foreign bribery. A multi-jurisdictional case is one in which prosecutions for foreign bribery are brought in more than one country for related acts of foreign bribery; i.e. in relation to the same bribery scheme. Of the 6 multi-jurisdictional cases in the WGB database, 4 involved at least one resolution in one or more jurisdictions in 2016. The other two involved first resolutions in 2004 and 2008. These 6 cases related to foreign bribery or associated offences by very large multinational enterprises with extensive, global networks for marketing and production. In all six cases, the bribe amounts were large and resolutions totalled in the hundreds of millions of USD. All six of these cases involved US enforcement authorities. Brazil, Germany and Switzerland were each involved in two cases and Norway, Netherlands and the United Kingdom in one.

5. With respect to co-operation across jurisdictions, the multi-jurisdictional cases raise complex issues relating to how investigations and prosecutions in different jurisdictions are to be coordinated. For example:

- How do the procedural rules for investigations, information sharing and attorney-client privilege interact across jurisdictions?
- How are financial and non-financial sanctions determined and shared between jurisdictions?

For the time being, publicly available information suggests that these jurisdictions have been able to address coordination issues, presumably by relying on a spirit of co-operation and existing legal principles. However, further consideration of the law enforcement issues raised by multi-jurisdictional cases will be followed closely by the WGB as part of its ongoing monitoring work.

6. The activities of the WGB facilitate international co-operation in law enforcement. For the last ten years, the law enforcement officials of the members of the Working Group on Bribery have been meeting twice a year in a confidential setting to share experiences and information on anti-foreign bribery enforcement. In these meetings, practitioners discuss practical challenges encountered in investigating and prosecuting foreign bribery, share good practices and nurture social relationships that can enhance international co-operation.

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9 For the 2016 cases, one multi-jurisdictional case involved one resolution in the Netherlands and 3 resolutions in the United States in 2016; a second multijurisdictional case involved one resolution in Brazil and 2 resolutions in the United States in 2016; a third case involved 2 resolutions in Germany and 1 in the United States in 2016 (and in the United Kingdom a resolution in 2017). A fourth multijurisdictional case involved two resolutions in Brazil, 1 in Switzerland and 1 in the United States in 2016 (this case also involved 2 resolutions in the United States in 2017).

10 Defendants in a Norwegian company's foreign bribery scheme were resolved in Norway in 2004 and in United States in 2006.

11 Defendants in a German companies' foreign bribery scheme were resolved in the United States in 2008, in Germany between 2007 and 2011, and in Switzerland in 2013.

12 This report was prepared with the valuable research assistance of Sara Brimbeuf working as an Intern for the OECD Anti-Bribery Division.
### Box 2. International co-operation in FCPA enforcement – Foreign law enforcement and financial regulatory institutions whose co-operation is acknowledged in 2016 DOJ and SEC FCPA press releases

<table>
<thead>
<tr>
<th>Country</th>
<th>Institutions/Authorities</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Austria</strong></td>
<td>Financial Market Authority. Law enforcement colleagues.</td>
</tr>
<tr>
<td><strong>Belgium</strong></td>
<td>Law enforcement colleagues.</td>
</tr>
<tr>
<td><strong>Canada</strong></td>
<td>Royal Canadian Mounted Police.</td>
</tr>
<tr>
<td><strong>Cayman Islands</strong></td>
<td>Monetary Authority.</td>
</tr>
<tr>
<td><strong>Cyprus</strong></td>
<td>Securities and Exchange Commission.</td>
</tr>
<tr>
<td><strong>Denmark</strong></td>
<td>State Prosecutor.</td>
</tr>
<tr>
<td><strong>Estonia</strong></td>
<td>Finantsinspektsioon (Financial Supervisory Authority)</td>
</tr>
<tr>
<td><strong>France</strong></td>
<td>Financial Markets Authority. Law enforcement colleagues.</td>
</tr>
<tr>
<td><strong>Finland</strong></td>
<td>Financial Supervisory Authority.</td>
</tr>
<tr>
<td><strong>Gibraltar</strong></td>
<td>Financial Services Commission</td>
</tr>
<tr>
<td><strong>India</strong></td>
<td>Securities and Exchange Board</td>
</tr>
<tr>
<td><strong>Ireland</strong></td>
<td>Law enforcement colleagues.</td>
</tr>
<tr>
<td><strong>Latvia</strong></td>
<td>Financial and Capital Market Commission; Corruption Prevention and Combating Bureau.</td>
</tr>
<tr>
<td><strong>Liechtenstein</strong></td>
<td>Federal Market Authority.</td>
</tr>
<tr>
<td><strong>Luxembourg</strong></td>
<td>Law enforcement colleagues.</td>
</tr>
<tr>
<td><strong>Malta</strong></td>
<td>Financial Services Authority. Judicial authorities.</td>
</tr>
<tr>
<td><strong>Mexico</strong></td>
<td>Office of the Attorney General.</td>
</tr>
<tr>
<td><strong>Netherlands</strong></td>
<td>OM (Netherlands Prosecution Service)</td>
</tr>
<tr>
<td><strong>Portugal</strong></td>
<td>Security Market Commission</td>
</tr>
<tr>
<td><strong>South Africa</strong></td>
<td>Financial Services Board.</td>
</tr>
<tr>
<td><strong>Spain</strong></td>
<td>Comisión Nacional del Mercado de Valores.</td>
</tr>
<tr>
<td><strong>Sweden</strong></td>
<td>Prosecution Authority</td>
</tr>
<tr>
<td><strong>United Kingdom</strong></td>
<td>Financial Conduct Authority; Serious Fraud Office. Law enforcement colleagues.</td>
</tr>
<tr>
<td><strong>Uruguay</strong></td>
<td>Banco Central del Uruguay,</td>
</tr>
</tbody>
</table>

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Footnote 13: The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognizes the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of United Nations, Turkey shall preserve its position concerning the “Cyprus’ issue”.

Footnote by all the European Union Member States of the OECD and the European Commission: The Republic of Cyprus is recognized by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.
ANNEX ON METHODOLOGY

Collection and presentation of enforcement data

Tables 1A and 1B present all data that the Parties to the Anti-Bribery Convention have agreed to provide on a mandatory basis as part of the data collection exercise described above. It shows the number of criminal cases (in Table 1A) and administrative and civil cases (in Table 1B) of foreign bribery that have resulted in a final court disposition, such as a criminal conviction or acquittal, or similar findings under an administrative procedure. The tables report the number of sanctions that have been imposed on individuals and entities in criminal, administrative and civil proceedings for foreign bribery and for failures to prevent a proven case of foreign bribery in the 41 Parties to the Anti-Bribery Convention from its entry into force to December 2016. The following additional points about these tables should be noted:

- **Agreements between law enforcement authorities and the accused.** The tables also include data provided on a voluntary basis by countries concerning the number of foreign bribery cases that have been resolved through an agreement between law enforcement authorities and the accused person or entity, with or without court approval. In some cases the proceedings may have been terminated or deferred for a certain period of time on condition that the accused person agrees to certain conditions, such as implementation of corporate reforms, the payment of fines, restitution, and/or full co-operation in the investigation of others individuals or companies allegedly involved in the same case.

- **What is not included in the tables.** The tables do not include other offences that might also apply to this form of conduct in certain circumstances, such as trading in influence, United Nations embargo violations, private-to-private bribery or to obtain a benefit outside of an international business transaction. They also do not record the number of sanctions that may have been ordered in the 41 Parties against foreign public officials for receiving bribes, as this offence is not covered by the Convention.

Tables 2A and 2B present the enforcement data provided on a voluntary basis by Parties regarding sanctions in criminal, administrative and civil cases for other offences related to foreign bribery. These include non-bribery offences that are covered by Articles 7 (Money Laundering) and 8 (Accounting) of the Convention. The specific offences vary by jurisdiction, but all relate to misconduct associated with foreign bribery in international business transactions, such as books and records violations, failure to implement internal controls, *abus de biens sociaux* (misuse of company assets), and breach of trust based on a failure to supervise. As with Tables 1A and 1B, this data set does not cover other offences that fall outside the Convention, such as trading in influence, United Nations embargo violations, or bribery to obtain a benefit outside of an international business transaction.

Supplementary information about the methodology used to collect the data on enforcement is available here: [www.oecd.org/daf/anti-bribery/Methodology-Enforcement-Data.pdf](http://www.oecd.org/daf/anti-bribery/Methodology-Enforcement-Data.pdf).
2015

Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities

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CROSS-BORDER CORRUPTION ENFORCEMENT:  
A CASE FOR MEASURED COORDINATION  
AMONG MULTIPLE  
ENFORCEMENT AUTHORITIES

Jay Holtmeier*

INTRODUCTION

The steady increase in cooperation and information sharing among governments is a trend commonly noted in discussions of current anticorruption enforcement.1 There is no shortage of evidence to support this observation. In 2013 and 2014 alone, the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) recognized the cooperation and assistance of foreign law enforcement authorities in at least twenty-three actions brought under the U.S. Foreign Corrupt Practices Act (FCPA or “the Act”).2 U.S. enforcement authorities—once the world’s primary anticorruption enforcers—increasingly can and do rely on the help of their international counterparts and are pursuing more investigations that run concurrently with, or in the wake of, investigations initiated by foreign authorities.3

This increase in cross-border information sharing and enforcement is unsurprising given that a growing number of countries are entering the

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3. See WILMERHALE LLP, supra note 1.
anticorruption fray as independent players, either by passing antibribery laws or by stepping up enforcement of existing laws. Of the forty-one present members of the Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention” or “the Convention”), which requires state signatories to implement legislation criminalizing bribery of foreign public officials, only twenty member states had such laws on the books at the time the Convention came into force in 1999—the other twenty-one have passed such legislation since then. The number of non-U.S. enforcement actions concerning bribery of foreign officials has more than doubled since 2012, and, in 2014, for the first time, such actions outnumbered U.S. enforcement actions. The United Kingdom has recently become an active prosecutor of foreign bribery, passing the U.K. Bribery Act in 2010 and playing an increasingly aggressive and effective role in enforcement through its Serious Fraud Office (SFO).

Enforcement in other countries has followed a similar trajectory, and not only in the developed Western world. In mid-2013, Brazil entered the foreign anticorruption arena with the enactment of the Clean Company Act, which prohibits bribery of foreign officials by companies that operate in Brazil as well as by their affiliates around the world. In 2015, Brazil filed charges against nearly forty individuals in connection with investigations of corruption at Petroleo Brasileiro S.A. (“Petrobras”), a Brazilian energy company, and Embraer S.A., a Brazilian aircraft manufacturer—both of which are also reportedly under investigation in the United States for FCPA violations.

China, another relatively new player in the anticorruption enforcement arena, amended its corruption law in 2011, making it illegal to bribe government officials overseas in an effort to secure “improper” commercial benefits. In 2014, Chinese authorities made headlines by fining the

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11. Zhong hua ren min gong he guo xing fa xiu zheng an (ba) (中华人民共和国刑法修正案(八)) [Eighth Amendment to the Criminal Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong.,
Chinese subsidiary of British pharmaceutical company GlaxoSmithKline plc (GSK) a record three billion yuan (approximately $489 million) for allegedly bribing doctors to prescribe GSK drugs. In addition to bringing criminal charges against GSK, Chinese authorities brought criminal charges against five individuals, including former GSK China executive Mark Reilly and four other managers, all of whom received prison sentences. U.S. authorities, who are also reportedly investigating GSK, have not taken action at this time.

As these and other foreign authorities increasingly investigate and proscribe bribery, concurrent investigations and prosecutions by multiple countries, once considered a “trend,” will become a fixture in the global anticorruption enforcement landscape. In some sense, this outcome is precisely what the United States and anticorruption organizations such as the OECD and Transparency International (TI) have advocated for many years: with multiple countries starting to pull their weight in efforts to root out and punish corrupt practices, the international community is moving toward developing a coordinated effort to deter bribery in international business. As more and more countries enter the anticorruption enforcement arena, however, it will become increasingly common that one incident of alleged misconduct will trigger years of parallel or successive enforcement actions and, in some cases, duplicative penalties by different authorities. When overlapping jurisdiction exists, and countries proceed in isolation, what can result is an unfair, unpredictable, and overly punitive regime that, in the long run, may prove counterproductive.

This Article takes stock of how international anticorruption enforcement authorities have addressed these issues and makes proposals for reducing the potential adverse effects of multijurisdictional prosecutions. Part I provides an overview of multinational antibribery enforcement efforts. Part II discusses different approaches to multinational enforcement that authorities have taken to date. These approaches suggest that some degree of coordination with respect to resolutions is the norm, although how and the extent to which different enforcers cooperate with one another varies widely.
Part III explores the primary policy reasons counseling against concurrent or successive anticorruption enforcement actions and in favor of a single resolution approach. Part IV examines some arguably more structured approaches that have been adopted to address overlapping jurisdiction in other contexts, both international and domestic. Finally, this Article concludes by proposing some general policy recommendations and guidelines that might help mitigate the risks and potential adverse effects present in today’s globalized, multinational enforcement regime.

I. MULTIJURISDICTIONAL ANTIBRIBERY ENFORCEMENT: A PRIMER

Laws prohibiting foreign bribery are extraterritorial by nature, aiming to regulate conduct that occurs abroad, within a foreign country’s borders. Such laws thus invite multijurisdictional enforcement, as at least two (if not more) sovereign nations will typically have some interest in the alleged crime. At the same time, virtually all countries have domestic bribery laws prohibiting bribery of local officials (and, in many cases, nongovernment parties). This part considers the various reasons why multiple countries may seek to prosecute the same instance of bribery and provides some relevant examples.

A. Interests of Both Supply- and Demand-Side Jurisdictions in Enforcing Anticorruption Laws

By its nature, any given instance of foreign bribery involves at least two countries: the bribe-giver’s home country (the supply-side jurisdiction) and the bribe-receiver’s home country (the demand-side jurisdiction). Several other jurisdictions also may have an interest in a particular action. For example, a bribe may involve one or more foreign subsidiaries of a supply-side country’s company, or perpetrators of the unlawful activity may include various foreign third-party companies or citizens.

Historically, international corruption has been adjudicated primarily by the supply-side jurisdiction, with the United States leading the charge since the 1977 enactment of the FCPA. Supply-side countries have a self-interest in policing those companies and individuals that fall under their jurisdiction. In the United States, for example, the FCPA was passed in the wake of both the Watergate political scandal and an SEC report that revealed the prevalence of U.S. companies engaging in bribery and


corruption overseas.\textsuperscript{18} Chief among the Act’s purposes was to restore and maintain U.S. integrity and credibility both at home and abroad.\textsuperscript{19}

In addition to the supply-side interest in maintaining integrity in the global marketplace, supply-side countries generally have an interest in deterring activity that harms their own economy and citizens. Bribery is generally thought to undermine employee confidence in the company’s management and to foster an atmosphere that invites other corporate misconduct such as embezzlement and financial fraud.\textsuperscript{20} Once the misconduct becomes public, the company faces negative press and financial harm, which in turn harms its shareholders. To the extent that a supply-side company wins business from a competitor from the same country, the country’s interest in fair competition for participants in its own economy is damaged.\textsuperscript{21} The United States and other supply-side jurisdictions thus believe they have an interest in making sure their corporate citizens comply with their laws.\textsuperscript{22}

Ensuring compliance also is an important interest for the countries whose public officials have been bribed. Demand-side jurisdictions tend to be in the developing world, and they arguably bear the brunt of the harm caused by foreign corruption. Citizens of these countries arguably suffer most because it is their governments that have been corrupted, their local markets deprived of honest competition, their national public works projects compromised, and their security jeopardized as ill-gotten funds are funneled into other criminal endeavors.\textsuperscript{23}

Demand-side jurisdictions also have a particular interest in defending political integrity and credibility by enforcing their own antibribery laws. By holding foreign companies and domestic public officials accountable for corruption, these countries benefit from demonstrating to the market the legitimacy and enforceability of their laws. And, by maintaining a stable marketplace where corruption laws are enforced, demand-side countries can create a competition-friendly environment, which leads to their further economic development.\textsuperscript{24}

\textbf{B. “Carbon Copy” Prosecutions}

Given the multiplicity of parties with a potential interest in prosecuting any given foreign corrupt payment, it is not surprising that enforcement actions by multiple authorities related to the “same” bribery scheme can

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{18} Mike Koehler, \textit{The Story of the Foreign Corrupt Practices Act}, 73 Ohio St. L.J. 930, 932 (2012).
\item \textsuperscript{19} See U.S. DEP’T OF JUSTICE & SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 2–3 (2012) [hereinafter RESOURCE GUIDE].
\item \textsuperscript{20} Id. at 3.
\item \textsuperscript{21} See Bruce W. Klaw, \textit{A New Strategy for Preventing Bribery and Extortion in International Business Transactions}, 49 Harv. J. Legis. 303, 307–08 (2012).
\item \textsuperscript{22} See id.
\item \textsuperscript{24} Cf. id.
\end{itemize}
\end{footnotesize}
come in many forms. The most basic—and for reasons explained below, potentially most problematic—of these is the “carbon copy” prosecution. This term, coined by Andrew S. Boutros and T. Markus Funk in their article, "Carbon Copy" Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World, describes successive prosecutions by multiple sovereigns for the same or similar conduct. In the paradigmatic example of a “carbon copy” prosecution, a company enters into a settlement with one jurisdiction pursuant to which the company admits that it paid bribes; subsequently, it is subject to investigation, prosecution, and/or penalties in another jurisdiction on the basis of these admissions.

The main advantage for a government bringing a “carbon copy” prosecution is that, as the second enforcer, it can piggyback off of the efforts of the original jurisdiction’s prosecutors. This can actually promote anticorruption enforcement efforts, particularly in demand-side countries that have fewer law enforcement resources and are often less able to undertake an extensive investigation. The drawbacks of these prosecutions, as several scholars and practitioners have observed, is that such prosecutions potentially violate the principles of double jeopardy by imposing duplicative penalties for the same conduct.

Two prominent examples of duplicative cases in the FCPA context are the TSKJ/Bonny Island prosecutions and the Panalpina prosecutions. In 2010, the United States settled FCPA charges against four companies—Kellogg, Brown & Root LLC (KBR, a Halliburton subsidiary); Eni/Snamprogetti Netherlands BV; JGC Corporation; and Technip, S.A. (collectively, “the TSKJ consortium”)—arising out of a joint venture that allegedly bribed Nigerian public officials in exchange for contracts to build liquefied natural gas facilities on Bonny Island in Nigeria. The DOJ and SEC recovered $1.5 billion in FCPA-related penalties and disgorgement from the TSKJ consortium.

Concurrently with the U.S. investigation, Nigeria’s Economic and Financial Crimes Commission (EFCC) also opened an investigation against...
the consortium and associated persons for the same corruption scheme.\textsuperscript{32} The Nigerian government subsequently entered into settlements with the four companies in exchange for approximately $126 million in fines and disgorgement.\textsuperscript{33} In addition, in 2011, the U.K. High Court issued to M.W. Kellogg Limited (MWKL), KBR’s U.K.-based wholly owned subsidiary, a civil recovery order for over £7 million (approximately $10.8 million), representing the amount of the “share dividends payable from profits and revenues generated by contracts obtained by bribery and corruption undertaken by MWKL’s parent company and others.”\textsuperscript{34} Additionally, in 2014, the four consortium members agreed to pay penalties totaling $22.7 million to the African Development Bank for bribes related to the same contracts.\textsuperscript{35} Finally, in July 2013, an Italian court fined Saipem SA (into which Snamprogetti merged in 2006) $780,000 and ordered the confiscation of €24.5 million (approximately $27.4 million) of assets after finding the company guilty of corruption in connection with the Bonny Island contracts.\textsuperscript{36}

The Panalpina cases in 2010 and 2011 followed a similar pattern. In those actions, U.S. authorities settled allegations that the global freight forwarding company, Panalpina World Transport (Holdings) Ltd., along with five oil-and-gas service companies and subsidiaries, engaged in a scheme to pay bribes to foreign officials in numerous jurisdictions,

\begin{flushright}
\textsuperscript{32} See Trace Compendium, supra note 10 (search entry for “namprogetti” and select “Eni / Namprogetti”).
\textsuperscript{34} Press Release, Serious Fraud Office, MW Kellogg Ltd to Pay £7 Million in SFO High Court Action (Feb. 16, 2011), https://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2011/mw-kellogg-ltd-to-pay-7-million-in-sfo-high-court-action.aspx [http://perma.cc/8UCD-NS3X]. Per this press release, the decision to require restitution of the corruptly obtained funds was reached by the SFO “working in partnership with the US Department of Justice” and reflected “the finding that MWKL was used by the parent company and was not a willing participant in the corruption.” Id.
\end{flushright}
including Nigeria, on behalf of customers. The Panalpina defendants paid over $230 million in penalties and disgorgement. Subsequently, in early 2011, several of the companies charged in the United States reportedly paid an additional $18.8 million to settle charges brought by the Nigerian EFCC and Attorney General’s Office based on the alleged bribery of the Nigerian officials.

Insofar as the multiple settlements in the Bonny Island and Panalpina cases reportedly premised liability on the same bribes paid to the same officials in connection with the same contracts, they represent true “carbon copy” prosecutions. Publicly available information does not suggest to what extent, if any, the penalties imposed in one jurisdiction played a role in the calculation of penalties imposed by other authorities.

These two sets of cases thus highlight fundamental issues that can arise when an inherently multinational crime, such as foreign bribery, is subject to independent enforcement by multiple sovereigns. Namely, the cases illustrate the issues of (1) how to weigh the law enforcement interests of the various involved states against one another, and (2) how to address the inherent unfairness and unpredictability of a system that contains no check on the imposition of multiple penalties in successive enforcement actions, by different authorities, for the same conduct. Which and whose interests should predominate in any given case? Should authorities in demand-side countries ever defer to investigations and penalties collected by supply-side jurisdictions or jurisdictions with only a tenuous link to the conduct in question? Should countries like the United States defer to foreign bribery investigations of non-U.S. companies conducted by the home jurisdiction or the demand-side jurisdiction, even when penalties imposed by those jurisdictions may not be viewed as sufficient to deter future misconduct or to disgorge ill-gotten gains?

Not all “carbon copy” prosecutions are brought by demand-side countries seeking to take advantage of investigations conducted by resource-rich authorities abroad. There have been a number of cases brought by U.S. enforcement authorities following settlements by companies with foreign governments for related conduct. In nearly all of these cases, however, U.S. authorities reportedly accounted for penalties paid to (or, in some cases, anticipated to be paid to) foreign enforcement authorities by the defendant-company when calculating monetary sanctions under settlement or plea agreements.


38. Id. The companies agreed to pay a total of approximately $156.6 million in criminal penalties. Id. In SEC actions, they paid civil disgorgement, interest, and penalties totaling approximately $80 million. Id.

39. Noble Corp. said it would pay $2.5 million; Royal Dutch Shell, $10 million; and Tidewater, $6.3 million. See Trace Compendium, supra note 10 (search entries for “Noble Corporation,” “Royal Dutch Shell,” and “Tidewater”).
For example, in 2014, the DOJ and SEC settled allegations that executives at ZAO Hewlett-Packard A.O. ("HP Russia") created a secret slush fund to bribe Russian government officials.\footnote{See Press Release, U.S. Dep’t of Justice, Hewlett-Packard Russia Agrees to Plead Guilty to Foreign Bribery (Apr. 9, 2014), http://www.justice.gov/opa/pr/hewlett-packard-russia-agrees-plead-guilty-foreign-bribery [http://perma.cc/6XTQ-9AU3]; Press Release, SEC, SEC Charges Hewlett-Packard with FCPA Violations (Apr. 9, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541453075#.VPcRtflWqV A [http://perma.cc/PHM7-U2CU].} In its plea agreement with HP Russia, the DOJ identified that an anticipated payment in connection with an ongoing related proceeding in Germany, as well as payments by HP Russia’s parent company (Hewlett-Packard, Inc.) to the SEC, were among the factors justifying a downward departure from the recommended fine range.\footnote{Plea Agreement at 16, United States v. Zao Hewlett-Packard A.O., No. CR-14-201 (N.D. Cal. Apr. 9, 2014), http://www.justice.gov/criminal/fraud/fcpa/cases/hewlett-packard-zao/hp-russia-plea-agreement.pdf [http://perma.cc/2SXC-DS59]. The SEC likewise applied a credit against its SEC disgorgement figure in its settled administrative proceeding against Hewlett-Packard for an administrative forfeiture undertaken by the DOJ in connection with the criminal resolution by Hewlett-Packard’s Mexican subsidiary. See Cease-and-Desist Order, In re Hewlett-Packard Co., No. 71916 (SEC Apr. 9, 2014), https://www.sec.gov/litigation/admin/2014/34-71916.pdf [http://perma.cc/K9TU-LW3R].} While the $58.8 million penalty was significantly less than the $87 million to $174 million fine range suggested by the DOJ’s calculation, the DOJ’s papers did not specify how the “credit” for these other penalties was determined or how it was apportioned between the German and SEC proceedings.\footnote{See Press Release, U.S. Dep’t of Justice, ADM Subsidiary Pleads Guilty to Conspiracy to Violate the FCPA (Dec. 20, 2013), http://www.justice.gov/opa/pr/adm-subsidiary-pleads-guilt-conspiracy-violate-foreign-corrupt-practices-act [http://perma.cc/T4VC-LAMP].}


In 2011, Aon Corporation, a publicly traded Delaware company, entered into a nonprosecution agreement (NPA) with the DOJ. The company paid a
$1.76 million fine to resolve FCPA charges for alleged improper payments by Aon’s U.K. subsidiary, Aon Limited, to Costa Rican officials. The NPA cited a previous fine of £5.25 million paid by an Aon subsidiary to the United Kingdom’s Financial Services Authority (FSA) covering conduct in Bangladesh, Bulgaria, Indonesia, Myanmar, the United Arab Emirates, and Vietnam in 2009, and “the FSA’s close and continuous supervisory oversight over Aon Limited,” as factors informing the financial penalty and the DOJ’s decision not to prosecute. But publicly available information still left somewhat unclear exactly how the U.K. and U.S. authorities’ separate—though apparently coordinated—penalties corresponded to which conduct in which geographic areas.

In 2010, French telecommunications company Alcatel-Lucent S.A. (“Alcatel-Lucent”) and three of its subsidiaries entered into a deferred prosecution agreement (DPA) and other related agreements with the DOJ and paid a total of $92 million in criminal penalties and approximately $45.4 million in disgorgement and prejudgment interest to the SEC to settle a U.S. investigation into alleged illicit payments in Costa Rica, Honduras, Malaysia, and Taiwan. The DPA indicated that the fine imposed was appropriate given, among other things, “penalties related to the same conduct in Costa Rica,” referencing $10 million paid by Alcatel-Lucent earlier that year to settle civil claims in a corruption case brought by Costa Rican authorities. Again, it is unclear how the $10 million was factored into the overall DOJ penalty, which fell within the $86.5 to $173.2 million


47. The FSA has since been restructured and replaced by the Financial Conduct Authority (FCA) as the primary financial regulatory body in the United Kingdom. History of the FCA, FCA (Jan. 28, 2015), http://www.fca.org.uk/about/history [http://perma.cc/PT7E-PY5W].


49. See id.

50. Press Release, U.S. Dep’t of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), http://www.justice.gov/opa/pr/alcatel-lucent-sa-and-three-subsidiaries-agree-pay-92-million-resolve-foreign-corrupt [http://perma.cc/DRS5-UGWG]. Alcatel-Lucent was charged with one count of violating the internal control provisions of the FCPA and one count of violating the books and records provisions of the FCPA. Id. Alcatel-Lucent agreed to resolve the charges by entering into a DPA for a term of three years. Id. The DOJ also filed criminal informations charging three subsidiaries—Alcatel-Lucent France S.A., Alcatel-Lucent Trade International A.G., and Alcatel Centroamerica S.A.—with conspiring to violate the antibribery, books and records, and internal controls provisions of the FCPA. Id. Each of the three subsidiaries agreed to plead guilty to the charges. Id. The $92 million penalty was imposed pursuant to the DPA with the parent company. See Deferred Prosecution Agreement at 7, United States v. Alcatel-Lucent, No. 10-cr-20907 (S.D. Fla. Feb. 22, 2011).

fine range calculated by the government.\textsuperscript{52} The $10 million fine was not expressly taken into consideration in the SEC matter.\textsuperscript{53}

In 2004, Norwegian authorities issued penalty notices to Statoil ASA ("Statoil") for approximately $3 million for trading-in-influence violations (a lesser charge than foreign bribery, with milder penalties under Norwegian law).\textsuperscript{54} Concurrent with the Norwegian investigation, the DOJ and SEC opened investigations into Statoil for violations of the FCPA. Statoil settled with both agencies in 2006.\textsuperscript{55} In light of the fine paid to Norwegian authorities, the DOJ reduced the ordered penalty of $10.5 million by $3 million.\textsuperscript{56} The SEC required Statoil to pay disgorgement of $10.5 million, not adjusted to reflect the Norwegian penalties.\textsuperscript{57}

This "offsetting" approach somewhat reduces the problem of duplicative penalties, although in many cases it is unclear how the offset is calculated or what conduct is considered relevant. This approach also arguably alleviates concerns about protecting the interests of the demand-side country.\textsuperscript{58} It still leaves open, however, the question of whether a single investigation and resolution—by one authority, or jointly with multiple authorities—would better promote the goals of anticorruption legislation and fairness to the investigated companies, particularly where those companies are cooperating with the relevant authorities.

\section*{C. Other "Me Too" Prosecutions}

As a practical matter, the enforcement picture is even more complex than these examples suggest. Although it is certainly possible that the country where a bribe occurred and the country where the offenders reside will both look to exercise jurisdiction over a single matter, sometimes a single instance of bribery prosecuted by one country will become "the entry point to a much larger complex of corruption-related offenses, typically spanning an extended period of time and affecting multiple jurisdictions."\textsuperscript{59} In that case, multiple prosecutions by different enforcement authorities may target

\begin{footnotesize}
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\item[52.] Id.
\item[54.] Deferred Prosecution Agreement at 6, United States v. Statoil, ASA (S.D.N.Y. Oct. 10, 2006).
\item[56.] See id.; Deferred Prosecution Agreement, supra note 54, at 14–15.
\item[57.] Cease-and-Desist Order, In re Statoil, ASA, No. 54599 (SEC Oct. 13, 2006). The SEC presumably would argue that the lack of a civil penalty was the "credit" for penalties paid to the DOJ and/or Norwegian authorities, and the disgorgement is simply the return of ill-gotten profits. The reality, however, is that the company ultimately paid for the same conduct to three different authorities.
\item[58.] See supra Part I.A.
\item[59.] JACINTA ANYANGO ODUOR ET AL., LEFT OUT OF THE BARGAIN: SETTLEMENTS IN FOREIGN BRIBERY CASES AND IMPLICATIONS FOR ASSET RECOVERY 60 (2014).
\end{itemize}
\end{footnotesize}
aspects of a bribery scheme in different places or at different times.\textsuperscript{60} Thus, the different prosecutions may be related and may overlap to a degree, but may not all punish the same alleged misconduct.

One example of this phenomenon is the investigation of Siemens AG (“Siemens”), which settled with both U.S. and German authorities in 2008.\textsuperscript{61} Pursuant to the U.S. settlement, Siemens and three of its subsidiaries paid a total of $800 million to resolve allegations with the DOJ and SEC ($450 million in criminal fines to the DOJ\textsuperscript{62} and $350 million in disgorgement to the SEC).\textsuperscript{63} The conduct generally arose out of illegal payments made in Latin America, the Middle East, and Bangladesh.\textsuperscript{64} Siemens paid approximately $569 million more to settle charges with the Munich Prosecutor’s office.\textsuperscript{65} The German charges involved a different set of corrupt acts in the medical and transportation sectors in Spain, Venezuela, and China.\textsuperscript{66}

Over the five years following the U.S. and German settlements, Siemens also resolved actions with a number of authorities in other countries, including: (1) a $100 million settlement with the World Bank to resolve fraud allegations against a Russian affiliate of Siemens;\textsuperscript{67} (2) a $46.5 million settlement with the Nigerian EFCC related to criminal charges against Siemens and its subsidiary, Siemens Ltd. Nigeria;\textsuperscript{68} (3) a €270 million settlement with Greece to resolve multiple civil and criminal complaints involving bribery in the Greek telecommunications market;\textsuperscript{69} and (4) orders by the Swiss Federal Prosecutor’s Office to forfeit $65 million of “dirty money” related to the slush fund scandal and $10.6 million in profits obtained by Siemens’ Swedish subsidiary after channeling bribe money through Swiss accounts to win orders from a Russian gas pipeline project.\textsuperscript{70}

\textsuperscript{60} Id.
\textsuperscript{62} Id.
\textsuperscript{64} ODOUR ET AL., supra note 59, at 132 & n.219.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id. at 133.
\textsuperscript{68} See Trace Compendium, supra note 10 (search entry for “Siemens AG”).
\textsuperscript{69} See ODOUR ET AL., supra note 59, at 133–34.
\textsuperscript{70} Matthew Allen, Swiss Seize CHF60 Million Corporate Bribes, SWISSINFO.CH (Nov. 12, 2013), http://www.swissinfo.ch/eng/slush-funds_swiss-seize-chf60-million-corporate-bribes/37317030 [http://perma.cc/CLT3-8XV4]. Furthermore, prior to the headline-making settlements with U.S. and German authorities, Siemens and a subsidiary had entered into a plea bargain in Milan, agreeing to pay a €0.5 million fine and to give up €6.1 million of profit relating to contracts procured as a result of bribes paid by its executives to officials at state-owned Enelpower. ODOUR ET AL., supra note 59, at 132. Also, in 2007, Siemens entered into a separate agreement with the Munich prosecutor’s office for $287 million to
In another, more recent example, the United States brought a follow-on prosecution of Alstom S.A. (“Alstom”), a French power and transportation company, and its Swiss subsidiary, Alstom Network Schweiz AG (“Alstom Network”). In 2011, Alstom Network was subject to a summary punishment order issued by the Swiss Office of the Attorney General for failing to prevent the payment of bribes to foreign public officials in Latvia, Malaysia, and Tunisia. Under that order, Alstom was sentenced to a fine of 2.5 million Swiss francs and a compensatory penalty of 36.4 million Swiss francs. In addition, in 2012, Alstom Network and another Alstom subsidiary, Alstom Hydro France, were debarred for three years under a negotiated resolution agreement with the World Bank, pursuant to which the companies acknowledged making an improper payment of €110,000 to an entity controlled by a former Zambian senior government official for consultancy services in relation to a World Bank project. That agreement also included a restitution payment by the two companies totaling approximately $9.5 million.

In connection with the related prosecution brought by U.S. authorities, in 2014, Alstom and Alstom Network pleaded guilty and agreed to pay a record $772 million criminal fine to resolve charges related to a widespread scheme involving bribes paid to government officials in connection with power and transportation projects for state-owned entities in Indonesia, Egypt, Saudi Arabia, the Bahamas, and Taiwan. Alstom Grid Inc. and Alstom Power Inc., two U.S. subsidiaries, both entered into DPAs, admitting to charges that they conspired to violate the antibribery provisions of the FCPA.

The Siemens and Alstom cases both made headlines (and incurred record-breaking penalties) because of the scale, scope, and geographic reach of the wrongdoing uncovered by various enforcement authorities. Notably, while these cases provide examples of how several different enforcement authorities can conduct multiple, related bribery prosecutions, the various prosecutions of Siemens and Alstom appear to cover misconduct in different areas of the world, with little apparent overlap. Without insight into the confidential negotiations behind these settlements, it is impossible to know in which instances, if any, various authorities took into consideration potential prosecutions or ongoing investigations in other jurisdictions, or in what cases an investigation by one authority may have settled similar claims relating to corrupt payments to foreign officials by Siemens AG’s Telecommunications. See U.S. Dep’t of Justice, supra note 61.

72. ODUOR ET AL., supra note 59, at 105.
73. Id.
74. Id. at 107.
75. Id.
76. U.S. Dep’t of Justice, supra note 71.
77. Id.
78. See id.; see also ODUOR ET AL., supra note 59, at 105–07, 131–34.
spurred investigations by others that uncovered new, chargeable offenses. It also is unclear whether the selection of specific conduct by each prosecuting authority had any relation to that conduct’s relevance to, or impact on, each prosecuting authority’s national interests, or whether the division was based on horse trading (or simply happenstance).

From the perspective of promoting efficient and just responses to corruption, the specter of global companies facing successive enforcement actions in response to separate offenses that occurred in different jurisdictions does not raise the same fairness concerns as true “carbon copy” prosecutions. The Siemens and Alstom cases certainly prompt questions, however, about what companies can or should do to limit their anticorruption liability risks once certain corrupt conduct has been discovered. These cases also raise questions about the limits of what enforcement authorities can do to facilitate predictability and efficiency in a multijurisdictional enforcement context.

II. CURRENT APPROACHES TO MULTIJURISDICTIONAL ENFORCEMENT

As more countries demonstrate an aggressive willingness to pursue corruption cases, the possibility that multinational companies could face successive prosecutions and/or concurrent liability is an increasingly worrisome prospect. To date, however, global authorities have largely managed to sidestep the problem of duplicative penalties by using one of several related mechanisms: penalty offsets, coordinated settlements, or declinations. This part explores how enforcement authorities have used these mechanisms to address overlapping jurisdiction. While some of these solutions indeed mitigate concerns about unfair penalties, they do not go the distance in terms of providing a clear set of principles to avoid unfairness, duplicative investigations, and other negative impacts of multijurisdictional enforcement.

A. Offsetting Monetary Penalties

As noted above, the DOJ (and to a lesser extent the SEC) has demonstrated a willingness to give “credit” to companies for monetary penalties paid to foreign enforcement authorities for the same or similar conduct. What is more, in several cases, U.S. authorities appear to have directed their investigation and charges to illegal acts and actors not encompassed by the earlier settlements. In the HP Russia matter, for example, the U.S. authorities charged a different entity than was under investigation by Germany, and in the Aon matter, the alleged bribes were paid in countries that were not a part of the FSA resolution. Arguably, in these matters, the defendants were credited for penalties based on misconduct that was related to—but separate from—misconduct that was charged by U.S. authorities.

79. See supra notes 40–56 and accompanying text.
80. See supra note 41 and accompanying text.
81. See supra notes 40–56 and accompanying text.
The “offsetting” approach to successive enforcement actions partially remedies the potential unfairness to defendants of multiple penalties. An example of the use of “offsets” is the Alcatel-Lucent matter, discussed above, in which the United States, which had an attenuated interest in a bribery scheme by non-U.S. companies operating internationally, partially offset criminal penalties by the amount of a monetary sanction paid to Costa Rica, a country with a more direct interest in that scheme. This offsetting approach shows the practical difficulty of determining the right amount to offset. The TSKJ and Panalpina matters are also good examples. After U.S. authorities imposed substantial penalties in those cases, it is difficult to know how much credit, if any, the companies received in the subsequent Nigerian proceedings (and whether any credit was appropriate at all). By utilizing an offsetting approach, Nigeria—arguably the “victim” country—may have had no incentive to enforce its antibribery laws against any of these defendants.

Even in cases where the timing and coordination is such that offsetting can be used effectively, crediting penalties paid in parallel proceedings only ameliorates the problem of duplicative penalties and proceedings. It does nothing to reduce the burdens and costs associated with responding to serial investigations by different foreign and domestic regulators for the same offenses.

Furthermore, there is no guarantee that one enforcement authority will reduce the penalties it imposes in acknowledgement of monetary or other penalties paid to other foreign enforcement authorities. For example, in its 2014 settlement with Alstom, the DOJ did not appear to credit penalties paid in the related Swiss and World Bank enforcement actions and, in fact, noted these settlements as evidence of Alstom’s repeated wrongdoing. Arguably the Swiss and World Bank settlements addressed conduct that was not covered by the FCPA charges, but this has not always prevented the DOJ from crediting foreign sanctions in the past. Alstom’s reported lack of cooperation and failure to self-disclose its misconduct may have played a role in the decision by U.S. authorities not to credit those earlier sanctions. But without more visibility into the U.S. settlement process, or additional guidance from U.S. regulators, it is difficult to infer anything

82. See supra note 50 and accompanying text.
83. See supra Part I.B.
84. See U.S. Dep’t of Justice, supra note 71. The JGC and Siemens cases are other examples. The United States may have declined to credit JGC’s settlement with Nigeria to maintain consistency with its treatment of other TSKJ consortium members, which were subject to Nigerian penalties only after settling with U.S. authorities. See supra Part I.B. In the Siemens cases, the bribes at issue in earlier actions by foreign prosecutions were not within the scope of the conduct charged by the United States. See supra Part I.C.
86. Cf. id.
certain about the SEC’s or DOJ’s policies with respect to U.S. treatment of foreign antibribery settlements.87

B. Coordinated Actions

A second approach that authorities with overlapping jurisdiction have used in past enforcement actions is to reach a “global” or simultaneous settlement with the offending company. In these cases, various regulators appear to have coordinated their penalties (and presumably their investigations) by focusing either on the conduct of different corporate entities or on different geographic areas. The U.S./German actions against Siemens, discussed above, are one example of this approach.88 Others are discussed below.

In May 2013, Total S.A. (“Total”) settled FCPA charges related to illegal payments made through third parties to an Iranian government official to obtain oil and gas concessions.89 That same day, French authorities announced that Total and its chief executive officer, among others, would also face prosecution in connection with alleged bribes and kickback payments made to Iraqi officials in connection with the Oil-for-Food Program.90

In 2011, Johnson & Johnson agreed to pay a $21.4 million penalty to resolve criminal FCPA charges against its subsidiary, DePuy Inc., and $48.6 million in disgorgement and prejudgment interest to settle related civil charges.91 Following a referral from the United States, the SFO brought charges against DePuy International Limited, the U.K.-based subsidiary of DePuy Inc.92 On the day the U.S. penalty was announced, the SFO announced that DePuy International Limited had been ordered to pay £4.8 million in a civil recovery action.93 The DOJ and SEC both stated in press releases that they reduced Johnson & Johnson’s financial penalties in

87. It bears noting that the DOJ did defer to the World Bank’s investigation insofar as it already led to the appointment of a corporate monitor by not requiring a second monitor if the company complied with its World Bank settlement monitoring.
88. See supra note 61 and accompanying text.
93. Id.
light of the company’s civil penalties in the United Kingdom, although they
did not say whether the reduction matched the initial penalty.\footnote{See U.S. Dep’t of Justice, supra note 91.}

In 2010, although never charged with FCPA liability, BAE entered into
coordinated settlements with U.S. and U.K. authorities in connection with
suspicious payments made in several countries.\footnote{See Boutros & Funk, supra note 25, at 290–91.} In the U.S. actions, BAE
pleaded guilty to charges arising out of payments to secure business in the
same day, the SFO ordered BAE to make a $47.7 million payment for the
benefit of the people of Tanzania, the country adversely affected by BAE’s
not say how, if at all, the penalties in one jurisdiction were accounted for by

Also in 2010, the United Kingdom and the United States pursued
criminal cases against Innospec Inc., a Delaware company, and its British
conspiracy, foreign bribery, and books and records violations relating to
conduct in Iraq; the SFO prosecuted Innospec Ltd. for foreign bribery with
respect to Indonesia.\footnote{Id. ¶ 2; Press Release, Serious Fraud Office, Innospec Limited Prosecuted for Corruption by the SFO (Mar. 18, 2010), http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2010/innospec-limited-prosecuted-for-corruption-by-the-sfo.aspx [http://perma.cc/9Q86-K36V].} Once again, the SFO’s case was developed as a
result of a referral by the DOJ, and both settlements were announced on the
same day.\footnote{R ICHARD ALDERMAN, B20 TASK FORCE ON IMPROVING TRANSPARENCY AND ANTI-CORRUPTION: DEVELOPMENT OF A PRELIMINARY STUDY ON POSSIBLE REGULATORY DEVELOPMENTS TO ENHANCE THE PRIVATE SECTOR ROLE IN THE FIGHT AGAINST CORRUPTION IN A GLOBAL BUSINESS CONTEXT 17–18 (2014).} The U.S. plea agreement notes that Innospec represented that
“its total ability to pay all enforcement agencies” was $40.2 million and,
“[i]n light of the interests of the other enforcement agencies,” $14.1 million
would be paid to the DOJ, $11.2 million to the SEC, $12.7 million to the
SFO, and $2.2 million to the Office of Foreign Assets Control. It did not explain how those amounts had been determined.

While coordinated resolutions are certainly a step in the right direction, there are still many shortcomings with this approach as it is currently applied. It is unclear how U.S. and foreign authorities resolve differing views of the facts or law, or how they decide who takes the lead on an investigation. It also is unclear what a company can do to promote a coordinated resolution. There is little transparency with respect to the circumstances under which various regulators have sought to coordinate their efforts to achieve a single resolution. In some cases, coordinated settlements may be the outcome of a referral of the matter from one authority to another; they may be the product of self-reporting to multiple authorities and voluntary intergovernmental cooperation; they may arise where one government lacks jurisdiction over an aspect of a transnational bribery scheme; or they may be the result of some combination of these factors. On a more practical level, the coordination and division of penalties may be a result of horse trading or comity as multiple regulators that have invested significant resources into the investigation seek to obtain something to show for it.

Although U.S. enforcement authorities have expressed commitment to cooperation with international counterparts, past cooperation is no indicator of future cooperation. For example, while the DOJ acknowledged cooperation by French investigative authorities in the Total case, the Alstom press release makes no reference to assistance from French law enforcement, despite the fact that Alstom is a major French company. Moreover, while U.S. and U.K. authorities have cooperated in a number of recent cases, the SFO has charged two Alstom entities and a number of individuals independently of the U.S. settlement.

Moreover, cooperation and coordination between multiple authorities may not ultimately be tantamount to a single resolution. Unless the coordinated settlement includes all potentially interested sovereigns, there always is the possibility that additional countries will bring future charges based on the same conduct. Indeed, where each state takes jurisdiction over different violations, it is possible that the “coordinating” parties will later bring related charges following a settlement. Recently, for example, Total disclosed that it will face trial in France on corruption charges related to payments in Iran, potentially implicating in its first “coordinated” action

103. See, e.g., Alderman, supra note 101, at 31 n.46.
104. See Boutros & Funk, supra note 25, at 287–89.
105. See OGDEN ET AL., supra note 6, at 45, 62.
106. See supra Part I.B.
with French authorities the precise acts the company acknowledged in its agreement with the DOJ.110

In the Innospec matter, to take another example, it may be that U.S. and U.K. authorities did not discuss offsetting or otherwise recognize penalties from other jurisdictions because the conduct encompassed in each matter was different.111 That said, had just one jurisdiction’s enforcement authorities pursued all the conduct, it is likely that the total penalty to Innospec would have been lower. Moreover, it is unclear why the United States reasonably had any more interest in the Iraqi conduct or why the United Kingdom had any more interest in the Indonesian conduct. The level of coordination visible to the public would appear to suggest that major aspects of the settlement were largely a matter of practical accommodations between the jurisdictions, rather than any principled apportionment of proper enforcement authority and scope of sanctioning.112

C. Declinations

A final approach that enforcement authorities have taken to the matter of overlapping jurisdiction is to decline to prosecute a company for a violation on the grounds that the company has already resolved charges brought by authorities of a different country for the same or similar offenses. This practice has been applied in a small number of multijurisdictional cases so far.

On June 15, 2015, the DOJ announced that the former CEO of PetroTiger Ltd. pleaded guilty to conspiring to bribe Colombian officials in the employ of Ecopetrol, the state-owned oil company.113 Three other former PetroTiger executives had already pleaded guilty, but the DOJ declined to prosecute the company itself, citing voluntary disclosure, cooperation, and remediation.114 The DOJ acknowledged the assistance of the Philippines, Panama, and the United Kingdom, in addition to several agencies of the Colombian government, but there has been no suggestion that the DOJ’s declination relates to any contemplated actions by these countries.115

More recently, and perhaps more interestingly, the DOJ dropped its investigation of Dutch-based SBM Offshore after the company entered into


112. See U.S. Dep’t of Justice, supra note 111.


114. Id.

115. Id.
a $240 million out-of-court settlement with the Dutch Public Prosecutor for antibribery violations in Equatorial Guinea, Angola, and Brazil. The settlement amount consisted of a $40 million fine and $200 million in disgorgement. It is tempting to assume that the record size of the Dutch penalty would have negated any U.S. penalties under the “offset” approach sometimes applied. That said, it also is possible that the DOJ “declined” the case because it did not have jurisdiction or faced evidentiary hurdles.

In 2007, Sweden’s National Corruption Unit launched an investigation into AB Volvo based on kickbacks the company’s subsidiaries paid to Iraqi officials in connection with the U.N. Oil-for-Food program—conduct that was also charged by the SEC and DOJ in 2008. Although two executives were found guilty of bribery in 2012, the Swedish prosecutor reportedly declined to demand a corporate fine because of Volvo’s payment of $19.6 million in penalties in the United States.

Unfortunately, because regulators rarely disclose the rationale behind their decisions to forgo prosecution, there is very little basis from which to draw conclusions about the circumstances under which one sovereign will defer to another in the pursuit of corruption charges. Moreover, there may be instances where an authority forgoes opening an investigation altogether because an investigation is already ongoing in another jurisdiction. Absent public comment or other guidance from the relevant enforcement authorities, we can only speculate as to the considerations underlying these decisions. Although declinations avoid the problem of double jeopardy, there is still a lack of clarity and predictability around the question of when authorities will deliver and on what grounds.

Several recent actions by foreign authorities may soon shed light on this issue. As discussed above, Petrobras and GSK have been involved in corruption scandals in Brazil and China, respectively. GSK paid $489 million to settle charges in China that involved alleged physician kickbacks, among other things, and the company is reportedly now under investigation by U.S. and U.K. authorities for possible antibribery violations. Similarly, Brazilian federal prosecutors have purportedly sought $1.55 billion from six construction and engineering companies for their alleged


[120] See supra INTRODUCTION.

[121] Plumridge & Burkitt, supra note 12.
involvement in a kickback scheme at Petrobras. The DOJ and SEC are now both reportedly investigating the Petrobras matter. The fact that U.S. authorities are conducting follow-on and/or parallel investigations in these cases suggests that they may not be willing to back down solely on the basis of a strong response by a foreign enforcer. It remains to be seen how U.S. authorities will treat the issue of duplicative penalties in light of the large amounts already sought or assessed by foreign governments.

Identifying patterns and trends in actions like these can be difficult, and observers and practitioners may often be reduced to reading proverbial tealeaves in an attempt to map out the landscape. Certainly, enforcers may have a number of different reasons or motivations behind their decisions to coordinate actions in any particular way. These decisions may reflect an agreement or perception that the consequences already suffered may be sufficient to punish or deter, or that a foreign authority has a stronger interest in enforcement. Leniency may be based on a desire to avoid unintended collateral consequences, such as undue harm to innocent shareholders, employees, and other third parties. And, as illustrated in several examples above, less principled and more practical considerations may drive coordination (or “declination”) decisions in many cases.

Companies engaged in international business may be hard pressed to draw neat conclusions from such experiences in case studies that, ultimately, provide too little consistency and predictability. Unable to fully understand—much less control—how various authorities may synchronize parallel actions and sanctions, companies have good reasons to prefer and push for single coordinated “global” settlements. As it turns out, there are

122. See Trace Compendium, supra note 10 (entries for “Petroleo Brasileiro SA” and “Embraer”).

124. For example, the DOJ’s NPA with Akzo Nobel was announced on the same day the company agreed to pay nearly $3 million ($750,000 in civil penalties and $2.2 million in disgorgement of profits) to the SEC, and it gave the company six months to enter into a settlement with the Dutch National Public Prosecutor, or else pay an additional fine to the U.S. Treasury. See Press Release, U.S. Dep’t of Justice, Akzo Nobel Acknowledges Improper Payments Made by Its Subsidiaries to Iraqi Government Under the U.N. Oil for Food Program, Enters Agreement with Department of Justice (Dec. 20, 2007), http://www.justice.gov/archive/opa/pr/2007/December/07_crm_1024.html [http://perma.cc/2ZCG-TN86]. Under circumstances such as these, the DOJ appears to be foregoing criminal prosecution at least in part based on a reasoned judgment that a company has paid enough in proportion to its wrongdoing, though certainly other factors could be at play. See id.

125. The reduced, discounted, or “offset” penalties accepted by the DOJ and SEC in settlements with HP, ADM, Aon, Alcatel-Lucent, and Statoil (as discussed earlier) may all reflect recognition by U.S. authorities that the various foreign enforcement agencies involved in those cases had a stronger interest in regulating the conduct, had greater ability or willingness to take the lead in enforcement, or at the very least got there first and had things under control.

126. In the DOJ and SFO’s coordinated settlement with Inmospec, for example, the agencies’ cooperation in imposing fines was almost certainly influenced by the perception that harsher penalties would likely have bankrupted the company.

127. See supra Part II.
good policy reasons for national governments and the international community to support single resolutions as well.

III. PRINCIPLED RESTRAINT IN A GLOBAL ANTICORRUPTION REGIME: POLICY REASONS FOR ENCOURAGING SINGLE RESOLUTIONS

As the previous part illustrates, multinational enforcement authorities often voluntarily coordinate their actions in ways that are more or less reasonable (as the case may be), but there are few reliable safeguards to ensure that such discretion is exercised rationally, responsibly, and regularly. Whenever parties reach multiple resolutions that impose multiple rounds of sanctions on the same actors for the same conduct, there exists a danger that those actors are being overly or unfairly punished and that law enforcement resources are not being deployed efficiently.

Even though each jurisdiction in any given action may each have valid reasons to seek its respective pound of flesh, duplicative enforcement actions and multiple penalties may actually hinder the detection and deterrence of corruption. Duplicative actions add an element of unfairness and unpredictability to the enforcement regime. Thus, they also can be counterproductive by discouraging parties from self-reporting and cooperating with enforcement authorities. This part examines the ways in which “carbon copy” and “me too” prosecutions can undermine the goals of anticorruption legislation.

A. Overdeterrence and Fundamental Unfairness

Entirely duplicative enforcement actions and penalties seem to violate the principle (or at least the spirit) of double jeopardy, the notion that repeat prosecution is unlawful and that one defendant should not be tried twice for the same crime. That principle is deeply ingrained, in some form at least, in many legal systems throughout the world. It also is recognized by international law. For example, the United Nations International Covenant on Civil and Political Rights, to which the vast majority of states are party, provides that “[n]o one shall be liable to be tried or punished again for an


129. See 1 ROGER M. WITTEN ET AL., COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT 7–8 (2013) (noting that companies self-report potential misconduct out of a sense that it is in their own self-interest to do so).


offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”

But the double jeopardy principle in the international context is highly limited in application. It does not apply to international prosecutions by different national enforcement authorities because of the dual sovereignty doctrine exception, which provides that two sovereigns can prosecute an individual for a single act that violates both countries’ laws. This principle originates in the common law notion that a crime is an offense against a sovereign, and, therefore, a single act that violates the laws of two different countries constitutes two distinct offenses. As Justice Black has noted, “If double punishment is what is feared, it hurts no less for two ‘Sovereigns’ to inflict it than for one . . . . In each case, inescapably, a man is forced to face danger twice for the same conduct.”

A company that finds itself subject to an enforcement action in one country may spend years in consecutive enforcement actions, unsure when the prosecution has truly rested. This uncertainty is precisely what the double jeopardy protection seeks to shield against.

The difficulties involved in raising a double jeopardy type of defense were illustrated in a recent case involving the prosecution of an individual in connection with the Siemens matter discussed earlier. The defendant moved to dismiss the case brought against him in an Argentine court, on the basis that he had already been prosecuted for the same conduct in Germany (and ultimately reached a plea agreement with authorities there). But the Argentine court refused to dismiss the case and allowed the prosecution to proceed, on the basis that it “found no matching between the facts investigated in Germany with those being investigated in Argentina, nor between the private and public interests potentially at issue in each country.” Thus, as conceived, the double jeopardy principle is narrow enough that if courts and enforcement authorities can find some way to distinguish the separate proceedings, and show they are not identical, it will rarely be a bar to prosecution.

In addition to being fundamentally unfair, multiple duplicative enforcement actions result in overdeterrence, penalizing companies more
harshly than is necessary to deter future misconduct. This is not only unduly harsh, but it is also a waste of resources—a waste of enforcement agencies’ resources in prosecuting misconduct that has already been adjudicated and future instances of which have already been deterred, and a waste of company resources in defending against another costly enforcement action.

When penalties are too high, companies will be induced to spend excessive amounts to monitor employees in an attempt to avoid FCPA violations. While prosecutors may question whether companies can ever spend too much on compliance, these excessive costs may result in increased costs of doing business, hindering the company’s ability to provide competitive pricing. A company might decide that, despite a robust compliance program, the risk of doing business in a particular market is too high and might opt to pull its business out of that country rather than risk successive enforcement actions and duplicative penalties. In fact, in recent cases, including the February 2015 settlement with Goodyear Tire & Rubber Company, the SEC has touted divestiture of foreign subsidiaries responsible for corrupt conduct as a “remedial effort” reflected in the favorable settlement with the company. Similarly, in the November 2010 settlement with Panalpina World Transport (Holding) Ltd., the DOJ acknowledged the company’s termination of its operations in one of the countries in which misconduct had occurred as a factor in its agreement to a fine below the guidelines range.

B. The Chilling Effect of Duplicative Enforcement Actions on Self-Reporting

A final reason to avoid duplicative enforcement is the chilling effect it may have on self-reporting. Companies may be less likely to self-report potential FCPA violations for fear of being subject to years of follow-on investigations, carbon copy prosecutions, and disproportionately punitive monetary sanctions for a single incident of bribery. A company may be willing to take the risk that misconduct will remain undetected by law enforcement and calculate that its resources are better spent on an internal investigation to remedy the misconduct or on other business pursuits unrelated to compliance.

140. See Dunahoe, supra note 128, at 56–57 (noting that sanctions for misconduct are excessive if a less costly penalty exists that would have the same deterrent effect).
141. See id.
142. See id.
143. See id.
144. See id.
The DOJ and SEC strongly encourage companies to self-report potential FCPA violations.\textsuperscript{147} Both agencies identify voluntary disclosures of wrongdoing as being a mitigating factor in determining what charges and penalties are appropriate.\textsuperscript{148} Providing these incentives to self-report potential misconduct allows the DOJ and SEC to focus their resources on detecting corruption that goes unreported, allowing for a more efficient use of law enforcement resources.\textsuperscript{149}

Where disclosure is discretionary, companies weigh a number of factors in determining whether it is in their best interest to self-report a potential violation to the government. Companies self-report in the hopes that doing so will result in a reduction in penalty and an efficient and definitive resolution to the FCPA concern.\textsuperscript{150} However, the benefits of voluntary disclosure are speculative and must be weighed against the many other factors laid out by the DOJ and SEC as being relevant to enforcement strategy.\textsuperscript{151} Add to this calculus the risk of costly follow-on investigations and penalties from other jurisdictions (particularly those without established track records in these investigations), and the perceived company benefits of self-reporting may diminish even further.

IV. COMPARATIVE ANALYSES: PRECEDENT AND PRESCRIPTION

There are international legal regimes that seek to bring consistency and best practices to global anticorruption enforcement efforts, including those put forward by the OECD Convention, the United Nations Convention Against Corruption, and the World Bank.\textsuperscript{152} But as the cases discussed

\textsuperscript{147} RESOURCE GUIDE, supra note 19, at 54 (“While the conduct underlying any FCPA investigation is obviously a fundamental and threshold consideration in deciding what, if any, action to take, both the DOJ and SEC place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters.”).


\textsuperscript{150} WITTEN ET AL., supra note 129, § 7.04.


\textsuperscript{152} The OECD Convention provides that parties with concurrent jurisdiction must “consult with a view to determining the most appropriate jurisdiction for prosecution” only “at the request of one of them.” OECD Convention, supra note 5, at 8. It also recommends that member countries “consult and otherwise co-operate with competent authorities in other countries . . . through such means as the sharing of information spontaneously or upon request, provision of evidence, extradition, and the identification, freezing, confiscation and recovery of the proceeds of bribery of foreign public officials.” Id. at 26. Although the OECD Convention appears to envisage a single prosecution for cases of foreign bribery, it certainly does not advocate or insist upon that in every instance, and its reliance on a request for consultation among states reduces its effectiveness in eliminating duplicative prosecutions. It seemingly recognizes the practical reality that different states
earlier illustrate, the challenges posed by the rising tide of multinational enforcement have been far from fully addressed. Regulators have arguably met with greater success in similar challenges of fostering clarity and coordination in other legal contexts, including in the enforcement of antitrust violations by authorities in different countries and in the enforcement of U.S. law violations by federal and state authorities with overlapping jurisdiction. Even where major challenges remain in those contexts, they still may provide instructive examples from which the international anticorruption enforcement community can learn.

A. Coordination in Antitrust Enforcement

In the realm of antitrust enforcement, state action—by specific legislation, agency action, and/or international negotiation and agreement—has been arguably more effective in addressing the concerns posed by potentially duplicative prosecutions across borders and enforcement authorities. Under the United States’s 1994 International Antitrust Enforcement Assistance Act (IAEAA), the DOJ and the Federal Trade Commission can negotiate specific civil and criminal antitrust multilateral assistance treaties (MLATs), as well as bilateral “positive comity” agreements, directly with other nations. These international agreements outline processes by which national authorities refer cases to one another, coordinate enforcement approaches, and, ideally, reduce unnecessary and duplicative multiple prosecutions.

One example of such enforcement coordination in antitrust and competition matters is the 1998 Positive Comity Agreement between the United States and the European Union (EU). This treaty sets out procedures by which “each Party will normally avoid allocating enforcement resources to deal with anti-competitive activities that occur principally in and are directed principally towards the other Party’s territory,” though only where “the competition authorities of the other Party are able and prepared to examine and take effective sanctions under their law to deal with those activities.” The treaty thus clearly envisions a form of voluntary deference by one national enforcement authority in

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153. See supra Parts I, II.
155. Id.
157. Id. art. I.2(b).
158. Id.
favor of another, in the conduct of fact investigation, prosecution, and/or imposition of penalties.

This is just one example showing how the United States and the EU—major players with interests in enforcing antitrust laws and combating anticompetitive practices across borders—have been able to coordinate and establish cooperation to reduce the costs associated with duplicative prosecution and thereby streamline international enforcement. While the treaty focuses on ceding enforcement action where the other jurisdiction is “able and prepared”—a condition that may be less prevalent in the corruption context in jurisdictions with high levels of corruption—it is clear, as discussed earlier, that less developed countries are finding their prosecutorial footing in corruption matters in recent years.\(^{159}\)

And even beyond the explicit legal rules and agreements that can limit the potential for duplicative enforcement, more informal and voluntary coordination by relevant authorities can also have a significant impact. As one Deputy Assistant Attorney General for the Antitrust Division noted:

\[\text{Another approach is the allocation of jurisdiction over conduct with multijurisdictional effects to one agency by another agency that also has a claim of jurisdiction. This model operates on a specific case by case basis, and is not characterized by elaborate rules or agreements. Rather, basic agreements would establish factors for the delineation of jurisdiction. This approach involves deference to another agency perceived to have greater interests in the conduct.}^{160}\]

That is to say, transnational enforcement authorities can (and often do) exercise their discretion to coordinate their cases and avoid the most duplicative prosecutions and penalties, even when not required to do so. This appears to be a somewhat more reliable approach in the realm of antitrust enforcement than in that of international anticorruption efforts. To be sure, efficient coordination in international antitrust enforcement still requires much voluntary action and the will to cooperate effectively among multinational authorities. But additional legal frameworks also encourage and facilitate that coordination and make it arguably less ad hoc than coordination in international anticorruption efforts. It seems intuitive that when coordination is pursued ex ante, as a matter of public policy addressed by general legislation and treaties, it stands a better chance to establish principled guidelines than when it is pursued on a case-by-case basis, as enforcement authorities address particular sets of facts in real time.

\(^{159}\) See supra INTRODUCTION.

\(^{160}\) Andrew C. Finch, Counsel to the Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Speech Before the ABA Administrative Law Section Fall Meeting: Facing the Challenge of Globalization: Coordination and Cooperation Between Antitrust Enforcement Agencies the U.S. and E.U. (Oct. 22, 2004). In that speech, Mr. Finch noted that “antitrust has arrived relatively late to the discussion of the international implications of law enforcement and methods to coordinate with foreign colleagues.” \textit{Id.} But international anticorruption enforcement has come even later to the game and could look to the experience of antitrust enforcement in seeking ways to create a global regime in which multinational enforcers work together for the public good.
B. Parallel Enforcement in Domestic Cases

Looking to domestic law enforcement policies and practices in the United States may offer some principles for when cooperation—and perhaps deference—is most appropriate. In the United States, various federal and state, criminal and civil enforcement authorities often share overlapping authority over the same conduct. Among the many factors they consider, and are encouraged to consider, in deciding whether to bring criminal charges or civil or administrative actions is whether other authorities with concurrent jurisdiction have already imposed adequate penalties and what the collateral consequences of additional penalties might be. For example, when determining whether criminal charges against an organization are warranted and necessary, or whether regulatory enforcement alone is sufficient, the DOJ will consider “the strength of the regulatory authority’s interest; the regulatory authority’s ability and willingness to take effective enforcement action; the probable sanction if the regulatory authority’s enforcement action is upheld; and the effect of a non-criminal disposition on federal law enforcement interests.” In addition, the DOJ’s policy on dual and successive prosecutions, or “Petite Policy,” is generally to defer criminal prosecution where the same underlying conduct has already formed the basis for a state criminal prosecution. Though it is under no constitutional or other legal obligation to decline such prosecutions, the DOJ has clearly espoused a prudential policy “to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s), to promote efficient utilization of Department resources, and to promote coordination and cooperation between federal and state prosecutors.”


162. See, e.g., DOJ MANUAL, supra note 148, chs. 9-28.1000–1100.

163. Id. cmt. to ch. 9-28.1100; see also id. chs. 9-27.240–250.

164. Id. ch. 9-2.031 (entitled “Dual and Success Prosecution Policy (‘Petite Policy’)”).

165. Id. ch. 9-2.031(A). The DOJ’s Petite Policy also makes clear that it applies to charging decisions, not to precharging investigations, and that satisfaction of the listed
The DOJ’s domestic policies in this regard, necessarily adjusted somewhat, seem like a reasonable starting point for articulating prosecutorial guidelines when it comes to multiple, successive, or duplicative international enforcement of anticorruption laws. Given the increase in international prosecutions, and the analytically similar double jeopardy issues, it would seem that the time has come to apply a double jeopardy principle in the international context. It may be that factors similar to those outlined in the Petite Policy are already utilized informally by the DOJ in analyzing international corruption cases. If so, publicizing such factors, and making them partially applicable to the SEC, would help reduce the problems identified in this Article.

Interestingly, both the DOJ and SEC have concurrent authority to enforce the FCPA, and they routinely exercise it over virtually identical facts. While there are differences in jurisdiction and the available remedies, in large part the two authorities can and often do pursue almost identical conduct, resulting in essentially duplicate fines. This issue is beyond the scope of this Article, but it is worth noting that many of the issues identified here as problematic internationally should be addressed at home as well, where they ought to be simpler to fix.

CONCLUSION

The DOJ and SEC’s actions in cooperating with foreign authorities and coordinating anticorruption settlements may indicate a growing (if often tacit and rather informal) acceptance of similar principles that U.S. authorities already apply more explicitly in other domestic enforcement matters. However, the United States, along with all countries prosecuting foreign bribery, should do better in deliberately calculating and balancing the law enforcement interests of all jurisdictions. As more countries pursue foreign bribery cases, a greater degree of clarity, predictability, and finality is needed to prevent the negative consequences of multijurisdictional enforcement.

The United States—formerly the frontrunner in the antibribery movement—should take the lead in proactively promoting coordination among states with a shared interest in enforcement. One approach suggested by the case and settlement precedents discussed in this Article is for the United States to outline a process under which its enforcement

criteria in no way suggests that a proposed prosecution must be brought—rather, “traditional elements of federal prosecutorial discretion continue to apply.” Id.

166. See RESOURCE GUIDE, supra note 19, at 4 (“DOJ and SEC share enforcement authority for the FCPA’s antibribery and accounting provisions.”); see also, e.g., supra Part I.B–C. (discussing the HP, ADM, Alcatel-Lucent, Statoil, and Siemens cases).

167. See RESOURCE GUIDE, supra note 19, at 4–5. For recommendations on how the SEC in particular might reduce duplication in regulatory enforcement, see U.S. CHAMBER OF COMMERCE CTR. FOR CAPITAL MKTS. COMPETITIVENESS, EXAMINING U.S. SECURITIES AND EXCHANGE COMMISSION ENFORCEMENT: RECOMMENDATIONS ON CURRENT PROCESSES AND PRACTICES 28–30 (2015) (recommending greater use of memoranda of understanding with other enforcement authorities, both domestic and international, “to avoid ‘duplication of efforts, unnecessary burdens on businesses, and ensuring consistent enforcement”’).
agencies will refer cases of possible corruption to the relevant foreign authorities, similar to the general process in place in the realm of antitrust law. Such an approach could be used to reward self-reporting and cooperation by, for example, expressly allowing cooperating companies to request participation by other states with an interest in the case, with an understanding that only the most relevant jurisdiction(s) would investigate and possibly prosecute wrongdoing.

The twin goals of this approach would be to establish final liability in all states with a legitimate interest in the alleged conduct and to avoid the waste, inefficiency, and unfairness inherent in successive investigations and resolutions. This approach would allow prosecutors to address head-on the issues of double jeopardy and associated fairness concerns; comity and good foreign diplomatic relations; collateral consequences to the alleged offender, victims, and innocent third parties; and practical issues, such as which authority is best positioned to enforce sanctions.

Of course, there may be instances in which cooperation cannot be achieved, and authorities will default to one of the current informal mechanisms for addressing duplicative prosecutions. A transparent policy of inviting foreign authorities to enter coordinated settlements, however, would have several benefits. It would eliminate present disincentives to self-reporting by providing companies with some involvement in the process and some certainty regarding resolution. It would promote fairness not only by avoiding duplicative penalties, but also by enabling defendants to craft a fair defense in light of the jurisdictions involved. Finally, it would spare scarce investigative and prosecutorial resources.

As demonstrated in this Article, such coordination already occurs in some cases. Normalizing this type of multijurisdictional coordination may require a shift in policy across the OECD, and not just in the United States or a few other countries. The OECD Convention’s Working Group on Bribery monitors member countries’ efforts to implement the goals of the Convention and would seem a natural forum and mechanism for facilitating a shift toward more effective multijurisdictional coordination.

Even if a commitment to international coordination is an optimistic goal or request, there are other steps that U.S. and foreign enforcement authorities can take to mitigate the negative impacts of overlapping jurisdiction. In particular, states should outline more explicit policy guidelines regarding deferral of prosecution where the same underlying conduct is, or could be, under investigation in multiple jurisdictions. Akin to the DOJ’s Petite Policy, such guidelines could take the form of a “prudential policy” that imposes a higher bar than merely demonstrating jurisdiction for bringing (or opening) a concurrent (or follow-on) action. Some factors that this policy might consider are: (1) the strength of the investigating/prosecuting state’s interest in the case, such as whether the offender is incorporated in the state or listed on one of its exchanges; (2) whether a prior or related investigation/prosecution addresses all offending conduct; and (3) whether the other prosecution(s) satisfies the demands of deterrence, in view of the defendant’s culpability and compliance. More
clearly articulating such a policy, with a commitment to fair and principled multijurisdictional enforcement, would be a step in the right direction toward mitigating some of the potential risks and costs identified in this Article.
How Multijurisdictional Bribery Enforcement Enhances Risks for Global Enterprises

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Introduction
The emergence of multijurisdictional bribery enforcement presents complex challenges and increased operational risk for multinational corporations. Aggressive enforcement of the Foreign Corrupt Practices Act (FCPA) by the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) has encouraged non-U.S. authorities to pursue cross-border investigations and enforcement actions. As more foreign authorities begin to vigorously enforce their respective anti-bribery laws, companies and their in-house counsel should consider how these developments could impact their operations and their ability to resolve cases involving alleged bribery.

The FCPA Is Not the Only Extraterritorial Game in Town
The FCPA is no longer the only bribery law affecting international firms. Stronger anticorruption laws, some of which may be interpreted to apply extraterritorially, have enabled non-U.S. authorities to pursue multijurisdictional enforcement actions. For example, in 2014, the Republic of Brazil filed criminal charges against Embraer S.A. executives for making illicit payments in the Dominican Republic to obtain a government contract. Embraer S.A. subsequently entered into discussions with U.S. authorities in 2015 to conclude a settlement for FCPA violations, which remain ongoing. In another case in 2015, the U.K. Serious Fraud Office (SFO), the UK agency tasked with prosecuting complex fraud,
charged Standard Bank PLC with violating the UK Bribery Act. The bank’s subsidiary in Tanzania engaged in misconduct that included paying bribes, and the SFO held Standard Bank accountable for its failure to implement sufficient internal controls. To resolve the matter, the SFO negotiated its first Deferred Prosecution Agreement (DPA) with Standard Bank, which required the bank to pay approximately $37 million in penalties to UK authorities and U.S. regulators for bribery and securities law violations, respectively.

What is the significance? These cases represent the “new normal” in anticorruption enforcement. Authorities are working together across jurisdictions to investigate and charge companies for violating anti-bribery laws, and they are using extraterritorial provisions to expand their reach as widely as possible. U.S. and non-U.S. authorities can and have relied upon the same misconduct to charge a company for violations of their respective anti-bribery and securities laws. The potential for regulatory overlap amongst these legal regimes increases the chance that a corporation facing bribery allegations will confront scrutiny from authorities in multiple countries.

There’s No Double Jeopardy for Bribery

Double jeopardy does not apply to bribery cases at the international level; thus, multiple countries could bring charges based on a single violation. During the course of an FCPA investigation, cooperation between the DOJ or SEC and foreign authorities serves to apprise the other country (or countries) of potential misconduct within their jurisdiction. Alternatively, if a company enters into a DPA with the DOJ, the DPA or a related press release may name the jurisdictions where the wrongdoing allegedly occurred, prompting foreign authorities to investigate.

The experience of GlaxoSmithKline (GSK) demonstrates how a bribery case in one jurisdiction can spark multiple enforcement actions. In 2013, Chinese authorities charged GSK with employing agents to bribe public health officials and doctors in China to promote the use of their products. A Chinese court found the company guilty in 2014 of having paid $482 million in bribes and fined GSK $490 million. The United States, among other countries, “does not recognize international double jeopardy, [so] China’s action poses no legal obstacle to an FCPA prosecution.”

International law only requires the United States “to consult with China regarding the two nations’ overlapping investigations, and even then, only ‘as appropriate.’” The UK and United States subsequently initiated investigations into GSK’s sales and distribution practices, both of which remain ongoing. Recently, authorities in other jurisdictions where GSK operates, including Romania, Poland, and others, have begun to investigate the firm’s contracts, what structured negotiation can offer business attorneys, shareholder activism, and more.
alleged use of illicit payments to promote product sales. While no additional charges have been brought to date, these developments suggest that GSK has yet to conclusively resolve these foreign bribery cases triggered, in part, by the firm’s prosecution in China.

The recurring and ongoing enforcement actions targeting Alstom S.A. highlight the impact of multijurisdictional enforcement actions on a company’s ability to conclude these cases. The French company pled guilty to FCPA violations in 2014 and agreed to pay over $772 million in penalties. The corporate bribery scheme crossed several continents and continued unabated for over a decade. Prior to that settlement, Swiss authorities fined Alstom S.A. approximately $40 million in 2011 for corporate negligence for its failure to prevent bribery within the company. The UK SFO later brought charges related to the firm’s alleged misconduct in Lithuania and has arrested seven executives on criminal bribery charges to date. The company has also been the subject of a corruption probe in Brazil.

These cases underscore three important points. First, bribery enforcement has become global, and is no longer dominated by the United States. Second, even if a bribery investigation has been resolved in one jurisdiction, international companies will likely have to “pay for their sins” across several jurisdictions. A settlement or conviction in one country does not preclude others from investigating the firm for the same, or similar misconduct. Finally, companies may be subject to investigation for a number of years and incur multiple penalties in cases where bribe payments comprised a substantial part of the firm’s business strategy.

**Avoiding Trial? Corruption Cases in Court**

A settlement for violations in one country may not be the end of these bribery cases, as a greater number of foreign authorities seek to punish corporate actors for their misconduct. FCPA cases are largely resolved outside of the courtroom through the use of Non-Prosecution Agreements (NPAs) or Deferred Prosecution Agreements (DPAs), and authorities in other jurisdictions have employed this same approach. This strategy has been criticized as overly lenient because it fails to provide the deterrence needed to discourage corporate malfeasance. From a corporate perspective, settlements are the preferred outcome because they are usually the most expedient solutions, and they can enable the firm to mitigate any reputational impact from the case.

The settlement of civil or criminal bribery charges in one country will not keep a company out of court in another jurisdiction. Total S.A., a French oil and gas company, violated the FCPA by using a third party to make illegal payments to an Iranian government official to obtain oil and gas concessions. The company entered into a DPA with the DOJ in 2013 and agreed to pay a $245 million
penalty to settle the charges. French prosecutors then charged Total S.A. for the corruption of foreign public officials; however, a French criminal court cleared the company of all charges in 2013. But after new criminal charges were filed in 2014, a French court of appeals found Total S.A. guilty of corrupting foreign officials in February 2016. Notably, French authorities had cooperated with the U.S. authorities who had initially investigated Total S.A. for FCPA violations.

What does this mean for corporate entities? They should continue to expect unpredictable enforcement from non-U.S. authorities as they enhance their anticorruption efforts. The French reaction in the Total S.A. case could be attributed to pressure from the Organization for Economic Cooperation and Development (OECD), which has urged OECD member states to bolster foreign bribery enforcement. Also, French authorities may have felt additional pressure to prosecute the company because it is headquartered in France. The Total S.A. case highlights the risks that global anti-bribery enforcement generates for multinational companies.

**Local Laws Can Inhibit Global Investigations**

Multijurisdictional enforcement has contributed to another challenge inherent in cross-border investigations: the potential to prompt legal proceedings that may be wholly unrelated to the bribery allegations. If not carefully managed, an internal corporate investigation into alleged bribery could trigger legal action in a foreign jurisdiction. For example, the improper production of evidence or removal of evidence to another jurisdiction can potentially violate procedural rules or data privacy laws. Such violations can lead to civil and criminal proceedings, which can add undesired complexity to ongoing foreign bribery investigations.

Data privacy protections can complicate a foreign bribery investigation. Heightened privacy protections across the European Union (EU) present challenges to companies tasked with responding to requests from non-EU authorities. Employee communications are privileged in the EU and not subject to the more liberal discovery rules applicable in the United States. For example, employees in the EU must receive notice from the company prior to the disclosure of their workplace communications. Employee consent is also required. Databases containing employee information often must be maintained within the European country where those employees are under contract. In some cases, particularly if a blocking statute is involved, it may simply become impossible for a company to comply with a request for information from U.S. or other foreign authorities if the jurisdiction housing the data prohibits it. Thus, a company may be placed in a position where it must decide whether it is willing to
face the consequences for refusing to comply with the request for information or risk contravening data privacy statutes.

Engaging in internal investigations in countries such as China are even more problematic, as a result of the Chinese government’s broad authority to determine the limits on data protection. Multinational companies that have conducted an internal corporate investigation in China have confronted the challenges of complying with China’s State Secrets Law. The law dictates that state secrets are "matters that have a vital bearing on state security and national interests.” The law outlines seven categories of state secrets, but also includes a catch-all provision that enables Chinese authorities to exercise total discretion over defining what information may be classified under this category. During the course of investigating corporate misconduct for their client GlaxoSmithKline, two investigators were arrested in 2013 and subsequently convicted in 2014 of having illegally obtained and sold Chinese client data. While these charges did not directly target GSK, these investigators were providing professional services to facilitate the company’s internal investigation into reports of fraud and corruption obtained from a whistleblower. Clearly, these vague and overly broad data privacy protections afford a great deal of discretion to the Chinese government, increasing the complexity of conducting an internal corporate investigation in China.

These data privacy issues are unique to these respective jurisdictions; however, they highlight a few of the issues that companies must confront when handling multijurisdictional investigations. As more countries consider adopting stricter privacy laws modeled after those in the EU (in contrast to U.S. laws that allow for greater disclosure), the ability for a company to uniformly manage international investigations will further diminish. To comply with such laws, firms typically must conduct such investigations within the host country where the data is located, but even so, they must employ local counsel or attorneys with expertise in local privacy laws. Increased international anticorruption enforcement combined with stricter data privacy regimes will require multinational firms to develop a unique response for each investigation, carefully designed to prevent parallel proceedings.

To Disclose or Not to Disclose in an Age of Global Enforcement?

Voluntary cooperation in a multijurisdictional enforcement context can be a valuable strategy for a firm facing foreign bribery charges. But, how and when a company should disclose depends on the circumstances. As the previously discussed cases illustrate, foreign authorities frequently collaborate during the course of these investigations. Accordingly, some authorities may take the
approach that, “A firm may have settled there, but we will still investigate the company and impose penalties here.” With more scrutiny from authorities globally, does voluntary disclosure still make sense?

Although subject to careful timing, a company’s decision to self-report misconduct uncovered during an internal investigation can yield benefits in the United States. It can ensure that the option to negotiate a NPA or DPA will remain available, as demonstrated by the Goodyear case. Goodyear uncovered FCPA violations during an internal investigation, self-disclosed these findings to U.S. authorities, and obtained a favorable settlement in exchange for its substantial cooperation. But if the misconduct spans several jurisdictions, should a company disclose to one or all regulators?

A company’s decision to cooperate with authorities could protect the firm from collateral consequences. In the Siemens case, the firm faced bribery charges from European and U.S. authorities for allegedly paying $1.4 billion in bribes to foreign officials across multiple jurisdictions to facilitate business operations. Had the firm been charged with criminal bribery in the United States, Siemens would have been automatically debarred from engaging in European government contracts as per the EU Public Procurement Directive. In that case, U.S. authorities structured the charges to avoid that outcome; however, not all authorities may be willing to enter a “global settlement” of this type depending on their objectives. By cooperating and engaging with authorities during an enforcement action, a company’s legal counsel can identify and address these issues prior to the initiation of any enforcement proceedings.

Unfortunately, voluntary disclosure and cooperation does not insulate a firm from liability, particularly if foreign authorities are managing independent, but parallel, investigations. In addition, the option to enter a settlement agreement to avoid criminal or civil bribery charges may not be available depending on the enforcement framework within a particular country. In Brazil, the country’s penal code does not provide for corporate criminal liability, but Brazilian entities found to have paid bribes will be subject to strict liability under the Clean Company Act. Civil fines and penalties will automatically be imposed, ranging up to 30 percent of the firm’s annual profits. While a company may succeed in reducing those fines through cooperation with the Brazilian government, strict liability for a firm’s misconduct could invite additional scrutiny from other countries, which may result in another investigation or additional penalties. Companies must be aware of the fundamental differences in each country’s approach to bribery enforcement to successfully to resolve pending bribery allegations.
Careful analysis of the decision to disclose or cooperate is required to avoid incurring collateral consequences, including scrutiny from numerous foreign authorities. Evaluating how a settlement could resonate across jurisdictions, if and when available, will be important for global companies. Additionally, companies should not expect these matters to be resolved through collaborative or comprehensive agreements among foreign authorities because each country has different enforcement priorities and objectives. While U.S. and European authorities have collaborated to settle these cases, these occurrences have been rare. Joint settlements have not yet been adopted as the predominant approach to resolving multijurisdictional bribery cases.

**Considerations for Companies Facing Multijurisdictional Bribery Enforcement**

Companies that find themselves the targets of multijurisdictional enforcement actions must develop a comprehensive plan for managing their internal investigations and the options available to resolve the matter. Their strategies should address the potential consequences for the firm if it is sanctioned by two countries for the same conduct. In developing its approach, the firm should consider how resolving charges in one country could impact the outcome in another jurisdiction. Voluntary disclosure has been a favored strategy by some firms, but this approach may produce risky outcomes when dealing with multiple jurisdictions. Companies should consider the following issues when crafting their response:

1. **Expect to coordinate with multiple authorities and regulators and develop a strategy with built-in flexibility.** After initiating an internal investigation, global companies should develop a plan for communicating with foreign authorities in the event that further misconduct is discovered.

2. **FCPA investigations and enforcement actions will likely have follow-on cases.** Relationships being forged between foreign authorities through cross-border investigations are expanding the scope of such investigations. Anticipate that they will be in communication if your case transcends national boundaries. While a firm’s case may be settled or resolved in one country, that resolution could initiate an independent investigation by anti-corruption authorities in other countries.

3. **Firms are likely to experience inconsistent and unpredictable enforcement as non-U.S. authorities bring more bribery enforcement actions.** How authorities and courts outside of the United States interpret the provisions of their respective anti-bribery statutes will determine the extent to which future cases overlap. However, in situations where authorities are enforcing a new or revised anti-bribery law, companies will face greater uncertainty.

4. **Understand the ramifications of entering into a settlement agreement with foreign authorities, and recognize that a settlement may not be available.** Carefully evaluate all of the options available to settle or mitigate any charges brought by U.S. and non-U.S. authorities. It will be important to consider how a settlement in one jurisdiction could affect the company’s operations in other markets. Potential consequences should be analyzed prior to concluding such agreements.

5. **When designing an investigation plan, carefully evaluate it to ensure that it adheres to data privacy restrictions and complies with local laws to preserve privilege.** Developing a local strategy for conducting a company’s internal investigation can be an important preventive measure to avoid violating local laws relating to data privacy, privilege, or evidence-gathering procedures.
company should consult local experts and local legal counsel to assist with the execution and management of the internal investigation. Coordinating a strategic response with oversight from in-house counsel can help the company avoid entanglement in additional legal proceedings.

Conclusion

The prospect of authorities bringing more bribery enforcement actions globally introduces greater uncertainty into the regulatory environment for multinational companies. When responding to a multijurisdictional enforcement action, companies must consider how their geographic scope of operations may shape the inquiry. Companies must be aware of these developments in global enforcement because they will inevitably impact a firm’s ability to settle or resolve bribery investigations with any degree of certainty.