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International White Collar Crime and the Globalization of Internal Investigations

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Abstract

Much has been written about the methods by which counsel may efficiently, thoroughly, and credibly conduct internal investigations. Given the globalization of such matters, however, this Article seeks to focus on the challenges present when conducting an internal investigation of potential international white-collar criminal activity. In Part I, this Article will examine the challenges of selecting counsel to perform internal investigations abroad. In particular, consideration will be given to global standards regarding the application of the attorney-client privilege and work product protections. In Part II, this Article will discuss the influence of data privacy and protection laws in various countries and analyze the challenges of attempting to conduct an American-style internal investigation in such jurisdictions. Part III of this Article will examine interactions with employees during international internal investigations and will consider the challenges of complying with varying labor laws and due process requirements around the world. Finally, in Part IV, this Article will discuss the hazards of multi-jurisdictional investigations by government agencies. In particular, consideration will be given to decisions regarding the disclosure of investigatory findings and the difficulties of engaging in settlement negotiations in an international enforcement environment.

KEYWORDS: White-Collar Defense, Investigation, Attorney-client Privilege, International Law

INTERNATIONAL WHITE COLLAR CRIME AND THE GLOBALIZATION OF INTERNAL INVESTIGATIONS

*Lucian E. Dervan**

ABSTRACT

Much has been written about the methods by which counsel may efficiently, thoroughly, and credibly conduct internal investigations.¹ Given the globalization of such matters, however, this Article seeks to focus on the challenges present when conducting an internal investigation of potential international white-collar criminal activity. In Part I, this Article will examine the challenges of selecting counsel to perform internal investigations abroad. In particular, consideration will be given to global standards regarding the application of the attorney-client privilege and work product protections. In Part II, this Article will discuss the influence of data privacy and protection laws in various countries and analyze the challenges of attempting to conduct an American-style internal investigation in such jurisdictions. Part III of this Article will examine interactions with employees during international internal investigations and will consider the challenges of complying with varying labor laws and due process requirements around the world. Finally, in Part IV, this Article will discuss the hazards of multi-jurisdictional investigations by government agencies. In particular, consideration will be given to decisions regarding the disclosure of investigatory findings and the difficulties of engaging in settlement negotiations in an international enforcement environment.

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1. See generally Lucian E. Dervan, *Responding to Potential Employee Misconduct in the Age of the Whistleblower: Foreseeing and Avoiding Hidden Dangers*, 3 BLOOMBERG CORP. L.J. 670 (2008) [hereinafter Dervan, *Responding to Potential Employee Misconduct*]; Paul B. Murphy & Lucian E. Dervan, *Watching Your Step: Avoiding the Pitfalls and Perils When Conducting Internal Investigations*, 16 ALAS LOSS PREVENTION J. 2 (2005) [hereinafter Murphy & Dervan, *Watching Your Step*].

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INTRODUCTION

On April 14, 2010, Russian authorities raided Hewlett-Packard's (HP's) Moscow company offices in search of information regarding an alleged scheme by employees in Germany to bribe Russian officials.² HP's German subsidiary allegedly paid kickbacks in Russia to obtain a €35 million contract for the delivery and installation of an information technology network to a Russian public prosecutor's office.³ By September 2010, HP publicly disclosed through its securities filings that the criminal investigations into the scheme had spread well beyond Germany and Russia and now included an investigation by the U.S. Department of Justice (DOJ) and Securities and Exchange Commission (SEC).⁴ Further, HP revealed that the investigation by

2. See Bruce Zagaris, *Bribery Investigation of Hewlett-Packard Spread*, 26 INT'L ENFORCEMENT L. REP. 445, 445 (2010) [hereinafter Zagaris, *Bribery Investigation*] ("Russian authorities conducted the searches at the request of German authorities, investigating \$7 million in suspicious payments to Russian officials."); see also Bruce E. Yannet & David M. Fuhr, *Russia: H-P Bribery Investigation and Public and Private Anti-Corruption Efforts*, DEBEVOISE & PLIMPTON LLP FCPA UPDATE 9, at 3 (2010) (citations omitted) ("The investigation reportedly began in 2007 after a German tax auditor became suspicious of payments a Germany H-P subsidiary made totaling €22 million to a small computer hardware firm near Leipzig from 2004 to 2006. The H-P subsidiary recorded the payments as having been made for services rendered in Moscow. The investigation also identified three payment intermediaries, shell companies in multiple jurisdictions, and a Moscow-based computer supplier with foreign bank accounts as having conspired with H-P to perpetrate the alleged bribery scheme. Using H-P funds, the intermediaries—based in former East Germany—allegedly paid fake invoices to the shell companies for equipment. The illicit funds then flowed through bank accounts all over the world—including the U.K., the U.S., New Zealand, the British Virgin Islands, Latvia, Lithuania, Belize, Austria, and Switzerland—before making their way to Russia.").

3. See Zagaris, *Bribery Investigation*, *supra* note 2, at 445.

4. See Joseph Palazzolo, *H-P Bribe Probe Widens*, WALL ST. J. (Sept. 10, 2010), <http://online.wsj.com/article/SB10001424052748704644404575481961121687910.html>.

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the United States' government had expanded to include Germany, Russia, Austria, Serbia, and the Netherlands.⁵ The proliferation of an alleged bribe in Germany into subsequent government investigations in as many as twelve countries around the globe demonstrates the truly international nature of white collar crime in the twenty-first century.⁶ With this internationalization of white collar crime and increase in global enforcement initiatives and cooperatives comes an inevitable byproduct: the globalization of internal corporate investigations.⁷

The historical rise of internal investigations as an important tool in the arsenals of corporate defense counsel can be traced to increasingly aggressive enforcement programs by the SEC in the 1960s.⁸ During this period, the SEC staff was tasked with creating innovative enforcement mechanisms by which corporations would be required to

5. See Brandon Bailey, *HP Corruption Case Expands to Other European Countries*, SAN JOSE MERCURY NEWS (Dec. 16, 2010) ("HP also said in its report that U.S. authorities have sought information relating to whether HP personnel in Russia, Germany, Austria, Serbia and the Netherlands 'were involved in kickbacks or other improper payments' to distributors, government agencies or private parties.").

6. See Michael D. Hausfeld, *Global Enforcement of Anticompetitive Conduct*, 10 SEDONA CONF. J. 9, 9 (2009) ("Globalization of commerce has increased the economic interdependence of countries around the world. The increasing integration of markets has brought with it an increase in the number and frequency of anti-competitive business practices, affecting economies worldwide."); Bruce Zagaris, *International Enforcement Law Trends for 2010 and Beyond: Can the Cops Keep Up with the Criminals?*, 34 SUFFOLK TRANSNAT'L L. REV. 1, 2 (2011) [hereinafter Zagaris, *International Enforcement*] ("The modern economy, globalization, and new technologies facilitate the spread of transnational crime, especially economic crime.").

7. See Tommy Helsby, *Compliance: Why 'by the Book' is Good for the Books*, CORP. GOV. ASIA, Apr.–June 2011, at 30, available at http://www.krollconsulting.com/media/pdfs/Corporate_Gov_Asia_Tommy_Helsby_July_2011_jpg.pdf ("The past twelve months have brought not only tougher regulation, including the Dodd-Frank Act in the United States and the Bribery Act in the United Kingdom, but also more active enforcement—notably increased resources devoted to corruption investigations in the United States at the Department of Justice and the Securities and Exchange Commission as well as a similar business crime focus in Britain at the Serious Fraud Office. Meanwhile, storied magistrates elsewhere in Europe—Joly in France, Garzon in Spain, DiPietro in Italy—have been succeeded by a new generation of officials keen to make their names. Prosecutors in Germany, often in cooperation with their counterparts in the United States and elsewhere, have successfully targeted a series of major domestic businesses."); see also Ellen S. Podgor, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 325, 325–26 (1997) (discussing the increase and anticipated increase in enforcement regarding international activities).

8. See Arthur F. Mathews, *Internal Corporate Investigations*, 45 OHIO ST. L.J. 655, 656 (1984) ("I first began to observe the development of corporate self-investigations as an outgrowth of the increased pace of the SEC's nationwide enforcement program in the early 1960s.").

engage in activities to restore the corporation to a “pre-violation, law-abiding condition.”⁹ One example of such ancillary relief was the requirement that a receiver be appointed to ensure corporate improprieties were halted.¹⁰ Over time, however, corporations began to propose an alternative to receivership, which was a costly and intrusive form of government oversight.¹¹ Instead, corporations began proposing that injunctive relief orders contain a requirement that the corporation undertake an internal investigation on its own using special counsel to achieve the same ends.¹² By the early 1970s, the ordering of internal investigations led by the corporation, rather than the SEC, had become the norm, with one court commenting that the appointment of special counsel to conduct an internal investigation as part of an SEC settlement was “a ‘desirable and economical practice’ that ‘allows the company to keep its own house clean and avoid unnecessary governmental supervision.’”¹³

9. *See id.* at 656–57 (“[T]he Enforcement staff [in the 1960s] was encouraged to seek sometimes novel, somewhat exotic additional relief in important civil injunctive actions. Such ancillary relief, as it came to be called, was designed to make victims whole and to restore corporate circumstances to healthier, pre-violation, law-abiding conditions: it was an important supplement to the traditional injunctive order, which merely deterred future violations. The decade of the 1960s saw SEC civil injunctive enforcement actions request with increasing regularity such ancillary relief. The SEC sought ancillary relief in such forms as appointment of receivers or special agents, restitution or disgorgement of ill-gotten gains, limitations on activities of officers or directors, wholesale restructuring of boards or directors, accountings, and restrictions on voting blocs of stock and rescission offers.”).

10. *See id.* at 657 (“For example . . . the SEC sought, in addition to injunctive relief, restitution of over \$1.2 million from the principal officers and directors of the corporate defendant, as well as appointment of a receiver to assure that corporate affairs would be conducted properly, that all self-dealing would be halted, and that the company’s deficient SEC filings would be corrected.”).

11. *See id.* (“Astute defense counsel, wiser and more experienced than I, were willing to counsel their clients to provide the requested restitution after an appropriate accounting, but refused to consider appointment of a receiver. . . . [C]ounsel countered the SEC’s request for a receiver with an offer to have the district court appoint three new independent directors to constitute a court-supervised majority on the five-person board . . . and to charge the independent directors to pursue an internal corporate investigation.”).

12. *See id.* at 658 (“Thus, by the early 1970s, the SEC was gradually learning that an efficacious way to straighten out huge corporate messes brought to surface by some of its major enforcement actions was to restructure boards of directors and cause independent directors or their special counsel to accomplish internal corporate self-investigations, rather than to tie up scarce government resources to do the whole job in each case.”).

13. *Id.* at 661 (quoting *United States v. Handler*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96,519, at 94,024 (C.D. Cal. Aug. 3, 1978)); *see Mathews, supra* note 8, at 661–62 (“It gradually became rather routine to settle an SEC enforcement case against a major corporation by agreeing to have outside counsel serve as special

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In 1977, in the wake of the Watergate scandal and revelations that hundreds of American corporations were bribing foreign governmental officials, the Foreign Corrupt Practices Act (FCPA) was passed into law.¹⁴ The statute, which remains a centerpiece of international white collar criminal enforcement today, prohibits

corruptly paying or promising to pay money or anything of value to a foreign official, foreign political party, foreign political party official, or candidate for foreign political office to influence the foreign official in the exercise of his or her official duties to assist the payor in obtaining or retaining business.¹⁵

Given the sensitive nature and significant business and reputational risks associated with criminal charges stemming from this type of conduct, American corporations began to realize the value of conducting internal investigations before the government became involved in the matter, rather than merely utilizing this tool to settle existing enforcement actions.¹⁶ As a result, corporations and their counsel began to ask why it would not be more prudent for a company to investigate itself privately without court supervision, SEC monitoring, or inflexible conditions imposed by a consent decree. By employing a self-investigation procedure, a company could use inside or

counsel in conducting an internal corporate investigation on behalf of the company's board of directors or audit committee.”); see also David S. Hilzenrath, *U.S. Investigations of Firms Rely on Companies' Own Legal Work*, WASH. POST (May 23, 2011), http://www.washingtonpost.com/business/economy/justice-department-sec-investigations-often-rely-on-companies-internal-probes/2011/04/26/AFO2HP9G_story.html (“As the U.S. government steps up investigations of companies suspected of paying bribes overseas, law enforcement officials are leaving much of the detective work to the very corporations under suspicion. The probes are so costly and wide-ranging that the Justice Department and Securities and Exchange Commission often let the companies investigate themselves.”). Hilzenrath's article further notes that Avon has confirmed spending more than \$130 million on internal investigations in recent years, and Siemens has spent about \$950 million on recent global bribery inquiries. *Id.*

14. See F. Joseph Warin, Charles Falconer & Michael S. Diamant, *The British are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT'L L.J. 1, 4 (2010).

15. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 (2006); see Warin et al., *supra* note 14, at 8–9 (“The FCPA's anti-bribery provisions cast a wide net. They can ensnare corporations and individuals, including any officer, director, employee, or agent of a corporation and any stockholder acting on behalf of a subject entity.”).

16. See Mathews, *supra* note 8, at 666 (“As the sensitive foreign payments cases mushroomed in the mid-1970s, the corporate defense bar awoke to the fact that proper corporate maneuvering in advance of, or in the midst of, an SEC enforcement investigation might lead to a less painful resolution of corporate payments.”).

outside counsel, not necessarily wholly independent, and at least not subject to prior approval of the SEC or the court.¹⁷

With the realization in the 1970s of the significant advantages of acting in advance of government inquiries, the modern internal corporate investigation was born.¹⁸

Much has been written about the methods by which counsel may efficiently, thoroughly, and credibly conduct internal investigations.¹⁹ Given the globalization of such matters, however, this Article seeks to focus on the challenges present when conducting an internal investigation of potential international white collar criminal activity. In Part I, this Article will examine the challenges of selecting counsel to perform internal investigations abroad. In particular, consideration will be given to global standards regarding the application of the attorney-client privilege and work product protections. In Part II, this Article will discuss the influence of data privacy and protection laws in various countries and analyze the challenges of attempting to conduct an American-style internal investigation in such jurisdictions. Part III of this Article will examine interactions with employees during international internal investigations and consider the challenges of complying with varying labor laws and due process requirements around the world. Finally, in Section IV, this Article will discuss the hazards of multi-jurisdictional investigations by government agencies. In particular, consideration will be given to decisions regarding the disclosure of investigatory findings and the difficulties of engaging in settlement negotiations in an international enforcement environment.

17. *Id.*

18. See Sarah H. Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 869–71 (2003) (discussing the government's increased focus on corporate crime beginning in the 1960s and the resulting increase in internal investigations by corporations seeking to "identify and address issues before they became the focus of government inquiries."); Kevin H. Michels, *Internal Corporate Investigations and the Truth*, 40 SETON HALL L. REV. 83, 84 (2010) ("In 2008, nearly half of all United States public companies commissioned outside counsel to conduct at least one internal investigation."); Richard H. Porter, *Voluntary Disclosures to Federal Agencies—Their Impact on the Ability of Corporations to Protect from Discovery Materials Developed During the Course of Internal Investigations*, 39 CATH. U. L. REV. 1007, 1007 (1990) ("In many American corporations, internal investigations are becoming commonplace.").

19. See generally Dervan, *Responding to Potential Employee Misconduct*, *supra* note 1; Murphy & Dervan, *Watching Your Step*, *supra* note 1.

I. SELECTING THE INVESTIGATORS IN INTERNATIONAL MATTERS

One of the most important initial considerations when launching an internal investigation is determining who will conduct the inquiry.²⁰ Several options exist, including utilizing corporate human resources, internal compliance officers, in-house counsel, or outside counsel.²¹ In the context of potential international white collar criminal activity, however, it is clear that independent counsel should be retained as soon as possible to achieve two important goals.²² First, retention of outside counsel makes investigative findings more credible, because the government often looks with suspicion upon the statements and conclusions of insiders who may either be involved in the underlying misconduct or, at a minimum, who have a significant financial stake in the investigation's outcome.²³ Second, utilization of attorneys to conduct the investigation, rather than corporate employees or officers, shields investigative memoranda, reports, and conclusions from involuntary disclosure to third parties, including the government, because of the application of the attorney-client privilege and work

20. See Dervan, *Responding to Potential Employee Misconduct*, *supra* note 1, at 676 ("The first question that must be answered after an employee reports potential misconduct is who will perform the internal investigation."). While there are a myriad of challenges that arise during international internal investigations, this Article will only focus on a select few issues that arise commonly during these inquiries. Counsel should be aware, however, that many other unique challenges can arise from jurisdiction in the international arena. As such, counsel must be proactive in ensuring an awareness of such issues. One mechanism by which to better understand the unique legal requirements in each jurisdiction is to ensure local counsel is available for consultation.

21. *Id.* ("Where the issue does not implicate any potential wrongdoing on the part of the corporation or any of its employees and the issues are not prohibitively complex, the investigation may be handled internally.").

22. *Id.* ("However, once it becomes clear that there may be potential corporate liability or the issues become sufficiently complex, involvement by outside counsel is likely warranted.").

23. See Robert S. Bennett, Alan Kriegel, Carl S. Rauth & Charles F. Walker, *Internal Investigations and the Defense of Corporations in the Sarbanes-Oxley Era*, 62 *BUS. LAW.* 55, 62 (2006) ("Although the perception may be unfair, in-house counsel are likely to be viewed by the government as lacking independence due to their status as part of the corporate management structure. This can be a particular problem where the government perceives a conflict between the interests of a company's management and the interests of its employees."); J. Justin Johnston, *Corporate Investigations After the Mortgage Meltdown*, 65 *J. MO. B.* 70, 73 (2009) ("[I]n fraud cases particularly, an internal investigation may require scrutiny of high-level corporate officers and others with power to affect in-house counsel's future with the company. Under no circumstances should in-house counsel be asked to investigate such persons due to the inherent lack of credibility regarding his or her conclusions.").

product protections.²⁴ While it appears at first glance that the issue of who will conduct the investigation is a simple one in the context of international white collar crime, the reality of international multi-jurisdictional inquiries makes this a complex and precarious area in which several potential pitfalls exist.²⁵

24. See Bennett et al., *supra* note 23, at 63 (discussing the importance of establishing attorney-client privilege during an internal investigation); Johnston, *supra* note 23, at 73 (“Clearly, an investigation can be handled by non-attorney corporate employees, such as company security, or corporate officers. The drawback to this method is that attorney-client privilege and work product protections do not attach to the result of the investigation.”); Porter, *supra* note 18, at 1009–10 (“Furthermore, there is a compelling practical reason why the investigation should not be conducted by management personnel: It is highly unlikely that documents generated during an investigation conducted by managerial personnel can be shielded from discovery by third parties.”). See generally Thomas R. Mulroy & Eric J. Munoz, *The Internal Corporate Investigation*, 1 DEPAUL BUS. & COM. L.J. 49 (2002) (discussing the importance of attorney-client privilege and work product protection in the internal investigation context).

Interestingly, the application of attorney-client privilege and work product protection to internal investigations in the United States was not always assured. In the mid-1970s, a company called Diversified Industries undertook an internal corporate investigation regarding allegations of commercial bribery. See *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 600 (8th Cir. 1977); Mathews, *supra* note 8, at 669. The report produced by counsel conducting the internal investigation was provided to the SEC and proved extremely helpful in negotiating a favorable resolution of the matter. *Id.* Later, however, private litigators sought copies of the internal investigation report for use in their civil suits. *Id.* The issue went to the United States Court of Appeals for the Eighth Circuit, where a panel ruled that the material was not protected:

[With regard to the investigatory report], [w]e have concluded . . . that the report is not entitled to protection on the basis of either attorney-client privilege or work product immunity. We find it unnecessary to decide whether the persons interviewed by the Firm’s representatives should be considered as “clients” because we are persuaded that Law Firm was not hired by Diversified to provide legal services or advice. It was employed solely for the purpose of making an investigation of facts and to make business recommendations with respect to the future conduct of Diversified in such areas as the results of the investigation might suggest.

Diversified Industries, 572 F.2d at 603. Fortunately for the future of such internal investigations, the Eighth Circuit *en banc* reversed the decision of the appellate panel:

To be sure, there are possibilities of abuse, but the application of the attorney-client privilege to this matter and others like it will encourage corporations to seek out and correct wrongdoing in their own house and to do so with attorneys who are obligated by the Code of Professional Responsibility to conduct the inquiry in an independent and ethical manner. . . . We conclude that these employee interviews are confidential communications of the corporate client and entitled to the attorney-client privilege.

Id. at 610–11; see also *United States v. Upjohn Co.*, 449 U.S. 383, 396–97 (1981) (establishing the modern standard by which privilege applies to internal corporate investigations).

25. See Walfrido J. Martinez, *Recent Trends in and Practical Guidance for Preventing and Defending International White Collar Crime*, in *INTERNATIONAL WHITE*

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On February 10, 2003, the European Union's (EU) Commission, charged with developing antitrust rules for the EU and investigating alleged violations of EU competition provisions, ordered Akzo Nobel Chemicals Ltd. (Akzo) and Akcros Chemicals Ltd. (Akcros) to submit to an inquiry regarding potential anti-competitive practices.²⁶ On February 12 and 13, 2003, the Commission carried out a dawn raid on the companies' Manchester, Britain, offices in search of documents relevant to the governmental investigation.²⁷ During the search, Commission officials discovered two emails that appeared to contain relevant information.²⁸ The emails were an exchange regarding antitrust issues between a general manager and Akzo's in-house counsel, who was in charge of coordinating competition law and who was a licensed practitioner in the Netherlands.²⁹ Though company officials protested, the Commission's representatives took the emails after concluding that the documents were not protected by the attorney-client privilege.³⁰

The basis for the Commission representatives' decision to seize the documents was a 1982 European Court of Justice decision entitled *AM&S v. Commission*.³¹ In *AM&S*, the Commission sought docu-

COLLAR ENFORCEMENT: LEADING LAWYERS ON UNDERSTANDING INTERNATIONAL DEVELOPMENTS, COMPLYING WITH FCPA INVESTIGATIONS, AND ESTABLISHING EFFECTIVE CORPORATE COMPLIANCE PROGRAMS, 2011 EDITION 81, 93 (Michaela Falls ed., 2010) [hereinafter *INT'L WHITE COLLAR ENFORCEMENT 2011 ED.*], available at 2010 WL 5312203, at *6 ("Attorneys representing clients in the international context must immediately familiarize themselves with the rules concerning privilege in order to minimize the risk of having 'privileged' information disclosed to third parties.").

26. See Case C-550/07 P, *Akzo Nobel Chems. Ltd. v. European Comm'n*, 5 C.M.L.R. 19, 1191 (2010).

27. See *id.*; Benjamin W. Heineman, Jr., *European Rejection of Attorney-Client Privilege for Inside Lawyers*, HARVARD L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (Oct. 2, 2010), <http://blogs.law.harvard.edu/corpgov/2010/10/02/european-rejection-of-attorney-client-privilege-for-inside-lawyers>.

28. See Heineman, Jr., *supra* note 27.

29. See Heineman, Jr., *supra* note 27 ("At issue were two emails about antitrust issues—obtained in a dawn raid aimed at enforcing EU competition laws—exchanged between a general manager and an in-house lawyer who was a member of the Netherlands bar."); see also Laurel S. Terry, *Introductory Note to the Court of Justice of the European Union: The Akzo Nobel EU Attorney-Client Privilege Case*, 50 *INT'L LEGAL MATERIALS* 1, 2 (2011) (noting that under the laws of the Netherlands, communications by this in-house counsel with his client, the corporation, were protected by the attorney-client privilege).

30. See *Akzo Nobel Chems.*, 5 C.M.L.R. at 1191 ("After examining the last three documents and obtaining the applicants' observations, the head of the investigating team took the view that they were definitely not privileged.").

31. See Case 155/79, *AM & S Eur. Ltd. v. Comm'n of the European Cmtys.*, 1982 E.C.R. 1575; see also Maurits Dolmans, *Attorney-Client Privilege for In-House*

ments regarding potential price-fixing from AM&S's Bristol, England, offices that the company claimed were protected by the attorney-client privilege.³² In considering the application of privilege to the documents, the court held that an EU rule of privilege, rather than a country specific rule, applied in all Commission investigations of anti-competitive practices.³³ To fall within the protection of the EU rule of privilege, two elements were required to be satisfied.³⁴ "First, the communication must have been given for purposes of the client's defense. Second, the communication must have been with an independent lawyer, which would not include in-house counsel."³⁵ As the emails seized in the *Akzo Nobel* case involved communications between an in-house attorney and a company manager, the Commission believed they were not protected from disclosure, even though privilege rules in the Netherlands would have protected the exchange.³⁶

The dispute over the documents taken from the Manchester offices continued with the companies sending a letter of complaint to the Commission in mid-February 2003.³⁷ On May 8, 2003, however, the Commission rejected the application of privilege and the request for the return of the emails.³⁸ Later that year, the companies filed an action with the EU's General Court, and the matter eventually made its

Counsel: A European Proposal, 4 COLUM. J. EUR. L. 125, 125 (1998) (discussing the state of privilege in Europe); Terry, *supra* note 29, at 1.

32. See Dan R. Mastromarco, *Disparity in the Application of Legal Principles as a Form of Trade Restraint: Attorney-Client Privilege in the European Community*, 13 HASTINGS INT'L & COMP. L. REV. 479, 482 (1990); see also Theofanis Christoforou, *Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case*, 9 FORDHAM INT'L L.J. 1, 2 (1985).

33. See Terry, *supra* note 29, at 1.

34. *Id.*

35. *Id.* at 1-2; see also Stephen A. Calhoun, *Globalization's Erosion of the Attorney-Client Privilege and What U.S. Courts Can Do to Prevent It*, 87 TEX. L. REV. 235, 240 (2008) ("First, the communications must be 'made for the purposes and in the interests of the client's right of defence.' Second, the communications must 'emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment.'").

36. Terry, *supra* note 29, at 2 n.10 ("The contract between Akzo and its in-house counsel specifically acknowledged the in-house counsel's freedom and independence. Under Dutch law, this agreement and the lawyer's status as a member of the bar meant that Dutch [privilege laws] applied.").

37. See Case C-550/07 P, *Akzo Nobel Chems. Ltd. v. European Comm'n*, 5 C.M.L.R. 19, 1191 (2010).

38. See *id.* at 1192.

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way back to the European Court of Justice almost twenty years after the *AM&S* case.³⁹

In its *Akzo Nobel* decision rejecting the companies' claims of privilege, the European Court of Justice reaffirmed its earlier, narrow interpretation of the applicability of privilege in the corporate context.⁴⁰ In particular, the court stated, "It follows, both from the in-house lawyer's economic dependence and the close ties with his employer, that he does not enjoy a level of professional independence comparable to that of an external lawyer," resulting in a failure to satisfy the second prong of the *AM&S* test.⁴¹ Importantly, however, the court noted that the EU privilege standard established in *AM&S* and reiterated in *Akzo Nobel* applies only to EU investigations, such as those conducted by the Commission regarding anti-competitive practices.⁴² As such, in other legal situations the various laws of each individual country of the EU apply, some of which take similar views of in-house counsel.⁴³

39. *See id.*

40. *See id.* at 1201; *see also* John Gergacz, *Privileged Communications with In-House Counsel Under United States and European Community Law: A Proposed Re-Evaluation of the Akzo Nobel Decision*, 42 CREIGHTON L. REV. 323, 323 (2009) ("In *Akzo Nobel*, the court held that lawyers employed as in-house counsel were not independent of their corporate employers and, thus, could not engage in privileged communications with their client, the corporation."); Mauro Squitieri, *The Use of Information in EU Competition Proceedings and the Protection of Individual Rights*, 42 GEO. J. OF INT'L L. 449, 461–64 (2011) (discussing the *Akzo* decision).

41. *Akzo Nobel Chems.*, 5 C.M.L.R. at 1198. ("Therefore, the General Court correctly applied the second condition from legal professional privilege laid down in the judgment in *Australian Mining & Smelting Europe Ltd. v. Commission of the European Communities*.")

42. *See* Terry, *supra* note 29, at 3 ("As [commentators] have correctly observed, *Akzo Nobel* does not invalidate or change the legal professional privilege that applies to Member State proceedings . . . Moreover, *AM&S* and *Akzo Nobel* were limited to the Commission's competition investigations, not competition proceedings by Member States.")

43. *See id.* at 1 ("In addition to its rules about bar eligibility, each EU Member State has its own set of rules or case-law governing the confidentiality or privileged nature of communications between clients and their lawyers. These national laws vary in some significant respects. For example, in some EU Member States, the privilege belongs to the client, whereas in other Member States, the privilege belongs to the lawyer. In some EU Member States, confidentiality can be waived, whereas in other Member States, this is not possible."); *see also* Donald C. Dowling, Jr., *International HR Best Practice Tips: Conducting Internal Employee Investigation Outside the U.S.*, 19 INT'L HUM. RESOURCES J. 1, 4 (2010) ("Jurisdictions like Hungary do not recognize a viable in-house lawyer privilege. A broad overview published in *Inside Counsel* lists the 'EU member states that recognize privilege for the in-house bar' as 'Denmark, Germany, Ireland, Luxembourg, Netherlands, Portugal, Romania, Spain, UK.'").

As the *Akzo Nobel* decision makes strikingly clear, one must be familiar with privilege laws in the jurisdictions, both regional and national, involved in an international internal investigation as the rules vary dramatically by country and subject matter.⁴⁴ While the different variations of privilege can have a myriad of impacts on an internal inquiry, two will be mentioned here specifically. First, the role of in-house counsel, including a corporation's general counsel, must be closely examined. While it is common for in-house counsel in the United States to perform a preliminary inquiry to determine whether outside counsel is required for a more extensive investigation, in some jurisdictions the materials and information collected during this initial appraisal of the situation might not be protected from compulsory disclosure.⁴⁵ Further, to the extent in-house counsel seeks to assist outside counsel during the performance of the internal investigation, consideration must be given to whether such activity would be covered by privilege.⁴⁶ While an argument exists that any such assistance by in-house counsel would be at the direction of a recognized outside "attorney," this argument may be defeated in jurisdictions that interpret privilege in a narrow fashion.⁴⁷ Second, counsel must be aware of the possibility that attorneys from one region of the globe might not enjoy any privilege protections in certain jurisdictions, even if they are independent outside counsel. As has been noted by some commentators, the European Court of Justice's decision on the issue of privilege in *Akzo Nobel* contains language indicating attorneys unlicensed within the EU itself may not enjoy privilege when working

44. See Terry, *supra* note 29, at 1.

45. See *supra* notes 31–43 and accompanying text; see also Gergacz, *supra* note 40, at 328 ("Under the law of the United States, in-house counsel are not disqualified from having privileged communications with their client Thus, a lawyer's employment status as in-house or outside counsel has never affected the applicability of the attorney-client privilege in the United States.").

46. See Gergacz, *supra* note 40, at 328.

47. See Fed. R. Evid. 501 (2011).

The value of the privilege would be substantially diminished if it covered only statements between the attorney and the client. Often the attorney must retain agents, such as private investigators and psychiatric and forensic experts. If communications to these agents resulted in a loss of privilege, then the agents could not be effectively used, and the effectiveness of the representation (which the privilege serves to strengthen) would suffer. Accordingly, communications from the client to and through agents hired by the attorney in furtherance of the representation can qualify for the attorney-client privilege.

Id., Stephen A. Saltzburg, Daniel J. Capra & Michael M. Martin cmt.

for clients within its borders.⁴⁸ While grappling with the difficulties presented by these divergent privilege rules is challenging, conducting an international internal investigation without consideration of their impact on the course and conduct of the inquiry could be fatal.

II. COLLECTING, REVIEWING AND TRANSFERRING INVESTIGATORY DOCUMENTS FROM ABROAD

The starting place for any internal investigation is the collection of relevant documentary evidence for review and analysis.⁴⁹ Such an undertaking allows counsel to begin the process of compartmentalizing information, piecing together facts, identifying issues for further analysis, and preparing for employee interviews.⁵⁰ In the international context, however, collection, review, and transfer of documentation can present unique challenges to counsel because of the growing prevalence of data protection laws around the globe.⁵¹ First, some da-

48. See Terry, *supra* note 29, at 3 (footnote omitted) (“One of the unanswered questions after *Akzo Nobel* is the extent to which the EU competition LPP [privilege rules] excludes non-EU lawyers. On the one hand, both the *AM&S* decision and the *Akzo Nobel* Advocate General’s opinion include language that arguably limits LPP to lawyers located with the EU and the European Economic Area On the other hand, the *Akzo Nobel* decision itself refers to the ‘positive’ and ‘negative’ indicators of ‘independence’ but does not use language that would automatically exclude from LPP protection communications with independent, non-employed lawyers from non-EU/EEA nations.”).

49. See Dervan, *Responding to Potential Employee Misconduct*, *supra* note 1, at 676 (“The first step in any internal investigation is the gathering of the relevant information through collection and review of documents.”); Murphy & Dervan, *Watching Your Step*, *supra* note 1, at 6–7 (discussing the importance of document collection); see also Johnston, *supra* note 23, at 73 (“Before an investigator begins the all-important process of interviewing corporate employees and other available witnesses, it is advisable that the investigator identify and gather all possible sources of documentary evidence relating to the conduct in question.”).

50. See Dervan, *Responding to Potential Employee Misconduct*, *supra* note 1, at 676 (discussing the need for documentation to draw accurate and credible conclusions during an internal investigation); Murphy & Dervan, *Watching Your Step*, *supra* note 1, at 6 (“Another important aspect of a credible investigation is ensuring that the documents necessary to make accurate findings are present and available for review. Without the relevant materials, it may be difficult or even impossible to make well-supported conclusions about the conduct under investigation.”); see also Bennett et al., *supra* note 23, at 68 (“Generally, when conducting an internal investigation, it is preferable to review the relevant documents prior to commencing interviews.”).

51. See Dowling, *supra* note 43, at 2 (describing the challenges associated with cross-border data transfers and accessing data); see also David Banisar & Simon Davies, *Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments*, 18 J. MARSHALL J. COMPUTER & INFO. L. 1, 3 (1999) (“In the early 1970s, countries began adopting broad laws in-

ta protection laws prevent companies from collecting and reviewing information, including company emails, that are deemed “personal” without consent from the affected employee.⁵² Further, in securing such consent, the corporation may be required to provide the employee access to the material and an opportunity to correct any inaccuracies.⁵³

As an example, the EU has adopted data protection laws that define “personal data” broadly and require one of several criteria be satisfied before collection and processing of such information.⁵⁴

tended to protect individual privacy. Throughout the world, there is a general movement towards adopting comprehensive privacy laws that set a framework for protection.”).

52. See George J. Terwilliger III, *Transnational Practice in Preventing and Addressing Corruption Cases*, in INT’L WHITE COLLAR ENFORCEMENT 2011 ED., *supra* note 25, at 95, available at 2010 WL 5312204, at *2 (“Procedural differences among nations also affect the ability of a company to address suggestions of internal wrongdoing. A company conducting an internal investigation in the U.S.— a country that does not have the kind of data privacy laws that protect an individual’s e-mail traffic and other similar so-called personal data—is less confined, as to the scope and process of records review, than it would be in an E.U. country, which does have such data privacy laws.”); Miriam Wugmeister, Karin Retzer & Cynthia Rich, *Global Solution for Cross-Border Transfers: Making the Case for Corporate Privacy Rules*, 38 GEO. J. INT’L L. 449, 451 (2007) (“More than sixty countries around the world have laws that regulate the collection, use and disclosure of personal information. Typically these laws cover any personal information pertaining to individual customers, business contacts, consumers, employees and in some cases legal entities.”). See generally James Sullivan, *IADC International Law Committee Survey of Electronic Discovery and Data Privacy Law*, 77 DEF. COUNS. J. 396 (2010) (reviewing data privacy laws around the world).

53. See Terwilliger, *supra* note 52, at *2 (“For example, a U.S. investigator . . . may be obliged to provide data subjects with access to the data targeted by the investigation and allow the data subjects to make corrections to any inaccurate data.”); see also Dowling, *supra* note 43, at 2 (“Counterintuitively, data laws can actually require turning investigation notes and files over to targets or witnesses. In EU jurisdictions, employee ‘data subjects’ enjoy broad rights to access, and to request deletion or ‘rectification’ of, employer-maintained documents identifying them.”); Wugmeister et al., *supra* note 52, at 451 (“[These laws] also require that individuals whose personal information is maintained by an organization be given notice of, and in certain circumstances the right to consent (or to withhold consent) to, the collection, use and transfer of their personal information, as well as the right to access and correct the information held about them.”).

It should be noted that this right may even extend to internal investigatory notes. As one publication regarding such investigations noted, “Data law in some jurisdictions can require notifying targets and implicated witnesses that investigation notes identify them, and can require offering them limited access to a pending-investigation file.” Dowling, *supra* note 43, at 5.

54. See Wugmeister et al., *supra* note 52, at 456; see also Beryl A. Howell & Laura S. Wertheimer, *Data Detours in Internal Investigations in EU Countries: Part I*, 16 METRO. CORP. COUNS. 30 (2008) [hereinafter Howell & Wertheimer, *Part I*] (third alteration in original) (footnote omitted) (“[P]ersonal data’ . . . is defined as

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According to the EU Directive, personal information can only be processed when one of the following exceptions is met: consent from the individual; contractual necessity (that is, data may be used if necessary for the performance of the contract with the individual); compliance with (local) legal obligations; or the legitimate interests of the entity collecting the personal information outweigh the privacy interests of the individuals.⁵⁵

While one might argue that the covert collection and review of employees' personal data as part of an internal investigation regarding potential criminal wrongdoing is necessary and permissible under the final above criteria, it must be noted that "many of the data privacy laws in the E.U. are structured so that the degree of protection that is afforded to an individual's data *increases* as the investigation trends more toward criminal rather than the administrative."⁵⁶

Second, some data protection laws prevent or hinder the transfer of certain data outside the country of origin, including transfers back to corporate headquarters or affiliates located in other countries.⁵⁷ For example, in the EU, the transfer of "personal" information to countries outside the European Economic Area is prohibited unless an "adequate" level of protection is provided by the country to which the

data that 'relate[s] to an identified person or identifiable natural person' (i.e., the data subject), who 'can be identified, directly or indirectly,' by reference to an identification number or 'to his physical, physiological, mental, economic, cultural or social identity.'").

55. Wugmeister et al., *supra* note 52, at 456.

56. Terwilliger, *supra* note 52, at *2 (emphasis added).

57. See Christopher J. Clark, *The Complexities to International White Collar Enforcement*, in *INTERNATIONAL WHITE COLLAR ENFORCEMENT: LEADING LAWYERS ON UNDERSTANDING CROSS-BORDER REGULATIONS, DEVELOPING CLIENT COMPLIANCE PROGRAMS, AND RESPONDING TO GOVERNMENT INVESTIGATIONS* 7, 12 (Michaela Falls ed., 2010) [hereinafter *INT'L WHITE COLLAR ENFORCEMENT*], available at 2010 WL 271738, at *4 ("[E]specially in Europe the laws relating to the transfer of data and information are extraordinarily strict. In the EU, it is against the law to transfer electronic data out of the EU if it relates to a person. That is defined extraordinarily broadly to mean basically any e-mail someone had on their work computer. So if your client gets a subpoena from the U.S. SEC seeking all the e-mails relating to someone, and this person worked in France, you will probably have to tell the SEC you cannot do that, it is against the law."); Dowling, *supra* note 43, at 2 ("In cross-border investigations, information identifying employees almost inevitably gets transmitted back to headquarters. Before undertaking a specific investigation, build channels allowing the legal 'export' of investigation data. This is a keen issue in jurisdictions like Belgium and the Netherlands where laws impede cross-border transmissions of *workplace accusations* specifically."); see also Wugmeister et al., *supra* note 52, at 449 ("Nevertheless, such [data] transfers are becoming more difficult and costly from a business perspective as more countries adopt privacy laws that, among other things, regulate and limit cross-border transfers of personal information, including transfers to headquarters, affiliates, branch offices or subsidiaries.").

information is being transferred.⁵⁸ A failure to satisfy the stringent EU data protection requirements may result in substantial liability for the breaching entity, including criminal liability for investigating counsel.⁵⁹

One company that likely navigated the challenges presented by the growing cadre of data protection laws is Avon Products Inc., which since 2008 has been conducting an international internal investigation regarding allegations of bribery by its officials in numerous countries, including China.⁶⁰ China has strong data protection laws, including the Law of the People's Republic of China on Guarding State Secrets (Chinese State Secrets Law), which was first passed in 1989 and revised in 2010.⁶¹ The Chinese State Secrets Law broadly defines state

58. See Wugmeister et al., *supra* note 52, at 458 (“The transfer of personal information to countries outside the EEA is prohibited unless the receiving countries provide an “adequate” level of protection, as determined by the European Commission or national DPAs, or the transfer satisfies one of the exceptions contained in law To date, the European Commission has deemed adequate the laws of Argentina, Canada, Guernsey, the Isle of Man, and Switzerland, as well as the U.S. Safe Harbor Framework.”).

59. *Id.*; see Howell & Wertheimer, *Part I, supra* note 54, at 30 (“The specific laws of the country in which data is sought for an internal inquiry must be examined, both because the substance of the limitations as well as the penalties for violating the limitations, differ. For example, violations of the French data protection law carry both civil and criminal penalties, while the UK data protection law does not, as yet, provide criminal penalties.”); Terwilliger, *supra* note 52, at *2 (“A U.S. investigator can be held criminally liable in the E.U. country for failing to comply with these data processing and export requirements.”).

60. See Avon Products, Inc., Quarterly Report (Form 10-Q) (Oct. 28, 2010), at 10, available at <http://www.sec.gov/Archives/edgar/data/8868/000119312510238768/d10q.htm> (“As previously reported, we have engaged outside counsel to conduct an internal investigation and compliance reviews focused on compliance with the Foreign Corrupt Practices Act (“FCPA”) and related U.S. and foreign laws in China and additional countries. The internal investigation, which is being conducted under the oversight of our Audit Committee, began in June 2008. As we reported in October 2008, we voluntarily contacted the United States Securities and Exchange Commission and the United States Department of Justice to advise both agencies of our internal investigation. We are continuing to cooperate with both agencies and inquiries by them, including but not limited to, signing tolling agreements, translating and producing documents and assisting with interviews.”); see also Chen Weihua, *Multinationals Under Scrutiny for Corruption*, CHINA DAILY (Sept. 8, 2010), http://www.chinadaily.com.cn/usa/2010-09/08/content_11273809.htm (“In the past years, there have been many high profile bribery cases involving multinationals operating in China. Multinational companies such as Rio Tinto, Siemens, Daimler, Lucent, Avery Dennison, IBM, Avon, Diagnostic Products and UTStarcom have all been penalized.”).

61. See Sigrid U. Jernudd, Comment, *China, State Secrets, and the Case of Xue Feng: The Implication for International Trade*, 12 CHI. J. INT'L L. 309, 317 (2011) (“The Law of the People's Republic of China on Guarding State Secrets was first passed in 1989, replacing provisional regulations that were developed in 1951. The

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secrets to include “matters that relate to state security and national interests,” a statement that leaves much ambiguity and uncertainty regarding what types of data may be collected and transferred out of the country during an investigation.⁶² As one set of practitioners has noted, “[T]he [international internal] investigative team must ensure that the data and information being exported from China does not constitute state secrets. This can be difficult given that the categories of state secrets remain vague and open to subjective interpretation.”⁶³ Further, the penalties for failing to abide by the Chinese State Secrets Law are severe, including capital punishments for intentional misappropriations and lesser punishments for other disclosures, including the strict liability offense of “stealing” state secrets.⁶⁴

An incident perpetuating investigating counsels’ above described uncertainty and anxiety regarding the applicability of the Chinese State Secrets Law is the case of Xue Feng.⁶⁵ Xue Feng, a naturalized American citizen, was a geologist working in China for an American company.⁶⁶ Under instructions from his employer, Xue Feng pur-

National People’s Congress Standing Committee then passed a revised version of the Law on the Protection of State Secrets on April 29, 2010.”); *see also* Mitchell S. Ettinger & Patrick H. Haggerty, *Increased International Coordination and Cooperation to Fight Corruption and the Impact on Multinational Companies*, 25TH ANNUAL NATIONAL INSTITUTE ON WHITE COLLAR CRIME, at J-8 (Mar. 2–5, 2011) (“When exporting data and information, consideration needs to be given to state secret laws. For example, China’s long anticipated amended Law on Guarding State Secrets (the Law) came into force on October 1, 2010.”).

62. *Law on the Protection of State Secrets*, CONG.-EXEC. COMM’N ON CHINA, Art. 2, available at <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsing=140200> (last visited September 16, 2011); *see also* Jernudd, *supra* note 61, at 319 (noting the ongoing debate regarding the breadth and transparency of the existing Chinese State Secrets Law).

63. Ettinger & Haggerty, *supra* note 61, at J-8.

64. *See* Jernudd, *supra* note 61, at 319–20 (“The penalties for violating the State Secrets Law are found in the Chinese Criminal Law, which also defines the particular offenses. The most serious offense is that of ‘stealing, spying to obtain, buying, or unlawfully supplying’ state secrets to ‘an organ, organization, or individual outside the territories of China,’ which, if done with subjective intent to deal with a state secret, will be punished with anything between five years imprisonment and the death penalty, depending on the seriousness of the circumstances of the crime. Unlawfully acquiring state secrets, either through ‘stealing,’ ‘spying,’ or ‘buying,’ which does not have a mens rea specified, carries penalties of up to three years, or in more serious cases, of three to seven years. Similar punishments follow for the crime of divulging state secrets, which can be done with ‘subjective intent’ or merely fault.”).

65. *See* Jernudd, *supra* note 61, at 322–23.

66. *See id.*; Ariana E. Cha, *In China, the Business of ‘State Secrets’*, WASH. POST (Mar. 4, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/03/AR2010030303852.html> (“When Xue bought the surveys and maps for use in his company’s research reports, the information was openly available.”); Andrew Jacobs,

chased an unprotected database regarding oil and gas information and transferred the data out of China to his employer in the United States.⁶⁷ Following the transfer, Chinese authorities determined that the data constituted state secrets under the narrow pre-2010 definition and, in 1997, Xue Feng was taken into custody.⁶⁸ This despite the fact that much of the information he transferred to the United States on behalf of his employer remains publically available inside China.⁶⁹ Xue Feng was eventually tried and convicted of violating the Chinese State Secrets Law and sentenced to eight years in prison for industrial espionage, a sentence that has subsequently been affirmed on appeal.⁷⁰

The Xue Feng case and above described Chinese and European data protection laws convey the significance of carefully contemplating potential restrictions on and ramifications flowing from the collection, review, and transfer of data and information during international internal investigations.⁷¹ As it becomes increasingly common for

China Upholds Conviction of American Geologist, N.Y. TIMES (Feb. 18, 2011), <http://www.nytimes.com/2011/02/19/world/asia/19beijing.html>.

67. See Jacobs, *supra* note 66 (“His lawyer says the information was classified as secret only after he bought it.”); Jernudd, *supra* note 61, at 322 (“[H]e purchased a database of oil and gas information that was deemed to be unprotected; however, after its purchase and conveyance to the US, China determined that the material was a state secret.”).

68. See Jernudd, *supra* note 61, at 322. The pre-2010 Chinese State Secrets Law covered “matters that have a vital bearing on state security and national interests.” *Id.* at 318. The 2010 amendment removed the terms “vital bearing” and, therefore, made the provision arguably broader than that used against Xue Feng. *Id.*

69. *Id.* at 322 (“Much of the information in the databases is publically available and necessary for basic due diligence work for businesses involved with the Central SOEs.”); see also Daniel M. Anderson, *Taking Stock in China: Company Disclosure and Information in China’s Stock Markets*, 88 GEO. L.J. 1919, 1950–51 (2000) (“Under the law on Guarding State Secrets, state secrets are broadly defined to include nonpublic financial and economic information. In 1994, a reporter for the *Ming Pao* newspaper in Hong Kong was sentenced under this law to ten to twelve years in prison for allegedly disclosing internal interest rate and gold policies of the PBOC. The potential liability for reporting undisclosed material may remove the incentive to investigate companies; therefore, company disclosures will remain unquestioned.”).

70. See Jacobs, *supra* note 66 (“In a case that has prompted a number of appeals from the White House, a Chinese court on Friday upheld the conviction of an American oil geologist sentenced to eight years in prison on charges of industrial espionage.”).

71. See Lorenza F. Hofer, *New Conditions for Data Processing by Companies: First Experiences with the Revised Swiss Data Protection Law*, 5 IBA CONVERGENCE 113 (2009) (discussing Swiss data protection laws). See generally Thomas Rihm, *New International Data Transfer Rules for Switzerland: Business Friendly by Respecting Employees’ Privacy Rights*, 18 EMP. & INDUS. REL. L. 16 (2008) (discussing Swiss data protection laws).

countries around the globe to create restrictive and varying laws protecting data, internal investigators must recognize that utilization of a standard Americanized investigatory strategy can result in significant collateral consequences and liabilities for both client and counsel.⁷² As such, internal investigators must be cognizant of the difficulties data collection and review present in the international setting and be proactive in determining the most appropriate procedures in each individual jurisdictional setting.⁷³

III. DEALING WITH EMPLOYEES IN AN INTERNATIONAL CONTEXT

There are two particularly defining encounters with employees during an internal investigation. The first is when investigating counsel interviews employees as part of the inquiry.⁷⁴ When conducting such interviews, counsel must be cognizant of her ethical and legal duty to clarify the relationship between herself and the interviewee through the delivery of an *Upjohn* warning.⁷⁵

The warning typically includes the following elements: the attorney represents the corporation and not the individual employee; the interview is covered by the attorney-client privilege, which belongs to and is controlled by the corporation, not the individual employee; the corporation may decide, in its sole discretion, whether to waive

72. See Jorg Rehder & Erika C. Collins, *The Legal Transfer of Employment-Related Data to Outside the EU: Is It Still Even Possible?*, 39 INT'L LAW. 129, 129 (2005) ("Current European Union (EU) data privacy laws place multinational companies in an unenviable position. On one hand, the laws are broadly worded yet strict, and on the other, a multitude of questions regarding application and enforcement remain unanswered.").

73. See Beryl A. Howell & Laura S. Wertheimer, *Data Detours in Internal Investigations in EU Countries: Part II*, 16 METRO. CORP. COUNS. 38, 39 (2008) [hereinafter Howell & Wertheimer, *Part II*] ("While far from an impossible task, an understanding of the requirements contained in the EU Directive, as well as possible exceptions to these requirements, is necessary so that U.S. lawyers conducting an internal inquiry that involves data in the EU can collect, process and review the data, without exposing themselves or their clients to possible liability for violations of the EU Directive.").

74. See Dervan, *Responding to Potential Employee Misconduct*, *supra* note 1, at 676 ("The second step is to gather information through employee interviews.").

75. See Johnston, *supra* note 23, at 74-75 ("Before beginning the process of witness interviews, however, counsel must consider a key ethical concern: counsel conducting an internal investigation represents the company, and not the witness.").

the privilege and disclose information from the interview to third parties, including the government.⁷⁶

Often, during internal investigations in the United States, little else need be done beyond giving the targeted employee this preliminary instruction and proceeding with the questioning.⁷⁷ In foreign jurisdictions, however, investigating counsel must be alert to the possibility that local laws may restrict one's ability to conduct employee interviews or, at a minimum, may curtail the manner in which any such interview may occur.⁷⁸ As one commentator notes, several European nations restrict in total the ability of counsel conducting an international internal investigation to interview witnesses if there are parallel proceedings.⁷⁹

[M]any European countries have what are called blocking statutes, which prohibit the interview of witnesses. In a potential civil or criminal investigation in that jurisdiction, of which France is a good example, you are not allowed to interview a witness who was also a witness in a French criminal investigation. So if you have a multi-jurisdictional insider trading investigation, you are not allowed to go to France and interview that witness without the permission of the French authorities.⁸⁰

Even where such onerous blocking statutes are not applicable, local labor laws and related regulations may impede one's ability to

76. Dervan, *Responding to Potential Employee Misconduct*, *supra* note 1, at 677; see also Duggin, *supra* note 18, at 893–99 (discussing the case of *Upjohn v. United States*, 449 U.S. 383 (1981)).

77. It should be noted that some counsel in the United States also provide an additional warning regarding the possibility of the government indicting an individual for obstruction of justice should he or she provide false information to internal investigators who then provide that information to the government. See Lucian E. Dervan, *Over-Criminalization 2.0: The Role of Plea Bargaining*, 7 J.L. ECON. & POL'Y 645, 646–49 (2011) (discussing the *Computer Associates* prosecution); see also Murphy & Dervan, *Watching Your Step*, *supra* note 1, at 3; (“Although some attorneys provide additional interview warnings to employees, counsel must be mindful of the delicate balance between providing sufficient cautions and obtaining information necessary to further the company's investigation. Excessive warnings can chill an employee's willingness to cooperate.”).

78. See Clark, *supra* note 57, at *4; D. Michael Crites, *Recent Trends in White Collar Crime*, in INT'L WHITE COLLAR ENFORCEMENT, 2010 WL 5312199, at *2 (2010); Dowling, *supra* note 43, at 3; .

79. See Clark, *supra* note 57, at *4; see also Dowling, *supra* note 43, at 3 (“Some jurisdictions actually prohibit non-government employers from conducting quasi-criminal internal investigations on the theory that private parties cannot intrude on the exclusive policing authority of government law enforcers.”).

80. Clark, *supra* note 57, at *4; see also Crites, *supra* note 78, at *2 (“[M]any countries have blocking statutes that prohibit counsel from interviewing witnesses without permission from the host country.”).

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quickly conduct employee interviews in an informal one-on-one setting.⁸¹ For example, the employee may have the right to consult with representatives before being interviewed or to have such representatives present during the interview itself.⁸²

The second defining encounter with employees during an internal investigation occurs when employees are disciplined either because they have failed to cooperate with the inquiry or the investigation has revealed that they have committed wrongful conduct.⁸³ When disciplining employees in the United States under either of these scenarios, corporations and their counsel have significant discretion in determining the appropriate procedures and punishments, up to and including termination.⁸⁴ This, however, is not the case in most other jurisdictions around the world.⁸⁵ First, employees in many countries are not required to cooperate with internal investigations and, therefore, may not be disciplined for such refusals.⁸⁶ Second, employees in foreign jurisdictions are often entitled to damages or severance pay when terminated, even for good cause, and must be afforded certain procedural rights during the disciplinary process.⁸⁷ In this context, some countries even impose strict temporal limitations on disciplinary

81. See Dowling, *supra* note 43, at 5.

82. *Id.* at 5 (“Local labor laws may require consulting with employee representatives before interviewing a slate of employee witnesses, and some jurisdictions require allowing a representative to accompany an employee witness in an interview, analogous to American *Weingarten* rights.”).

83. See Dervan, *Responding to Potential Employee Misconduct*, *supra* note 1, at 678.

84. See Donald C. Dowling, Jr. & Darin R. Leong, *Britain’s New Discipline Procedure Law: Action Steps for American Compliance*, 14 INT’L HUM. RESOURCES J. 1, 1 (2005) (“Nothing about [Donald] Trump’s brusque procedures [for firing individuals on *The Apprentice*] strikes American ‘couch potatoes’ as odd, because nothing about it is illegal or contrary to U.S. practice. American-style employment-at-will lets Trump fire anyone for any reason (except an illegal reason), and our employment-at-will rule also leaves Trump free to use whatever discharge procedure he wants.”).

85. See Dowling & Leong, *supra* note 84, at 1 (“The rest of the world . . . is a lot different. ‘Employment-at-will’ exists almost nowhere else.”).

86. See Dowling, *supra* note 43, at 5. (“[O]utside of U.S. employment-at-will, forcing employees to ‘cooperate’ raises employment law challenges. Overseas employees may in effect invoke a legal right to remain silent analogous to the right against self-incrimination in a U.S. criminal investigation.”); see also Greg Farrell, *IMF Dropped Internal Probe of Strauss-Kahn After Woman Wouldn’t Cooperate*, BLOOMBERG.COM (May 21, 2011), <http://www.bloomberg.com/news/2011-05-20/strauss-kahn-imf-probe-aborted-in-2008-as-alleged-victim-wouldn-t-testify.html> (discussing the refusal of an IMF employee to cooperate in a 2008 internal investigation regarding Dominique Strauss-Kahn).

87. See Dowling, *supra* note 43, at 5.

actions, which can create significant difficulties for internal investigators examining complex matters.⁸⁸

In Belgium, for example, an employee termination for good cause “must occur within three working days from the moment the facts are known to the [employer]; the facts must be notified to the dismissed [employee] by registered mail within three working days from the date of dismissal.” The clock here can start as soon as an employer gets a credible allegation, not after it completes a full-blown internal investigation.⁸⁹

While such restrictions on disciplinary procedures and determinations seem unnaturally intrusive in the American corporate context, counsel must be aware of the impact of these laws on the course of an international internal investigation.

The breadth of laws in foreign jurisdictions regarding disciplinary procedures is exemplified by a series of communications recently released as part of the current investigations of phone-hacking by the now defunct *News of the World*.⁹⁰ While much attention is currently centered on hacking from recent years, this is not the first time the newspaper had dealt with this issue.⁹¹ In 2007, Clive Goodman, a former *News of the World* reporter in Britain pleaded guilty to phone-hacking charges and was imprisoned.⁹² Shortly after his guilty plea, he received a letter from company officials:

I am sorry to have to be writing this letter, but am afraid that events of the last few days and months provide us no choice but to terminate your employment with News Group Newspapers Limited. This action, I know you understand, is the consequence of your plea of guilty, and subsequent imprisonment on 26 January, in relation to conspiracy to intercept voicemail messages. This obviously constitutes a very serious breach of your obligations as an employee, such as to warrant dismissal without any warning. In the circumstances of your plea and the court’s sentence, it is reasonable for us to dismiss you without any further enquiries.⁹³

88. *Id.*

89. *Id.* at 3 (quoting Carl Bevernage, *Belgium*, in INTERNATIONAL LABOR AND EMPLOYMENT LAWS 3-38 (William L. Keller et al. eds., 2009)).

90. See Paul Sonne, Jeanne Whalen & Bruce Orwall, *New Issues Emerge for News Corp. in Britain*, WALL ST. J. (Aug. 17, 2011), <http://online.wsj.com/article/SB10001424053111903480904576511963847040354.html>.

91. *Id.*

92. *Id.*

93. *Id.* (follow “Documents Relating to Clive Goodman” hyperlink; then view page 8/36).

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In response, Goodman sent a letter to the company containing numerous allegations, including the following statement: “The dismissal is automatically unfair as the company failed to go through the minimum required statutory dismissal procedures.”⁹⁴

The newspaper responded to Goodman’s allegations as follows:

I would like to request your attendance at an appeal hearing on Tuesday, 20th March 2007 at 10:00 am at the offices of News Magazine Limited The purpose of the hearing is to consider, under the News International disciplinary procedure, your appeal against your dismissal on 5th February, on the grounds raised in your letter of 2nd March. . . . You are entitled to be accompanied as specified in the Company’s Disciplinary procedures. Please let me know in advance if you decide to bring a companion and their name and contact details. If there are any documents you wish to be considered at the appeal hearing, please provide copies as soon as possible. If you do not have those documents, please provide details so that they can be obtained.⁹⁵

While such an exchange and appeals process might appear absurd in the United States, particularly given the serious criminal conviction of the employee and the criminal offense’s direct relation to his work at the corporation, British law imposes strikingly different obligations on employers.

Since 2004, the United Kingdom has imposed an extensive “Code of Practice for Disciplinary and Grievance Procedures” on employers that dictates the manner in which all manner of significant discipline may be imposed, including terminations.⁹⁶ At its most basic, the law requires a three-step process of notice and meeting prior to any disciplinary action, a disciplinary hearing at which the employee may respond to the allegations, and an appeals process to challenge the corporation’s disciplinary decision.⁹⁷ Failure to abide by these requirements can result in serious penalties for the corporation.⁹⁸

94. *Id.* (follow “Goodman’s March 2007 Letter Protesting His Dismissal” hyperlink; then view page 2/2).

95. *Id.* (follow “Documents Relating to Clive Goodman” hyperlink; then view page 12/36).

96. See Dowling & Leong, *supra* note 84, at 1 (“The upshot of these [UK disciplinary and grievance laws] is that as of October 1, 2004, in Britain a Donald-Trump-style ‘*You’re sacked!*’ is flatly illegal.”).

97. *Id.* at 3. In France, the following must be done to satisfy employment laws: “Set meeting with employee or ‘works council,’ via certified mail letter; conduct dismissal meeting; inform about reasons for termination and relocation opportunities; serve formal dismissal notice by certified mail; inform government labor agency.” *Id.* at 2. See generally Thomas Eger, *Opportunistic Termination of Employment Con-*

As with the other unique aspects and challenges of conducting international internal investigations, counsel must be aware of the significant differences that exist between jurisdictions regarding disciplinary procedures and options. Even in situations where the conduct of the employee under review clearly violates corporate standards and rules of conduct, local labor laws may dictate the manner in which disciplinary action may be taken.⁹⁹ Proceeding without an understanding of the constraints and deadlines imposed by such requirements may lead to additional exposure for clients and limiting of options in response to troubling conduct by employees.¹⁰⁰

IV. DISCLOSURE AND SETTLEMENT AFTER INTERNATIONAL INTERNAL INVESTIGATIONS

One of the most challenging decisions faced by corporations at the conclusion of an internal investigation where the government is, as of yet, unaware of the conduct under examination is determining whether to disclose the investigatory findings.¹⁰¹ While some disclosures are required by law, there can also be several advantages to disclosure even where it is permissive, including receipt of cooperation credit from the DOJ when determining the appropriate governmental response and potential application of amnesty programs.¹⁰² As an ex-

tracts and Legal Protection Against Dismissal in Germany and the USA, 23 INT'L REV. L & ECON. 381 (2004) (discussing labor law requirements in Germany); Otto Kaufman, *Weakening of Dismissal Protection or Strengthening of Employment Policy in France?*, 36 INDUS. L.J. 267 (2007) (discussing labor law requirements in France).

98. Dowling & Leong, *supra* note 84, at 2 (“The imposition of these new procedures is no mere technicality, as penalties are severe.”).

99. *See* Dowling, *supra* note 43, at 6 (“In France, UK, and elsewhere, even for-cause terminations of the obviously-guilty must follow detailed procedures.”).

100. It is even possible that a corporation might find itself in the unenviable position of selecting between abiding by local labor laws or acquiescing to a governmental request that culpable employees be punished. *See id.*

101. *See* Murphy & Dervan, *Watching Your Step*, *supra* note 1, at 9 (“Although counsel conducting an internal investigation should take steps to safeguard the company’s attorney-client privilege, she always should keep in mind that, at some point, it may be necessary or even advantageous for the company to disclose the results of the investigation and, perhaps, even materials generated during the inquiry.”); *see also* Bennett et al., *supra* note 23, at 80 (“Where a company conducts an internal investigation based upon information it receives about possible wrongdoing that is not known to the government, the question arises whether the findings of the investigation should be disclosed to the government.”).

102. *See* Murphy & Dervan, *Watching Your Step*, *supra* note 1, at 9–10 (“When dealing with the government, the corporation’s timely and voluntary disclosure of wrongdoing will often work to its advantage. In determining whether to charge a

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ample, in 2008 the U.S. government alleged that Siemens had engaged in widespread bribery overseas.¹⁰³ In response, the company hired an outside law firm to conduct a thorough internal investigation.¹⁰⁴ The inquiry covered thirty-four countries, included over 1750 interviews, and resulted in the collection of more than one-hundred million documents.¹⁰⁵ Throughout this extensive investigation, Siemens cooperated fully with the government and provided documents and other information as requested.¹⁰⁶ As a result, Siemens was rewarded with significantly less punishment than might otherwise have been exacted on the corporation for its conduct:

Though Siemens could have been fined as much as \$2.7 billion in the criminal prosecution, the Justice Department and SEC settled for a combined U.S. total of \$800 million. The Justice Department has not prosecuted any of the company's executives or employees for the violations. Based partly on Siemens' cooperation in the case, the U.S. government decided that the firm could remain eligible for federal contracts, a priority for Siemens.¹⁰⁷

corporation, the Department of Justice advises prosecutors to weigh the 'timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation.'" (quoting U.S. DEP'T OF JUSTICE, FEDERAL PRINCIPLES OF PROSECUTION OF BUSINESS ORGANIZATIONS (Jan. 20, 2003)). "Even if disclosure to the government does not forestall criminal charges, it can significantly reduce the corporation's exposure to criminal penalties. The Federal Sentencing Guidelines also contain language equating cooperation with a disclosure of 'pertinent information,' including, if necessary, privileged material." *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (2004)); *see also* Bennett et al., *supra* note 23, at 80 ("[V]arious federal agencies and other regulatory bodies have developed more or less formal programs for crediting voluntary disclosures in the exercise of their regulatory authority."). Although the Federal Principles of Prosecution and U.S. Sentencing Guidelines have been amended over time, these basic edicts remain a centerpiece of the documents.

103. *See* Hilzenrath, *supra* note 13, at 2 ("The allegations were based largely on an internal investigation that Siemens, an engineering company based in Germany, began in 2006 after German authorities raided company offices and employees' homes.").

104. *See id.*

105. *See id.*

106. *See id.* at 3 ("Siemens routinely provided English translations of its documents, the Justice Department said in a court filing, 'thereby saving the Department very significant time and expense.'").

107. *Id.*; *see also* Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Fines (Dec. 15, 2008) [hereinafter DOJ Press Release], available at <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>.

For Siemens, disclosure and cooperation proved to be valuable tools in resolving its case in a satisfactory manner with both American and European authorities.¹⁰⁸

As was true in the Siemens case, many internal corporate investigations today involve examination of international conduct. Therefore, potential resolution of the matter requires consideration of not only American disclosure obligations and advantages, but such obligations and advantages on a global scale.¹⁰⁹ In this regard, it is important to note first that the United States is not the only country that rewards disclosure and cooperation.¹¹⁰ A significant example is the EU's amnesty program in anti-trust cases.¹¹¹ Under the European program,

108. See Hilzenrath, *supra* note 13, at 2–3; see also Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. (forthcoming 2011) (discussing the Siemens case); Eric Lichtblau & Carter Dougherty, *Siemens to Pay \$1.34 Billion in Fines*, N.Y. TIMES (Dec. 16, 2008), <http://www.nytimes.com/2008/12/16/business/world-business/16siemens.html> (“Siemens, the German engineering giant, agreed Monday to pay a record total of \$1.6 billion to American and European authorities to settle charges that it routinely used bribes and slush funds to secure huge public works contracts around the world.”).

109. See DOJ Press Release, *supra* note 107 (“The Department and the SEC closely collaborated with the Munich Public Prosecutor’s Office in bringing these cases. The high level of cooperation, including sharing information and evidence, was made possible by the use of mutual legal assistance provisions of the 1997 Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which entered into force on Feb. 15, 1999.”).

While disclosure obligations will not be examined in this Article, it should be noted that many jurisdictions have broad requirements that will impact the disclosure decision. See Dowling, *supra* note 43, at 6 (“[L]ocal law in some jurisdictions *requires* denunciation: In Slovakia, for example, parties with knowledge of a criminal act must notify authorities.”).

110. See Roberto Grasso, Note, *The E.U. Leniency Programs and U.S. Civil Discovery Rules: A Fraternal Fight*, 29 MICH. J. INT’L L. 565, 573 (2008).

111. See *id.* The United States also has such a program. See Robert W. Tarun & Peter P. Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 174–75 (2010) (“The DOJ has established and promoted leniency policies to incentivize corporations and individuals to report antitrust violations to and cooperate with law enforcement. The Antitrust Division first implemented a leniency program in 1978. In 1993, the Division significantly revised and greatly improved the leniency program with the issuance of the Corporate Leniency Program. Under the Division’s Corporate Leniency Program, ‘a corporation can avoid criminal conviction and fines . . . by being the first to confess participation in a criminal antitrust violation, fully cooperating with the Antitrust Division and meeting other specified conditions.’”).

In fact, the success of the U.S. amnesty program led to the establishment of similar programs by over fifty other nations. See *id.* at 183.

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the first corporation to reveal its involvement in anti-competitive practices receives immunity.¹¹²

[The Commission] will grant immunity from any fine which would otherwise have been imposed to an undertaking disclosing its participation in an alleged cartel affecting the Community if that undertaking is the first to submit information and evidence which in the Commission's view will enable it to:

- (a) carry out a targeted inspection in connection with the alleged cartel; or
- (b) find an infringement of Article 81 EC in connection with the alleged cartel.¹¹³

Importantly, under the EU anti-trust amnesty program, corporations that are not the first through the door can still achieve significant advantages from self-reporting the discovered conduct.¹¹⁴

Companies which do not qualify for immunity may benefit from a reduction of fines if they provide evidence that represents "significant added value" to that already in the Commission's possession and have terminated their participation in the cartel. Evidence is considered to be of a "significant added value" for the Commission when it reinforces its ability to prove the infringement. The first company to meet these conditions is granted 30 to 50% reduction, the second 20 to 30% and subsequent companies up to 20%.¹¹⁵

Without carefully examining the unique aspects of disclosure obligations and advantages in the various jurisdictions affected, counsel may inadvertently create additional liability for a corporation or forfeit a potentially significant advantage.

It is also important to note that while numerous countries offer advantages to those who disclose investigatory findings and cooperate with governmental inquiries, the globalization of white collar crime and the international nature of modern internal investigations also present significant challenges to successful resolution and settlement of such matters. Two particular reasons for this challenge will be noted herein. First, different jurisdictions and varying enforcement agencies may be unwilling to operate in a uniform timeframe or ap-

112. See Grasso, *supra* note 110, at 573.

113. *Id.*

114. See *Cartels: Leniency*, EUROPEAN COMMISSION, available at <http://ec.europa.eu/competition/cartels/leniency/leniency.html> (last updated Nov. 23, 2011).

115. *Id.*

proach the issue of resolution in a similar manner.¹¹⁶ As such, while the DOJ may be pressuring a corporation to settle a matter quickly, a parallel proceeding in the EU might only just be starting. Where such multijurisdictional inquiries are operating at different speeds or one or more entities are unwilling to enter into negotiations, it becomes difficult to settle any of the matters for fear that admissions made during one agreement will simply become incriminating admissions for another.¹¹⁷ Second, even where all of the governmental entities involved may be willing and prepared to enter into negotiations, significant differences regarding what modes of settlement are appropriate may exist. For example, while non-prosecution and deferred prosecution agreements are extremely popular mechanisms by which to settle matters involving potential corporate criminal liability, they are rejected forms of resolution in many jurisdictions outside the United States.¹¹⁸

For any corporation embroiled in a significant global white collar criminal matter, a keen awareness of the challenges regarding disclosure and settlement alternatives on an international scale is invaluable.

116. See Luke Balleny, *Anti-Corruption Views—IBA Conference: The Problems with Multijurisdictional Corruption Investigations*, TRUSTLAW (June 24, 2011, 10:58 PM), <http://www.trust.org/trustlaw/blogs/anti-corruption-views/iba-conference-the-problems-with-multijurisdictional-corruption-investigations>.

117. See *id.* (“If one set of prosecuting authorities is willing to negotiate and the other isn’t, it makes it next to impossible for the defendant to admit to anything of substance to the prosecutor that’s open to a settlement. For if the defendant does admit to something, they would simply be giving ammunition for the other prosecutor’s case.”).

118. See Nicolas Bourtin, *Conflicts of Laws in International White Collar Investigations*, in INT’L WHITE COLLAR ENFORCEMENT, *supra* note 57, available at 2010 WL 271743, at *6 (2010) (“Outside the United States, the use of such agreements is virtually unheard of. Instead, the expectation is that criminal investigations will end in one of two ways: with a declination to prosecute or with the filing of charges.”).

In its simplest form, an NPA [non-prosecution agreement] is an agreement by which the government declines to prosecute a defendant in exchange for the defendant’s promise for an agreed period of time to cooperate with the government’s investigation, abide by the law, and satisfy any number of other conditions, which could include the acknowledgement of wrongful conduct, the payment of a monetary penalty, or the implementation of remedial measures. Should the defendant fail to uphold its end of the agreement, the government is released from its declination and can file criminal charges. A DPA [deferred prosecution agreement] incorporates many of the provisions of an NPA In contrast to an NPA, however, a DPA contemplates the filing of formal criminal charges, which are stayed for an agreed period of time in exchange for the defendant’s obligations under the agreement.

Id.

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ble. In 2010, BAE Systems settled a long-standing criminal bribery investigation that had spanned several continents.¹¹⁹ The settlement included guilty pleas by the corporation in both the United States and the United Kingdom.¹²⁰ Though the case involved complex international issues, BAE was successful in resolving the matter in a universally agreeable manner by utilizing the institutions and mechanisms available in each of the affected jurisdictions.¹²¹ According to the United Kingdom Serious Fraud Office (UK SFO), the agreement between the DOJ, the UK SFO, and BAE was a “ground breaking global agreement.”¹²² As the globalization of white collar crime continues to bring internal investigations into various international jurisdictions, the necessity of striving for such truly global settlement will only continue to become of greater importance.

CONCLUSION

Though this Article only begins to touch on the various types of challenges one might experience as a result of the globalization of internal investigations, it does reveal one constant in such matters. Counsel must avoid the temptation of utilizing a standard American-style investigatory technique when undertaking multi-jurisdictional investigations. As the above examples demonstrate, different jurisdictions and regions of the world view the tools and techniques of such inquiries in strikingly different ways. Through realization of the types of challenges that exist in this field and a willingness to conduct particularized investigations that are flexible to the demands of differing jurisdictions, the achievement of successful and thorough internal investigations can continue even in the testing context of growing globalization.

119. See Christopher Drew & Nicola Clark, *BAE Settles Corruption Charges*, N.Y. TIMES (Feb. 5, 2010), <http://www.nytimes.com/2010/02/06/business/global/06bribe.html>.

120. See *id.*

121. See *id.*

122. Press Release, U.K. Serious Fraud Office, BAE Systems plc (Feb. 5, 2010), available at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/bae-systems-plc.aspx> (“I am very pleased with the global outcome achieved collaboratively with the DOJ. This is a first and it brings a pragmatic end to a long-running and wide-ranging investigation.”).