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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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1. See, e.g., WILMERHALE LLP, GLOBAL ANTI-BRIBERY YEAR-IN-REVIEW: 2014 DEVELOPMENTS AND PREDICTIONS FOR 2015 20–22 (2015), https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDFs/CPA%20YIR%20Alert_01%2027%2015.pdf [<http://perma.cc/EJG5-WJQ9>]; Robb Adkins & Benjamin Kimberley, *The Globalization of Anti-Corruption Enforcement: Recent Trends and Developments*, in INTERNATIONAL WHITE COLLAR ENFORCEMENT 87, 108 (2014).

2. See generally *Justice News*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/justice-news> (last visited Oct. 21, 2015) [<http://perma.cc/Q33E-DXN9>]; *Press Releases*, SEC, <http://www.sec.gov/news/pressreleases> (last visited Oct. 21, 2015) [<http://perma.cc/99CK-66AZ>]. This count includes only cases where the DOJ or SEC publicly and affirmatively acknowledged such cooperation; the true number of cases resolved with the cooperation of foreign authorities is probably greater.

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.⁴ 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,⁵ 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.⁶ 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.⁷ 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 Office⁸ (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.⁹ 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.¹⁰

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.¹¹ In 2014, Chinese authorities made headlines by fining the

4. Gwendolyn L. Hassan, *The Increasing Risk of Multijurisdictional Bribery Prosecution: Why Having an FCPA Compliance Program Is No Longer Enough*, 42 INT'L L. NEWS 12, 14–15 (2013).

5. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1, Dec. 18, 1997, 37 I.L.M. 1 (1998) [hereinafter OECD Convention].

6. See ORG. FOR ECON. COOPERATION & DEV. [OECD], OECD FOREIGN BRIBERY REPORT: AN ANALYSIS OF THE CRIME OF BRIBERY OF FOREIGN PUBLIC OFFICIALS 11 (2014).

7. TRACE INT'L, INC., GLOBAL ENFORCEMENT REPORT 2014 8 (2015).

8. See *id.* at 6–7; *Corruption by Country: United Kingdom*, TRANSPARENCY INTERNATIONAL, http://www.transparency.org/country/#GBR_Overview (last visited Oct. 21, 2015) [<http://perma.cc/MWY3-DG8M>].

9. Decreto No. 12.846, de 1 del Augusto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 2.08.2013 (Braz.).

10. *Trace Compendium*, TRACE INT'L, <https://www.traceinternational2.org/compendium> (search entries for “Petroleo Brasileiro SA” and “Embraer”) (last visited Oct. 21, 2015) [hereinafter *Trace Compendium*] [<http://perma.cc/S9BV-HZWB>].

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.¹² 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.¹³ U.S. authorities, who are also reportedly investigating GSK,¹⁴ 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.¹⁵ 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.

Feb. 25, 2011, effective May 1, 2011), <http://en.pkulaw.cn/display.aspx?cgid=145719&lib=law> [<http://perma.cc/6FHJ-UBSF>].

12. See Hester Plumridge & Laurie Burkitt, *GlaxoSmithKline Found Guilty of Bribery in China*, WALL STREET J. (Sept. 19, 2014, 2:15 PM), <http://www.wsj.com/articles/glaxosmithkline-found-guilty-of-bribery-in-china-1411114817> [<http://perma.cc/UG9Z-7JQS>].

13. *Id.*

14. Adam Jourdan & Aruna Viswanatha, *GSK China Consumer Healthcare Unit Linked to DOJ Probe in 2012*, REUTERS (Sept. 9, 2014, 8:02 AM), <http://www.reuters.com/article/2014/09/09/us-gsk-china-corruption-exclusive-idUSKBN0H407Q20140909> [<http://perma.cc/K9SB-MN4F>].

15. See, e.g., OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (Nov. 26, 2009); *What Is Transparency International?*, TRANSPARENCY INT'L, <http://www.transparency.org/about/> (last visited Oct. 21, 2015) [<http://perma.cc/U99H-ZAJP>].

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).¹⁶ 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.¹⁷ 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

16. See Homer E. Moyer, Jr., *Global Overview*, GETTING THE DEAL THROUGH (Mar. 10, 2015), <https://gettingthedealthrough.com/area/2/article/28825/global-overview/> [http://perma.cc/LQ23-SV9S].

17. Brian C. Harms, *Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption*, 33 CORNELL INT'L L.J. 159, 171 (2000).

corruption overseas.¹⁸ Chief among the Act's purposes was to restore and maintain U.S. integrity and credibility both at home and abroad.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.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.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.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.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.²⁴

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

18. Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 930, 932 (2012).

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].

20. *Id.* at 3.

21. See Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. LEGIS. 303, 307-08 (2012).

22. See *id.*

23. See Nikolaus Schuttauf, *Repeal Anti-Bribery Legislation? A Defense of Laws Promoting Clean Business and Transparent Governments*, 46 NEW ENG. L. REV. 617, 646 (2012).

24. Cf. *id.*

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.²⁵ 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.²⁶

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.²⁷ 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.²⁸ 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.²⁹

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.³⁰ The DOJ and SEC recovered \$1.5 billion in FCPA-related penalties and disgorgement from the TSKJ consortium.³¹

Concurrently with the U.S. investigation, Nigeria’s Economic and Financial Crimes Commission (EFCC) also opened an investigation against

25. Andrew S. Boutros & T. Markus Funk, “*Carbon Copy*” *Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World*, 2012 U. CHI. LEGAL F. 259, 269.

26. *See id.* at 271–72.

27. *See* Leah M. Trzcinski, *The Impact of the Foreign Corrupt Practices Act on Emerging Markets: Company Decision-Making in a Regulated World*, 45 N.Y.U. J. INT’L L. & POL. 1201, 1215 (2013).

28. *See id.*

29. *See id.* *See generally* Michael P. Van Alstine, *Treaty Double Jeopardy: The OECD Anti-Bribery Convention and the FCPA*, 73 OHIO ST. L.J. 1321 (2012).

30. Press Release, U.S. Dep’t of Justice, Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty (July 7, 2010) [hereinafter DOJ, Snamprogetti], <http://www.justice.gov/opa/pr/snamprogetti-netherlands-bv-resolves-foreign-corrupt-practices-act-investigation-and-agrees> [<http://perma.cc/P6JD-QLGX>]; Press Release, U.S. Dep’t of Justice, JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$218.8 Million Criminal Penalty (Apr. 6, 2011) [hereinafter DOJ, JGC], <http://www.justice.gov/opa/pr/jgc-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-2188> [<http://perma.cc/85UB-RJ2Q>].

31. *See* DOJ, Snamprogetti, *supra* note 30; DOJ, JGC, *supra* note 30.

the consortium and associated persons for the same corruption scheme.³² The Nigerian government subsequently entered into settlements with the four companies in exchange for approximately \$126 million in fines and disgorgement.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."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.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.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 (Holding) Ltd., along with five oil-and-gas service companies and subsidiaries, engaged in a scheme to pay bribes to foreign officials in numerous jurisdictions,

32. See *Trace Compendium*, *supra* note 10 (search entry for "snamprogetti" and select "Eni / Snamprogetti").

33. The settlement agreements with the Nigerian government are not publicly available. Halliburton, however, announced that it agreed to pay \$35 million to settle all lawsuits and charges against KBR and Halliburton corporate entities and that the Nigerian government agreed not to bring any further criminal charges or civil claims against those entities. See Press Release, Halliburton, Halliburton Confirms Agreement to Settle with Fed. Gov't of Nigeria (Dec. 21, 2010), http://www.halliburton.com/public/news/pubsdata/press_release/2010/corpnws_12212010.html [<http://perma.cc/2CDQ-59DF>]. Snamprogetti allegedly agreed to pay \$32.5 million to have all charges dropped. See *UPDATE 1—Saipem Settles Nigeria Probe for \$30 Mln*, REUTERS (Dec. 20, 2010, 4:11 PM), <http://uk.reuters.com/article/2010/12/20/saipem-nigeria-idUKLDE6BJ1N020101220> [<http://perma.cc/HN48-RVWP>]. Sources estimate that Technip and JGC paid approximately \$30 million and \$28.5 million in fines, respectively. See *StAR Corruption Cases Search Center*, STOLEN ASSET RECOVERY INITIATIVE, <http://star.worldbank.org/corruption-cases/> (search entries for "Technip" and "JGC") (last visited Oct. 21, 2015) [<http://perma.cc/G2U8-LC4D>].

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.*

35. Press Release, African Dev. Bank Group, AfDB Charges Snamprogetti Netherlands B.V. US \$5.7 million in Monetary Sanction for Corrupt Practices (May 28, 2014), <http://www.afdb.org/en/news-and-events/article/afdb-charges-snamprogetti-netherlands-b-v-us-5-7-million-in-monetary-sanction-for-corrupt-practices-13233/> [<http://perma.cc/R3WC-W4KR>].

36. Liam Moloney, *Milan Court Finds Saipem Guilty of Nigeria Corruption*, WALL STREET J. (July 11, 2013, 3:32 PM), <http://www.wsj.com/articles/SB1000142412788732442520457859990427813164> [<http://perma.cc/YBD5-Z7Z5>].

including Nigeria, on behalf of customers.³⁷ The Panalpina defendants paid over \$230 million in penalties and disgorgement.³⁸ 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.³⁹

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.

37. See Press Release, U.S. Dep't of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More than \$156 Million in Criminal Penalties (Nov. 4, 2010), <http://www.justice.gov/opa/pr/oil-services-companies-and-freight-forwarding-company-agree-resolve-foreign-bribery> [<http://perma.cc/3RLB-AJYJ>].

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.⁴⁰ 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.⁴¹ 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.⁴²

In 2013, Alfred C. Toepfer International (Ukraine) Ltd. (“ADM Ukraine”), a subsidiary of Archer-Daniels-Midland Company, pleaded guilty to violating the FCPA by paying bribes to Ukrainian government officials to obtain tax refunds.⁴³ According to the plea agreement with the DOJ, ADM Ukraine received a deduction of \$1,338,387 to account for a fine imposed by German authorities on ADM Ukraine’s direct parent company, Alfred C. Toepfer International GmbH, for the same conduct.⁴⁴ In a parallel action, ADM consented with the SEC to a proposed final judgment that required the company to pay roughly \$36.5 million in disgorgement and prejudgment interest, without adjusting for the fine imposed by German authorities.⁴⁵

In 2011, Aon Corporation, a publicly traded Delaware company, entered into a nonprosecution agreement (NPA) with the DOJ. The company paid a

40. 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#.VPcRtflWqVA> [<http://perma.cc/PHM7-U2CU>].

41. 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>].

42. See SEC, *supra* note 40.

43. 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-subsubsidiary-pleads-guilty-conspiracy-violate-foreign-corrupt-practices-act> [<http://perma.cc/T4VC-LAMP>].

44. See Plea Agreement at 8, United States v. Alfred Toeffler Int’l (Ukraine) Ltd., No. 13-cr-20062 (C.D. Ill. Dec. 23, 2013), http://www.buckleysandler.com/uploads/1082/doc/Docs_9_and_9-1_Plea_and_Exhibit%28s%29_13-cr-20062_%2812-20-13%29.pdf [<http://perma.cc/FCP3-VA2G>].

45. Press Release, SEC, SEC Charges Archer-Daniels-Midland Company with FCPA Violations (Dec. 20, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540535139#.UrS_GPY2byA [<http://perma.cc/5TGT-K68R>].

\$1.76 million fine to resolve FCPA charges for alleged improper payments by Aon's U.K. subsidiary, Aon Limited, to Costa Rican officials.⁴⁶ The NPA cited a previous fine of £5.25 million paid by an Aon subsidiary to the United Kingdom's Financial Services Authority⁴⁷ (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.⁴⁸ 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.⁴⁹

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.⁵⁰ 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.⁵¹ 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

46. Press Release, U.S. Dep't of Justice, Aon Corporation Agrees to Pay a \$1.76 Million Criminal Penalty to Resolve Violations of the FCPA (Dec. 20, 2011), <http://www.justice.gov/opa/pr/aon-corporation-agrees-pay-176-million-criminal-penalty-resolve-violations-foreign-corrupt> [<http://perma.cc/HW2Q-Z5ZM>].

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>].

48. Memorandum from the U.S. Dep't of Justice to Lauren A. Urgenson, Esq. 1 (Dec. 20, 2011), <http://www.justice.gov/criminal/fraud/fcpa/cases/aon/2011-12-20-aon-final-executed-npa.pdf> [<http://perma.cc/V5YA-TGKS>].

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).

51. Deferred Prosecution Agreement, *supra* note 50, at 7.

fine range calculated by the government.⁵² The \$10 million fine was not expressly taken into consideration in the SEC matter.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).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 2006.⁵⁵ In light of the fine paid to Norwegian authorities, the DOJ reduced the ordered penalty of \$10.5 million by \$3 million.⁵⁶ The SEC required Statoil to pay disgorgement of \$10.5 million, not adjusted to reflect the Norwegian penalties.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.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.

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.”⁵⁹ In that case, multiple prosecutions by different enforcement authorities may target

52. *Id.*

53. Litigation Release No. 21795, SEC, SEC Files Settled Foreign Corrupt Practices Act Charges Against Alcatel-Lucent, S.A. with Total Disgorgement and Criminal Fines of Over \$137 Million (Dec. 27, 2010), <https://www.sec.gov/litigation/litreleases/2010/lr21795.htm> [<http://perma.cc/RNS7-683J>].

54. Deferred Prosecution Agreement at 6, *United States v. Statoil, ASA* (S.D.N.Y. Oct. 10, 2006).

55. Press Release, U.S. Dep’t of Justice, U.S. Resolves Probe Against Oil Company That Bribe Iranian Official (Oct. 13, 2006), http://www.justice.gov/archive/opa/pr/2006/October/06_crm_700.html [<http://perma.cc/G373-SAX3>].

56. *See id.*; Deferred Prosecution Agreement, *supra* note 54, at 14–15.

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.

58. *See supra* Part I.A.

59. JACINTA ANYANGO ODUOR ET AL., LEFT OUT OF THE BARGAIN: SETTLEMENTS IN FOREIGN BRIBERY CASES AND IMPLICATIONS FOR ASSET RECOVERY 60 (2014).

aspects of a bribery scheme in different places or at different times.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 2008.⁶¹ 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 DOJ⁶² and \$350 million in disgorgement to the SEC).⁶³ The conduct generally arose out of illegal payments made in Latin America, the Middle East, and Bangladesh.⁶⁴ Siemens paid approximately \$569 million more to settle charges with the Munich Prosecutor’s office.⁶⁵ The German charges involved a different set of corrupt acts in the medical and transportation sectors in Spain, Venezuela, and China.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;⁶⁷ (2) a \$46.5 million settlement with the Nigerian EFCC related to criminal charges against Siemens and its subsidiary, Siemens Ltd. Nigeria;⁶⁸ (3) a €270 million settlement with Greece to resolve multiple civil and criminal complaints involving bribery in the Greek telecommunications market;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.⁷⁰

60. *Id.*

61. 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 Criminal Fines (Dec. 15, 2008), <http://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html> [<http://perma.cc/7MSF-XCLX>].

62. *Id.* Siemens AG agreed to pay a \$448.5 million fine, and Siemens Argentina, Bangladesh, and Venezuela each agreed to pay a \$500,000 fine. *Id.*

63. *Id.*; Eric Lichtblau & Carter Dougherty, *Siemens to Pay \$1.34 Billion in Fines*, N.Y. TIMES (Dec. 15, 2008), <http://www.nytimes.com/2008/12/16/business/worldbusiness/16siemens.html> [<http://perma.cc/5U8B-P2UZ>].

64. ODUOR ET AL., *supra* note 59, at 132 & n.219.

65. *Id.*

66. *Id.*

67. *Id.* at 133.

68. See *Trace Compendium*, *supra* note 10 (search entry for “Siemens AG”).

69. See ODOUR ET AL., *supra* note 59, at 133–34.

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 AG⁷¹ (“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.⁷² 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.⁷³ 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.⁷⁴ That agreement also included a restitution payment by the two companies totaling approximately \$9.5 million.⁷⁵

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.⁷⁶ 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.⁷⁷

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.⁷⁸ 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

settle similar claims relating to corrupt payments to foreign officials by Siemens AG’s Telecommunications. *See* U.S. Dep’t of Justice, *supra* note 61.

71. Press Release, U.S. Dep’t of Justice, Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), <http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery> [<http://perma.cc/Z5ET-SM5V>].

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.⁷⁹ 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,⁸⁰ and in the Aon matter, the alleged bribes were paid in countries that were not a part of the FSA resolution.⁸¹ 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.⁸² This offsetting approach shows the practical difficulty of determining the right amount to offset. The TSKJ and Panalpina matters are also good examples.⁸³ 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.⁸⁴ 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.⁸⁵ 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.⁸⁶ 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.

85. *See* Plea Agreement at 14, *United States v. Alstom S.A.*, No. 14-CR-236 (D. Conn. Dec. 22, 2014).

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.

89. Press Release, U.S. Dep't of Justice, French Oil & Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme (May 29, 2013), <http://www.justice.gov/opa/pr/french-oil-and-gas-company-total-sa-charged-united-states-and-france-connection-international> [<http://perma.cc/V8J4-ZE5C>].

90. *Id.*; Associated Press, *Total and French Officials Cleared in Iraq Oil-for-Food Case*, N.Y. TIMES (July 8, 2013), <http://www.nytimes.com/2013/07/09/business/global/total-and-french-officials-cleared-in-iraq-oil-for-food-case.html> [<http://perma.cc/BD8D-LE6F>].

91. Press Release, U.S. Dep't of Justice, Johnson & Johnson Agrees to Pay \$21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations (Apr. 8, 2011), <http://www.justice.gov/opa/pr/johnson-johnson-agrees-pay-214-million-criminal-penalty-resolve-foreign-corrupt-practices-act> [<http://perma.cc/NX8D-BUQQ>].

92. Press Release, Serious Fraud Office, DePuy International Ltd. Ordered to Pay £4.829 Million in Civil Recovery Order (Apr. 8, 2011), <http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2011/depuy-international-limited-ordered-to-pay-4829-million-in-civil-recovery-order.aspx> [<http://perma.cc/Q84J-QKN2>].

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.⁹⁴

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.⁹⁵ In the U.S. actions, BAE pleaded guilty to charges arising out of payments to secure business in the Czech Republic, Hungary, and Iraq, and paid a fine of \$400 million.⁹⁶ That 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 alleged payments to an "advisor" there.⁹⁷ The publicly released papers did not say how, if at all, the penalties in one jurisdiction were accounted for by the other jurisdiction.⁹⁸

Also in 2010, the United Kingdom and the United States pursued criminal cases against Innospec Inc., a Delaware company, and its British subsidiary, Innospec Ltd.⁹⁹ The United States prosecuted Innospec Inc. for 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.¹⁰⁰ 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.¹⁰¹ 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

94. See U.S. Dep't of Justice, *supra* note 91.

95. Boutros & Funk, *supra* note 25, at 290–91.

96. WILMERHALE LLP, FOREIGN CORRUPT PRACTICES ACT BRIEFING SERIES: ANTI-CORRUPTION ENFORCEMENT DEVELOPMENTS: 2010 YEAR IN REVIEW AND 2011 PREVIEW 2 (2011), https://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/Anti-Corruption%20Enforcement%20Developments.pdf [<http://perma.cc/Z7DQ-F7QM>].

97. See Mike Koehler, *A Conversation with Richard Alderman Regarding BAE*, SCRIBD (Feb. 23, 2011), www.scribd.com/doc/50759481/A-Conversation-With-Richard-Alderman-Regarding-BAE [<http://perma.cc/FNX2-TECE>].

98. See Press Release, U.S. Dep't of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010), <http://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine> [<http://perma.cc/49HU-HXKH>]; see also Press Release, Serious Fraud Office, BAE Fined in Tanzania Defence Contract Case (Dec. 21, 2010), <http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2010/bae-fined-in-tanzania-defence-contract-case.aspx> [<http://perma.cc/UN8D-8MZP>].

99. Plea Offer at 4, *United States v. Innospec Inc.*, No. 1:10-cr-00061 (D.D.C. Mar. 18, 2010), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/03-18-10innospec-plea.pdf> [<http://perma.cc/3B9N-RR42>].

100. *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>].

101. RICHARD 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).

SFO, and \$2.2 million to the Office of Foreign Assets Control.¹⁰² 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.¹⁰³ 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;¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷

Moreover, cooperation and coordination between multiple authorities may not ultimately be tantamount to a single resolution.¹⁰⁸ 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.¹⁰⁹ 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

102. Plea Offer, *supra* note 99, at 4.

103. *See, e.g.*, Alderman, *supra* note 101, at 31 n.46.

104. *See* Boutros & Funk, *supra* note 25, at 287–89.

105. *See* ORG. FOR ECON. COOPERATION & DEV., *supra* note 6, at 15.

106. *See* U.S. Dep’t of Justice, *supra* note 71.

107. Press Release, Serious Fraud Office, Former Alstom Director Faces UK Corruption Charges (May 12, 2015), <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2015/former-alstom-director-faces-uk-corruption-charges.aspx> [http://perma.cc/53DS-HFZ8].

108. *See* ODOUR ET AL., *supra* note 59, at 45, 62.

109. *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

110. Tara Patel, *Total Faces French Trial on Iran-Corruption Claim After U.S. Deal*, BLOOMBERG (Nov. 26, 2014, 9:59 AM), <http://www.bloomberg.com/news/articles/2014-11-26/total-faces-french-trial-on-iran-corruption-claim-after-u-s-deal> [http://perma.cc/D582-3E5Q].

111. See Press Release, U.S. Dep't of Justice, Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba (Mar. 18, 2010), <http://www.justice.gov/opa/pr/innospec-inc-pleads-guilty-fcpa-charges-and-defrauding-united-nations-admits-violating-us> [http://perma.cc/RX6M-PTBR]; Serious Fraud Office, *supra* note 100.

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

113. Press Release, U.S. Dep't of Justice, Former Chief Executive Officer of Oil Services Company Pleads Guilty to Foreign Bribery Charge (June 15, 2015), <http://www.justice.gov/opa/pr/former-chief-executive-officer-oil-services-company-pleads-guilty-foreign-bribery-charge> [http://perma.cc/KFW7-GCMN].

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.¹¹⁶ The settlement amount consisted of a \$40 million fine and \$200 million in disgorgement.¹¹⁷ 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 2008.¹¹⁸ 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.¹¹⁹

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.¹²⁰ 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.¹²¹ Similarly, Brazilian federal prosecutors have purportedly sought \$1.55 billion from six construction and engineering companies for their alleged

116. Nicolas Torres, *SBM Offshore Pays \$240 Million to Resolve Dutch Bribe Allegations, Receives DOJ Declination*, FCPA BLOG (Nov. 12, 2014, 11:22 AM), <http://www.fcpablog.com/blog/2014/11/12/sbm-offshore-pays-240-million-to-resolve-dutch-bribe-allegat.html> [<http://perma.cc/L43X-ZDVN>].

117. Press Release, Openbaar Ministerie, SBM Offshore N.V. Settles Bribery Case for US\$ 240,000,000 (Nov. 12, 2014), <https://www.om.nl/actueel/nieuwsberichten/@87201/sbm-offshore-settles/> [<http://perma.cc/Y7WK-4M7D>].

118. Richard L. Cassin, *AB Volvo Settles FCPA Charges for \$19.6 Million*, FCPA BLOG (Mar. 20, 2008, 12:39 AM), <http://www.fcpablog.com/blog/2008/3/20/ab-volvo-settles-fcpa-charges-for-196-million.html> [<http://perma.cc/8ZAS-GANB>].

119. Press Release, U.S. Dep’t of Justice, AB Volvo to Pay \$7 Million Penalty for Kickback Payments to the Iraqi Government Under the U.N. Oil for Food Program (Mar. 8, 2008), http://www.justice.gov/archive/opa/pr/2008/March/08_orm_220.html [<http://perma.cc/44DK-JC7N>].

120. See *supra* INTRODUCTION.

121. Plumridge & Burkitt, *supra* note 12.

involvement in a kickback scheme at Petrobras.¹²² The DOJ and SEC are now both reportedly investigating the Petrobras matter.¹²³ 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,¹²⁴ or that a foreign authority has a stronger interest in enforcement.¹²⁵ Leniency may be based on a desire to avoid unintended collateral consequences, such as undue harm to innocent shareholders, employees, and other third parties.¹²⁶ And, as illustrated in several examples above, less principled and more practical considerations may drive coordination (or “declination”) decisions in many cases.¹²⁷

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”).

123. See *Update 2—Brazil’s Petrobras Says Received U.S. SEC Subpoena for Documents*, REUTERS (Nov. 24, 2014, 6:08 PM), <http://www.reuters.com/article/2014/11/24/brazil-petrobras-sec-idUSL2N0TE1UY20141124> [<http://perma.cc/V8VA-5V7T>].

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 Innospec, 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.¹²⁸ Thus, they also can be counterproductive by discouraging parties from self-reporting and cooperating with enforcement authorities.¹²⁹ 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.¹³⁰ That principle is deeply ingrained, in some form at least, in many legal systems throughout the world.¹³¹ 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

128. See Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 56–57 (2005).

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).

130. See Erin M. Cranman, *The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right?*, 14 EMORY INT’L L. REV. 1641, 1667–68 (2000).

131. See Peter Herbel et al., *Double Jeopardy—Finding a Balance in Enforcement Actions for Companies*, LEGALWEEK.COM (Nov. 24, 2011), <http://www.eldinternational.com/wp-content/uploads/2012/11/Double-Jeopardy-Legal-Week-Nov-24-2011.pdf> (noting that double jeopardy principles are recognized by at least fifty countries and are incorporated into numerous international treaties and conventions) [<http://perma.cc/89T4-PGE4>].

offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”¹³²

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.¹³³ 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.¹³⁴ 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.”¹³⁵ 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.¹³⁶ 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.¹³⁷ 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).¹³⁸ 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.”¹³⁹ 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

132. International Covenant on Civil and Political Rights art. 14(7), Dec. 16, 1966, 999 U.N.T.S. 171.

133. Cranman, *supra* note 130, at 1655–56.

134. *Id.* at 1653.

135. *Bartkus v. Illinois*, 359 U.S. 121, 155 (1959) (Black, J., dissenting).

136. Cranman, *supra* note 130, at 1667–68 (noting that an individual who commits a crime involving multiple countries may spend years in a constant state of apprehension and anxiety).

137. *See supra* Part I.C.

138. Lucio M. Fabani Larranga, *Double Jeopardy? Siemens Defendant Loses Argentina Dismissal Motion*, FCPA BLOG (Jul. 21, 2015, 9:18 AM), <http://www.fcpablog.com/blog/2015/7/21/double-jeopardy-siemens-defendant-loses-argentina-dismissal.html> [<http://perma.cc/8HVT-Q43P>].

139. *Id.*

harshly than is necessary to deter future misconduct.¹⁴⁰ 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.¹⁴¹

When penalties are too high, companies will be induced to spend excessive amounts to monitor employees in an attempt to avoid FCPA violations.¹⁴² 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.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶

*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.*

145. Press Release, SEC, SEC Charges Goodyear with FCPA Violations (Feb. 24, 2015), <http://www.sec.gov/news/pressrelease/2015-38.html#.VPcxhPIWqVA> [<http://perma.cc/X69V-SXK4>]; Cease-and-Desist Order, *In re* The Goodyear Tire & Rubber Co., No. 74356, (SEC Feb. 24, 2015), <http://www.sec.gov/litigation/admin/2015/34-74356.pdf> [<http://perma.cc/5QWZ-D8EG>].

146. Deferred Prosecution Agreement at 7, *United States v. Panalpina World Transport (Holding) Ltd.* (S.D. Tex. Nov. 4, 2010), <http://www.justice.gov/sites/default/files/opa/legacy/2010/11/04/panalpina-world-transport-dpa.pdf> [<http://perma.cc/Y56F-9ZGU>].

The DOJ and SEC strongly encourage companies to self-report potential FCPA violations.¹⁴⁷ Both agencies identify voluntary disclosures of wrongdoing as being a mitigating factor in determining what charges and penalties are appropriate.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.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.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.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.¹⁵² But as the cases discussed

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.”).

148. See 5 DEPARTMENT OF JUSTICE MANUAL ch. 9-28.700 (3d ed. 2015) [hereinafter DOJ MANUAL]; Release No. 44969, SEC, Report of Investigation Under Section 21(a) of the Securities Exchange Act of 1934 (Oct. 23, 2001), <https://www.sec.gov/litigation/investreport/34-44969.htm> [<http://perma.cc/9PRB-VRK8>].

149. See Rashna Bhojwani, *Deterring Global Bribery: Where Public and Private Enforcement Collide*, 112 COLUM. L. REV. 66, 74 (2012).

150. See WITTEN ET AL., *supra* note 129, § 7.04.

151. Lucinda A. Low et al., *The Uncertain Calculus of FCPA Voluntary Disclosures 1* (Mar. 27–28, 2007) (unpublished manuscript), <http://apps.americanbar.org/intlaw/spring07/World%20Bank%20Anticorruption%20Programs/Low%20-%20The%20Uncertain%20Calculus%20of%20FCPA%20Voluntary%20Disclosures.pdf> [<http://perma.cc/V4D4-A696>].

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, seizure, confiscation and recovery of the proceeds of bribery of foreign public officials.” *Id.* at 26. Although the OECD Convention appears to envision 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.¹⁵³ 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.¹⁵⁴ 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.¹⁵⁵

One example of such enforcement coordination in antitrust and competition matters is the 1998 Positive Comity Agreement between the United States and the European Union¹⁵⁶ (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,”¹⁵⁷ 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.”¹⁵⁸ The treaty thus clearly envisions a form of voluntary deference by one national enforcement authority in

will open their own independent investigations and pursue them as far as and in whatever direction they please, until a foreign enforcement agency approaches them with a formal request to consult. *See* U.N. Convention Against Corruption, at 29, *opened for signature* Dec. 9, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005); *see also id.* at 30–41 (setting forth principles of international cooperation to increase effectiveness of cross-border enforcement).

153. *See supra* Parts I, II.

154. International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 46, 57b-1, 1311–12, 6201–12 (2012).

155. *Id.*

156. Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, U.S.-E.U., June 4, 1998, 37 I.L.M. 1070.

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:

A[nother] 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.” *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.¹⁶¹ 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.¹⁶²

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.”¹⁶³ 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.¹⁶⁴ 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.”¹⁶⁵

161. To give just one especially relevant example, under the Securities Act of 1933, the Securities Exchange Act of 1934, the rules and regulations promulgated thereunder, and other federal legislation, acts constituting “securities fraud” in the United States can be prosecuted and sanctioned both criminally by the DOJ *and* civilly by the SEC. *See, e.g.*, Mary Jo White, Chair, SEC, Speech: All-Encompassing Enforcement: The Robust Use of Civil and Criminal Actions to Police the Markets (Mar. 31, 2014), <http://www.sec.gov/News/Speech/Detail/Speech/1370541342996> [<http://perma.cc/5FQ2-NBHX>]; LINDA CHATMAN THOMSEN, DEPUTY DIR., SEC, INTERNATIONAL INSTITUTE FOR SECURITIES MARKET DEVELOPMENT: 2005 PROGRAM § 1.A, https://www.sec.gov/about/offices/oia/oia_enforce/overviewenfor.pdf (“A [DOJ] criminal prosecution does not preclude the Commission from taking civil action for the same conduct, and similarly, Commission action does not generally preclude a subsequent [DOJ] criminal prosecution.”) [<http://perma.cc/NV65-A6E6>]. The very same acts can be (and frequently are) prosecuted by state attorneys general and regulatory agencies as well, depending on the law and administrative apparatus in the states in which they occur. *See, e.g.*, Amanda M. Rose, *State Enforcement of National Policy: A Contextual Approach (with Evidence from the Securities Realm)*, 97 MINN. L. REV. 1343, 1375–86 (2013).

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.¹⁶⁶ 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.¹⁶⁷ 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.