

Winter 2019

## Fairness in FCPA Enforcement: A Call for Self-Restraint and Transparency in Multijurisdictional Anti-Bribery Enforcement Actions

Jessie M. Reniere

*J.D. 2019, Roger Williams University School of Law*

Follow this and additional works at: [https://docs.rwu.edu/rwu\\_LR](https://docs.rwu.edu/rwu_LR)



Part of the [International Trade Law Commons](#)

---

### Recommended Citation

Reniere, Jessie M. (2019) "Fairness in FCPA Enforcement: A Call for Self-Restraint and Transparency in Multijurisdictional Anti-Bribery Enforcement Actions," *Roger Williams University Law Review*: Vol. 24 : Iss. 1 , Article 8.

Available at: [https://docs.rwu.edu/rwu\\_LR/vol24/iss1/8](https://docs.rwu.edu/rwu_LR/vol24/iss1/8)

This Notes and Comments is brought to you for free and open access by the School of Law at DOCS@RWU. It has been accepted for inclusion in Roger Williams University Law Review by an authorized editor of DOCS@RWU. For more information, please contact [mwu@rwu.edu](mailto:mwu@rwu.edu).

# Fairness in FCPA Enforcement: A Call for Self-Restraint and Transparency in Multijurisdictional Anti-Bribery Enforcement Actions

Jessie M. Reniere\*

## INTRODUCTION

In September 2017, a Swedish company agreed to pay approximately \$483 million to the U.S. Treasury general fund in fines, penalties, and disgorgement for bribing an Uzbek public official in order to secure improper business advantages.<sup>1</sup> That company was also prosecuted by Sweden and the Netherlands and agreed to pay approximately \$965 million total to the three countries involved.<sup>2</sup> The United States, with seemingly weak connections to the case, collected nearly half of the global settlement for the U.S. Treasury. It is unclear what the United States policy interest was in prosecuting foreign bribery that, on its face, had little to do with the United States, especially when other countries with stronger connections were also prosecuting the company.

---

\* Candidate for Juris Doctor, Roger Williams University School of Law, 2019. The author would like to thank Professor Louise Ellen Teitz and Professor William B.F. Steinman for their invaluable guidance and support.

1. See discussion *infra* section II.B.i; see also Press Release, Dep't of Justice, Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than \$965 Million for Corrupt Payments in Uzb. (Sept. 21, 2017), <https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965> [<https://perma.cc/Q94A-LN3A>].

2. *Id.*

The United States has been the global leader in the fight against foreign bribery and was the first country to explicitly prohibit its citizens and companies from bribing foreign officials.<sup>3</sup> The Organisation for Economic Co-operation and Development (OECD) has stated that “bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions.”<sup>4</sup> It is estimated that as much as \$1.5 trillion each year are paid as bribes to foreign officials in order to secure improper advantages in international business.<sup>5</sup> While foreign bribery has significant negative consequences in international business, it also particularly harms developing countries.<sup>6</sup> The State Department describes foreign bribery as having “pernicious effects” on “economic development, rule of law, and democracy.”<sup>7</sup>

The Foreign Corrupt Practices Act (FCPA), the U.S. law that bans foreign bribery, was enacted as a response to the Watergate scandal.<sup>8</sup> Prior to the FCPA’s enactment, the United States did not expressly prohibit bribing foreign officials or require disclosure

---

3. *Spotlight: History of the FCPA*, PBS (Feb. 13, 2009), <http://www.pbs.org/frontlineworld/stories/bribe/2009/02/history-of-the-fcpa.html> [<https://perma.cc/MFM2-2WX4>].

4. Organisation for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* pmbl., Dec. 17, 1997, 37 I.L.M. 1 [hereinafter *OECD Convention*].

5. Daniel Kaufmann, *Myths and Realities of Governance and Corruption*, WORLD BANK 81, 83, [http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/2-1\\_Governance\\_and\\_Corruption\\_Kaufmann.pdf](http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/2-1_Governance_and_Corruption_Kaufmann.pdf) [<https://perma.cc/CY3Y-XC4X>] (last visited Dec. 20, 2018).

6. Alexandra Wrage, *Bribery is Bad. . . for Business*, FORBES (Jan. 25, 2017, 10:09 AM), <https://www.forbes.com/sites/alexandrawrage/2017/01/25/bribery-is-bad-for-business/#4e1fcbb64a42> [<https://perma.cc/ZRZ5-42TB>]; see *Corruption: Cost for Developing Countries*, TRANSPARENCY INT’L U.K., <http://www.transparency.org.uk/corruption/corruption-statistics/corruption-cost-for-developing-countries/#.WsU4QyPMzOQ> [<https://perma.cc/2YU5-MUJA>] (last visited Oct. 1, 2018).

7. U.S. DEP’T OF STATE, FOREIGN BRIBERY, <https://www.state.gov/e/eb/ifa/oma/foreignbribery/index.htm> [<https://perma.cc/62CM-8Q94>] (last visited Oct. 1, 2018).

8. STUART H. DEMING, *THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS* xvii (2nd ed. 2010).

of any foreign bribery.<sup>9</sup> The Securities and Exchange Commission (SEC) began looking into allegations that leading U.S. corporations had made undisclosed payments to President Nixon's re-election campaign in return for political favors from the administration.<sup>10</sup> It discovered that hundreds of companies had been hiding millions of dollars in slush funds to be used for a number of different purposes, including making illicit payments to foreign officials.<sup>11</sup>

Congress recognized that foreign bribery has consequences for United States foreign policy.<sup>12</sup> Furthermore, Congress was motivated by "post-Watergate morality" and the idea that by prohibiting these payments, U.S. companies would be able to resist the demand for them.<sup>13</sup> Enacting anti-bribery legislation would also show that the United States was taking a global leadership position on the issue.<sup>14</sup> President Carter signed the

---

9. DAVID A. STEIGER, *TRANSACTIONS WITHOUT BORDERS: A CLIENT AND LAWYER'S GUIDE TO OVERSEAS OPERATIONS* 129 (2014).

10. *Id.*; MIKE KOEHLER, *THE FOREIGN CORRUPT PRACTICES ACT IN A NEW ERA* 3 (2014).

11. STEIGER, *supra* note 9, at 129; KOEHLER, *supra* note 10, at 3.

12. In recognition of that fact, Senator Frank Church's committee (the Church Committee) held several hearings on the topic, focusing on U.S. corporate political contributions to foreign officials. KOEHLER, *supra* note 10, at 3–4. During one of the hearings, Senator Church said that American companies' participation in foreign bribery "only serve[s] to discredit them and the United States. Ultimately, [foreign bribery] create[s] the conditions which bring to power political forces that are no friends of ours . . ." *Id.* at 6. He further stated that,

[p]ayments by Lockheed alone may very well advance the communists in Italy. In Japan, a mainstay of our foreign policy in the Far East, the government is reeling as a consequence of payments by Lockheed. Inquiries have begun in many other countries. The Communist bloc chortles with glee at the sight of corrupt capitalism.

*Id.* at 7. Representative Robert Nix, who chaired the House hearings on the issue, said, "[t]he interference in democratic elections with corporate gifts undermines everything we are trying to do as a leader of the free world." *Id.* at 6.

13. *Id.* at 7.

14. *Id.* Representative Stephen Solarz stated during a House hearing, [w]hat is at stake here is . . . the reputation of our own country . . . we have an obligation to set a standard of honesty and integrity in our business dealings not only at home but also abroad which will be a beacon for the light of integrity for the rest of the world.

FCPA into law on December 19, 1977,<sup>15</sup> and while enforcement was almost non-existent from the time of the statute's enactment until roughly 2002, the FCPA has become a crucial compliance issue for companies now that U.S. enforcement agencies aggressively pursue FCPA violations.<sup>16</sup>

Other countries have enacted and begun to enforce their own anti-bribery laws, leading to overlapping jurisdiction in FCPA cases.<sup>17</sup> The FCPA gives the United States expansive jurisdiction to prosecute foreign bribery cases, and other countries' anti-bribery laws give them similarly expansive jurisdiction.<sup>18</sup> When a company pays a bribe to a foreign official, two countries already have jurisdiction—the country where the company is based and the country in which the foreign official is based.<sup>19</sup> In many situations, several other countries may also have jurisdictional ties to the case.<sup>20</sup> Due to this overlapping jurisdiction, companies may face prosecution multiple times for the same underlying misconduct.<sup>21</sup>

There is no existing law to prevent the United States from prosecuting companies that have already resolved bribery charges with other countries.<sup>22</sup> Double jeopardy does not apply to

*Id.* at 7–8.

15. STEIGER, *supra* note 9, at 129. It has been amended twice since then, in 1988 and 1998. DEMING, *supra* note 8, at 3.

16. Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 913 (2010); KOEHLER, *supra* note 10, at xii.

17. Jay Holtmeier, *Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities*, 84 FORDHAM L. REV. 493, 495 (2015).

18. See Michael P. Van Alstine, *Treaty Double Jeopardy: The OECD Anti-Bribery Convention and the FCPA*, 73 OHIO ST. L. J. 1321, 1326–30 (2012).

19. Holtmeier, *supra* note 17, at 496.

20. *Id.*

21. Van Alstine, *supra* note 18, at 1329.

22. Frederick T. Davis, *International Double Jeopardy: US Prosecutions and the Developing Law in Europe*, 31 AM. U. INT'L L. REV. 57, 65 (2016). The United States did sign the International Covenant on Civil and Political Rights (ICCPR) in 1966, which provides that “[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.” *Id.* at 76 (alteration in original). However, the United States expressly stated upon signing the ICCPR “that it did not create any enforceable rights in the United States” and noted “its ‘understanding’ that ‘the prohibition upon double jeopardy . . . [applies] only when the judgment of acquittal has been rendered by a court of the same governmental unit . . . as

prosecutions brought by separate sovereigns under their own distinct laws, and the primary international anti-bribery treaty—the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention)—does not provide a binding mechanism to address the issue of duplicative enforcement actions.<sup>23</sup> Given the FCPA’s relatively broad jurisdictional reach, and the aggressive stance of the U.S. enforcement agencies, there are instances when the United States is involved in multijurisdictional enforcement actions even though its ties to the matter are weak. Furthermore, it is difficult to discern clear patterns from recent multijurisdictional enforcement actions to explain U.S. enforcement policy or the reasoning behind U.S. portions of total global settlements.

This Comment makes two arguments. First, U.S. enforcement agencies could adopt a policy of self-restraint in foreign bribery cases by declining to prosecute when there is no strong public policy reason for United States involvement. Second, U.S. enforcement agencies should make their enforcement policy more transparent, specifically as to the justification for pursuing cases where there are minimal jurisdictional ties, and as to the reasoning behind the portion of global settlement money U.S. enforcement agencies take.

Expansive jurisdiction is not necessarily undesirable—in fact, having many countries with broad and overlapping jurisdiction helps to ensure that companies that have engaged in corrupt acts do not “slip through the cracks.” However, it would be better from a policy perspective for each country, particularly the aggressive enforcers like the United States, to show self-restraint in multijurisdictional cases given that companies are extremely unlikely to fight the charges.<sup>24</sup> Furthermore, unpredictable

---

is seeking a new trial for the same cause.” *Id.* at 99 (alteration in original). The ICCPR has not been successfully used as a valid defense in United States courts because the treaty is not “self-executing.” *Id.*

23. Van Alstine, *supra* note 18, at 1322–23; Davis, *supra* note 22, at 62. There are other global and regional anti-corruption treaties, but this Comment will focus only on the OECD Convention.

24. Koehler, *supra* note 16, at 927 (“Simply put, challenging the DOJ is too risky. In fact, no company has challenged the DOJ in an FCPA enforcement action in the last twenty years.”). Furthermore, cooperation with the Department of Justice is one of the key factors in the DOJ’s decision

enforcement policy and the potential for duplicative enforcement actions can deter companies from self-reporting any violations and can discourage cooperation with enforcement agencies.<sup>25</sup> This is counterproductive to the purpose and goals of global anti-bribery laws—eliminating foreign bribery from international business transactions.<sup>26</sup> The new Department of Justice (DOJ) policy against “piling on,” announced in May 2018, is an acknowledgment of the problem and a step in the right direction, but the policy itself lacks concrete detail and therefore still does not create predictability.<sup>27</sup>

As described above, this Comment argues for a policy of both self-restraint and transparency in multijurisdictional enforcement actions, rather than the application of a strict double jeopardy style rule under which multijurisdictional violations are prosecuted by only one enforcement authority. The United States has led the way in creating a more level playing field in international business, and at this point, not enough other countries consistently enforce their anti-bribery laws to justify the United States retreating from multijurisdictional enforcement in all cases.<sup>28</sup> There are likely situations when other countries’

---

of whether or not to bring a criminal indictment, and “to challenge the DOJ’s theories, its interpretation of facts, or to raise valid and legitimate FCPA defenses is not to cooperate with the investigation . . .” *Id.* at 925.

25. See Holtmeier, *supra* note 17, at 514–17.

26. See *id.*

27. Rod J. Rosenstein, Deputy Att’y Gen., Remarks to the New York City Bar White Collar Crime Institute (May 9, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar> [<https://perma.cc/CM5X-NCPF>].

28. From 1977 through 2017 there were 349 foreign bribery enforcement actions worldwide, and the United States was responsible for 236 of those (68%). *Global Enforcement Report 2017*, TRACE INT’L (Mar. 2018), <https://traceinternational.org/Uploads/PublicationFiles/GER2017.pdf> [<https://perma.cc/TCF7-L979>]. European countries account for 27%, while Asia Pacific, the Americas (excluding the United States), and the Middle East each accounted for 3% or less. *Id.* As of 2012, only seven of thirty-seven countries (most of the parties to the OECD Convention, at the time) were designated as having “active enforcement.” *Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention Progress Report 2012*, TRANSPARENCY INT’L (Sept. 6, 2012), [https://www.transparency.org/whatwedo/publication/exporting\\_corruption\\_country\\_enforcement\\_of\\_the\\_oecd\\_anti\\_bribery\\_conventio](https://www.transparency.org/whatwedo/publication/exporting_corruption_country_enforcement_of_the_oecd_anti_bribery_conventio) [<https://perma.cc/V8R2-ZBJB>]. Twelve countries were deemed to have “moderate enforcement,” while the remaining eighteen were classified as having “little enforcement” or “no enforcement.” *Id.*

enforcement actions are not strong enough to properly deter and punish companies for their corrupt acts, or when the countries that should prosecute choose not to, for whatever reason. The United States should be able to insert itself into these situations when there are good policy reasons to do so. However, U.S. enforcement agencies can be clearer in their public statements about the reasons for involvement in those cases, and might refrain from action in situations where there is no policy reason or need for United States involvement.

Part I of this Comment provides a basic overview of the FCPA's statutory provisions, the enforcement agencies and enforcement mechanisms, and the scope of U.S. jurisdiction. Part II examines the issue of overlapping jurisdiction in foreign bribery cases and analyzes the four multijurisdictional enforcement actions resolved in 2017. Part III proposes increased self-restraint and transparency in U.S. enforcement policy, supported by the U.S. approach to state-federal successive prosecutions and the spirit of the OECD Convention's jurisdiction provisions.

#### I. FCPA FUNDAMENTALS

This Part provides a basic overview of the FCPA. While the general idea behind the statute is easy to understand—paying bribes to foreign officials to obtain or retain business is prohibited—in practice it is much more complex. Subpart A describes the main statutory provisions—the anti-bribery and accounting provisions. Subpart B reviews the United States agencies that enforce FCPA violations and the means by which they resolve FCPA cases with companies, often with little or no judicial oversight. Subpart C explains the fines and penalties companies face, including the relatively new use of civil disgorgement, which has contributed to the enormous settlement amounts seen today. Finally, Subpart D covers the FCPA's wide-reaching jurisdictional coverage and the implications for companies operating internationally.

##### A. *The Anti-Bribery and Accounting Provisions*

The FCPA has two main sets of provisions: the anti-bribery

provisions and the accounting provisions.<sup>29</sup> The two sets of provisions “were intended to work in tandem and thereby complement one another.”<sup>30</sup> The anti-bribery provisions generally prohibit corrupt payments to foreign officials made to assist with obtaining or retaining business.<sup>31</sup>

The accounting provisions themselves impose two separate requirements on all companies, regardless of where they are based or established, that maintain a class of securities registered on a United States exchange, or that are otherwise required to file reports with the SEC.<sup>32</sup> These companies are referred to as “issuers.”<sup>33</sup> First, issuers must adhere to the so-called books and records provision, which obliges issuers to keep accurate books, records, and accounts.<sup>34</sup> In other words, if a company bribes a foreign official and does not record that bribe in its books and records, or records the charge but does not accurately describe it as an illicit payment, it has violated the accounting and recordkeeping provisions.<sup>35</sup> Thus, any company found in violation of the anti-bribery provisions will most likely be in violation of the books and records provision as well, as it is highly unlikely a company would accurately record bribes on its books.<sup>36</sup>

Second, issuers are required to devise and maintain adequate internal controls to ensure that funds are expended in accordance with management’s general and specific authorizations.<sup>37</sup> Essentially, the internal controls provision compels issuers to implement and adhere to written compliance procedures as to how they spend corporate funds.<sup>38</sup> In many FCPA enforcement

29. DEMING, *supra* note 8, at 3–4.

30. *Id.* at 4.

31. ROBERT W. TARUN, *THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK: A PRACTICAL GUIDE FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS AND WHITE COLLAR CRIMINAL PRACTITIONERS* 1 (2nd ed. 2012).

32. 15 U.S.C. § 78m(b)(2) (2012).

33. *Id.* § 78m(a).

34. *Id.* §§ 78m(a), 78m(b)(2)(A); TARUN, *supra* note 31, at 1, 13.

35. TARUN, *supra* note 31, at 13.

36. *See id.*

37. 15 U.S.C. § 78m(b)(2)(B).

38. CRIMINAL DIV. OF THE DEP’T OF JUSTICE & ENF’T DIV. OF THE SEC. AND EXCH. COMM’N, *FCPA: A RESOURCE GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT* 38, 40 (2012), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> [<https://perma.cc/WUJ5-GPYK>] [hereinafter *FCPA RESOURCE GUIDE*].

actions, companies found in violation of the anti-bribery provisions are also found to have violated the internal controls requirement; the logic is that if the company had sufficient internal controls, they would have prevented any misconduct.<sup>39</sup>

Although the anti-bribery provisions may seem simple on their face, they are in fact quite complex and companies may easily run afoul of them. A payment does not need to actually be made for there to be an anti-bribery violation; an offer, promise, or authorization of a corrupt payment will suffice.<sup>40</sup> Furthermore, the definition of “foreign official” is quite expansive. The definition provided in the statute is:

Any officer or employee of a foreign government or any department, agency or instrumentality thereof, or of a public international organization, or any person acting in an official capacity or on behalf of any such government, department, agency or instrumentality or for, or on behalf of, any such public international organization.<sup>41</sup>

Moreover, the anti-bribery provisions also apply to illicit payments rendered to foreign political parties, party officials, candidates for office, employees of state-owned enterprises, and officials of quasi-governmental agencies.<sup>42</sup>

The payment, or offer of payment, must be made “corruptly” but can take many forms.<sup>43</sup> It can be money, but “anything of value” is considered a bribe.<sup>44</sup> Enforcement actions demonstrate that, in addition to funds, bribes can be lavish trips, gifts in-kind,

---

39. *Id.* at 40.

40. TARUN, *supra* note 31, at 3. The DOJ also frequently charges companies and individuals with conspiracy to violate the anti-bribery provisions of the FCPA. *Id.* at 17–18.

41. 15 U.S.C. § 78dd-1(f)(1)(A); § 78dd-(2)(h)(2)(A); § 78dd-3(f)(2)(A) (2012).

42. FCPA RESOURCE GUIDE, *supra* note 38, at 19–21; *see* United States v. Esquenazi, 752 F.3d 912 (11th Cir. 2014) (laying out the factors for determining whether an entity is an instrumentality of a foreign government); *see also* Deferred Prosecution Agreement, United States v. Olympus Latin America, Inc., No. 16-3525(MF) (D.N.J. Mar. 1 2016) (available at <https://www.justice.gov/criminal-fraud/file/831256/download> [<https://perma.cc/Z58S-55LJ>]) (holding that doctors at state-owned hospitals were government officials).

43. 15 U.S.C. § 78dd-1(a); § 78dd-2(a); § 78dd-3(a).

44. *Id.*

and even employment provided to a foreign official's relatives.<sup>45</sup> There is no de minimis exception.<sup>46</sup>

A company may also be liable for bribes offered or paid by any third-party agents the company has hired to assist in foreign jurisdictions, such as marketing representatives, consultants, joint venture partners, distributors, law firms, or accountants.<sup>47</sup> The company must have had knowledge of the third-party agent's actions, but that knowledge could be actual or constructive.<sup>48</sup> The knowledge requirement is met if a person is aware that there is a high probability that an improper payment will be made or offered.<sup>49</sup> "Willful blindness," "deliberate ignorance," and "taking a 'head-in-the-sand'" attitude all constitute knowledge under the FCPA.<sup>50</sup> These third-party agent relationships present a serious compliance challenge for companies:<sup>51</sup> "[B]ecause of *respondeat superior* and the realities of the global marketplace, FCPA compliance can be difficult for even the most well-managed and well-intentioned business organizations with a commitment to

---

45. TARUN, *supra* note 31, at 4. In 2015, BNY Mellon faced FCPA charges for providing student internships to government officials' family members; the interns in question did not go through the company's competitive hiring process. Press Release, Sec. & Exch. Comm'n, SEC Charges BNY Mellon with FCPA Violations (Aug. 18, 2015), <https://www.sec.gov/news/pressrelease/2015-170.html> [<https://perma.cc/MN48-VHYY>].

46. TARUN, *supra* note 31, at 4. The FCPA does contain an exception for so-called "facilitating payments" or "grease payments," but it is questionable how much this exception helps companies during an investigation. KOEHLER, *supra* note 10, at 120. "Facilitating payments" are defined as "facilitating or expediting payment[s] to a foreign official . . . the purpose of which is to expedite or to secure the performance of a routine government action by a foreign official . . ." *Id.* at 116. Some examples the statute gives of "routine government action" include obtaining permits, licenses, or other documents to do business in that country; processing visas and work orders; and scheduling inspections. *Id.* at 117. Despite the legal authority for the exception, many FCPA enforcement actions today concern payments made or offered for the purpose of obtaining permits, licenses, or other documents to do business in a particular country; in fact, the SEC's former Assistant Director of Enforcement has called the facilitating payment exception "illusory." *Id.* at 119–20.

47. TARUN, *supra* note 31, at 7.

48. *Id.*

49. *Id.*

50. *Id.*

51. DEMING, *supra* note 8, at 60.

FCPA compliance.”<sup>52</sup>

If a company or individual is accused of having made an improper payment, there are two affirmative defenses that may be raised: the reasonable and bona fide expenditures defense and the local law defense.<sup>53</sup> The reasonable and bona fide expenditures defense applies to:

the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official . . . and was directly related to: (a) the promotion, demonstration, or explanation of products or services; or (b) the execution or performance of a contract with a foreign government or agency thereof.<sup>54</sup>

The local law defense applies when the payment in question is actually permissible under the written law of the foreign official’s country, with emphasis on *written* law: the fact that the practice is customary or widespread in a certain country is not sufficient.<sup>55</sup> While companies make payments every day that qualify as bona fide expenditures,<sup>56</sup> the local law defense in practice will not provide much help to a company under investigation.<sup>57</sup>

#### B. Enforcement Agencies and Resolution Vehicles

In the U.S., two agencies are responsible for enforcing FCPA violations, and they often both bring enforcement actions for the

---

<sup>52</sup> KOEHLER, *supra* note 10, at 54.

<sup>53</sup> *Id.* at 120–21.

<sup>54</sup> *Id.* at 123.

<sup>55</sup> *Id.* at 121. In *United States v. Kozeny*, the defendant alleged that he would have been “free from criminal responsibility” under the laws of Azerbaijan, the country of the foreign official in question and, therefore, he should be able to invoke the local law exception. *Id.* at 121–22 (referring to 582 F. Supp. 2d 535 (S.D.N.Y. 2008)). The court disagreed and found that the payment was in fact illegal, even if the defendant would not have been prosecuted in Azerbaijan due to a technicality. *Id.*

<sup>56</sup> Bill Steinman, *Bill Steinman: How to Handle Mandated Per Diems with Foreign Government Customers*, FCPA BLOG (Mar. 2, 2016, 10:08 AM), <http://www.fcpablog.com/blog/2016/3/2/bill-steinman-how-to-handle-mandated-per-diems-with-foreign.html> [<https://perma.cc/KW6G-G33Y>].

<sup>57</sup> STEIGER, *supra* note 9, at 152.

same instance of misconduct.<sup>58</sup> The DOJ is responsible for bringing all criminal charges, both for the anti-bribery provisions and for willful violations of the accounting and record-keeping provisions.<sup>59</sup> The SEC brings civil actions for violations of the anti-bribery provisions and accounting and record-keeping provisions; the SEC only has jurisdiction over issuers and individuals acting on behalf of issuers.<sup>60</sup> The DOJ also brings civil actions against all companies and individuals not covered by the SEC's authority.<sup>61</sup> If both enforcement agencies have jurisdiction in a particular case, they will "typically conduct parallel or joint investigations" and will bring "simultaneous criminal charges, civil complaints, deferred prosecution agreements, and/or consent decrees."<sup>62</sup>

FCPA cases against companies very rarely go to trial.<sup>63</sup> Instead, the DOJ and SEC use other means to resolve FCPA matters. The DOJ resolves criminal matters with companies through plea agreements, deferred prosecution agreements, non-prosecution agreements, and declinations.<sup>64</sup> Plea agreements are reserved for the most egregious cases of misconduct, typically where senior management was involved in the bribery, or where the company failed to voluntarily disclose the misconduct or cooperate with the enforcement agencies.<sup>65</sup>

In most instances when companies are subject to criminal prosecution for FCPA violations, those companies will enter into a non-prosecution agreement or deferred-prosecution agreement with the DOJ.<sup>66</sup> A non-prosecution agreement (NPA) is a formal, written agreement in which the enforcement agency agrees not to pursue an action and the company agrees to cooperate fully, but

---

<sup>58</sup> DEMING, *supra* note 8, at 75–76.

<sup>59</sup> KOEHLER, *supra* note 10, at 54.

<sup>60</sup> DEMING, *supra* note 8, at 75; KOEHLER, *supra* note 10, at 54–55.

<sup>61</sup> DEMING, *supra* note 8, at 75.

<sup>62</sup> TARUN, *supra* note 31, at 249.

<sup>63</sup> Koehler, *supra* note 16, at 927.

<sup>64</sup> FCPA RESOURCE GUIDE, *supra* note 38, at 74.

<sup>65</sup> *Id.*

<sup>66</sup> DEMING, *supra* note 8, at 79; Koehler, *supra* note 16, at 928, 933. "The DOJ's use of NPAs and DPAs has exploded in recent years. Professor Peter Henning, a former DOJ prosecutor and SEC enforcement official, recently noted that NPAs and DPAs 'have become almost the accepted norm' and 'there is even an expectation that companies will receive them.'" Koehler, *supra* note 16, at 933.

no formal charges are filed: the agreement is maintained by the DOJ and the company.<sup>67</sup> In a deferred prosecution agreement (DPA), on the other hand, the enforcement agency files formal charges in the appropriate court and agrees not to proceed with the enforcement action if the company agrees to cooperate fully during the deferred prosecution period.<sup>68</sup>

While NPAs and DPAs are beneficial for companies seeking to bring the matter to a speedy resolution,<sup>69</sup> there is very little judicial scrutiny of those agreements, which may give the enforcement agencies “unchecked power subject to abuse.”<sup>70</sup> There is no judicial scrutiny of NPAs, given that they are not filed with a court; DPAs are, in theory, subject to judicial scrutiny because they are filed with a court, but in practice there is little judicial oversight:<sup>71</sup>

[T]he first-of-its-kind [Government Accountability Office] report found that judges routinely “rubber-stamp” DPAs without inquiring into whether factual evidence exists to support the essential elements of the crime “alleged” or to determine whether valid and legitimate defenses are relevant to the “alleged” conduct. In fact, no court has ever rejected an NPA or DPA and all “have been approved without judicial modification.”<sup>72</sup>

Despite the benefits of non-prosecution or deferred prosecution to companies, these agreements lead to unfairness in the resolution process. Commentators have noted that “[t]hese agreements are made under duress. The economic reality is that if the corporation refuses to assent to the [DPA], the result will likely be the death of the corporation or alternatively, severe financial consequences that will gravely injure the corporation.”<sup>73</sup>

---

67. DEMING, *supra* note 8, at 79; Koehler, *supra* note 16, at 928–29.

68. DEMING, *supra* note 8, at 79; Koehler, *supra* note 16, at 928.

69. DEMING, *supra* note 8, at 79.

70. Koehler, *supra* note 16, at 938.

71. *Id.* at 935.

72. *Id.* at 936.

73. *Id.* at 937–38 (citing Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L. J. 1, 14 (2007)). The classic example of this is Arthur Anderson, “a company that died upon criminal conviction notwithstanding the fact that the U.S. Supreme Court later reversed its conviction.” *Id.* at 938.

As a result, U.S. enforcement agencies are able to push the boundaries of their jurisdiction, and companies accept the enforcement agencies' interpretation of the law, even if a court might reach a different conclusion.<sup>74</sup>

The remaining way the DOJ resolves FCPA matters with companies is through declinations—in other words, the DOJ declines to bring charges altogether.<sup>75</sup> The DOJ exercises this option when a company self-discloses the misconduct to the enforcement agencies and fully cooperates in the investigation.<sup>76</sup> The DOJ's Corporate Enforcement Policy, formerly known as the Pilot Program, does presume that companies will receive a declination if they meet the policy's criteria.<sup>77</sup> However, it can be

74. *Id.* at 907, 946.

75. FCPA RESOURCE GUIDE, *supra* note 38, at 75.

76. *Id.* at 77–79. See the Morgan Stanley 2012 declination for example. *Recent Declination in Morgan Stanley DOJ Case Spells Out Keys to Effective FCPA Compliance Policy*, LEXISNEXIS, <https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2012/10/14/rec-ent-declination-in-morgan-stanley-doj-case-spells-out-keys-to-effective-fcpa-compliance-policy.aspx> [<https://perma.cc/5AR6-AFR2>] (last visited Oct. 10, 2018); Press Release, Dep't of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), <https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required> [<https://perma.cc/6NUG-D68P>].

77. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-47.120 (2018) [hereinafter U.S. ATTORNEYS' MANUAL], <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120> [<https://perma.cc/T749-65XQ>]. The Pilot Program was announced by the DOJ in 2016 as a one-year program to try to encourage more companies to voluntarily disclose FCPA violations. If a company met the program's criteria, it would be eligible for significant benefits in resolving the matter with the DOJ. Dept. of Justice, *Criminal Division Launches New FCPA Pilot Program* (Apr. 5, 2016), <https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program> [<https://perma.cc/QZ43-ATFD>]. In November 2017, the DOJ announced that the Pilot Program would be made permanent and would be incorporated into the United States Attorney's Manual as the Corporate Enforcement Policy. Rod J. Rosenstein, Deputy Att'y Gen., Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017) (available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign> [<https://perma.cc/Z59X-GWYU>]). The Corporate Enforcement Policy made certain changes to the terms of the Pilot Program that are actually more beneficial for companies. See Bill Steinman, *Bill Steinman: What's New About the DOJ's New FCPA Corporate Enforcement Policy?*, FCPA BLOG (Dec. 1, 2017, 8:28 AM), <http://www.fcpablog.com/blog/2017/12/1/bill-steinman-whats-new-about-the-doj-s-new-fcpa-corporate-en.html>

difficult for companies to meet all of the policy's vague requirements to the DOJ's satisfaction.<sup>78</sup>

The SEC also utilizes DPAs, NPAs, and declinations the way the DOJ does. However, it has some other resolution options at its disposal as well. The SEC can obtain a civil injunction through a court order.<sup>79</sup> This was the traditional method for resolving FCPA cases, but the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd Frank) has led to an increase in FCPA cases being resolved in administrative courts before administrative law judges.<sup>80</sup> This is because Dodd-Frank allows the SEC to impose civil penalties through administrative proceedings.<sup>81</sup>

### C. *Fines and Penalties*

Although the statute provides limits for fines, total settlements in FCPA cases are continually increasing. For anti-bribery violations, the statutory limit on criminal fines for individuals is \$250,000; companies may be subject to a fine of up to \$2 million.<sup>82</sup> For criminal accounting and record-keeping violations, individuals may be fined up to \$5 million while companies may be fined up to \$25 million.<sup>83</sup> However, per the Alternative Fines Act, criminal fines may be increased to "double the gain or loss resulting from the corrupt payment."<sup>84</sup> This essentially means that "the statutory amounts are often of little importance in arriving at actual fine and penalty amounts in a

---

[<https://perma.cc/7APZ-XVGD>].

78. See Mike Koehler, *Grading the DOJ's 'FCPA Corporate Enforcement Policy'*, BLOOMBERG L. WHITE COLLAR CRIME REP. 24(2017).

79. FCPA RESOURCE GUIDE, *supra* note 38, at 76.

80. Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. PA. J. CONST. L. 45, 51–52 (2016).

81. *Id.* at 46.

82. STEIGER, *supra* note 9, at 153. Individuals may also be subject to a jail term of up to five years. *Id.*

83. *Id.* Individuals may also be subject to a jail term of up to twenty years. *Id.*

84. *Id.* "If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." 18 U.S.C. § 3571(d) (2012).

corporate FCPA enforcement action.....”<sup>85</sup>

The SEC now often also seeks disgorgement of profits,<sup>86</sup> which is in large part responsible for today’s substantial total settlement amounts.<sup>87</sup> Disgorgement was not part of any settlement agreement until 2004 but since then it “has been used in the majority of cases and comprises the most significant part of the SEC’s recovery.”<sup>88</sup> In 2016, disgorgement accounted for more than ninety-seven percent of the SEC’s total monetary recovery in FCPA enforcement actions—a total of \$1.14 billion.<sup>89</sup>

As mentioned above, FCPA fines and penalties almost always go to the U.S. Treasury general fund,<sup>90</sup> which leads many to

---

85. KOEHLER, *supra* note 10, at 182. “In practice, Alternative Fines Act fines often exceed the statutory maximum fine in significant FCPA cases and enable the DOJ to secure nine-figure megafines.” TARUN, *supra* note 31, at 19.

86. David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT’L L. 471, 478 (2009).

87. *Id.* at 484.

88. KOEHLER, *supra* note 10, at 184. One commentator notes that the SEC’s use of disgorgement is troubling: it is not clear that Congress ever intended the SEC to seek disgorgement in FCPA cases, and there are practical difficulties in determining exactly how much money the company made as a result of the foreign bribery. Weiss, *supra* note 86, at 473–75. Furthermore,

[t]he irony in many corporate FCPA enforcement actions is that the company is otherwise viewed as selling the best product or service for the best price. With such companies, can it truly be said that the alleged improper payments were the sole reason the company secured the contract or other benefit received? Does a but-for analysis have a place in arriving at FCPA fine and penalty amounts? In other words, should it be relevant that the company would likely have secured the contract or other benefit anyway, regardless of the improper payment?

KOEHLER, *supra* note 10, at 183. Also, disgorgement in theory must be proportional to the offense, and given the difficulties in calculating the amount in foreign bribery cases, it is quite possible that a calculated amount might be disproportional, therefore constituting a punishment rather than an equitable remedy. Weiss, *supra* note 79, at 506. “[D]isgorgement is ill-suited to the foreign bribery context, in which some disgorgement calculations must necessarily resemble speculation or, at best, rough estimates.” *Id.* at 475.

89. Debevoise & Plimpton LLP, *Supreme Court’s Ruling on Disgorgement Has Broad Implications for FCPA Matters*, FCPA UPDATE 2 (June 2017), [https://www.debevoise.com/~media/files/insights/publications/2017/06/fcpa\\_update\\_june\\_2017a.pdf](https://www.debevoise.com/~media/files/insights/publications/2017/06/fcpa_update_june_2017a.pdf) [https://perma.cc/9GLJ-VR5J].

90. Scott C. Jansen, *What Will \$30 Million of the Rolls-Royce Fine Be*

believe that FCPA enforcement is more about generating funds for the government rather than punishing and deterring corruption.<sup>91</sup> Former DOJ and SEC enforcement attorneys have made powerful statements on the subject. A former Assistant Director of the SEC Enforcement Division, who assisted in drafting the FCPA, wrote, “governments will keep pursuing corrupt business practices for one very simple reason—it’s lucrative.”<sup>92</sup> Another former DOJ prosecutor stated,

This is the one area of government activity that actually brings money in rather than shoots money out. We’re talking about literally billions of dollars that the government is able to collect . . . as long as there’s a budget issue it’s not too cynical to say that generating revenue is a factor in bringing these cases.<sup>93</sup>

The DOJ’s former Assistant Chief for FCPA enforcement, William Jacobson, also said, “the government sees a profitable program, and it’s going to ride that horse until it can’t ride it anymore.”<sup>94</sup> These statements potentially explain U.S. involvement in cases where jurisdictional ties are minimal and other countries with stronger ties have already initiated their own enforcement actions.<sup>95</sup>

---

*Used for?*, FCPA BLOG (Feb. 10, 2017, 8:22 AM), <http://www.fcpablog.com/blog/2017/2/10/what-will-30-million-of-the-rolls-royce-fine-be-used-for.html> [https://perma.cc/ML83-PA9V].

91. KOEHLER, *supra* note 10, at 238; *see also* Matthew C. Turk, *A Political Economy Approach to Reforming the Foreign Corrupt Practices Act*, 33 NW. J. INT’L L. & BUS. 325, 346 (2013) (“Not only does enforcement generate positive revenue for the U.S. government, it also advantages domestic U.S. corporations that are less heavily investigated or punished relative to their foreign competitors.”).

92. Michael F. Perlis & Wrenn E. Chais, *Investigating the FCPA*, FORBES (Dec. 8, 2009, 1:06 PM), <https://www.forbes.com/2009/12/08/foreign-corrupt-practices-act-opinions-contributors-michael-perlis-wrenn-chais.html#7403c2634e81> [https://perma.cc/Z2Z8-Y9VE].

93. Brian Mahoney, *FCPA Enforcement Will Stay Robust Beyond Obama’s 2nd Term*, LAW360 (Nov. 6, 2012, 12:00 AM), <https://0-www.law360.com.lawlib.rwu.edu/articles/392138/fcpa-enforcement-will-stay-robust-beyond-obama-s-2nd-term>.

94. Turk, *supra* note 91, at 352.

95. *See* KOEHLER, *supra* note 10, at 238–40. One commentator argues that U.S. enforcement agencies engage in “rent-seeking,” “in which every member of the FCPA enforcement apparatus benefits from expanding FCPA enforcement . . .” Turk, *supra* note 91, at 354. Furthermore, “as rents

It is important to note that U.S. enforcement agencies in many cases do credit or offset fines and penalties paid to other countries' enforcement agencies; this shows some recognition that it might be unfair for companies to face duplicative penalties for the same instance of foreign bribery.<sup>96</sup> However, there is no guarantee that a company will receive a credit, and there is little insight into what U.S. enforcement agencies deem an appropriate amount to offset.<sup>97</sup> Furthermore, duplicative penalties are only part of the problem for companies facing duplicative enforcement actions—there are also “burdens and costs” simply by virtue of being investigated by multiple enforcement agencies.<sup>98</sup> Given the lack of information in FCPA settlement agreements and the lack of official guidance on the subject, it is difficult to know when and how much U.S. enforcement agencies will credit for penalties paid in other jurisdictions.<sup>99</sup>

*D. The FCPA's Expansive Jurisdiction*

The FCPA gives the United States extremely broad jurisdiction to prosecute foreign bribery, which causes even more of a compliance concern for companies and individuals.<sup>100</sup> The FCPA provides three bases for jurisdiction.<sup>101</sup> First, as explained above, the FCPA covers “issuers,” which essentially include publicly traded companies and any other companies that are

---

become a more important governmental objective, more resources are invested in detection and punishment [of crimes that produce rents].” *Id.* at 361 (citing Nuno Garoupa & Daniel Klerman, *Optimal Law Enforcement with a Rent-Seeking Government*, 4 AM. L. & ECON. REV. 116, 128 (2002)). He proposes diverting disgorgement away from the SEC to reduce the enforcement agencies' incentive to prosecute “lower-hanging fruit” and encourage focus on cases with “clearer factual and legal bases.” *Id.* at 363. He suggests international organizations or demand-side countries (with conditions) as potential recipients of disgorgement. *Id.* at 366–67.

<sup>96</sup> Holtmeier, *supra* note 17, at 506–07.

<sup>97</sup> *Id.* at 507.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 507–08. “[W]ithout more visibility into the U.S. settlement process, or additional guidance from U.S. regulators, it is difficult to infer anything certain about the SEC’s or DOJ’s policies with respect to U.S. treatment of foreign antibribery settlements.” *Id.*

<sup>100</sup> See Natasha N. Wilson, Note, *Pushing the Limits of Jurisdiction Over Foreign Actors Under the Foreign Corrupt Practices Act*, 91 WASH. U. L. REV. 1063, 1070–71 (2014).

<sup>101</sup> 15 U.S.C. § 78dd-1 to 78dd-3.

required to file with the SEC.<sup>102</sup> The accounting and recordkeeping provisions and the internal controls provision of the FCPA only apply to issuers.<sup>103</sup> Officers, directors, agents, employees, and stockholders of an issuer are also covered by the FCPA.<sup>104</sup>

Second, the FCPA covers “domestic concerns.”<sup>105</sup> Domestic concerns include United States citizens, nationals, and residents, as well as any type of business entity that has its principal place of business in the United States or is organized under United States law.<sup>106</sup> Like with issuers, the FCPA also covers the officers, directors, agents, employees, and stockholders of domestic concerns.<sup>107</sup> It is important to note that a United States citizen, national, or resident need not be physically present in the United States for the FCPA to apply.<sup>108</sup>

The first two bases for jurisdiction were part of the FCPA as originally enacted in 1977.<sup>109</sup> The 1998 amendments added a third jurisdictional basis—territorial jurisdiction.<sup>110</sup> Essentially, anyone who does any “act in furtherance” of a bribe, or an offer to bribe, “while in the territory of the United States” is subject to the FCPA, even if they are not an issuer or a domestic concern.<sup>111</sup> The enforcement agencies have taken an aggressive stance on what “while in the territory of the United States” actually means.<sup>112</sup> For example, the enforcement agencies would consider

---

102. 15 U.S.C. § 78dd-1; TARUN, *supra* note 31, at 45.

103. DEMING, *supra* note 8, at 42.

104. 15 U.S.C. § 78dd-1.

105. 15 U.S.C. § 78dd-2.

106. *Id.* United States law includes state or federal law, as well as the law of any territory, possession, or commonwealth. *Id.*

107. *Id.*

108. *See id.*

109. 15 U.S.C. § 78dd-1 to 78dd-2; FCPA RESOURCE GUIDE, *supra* note 38, at 10.

110. 15 U.S.C. § 78dd-3; FCPA RESOURCE GUIDE, *supra* note 38, at 11.

111. 15 U.S.C. § 78dd-3(a).

112. *See* Sean Hecker & Margot Laporte, *Should FCPA “Territorial” Jurisdiction Reach Extraterritorial Proportions?*, 42 A.B.A. INT’L L. NEWS 1, 7–8 (2013); Wilson, *supra* note 100, at 1071.

“Within” has a particular meaning in this context: to commit an act “within” the territory actually means causing an act to be committed within the territory. The 1998 amendment thus established jurisdiction over anyone who uses the mails, means, or instrumentalities of interstate commerce in the United States to

the sending of emails via U.S.-based servers, or the use of the U.S. banking system by facilitating bribes in U.S. dollars, as giving the United States jurisdiction over the bribery.<sup>113</sup> Given that companies almost always settle, the enforcement agencies' interpretation of territorial jurisdiction has rarely been challenged.<sup>114</sup>

In originally enacting the FCPA, Congress excluded from jurisdictional reach foreign individuals and companies, provided they were not issuers or domestic concerns.<sup>115</sup> It did so out of concerns about sovereignty issues, foreign policy and diplomatic relations, and the potential for reciprocal prosecution.<sup>116</sup> However, in 1998, the Senate ratified the OECD Convention, which requires its signatories to criminalize foreign bribery and specifically calls for an expansive jurisdictional scope.<sup>117</sup> In fact, the official OECD Commentaries to the Convention state that "[t]he territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required."<sup>118</sup> To comply with the OECD Convention,

---

facilitate an FCPA violation, even if that person was not physically present in the United States when acting or otherwise subject to U.S. jurisdiction as a citizen or issuer.

Wilson, *supra* note 100, at 1071.

113. See Hecker, *supra* note 112, at 8; Wilson, *supra* note 100, at 1071–72.

When banks wish to transact in a location where they do not have a branch, they can use a correspondent account in that location to conduct transactions, such as receiving deposits or making payments. Foreign banks use U.S. correspondent accounts to facilitate U.S. dollar transactions . . . . In recent enforcement actions, the DOJ and SEC have signaled that the use of U.S. correspondent accounts can establish jurisdiction over the foreign actor conducting the transaction, even when that correspondent account is the actor's only link to the United States.

Wilson, *supra* note 100, at 1072.

114. Hecker, *supra* note 112, at 8, 10; Wilson, *supra* note 100, at 1072–73.

115. See Wilson, *supra* note 100, at 1070.

116. *Id.*

117. TARUN, *supra* note 31, at 45; OECD Convention, *supra* note 4, at art. 4 ¶ 1. "Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory." OECD Convention, *supra* note 4, at art. 4 ¶ 1.

118. Organisation for Economic Co-operation & Development, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 25 (1997), available at

Congress amended the FCPA that same year and broadened the jurisdictional scope to include foreign corporations and foreign individuals that bribe, or offer to bribe, foreign officials while “in” the United States.<sup>119</sup> The fact that the United States and all of the other OECD Convention signatories have statutes conferring such broad jurisdiction to prosecute foreign bribery cases creates overlapping jurisdiction that leads to duplicative enforcement actions.

## II. OVERLAPPING JURISDICTION AND MULTIJURISDICTIONAL ENFORCEMENT ACTIONS

Foreign bribery cases by nature involve multiple countries, and given that the United States and other countries assert extraterritorial jurisdiction in these cases, there is almost always overlapping jurisdiction.<sup>120</sup> As a result, companies may be subject to prosecution by multiple countries’ enforcement agencies.<sup>121</sup> Unfortunately for companies accused of FCPA violations, the United States constitutional protection against “double jeopardy” does not apply in cases involving multiple sovereigns; if the conduct constitutes a criminal offense in the United States, and also constitutes a criminal offense in another country, then the conduct is considered to be a separate violation of law in each country, even though the violations arose from the same underlying facts.<sup>122</sup>

In many instances, the United States does have jurisdiction, but given that the other countries involved in the enforcement action have much stronger ties to the case, there is no obvious public policy reason for the United States to be so heavily involved. While it is very possible that U.S. enforcement agencies do, in fact, have good policy reasons for their involvement, and for the portion of penalties they take in these cases, those reasons are not made clear to the public.<sup>123</sup> From the four multijurisdictional

---

[http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf).

119. 15 U.S.C. § 78dd-3(a); TARUN, *supra* note 31, at 45.

120. Holtmeier, *supra* note 17, at 496.

121. *Id.*

122. Van Alstine, *supra* note 18, at 1322.

123. Holtmeier, *supra* note 17, at 510.

It is unclear how U.S. and foreign authorities . . . decide who takes the lead on an investigation .....[T]he coordination and division of

enforcement actions in 2017, it is difficult to discern any patterns regarding (1) what the United States considers to be a strong tie to the case, and (2) what portion of total penalties the United States takes.<sup>124</sup>

*A. Overlapping Jurisdiction as a Result of the OECD Convention*

When Congress enacted the FCPA, the United States was the only country in the world that criminalized bribery of foreign officials, and as a result, U.S. companies were arguably at a disadvantage when competing for business in the international market.<sup>125</sup> In amending the FCPA in 1988, Congress expressly called for the President to negotiate an international agreement among OECD countries in order to level the playing field in international business transactions.<sup>126</sup> After many years of diplomatic efforts, the OECD Convention was finalized on December 17, 1997, requiring all signatories to enact domestic legislation that criminalized foreign bribery.<sup>127</sup> Currently, forty-three countries have ratified the OECD Convention and have

---

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.

*Id.* The International Foreign Bribery Taskforce (IFBT) is comprised of law enforcement agencies from the United States, Canada, Australia, and the United Kingdom, and representatives from those agencies have stated that in multijurisdictional matters, “the agencies will informally assign one organization among them to take the leading role in each multi-jurisdictional investigation. This decision is based not only where the misconduct has occurred or the situs of most of the evidence, but also where they’re likely to secure the largest penalty.” Bill Steinman, *Bill Steinman: It’s Time to Meet the International Foreign Bribery Taskforce*, FCPA BLOG (Dec. 7, 2016, 8:22 AM), <http://www.fcpablog.com/blog/2016/12/7/bill-steinman-its-time-to-meet-the-international-foreign-bri.html> [<https://perma.cc/C9TD-R43S>].

<sup>124</sup> Holtmeier, *supra* note 17, at 513.

Identifying patterns and trends . . . can be difficult, and observers and practitioners may often be reduced to reading proverbial tealeaves in an attempt to map out the landscape . . . Companies . . . may be hard pressed to draw neat conclusions from . . . case studies that, ultimately, provide too little consistency and predictability.

*Id.*

<sup>125</sup> Van Alstine, *supra* note 18, at 1325.

<sup>126</sup> *Id.*

<sup>127</sup> TARUN, *supra* note 31, at 55.

implemented foreign bribery legislation.<sup>128</sup>

Interestingly, Article 4 of the OECD Convention, which addresses jurisdiction, *requires* signatories to establish jurisdiction when the foreign bribery offense takes place either in whole or in part within that territory.<sup>129</sup> This essentially guarantees that there will be overlapping jurisdiction in foreign bribery cases, given that, by nature, foreign bribery takes place in at least two countries—the country from which the bribe is made, known as the supply-side country, and the country of the official who accepts the bribe, known as the demand-side country.<sup>130</sup> Furthermore, if a company has foreign subsidiaries that are involved in the bribery, the country where that subsidiary is located will also likely have jurisdiction.<sup>131</sup> Article 4 also requires that signatory countries, consistent with their own laws, establish jurisdiction when its nationals commit foreign bribery offenses while outside that country; therefore, the home country of any employee or third-party agent involved in the bribery will also likely have jurisdiction in a single case.<sup>132</sup>

*B. Trends, or Lack Thereof, in Recent Multijurisdictional Enforcement Actions*

Although the United States is still the primary enforcer of foreign bribery violations, it is no longer the only game in town. In 2017, there were 266 foreign bribery investigations conducted worldwide.<sup>133</sup> The United States by itself was responsible for forty-three percent of all investigations; the United Kingdom, with the second largest number of investigations, was responsible for sixteen percent.<sup>134</sup> Despite the fact that the United States

---

128. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Ratification Status as of May 2017, <https://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf> [<https://perma.cc/6BPJ-6GPC>].

129. OECD Convention, *supra* note 4, at art. 4 ¶ 1.

130. Holtmeier, *supra* note 17, at 496.

131. *Id.*

132. OECD Convention, *supra* note 4, at art. 4 ¶ 2; Holtmeier, *supra* note 17, at 496; Van Alstine, *supra* note 18, at 1326.

133. TRACE International, Inc., Global Enforcement Report 2017, 6 (Mar. 2018), <https://traceinternational.org/Uploads/PublicationFiles/GER2017.pdf> [<https://perma.cc/KRQ5-E7TJ>].

134. *Id.* However, enforcement actions brought by European countries,

conducted nearly half of the total investigations, it was one of thirty countries that conducted foreign bribery investigations in 2017.<sup>135</sup> As more countries begin to enforce their anti-bribery laws, there likely will be an increase in the number of multijurisdictional enforcement actions.

The United States participated in four multijurisdictional enforcement actions in 2017.<sup>136</sup> Examining the jurisdictional ties in each case, and the portion of each total settlement the U.S. took in comparison to the other countries involved, it is difficult to come to any conclusions about U.S. enforcement policy. Companies will likely have difficulty predicting the outcome when faced with investigations by multiple countries' enforcement agencies. This is not only unfair to companies, but also discourages them from voluntarily disclosing any violations, which is ultimately counterproductive to the goals of anti-bribery laws.<sup>137</sup>

### 1. *Telia Company AB*

In September 2017, Telia Company AB (Telia), a Swedish telecommunications company, agreed to pay more than \$965 million to resolve foreign bribery charges.<sup>138</sup> Telia was accused of having made corrupt payments to Gulnara Karimova (Karimova), the eldest daughter of the President of Uzbekistan, from 2007 to at least 2010.<sup>139</sup> According to the SEC, Telia made more than \$330 million in improper payments to Karimova, and Karimova helped Telia generate more than \$2.5 billion in revenues.<sup>140</sup>

---

when counted together, were responsible for forty-four percent. *Id.*

135. *Id.*

136. See discussion *infra* sections II.B.1–4.

137. Holtmeier, *supra* note 17, at 515–16.

138. Press Release, *supra* note 1.

139. Ryan Rohlfen, G. David Rojas & Kendall Scott, *In the Third-Largest FCPA Enforcement Action Ever, Telia Agrees to Pay Almost \$1 Billion to Resolve Bribery Inquiry in Uzbekistan; CEO, Senior Executive, and In-House Counsel Also Charged*, ROPES & GRAY ALERT (Sept. 22, 2017), [https://www.ropesgray.com/~media/Files/alerts/2017/09/20170922\\_AC\\_Alert.pdf](https://www.ropesgray.com/~media/Files/alerts/2017/09/20170922_AC_Alert.pdf) [<https://perma.cc/8T6J-87VQ>]; Richard L. Cassin, *Telia Disgorges \$457 Million to SEC, Agrees to \$965 Million in Total Penalties for FCPA Offenses*, FCPA BLOG (Sept. 21, 2017, 1:28 PM), <http://www.fcablog.com/blog/2017/9/21/telia-disgorges-457-million-to-sec-agrees-to-965-million-in.html> [<https://perma.cc/T4E3-6WWC>].

140. Telia Co. AB, No. 3-18195 (U.S. Sec. & Exch. Comm'n Sept. 21, 2017)

Specifically, Karimova helped Telia acquire COSCOM LLC, a telecommunications company that had operations in Uzbekistan; assisted with obtaining necessary licenses to operate a 3G, and later 4G, network; and improperly influenced other government officials in order to help COSCOM acquire the additional phone numbers it needed to gain more subscribers.<sup>141</sup>

Though the United States did have jurisdiction over the misconduct, its connection to the bribery was minimal. Telia's shares were traded on the NASDAQ from 2002 through September 5, 2007, so it was an issuer during that period.<sup>142</sup> However, it is not clear how much overlap there was when Telia was a United States issuer and when the bribery was taking place.<sup>143</sup> The United States also based jurisdiction on the fact that most of the improper transactions were made in U.S. dollars, and that communications with Karimova were made, in part, via e-mail accounts on U.S.-based servers.<sup>144</sup>

The other two countries involved in the enforcement action were Sweden and the Netherlands. Sweden is where Telia is incorporated, while three of Telia's subsidiaries related to its business in Eurasia were formed in the Netherlands.<sup>145</sup> Clearly, those two countries had a stronger connection to the case than did the United States, but still the United States ended up with hundreds of millions of dollars for the U.S. Treasury general fund. In its resolution with the DOJ, Telia agreed to pay a \$500,000 criminal fine; \$40 million as forfeiture, part of COSCOM's guilty plea; and a criminal penalty of approximately \$234 million.<sup>146</sup>

---

[hereinafter Telia Cease-and-Desist Order], <https://www.sec.gov/litigation/admin/2017/34-81669.pdf>.

141. *Id.* at 3–7.

142. *Id.* at 2.

143. Rohlfen, Rojas & Scott, *supra* note 139.

144. Telia Cease-and-Desist Order, *supra* note 140, at 2.

145. *Id.* at 2–3. Fintur Holdings B.V. “is a majority-owned subsidiary of Telia and acts as a manager and holding company for many of the [sic] Telia’s operating companies in the Eurasia business unit.” *Id.* at 3. TeliaSonera UTA Holding B.V. “is a wholly-owned subsidiary of Telia and acts as one of two intermediate holding companies of COSCOM.” *Id.* at 3. TeliaSonera Uzbek Telecom Holding B.V. “is a wholly-owned subsidiary of Telia and acts as one of two intermediate holding companies of COSCOM.” *Id.*

146. Deferred Prosecution Agreement at 8, United States v. Telia Co. AB, No. 17-CR-581-GBD (S.D.N.Y. Sept. 21, 2017), <https://www.justice.gov/usao-sdny/press-release/file/997851/download> [<https://perma.cc/UNX9-BRGL>].

Two hundred and seventy-four million dollars was to be paid to the Dutch authorities for a potential prosecution in the Netherlands, and if the Dutch penalty were to end up being less than \$274 million, the difference would be due to the U.S. Treasury.<sup>147</sup> In criminal penalties, the United States put approximately \$274.6 million, and possibly more, into the U.S. Treasury for a case of foreign bribery in which the only ties to the United States were some transactions made in U.S. dollars and some emails sent from U.S. servers. The United States took more than half of the total criminal penalties, despite the fact that the Netherlands' ties to the case were far more direct.

The SEC brought its own enforcement action against Telia, requiring Telia to disgorge hundreds of millions of dollars in profits.<sup>148</sup> The SEC credited Telia for the \$40 million forfeiture as part of the DOJ resolution, but still required Telia to pay \$208.5 million to the U.S. Treasury, and \$208.5 million to the Swedish and Dutch authorities.<sup>149</sup> If the amounts paid to those authorities were to end up being less than \$208.5 million, the difference would be due to the U.S. Treasury.<sup>150</sup> Again, despite Sweden and the Netherlands having much stronger ties to the case, the United States collected more than half of the disgorged profits. The United States, while technically having jurisdiction, had very little actual connection to the bribery and yet collected more than \$483 million total from the DOJ and SEC resolutions. While some might argue that the United States has an interest in protecting its capital markets and financial institutions, is it enough of a policy interest to justify these duplicative and excessive penalties?

## 2. *SBM Offshore N.V.*

In November 2017, SBM Offshore N.V. (SBM), a Dutch oil and gas drilling equipment company, entered into a DPA with the DOJ to resolve foreign bribery charges.<sup>151</sup> Between roughly 1996

---

147. *Id.* at 8–9.

148. Telia Cease-and-Desist Order, *supra* note 140, at 8.

149. *Id.*

150. *Id.*

151. Press Release, Dep't of Justice, SBM Offshore N.V. And United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries (Nov. 29, 2017), <https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case> [https://perma.cc/Q9XZ-

and 2012, SBM engaged in systematic bribery, with illicit payments made at multiple levels of the company, and the payments themselves taking many different forms.<sup>152</sup> SBM executives facilitated commission payments to third-party agents, knowing that part of those payments would be used to bribe officials in numerous countries, including Brazil, Angola, Equatorial Guinea, Kazakhstan, and Iraq, to “secur[e] improper advantages and obtain[] and retain[] business” with state-owned oil companies in those countries.<sup>153</sup> SBM either “earned or expected to earn at least \$2.8 billion” as a result of advantages from the improper payments.<sup>154</sup> SBM also sent foreign officials “thank you” payments after being awarded business.<sup>155</sup> Furthermore, SBM authorized some of its employees to make smaller improper payments in kind to foreign officials in the form of jewelry and electronics, and paid for foreign officials to take trips to attend sporting events, while also providing them with “spending money.”<sup>156</sup> SBM also covered “tuition and living expenses” for the relatives of foreign officials and employed relatives of foreign officials.<sup>157</sup>

The U.S. jurisdictional connection to the case was SBM’s Houston-based subsidiaries—domestic concerns for FCPA purposes as companies incorporated in the United States.<sup>158</sup> Also, one of the SBM executives who “managed a significant portion of the corrupt scheme” and “engaged in conduct within the jurisdiction of the United States” was a U.S. citizen and therefore also a domestic concern under the FCPA.<sup>159</sup> Furthermore, the “commission payments” made to one of the intermediaries, for the purpose of facilitating bribes to Brazilian officials, were made to a U.S. bank account.<sup>160</sup>

---

8EJ9].

152. Deferred Prosecution Agreement at A-7 to A-9, *United States v. SBM Offshore N.V.*, No. 17-686 (S.D. Tex. Nov. 21, 2017), <https://www.justice.gov/opa/press-release/file/1014801/download> [<https://perma.cc/HRU3-WNSB>].

153. *Id.* at A-7.

154. *Id.* at A-7 to A-8.

155. *Id.* at A-8.

156. *Id.* at A-8 to A-9.

157. *Id.* at A-9.

158. *Id.* at A-1 to A-2.

159. *Id.* at A-4 to A-5.

160. *Id.* at A-10.

In the U.S. enforcement action, SBM paid a total criminal penalty of \$238 million—\$500,000 of which was a criminal fine and \$13.2 million of which was a forfeiture by SBM on behalf of its U.S. subsidiary, which pleaded guilty to FCPA charges.<sup>161</sup> The DOJ credited SBM for the money already paid to the Netherlands—a \$40 million fine and \$200 million disgorgement—and for the predicted amount SBM would have to pay to resolve charges in Brazil.<sup>162</sup> In addition to crediting for penalties paid in other jurisdictions, the DOJ also tried to impose a penalty that would avoid “substantially jeopardiz[ing] the continued viability of the Company . . . .”<sup>163</sup> Despite those considerations, the settlement money paid to the United States was nearly equivalent to the penalties paid to the Netherlands, which is where SBM is headquartered and publicly traded.<sup>164</sup> The DOJ acknowledged this in the DPA: “[E]ven though the Offices are crediting the full amount paid in fines and forfeiture to the Dutch authorities in connection with the Dutch resolution, the penalty owed in the United States exceeds the amount paid to the Dutch authorities.”<sup>165</sup>

In the SBM enforcement action, the country where the company was publicly traded—the Netherlands—required the disgorgement of profits. In the Telia enforcement action, the United States required the disgorgement of profits, despite the fact that Telia was publicly traded in Sweden. The U.S. enforcement agencies did not make publicly clear why the disgorgement was paid to the United States in one case but not in the other. Furthermore, in both cases, the United States took half of the total payment, even though the Netherlands had a stronger connection to the case.

### *3. Keppel Offshore & Marine Ltd.*

In December 2017, Keppel Offshore & Marine Ltd. (Keppel)

---

161. *Id.* at 12.

162. *Id.* at 13.

163. *Id.* at 7.

164. *Id.* at 12-13, A-1.

165. *Id.* at 5. It is likely that the DPA states that the penalties “exceed” those paid to the Netherlands because technically the penalty paid to the Netherlands was only \$40 million—the disgorgement is not considered a penalty.

entered into a DPA with the DOJ to resolve charges that it had bribed officials in Brazil.<sup>166</sup> Keppel is a Singapore-based company and the world's largest builder of oil rigs.<sup>167</sup> From around 2001 to 2014, Keppel paid approximately \$55 million in bribes to officials in Brazil to obtain and retain business commissioned by Petrobras, a Brazilian state-owned oil company.<sup>168</sup> Keppel made more than \$350 million in profits from the business it won in Brazil in connection with the bribery scheme; the DPA states that some of the profits were made by Keppel's U.S. subsidiary, KOM USA.<sup>169</sup>

That subsidiary was the U.S. jurisdictional connection to the case, as it had entered into some of the "consulting agreements" that facilitated the bribes.<sup>170</sup> Keppel also made some of the "consulting payments" to bank accounts in the United States,

---

166. Press Release, Dep't of Justice, Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay \$422 Million in Global Penalties to Resolve Foreign Bribery Case. (Dec. 22, 2017), <https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties> [<https://perma.cc/536P-MSEF>].

167. *Id.*; Christie Smythe, *Keppel Offshore to Pay \$422 Million to End Bribery Probe*, BLOOMBERG (Dec. 22, 2017, 7:31 PM), <https://www.bloomberg.com/news/articles/2017-12-22/keppel-offshore-agrees-to-pay-422-million-to-end-bribe-probe>.

168. Deferred Prosecution Agreement at A-5, *United States v. Keppel Offshore & Marine Ltd.*, No. 17-CR-697 (KAM) (E.D.N.Y. Dec. 22, 2017), <https://www.justice.gov/opa/press-release/file/1020706/download> [<https://perma.cc/BBD5-WSAX>] [hereinafter Keppel DPA]. Brazilian prosecutors launched an investigation in March 2014 known as *Operacao Lava Jato*, or Operation Car Wash, which uncovered a bribery scheme in which executives at Petrobras, and the politicians who appointed those executives, accepted bribes to manipulate construction contract bids. Claire Felter & Rocio Cara Labrador, *Brazil's Corruption Fallout*, COUNCIL ON FOREIGN REL. (Jan. 11, 2018), <https://www.cfr.org/backgrounder/brazils-corruption-fallout> [<https://perma.cc/6DJF-DTNS>]; Celso Barros, *The Twilight of Brazil's Anti-Corruption Movement*, THE ATLANTIC (July 28, 2017), <https://www.theatlantic.com/international/archive/2017/07/temer-lula-rousseff-brazil-operation-carwash-corruption/535029/> [<https://perma.cc/45RA-4LMH>]. As of October 2018, Operation Car Wash has resulted in over 200 convictions for various crimes. Felter & Cara Labrador, *supra* note 168. Many politicians, including four former presidents of Brazil, have been investigated; former President Luiz Inacio Lula da Silva, referred to as the mastermind behind the corruption scheme, was sentenced in May 2017 to more than nine years in prison. *Id.*

169. Keppel DPA, *supra* note 168, at A-5.

170. *Id.*

which the consultants then transferred out of the country.<sup>171</sup>

The DOJ determined that Keppel's total criminal penalty should be approximately \$422 million but that only twenty-five percent of that total should be paid to the U.S. Treasury.<sup>172</sup> The DOJ credited the amounts Keppel would have to pay to the Brazilian and Singaporean authorities—approximately \$211 million and \$105.5 million respectively.<sup>173</sup> However, should the payments to the Brazilian and Singaporean authorities be less than those amounts, the difference would be due to U.S. Treasury.<sup>174</sup> The DOJ took the same approach in the *Telia* enforcement action, where if penalties paid to the Dutch and Swedish authorities were less than what the United States designated, the difference would be due to the U.S. Treasury.

*Keppel* is notable because both the supply-side country and demand-side country brought enforcement actions. In other words, a Singapore-based company supplied the bribes to Brazilian officials and both Singapore and Brazil were involved in enforcement. In *Telia*, the demand-side country, Uzbekistan, was not involved; in *SBM*, Brazil was one of the demand-side countries and did bring an enforcement action, but there were at least four other demand-side countries that did not bring enforcement actions. Given that the two countries with the strongest ties to the case brought enforcement actions in Keppel's case, it is unclear what the U.S. policy interest was in bringing its own action, and for taking such a large portion of the total global criminal penalty. One commentator questioned whether this was "piling on" by the United States:

Sure, the DOJ did credit amounts paid in connection with the Singapore and Brazil enforcement actions, but is this an instance in which the DOJ should simply have stepped back? What is the policy interest (other than perhaps filling U.S. Treasury coffers) in bringing an FCPA enforcement action against a Singapore company for allegedly bribing Brazilian officials when Singapore and Brazil also brought enforcement actions based on the

---

171. *Id.*

172. *Id.* at 8–9.

173. *Id.* at 9.

174. *Id.*

same conduct?<sup>175</sup>

In a way, *Keppel* looks like a step in the right direction because the United States only took a quarter of the total criminal penalty instead of half, like it did in *Telia* and *SBM*. Furthermore, one could argue that the U.S. subsidiary's involvement actually makes a stronger case for U.S. enforcement. However, if a company is already facing punishment by two other countries, especially both the supply-side and the demand-side countries, what effect does U.S. involvement really have? Are the duplicative penalties really advancing a U.S. policy interest?

#### 4. *Rolls-Royce plc*

In January 2017, Rolls-Royce plc (Rolls-Royce) entered into a DPA with the DOJ to resolve charges of FCPA violations.<sup>176</sup> Rolls-Royce, a U.K.-based company, manufactures and distributes “power systems for the aerospace, defense, marine and energy sectors.”<sup>177</sup> From around 2000 to around 2013, Rolls-Royce's United States subsidiary, RRESI, made “over \$35 million in commission payments” to third-party agents, “knowing that [those] payments would be used to bribe foreign officials on behalf of Rolls-Royce and RRESI . . . .”<sup>178</sup> The demand-side countries included Thailand, Brazil, Kazakhstan, Azerbaijan, Angola, and Iraq.<sup>179</sup>

Interestingly, the United States seemed to have a fairly strong connection to this case, despite the portion of the total

---

175. *Issues to Consider From the Keppel Offshore & Marine Enforcement Action*, FCPA PROFESSOR (Dec. 26, 2017), <http://fcpaprofessor.com/issues-consider-keppel-offshore-marine-enforcement-action/> [<https://perma.cc/99BF-VGDD>].

176. Press Release, Dep't of Justice, Rolls-Royce plc Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (Jan. 17, 2017), <https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act> [<https://perma.cc/X26J-MAR4>]. The Rolls-Royce enforcement action was concluded at the end of the Obama administration; *Telia*, *Keppel*, and *SBM* were concluded during the Trump administration.

177. *Id.*

178. Deferred Prosecution Agreement at A-5, United States v. Rolls-Royce plc, 16-cr-247 (S.D. Ohio Dec. 20, 2016), <https://www.justice.gov/opa/press-release/file/927221/download> [<https://perma.cc/GBT4-2RXU>] [hereinafter Rolls-Royce U.S. DPA].

179. *Id.*

penalties it took, as discussed below. RRESI was a domestic concern under the FCPA and two of the employees involved in the bribery scheme were United States citizens, and therefore also domestic concerns.<sup>180</sup> Furthermore, RRESI engaged all five intermediaries that then bribed government officials in each of the demand-side countries named above.<sup>181</sup>

Rolls-Royce agreed to pay a U.S. penalty of nearly \$170 million.<sup>182</sup> That amount reflected a credit for the penalties Rolls-Royce paid to the Brazilian authorities—approximately \$25 million.<sup>183</sup> Rolls-Royce also entered into a DPA with the U.K.'s Serious Fraud Office (SFO) for paying bribes in connection with its business in China, India, Indonesia, Malaysia, Nigeria, Russia, and Thailand.<sup>184</sup> The United States DPA did not mention the U.K. DPA, likely because the demand-side countries in each did not overlap, with the exception of Thailand. The total U.K. payment Rolls-Royce agreed to was approximately £487 million (approximately \$605 million).<sup>185</sup> Approximately £58 million (approximately \$72 million) of that was disgorgement and approximately £239 million (approximately \$296 million) was a financial penalty.<sup>186</sup> Rolls-Royce also agreed to reimburse the SFO for the costs of the investigation—£13 million (approximately \$16 million).<sup>187</sup>

Rolls-Royce paid approximately \$800 million total to the three countries involved in enforcement, but the United States took less than a quarter of that.<sup>188</sup> The United States subsidiary seemed to be heavily involved in the bribery scheme, and most of the conduct

180. *Id.* at A-1 to A-2.

181. *Id.* at A-2 to A-3.

182. *Id.* at 9. Thirty million dollars of the total U.S. penalty was to be paid to the Consumer Financial Fraud Fund; generally penalties and disgorgement are paid to the U.S. Treasury general fund. It is unclear why in this case part of the penalty was earmarked. Jansen, *supra* note 90.

183. Rolls-Royce U.S. DPA, *supra* note 178, at 9.

184. Press Release, *supra* note 176.

185. *Id.*

186. Deferred Prosecution Agreement at 2, *R. v. Rolls-Royce plc* (Jan. 17, 2017), <https://www.sfo.gov.uk/cases/rolls-royce-plc/> [<https://perma.cc/9X7P-S4H3>] (last visited Sept. 30, 2018).

187. *Id.* at 4. Unlike the United States, which generally requires payment within ten days, the United Kingdom allowed Rolls-Royce to pay in four installments, plus any interest. *See id.* at 4.

188. *See* Press Release, *supra*, note 176.

covered by the U.K. DPA did not overlap. It is hard to reconcile the U.S. involvement in this case with its involvement in *Telia*.<sup>189</sup>

### III. TIME FOR A POLICY OF SELF-RESTRAINT AND TRANSPARENCY IN MULTIJURISDICTIONAL ENFORCEMENT ACTIONS?

There is nothing that legally prevents the United States from bringing its own actions in multijurisdictional anti-bribery cases, but it would be good public policy for the United States to show self-restraint in these cases, as well as greater transparency in its approach to penalties. A strict double jeopardy rule would not make sense in FCPA cases because perhaps not all countries prosecute anti-bribery cases as they should. However, U.S. enforcement agencies might step back when the problem has been reasonably addressed by other countries. The OECD Convention and the DOJ's "Petite Policy," regarding state-federal successive prosecutions, support adopting a policy of self-restraint and transparency in multijurisdictional enforcement actions.<sup>190</sup> While the DOJ's new policy against "piling on" is a step in the right direction, the policy is vague and still does not give companies any practical sense of when the DOJ will seek duplicative penalties.<sup>191</sup> Furthermore, the SEC does not have an equivalent policy. Time will tell if the new DOJ policy will create real predictability in multijurisdictional enforcement actions.

#### A. *The OECD Convention Addresses Overlapping Jurisdiction, but Does Not Provide a Binding Mechanism*

Article 4.3 of the OECD Convention addresses the

---

189. It may be because the U.K. Bribery Act is a very strong anti-bribery statute and the U.K. has started to enforce anti-bribery violations aggressively. Steiger, *supra* note 9, at 160–61 (“[T]he new British statute has been hailed as ‘the toughest anti-corruption legislation in the world.’”). The U.K. Bribery Act has “ambitious” jurisdictional reach—if a company has a presence in the United Kingdom, even if not the headquarters, the U.K. has jurisdiction over any of that company’s foreign bribery violations, regardless of whether the bribery took place in the U.K. or was related to U.K. operations. *Id.* at 162 (“[I]f a U.S. company has a U.K. presence and engages in prohibited acts in Asia, it could be prosecuted in the U.K. pursuant to the Act.”).

190. See Van Alstine, *supra* note 18, at 1342–44, 1350 n.184.

191. Rosenstein, *supra* note 27. The “piling on” policy is discussed in detail in subsection C below.

inevitability of overlapping jurisdiction in foreign bribery cases.<sup>192</sup> It states that “[w]hen more than one Party has jurisdiction over an alleged offense described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.”<sup>193</sup> The use of the word “shall” seems to require the parties to work together and devise a plan to ensure that the company or individual in question is not subject to multiple enforcement actions.<sup>194</sup> Furthermore, the phrase “most appropriate jurisdiction” seems to indicate that only one country should prosecute.<sup>195</sup>

However, the way Article 4.3 is written indicates that the obligations are only triggered when one country requests a consultation.<sup>196</sup> As one commentator notes, “[w]e may easily dispense with the possibility that Article 4, paragraph 3 alone creates a self-executing protection against double jeopardy.”<sup>197</sup> The Fifth Circuit has also considered the meaning of Article 4.3 and concluded that the obligation to consult depends on one of the countries formally requesting it.<sup>198</sup> Unfortunately, there is nothing in the official commentaries about this section, but commentators have speculated about the drafters’ intent.<sup>199</sup> “[T]he OECD Convention appears to envision a single prosecution for cases of foreign bribery, [although] it certainly does not advocate or insist upon that in every instance . . . .”<sup>200</sup> “The

---

192. See OECD Convention, *supra* note 4, at art. 4 ¶ 3. “The OECD Convention clearly considered the possibility of multiple investigations.” Davis, *supra* note 22, at 62.

193. OECD Convention, *supra* note 4, art. 4 ¶ 3.

194. See Van Alstine, *supra* note 18, at 1344.

195. *Id.*

196. *Id.* “Having recognized the conditions that create a risk of multiple investigations, the Convention provided for no legally enforceable ban on multiple prosecutions . . . .” Davis, *supra* note 22, at 62.

197. Van Alstine, *supra* note 18, at 1344.

198. *Id.* at 1344–45 (referring to *United States v. Jeong*, 624 F.3d 706, 711 (5th Cir. 2010)). In *Jeong*, a South Korean individual was convicted and sentenced in South Korea for bribing American public officials, and then indicted for the same conduct in the United States. See *id.* The court held that Article 4.3 of the OECD Convention did not bar the U.S. action against Jeong because neither the United States nor South Korea had made a *formal* request for consultation. See *id.* (citing *Jeong*, 624 F.3d at 711).

199. *Id.* at 1345.

200. Holtmeier, *supra* note 17, at 517 n.152.

drafters clearly hoped that in the event of multiple investigations, only one country would actually prosecute a given defendant.”<sup>201</sup>

It is therefore unclear what the effect of Article 4.3 really is. It seems to mandate a single prosecution only in instances where countries want that outcome, and even that is not entirely certain. The Fifth Circuit, in dicta, interpreted the language of Article 4.3—“the Parties involved shall, at the request of one of them, consult *with a view* to determining the most appropriate jurisdiction”—to mean that determining “the most appropriate jurisdiction for prosecution” is only a goal.<sup>202</sup> However, it is odd that the drafters would specifically address multijurisdictional enforcement actions, particularly in a treaty with very few provisions, and then provide a mechanism that essentially has no teeth.<sup>203</sup> The drafters seemed to anticipate the likelihood of duplicative enforcement actions and the unfairness those duplicative enforcement actions would create for companies. Each country may have legitimate policy reasons for bringing its own action, so a strict double jeopardy provision may not be the best solution, but perhaps the spirit of Article 4.3 should be incorporated into the U.S. approach to multijurisdictional enforcement actions.<sup>204</sup>

*B. The “Petite Policy” Regarding State-Federal Successive Prosecutions*

The U.S. Constitution protects criminal defendants against double jeopardy—one cannot be “prosecuted or sentenced twice for substantially the same offense.”<sup>205</sup> However, U.S. protection against double jeopardy is limited to successive prosecutions by a

---

201. Davis, *supra* note 22, at 62.

202. Van Alstine, *supra* note 18, at 1346 (emphasis added) (citing *Jeong*, 624 F.3d at 711).

203. *See id.* at 1326; *see also* Davis, *supra* note 22, at 62.

204. For an argument that the OECD should provide a binding protection against double jeopardy, see Alistair Craig, *OECD Should Protect Against Multi-Country Enforcement*, FCPA BLOG (Nov. 11, 2013, 3:58 AM), <http://www.fcpablog.com/blog/2013/11/11/oecd-should-protect-against-multi-country-enforcement.html> [<https://perma.cc/59WX-CE69>].

205. *Double Jeopardy*, Black’s Law Dictionary (10th ed. 2014); *see* U.S. CONST. art. 5. In Europe and other parts of the world, this principle is known as *ne bis in idem*. Davis, *supra* note 22, at 58.

single sovereign.<sup>206</sup> In other words, the federal government cannot prosecute someone twice for the same offense; likewise, an individual state cannot prosecute someone multiple times for the same offense.<sup>207</sup> However, the federal government can prosecute someone already prosecuted by a state, and a state can prosecute someone already prosecuted by the federal government.<sup>208</sup> The theory is that sovereigns have the right to enforce their own laws and that “each sovereign’s laws address different interests.”<sup>209</sup> This applies in the international context as well, because individual countries are, of course, independent sovereigns.<sup>210</sup> Therefore, in FCPA cases, double jeopardy will not protect a company facing enforcement actions by multiple countries: foreign prosecution will not bar the United States from bringing its own action.<sup>211</sup>

Despite the fact that there is no constitutional protection against successive prosecutions by both a state and the federal government, the DOJ has its own internal policy against bringing these actions and this policy could be adapted to apply to foreign prosecutions in FCPA cases.<sup>212</sup> Known formally as the “Dual and Successive Prosecution Policy,” and informally as the “Petite Policy,” it “precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on

206. Davis, *supra* note 22, at 63.

207. *Id.* at 63–64.

208. *Id.* at 64.

209. Thomas White, *Limitations Imposed on the Dual Sovereignty Doctrine by Federal and State Governments*, 38 N. KY. L. REV. 173, 174 (2011). One commentator argues that in the anti-bribery context, each sovereign’s law comes from the same ultimate source—the OECD Convention. Van Alstine, *supra* note 18, at 1341. Each country adheres to the treaty by implementing a law with certain requirements to target a specific offense. *Id.* This undermines the primary reasoning behind the dual sovereign approach to double jeopardy because “once each member state has assumed the international law obligation, it is to that extent—in the words of the decisive Supreme Court opinion on the dual sovereignty doctrine—no longer ‘independently . . . determin[ing] what shall be an offense against its authority.’” *Id.*

210. See Davis, *supra* note 22, at 58.

211. See Van Alstine, *supra* note 18, at 1322. “[T]he [Double Jeopardy] clause . . . gives no weight to prosecutions abroad.” Davis, *supra* note 22, at 63–64. “[A]ny legal argument that a U.S. authority lacks the power to investigate or prosecute because another country has already done so will go nowhere.” *Id.* at 65.

212. Holtmeier, *supra* note 17, at 520–21.

substantially the same act(s) or transaction(s) . . . .”<sup>213</sup> There are three criteria pursuant to which the DOJ will set aside this policy: (1) if the matter involves a “substantial federal interest”; (2) the prior prosecution “ha[s] left that interest demonstrably unvindicated”; and (3) the DOJ believes that the conduct in question actually constitutes a violation of federal law and that there is enough evidence to gain a conviction.<sup>214</sup> This policy does not provide defendants with any legal protections—it is merely a self-imposed guideline for the DOJ, although generally abided by “in the sense that the federal government rarely engages in double prosecution domestically.”<sup>215</sup>

The Petite Policy’s background provides strong support for applying it to FCPA cases. It originated from U.S. Attorney General William Rogers’ memorandum to all U.S. Attorneys’ offices, addressing the Supreme Court cases that established there is no violation of double jeopardy in state-federal successive prosecutions.<sup>216</sup> The memorandum stated:

[T]he mere existence of a power, of course, does not mean that it should necessarily be exercised . . . . It is our duty to observe not only the rulings of the Court but the spirit of the rulings as well. In effect, the Court said that although the rule of the *Lanza* case is sound law, enforcement officers should use care in applying it. Applied indiscriminately and with bad judgment it, like most rules of law, could cause considerable hardship . . . . [T]hose of us charged with law enforcement responsibilities have a particular duty to act wisely and with self-restraint in this area . . . . We should continue to make every effort to cooperate with state and local authorities to the end that the trial occur in the jurisdiction, whether it be state or federal, where the public interest is best served.<sup>217</sup>

---

<sup>213</sup> U.S. ATTORNEYS’ MANUAL, *supra* note 77, § 9-2.031(A); Davis, *supra* note 22, at 64.

<sup>214</sup> U.S. Attorneys’ Manual, *supra* note 77, § 9-2.031(A).

<sup>215</sup> Davis, *supra* note 22, at 64; Ellen S. Podgor, *Department of Justice Guidelines: Balancing Discretionary Justice*, 13 CORNELL J.L. & PUB. POL’Y 167, 169, 179–80 (2004).

<sup>216</sup> White, *supra* note 206, at 196.

<sup>217</sup> *Id.* at 197 n.178.

Accepting that double jeopardy does not apply in multijurisdictional anti-bribery enforcement actions, the fact that the United States *can* bring an action does not mean that, as stated in the memo, that the power “should necessarily be exercised.”<sup>218</sup> Furthermore, it makes sense for U.S. enforcement agencies to “act wisely and with self-restraint” in multijurisdictional enforcement actions and to cooperate with other countries’ authorities to ensure that the action is brought “where the public interest is best served.”<sup>219</sup>

That is not to say that the United States should not be able to bring its own action if there is a strong policy interest. The Petite Policy lays out situations in which the federal government has a strong interest in bringing its own action after a state has already done so, several of which would apply well to FCPA cases.<sup>220</sup> For example, the federal government has an interest if there was no conviction in the first case as a result of “incompetence, corruption, intimidation, or undue influence.”<sup>221</sup> In a foreign bribery case, the country with the strongest jurisdictional ties might decline to prosecute for any of these reasons, and in that situation, the United States should be able to bring its own action. Even if the United States is not the most appropriate country to prosecute, the bad actor should not go unpunished.

Another situation in which the Petite Policy deems the federal government to have an interest is when the first case did result in a conviction but “the prior sentence was manifestly inadequate in light of the federal interest involved and a substantially enhanced sentence—including forfeiture and restitution as well as imprisonment and fines—is available through the contemplated federal prosecution . . . .”<sup>222</sup> U.S. enforcement agencies may already be using this as justification for involvement in multijurisdictional enforcement actions where U.S. ties are weak—they might think that other countries’ fines and penalties are insufficient. If this is in fact the justification, it would be fairer to companies to make this publicly known, and to be clear about why the other countries’ fines and penalties are insufficient.

---

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> U.S. ATTORNEYS’ MANUAL, *supra* note 77, §9-2.031(D).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

Transparency will create more predictability in the outcome.

Lastly, the Petite Policy establishes four reasons for self-restraint in state-federal successive prosecutions: (1) “to vindicate substantial federal interests through appropriate federal prosecutions”; (2) “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)”; (3) “to promote efficient utilization of Department resources”; and (4) “to promote coordination and cooperation between federal and state prosecutors.”<sup>223</sup> All four of these are strong reasons to implement a policy of self-restraint in FCPA cases.

*C. The New DOJ Policy Against “Piling On”*

On May 9, 2018, Deputy Attorney General Rod Rosenstein announced a new DOJ policy against “piling on,” to be incorporated into the United States Attorneys’ Manual.<sup>224</sup> The policy, while not specific to the FCPA, encourages cooperation between different DOJ units and other enforcement agencies, both foreign and domestic, to avoid duplicative penalties for the same misconduct.<sup>225</sup> Rosenstein, who announced the new policy during a speech to the New York City Bar White Collar Crime Institute, stated that “[i]t is important for [the DOJ] to be aggressive in pursuing wrongdoers. But we should discourage disproportionate enforcement of laws by multiple authorities.”<sup>226</sup> Like the Petite Policy, this new policy against “piling on” is not enforceable, but according to Rosenstein, is “another step towards greater transparency and consistency in corporate enforcement.”<sup>227</sup>

Rosenstein cited several reasons for the new policy. First, he noted that companies in highly regulated industries must answer to multiple regulatory authorities, which “creates a risk of repeated punishments that may exceed what is necessary to rectify the harm and deter future violations.”<sup>228</sup> Second, he explained that attorneys within the DOJ were concerned about

---

<sup>223</sup> *Id.* § 9-2.031(A).

<sup>224</sup> Rosenstein, *supra* note 27.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

duplicative penalties and the impact those duplicative penalties have on the DOJ's reputation for fairness; those attorneys were in favor of increased cooperation "to achieve reasonable and proportionate outcomes."<sup>229</sup> Lastly, Rosenstein cited the negative consequences of "piling on" to companies and the enforcement agencies: companies, including "innocent employees, customers, and investors," are left uncertain as to whether the issue has been fully resolved, and DOJ resources are perhaps not used in the most efficient manner.<sup>230</sup>

The new policy has four components.<sup>231</sup> First, the DOJ should not use enforcement for reasons unrelated to the criminal activity in question—a reiteration of existing policy.<sup>232</sup> Second, DOJ units should coordinate with each other to "achieve an overall equitable result," which may include crediting for penalties, fines, and forfeitures.<sup>233</sup> Third, DOJ attorneys are encouraged, "when possible," to coordinate with other enforcement agencies—federal, state, local, and foreign—that seek to resolve cases for the same underlying misconduct.<sup>234</sup> The last component lists several factors to be considered when determining whether to impose duplicative penalties: "the egregiousness of the wrongdoing; statutory mandates regarding penalties; the risk of delay in finalizing a resolution; and the adequacy and timeliness of a company's disclosures and cooperation with the Department."<sup>235</sup>

The last component of the policy is key: the DOJ will seek to avoid "piling on," but only in certain situations. Rosenstein in fact made a statement to that effect: "Sometimes, penalties that may

---

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* "We need to think about whether devoting resources to additional enforcement against an old scheme is more valuable than fighting a new one." *Id.*

<sup>231</sup> *Id.* In addition to the four components, Rosenstein also re-emphasized the DOJ's commitment to prosecuting individuals, as outlined in the 2015 Yates Memo. *Id.*; Memorandum from Sally Quillian Yates, Deputy Att'y Gen., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download> [<https://perma.cc/8MX3-GE3D>].

<sup>232</sup> Rosenstein, *supra* note 27.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* Rosenstein cites *Keppel* as an example of this type of coordinated resolution. *Id.*

<sup>235</sup> *Id.*

appear duplicative really are essential to achieve justice and protect the public. In those cases, we will not hesitate to pursue complete remedies, and to assist our law enforcement partners in doing the same.”<sup>236</sup> While the listed factors may give companies some indication of whether the DOJ will seek duplicative penalties, it is questionable how much the factors will really help.<sup>237</sup> For example, how is a company to determine how egregious the DOJ will perceive the wrongdoing?

Rosenstein also cited the practical concerns of cooperation as a reason duplicative penalties are imposed, such as limits on information-sharing, the timing of each agency’s action, and diplomatic relations.<sup>238</sup> This further undercuts the effect of the policy from the perspective of companies—a company deciding whether to voluntarily disclose may not be able to use these factors to assess whether duplicative penalties will be imposed.<sup>239</sup>

The DOJ’s acknowledgment of duplicative fines as an issue is a positive sign.<sup>240</sup> However, the policy’s language is vague and contains ideas that seem to undercut the policy’s goals. Time will tell if the policy is an effective solution to the problem.

#### IV. CONCLUSION

Foreign bribery is a serious concern for international business and it hurts the people who live in the countries where bribes are taken.<sup>241</sup> The United States, through the FCPA, has made significant progress in this area, leveling the playing field and

---

<sup>236</sup> *Id.*

<sup>237</sup> See Lara A. Covington & Michael E. Hantman, *New DOJ Policy Against Piling On Has Rewards, with Strings Attached*, FCPA BLOG (May 17, 2018, 7:08 AM), <http://www.fcpablog.com/blog/2018/5/17/covington-and-hantman-new-doj-policy-against-piling-on-has-r.html> [https://perma.cc/54LQ-96AM].

<sup>238</sup> Rosenstein, *supra* note 27.

<sup>239</sup> These practical concerns also do not explain the duplicative penalties in global settlements, such as *Telia* and *Keppel*.

<sup>240</sup> See Alex Brackett & Mark Earley Jr., *DOJ Enforcement Policy Announcements Provide Promising Guidance*, FCPA BLOG (May 23, 2018, 8:28 AM), <http://www.fcpablog.com/blog/2018/5/23/brackett-and-earley-doj-enforcement-policy-announcements-pro.html> [https://perma.cc/EVD5-CJ2G].

<sup>241</sup> Wrage, *supra* note 6; *Corruption: Cost for Developing Countries*, TRANSPARENCY INT’L UK, <http://www.transparency.org.uk/corruption/corruption-statistics/corruption-cost-for-developing-countries/#.WsU4QyPMzOQ> [https://perma.cc/DS6F-PDSW].

weeding out corruption. However, now that the rest of the world is catching up, the United States might consider adopting a policy of self-restraint in foreign bribery cases where its connection is minimal and when other countries with stronger ties are bringing enforcement actions. There is nothing wrong with overlapping jurisdiction as long as the aggressive enforcers keep themselves in check, and as long as they do so, there is no need for strict adherence to double jeopardy principles. However, in cases where the United States does feel it needs to be involved and the connection is not obvious, the enforcement agencies should be clear and transparent about the policy reasons for involvement and the portion of global settlement money taken for the U.S. Treasury.