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In Search of Guiding Principles of Transnational Anti-Corruption Investigations and Resolutions

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I. Introduction

"In vain may heroes fight and patriots rave; if secret gold sap on from knave to knave."

— Alexander Pope[1]

Since the enactment of the U.S. Foreign Corrupt Practices Act (FCPA) in 1977,[2] there has been a steady increase in global anti-corruption efforts.[3] In the past decade, these efforts have markedly increased in intensity.[4] The now significant global anti-corruption movement seeks to prohibit the provision of corrupt benefits to foreign officials that influence the performance of their duties.[5] This effort caused various states to enact legislation prohibiting the conveyance of bribes to foreign officials by

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1. ALEXANDER POPE, THE WORKS OF ALEXANDER POPE, WITH NOTES AND ILLUSTRATIONS, BY HIMSELF AND OTHERS 235 (Will Roscoe ed., London, Gilbert & Rivington 1847).

2. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3, 78ff, 78m (2012)) [hereinafter FCPA].

3. *See generally* KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY (Oxford Univ. Press 2019); Michelle R. Sanchez-Badin & Arthur Sanchez-Badin, *Anticorruption in Brazil: From Transnational Legal Order to Disorder*, 113 AJIL UNBOUND, 326–30 (2019); JONES DAY TOKYO, ANTI-CORRUPTION REGULATION SURVEY OF 42 COUNTRIES (Nov. 1, 2019), https://www.jonesday.com/en/insights/2019/11/anticorruption-regulation-survey-2019 [https://perma.cc/3SAZ-5TDX].

4. James Koukios & Amanda Aikman, *Top 10 Anti-Corruption Developments of the 2010s*, CORP. COMPLIANCE INSIGHTS (May 6, 2020), https://www.corporatecomplianceinsights.com/top-10-anti-corruption-developments-2010s/ [https://perma.cc/6L7R-URV8].

5. Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 11, Dec. 17, 1997, 37 I.L.M. 1 (1998) (establishing the most widely accepted definition for bribery of foreign official and is the most utilized by signatory states even with differing anti-corruption laws) [hereinafter OECD Convention Against Bribery].

entities or individuals that fall under the jurisdiction of the "home" state.[6] As the number of these domestic laws have grown, many "overlapping" jurisdictions have developed in the anti-corruption context.[7] Various circumstances have arisen in which multiple states have sought to enforce their domestic anti-corruption laws against individuals or entities concurrently based on the same set of operative facts.[8] Many of these circumstances result in, rather than trials in courtrooms, negotiated settlements with multiple enforcement agencies requiring payment of substantial monetary penalties.[9] For example, last year, a single multi-jurisdictional settlement led to multiple states sharing financial penalties reaching billions of dollars.[10] As a result, questions have arisen as to when, and how, in the face of competing interest, states cooperate, coordinate, and eventually apportion financial penalties. We do know from public pronouncements issued by the relevant enforcement agencies, as well as publicly available settlement agreements and related documents, that, at times, there is some type of cooperation, coordination, and apportionment among states.[11] But we do not know how these decisions are made or if there are a set of shared principles that govern the process.

The major domestic anti-corruption laws do not address these issues. For instance, the FCPA,[12] the U.K. Bribery Act of 2010,[13] and the Brazil Clean Company Act[14] are silent about cooperation, coordination, and apportionment of penalties among and between multiple jurisdictions. International conventions and treaties on anti-corruption superficially address international cooperation, but do not address the issues of coordination or apportionment of penalties in transnational anti-corruption settlements.[15] For instance, the Organization for Economic Co-operation and Development's (OECD) Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Convention Against Bribery), adopted in 1997, states that when there is overlapping jurisdiction, all signatories should consult to determine the most appropriate jurisdiction

6. Jessie M. Reniere, *Fairness in FCPA Enforcement: A Call for Self-Restraint and Transparency in Multijurisdictional Anti-Bribery Enforcement Actions*, 24 ROGER WILLIAMS U. L. REV. 167, 170 (2019).

7. *Id.*

8. *Id.*

9. *Id.* at 178.

10. Kate Beioley, *Airbus Case Reflects France's Changed Ways on Corruption*, FIN. TIMES (Feb. 16, 2020), https://www.ft.com/content/fe71368e-4cf6-11ea-95a0-43d18ec715f5 [https://perma.cc/J8J6-7NMB].

11. *See* discussion *infra* Section IV.

12. FCPA, *supra* note 2.

13. Bribery Act 2010, c. 23 (Eng.) [hereinafter U.K. Bribery Act 2010].

14. Lei No. 12846/14, de 1 de Agosto de 2013, DIA-RIO OFICIAL DA UNIA~O [D.O.U.] de 29.01.2014 (Braz.), *translated in Law No. 12,846 of August 1, 2013*, TRENCH, ROSSI E WATANBE ADVOGADOS (2013), http://f.datasrvr.com/fr1/813/29143/Trench_Rossi_e_Watanabe_-_Brazil's_anti-bribery_law__12846-2013.pdf [https://perma.cc/F85C-9YQW].

15. United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003) [hereinafter UNCAC].

and provide mutual legal assistance.[16] The United Nations Convention Against Corruption (UNCAC),[17] adopted in 2003, recognized the growing field of domestic anti-corruption legislation, but does not address methods or procedures states should use to cooperate, coordinate, and determine apportionment of financial penalties.[18] Various bilateral mutual legal assistance treaties (MLATs) obligate cooperation in connection with evidence gathering, process of service, asset seizure, and so forth, but do not address resolution coordination or penalty apportionment in the multistate anti-corruption context.[19]

There is also little publicly available guidance from enforcement agencies or scholarly commentary that explain how enforcement agencies approach whether, and how much, they should apply shared principles in determining if and how to cooperate in investigations as well as coordinate and apportion financial penalties in circumstances of overlapping anti-corruption jurisdiction.[20] To date, the most relevant document appears to be the May 9, 2018, memorandum issued by the U.S. Department of Justice (DOJ).[21] This document charges all department components and U.S. Attorneys that they

16. OECD Convention Against Bribery, *supra* note 5, at art. 9; *but see* Branislav Hock, *Transnational Bribery: When Is Extraterritoriality Appropriate?*, 11 CHARLESTON L. REV., 305, 323–24 (2017) (criticizing the OECD Convention Against Bribery language about "appropriate jurisdiction" as too "wide" and accordingly of little use in guiding enforcement agencies facing overlapping jurisdictional claims).

17. United Nations Convention Against Corruption, Art. 4 §3, https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf [https://perma.cc/MZ64-KB4D] ("When more than one Party has jurisdiction over an alleged offence 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."). *See* also UNCAC, *supra* note 15.

18. *See* Criminal Law Convention on Corruption, 2216 U.N. Doc. 225, E.T.S. No. 173 (Jan. 27, 1999); Intern-American Convention Against Corruption, S. Treaty Doc. No. 105-39, 35 I.L.M 724 (Mar. 29, 1996); African Union Convention on Preventing and Combating Corruption, 43 I.L.M. 5 (July 1, 2003) (all generally accepted multistate anti-corruption agreements that do not address apportionment of criminal penalties amongst different jurisdictional authorities).

19. Matthew Reeder, *Bad Math: State-Centric Anti-Corruption Enforcement + International Information Sharing Agreements = Conflicting Corporate Incentives*, 49 INT'L LAW. 325, 332 (Winter 2016).

20. *See* Andrew T. Bulovsky, *Promoting Predictability in Business: Solutions for Overlapping Liability in International Anti-Corruption Enforcement*, 40 MICH. J. INT'L L., 549 (2019) (Although there is little to no literature exploring prevailing principles, commentators have undertaken to criticize the current regime and advocate for formalized mechanisms for transnational anti-corruption enforcement.).

21. *See generally* Rod J. Rosenstein, Deputy Att'y Gen., Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act (May 9, 2018) *in Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act*, DEP'T JUST. (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes [https://perma.cc/2RXZ-EHE8] [hereinafter Memorandum from Rod J. Rosenstein].

should "consider the totality of fines, penalties, and/or forfeiture imposed by all Department components as well as other law enforcement agencies and regulators in an effort to achieve an equitable result."[22] While the policy does not mention global anti-corruption efforts, former Deputy Attorney General Rosenstein made clear its application is particularly important in the anti-corruption context.[23] The May 2020 memorandum, informally called the DOJ's "Anti-Piling on Policy,"[24] directs that DOJ anti-corruption enforcers employ "equity" in addressing penalty apportionment issues.[25] While the "Anti-Piling on Policy" is an explicit statement advocating the role of equity for DOJ enforcers, it provides no detail on how equity is to be applied and, on its face, leaves those decisions solely to the judgment and discretion of DOJ prosecutors.[26] The document does not address cooperation or settlement coordination. Moreover, the "Anti-Piling on Policy" applies only to DOJ employees.[27] Indeed, "while the DOJ certainly has been one of the world's leading enforcement authorities in combating foreign corruption, its unilateral policy is not globally applicable, and other enforcement authorities—including U.S. authorities— may follow a different approach."[28]

This context prompts the following research question: in multi-jurisdictional anti-corruption enforcement efforts, have enforcement agencies developed a set of principles beyond general "equity" to inform their decisions regarding cooperation, coordination, and appropriate transnational anti-corruption settlement penalties? To that end, Section II of this paper identifies the research methodology used to approach this question. Section III describes the evolution of global anti-corruption efforts to present leading to the need for increased clarity in the transnational anti-corruption investigation and settlement context. Section IV reviews recent global anti-corruption resolutions with an eye towards emerging principles. Section V reviews insights on these issues from interviews with former and current prosecutors employed by various governmental agencies tasked with enforcing anti-corruption laws. Section VI answers the research question and offers emerging guiding principles helpful in understanding how states cooperate and attempt to employ equitable treatment in reaching just resolution when multiple states seek to enforce anti-corruption laws. Section VII provides a conclusion.

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22. *Id.*

23. *Id.*

24. Sharon Oded, *The DOJ's Anti-Piling on Policy: Time to Reflect, in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES, A PRINCIPLED APPROACH, 256 (Tina Søreide & Abiola Mackinwa eds., 2020).

25. Memorandum from Rod J. Rosenstein, *supra* note 23.

26. Oded, *supra* note 24, at 253.

27. *Id.*

28. *Id.* at 253.

II. Methodology

To attempt to answer the research question, it is first necessary to understand the evolution of global anti-corruption enforcement. This contextual examination provides insight into why international cooperation and coordination are imperative to reach just resolutions in multi-jurisdictional anti-corruption enforcement circumstances. After describing the context, the paper analyzes recent multi-state anti-corruption settlements and insights from anti-corruption prosecutors to identify emerging principles that guide the process.

III. Evolution of Global Anti-Corruption Efforts and the Need for Cooperation in Investigations and Coordination and Penalty Apportionment in Transnational Anti-Corruption Resolutions

For most of the last half-century, the FCPA was the only statute enforced in the global anti-corruption context.[29] Simply put, many states did not value the importance of the anti-corruption effort.[30] Some even considered bribery of foreign officials to be an integral and accepted part of the conduct of international business.[31] For some time, the prevailing notion was that foreign companies needed to pay bribes in geographies with deeply rooted cultures of graft and that such conduct was neither unethical nor immoral.[32] In the 1970s, some even considered bribery to be "market enhancing."[33] For example, before 2000, France, Germany, Austria, Belgium, Australia, Portugal, New Zealand, Netherlands, and Switzerland allowed tax deductions for their companies that paid overseas bribes to secure business opportunities.[34]

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29. CRIM. DIV. U.S. DEP'T JUST. & ENF'T DIV. U.S. SEC. & EXCH. COMM'N , A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, (2020), https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf [https://perma.cc/CHY9-3HG2] (giving a primer on the FCPA); *see also* Matthew J. Feeley, *U.S. Foreign Corrupt Practices Act's Applicability to Non-U.S. Entities Sponsoring American Depository Receipts*, 8 BUS. L. INT'L. 91 (2007) (explaining FCPA jurisdictional issues).

30. *See* Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption*, 33 VAND. J. TRANSNAT'L L. 877 (2000) (discussing the concept of "geographic morality" and how it shaped the development of bribery of foreign officials).

31. *Id.* at 881 (defining the "rule of geographical morality" as a norm by which a citizen of a country in the North may engage in acts of corruption in a country in the South, including bribery and extortion, without the attachment of any moral condemnation to those acts).

32. *Id.* at 896–902.

33. Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 L. & CONTEMP. PROBS. 193, 198–99 (2017).

34. Siemens, *A Giant Awakens*, ECONOMIST, (Sept. 9, 2020), https://www.economist.com/briefing/2010/09/09/a-giant-awakens [https://perma.cc/4GSG-Q7NV]; Martine Milliet-Einbinder, *Writing off Tax Deductibility*, OECD OBSERVER (Apr. 2000), https://oecdobserver.org/news/archivestory.php/aid/245/Writing_off_tax_deductibility_.html [https://perma.cc/2EHS-THDS].

But global anti-corruption efforts outside the United States slowly grew.[35] For instance, in 2010 the United Kingdom passed the U.K. Bribery Act 2010.[36] In August 2013, motivated by the commitments it undertook in the OCED Convention Against Bribery, Brazil enacted both its Anti-Corruption Law and the Law on Fighting Organized Crime, commonly referred to as the Brazilian Clean Company Act.[37] In 2017, France enacted its own anti-corruption law—the Sapin II Legislation—and formed a new agency, the Agence Francaise Anticorruption (AFA), charged with enacting regulations, monitoring compliance, and conducting enforcement.[38] Also in 2017, Argentina passed a law making domestic companies liable for bribery committed abroad.[39] Many other states, including China, India, Ireland, Malaysia, and Tanzania, have either recently enacted or amended domestic anti-corruption laws.[40] As of May 2018, the forty-four signatories to the OECD Convention Against Bribery have implemented domestic legislation that makes bribery of foreign officials unlawful.[41]

Although many of these new laws are based on the provisions of the FCPA,[42] they are not replicas of the FCPA. For instance, the U.K. Bribery Act is a strict criminal liability statute that criminalizes receipt of a bribe, prohibits commercial bribery,[43] provides a defense for a company with a

35. *See* Christopher J. Duncan, *The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism*, 1 ASIAN-PAC. L. & POL'Y J. 16 (2000) (highlighting a notion that the U.S. led effort to promote global anti-corruption laws and their meaningful enforcement is little more than cultural imperialism).

36. U.K. Bribery Act 2010, *supra* note 13.

37. Renata Muzzi Gomes de Almeida & Shin Jae Kim, *The New Brazilian Clean Company Act*, EMPEA LEGAL & REGUL. BULL. 3 (2014), https://www.empea.org/app/uploads/2017/03/Brazilian-Clean-Company-Act.pdf [https://perma.cc/D4RZ-E4UR].

38. Brandon Garrett, *The Path of FCPA Settlements*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES, A PRINCIPLED APPROACH, 38–39 (Tina Søreide & Abiola Mackinwa eds., 2020).

39. *Id.* at 34.

40. Marc Alain Bohn et al., *Anti-Corruption*, 53 YEAR IN REV. 347, 357–59 (2019).

41. *OCED Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, ORG. FOR ECON. COOP. & DEV. (May 2018), http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf [https://perma.cc/M8RJ-EWGE] (Signatories include Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Costa Rica, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Russian Federation, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States). *See also* Eric C. Chaffee, *From Legalized Business Ethics to International Trade Regulation: The Role of the Foreign Corrupt Practices Act and Other Transnational Anti-Bribery Regulations in Fighting Corruption in International Trade*, 65 MERCER L. REV. 701, 713–23 (2014) (detailed description of the development of anti-corruption laws and agreements).

42. Glenn Ware & Kindra Mohr, *Anticorruption Litigation Does Not Stop at the Water's Edge*, 39 GLOB. LITIG., no 3. 59, 61 (2013).

43. *See, e.g.*, Jeffrey Boles, *Examining the Lax Treatment of Commercial Bribery in the United States: A Prescription for Reform*, 51 AM. BUS. L. J. 119, 120 (Jan. 26, 2014) (defining commercial bribery as, generally, bribery of non-governmental officials, usually in a business context). For

robust compliance program and excludes a facilitation payment exception.[44] The Brazilian Clean Company Act differs from the FCPA, amongst other things, in that it cannot be used to assert criminal liability against a company, applies a strict liability standard, and provides an explicit compliance program defense.[45]

Nevertheless, these laws, as well as others, generally track the OECD Convention Against Bribery's definition of bribery (which followed the FCPA definition).[46] States also borrow from U.S. enforcement agencies' anti-corruption protocols, including the use of deferred prosecution agreements (DPAs), non-prosecution agreements (NPAs), and publicized declinations of potential enforcements.[47] For example, the Brazilian Clean Company Act—following anti-corruption policy in the United States—provides incentives for voluntary disclosure.[48]

Some development of global anti-corruption efforts may be attributed to the growing international consensus that corruption leads to economic waste and often causes competitive inefficiencies that slow growth. It is generally accepted that "corruption hurts competition, raises prices, negates fair trade, and has social consequences."[49] It is also generally accepted that corruption is linked to human rights abuses.[50] All that is true, and by way of example, the European Commission reports that corruption costs the European Union at least _120 billion annually.[51] But there are other possible motivations to consider. First, states recognize the substantial anti-corruption penalties collected by U.S. enforcement agencies[52] and have decided that their treasuries could also benefit from the enforcement of similar laws with comparable financial penalties. Second, because most large financial settlements with U.S. enforcement agencies involve non-U.S.

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example, if a company employee responsible for selecting a supplier was paid a bribe to select a certain supplier, that payment would be commercial bribery. *Id.* at 119.

44. Dominic Saglibene, *The U.K. Bribery Act: A Benchmark for Anti-Corruption Reform in the United States*, 23 TRANSNAT'L L. & CONTEMP. PROBS. 119, 131–35 (2014); *see also* Margaret Ryznar & Samer Korkor, *Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing*, 76 MO. L. REV. 415, 438–43 (2011). *See also* Emily N. Strauss, *Easing Out' the FCPA Facilitation Payment*, 93 B.U. L. REV. 235 *passim* (2013) (discussion on facilitation payments).

45. Lindsay B. Arrieta, *Taking the "Jeitinho" out of Brazilian Procurement: The Impact of Brazil's Anti-Bribery Law*, 44 PUB. CONT. L. J. 157, 170–74 (2014).

46. *See generally* OECD Convention Against Bribery, *supra* note 5.

47. Garrett, *supra* note 38, at 38.

48. *See, e.g.*, Michelle R. Sanchez-Badin & Arthur Sanchez-Badin, *supra* note 3, at 327.

49. Ron Brown, *EU-China FTA: Enhanced Enforcement and Umbrella Coverage of Anticorruption*, 43 HASTINGS INT'L & COMPAR. L. REV. 211, 213 (2020).

50. Steve O'Hagan, *Fuelling Corruption*, 76 GEOGRAPHICAL 50, 50–51 (Nov. 2004).

51. *The Costs of Corruption Across the European Union*, GREENS/EFA EUR. PARL., (Dec 7, 2018), https://www.greens-efa.eu/en/article/document/the-costs-of-corruption-across-the-european-union/ [https://perma.cc/9JKU-C78P].

52. Ellen Gutterman, *Banning Bribes Abroad: US Enforcement of the Foreign Corrupt Practices Act*, 53 OSGOODE HALL L. J. 31, 38 (2015).

companies,[53] some states may view the United States' enforcement of the FCPA as discriminatory and anti-foreigner in nature. In turn, these states may desire laws they might use affirmatively against foreign companies in the global marketplace.[54] A commentator has more gently asserted that the goal of the FCPA was not to eradicate corruption, but rather to increase the competitive advantage of U.S. companies in the international marketplace.[55] Empirical data suggests that U.S. prosecutions, including FCPA prosecutions, increasingly target foreign corporations and foreign corporations paid larger fines than domestic corporations.[56] The latter notion stems from the fact that between 2004 and 2018, "the average FCPA monetary resolution against U.S. companies was $21,182,931, compared with $75,016,934 for non-U.S. companies."[57] Indeed, "foreign companies have faced stratospheric monetary penalties compared with domestic companies in recent years. The contrast was particularly acute in 2017, when foreign corporations paid an average of $150,349,415 (or $1.05 billion in total) compared with an average of $16,103,333 (or $96.6 million in total) for domestic corporations."[58]

53. *Id.* at 49.

54. *See* Brewster & Buell, *supra* note 33, at 204. "There are some abroad, especially in Europe, who believe that the United States may be using global corporate enforcement, especially FCPA enforcement, as a means of assisting U.S. firms in the competition for dominance among multi-nationals." *Id.*

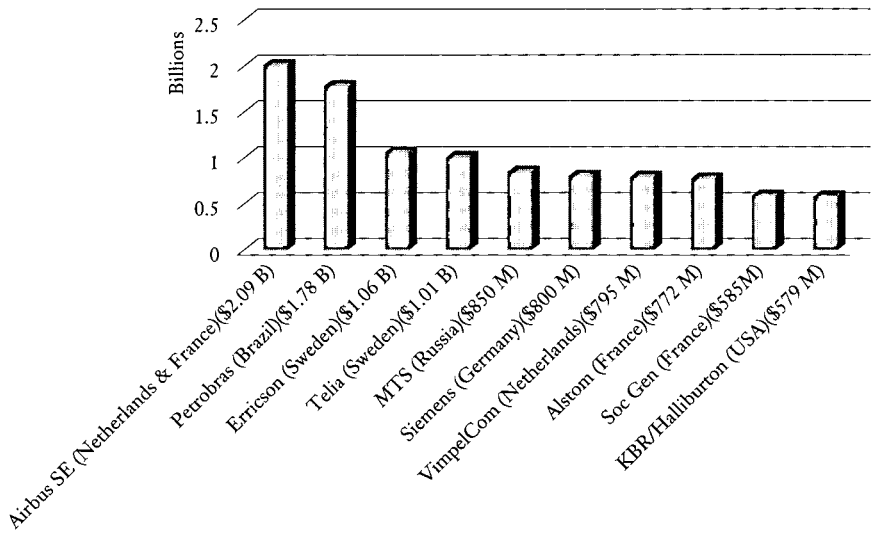
55. Gutterman, *supra* note 52, at 49. The "central purpose of FCPA enforcement is to ensure competitive access to global markets by U.S. firms—not to control corruption more generally." *Id.* at 61.

56. Garrett, *supra* note 38, at 34.

57. Michael S. Diamant et al., *FCPA Enforcement Against U.S. and Non-U.S. Companies*, 8 MICH. BUS. & ENTREPRENEURIAL L. REV. 353, 371 (2019).

58. *Id.*

The following graph demonstrates the disproportionate representation of non-U.S. companies in the largest FCPA resolutions to date:[59]



Notwithstanding the debate over the motivations and incentives for the growth of global anti-corruption laws, there is no dispute that these laws have proliferated. With the proliferation of this network of anti-corruption laws, corresponding investigations by various non-U.S. enforcement agencies have also grown.[60] As of December 31, 2019, there are no less than 328 active investigations of bribery of foreign officials being conducted by enforcement authorities in thirty-seven states.[61] Only 37 percent of these

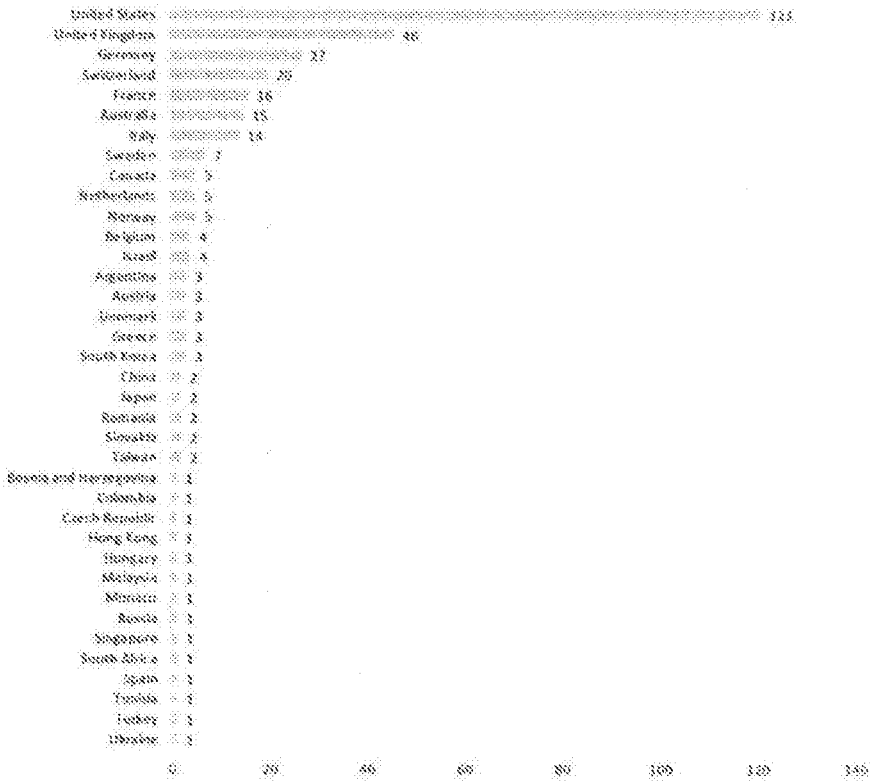
59. Harry Cassin, *Airbus Shatters the FCPA Top Ten*, FCPA BLOG (Feb. 3, 2020, 7:48 AM), https://fcpablog.com/2020/02/03/airbus-shatters-the-fcpa-top-ten/ [https://perma.cc/SGE5-J23G].

60. *See 2019 Global Enforcement Report*, TRACE ANTI-BRIBERY COMPLIANCE SOLS. 6 (2020), https://info.traceinternational.org/2019-ger [https://perma.cc/J3Z2-UBG3] (fill in the fields with requested information; then press "submit" to access report).

61. *Id.* at 6.

investigations are being conducted by U.S. enforcement agencies.[62] The following graph illustrates these facts as provided by TRACE Anti-Bribery Compliance Solutions.[63]

Figure 1: Investigations Concerning Bribery of Foreign Officials by Country



The vast majority of anti-corruption enforcement actions around the world result in negotiated settlement rather than litigation.[64] This is, in part, because the criminal trial risks—in terms of sentences and reputational harm—are quite substantial. Accused parties may also be motivated to settle because litigating an anti-corruption action with one state likely forecloses the possibility for future negotiated settlements with other states.[65] Historically, the concept of settled corporate criminal resolution was resisted

62. *Id.*
63. *Id.* at 6 fig. 1
64. Nick Gersh, *The Curious Absence of FCPA Trials*, GAB. GLOB. ANTICORRUPTION BLOG, (Sept. 8, 2017), https://globalanticorruptionblog.com/2017/09/08/the-curious-absence-of-fcpa-trials/ [https://perma.cc/5VY4-AYYW].
65. *Id.*

by many in continental European legal circles, both inside and outside of the anti-corruption context, because of the notion that such settlements ran contrary to fairness, the adversarial pursuit of truth, and the privilege against self-incrimination.[66] But the merit of negotiated resolution of corporate criminal liability in the anti-corruption context is widely accepted around the globe.

As global anti-corruption laws proliferated, circumstances arose where states recognized concurrent jurisdiction over the same conduct that gave rise to potential liability. These circumstances led to the advent of carbon copy enforcement, which refers to successive enforcement action initiated by several foreign states with respect to the same or similar nucleus of facts.[67] Butros and Funk "use the term carbon copy prosecutions to refer to successive, duplicative prosecutions by multiple sovereigns for conduct transgressing the laws of several nations, but arising out of the same common nucleus of operative facts."[68] The practice essentially makes it easier for subsequent enforcement actions to piggy back off the successful earlier enforcement action. This is true because most settlements—particularly under DOJ practice—typically include an agreed statement of facts.[69] Many DOJ FCPA settlements also include an obligation on the settling entity to cooperate with foreign enforcement agencies.[70] Accordingly, anti-corruption enforcement authorities learned to use the facts admitted in the DOJ FCPA settlement documents to subsequently assert additional liability against the settling parties.[71]

The advent of carbon copy enforcement led to an outcry from the anti-corruption defense bar that their clients were being subjected to a "double jeopardy" where they had no ability to assure themselves that a settlement with one enforcement agency would provide certainty against future prosecutions by other states and/or administrative actions by international entities.[72] Although this assertion has merit, it should be noted that once an

66. Mark Pieth, *Negotiating Settlements in a Broader Law Enforcement Context*, *in* NEGOTIATED SETTLEMENTS, IN BRIBERY CASES, A PRINCIPLED APPROACH 19 (Tina Soreide & Abiola Mackinwa eds., 2020).

67. Andrew S. Boutros & T. Markus Funk, *"Carbon Copy" Prosecution: A Growing Anticorruption Phenomenon in a Shrinking World*, 2012 U. CHI. LEGAL. F. 259, 269 (2012).

68. *Id.*

69. *See id.* at 275.

70. *Id.* at 285.

71. Oded, *supra* note 24, at 235–36. The United States is not always the lead enforcer in copy-cat enforcement scenarios. For instance, in the *Alcatel-Lucent SA* matter, the DOJ and SEC reached settlement with Alcatel-Lucent after the company had already settled the same conduct with Costa Rica. In the *GlaskoSmithKline* (GSK) matter, GSK reached settlement with Chinese authorities two years before it reached a settlement with the SEC. *Id.*

72. Boutros & Funk, *supra* note 68, at 290–91. Indeed, the issues of certainty and finality are the bedrock of negotiated settlement process in U.S. domestic litigation. *See, e.g.*, Poole v. Recycling Serv. of Fla., Inc, No. 2:18-cv-810-FtM-99MRM, 2020 WL 1496151, at * 7 (M.D. Fla. Feb. 24, 2020) ("[T]he proposed settlement containing mutual releases buy Plaintiff *certainty and finality with* respect to this litigation."); *see also* Gossinger v. Ass'n of Apartment Owners of Regency of Ala Wai, 835 P.2d 627, 633 (Haw. 1992) (noting that public policy

entity becomes aware of issues surrounding potential international corruption, competent legal counsel should advise the client to consider exposure under the law of every state that might successfully assert jurisdiction related to the alleged conduct. For example, while discussing the problem of carbon copy enforcement, Oded points to the consortium that paid bribes to Nigerian officials, through a British lawyer, in relation to a natural gas processing plant in Bonny Island, Nigeria (commonly known as the "Bonny Island" matter).[73] The consortium was comprised of French, Italian, American, and Japanese companies.[74] Oded establishes that the parties, perhaps unfairly, were subjected to multiple subsequent enforcement actions over a period of six years after they settled with the U.S. enforcement authorities.[75] But given the sophistication of the parties involved and their respective lawyers, it is hard to imagine the consortium members did not consider—and likely deeply analyze—the full scope of multiple jurisdictional exposure at the outset of their own internal factual investigation, and certainly before they settled with the United States.

Nonetheless, uncoordinated and duplicative anti-corruption enforcement has been criticized for chilling self-reporting of potential violations, as a single report to one enforcement agency might ignite a firestorm of uncoordinated investigations and related expenses.[76] With over-enforcement, "[t]he worry here . . . is that national regulators, acting alone and without coordination with other national regulators, might deter beneficial corporate behavior or encourage wasteful corporate behavior."[77] Moreover, the proliferation of duplicative enforcements has been criticized by some for the disproportionate effects it renders on employers, shareholders, financiers, and customers of the culpable parties.[78] The criticism has been so substantial that some commentators have called for the establishment of a "supranational administrative body" to handle cases of

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"favors the finality of negotiated settlements that avoid the costs and *uncertainties* of protracted litigation").

73. ODED, *supra* note 24, at 234.

74. Richard L. Cassin, *'They Followed the Leader into FCPA Oblivion'*, FCPA BLOG (Sept. 17, 2013, 6:18 AM), https://fcpablog.com/2013/09/17/they-followed-the-leader-into-fcpa-oblivion/ [https://perma.cc/867J-SBZX].

75. ODED, *supra* note 24, at 234.

76. Boutros & Funk, *supra* note 68, at 286–87. Indeed, this collective action excessive enforcement problem stands in stark contrast to recent commercial bribery circumstances, such as the *FIFA* matter, where many states failed to move forward with enforcement because of an apparent lack of jurisdiction and/or appropriate enforcement mechanism. *See, e.g.*, *Tip of the Iceberg: The Role of Banks in the FIFA Story*, GLOB. WITNESS (June 19, 2015), https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/banks/tip-iceberg-role-banks-fifa-story/?gclid=CJ0KCQjw3s_4BRDPARIsAJsyoLMo3TT7JARKh-3t9ReYOnvKsT37zH6nlvQHiPeyUYEqz1fW1khsj8AaArYcEALw_wcB [https://perma.cc/DF73-YU4U].

77. William Magnuson, *International Corporate Bribery and Unilateral Enforcement*, 51 COLUM. J. TRANSNAT'L L. 360, 413 (2013).

78. *See, e.g.*, ODED, *supra* note 24, at 237–38; Jay Holtmeier, *Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities*, 84 FORDHAM L. REV. 493, 516 (2015).

overlapping anti-corruption jurisdiction in the transnational context.[79] Given this context and in response to these challenges and criticism, the DOJ issued the "No Piling on Policy."[80] While the policy certainly provides some level of reassurance to the anti-corruption defense bar, questions remain as to how the policy is carried forth within the DOJ and how U.S. and international enforcers cooperate and coordinate amongst themselves in the anti-corruption context.

IV. Insights from Recent Transnational Anti-Corruption Settlements

Recent transnational anti-corruption resolutions might provide both explicit and implicit indications of the development of guiding principles utilized by enforcement agencies in deciding when, and under what circumstances, to cooperate, coordinate, and apportion financial penalties in the investigation and resolution of transnational anti-corruption circumstances. While the following review is not exhaustive, it is intended to capture recent resolutions that might reflect practices and emerging principles currently utilized by enforcement agencies.

A. Société Générale S.A. Corruption Settlement—United States and France

In June 2018, Société Générale S.A. (Soc Gen) entered into coordinated settlements with French and U.S. enforcement authorities in relation to bribes it paid to Libyan officials and its manipulation of the London Inter Bank Offered Rate (LIBOR).[81] Soc Gen agreed to pay France and the United States more than $585 million related to the bribing scheme.[82] The United States credited Soc Gen $292,776,444 that it paid to the Parquet National Financier (PNF).[83] The U.S. credit equaled exactly 50 percent of the total criminal penalty due to the United States.[84] In announcing the

79. Thomas J. Bussen, *Midnight in the Garden of Ne Bis in Idem: The New Urgency for an International Enforcement Mechanism*, 23 Cardozo J. Int'l & Comp. L. 485, 510 (2015).

80. Jay Holtmeier et al., *New DOJ Policy to Prevent "Piling-On"*, WilmerHale (May 30, 2018), https://www.wilmerhale.com/en/insights/client-alerts/2018-05-30-new-doj-policy-to-prevent-piling-on [https://perma.cc/8U4R-PQ4Z].

81. Press Release, U.S. Dep't Just., Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate (June 4, 2018), https://www.justice.gov/usao-edny/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan [https://perma.cc/VD3S-38BJ].

82. *Id.*; *see* Plea Agreement at 2, United States v. SGA Société Générale S.A., No. 18-CR-274 (E.D.N.Y. June 5, 2018) (dismissed as part of a deferred prosecution agreement, explaining that Soc Gen previously agreed to pay the Libyan Investment Authority $1.1 billion to settle the corruption conduct).

83. Press Release, U.S. Dep't of Just., Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate, *supra* note 82.

84. *Id.*

settlement, the DOJ stated that it was the "first coordinated resolution with French authorities in a foreign bribery case."[85] The settlement did not include the requirement that Soc Gen engage an independent FCPA monitor,[86] in part, because Soc Gen was to be monitored by the AFA.[87] In announcing the settlement, the DOJ expressly acknowledged the cooperation and assistance provided by the PNF, the United Kingdom's Serious Fraud Office, the Federal Office of Justice in Switzerland, and the Office of Attorney General in Switzerland (the Swiss AG).[88] The United States settlement with Soc Gen included a DPA requiring cooperation with international law enforcement efforts and a detailed agreed statement of facts.[89]

The DOJ opened its investigation nearly two years before the PNF opened its investigation of Soc Gen and the United States shared relevant internal Soc Gen documents with its French counterparts.[90] Indeed, it appears the DOJ delayed resolution with Soc Gen to allow the PNF to complete its inquiry and conclude a joint resolution. French commentators believe the delegation of monitoring responsibility to the AFA was of substantial import, as it signaled the credibility and authority of French enforcement agencies.[91]

B. Airbus SE Corruption Settlement—United States, France and United Kingdom

In January 2020, Airbus SE (Airbus) settled a corruption inquiry with U.S., French, and British enforcement authorities.[92] Airbus paid $3.9 billion in total to settle charges related to its scheme to bribe government officials

85. *Id.*

86. *See* discussion *infra* Section VI.E (further discussing monitors, which in this context are private attorneys engaged by the corporate entity at their expense and with the approval of the DOJ to monitor the entity's prospective remediation and compliance efforts under the terms of the agreement between the entity and the DOJ).

87. Press Release, U.S. Dep't of Just., Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate, *supra* note 82.

88. *Id.*

89. *SGA Société Générale S.A.*, No. 18-CR-274 at ? 1 (in accordance with a deferred prosecution agreement).

90. Valérie de Senneville & Sharon Wajsbrot, *Le parquet enquête sur les opérations de Société Générale en Libye* [*The Prosecution Investigates the Operations of Societe Generale in Libya*], Les Echos, (Nov. 8, 2017, 1:01 AM), https://www.lesechos.fr/2017/11/le-parquet-enquete-sur-les-operations-de-societe-generale-en-libye-179033 [https://perma.cc/R3KJ-Q99A].

91. *Id.*

92. Press Release, U.S. Dep't of Just., Airbus Agrees to Pay Over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case, (Jan. 31, 2018), https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case#:~:text=january%2031%2C%202020-,Airbus%20Agrees%20to%20Pay%20over%20%243.9%20Billion%20in%20Global%20Penalties,Foreign%20Bribery%20and%20ITAR%20Case&text=the%20FCPA%20charge%20arose%20out,including%20contracts%20to%20sell%20aircraft [https://perma.cc/46K8-44J2].

around the world and to resolve the company's violations of the U.S. Arms Export Control Act (AECA) and the International Traffic in Arms Regulations (ITAR).[93] Airbus agreed to pay the United States $527 million to settle the FCPA and ITAR violations, France $2.29 billion to settle foreign official and commercial bribery violations, and the United Kingdom $1.09 billion related to bribes paid in Malaysia, Sri Lanka, Taiwan, Indonesia, and Ghana.[94] The U.S. settlement was reduced based on a credit for part of the fine paid to French authorities.[95] Under the resolution, the DOJ declined to require an appointment of a compliance monitor, in part because Airbus was subject to oversight from the AFA.[96] The resolution expressly recognizes that the U.S. ability to assert FCPA jurisdiction over Airbus "is limited" given that Airbus is neither an issuer nor domestic concern.[97]

In reference to international coordination in *Airbus*, Assistant Attorney General Brian A. Benczkowski stated:

> This coordinated resolution was possible thanks to the dedicated effort of our foreign partners at the Serious Fraud Office in the United Kingdom and the PNF in France. The [DOJ] will continue to work aggressively with our partners across the globe to root out corruption, particularly corruption that harms American interests.[98]

Despite that anti-corruption inquiries of Airbus began with the SFO in April 2016,[99] France and the United Kingdom investigated Airbus together as a part of a "Joint Investigative Team."[100]

In *Airbus*, it appears the DOJ made an explicit decision to seek a substantially lower penalty than its French and British counterparts, rather than only "crediting," because of Airbus's nexus to Europe and those states in particular.[101] In announcing the joint resolution, the DOJ stated:

> [F]or the FCPA-related conduct, the U.S. resolution recognizes the strength of France's and the United Kingdom's interests over the Company's corruption-related conduct, as well as the compelling equities of France and the United Kingdom to vindicate their respective

93. *Id.*

94. *Id.*

95. *Id.*

96. Airbus Deferred Prosecution Agreement at ¶ 4(f), United States v. Airbus SE, 2020 WL 1226425 (D.D.C. Jan. 31, 2020) (No. 1:20-cr-00021), https://www.justice.gov/opa/press-release/file/1241466/download [https://perma.cc/R6XN-WUXU].

97. *Id.*, at ¶ 4(i).

98. U.S. Dep't Just., Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case, *supra* note 93.

99. Bruno Trevidic, *Airbus renforce son dispositif anti-corruption* [*Airbus Strengthens its Anticorruption System*], LES ECHOS, (May 22, 2017, 1:53 PM), https://www.lesechos.fr/2017/05/airbus-renforce-son-dispositif-anti-corruption-168670 [https://perma.cc/LR6S-DV6K].

100. *Id.*

101. U.S. Dep't Just., Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case, *supra* note 93.

> interests as those countries deem appropriate, and the [DOJ] has taken into account these countries' determination of the appropriate resolution into all aspects of the U.S. resolution.[102]

C. VimpelCom Corruption Settlement—United States and the Netherlands

In February 2016, VimpelCom (VimpelCom) and its wholly owned Uzbek subsidiary, Unitel LLC (Unitel), settled allegations that they paid bribes to government officials in Uzbekistan to allow them to enter and operate in the Uzbek telecommunications market.[103] VimpelCom is based in the Netherlands and is the world's sixth largest telecommunications company.[104] VimpelCom agreed with the DOJ to pay $230 million.[105] VimpelCom agreed to pay the SEC and the Public Prosecution Service of the Netherlands—Openbaar Ministrie (the OM)—$375 million (to be divided amongst them).[106] Separately, VimpelCom agreed to pay the OM $230 million in criminal penalties.[107] The DOJ agreed to credit the criminal penalty paid to the OM towards the total U.S. criminal penalty.[108] In separate civil actions, the DOJ sought the forfeiture of more than $850 million held in bank accounts in Switzerland, Belgium, Luxembourg, and Ireland under the theory that these funds were bribe payments or monies used to launder bribe payments.[109] The U.S. investigation was assisted by law enforcement in the Netherlands, Sweden, Switzerland, Latvia, Belgium, France, Ireland, Luxembourg, and the United Kingdom.[110]

D. Telia Corruption Settlement—United States, Sweden, and the Netherlands

In November 2017, Swedish company Telia Company AB (Telia) and its Uzbek subsidiary, Coscom LLL (Coscom), agreed with Sweden and the United States to settle allegations that they paid bribes to Uzbek government officials to secure telecommunications opportunities.[111] In

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102. *Id.*

103. Press Release, U.S. Dep't Just., VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Schemes (Feb. 18, 2016), https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million [https://perma.cc/U9HV-W6XW].

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Press Release, U.S. Dep't Just., Telia Company AB and its Uzbek Subsidiary Enter into a Global Foreign Bribery Resolution of More than $965 Million for Corrupt Payments in

resolution with the DOJ, Telia agreed to pay a criminal penalty of $275 million.[112] Telia agreed with the SEC to a disgorgement of profits and interest of $457 million, with the SEC agreeing to credit half that amount in disgorged profits if Telia makes payment of the same to either the Swedish Prosecution Authority, or the OM.[113] Separately, Telia agreed to pay OM $274 million in criminal penalties.[114] The DOJ agreed to credit the criminal penalty paid to the OM in its agreement.[115] In announcing the settlement, Acting DOJ Assistant Attorney General Kenneth A. Blanco stated the following: "This resolution underscores the Department's continued and unwavering commitment to robust FCPA and white-collar criminal enforcement. It also demonstrates the Department's cooperative posture with its foreign counterparts to stamp out international corruption and to reach fair, appropriate and coordinated resolutions."[116]

The *Telia* investigation was originally opened by Swedish authorities based on Swedish media reports about the corruption scheme.[117] Swedish, Dutch, and U.S. law enforcement provided each other with cooperation and assistance.[118] Assistance was also provided by law enforcement from Austria, Belgium, Cyprus, France, Ireland, Latvia, Luxembourg, Norway, Switzerland, the Isle of Man, and the United Kingdom.[119]

E. Petrobras and Corruption Settlement—Brazil and the United States

In September 2018, Petróleo Brasileiro S.A.—Petrobras (Petrobras) reached agreement with Brazil and the United States to settle allegations Petrobras made corrupt payments to politicians and political parties in Brazil.[120] Under an arrangement involving the DOJ, SEC, and the Ministerio Publico Federal in Brazil (MPL), Petrobras agreed to pay a total criminal penalty of $853 million, with the United States receiving 20 percent

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Uzbekistan, (Sept. 21, 2017), https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965#:~:text=stockholm%2Dbased%20Telia%20Company%20AB,than%20%24965%20million%20to%20resolve [https://perma.cc/3N55-7EME].

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Press Release, U.S. Dep't Just., Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History, (Dec. 21, 2016), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve#:~:text=odebrecht%20S.A.%20(Odebrecht)%2C%20a,States%2C%20Brazil%20and%20Switzerland%20arising [https://perma.cc/W7FN-KSCE].

and Brazil receiving 80 percent.[121] In explaining the settlement, the DOJ stated that the case presented a number of unique factors, "including that Petrobras is a Brazilian-owned company that entered into a resolution with Brazilian authorities and is subject to oversight by Brazilian authorities."[122] Separately, Petrobras agreed with the SEC to disgorgement of profits and interests in the amount of $933 million.[123] In declining to require appointment of a compliance monitor, DOJ noted that Petrobras "will be subject to oversight by Brazilian authorities, including Brazil's Tribunal de Contas de União and Comissão de Valories Mobiliários."[124]

F. Odebrecht and Braskem Corruption Settlement—Brazil, United States, and Switzerland

In December 2016, Brazilian construction company Odebrecht S.A. (Odebrecht) and Brazilian petrochemical company Braskem S.A. (Braskem) resolved claims with Brazil, the United States, and Switzerland arising out of their schemes to pay bribes around the world.[125] The resolution was structured through settlement with the DOJ, the MPL, and the Swiss AG, with the United States and Switzerland receiving 10 percent each and Brazil 80 percent of the total criminal penalty of $4.5 billion from Odebrecht.[126]

In resolution with DOJ, Braskem agreed to pay the United States $632 million in criminal penalties.[127] Braskem also agreed with the SEC, MPL, and Swiss AG that Braskem would pay a total of $325 million in disgorgement of profits, with 70 percent going to Brazil and 15 percent each going to Switzerland and the United States.[128]

The *Odebrecht* settlement was structured so that the U.S. criminal penalty was paid first, and the Brazilian and Swiss penalties were to be paid in subsequent installments.[129] This is because Odebrecht claimed it did not have the financial ability to pay the penalties in one lump sum.[130]

The *Odebrecht* settlement also served to emphasize the continuing challenge of carbon copy prosecutions[131] in the transnational anti-corruption

121. *Id.*
122. *Id.*
123. *Id.*
124. Michelle R. Sanchez-Badin & Arthur Sanchez-Badin, *supra* note 3, at 329–30.
125. *Id.*
126. *See* discussion *supra* Section V.B.
127. *Id.* at 330.
128. *Id.*
129. Statement of Facts, Regina (Serious Fraud Office) v. Guralp Systems Ltd., Limited, https://cdn.wide-area.com/acuris/files/private-equity-law-report/documents/Guralp%20Statement%20of%20Facts.pdf [https://perma.cc/T7NT-R94V].
130. Deferred Prosecution Agreement, Serious Fraud Office v. Guralp Systems Ltd., https://www.sfo.gov.uk/download/deferred-prosecution-agreement-statement-of-facts-approved-judgment-sfo-v-guralp-systems-ltd/ [https://perma.cc/EUV6-QX5K].
131. Letter from Daniel S. Kahn, Deputy Chief, U.S. Dep't Just., Criminal Division to Matthew Reinhard, at Miller and Chevalier Chartered (Aug. 20, 2018), https://www.justice.gov/criminal-fraud/page/file/1088621/download [https://perma.cc/58BJ-2KMN].

context. As part of the *Odebrecht* settlement, the company admitted to bribery conduct in Angola, Argentina, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, and Venezuela.[132] Subsequently many of these jurisdictions either then began negotiating separate settlements with Odebrecht or banned Odebrecht from government contracting.[133]

G. Gurlap Systems Limited Corruption Settlement—The United Kingdom

In October 2019, the United Kingdom Serious Frauds Office entered into a deferred prosecution agreement with Guralp Systems Limited (Guralp) to settle claims that Guralp paid bribes to a Korean official of the Korea Institute of Geoscience and Mineral Resources, in relation to opportunities to sell seismic measuring equipment to the same.[134] As part of the resolution, Guralp agreed to pay the United Kingdom £2 million in profit disgorgement.[135]

While the DOJ opened an investigation Guralp, it declined to move forward with a prosecution in part because of

> the fact that [Guralp], a U.K. company with its principal place of business in the U.K., is the subject of an ongoing parallel investigation by the U.K.'s Serious Fraud Office for violations of law relating to the same conduct and has committed to accepting responsibility for that conduct with the SFO.[136]

H. Rolls-Royce PLC Corruption Settlement—Brazil, United Kingdom, and United States

In January 2017, Rolls Royce PLC (Rolls-Royce) agreed to pay $800 million in penalties to be split between Brazil, the United Kingdom, and the United States to settle charges it paid bribes in Thailand, Brazil, Kazakhstan, Azerbaijan, Angola, and Iraq.[137] Rolls-Royce agreed to pay the United

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132. Press Release, U.S. Dep't Just., 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/V7BG-VL8X].

133. *Id.*

134. *Id.*

135. *Id.*

136. Henry Cassin, *UK Ends Draft Investigation of GSK and Individuals at Rolls-Royce*, FCPA Blog (Feb. 25, 2019, 1:28 PM), https://fcpablog.com/2019/02/25/uk-ends-graft-investigations-of-gsk-and-individuals-at-rolls/ [https://perma.cc/GBR8-458H]; Case Updates, U.K. Serious Frauds Off., SFO Closes GlaxoSmithKline Investigation and Investigation into Rolls-Royce Individuals, Feb. 22, 2019, https://www.sfo.gov.uk/2019/02/22/sfo-closes-glaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/ [https://perma.cc/8YD3-U34B].

137. Press Release, U.S. Dep't Just., Rolls-Royce PLC Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case, *supra* note 138.

States $170 million and enter into a DPA.[138] Rolls-Royce agreed to pay the United Kingdom $604 million and enter into a DPA.[139] Rolls-Royce agreed to pay Brazilian authorities $26 million with that amount to be credited against the U.S. settlement.[140] The United Kingdom considered, but later decided against, bringing claims against individuals.[141] Austria, Germany, the Netherlands, Singapore, and Turkey provided significant investigative cooperation.[142]

138. *Id.*
139. *Id.*
140. *Id.*
141. Henry Cassin, *UK Ends Draft Investigation of GSK and Individuals at Rolls-Royce*, FCPA BLOG (Feb. 25, 2019, 1:28 PM), https://fcpablog.com/2019/02/25/uk-ends-graft-investigations-of-gsk-and-individuals-at-rolls/ [https://perma.cc/GBR8-458H]; Case Updates, U.K. Serious Frauds Off., SFO Closes GlaxoSmithKline Investigation and Investigation into Rolls-Royce Individuals, Feb. 22, 2019, https://www.sfo.gov.uk/2019/02/22/sfo-closes-glaxo smithkline-investigation-and-investigation-into-rolls-royce-individuals/ [https://perma.cc/8YD3-U34B].
142. Press Release, U.S. Dep't Just., Rolls-Royce PLC Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case, *supra* note 138.

I. Corruption Settlement Summation Table

The following summation table may assist in further analysis of the aforementioned resolutions:

Matter (Home State)	Total Financial Penalty with Crediting	States Involved	"Home" State Stake	"Away" States Stake
Soc Gen (Fr.)	$585 million	U.S., Fr.	$292.5 million (Fr.)	$292.5 million (U.S.)
Airbus (Fr.)	$3.9 billion	Fr., U.K., U.S.	$2.29 billion (Fr.)	$1.09 billion (U.K.) $527 million (U.S.)
VimpelCom (Neth.)	$605 million	Neth., U.S.	Unknown[143] (Neth.)	Unknown (U.S.)
Telia (Swed.)	$732 million	Swed., Neth., U.S.	$229 million (Swed.)	$274 million (Neth.) $229 million (U.S.)
Petrobras (Braz.)	$853 million	Braz., U.S.	$682 million (Braz.)	$171 million (U.S.)
Odebrecht (Braz.)	$4.5 billion	Braz., U.S., Switz.	$3.6 billion (Braz.)	$450 million (U.S.) $450 million (Switz.)
Braskem (Braz.)	$957 million	Braz., U.S., Switz.	$228 million (Braz.)	$680 million (U.S.) $49 million (Switz.)
Guralp (U.K.)	£2 million	U.K., U.S. (potentially)	£2 million (U.K.)	$0 (U.S.)
Rolls Royce (U.K.)	$774 million	U.K., Brazil, U.S.	$604 million (U.K.)	$144 million (U.S.) $26 million (Brazil)

143. The exact terms of the VimpelCom apportionment between the Netherlands and United States is unclear from publicly available information. *See* Press Release, U.S. Dep't Just., VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Schemes, *supra* note 104.

V. Insight from Anti-Corruption Enforcers

In the course of researching these issues, several former, and one current, government officials responsible for enforcement of anti-corruption laws generously provided insights based on their personal professional experiences as to how states interact in the context of transnational anti-corruption investigations and settlements. A description of their input follows.

A. Anti-Corruption Investigations

State-to-state cooperation in transnational anti-corruption investigations is often obligatory pursuant to either international conventions or bilateral treaties.[144] There is, however, an informal component to cooperation.[145] As a matter of practice, anti-corruption prosecutors work to develop personal relationships with their foreign counterparts.[146] For instance, the United States routinely sends DOJ anti-corruption prosecutors to international meetings and conventions regarding anti-corruption issues.[147] The DOJ and SEC recently hosted non-U.S. anti-corruption prosecutors for a meeting on anti-corruption issues.[148] Accordingly, when they seek foreign cooperation in a particular investigation, enforcers often times simply pick up the phone and call their known foreign contact.[149] But for these personal relationships, much of the investigatory cooperation we have recently seen in this area would not have developed.[150] The more formal cooperation request process, typically through the MLAT procedure, is often cumbersome and recipient states may be non-responsive.[151] Even with the MLAT process, successful cooperation is greatly enhanced in the presence of a preexisting professional relationship.[152]

Deciding whether to seek international cooperation in the investigation phase often turns on a number of factors and is essentially a subjective balancing test. For instance, enforcement agencies might balance the benefits of cooperation with the increases in bureaucratic complications and

144. Telephone Interview with Ephraim Wernick, Partner, Vinson & Elkins, LLP (July 1, 2020) (Wernick is the former Assistant Chief for the U.S. Department of Justice's Criminal Fraud Section and the former U.S. delegate and negotiator on anticorruption issues to OECD and the United Nations. Wernick was also a negotiator of the anticorruption component of NAFTA 2.0.).

145. Telephone Interview with Taavi Pern, Chief State Prosecutor, Prosecution Dep't of the Estonian Prosecutor General, (July 15, 2020).

146. *Id. See also* Telephone Interview with Marcello Miller, Former Federal Prosecutor, Brazilian Public Prosecutor's office (July 14, 2020) (Miller worked extensively on both the *Embraer* and *Odebrecht* matters.).

147. Telephone Interview with Ephraim Wernick, *supra* note 145.

148. *Id.*

149. *Id.*

150. Telephone Interview with Marcello Miller, *supra* note 147.

151. *Id.*

152. *Id.*

potential multiplicity of discovery obligations.[153] By deciding not to seek cooperation, particularly with the country that is the situs of the alleged bribing conduct, enforcers run the risk of angering their foreign counterparts if the investigation is later revealed.[154] Moreover, enforcers might seek foreign cooperation as a method of building personal relationships and to incentivize the development of foreign anti-corruption capabilities.[155] For example, if a U.S. enforcement agency developed corruption evidence but did not have a jurisdictional basis to assert a claim under U.S. law, it might seek foreign investigation cooperation with a state that does have jurisdiction both as a method of furthering the interest of justice and encouraging the development of that state's anti-corruption capabilities.[156] In other jurisdictions, however, the process for seeking international cooperation may be more formalized and might be initiated by separate officials before the matter is presented to the actual prosecutor.[157]

Circumstances arise where an enforcement agency may decline to consider cooperation and assistance from a foreign enforcement agency if there are concerns about foreign agency integrity, corruption, or the ability to maintain the covert nature of investigation.[158] Enforcers from some states might also decline to agree to a foreign anti-corruption investigation cooperation request if there were substantial concerns that the investigation was solely motivated by political considerations.[159] Some particularly non-friendly states may even decline a formal cooperation request based on treaty obligations seemingly to protect investigatory targets within their borders.[160] In other instances, enforcers might decline to seek cooperation in an investigation from a jurisdiction that retains the death penalty for corruption offenses.[161] In some states, like Brazil for example, cooperation is non-discretionary as a matter of law.[162]

Additionally, there are limits to the extent of cooperation. For example, it would not be possible for U.S. enforcement agencies to enter into a joint investigation team—as France and the United Kingdom did in *Airbus*[163]—

153. Telephone Interview with Patrick Pericak, Senior Managing Director, FTI Consulting (July 2, 2020) (Pericak is a former Trial Attorney with the U.S. Department of Justice's Criminal Fraud Section.).

154. *Id.*

155. Telephone Interview with Ephraim Wernick, *supra* note 145.

156. Telephone Interview with Patrick Pericak, *supra* note 154.

157. Telephone Interview with Former Joint Head of Bribery and Corruption, United Kingdom's Serious Fraud Office ("SFO") (July 8, 2020).

158. Telephone Interview with Ephraim Wernick, *supra* note 145.

159. Telephone Interview with Patrick Pericak, *supra* note 154.

160. Telephone Interview with Taavi Pern, *supra* note 146.

161. Telephone Interview with Former Joint Head of Bribery & Corruption, U.K.'s SFO, *supra* note 158.

162. Telephone Interview with Marcello Miller, *supra* note 147.

163. The label "joint investigation team" may somewhat exaggerate the level of cooperation entailed by this arrangement. Typically, although the investigation is run jointly, the enforcers from different countries maintain a certain level of independence. *See* Telephone Interview with Former Joint Head of Bribery & Corruption, U.K.'s SFO, *supra* note 158.

because of U.S. concerns about discovery obligations.[164] Cooperation is informal, and enforcement agencies may work nearly in unison.[165] In practice, given the complexities of differences in cultures and legal systems, the investigation cooperation process may be frustrating and bear little fruit.[166]

B. Anti-Corruption Settlements

In deciding whether to coordinate with foreign anti-corruption enforcers during the resolution phase, enforcement professionals report typically undertaking a nuanced evaluation intended to further their state's own investigation and the shared global anti-corruption capability. For instance, enforcers report delaying unilateral resolution in favor of multi-state resolution as a matter of courtesy and professionalism to their foreign colleagues.[167] In terms of U.S. enforcement decisions to jointly resolve a matter with a foreign enforcement agency, enforcers report that the decision might be influenced by an incentive to lend U.S. credibility to the foreign agency's efforts.[168]

Joint resolutions may cause complications for enforcement authorities.[169] For instance, it appears there may have been tension between French and U.S. investigations into Airbus because of French efforts to assert their independence and demonstrate their new anti-corruption compliance capabilities under Sapin II and the general thinking that the United States often investigates non-American entities—like Airbus—to protect U.S. interests—like Boeing.[170] Indeed, the French government was criticized domestically for working with the United States to resolve *Airbus*.[171]

Generally, it would be natural for states cooperating in the investigation phase to discuss a joint resolution.[172] It is nearly inconceivable that states would consider a joint resolution if they had not previously worked together

164. Interview with Ephraim Wernick, *supra* note 145.

165. Interview with Marcello Miller, *supra* note 147.

166. *See* Interview with Patrick Pericak, *supra* note 154; *see also* Interview with Former Joint Head of Bribery & Corruption, U.K.'s SFO, *supra* note 158.

167. *See* Interview with Patrick Pericak, *supra* note 154; *see also* Interview with Former Joint Head of Bribery & Corruption, U.K.'s SFO, *supra* note 158.

168. *See* Interview with Patrick Pericak, *supra* note 154; *see also* Interview with Former Joint Head of Bribery & Corruption, U.K.'s SFO, *supra* note 158.

169. *See* Interview with Patrick Pericak, *supra* note 154; *see also* Interview with Former Joint Head of Bribery & Corruption, U.K.'s SFO, *supra* note 158.

170. Beioley, *supra* note 10; *see also* Robert Lea, *US 'Set to Join' Airbus Corruption Inquiry*, The Times (Aug. 15, 2016), https://www.thetimes.co.uk/article/us-set-to-join-airbus-corruption-inquiry-5w0pjhfhh [https://perma.cc/74WB-QDHL].

171. James Thomas, *Airbus Settlement Proves France Can Go Toe-to-Toe with US Prosecutors*, Glob. Investigations Rev. (Feb. 19, 2020), https://globalinvestigationsreview.com/news-and-features/investigators-guides/france/article/airbus-settlement-proves-france-can-go-toe-toe-us-prosecutors [https://perma.cc/P5MP-ZFNP].

172. Interview with Ephraim Wernick, *supra* note 145.

on the investigation.[173] Even then, however, an opportunity for a joint resolution might be diminished because of the relationship between the states involved.[174] Before deciding whether to pursue a joint resolution, enforcers from different countries would likely consider basic parameters of the resolution, including whether the different states involved are intent on resolving based on the same conduct and whether they wish to allocate charging conduct based on geography, as appears to have occurred in *Airbus*.[175]

Enforcers report that after a decision is made to attempt to jointly resolve a matter with a foreign enforcement agency, typically the enforcement agency parties reach out to the corporate entity to suggest the joint resolution.[176] From that point forward the enforcement agencies typically negotiate independently with the entity while meeting bilaterally to coordinate amongst themselves.[177] The actual negotiations as to the specific terms of a joint settlement involving a foreign enforcement agency are known to be quite contentious at times—both in terms of the negotiations between the entity and the enforcement agencies and amongst the enforcement agencies themselves.[178]

Even if states cooperate during the investigatory phase, enforcement agencies may decline to seek a joint resolution with a state if that state does not have the complementary enforcement mechanisms.[179] For instance, a state that seeks to use DPAs in the anti-corruption context may decline to consider a joint resolution with a state that does not provide for DPAs.[180]

In determining the apportionment of the total financial penalty, as well as whether to apply credits and to what extent, enforcers generally consider the "sweat equity" that each enforcement agency committed to the investigation, the level of evidence that each party developed, and the "interest" that each state has in the entity and the conduct.[181] Moreover, negotiation concessions may be made to develop trust between enforcement agencies and encourage further anti-corruption capabilities.[182] There is no rigid financial formula applied to the apportionment, credit amount or priority of claim; rather, it is generally a matter of informal negotiation.[183] At least for DOJ enforcers, however, the starting point of the negotiation is determined by reference to

173. Interview with Marcello Miller, *supra* note 147.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. Interview with Former Joint Head of Bribery & Corruption, U.K.'s SFO, *supra* note 158.

180. *Id.*

181. *Id.*; Interview with Ephraim Wernick, *supra* note 145; Interview with Patrick Pericak, *supra* note 154.

182. Interview with Marcello Miller, *supra* note 147; Interview with Patrick Pericak, *supra* note 154.

183. Interview with Marcello Miller, *supra* note 147.

the total possible fine amount pursuant to U.S. Sentencing Guidelines.[184] This information is consistent with the data from the settlements explored.[185] In some resolutions, it appears that the home state nexus is a strong apportionment factor. That does not, however, hold true throughout the entire data set.

In reference to the challenges presented by carbon copy prosecutions, enforcers expressed both frustration and optimism.[186] Because of the reality of carbon copy prosecutions, enforcers are limited in the "carrot" they may offer to encourage settlement.[187] Indeed, an enforcer may not offer an entity the traditional litigation settlement notions of "certainty" and "finality" because they cannot compel other states to join the settlement.[188] Some enforcers have raised the idea of establishing a type of international process whereby states with potential claims would be compelled to either join settlements or bring claims within a reasonable time period.[189] Nonetheless, at least from the U.S. perspective, prosecutors must include a description of enough relevant conduct to prove the allegations of the offense.[190] In some cases, corporate counsel might actually prefer to expressly include covered conduct from other jurisdictions in the settlement documents to later bolster an argument against future prosecutions based on the theory of "double jeopardy."[191] Moreover, conduct included in settlement documents is a matter of negotiation with defense counsel and enforcement agencies may even agree to decline to require specific identifications of states.[192]

Enforcers generally report that they may decline to move forward with an investigation or resolution when a prior settlement is considered fair and adequate and national interests are vindicated.[193] In such instances, an agency might decline to even initiate an investigation.[194] Alternatively, there are circumstances under which an enforcement agency may jointly cooperate with an agency from another state during the investigation phase and decline

184. Interview with Ephraim Wernick, *supra* note 145; Interview with Patrick Pericak, *supra* note 154; *see also* U.S. SENTENCING COMM'N, GUIDELINES MANUAL, §§ 2B4.1, 2C1.1 (Nov. 2018).

185. *See* discussion *supra* Section IV.I.

186. *See* Interview with Ephraim Wernick, *supra* note 145; Interview with Taavi Pern, *supra* note 146; Interview with Marcello Miller, *supra* note 147; Interview with Patrick Pericak, *supra* note 154; Interview with Former Joint Head of Bribery & Corruption, U.K.'s SFO, *supra* note 158.

187. *See* Interview with Ephraim Wernick, *supra* note 145; Interview with Taavi Pern, *supra* note 146; Interview with Marcello Miller, *supra* note 147; Interview with Patrick Pericak, *supra* note 154; Interview with Former Joint Head of Bribery & Corruption, U.K.'s SFO, *supra* note 158.

188. Interview with Former Joint Head of Bribery & Corruption, U.K.'s SFO, *supra* note 158.

189. Interview with Marcello Miller, *supra* note 147.

190. Interview with Ephraim Wernick, *supra* note 145.

191. *Id.*

192. Interview with Patrick Pericak, *supra* note 154.

193. *Id.*; Interview with Former Joint Head of Bribery & Corruption, U.K.'s SFO, *supra* note 158.

194. Interview with Former Joint Head of Bribery & Corruption, U.K.'s SFO, *supra* note 158.

prosecution in favor of the other state's prosecution efforts solely based on equitable considerations.[195]

An enforcement agency might also decline enforcement against a company if the agency is able to identify an individual wrongdoer that it wishes to prosecute.[196] As such, under certain circumstances, an agency might consider the adequacy of enforcement against individuals when determining whether to proceed against a company.[197] The reality, however, is that the prosecutions of individuals also typically makes it easier to prove a case against an entity under criminal agency principles.[198] Prosecutors are bound to balance these two competing considerations, including when the individual may been may have been prosecuted by a foreign authority.[199]

By making such decisions, enforcers intend to send a message to the public and the markets that they are not heavy-handed and prefer fair settlements with other enforcement agencies that will encourage self-reporting and cooperation.[200] In this regard, enforcement agencies have given substantial thought to the possibility that declining enforcement may advance global anti-corruption capabilities.[201] But in some nations, such as Brazil, declinations are not permitted as a matter of law.[202] With very limited exceptions for the Brazilians, if a possible claim exists, it must be asserted.[203]

VI. Emerging Guiding Principles of Cooperation and Coordination in Transnational Anti-Corruption Investigations and Resolutions

The foregoing information provides the basis for the identification of emerging guiding principles of cooperation and coordination in transnational anti-corruption investigations and resolutions. The following identified principles are not exclusive, exhaustive, or compulsory. Yet, their identification and description may be useful to better understand the incentives, motivations, and objectives of anti-corruption enforcement agencies as they seek to carry forth their duties and execute their authority with equity and discretion in the transnational anti-corruption environment. These principles may be particularly useful to companies and corporate counsel facing corruption issues or risking exposure as they attempt to chart

195. Interview with Taavi Pern, *supra* note 146.

196. Interview with Ephraim Wernick, *supra* note 145.

197. *Id.*

198. *Id.*

199. *Id.*

200. Interview with Patrick Pericak, *supra* note 154.

201. *Id.*

202. Interview with Marcello Miller, *supra* note 147.

203. *Id.*

a path forward.[204] Indeed, identifying a set of guiding principles may lower costs of both enforcement and defensive representation, increase predictability, encourage voluntary self-disclosures, and, more generally, move us further toward an optimal level of transparency and deterrence.[205]

A. Enforcement Agencies Seek to Coordinate and Cooperate During the Investigatory Stage if the Benefits of Cooperation Outweigh the Costs

States with an interest in the anti-corruption movement seek to cooperate with other states in anti-corruption investigations to the extent that such cooperation advances their own anti-corruption efforts and comports with their general policy objectives. As the *Soc Gen*, *Airbus*, *VimpelCom*, *Telia*, *Petrobras*, *Odebrecht*, *Braskem*, and *Rolls-Royce* matters illustrate, at least the following states have cooperated amongst themselves in recent anti-corruption investigations: the United States, the United Kingdom, Switzerland, France, Brazil, the Netherlands, Sweden, Switzerland, Latvia, Belgium, Ireland, Luxembourg, Austria, Cyprus, Norway, Isle of Man, Germany, Singapore, and Turkey.[206] In at least one instance, as seen in the *Airbus* case, states have actually formed joint investigatory teams.[207] While the cases surveyed here demonstrate coordination is predominately between the United States and European authorities, coordination and cooperation in anti-corruption efforts is becoming more global.[208] As the enforcer interviews established, however, a decision to cooperate or to seek cooperation from foreign anti-corruption counterparts is generally based a risk/benefit balancing test.[209] "The benefits of assistance from foreign anti-corruption institutions should not be accessed without taking into account the costs—foreign assistance sometimes comes at a price."[210] As a result of this principle, companies facing anti-corruption legal exposure should assume enforcement agencies will actively seek cooperation and share information with their foreign counterparts.

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204. *See* OECD, Anti-Corruption Ethics & Compliance Handbook for Business 10 (2013), https://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf [https://perma.cc/HCK4-XSFN].

205. Oded, *supra* note 24, at 253–57.

206. *See* discussion *supra* Section IV.

207. *See* discussion *supra* Section IV.B.

208. Kevin Abikoff et al., *FCPA & Anti-Bribery Alert*, Hughes, Hubbard & Reed LLP 109 (Dec. 23, 2016), https://www.hugheshubbard.com/news/fcpa-anti-bribery-alert-fall-2016 [https://perma.cc/TM3Y-5TLC] (detailing cooperation provided the SEC by the South African Financial Services Board and the African Development Bank's Integrity and Anti-Corruption Department in relation to enforcement action against Hitachi).

209. *See* discussion *supra* Section V.A.

210. Kevin E. Davis et al., *Transnational Anticorruption Law in Action: Cases from Argentina and Brazil*, 40 L. & Soc. Inquiry 664, 693 (Summer 2015).

B. Enforcement Agencies Seek to Coordinate Resolutions with Enforcement Agencies From Other Appropriate States in the Interest of Equity and Development of Global Anti-Corruption Capabilities

The *Soc Gen*, *Airbus*, *VimpelCom*, *Telia*, *Petrobras*, *Braskem*, *Odebrecht*, and *Rolls Royce* matters evidence that in recent years enforcement agencies from different states frequently sought to coordinate anti-corruption resolutions amongst themselves.[211] Settlement coordination, however, is not always desired or possible and will only be considered if the subject enforcement agency determines it is in the best interest of the state and the greater global anti-corruption regime.[212] As the enforcer interviews indicate, there is a substantial amount of discretion involved in this decision and it appears to be made on a case-by-case basis.[213] Enforcement agencies, however, do seem willing to delay their own resolutions, as demonstrated in the *Soc Gen* matter, in favor of joint resolution.[214]

Odebrecht, however, demonstrates that coordination amongst several states presents its own problems if other relevant states are not included in the resolution. As the Sanchez-Badins, two Brazilian lawyers, note:

> The recent increase of local anti-corruption investigations beyond the United States has increased the pressure to develop a more sophisticated system of cooperation among authorities from different jurisdictions. The experience of Odebrecht dramatically illustrates the underdevelopment of such transnational mechanisms of coordination. In the Car Wash case, investigations have unfolded in forty-nine other jurisdictions.[215]

Indeed, the carbon copy litigation dilemma is a very real challenge to the principle. In this context, the recent U.S. Supreme Court decision in *Gamble* might be particularly important.[216] As upheld in *Gamble* on June 17, 2019, the United States maintains its recognition of the "Dual Sovereignty Rule" under which two similar offenses against two states are separate and distinct and therefore not subject to domestic prohibition against double jeopardy.[217] First, there is some thought that the issues of fairness and equity in disputes implicating the laws of more than one state brought forth in

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211. *See* discussion *supra* Section IV.

212. *See* Stephen J. DeCosse et al., *Anticorruption Regulation Survey*, Jones Day 49 (Apr. 18, 2018), https://www.jonesday.com/en/insights/2018/04/anticorruption-regulation-survey-of-41-countries-2 [https://perma.cc/68BV-K4W3].

213. *See* Press Release, U.S. Dep't of Just., Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate, *supra* note 82, at ¶ 4.

214. *See* de Senneville & Wajsbrot, *supra* note 91, at ¶¶ 6–7.

215. *See, e.g.*, Michelle R. Sanchez-Badin & Arthur Sanchez-Badin, *supra* note 3, at 329.

216. Gamble v. United States, 139 S. Ct. 1960, 1966 (2019).

217. *Id.* at 1964.

Gamble may have informed the Anti-Piling-On Policy,[218] issued while *Gamble* was pending before the Supreme Court. Second, *Gamble*'s holding may have also enlightened a defense to carbon copy litigation not previously considered on a substantial level. Indeed, it is now apparent that defense counsel may not always seek to include in a resolution all states with possible jurisdiction and potential claims.[219] Some counsel may strategically exclude states with an intent to later mount a double jeopardy defense. Although the United States does not recognize double jeopardy in a dual sovereignty context,[220] other states do. Accordingly, when reaching resolution with some, but not all, states that have both jurisdiction and national interest in the conduct, defense counsel may defend carbon copy enforcement actions on this theory of double jeopardy. More generally, as a result of this emerging principle, companies and their counsel would be wise to consider all possible combination of joint resolutions, and the risks and rewards of each, when considering negotiation of an anti-corruption settlement.

C. Enforcement Agencies Consider Equitable Apportionment of Total Penalties and Crediting of Penalties and Profit Disgorgements Paid to Other States to Encourage Anti-Corruption Capacity Building and Future Voluntary Self-Reporting by Offending Entities

Both *Soc Gen* and *Airbus* demonstrate that "crediting" is a method by which enforcement agencies may properly prosecute statutorily based penalties while at the same time using principles of equity and deference to fashion a resolution that is just and does not amount to double enforcement.[221] *Petrobras*, *Odebrecht*, and *Braskem* demonstrate that, even without crediting, states apportion total settlement amounts in multi-state settlement scenarios.[222] Similarities may be drawn between crediting done in the anti-corruption context and crediting against tax liability by U.S. tax authorities for taxes paid to foreign tax authorities.[223] Both types of crediting allow agencies to recognize potential financial assessments generally authorized under regulatory schemes while also allowing for concessions made in the interest of equity and fairness.[224] While taxes are not punitive in

218. *See* discussion *supra* Section III.

219. *See* discussion *supra* Section V.B.

220. Hock, *supra* note 16, at 325.

221. *See* discussion *supra* Sections IV.A., IV.B.

222. *See* discussion *supra* Sections IV.E., IV.F.

223. *See* Staff of J. Comm. on Taxation, 114th Cong., Present Law and Selected Policy Issues in the U.S. Taxation of Cross-Border Income 3 (Comm. Print Mar. 16, 2015).

224. *See id.* at 4.

nature, as anti-corruption penalties are, it is quite possible that the concept of anti-corruption crediting was "borrowed" from the U.S. tax law regime.[225]

Apportionment deference in this context is also considered as a means of encouraging another state's development of anti-corruption capabilities.[226] In *Airbus*, the United States expressly stated in a press release that its relatively lower settlement amount was in recognition of France and the United Kingdom's "interest" in Airbus's conduct and their "compelling equities" to vindicate their "respective interests."[227] In *Airbus*, this deference was likely based on the fact that Airbus is owned in part by the French government and much of the elicit conduct took place in, or was directed from, France and the United Kingdom.[228] Moreover, Airbus employs eleven thousand in the United Kingdom and provides for thousands more jobs though its supply chain.[229] Airbus employs nearly fifty thousand people in France.[230] In *Airbus*, France was also enthusiastic to demonstrate its competence with the new Sapin II law, which holds that deference by an established enforcement agency to a less established counterpart agency may be used to convey legitimacy and trust.[231] These messages, in turn, may build the general enforcement capability of that agency.

Of note, coordinated settlements are not a predicate for crediting in the transnational settlement context. For instance, in entering into a DPA with SBM Offshore in connection with bribes paid to foreign officials in Brazil, Angola, Equatorial Guinea, Kazakhstan, and Iraq, the DOJ agreed to credit SBM Offshore for a $240 million penalty the company already paid to the Dutch Public Prosecutor's Office.[232]

As a result of this emerging principle, companies and their counsel should keep a keen eye towards opportunities to facilitate the apportionment and credit process for enforcement agencies and look for occasions to reduce the overall financial exposure through crediting and enforcement deference.

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225. *See* Press Release, U.S. Dep't of Justice, U.S. Dep't of Just., Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History *supra* note 126, at ¶ 18.

226. Commentators have argued that this type of deference be obligatory as established in "informal" agreements between members of the OECD convention. Rachel Brewster & Christine Dryden, *Building Multilateral Anticorruption Enforcement: Analogies Between International Trade and Anti-Bribery Law*, 57 VA. J. INT'L L. 221, 253–54 (Spring 2018).

227. *See* discussion *supra* Section IV.B.

228. *Airbus in France*, AIRBUS ¶ 2, https://www.airbus.com/company/worldwide-presence/france.html [https://perma.cc/C9GE-CUNB] (last visited Dec. 20, 2020).

229. Lea, *supra* note 171.

230. *See Airbus in France*, *supra* note 229, at ¶ 1.

231. *See* discussion *supra* Section IV.B.

232. *See* Press Release, U.S. Dep't Justice, SBM Offshore N.V. and United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribery in Five Countries ¶ 1 (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/V4XG-GQQC].

D. Enforcement Agencies Consider "Side-Stepping" to Encourage Anti-Corruption Capacity Building and Future Voluntary Self-Reporting by Offending Entities

The term "side-stepping" is used to describe situations in which an enforcement agency declines to move forward with an enforcement action when the target already resolved charges based on the same facts with a different enforcement agency.[233] Enforcement agencies employ side-stepping in both deference to their foreign counterparts to encourage development of legitimacy and capabilities, and also to encourage self-reporting.[234] An entity faced with an anti-corruption concern will be more able to voluntarily report conduct to various enforcement agencies if it is confident that those agencies will not seek double-enforcement. The DOJ's treatment of Guralp exemplifies side-stepping.[235]

Until recently, the DOJ's FCPA declinations were not made public, leaving the anti-corruption defense bar to speculate as to whether side-stepping decisions were actually made.[236] That changed in November 2017.[237] Now, DOJ declination letters are publicly available.[238] DOJ officials have indicated that the *Guralp* declination reflects the Anti-Piling-On Policy.[239] But as seen in the *Statoil* matter, enforcers may decline to side-step if they are unsatisfied with a prior settlement. Indeed, as seen in *Statoil*, "[t]he United States has prosecuted companies after their home country governments have completed investigations and reached final settlements, in what appears to be an effort to register dissatisfaction with the resolution of the matter by home countries, either because the punishment was insufficient or the investigation was inadequately thorough."[240] As such, an enforcement decision not to side-step may be as much a signal to foreign enforcement counterparts as it is to the market.

As a result of this emerging principle, companies and their counsel facing anti-corruption exposure should marshal facts, when possible, demonstrating that alternative enforcement actions—either already taken or underway—are

233. Oded, *supra* note 24, at 229.

234. *Id.*

235. *See* discussion *supra* Section IV.G.

236. Holtmeier et al., *supra* note 81, at 511–12.

237. *See* Rod J. Rosenstein, Deputy Attorney General, U.S. Dep't of Justice, Remarks at the 34th International Conference of the Foreign Corrupt Practices Act ¶¶ 33, 36-39, 42 (Nov. 29, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign [https://perma.cc/68SC-GKTU]; *see also* U.S. Dep't of Justice, Justice Manual Ch. 9-47.120, FCPA Corporate Enforcement Policy § 4 (Mar. 2019), https://www.justice.gov/criminal-fraud/file/838416/download [https://perma.cc/XTW3-2S5K].

238. *See Declinations*, U.S. Dep't of Just., (Aug. 6, 2020), https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations [https://perma.cc/VV5H-RL7H].

239. *See* discussion *supra* Section III.

240. Magnuson, *supra* note 78, at 414.

just, reasonable, and adequate and that further enforcements actions would be imprudent.

E. Enforcement Agencies Consider Deference to Other States for Monitoring Purposes to Encourage Anti-Corruption Capacity Building

Soc Gen, *Airbus*, and *Petrobras* demonstrate that enforcement agencies, at least U.S. enforcement agencies, will defer to other states for compliance monitoring purposes when those states have the required capability.[241] Independent compliance monitors in the FCPA context are frequently utilized by the DOJ, as part of the terms of a DPA, to assure future compliance.[242] Monitors are often an expensive and cumbersome burden for corporate entities. In *Soc Gen*, *Airbus*, and *Petrobras*, the United States declined to appoint a monitor and expressly stated that it was declining such a requirement because the entity was going to be monitored by a foreign agency.[243] It appears that such deference is exercised to signal legitimacy and anti-corruption capacity building in foreign counterparts.

As a result of this emerging principle, companies and their counsel facing anti-corruption issues, particularly with U.S. enforcement agencies, might argue that governmental agencies in the home state are capable to monitor anti-corruption compliance going forward. If successful, this argument may be significant, as under U.S. practice, compliance monitors are generally private attorneys.[244] Such forced engagement of private attorneys as compliance monitors may be exceedingly expensive for offending entities.

VII. Conclusion

As the global community continues to move forward with the worthwhile anti-corruption effort, we will continue to see, likely with increasing frequency, circumstances where multiple states work together to investigate and resolve anti-corruption enforcement actions. In the absence of a formal collective institutional anti-corruption resolution system, we will likely continue to see these investigations and resolutions guided by the emerging principles identified herein. Although the present system is not perfect, it appears to be in the competent and well-meaning hands of anti-corruption enforcement agencies that seek justice, deterrence, and encouragement of the growing shared global anti-corruption capability on equitable terms.

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241. *See* discussion *supra* Sections IV.A, IV.B, IV.E.

242. *Monitorships: List of Independent Compliance Monitors for Active Fraud Section Monitorships*, U.S. Dep't of Just. (Oct. 16, 2020), https://www.justice.gov/criminal-fraud/strategy-policy-and-training-unit/monitorships [https://perma.cc/9CUJ-UKXK].

243. *See* discussion *supra* Sections IV.A, IV.B, IV.E.

244. *Id.*