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Beyond "Equity": The Continued Search for Guiding Principles of Transnational Anti-Corruption Investigations

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ABSTRACT

The recent global proliferation of domestic anti-corruption laws intended to have extraterritorial application has led to circumstances where multiple states seek to enforce their anti-corruption laws against the same entities based on the same set of facts. This work examines the development of these transnational enforcement circumstances, as well as the attendant policy complications, and poses the following research question: when approaching multi-jurisdictional anti-corruption enforcement efforts, have enforcement agencies developed a set of principles beyond general "equity" to inform their decisions about when and how to cooperate in investigations and coordinate and structure appropriate transnational anti-corruption settlement penalties? To attempt to answer this question, this work evaluates the context of these enforcement developments, recent transnational anti-corruption resolutions and interviews with former and current anti-corruption prosecutors from various states. The work concludes that the following guiding principles are emerging: (1) enforcement agencies seek to coordinate and cooperate during the investigatory stage if the benefits of cooperation outweigh the costs; (2) enforcement agencies seek to coordinate resolutions with enforcement agencies from other appropriate states recognition of jurisdictional nexuses and development of global anti-corruption efforts; (3) enforcement agencies utilize crediting of penalties and profit disgorgements paid to other states to both maintain domestic statutory enforcement and consistency and to encourage anti-corruption capacity building and future voluntary self-reporting by offending entities; (4) enforcement agencies consider "side-stepping" to encourage anti-corruption capacity building and future voluntary self-reporting by offending entities; and (5) enforcement agencies consider deference to other states for monitoring purposes to encourage anti-corruption capacity building. The identification of these emerging principles may provide additional insight into the investigation and resolution process and may inform entities and corporate counsel as they navigate potential transnational anti-corruption exposure.

KEYWORDS

Anti-Corruption; Bribery, Corruption, Transnational, Coordination

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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 United States [hereinafter U.S.] Foreign Corrupt Practices Act [hereinafter the F.C.P.A.] 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 entities or individuals that fall under the jurisdiction of the "home" state.[6] As the number of these domestic laws has grown, many "overlapping" jurisdictions have developed in the anti-corruption context.[7] Various circumstances have arisen wherein 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 negotiated settlements with multiple enforcement agencies requiring payment of substantial monetary penalties, rather than trials in courtrooms.[9] For example, in 2020, 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

[1] Alexander Pope, The Works of Alexander Pope, With Notes and Illustrations, by Himself and others 235 (Will Roscoe ed., 1847).

[2] *See* 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)).

[3] *See generally* Kevin E. Davis, *Between Impunity and Imperialism: the Regulation of Transnational* Bribey (2019); Michelle R. Sanchez-Badin & Arthur Sanchez-Badin, *Anticorruption in Brazil: From Transnational Legal Order to Disorder*, 113 Ajil Unbound 326, (2019); *see also Anti-Corruption Regulation Survey of 42 Countries*, Jones Day Tokio (Nov. 1, 2019), https://www.jonesday.com/en/insights/2019/11/anticorruption-regulation-survey-2019 [https://perma.cc/3SAZ-5TDX].

[4] *See* 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, Dec. 17, 1997, 37 I.L.M. 1. (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).

[6] *See* Jessie M. Reniere, *Fairness in FCPA Enforcement: A Call for Self-Restraint and Transparency in Multijurisdictional Anti-Bribery Enforcement Actions*, 24 Roger Williams Univ. L. Rev. 167, 170 (2019).

[7] *Id.*

[8] *Id.*

[9] *Id.* at 178.

[10] *See, e.g.*, 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.

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 is a set of shared principles that govern the process.

The major domestic anti-corruption laws do not address these issues. For instance, the F.C.P.A.,[12] the United Kingdom [hereinafter 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 [hereinafter O.E.C.D.] Convention on Combating Bribery of Foreign Officials in International Business Transactions [hereinafter the O.E.C.D. Convention Against Bribery], adopted in 1997, states that when there is overlapping jurisdiction, all signatories should consult one another to determine the most appropriate jurisdiction and provide mutual legal assistance.[16] The United Nations Convention Against Corruption [hereinafter U.N.C.A.C.],[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

[11] *See* discussion *infra* Section 3.

[12] F.C.P.A., *supra* note 2.

[13] *See, e.g.*, U.K. Bribery Act 2010, UK Public General Acts, 2010 c. 23, http://www.legislation.gov.uk/ukpga/2010/23/contents. (Eng.).

[14] Lei No. 12846/14, de 1 de Agosto de 2013, *see* Diário Oficial da União [D.O.U.] de 29.01.2014 (Braz.), translated in Law No. 12,846 of August 1, 2013; *see also* 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] *See generally* U.N. Convention Against Corruption, Oct. 31, 2003, G.A. Res. 58/4, UN Doc. A/RES/58/4.

[16] Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, supra note 5, art. 9.; but see Branislav Hock, Transnational Bribery: When is Extraterritoriality Appropriate?, 11 CHARLESTON L. REV. 305, 323-24 (2017) (criticizing the O.E.C.D. Convention Against Bribery language about "appropriate jurisdiction" as too "wide" and accordingly of little use in guiding enforcement agencies facing overlapping jurisdictional claims).

[17] *See* United Nations Convention Against Corruption, *supra* note 15, 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* U.N.C.A.C., *supra* note 15.

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

assistance treaties [hereinafter M.L.A.T.s] 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 explains 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 [hereinafter D.O.J.][21] This document charges all department components and U.S. Attorneys that they 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 D.O.J.'s "Anti-Piling on Policy",[24] directs that D.O.J. 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 D.O.J. 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 D.O.J. prosecutors.[26] The document does not address cooperation or settlement coordination. Moreover, the "Anti-Piling on Policy" applies only to D.O.J. employees.[27]

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[19] Matt Reeder, *Bad Math: State-Centric Anti-Corruption Enforcement + International Information Sharing Agreements = Conflicting Corporate Incentives*, 49 Int'L. L. 325, 332 (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].

[22] *Id.*

[23] *Id.*

[24] Sharon Oded, *The DOJ's Anti-Piling on Policy: Time to Reflect?, in* Negotiated Settlement in Bribery Case: a Principled Approach 256 (Tina Søreide & Abiola Makinwa eds., 2020).

[25] *See* Memorandum from Rod J. Rosenstein, *supra* note 21.

[26] *Contra* Oded, *supra* note 24, at 253.

[27] *Id.*

Indeed, "while the D.O.J. 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 1 of this paper identifies the research methodology used to approach this question. Section 2 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 3 reviews recent global anti-corruption resolutions with an eye towards emerging principles. Section 4 reviews insights on these issues from interviews with former and current prosecutors employed by various governmental agencies tasked with enforcing anti-corruption laws. Section 5 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. Lastly follows the conclusion.

1. 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 as to 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.

[28] *Id.* at 253.

2. 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 F.C.P.A. 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 territories 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]

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 O.E.C.D. 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

[29] *See, e.g.*, 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/F.C.P.A./F.C.P.A.-resource-guide.pdf [https://perma.cc/CHY9-3HG2] (giving a primer on the F.C.P.A.); *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 F.C.P.A. jurisdictional issues).

[30] Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade against Corruption*, 33 VANDERBILT 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 LAW Contemp. Probs. 193, 198-99 (2017).

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

[35] See Christopher J. Duncan, The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism, 1 ASIAN-PACIFIC 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] See, e.g., U.K. Bribery Act 2010, supra note 13.

[37] See generally Renata Muzzi Gomes de Almeid & Shin Jae Kim, The New Brazilian Clean Company Act, EMPEA LEGAL Regul. Bull. 3 (2014), t.pdfhttps://www.empea.org/app/uploads/2017/03/Brazilian-Clean-Company-Act.pdf [Z-E4URhttps://perma.cc/D4RZ-E4UR].

enacted its own anti-corruption law—the Sapin II Legislation—and formed a new agency, the Agence Française Anticorruption [hereinafter the A.F.A.], 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 O.E.C.D. 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 F.C.P.A.,[42] they are not replicas of the F.C.P.A. . 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 robust compliance program and excludes a facilitation payment exception.[44] The Brazilian Clean Company Act differs from the F.C.P.A., 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 O.E.C.D. Convention Against Bribery's definition of bribery (which followed the F.C.P.A. definition).[46] States also borrow from U.S. enforcement agencies' anti-corruption protocols, including the use of deferred prosecution agreements [hereinafter the D.P.A.s], non-prosecution agreements [N.P.A.s], and publicized declinations of potential

[38] *See* Brandon L. Garrett, *The Path of F.C.P.A. Settlements, in* Negotiated Settlements in Bribery Cases: a Principled Approach 25, 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] O.C.E.D. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, May 2018, Senate Consideration of Treaty Document 105-43. *See* 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] *See* Glenn Ware & Kindra Mohr, *Anticorruption Litigation Does Not Stop at the Water's Edge*, 39 GLOB. LITIGATOR 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 (2014) (defining commercial bribery as, generally, bribery of non-governmental officials, usually in a business context). For 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] *See* Dominic Saglibene, *The U.K. Bribery Act: A Benchmark for Anti-Corruption Reform in the United States*, 23 Transat'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) (discussion on facilitation payments).
[45] *See* Lindsay B. Arrieta, *Taking the "Jeitinho" out of Brazilian Procurement: The Impact of Brazil's Anti-Bribery Law,* 44 Pub. Cony. L. J. 157, 170–74 (2014).
[46] See generally Organisation for Economic Cooperation and Development, Convention Against Bribery, *supra* note 5.

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 [the E.U.] 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. companies,[53] some states may view the United States' enforcement of the F.C.P.A. 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] One commentator has more gently asserted that the goal of the F.C.P.A. 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 F.C.P.A. prosecutions, increasingly target foreign corporations and foreign corporations pay larger fines than domestic corporations.[56] The latter finding stems from the fact that between 2004 and 2018, "the average F.C.P.A. monetary resolution against U.S. companies was $21,182,931, compared with $75,016,934 for non-U.S. companies".[57]

[47] *See* Garrett, *supra* note 38, at 38.
[48] See, e.g., Sanchez-Badin & 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] See generally Steve O'Hagan, Fuelling Corruption, Geographical, Nov. 2004, at 50, 50–51.
[51] The Costs of Corruption Across the European Union, see Greens/EFA Eur. Parl., (Dec 7, 2018), union/https://www.greens-efa.eu/en/article/document/the-costs-of-corruption-across-the-european-union/ [U-C78Phttps://perma.cc/9JKU-C78P].
[52] But see Ellen Gutterman, Banning Bribes Abroad: US Enforcement of the Foreign Corrupt Practices Act, 53 OSGOODE HALL L. J. 31, 38 (2015).
[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 F.C.P.A. enforcement, as a means of assisting U.S. firms in the competition for dominance among multi-nationals." *Id.*
[55] *See* Gutterman, *supra* note 52, at 49. The "central purpose of F.C.P.A. enforcement is to ensure competitive access to global markets by U.S. firms—not to control corruption more generally." *Id.* at 61.
[56] *See* Garrett, *supra* note 38, at 34.
[57] Michael S. Diamant et al., *F.C.P.A Enforcement Against U.S. and Non-U.S. Companies*, 8. MICH. BUS. & ENTRAPRENEURAL L. REV. 353, 371 (2019).

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]

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

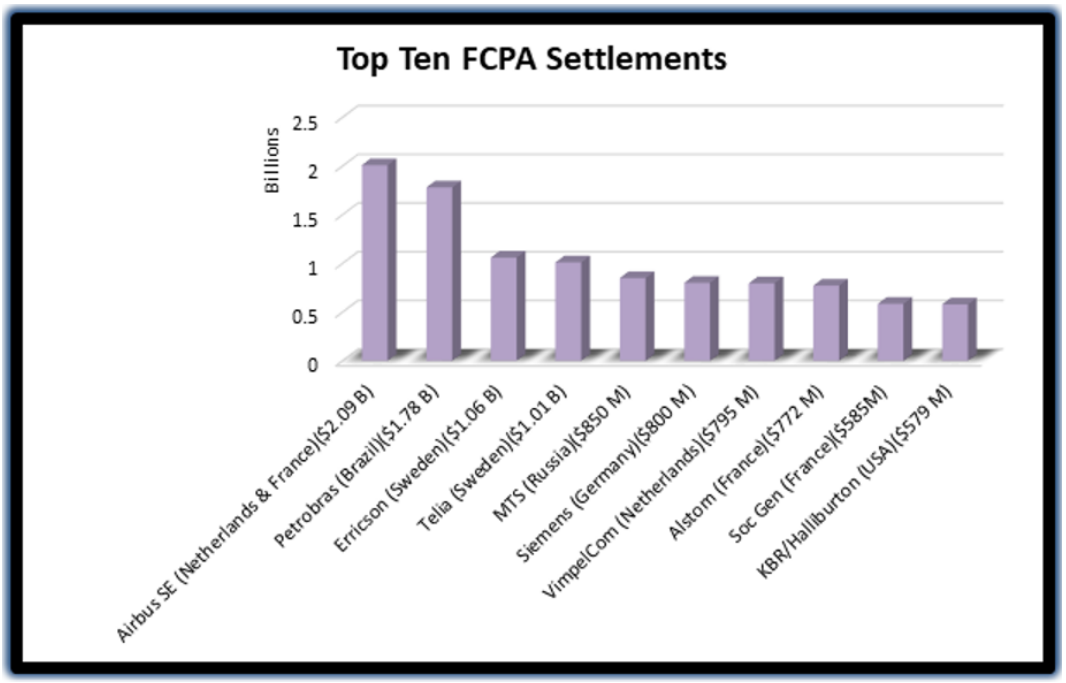

Figure 1

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 thirty seven of these

[58] *Id.*

[59] *See generally* Harry Cassin, *Airbus Shatters the F.C.P.A. Top Ten*, F.C.P.A Blog(Feb. 3, 2020, 7:48 AM)https://F.C.P.A.blog.com/2020/02/03/airbus-shatters-the-F.C.P.A.-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]

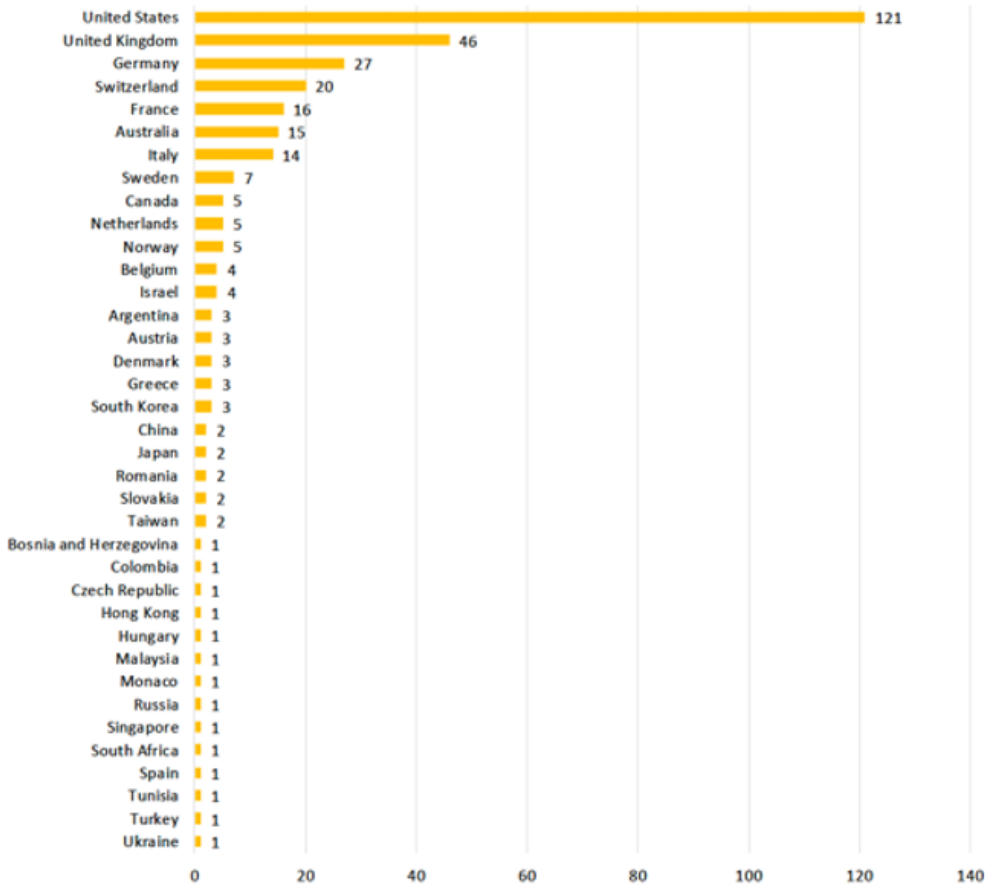

Figure 2: Investigations Concerning Bribery of Foreign Officials by Country

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 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

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

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 piggyback off the successful earlier enforcement action. This is true because most settlements - particularly under D.O.J. practice - typically include an agreed statement of facts.[69] Many Department of Justice's Foreign Corrupt Practices Act Settlements [hereinafter the D.O.J. F.C.P.A. 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 D.O.J. F.C.P.A. 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

[66] *See* 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] *See* Andrew S. Boutros & T. Markus Funk, *"Carbon Copy" Prosecution: A Growing Anticorruption Phenomenon in a Shrinking World,* 2012 U. Ch.I. Legal. F. 259, 269 (2012).

[68] *Id.*

[69] *Id.* at 275.

[70] *Id.* at 285.

[71] *See* 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 S.A.* matter, the D.O.J. and Security and Exchange commission [hereinafter S.E.C.] reached settlement with Alcatel-Lucent after the company had already settled the same conduct with Costa Rica. In the *GlaskoSmithKline* [hereinafter the G.S.K.] matter, G.S.K. reached settlement with Chinese authorities two years before it reached a settlement with the S.E.C. . *Id.*

[72] *See* Boutros & Funk, *supra* note 67, 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, 2:18-cv-810-FtM-99MRM, 2020 WL 1496151, 7 (M.D. Fla. 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. Super. Ct. 1992) (noting that public policy "favors the finality of negotiated settlements that avoid the costs and uncertainties of protracted litigation").

merit, it should be noted that once an 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 overlapping anti-corruption jurisdiction in the transnational

[73] *See, e.g.*, Oded, *supra* note 24, at 234.

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

[75] *See, e.g.*, Oded, *supra* note 24, at 234.

[76] *See* Boutros & Funk, *supra* note 67, 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).

context.[79] Given this context and in response to these challenges and criticism, the D.O.J. 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 D.O.J. and how U.S. and international enforcers cooperate and coordinate amongst themselves in the anti-corruption context.

3. 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 cases. 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.

3.1. SOCIÉTÉ GÉNÉRALE S.A. CORRUPTION SETTLEMENT - UNITED STATES AND FRANCE

In June 2018, Société Générale S.A. [hereinafter 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 [hereinafter L.I.B.O.R.].[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

[79] *But see* 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 Compar L. 485, 510 (2015).

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

[81] *See* 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 L.I.B.O.R. 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.*; United States v. SGA Société Générale S.A., 18-CR-274, Plea Agreement 2, (D.N.Y. 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).

paid to the Parquet National Financier [hereinafter P.N.F.].[83] The U.S. credit equaled exactly fifty percent of the total criminal penalty due to the United States.[84] In announcing the settlement, the D.O.J. 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 F.C.P.A. monitor,[86] in part, because Soc. Gen. was to be monitored by the A.F.A. .[87] In announcing the settlement, the D.O.J. expressly acknowledged the cooperation and assistance provided by the P.N.F., the United Kingdom's Serious Fraud Office [hereinafter S.F.O.], the Federal Office of Justice in Switzerland, and the Office of Attorney General in Switzerland [hereinafter Swiss A.G.].[88] The United States settlement with Soc. Gen. included a D.P.A. requiring cooperation with international law enforcement efforts and a detailed agreed statement of facts.[89]

The D.O.J. opened its investigation nearly two years before the P.N.F. 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 D.O.J. delayed resolution with Soc. Gen. to allow the P.N.F. to complete its inquiry and conclude a joint resolution. French commentators believe the delegation of monitoring responsibility to the A.F.A. was of substantial import, as it signaled the credibility and authority of French enforcement agencies.[91]

[83] *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 L.I.B.O.R. Rate, *supra* note 81.
[84] *Id.*
[85] *Id.*
[86] *See* discussion *infra* Section 5.5. (further discussing monitors, which in this context are private attorneys engaged by the corporate entity at their expense and with the approval of the D.O.J. to monitor the entity's prospective remediation and compliance efforts under the terms of the agreement between the entity and the D.O.J.).
[87] *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 L.I.B.O.R. Rate, *supra* note 82.
[88] *Id.*
[89] S.G.A. Société Générale S.A., *supra* note 82 (in accordance with a deferred prosecution agreement).
[90] *See* 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.*

3.2. AIRBUS S.E. CORRUPTION SETTLEMENT - UNITED STATES, FRANCE AND UNITED KINGDOM

In January 2020, Airbus SE [hereinafter 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 around the world and to resolve the company's violations of the U.S. Arms Export Control Act [A.E.C.A.] and the International Traffic in Arms Regulations [hereinafter I.T.A.R.].[93] Airbus agreed to pay the United States $527 million to settle the F.C.P.A. and I.T.A.R. 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 D.O.J. declined to require an appointment of a compliance monitor, in part because Airbus was subject to oversight from the A.F.A. .[96] The resolution expressly recognizes the U.S. ability to assert F.C.P.A. 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 P.N.F. in France. The [D.O.J.] will continue to work aggressively with our partners across the globe to root out corruption, particularly corruption that harms American interests.[98]

[92] See Press Release, U.S. Dep't of Just., Airbus Agrees to Pay Over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and I.T.A.R. Case, The United States Department of Justice (Jan. 31, 2018), https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itarcase#:~: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/46K844J2].

[93] Id.

[94] Id.

[95] Id.

[96] *See* United States v. Airbus SE, 1226425, Airbus Deferred Prosecution Agreement 4(f), (D.D.C. 2020), The United States Department of Justice, https://www.justice.gov/opa/press-release/file/1241466/download [https://perma.cc/R6XN-WUXU].

[97] *Id.* § 4(i).

[98] U.S. Dep't Just., Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and I.T.A.R. Case, *supra* note 92.

Although anti-corruption inquiries of Airbus began with the S.F.O. 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 D.O.J. made an explicit decision to seek a substantially lower penalty than its French and British counterparts, instead of only "crediting", because of Airbus's nexus to Europe and those states in particular.[101] In announcing the joint resolution, the D.O.J. stated:

> [F]or the F.C.P.A.-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 interests as those countries deem appropriate, and the [D.O.J.] has taken into account these countries' determination of the appropriate resolution into all aspects of the U.S. resolution.[102]

3.3. VIMPELCOM CORRUPTION SETTLEMENT - UNITED STATES AND THE NETHERLANDS

In February 2016, VimpelCom Ltd. [hereinafter VimpelCom] and its wholly owned Uzbek subsidiary, Unitel LLC [hereinafter 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 D.O.J. to pay $230 million.[105] VimpelCom agreed to pay the S.E.C. and the Public Prosecution Service of the Netherlands - Openbaar Ministrie [hereinafter the O.M.] - $375 million (to be divided amongst them).[106] Separately, VimpelCom agreed to pay the O.M. $230

[99] *See* 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 I.T.A.R. Case, *supra* note 92.
[102] *Id.*
[103] *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 (Feb. 18, 2016), https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more795-million [https://perma.cc/U9HV-W6XW].
[104] *Id.*
[105] *Id.*
[106] *Id.*

million in criminal penalties.[107] The D.O.J. agreed to credit the criminal penalty paid to the O.M. towards the total U.S. criminal penalty.[108] In separate civil actions, the D.O.J. 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]

3.4. TELIA CORRUPTION SETTLEMENT - UNITED STATES, SWEDEN, AND THE NETHERLANDS

In November 2017, Swedish company Telia Company AB [hereinafter Telia] and its Uzbek subsidiary, Coscom L.L.C. [hereinafter 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 resolution with the D.O.J., Telia agreed to pay a criminal penalty of $275 million.[112] Telia agreed with the S.E.C. to a disgorgement of profits and interest of $457 million, with the S.E.C. agreeing to credit half that amount in disgorged profits if Telia makes payment of the same to either the Swedish Prosecution Authority, or the O.M. .[113] Separately, Telia agreed to pay O.M. $274 million in criminal penalties.[114] The D.O.J. agreed to credit the criminal penalty paid to the O.M. in its agreement.[115] In announcing the settlement, Acting D.O.J. Assistant Attorney General Kenneth A. Blanco stated the following: "This resolution underscores the Department's continued and unwavering commitment to robust F.C.P.A. 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]

[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *See* 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 Uzbekistan, (Sept. 21, 2017), https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolutionmore965#:~: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.*

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]

3.5. PETROBRAS AND CORRUPTION SETTLEMENT - BRAZIL AND THE UNITED STATES

In September 2018, Petróleo Brasileiro S.A.-Petrobras [hereinafter 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 D.O.J., S.E.C., and the Ministerio Publico Federal in Brazil [hereinafter M.P.L.], Petrobras agreed to pay a total criminal penalty of $853 million, with the United States receiving twenty percent and Brazil receiving eighty percent.[121] In explaining the settlement, the D.O.J. 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 S.E.C. to disgorgement of profits and interests in the amount of $933 million.[123] In declining to require appointment of a compliance monitor, D.O.J. 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]

[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *See* Press Release, U.S. Dep't of Just., Petróleo Brasilero S.A.-Petrobras Agrees to Pay More Than $850 Million for F.C.P.A. Violations, THE UNITED STATES DEPARTMENT OF JUSTICE (Sept. 27, 2018), https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-F.C.P.A.-violations [https://perma.cc/6RE2-CB5K].
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] Letter from Sandra Moser, Acting Chief, U.S. Dep't Just., to Joseph Warin, Gibson, Dunn, & Crutcher, L.L.P. (Sept. 26, 2018), https://F.C.P.A..shearman.com/siteFiles/F.C.P.A.%20Cases/Petrobras%20-%20NPA.pdf [https://perma.cc/6N8R-E2LS].

3.6. ODEBRECHT AND BRASKEM CORRUPTION SETTLEMENT - BRAZIL, UNITED STATES, AND SWITZERLAND

In December 2016, Brazilian construction company Odebrecht S.A. [hereinafter Odebrecht] and Brazilian petrochemical company Braskem S.A. [hereinafter 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 D.O.J., the M.P.L., and the Swiss A.G., with the United States and Switzerland receiving ten percent each and Brazil twenty percent of the total criminal penalty of $4.5 billion from Odebrecht.[126]

In resolution with D.O.J., Braskem agreed to pay the United States $632 million in criminal penalties.[127] Braskem also agreed with the S.E.C., M.P.L., and Swiss A.G. that Braskem would pay a total of $325 million in disgorgement of profits, with seventy percent going to Brazil and fifteen 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 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]

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[125] *See* 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-penaltiesresolve#: :text=Odebrecht%20S.A.%20(Odebrecht)%2C%20a,States%2C%20Brazil%20and%20Switzerland%20arising [https://perma.cc/W7FN-KSCE].

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *See generally* Sanchez-Badin & Sanchez-Badin, *supra* note 3, at 329–30.

[130] *Id.*

[131] *See* discussion *supra* Section 4.2. .

[132] *See* Sanchez-Badin & Sanchez-Badin, *supra* note 3, at 330.

[133] *Id.*

3.7. 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 [hereinafter 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 two million pounds in profit disgorgement.[135]

While the D.O.J. 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 paral 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 S.F.O. .[136]

3.8. ROLLS-ROYCE PLC CORRUPTION SETTLEMENT - BRAZIL, UNITED KINGDOM, AND UNITED STATES

In January 2017, Rolls Royce P.L.C. [hereinafter 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 States $170 million and enter into a D.P.A.[138] Rolls-Royce agreed to pay the United Kingdom $604 million and enter into a D.P.A.[139] Rolls-Royce agreed to pay Brazilian authorities $26 million with that amount to be

[134] *See generally* Statement of Facts, Regina (Serious Fraud Office) v. Guralp Systems Ltd., https://cdn.wide-area.com/acuris/files/private-equity-law-report/documents/Guralp%20Statement%20of%20Facts.pdf [https://perma.cc/T7NT-R94V], (last visited Dec. 19, 2020).

[135] *See generally* Deferred Prosection Agreement, Serious Fraud Office v. Guralp Systems Ltd., SERIOUS FREUD OFFICE, https://www.S.F.O..gov.uk/download/deferred-prosecution-agreement-statement-of-facts-approved-judgment-S.F.O.-v-guralp-systems-ltd/ [https://perma.cc/EUV6-QX5K], (last visited Dec. 19, 2020).

[136] *See* Letter from Daniel S. Kahn, Deputy Chief, U.S. Dep't Just., Criminal Division to Matthew Reinhard, at Miller and Chevalier Chartered, THE UNITED STATES DEPARTMENT OF JUSTICE (Aug. 20, 2018), https://www.justice.gov/criminal-fraud/page/file/1088621/download [https://perma.cc/58BJ-2KMN].

[137] *See* Press Release, *U.S. Dep't Just., Rolls-Royce P.L.C. Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case*, THE UNITED STATES DEPARTMENT OF JUSTICE (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].

[138] *Id.*

[139] *Id.*

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]

3.9. 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)

Table 1

[140] *Id.*

[141] *But see* Henry Cassin, *UK Ends Draft Investigation of GSK and Individuals at Rolls-Royce*, F.C.P.A. BLOG (Feb. 25, 2019, 1:28 PM), https://F.C.P.A.blog.com/2019/02/25/uk-ends-graft-investigations-of-gsk-and-individuals-at-rolls/ [https://perma.cc/GBR8-458H]; *see also* Case Updates, U.K. Serious Frauds Off., S.F.O. Closes GlaxoSmithKline Investigation and Investigation into Rolls-Royce Individuals, SERIOUS FREUD OFFICE (Feb. 22, 2019), https://www.S.F.O.gov.uk/2019/02/22/S.F.O.-closes-glaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/ [https://perma.cc/8YD3-U34B].

[142] *See* United States Dep't. of Justice, Rolls-Royce P.L.C. Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case, *supra* note 137.

[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 L.L.C. 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 103.

4. 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.

4.1. 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 D.O.J. anti-corruption prosecutors to international meetings and conventions regarding anti-corruption issues.[147] The D.O.J. and S.E.C. 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 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 M.L.A.T. procedure is often cumbersome and recipient states may be non-responsive.[151] Even with the M.L.A.T. 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

[144] *See* Telephone Interview with Ephraim Wernick, Partner, Vinson & Elkins, L.L.P. (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 O.E.C.D. and the United Nations. Wernick was also a negotiator of the anticorruption component of NAFTA 2.0.).

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

[146] *Id.*; *see* 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] *See, e.g.*, Telephone Interview with Ephraim Wernick, *supra* note 144.

[148] *Id.*

[149] *Id.*

[150] *But see* Telephone Interview with Marcello Miller, *supra* note 146.

[151] *Id.*

[152] *Id.*

increases in bureaucratic complications and 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] - because of U.S. concerns about discovery

[153] *See, e.g.*, Telephone Interview with Patrick Pericak, Senior Managing Director, FTI Consulting (July 2, 2020) (Pericak is currently a Senior Managing Director at FTI Consulting).
[154] *Id.*
[155] *See generally* Telephone Interview with Ephraim Wernick, *supra* note 144.
[156] *See, e.g.*, Telephone Interview with Patrick Pericak, *supra* note 153.
[157] *But see* Telephone Interview with Former Joint Head of Bribery and Corruption, United Kingdom's Serious Fraud Office ("S.F.O.") (July 8, 2020).
[158] *See* Telephone Interview with Ephraim Wernick, *supra* note 144.
[159] *See generally* Telephone Interview with Patrick Pericak, *supra* note 153.
[160] *See* Telephone Interview with Taavi Pern, *supra* note 145.
[161] *See* Telephone Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 157.
[162] *See, e.g.*, Telephone Interview with Marcello Miller, *supra* note 146.
[163] *See, e.g.*, 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 also* Telephone Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 157.

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]

4.2. 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 investigation and the shared global anti-corruption capability. For instance, enforcers report delaying unilateral resolution in favor of the 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 on the investigation.[173] Even then, however, an opportunity for a joint resolution might be diminished because of the

[164] *See* Interview with Ephraim Wernick, *supra* note 144.
[165] *See* Interview with Marcello Miller, *supra* note 146.
[166] *See* Interview with Patrick Pericak, *supra* note 153; *see also* Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 157.
[167] *See, e.g.*, Interview with Patrick Pericak, *supra* note 153; *see also* Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 157.
[168] *See* Interview with Patrick Pericak, *supra* note 153; *see also* Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 157.
[169] *Id.*
[170] *See, e.g.*, 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] *But see* 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] *See generally* Interview with Ephraim Wernick, *supra* note 144.
[173] *See* Interview with Marcello Miller, *supra* note 146.

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 complementary enforcement mechanisms.[179] For instance, a state that seeks to use D.P.A.s in the anti-corruption context may decline to consider a joint resolution with a state that does not provide for D.P.A.s.[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 D.O.J. enforcers, however, the starting point of the negotiation is determined by reference to the total possible fine amount pursuant to U.S. Sentencing Guidelines.[184]

[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *See* Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 157.
[180] *Id.*
[181] *Id.*; *see also* Interview with Ephraim Wernick, *supra* note 144; Interview with Patrick Pericak, *supra* note 153.
[182] *See* Interview with Marcello Miller, *supra* note 146; Interview with Patrick Pericak, *supra* note 153.
[183] *See* Interview with Marcello Miller, *supra* note 146.
[184] *See* Interview with Ephraim Wernick, *supra* note 144; Interview with Patrick Pericak, *supra* note 153; *see also* 2018 Guidelines Manual Annotated, United States Sentencing Commission, §§ 2B4.1, 2C1.1, USSC (Nov. 1, 2018), https://www.ussc.gov/guidelines.

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

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[185] *See* discussion *supra* Section 3.9.
[186] *See* Interview with Ephraim Wernick, *supra* note 144; Interview with Taavi Pern, *supra* note 145; Interview with Marcello Miller, *supra* note 146; Interview with Patrick Pericak, *supra* note 153; Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 158.
[187] *See* Interview with Ephraim Wernick, *supra* note 144; Interview with Taavi Pern, *supra* note 145; Interview with Marcello Miller, *supra* note 146; Interview with Patrick Pericak, *supra* note 153; Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 157.
[188] *See* Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 157.
[189] *See* Interview with Marcello Miller, *supra* note 146.
[190] *See* Interview with Ephraim Wernick, *supra* note 144.
[191] *Id.*
[192] *See generally* Interview with Patrick Pericak, *supra* note 153.
[193] *Id.*; Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 157.
[194] *Id.*
[195] *But see* Interview with Taavi Pern, *supra* note 145.

An enforcement agency might also decline enforcement against an entity 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 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]

5. 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. Importantly, the identification of these principles should take us further than the "equity" identified in the Anti-Piling on Policy, *see supra* section 1. These principles may

[196] *See* Interview with Ephraim Wernick, *supra* note 144.
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *See* Interview with Patrick Pericak, *supra* note 153.
[201] *Id.*
[202] *But see* Interview with Marcello Miller, *supra* note 146.
[203] *Id.*

be particularly useful to companies and corporate counsel facing corruption issues or risking exposure as they attempt to chart 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]

5.1. 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 investigative 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 on 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

[204] *See* O.E.C.D., Anti-Corruption Ethics & Compliance Handbook for Business 10 (2013), https://www.O.E.C.D..org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf [https://perma.cc/HCK4-XSFN].
[205] *See* Oded, *supra* note 24, at 253–57.
[206] *See* discussion *supra* Section 3.
[207] See discussion *supra* Section 3.2.
[208] *See* Kevin Abikoff et al., *F.C.P.A. & Anti-Bribery Alert*, Hughes, Hubbard & Reed L.L.P. 109 (Dec. 23, 2016), https://www.hugheshubbard.com/news/F.C.P.A.-anti-bribery-alert-fall-2016 [https://perma.cc/TM3Y-5TLC] (detailing cooperation provided the S.E.C. 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 4.1.
[210] Kevin E. Davis et al., *Transnational Anticorruption Law in Action: Cases from Argentina and Brazil*, 40 Law Soc. Inquiry 664, 693 (2015).

exposure should assume enforcement agencies will actively seek cooperation and share information with their foreign counterparts.

5.2. ENFORCEMENT AGENCIES SEEK TO COORDINATE RESOLUTIONS WITH ENFORCEMENT AGENCIES FROM OTHER APPROPRIATE STATES IN RECOGNITION OF JURISDICTIONAL NEXUSES 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] These cases demonstrate that enforcement authorities will, through crediting or other means, recognize penalties paid to enforcement authorities from other states that have a jurisdictional nexus to the underlying bribing conduct and will decline to require a monitor if a another state with an arguably stronger jurisdictional nexus seeks to monitor future compliance. This deference is not only in recognition of the corresponding jurisdictional nexus, but also reflects an interest in building anti-corruption enforcement capacity. That enforcement agencies work to coordinate the timing of resolution, often with a state delaying resolution for years, confirms these principles and emphasizes that global anti-corruption enforcement cooperation is sincere and important, in both practice and messaging.

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:

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[211] *See* discussion *supra* Section 3.

[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 L.I.B.O.R. Rate, *supra* note 81, §4.

[214] *See* de Senneville & Wajsbrot, *supra* note 90, ¶§6–7.

> 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 *United States v. Gamble* [hereinafter 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 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 combinations of joint resolutions, and the risks and rewards of each, when considering negotiation of an anti-corruption settlement. As the interviews demonstrate, companies should also consider the dynamics between the various enforcement agencies; although they may appear to have a united front, in practice there may be conflict and competition.

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[215] *See, e.g.*, Sanchez-Badin & Sanchez-Badin, *supra* note 3, at 329.
[216] See Gamble v. United States, 139 S. Ct. 1960, 1966 (2019).
[217] *Id.* at 1964.
[218] *See* discussion *supra* Section 2.
[219] *See* discussion *supra* Section 4.2.
[220] *See* Hock, *supra* note 16, at 325.

5.3. ENFORCEMENT AGENCIES UTILIZE CREDITING OF PENALTIES AND PROFIT DISGORGEMENTS PAID TO OTHER STATES TO BOTH MAINTAIN DOMESTIC STATUTORY ENFORCEMENT CONSISTENCY AND 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 consistently prosecute domestic based statutorily penalties while at the same time employing deference to fashion a resolution that is appears fair, does not amount to double enforcement, encourages capacity building and future voluntary self-reporting.[221] Petrobras, Odebrecht, and Braskem demonstrate that, even without crediting, states apportion total settlement amounts in multi-state settlement scenarios.[222] Publicly announcing an agreed financial settlement amount based on domestic statutory requirements allows the enforcement authority to confirm the statutory authority, publicize that authority to the market and build a record of consistent application. Later crediting payments to other states, encourages capacity building in other states and encourages future voluntary reporting by publicizing to entities and individuals that they will be treated fairly. The interviews evidence that they credit and apportionment process is fairly ad hoc, and can reflect geographic nexus issues, as well as the amount of investigatory resources an enforcing state has dedicated to the investigation.

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 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,

[221] *See* discussion *supra* Sections 3.2., 3.2. .
[222] *See* discussion *supra* Sections 3.5., 3.6. .
[223] *See* Staff of J. Comm. on Taxation, 114th Cong., Present Law and Selected Policy Issue in the U.S. Taxation of Cross-Border Income 3 (Comm. Print 2015).
[224] *id.* at 4.
[225] *See* United States Dep't. of Justice, *supra* note 125.
[226] Commentators have argued that this type of deference be obligatory as established in "informal" agreements between members of the O.E.C.D. Convention. *See* 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 (2018).

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 D.P.A. with S.B.M. Offshore in connection with bribes paid to foreign officials in Brazil, Angola, Equatorial Guinea, Kazakhstan, and Iraq, the D.O.J. agreed to credit S.B.M. 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.

[227] Discussion *supra* Section 3.2. .

[228] *See 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] *See* Lea, *supra* note 170.

[230] *See* Airbus in France, *supra* note 228, §1.

[231] *See* discussion *supra* Section 3.2. .

[232] *See* United States Dep't. Justice, Press Release No. 17-1348, 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].

5.4. 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 D.O.J.'s treatment of Guralp exemplifies side-stepping.[235]

Until recently, the D.O.J.'s F.C.P.A. 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, D.O.J. declination letters are publicly available.[238] D.O.J. 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.

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[233] *See* Oded, *supra* note 24, at 229.
[234] *Id.*
[235] *See* discussion *supra* Section 3.7. .
[236] *See* Holtmeier et al., *supra* note 80, 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, F.C.P.A. 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 2. .
[240] Magnuson, *supra* note 77, at 414.

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

5.5. 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 F.C.P.A. context are frequently utilized by the D.O.J., as part of the terms of a D.P.A., 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 of monitoring 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.

[241] *See* discussion *supra* Sections 3.1., 3.2., 3.5. .
[242] *See* Monitorships: List of Independent Compliance Monitors for Active Fraud Section Monitorships, U.S DEPT. OF JUSTICE (updated Sept. 22, 2022). https://www.justice.gov/criminal-fraud/strategy-policy-and-training-unit/monitorships https://perma.Monitorshipscc/9CUJ-UKXK.
[243] See discussion supra Sections 3.1., 3.2., 3.5. .
[244] *Id.*

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.