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Multi-Jurisdictional Anti-Corruption Enforcement: Time for a Global Approach

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MULTI-JURISDICTIONAL ANTI-CORRUPTION ENFORCEMENT: TIME FOR A GLOBAL APPROACH

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With the rise of globalization, foreign corruption has become a prominent enemy of the world's economy. Over time, numerous international initiatives—such as the OECD and United Nations conventions against foreign corruption—have enlisted a growing number of sovereign states to join in the global war against that enemy. As a consequence, global enhancement of anti-foreign corruption enforcement often results in duplicative, multi-jurisdictional enforcement, such that multiple enforcement actions are initiated against the same corporation by several authorities, in one or more jurisdictions, in relation to the same misconduct. This phenomenon, which was recently addressed by the U.S. Department of Justice in its Anti-Piling On Policy promulgated in May 2018, lies at the heart of this Article. After identifying the practical implications of the newly promulgated policy in recent multi-jurisdictional enforcement cases—which have taken the form of (i) multi-jurisdictional cooperation, (ii) crediting, and (iii) sidestepping—this Article analyzes recent multi-jurisdictional enforcement practices as formalized by the Anti-Piling On Policy, highlights several of their shortcomings, and proposes a set of guiding principles which, if adopted by sovereign states, may enhance the effectiveness of the global fight against foreign corruption.

INTRODUCTION

With the rise of globalization, foreign corruption has become a prominent enemy of the world economy. Foreign corruption occurs when corrupt benefits are offered, promised, or provided to a foreign public official to ensure that "the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."[1] Over time, numerous international

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initiatives—such as the Organisation for Economic Co-operation and Development ("OECD") and United Nations ("UN") conventions against foreign corruption—have enlisted a growing number of sovereign states to join the fight against corruption, particularly in the context of bribery of foreign public officials.[2]

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[1] This Article uses a definition of "foreign corruption" that matches the definition of "bribery of a public official" in Article 1 of the Convention on Combating Bribery. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 1, *signed* Dec. 17, 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. 1 (entered into force Feb. 15, 1999) [hereinafter OECD Convention on Combating Bribery]; OECD, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND RELATED DOCUMENTS (1997), http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [hereinafter OECD, CONVENTION ON COMBATING BRIBERY AND RELATED DOCUMENTS].

[2] The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was signed in 1997 and entered into force in 1999. This instrument focuses on the "supply side" of the bribery transaction. All OECD countries and eight non-OECD counties have adopted the Convention. The Preamble considers that "bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions" and that "all countries share a responsibility to combat bribery in international business transactions." OECD, CONVENTION ON COMBATING BRIBERY AND RELATED DOCUMENTS, *supra* note 1, at 3. The United Nations Convention Against Corruption was adopted in 2003 and entered into force in 2005. As of June 26, 2018, the Convention counts 186 parties.

> The Convention requires countries to establish criminal and other offences to cover a wide range of acts of corruption, if these are not already crimes under domestic law. Countries agreed to cooperate with one another in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders. Countries are bound by the Convention to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court, to extradite offenders. Countries are also required to undertake

Over the past two decades the global enhancement of anti-foreign corruption enforcement has translated into legislative reforms in various countries, leading to a widespread criminalization of foreign corruption.[3]

The proliferation of anti-foreign corruption laws—some of which are extraterritorially applicable—and the cross-border nature of foreign corruption have often resulted in duplicative, multi-jurisdictional enforcement, *i.e.*, multiple enforcement actions initiated against the same corporation by several authorities, in one or more jurisdictions, in relation to the same misconduct.[4] Hence, corporations that operate globally are increasingly exposed to the risk of facing multiple investigations conducted simultaneously or successively which threaten the corporation and related persons with overwhelming penalties and collateral damage.

In response to the emerging trend, on May 9, 2018, Deputy Attorney General Rod Rosenstein announced the Department of Justice's ("DOJ") new Anti-Piling On Policy at the New York City Bar White Collar Crime Institute.[5] This policy—and the duplicative

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> measures which will support the tracing, freezing, seizure and confiscation of the proceeds of corruption.

Convention Highlights, UNITED NATIONS OFF. ON DRUGS & CRIME, https://www.unodc.org/unodc/en/corruption/convention-highlights.html (last visited Mar. 16, 2020).

[3] *See* OECD WORKING GRP. ON BRIBERY, 2017 ENFORCEMENT OF THE ANTI-BRIBERY CONVENTION 1 (2018), http://www.oecd.org/daf/anti-bribery/OECD-WGB-Enforcement-Data-2018-ENG.pdf [hereinafter 2017 ENFORCEMENT OF THE ANTI-BRIBERY CONVENTION].

[4] Well known examples of anti-corruption laws that have extraterritorial application are the U.K. Bribery Act 2010, c. 23 (*see Bribery Act 2010*, LEGISLATION.GOV.UK, http://www.legislation.gov.uk/ukpga/2010/23/contents (last visited Mar. 16, 2020)) and the Foreign Corrupt Practices Act (FCPA) of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 to -2 (1982)).

[5] Letter from Rod J. Rosenstein, Deputy Att'y Gen., to Heads of Dep't Components (May 9, 2018) (on file with the United States Department of Justice) [hereinafter Letter from Rod J. Rosenstein]; *see also Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute*, DEP'T JUSTICE (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

enforcement challenge it seeks to resolve—lies at the heart of this Article.

The DOJ's new policy aims to discourage disproportionate enforcement by multiple authorities. The new policy promotes a coordinated approach between different DOJ departments, other U.S. enforcement authorities—such as the U.S. Securities and Exchange Commission ("SEC"), Commodity Futures Trading Commission, Federal Reserve, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Office of Foreign Assets Control and others—as well as foreign enforcement authorities to avoid disproportionate punishment and achieve an overall equitable outcome in anti-foreign corruption enforcement actions.[6] In addition to promoting cooperation, the policy allows U.S. attorneys to achieve the policy's goals by, for instance, using a mechanism of *crediting previous fines* paid by a company for the same misconduct; by *coordinating the distribution* of the overall penalties among the relevant authorities; and, in some circumstances, by *sidestepping*, thereby devoting the DOJ's valuable resources to detecting new schemes, rather than to additional enforcement against a scheme already detected.[7] That said, Deputy Attorney General Rosenstein clarified that the new policy provides no enforceable private right to corporations and that, under certain circumstances, penalties which may appear duplicative really are essential to achieving justice and protecting the public. In such cases, the DOJ will—and will not hesitate to—pursue complete remedies.[8]

This Article proposes the contours of a socially desirable multi-jurisdictional anti-foreign corruption framework based on a global common understanding related to a set of agreed principles. To that end, Part I provides a brief overview of anti-foreign corruption multi-jurisdictional enforcement practices as developed in recent years. In Part II, this Article introduces the Anti-Piling On Policy adopted in May 2018 by the DOJ in an attempt to cope with the challenges arising from duplicative multi-jurisdictional enforcement. The implementation of that policy in recent

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[6] *See* Letter from Rod J. Rosenstein, *supra* note 5.

[7] *Id.*

[8] *Id.*

enforcement cases is then discussed, where such implementation has taken the form of three key mechanisms: (i) multi-jurisdictional cooperation, (ii) crediting, and (iii) sidestepping. Part III suggests criteria that can be used to evaluate the functioning of enforcement systems in an international context. Part IV suggests that while the Anti-Piling On Policy may present an improvement to a world governed by an uncoordinated enforcement framework, its social desirability is strongly jeopardized by the lack of certainty and predictability from a corporation's perspective. Accordingly, this Article rounds off by outlining a set of guiding principles which, if adopted by sovereign states interested in combating foreign corruption, may increase the transparency and the predictability of multi-jurisdictional enforcement and thereby effectively serve the purposes and promote the societal goals enshrined in that enforcement.

I. MULTI-JURISDICTIONAL ANTI-FOREIGN CORRUPTION ENFORCEMENT

With advanced technology, the world of corporate business has become increasingly global. Over the past decades, many corporations have gone beyond conventional borders and have expanded their activities into remote local markets.[9] An increasing number of corporations have leveraged their expertise and economies of scale into markets of high demand.[10] No doubt, the globalization of corporate business activities has yielded tremendous benefits to the world's economy; nevertheless, this globalization has also taken its toll on society by amplifying one of the most prominent enemies of the world's economy: corruption.[11]

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[9] *See* Andreas Georg Scherer & Guido Palazzo, *Globalization and Corporate Social Responsibility 2009*, *in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 12 (A. Crane et al. eds., Oxford University Press 2008).

[10] *See id.*

[11] Various studies sought to quantify the social costs of bribery and corruption to society. Provided that these practices are often concealed, none of the studies pretend to provide an accurate quantification of the social problem. That said, the studies do provide a clear indication of corruption being a social problem of a major volume. For instance, according to a study by the International Monetary Fund in 2016, the annual cost of bribery is estimated at approximately

A. Global Anti-Foreign Corruption Enforcement Is On the Rise

The massive damage caused to society by foreign corrupt practices has sparked global combat against corruption. The pioneering step of that combat was initiated by the U.S. Congress in the wake of the Watergate scandal, in which the SEC discovered that more than 400 U.S. companies had paid substantial sums to bribe foreign government officials in order to secure business overseas.[12] Those discoveries led to the 1977 enactment of the Foreign Corrupt Practices Act ("FCPA")—the first-ever law to create liability for bribery of government officials in foreign markets.[13] While the FCPA was originally intended to foster a more ethical environment in the global corporate business world, soon after its promulgation it was perceived by corporate America as a major competitive disadvantage in their global business activities, placing them on

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$1.5–2 trillion, roughly two percent of global GDP. *See* IMF, CORRUPTION: COSTS AND MITIGATING STRATEGIES 5 (2016), https://www.imf.org/external/pubs/ft/sdn/2016/sdn1605.pdf. The World Economic Forum estimated that the cost of corruption is at least $2.6 trillion, or five percent of the global GDP. *See Global Cost of Corruption At Least 5 Per Cent of World Gross Domestic Product, Secretary-General Tells Security Council, Citing World Economic Forum Data*, UNITED NATIONS (Sept. 10, 2018), https://www.un.org/press/en/2018/sc13493.doc.htm.

[12] *See, e.g.*, *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure Acts of 1977: Hearing on S. 305 Before the S. Comm. on Banking, Hous., & Urban Affairs*, 95th Cong. (1977); AARON G. MURPHY, FOREIGN CORRUPT PRACTICES ACT: A PRACTICAL RESOURCE FOR MANAGERS AND EXECUTIVES (2010); Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929 (2012); Wallace Timmeny, *An Overview of the FCPA*, 9 SYRACUSE J. INT'L L. & COM. 235, 235–44 (1982); CRIMINAL DIV. OF THE U.S. DEP'T OF JUSTICE & THE ENFORCEMENT DIV. OF THE U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 3 (2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf [hereinafter FCPA RESOURCE GUIDE].

[13] Eugene R. Erbstoesser et al., *The FCPA and Analogous Foreign Anti-Bribery Laws—Overview, Recent Developments, and Acquisition Due Diligence*, 2 CAP. MKTS. L.J. 381, 381 (2007).

unequal footing with their non-U.S. competitors.[14] This imbalance generated by the FCPA led in 1998 to the FCPA's amendment which, among other things, expanded its reach to impose such liability on certain foreign corporations.[15] Simultaneously, the U.S. government exerted efforts toward convincing other countries to join the battle against foreign corruption, thereby leveling the playing field for business corporations operating globally.

The persistent anti-foreign corruption campaign by the U.S. government proved fruitful. Although it took roughly two decades to convince the world to join a global fight against foreign corruption, in 1997 it eventually happened: the signing of the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions (the "Anti-Bribery Convention") memorialized the global commitment.[16] The Anti-Bribery Convention, which entered into force in February 1999, requires the signatory countries—by now forty-four signatories, including all OECD members and eight non-OECD countries—to make it a criminal offense under local law for any person:

> intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.[17]

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[14] MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., R41466, FOREIGN CORRUPT PRACTICES ACT (FCPA): CONGRESSIONAL INTEREST AND EXECUTIVE ENFORCEMENT 1–5 (2016).

[15] *See* 15 U.S.C. §§ 78dd-1(g), 78dd-2(i); *see also* SEITZINGER, *supra* note 14, at 5.

[16] OECD Convention on Combating Bribery, *supra* note 1. *See generally* Elizabeth K. Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT'L L. 1 (2012) (providing an overview of the OECD Anti-Bribery Convention and the emergence of multi-jurisdictional enforcement as an outcome of the Convention).

[17] OECD, CONVENTION ON COMBATING BRIBERY AND RELATED DOCUMENTS, *supra* note 1, at 48 n.1.

To monitor the implementation of the Anti-Bribery Convention, the OECD established a Working Group on Bribery in International Business Transactions which conducts a periodic peer review of each party, including a review of the member state's domestic laws implementing the Convention, the effectiveness of their implementation, and enforcement.[18]

Another enhancement of the global fight against foreign corruption was generated by the United Nations Convention Against Corruption ("UNCAC"), adopted by the UN General Assembly in October 2003 and entered into force in December 2005.[19] The UNCAC requires parties to this Convention—by now 186 parties—to criminalize various corrupt acts, including foreign bribery and related offenses. Implementation of the UNCAC by parties to this Convention is also subject to peer review.[20] Altogether, those initiatives—and various others[21]—have substantially strengthened the commitment of many countries around the world to join the fight against foreign corruption. By now, many countries have indeed

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[18] OECD, THE DETECTION OF FOREIGN BRIBERY 9 (2017), https://www.oecd.org/corruption/anti-bribery/The-Detection-of-Foreign-Bribery-ENG.pdf. For the Working Group reports, see *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, OECD (2019), http://www.oecd.org/investment/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm.

[19] *See* United Nations Convention Against Corruption, *adopted by the General Assembly* Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005) [hereinafter UNCAC].

[20] The reports produced by the peer review mechanism are publicly available. *See id.* at 51–52 (explaining the peer review mechanism of the UNCAC and related requirements); *Country Profiles*, UNITED NATIONS OFF. ON DRUGS & CRIME, https://www.unodc.org/unodc/en/treaties/CAC/country-profile/index.html (last visited Mar. 16, 2020).

[21] *See* Organization of American States, Inter-American Convention Against Corruption, O.A.S.T.S. No. 58, *adopted* Mar. 29, 1996, 35 I.L.M. 724; *About GRECO*, COUNCIL OF EUROPE, https://www.coe.int/en/web/greco/about-greco (last visited Mar. 16, 2020). The Council of Europe's "Group of States Against Corruption (GRECO) . . . was established in 1999 by the Council of Europe." *Group of States Against Corruption*, COUNCIL EUR. PORTAL (2020), https://www.coe.int/en/web/greco/about-greco; *G20 Anti-Corruption Working Group*, STOLEN ASSET RECOVERY INITIATIVE, https://star.worldbank.org/about-us/g20-anti-corruption-wosrking-group (last visited Mar. 16, 2020).

amended their laws and criminalized acts of foreign corruption.[22] Naturally, anti-corruption laws are not the same across countries, and each country has adopted its own nuanced approach to certain aspects, such as the criminalization of bribery in the private sector, the approach to facilitation payments, and the treatment of bribery recipients.[23] That said, many of the anti-foreign corruption laws share common ground in penalizing providing—and often also the offer to provide—bribes to foreign officials with the intention of obtaining or retaining business.[24]

B. Duplicative Anti-Foreign Corruption Enforcement

The cross-border nature of the fight against foreign corruption has shaped emerging anti-corruption legislation in different legal systems. Many of those laws include an *extraterritorial application*, which provides local public prosecutors with powers to act against foreign corruption schemes, even when those schemes have taken place mostly or entirely outside the incumbent jurisdiction. A prominent example of such a far-reaching anti-foreign corruption law is the U.S. FCPA, which has been interpreted as applicable and triggering jurisdiction under its anti-bribery provisions even when the sole link to the U.S. is the use of U.S. email servers or of any "means or instrumentality of interstate commerce in furtherance of a corrupt payment to a foreign official."[25] Similarly, the U.K.

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[22] *Global Overview of Anti-Corruption Laws 2017*, GLOBAL COMPLIANCE NEWS (2016), https://globalcompliancenews.com/anti-corruption/anti-corruption-laws-around-the-world/ (providing a global overview of anti-corruption laws as of 2017, also including domestic anti-foreign corruption laws).

[23] *See* Frederick T. Davis, *International Double Jeopardy: U.S. Prosecutions and the Developing Law in Europe*, 31 AM. U. INT'L L. REV. 57, 61 (2016).

[24] *Global Overview of Anti-Corruption Laws 2017*, *supra* note 22 (providing a global overview of anti-corruption laws as of 2017, also including anti-foreign corruption in domestic laws).

[25] The FCPA is applicable to: (i) "issuers," including their officers, directors, employees, agents, and shareholders; (ii) "domestic concerns" and their officers, directors, employees, agents, and shareholders; and (iii) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States. *See* FCPA RESOURCE GUIDE, *supra* note 12, at 10–11, 20 (explaining the interpretation of the jurisdiction provided by the FCPA).

Bribery Act of 2010 holds commercial organizations incorporated outside the U.K. liable for failing to prevent bribery if they carry on part of their business in the U.K., even when the corrupt action was carried out entirely outside the U.K. by a person who has no connection with the U.K. and who is performing services outside the U.K.[26] The similar phenomenon of extraterritorial application of anti-foreign corruption laws is present in other jurisdictions' policies, such as those of France,[27] Germany,[28] the Netherlands,[29] Italy,[30] and Canada.[31]

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[26] *See Bribery Act 2010*, *supra* note 4 (reviewing Section 7 in combination with Section 12(5)).

[27] *See* Loi 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, dite « Sapin II » [Law 2016-1691 of December 9, 2016 on Transparency, the Fight Against Corruption, and the Modernization of Economic Life ("Sapin II")], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 10, 2016, texte 2 sur 146. The Act expands the French authorities' jurisdiction to all legal entities with a footprint in France, regardless of where in the world the corruption scheme has unfolded. *See* CODE PÉNAL [C. PÉN.] (PENAL CODE) art. 435-11-2, 435-7 to 435-10.

[28] For example, Section 5(14) in combination with Section 299 of the German Criminal Code (*Strafgesetzbuch*), which stipulates that German criminal law applies to bribery of public officials committed abroad. Therefore, the German anti-foreign corruption provision is applicable even when a minor part of the illegal conduct took place within Germany or in the event that the perpetrator is a German national. *See, e.g.*, STRAFGESETZBUCH [StGB] [PENAL CODE], §§ 5(14), 299.

[29] For example, Article 5 in combination with Articles 177 and 177a of the Dutch Criminal Code. In the Netherlands, bribery of public officials is criminalized if it is done by a Dutch corporation or Dutch national, regardless of the location in which the corrupt act has been conducted, and regardless of whether corruption is illegal where the act took place. *See* Art. 5:177/177a SR.

[30] For example, Articles 9 and 10 in combination with Article 322 bis of the Italian Criminal Code. In Italy, corporations may be held liable for an entire bribery scheme, even when the scheme was only partially conducted, planned, or initiated in Italy. *See* Art. 9, 10, 322 bis C.p.

[31] *See* Corruption of Foreign Public Officials Act, S.C. 1998, c 34; *Corruption of Foreign Public Officials Act*, CAN. DEP'T JUSTICE, https://laws-lois.justice.gc.ca/eng/acts/C-45.2/ (last modified Jan. 14, 2020) (reviewing Section 5(1)(2) in combination with Sections 3 and 4).

The rise of local anti-foreign corruption laws—many of which provide for extraterritorial application—has resulted in an increasing number of focal points of enforcement.[32] While, throughout the last decades, the U.S. has held the leading global position in enforcement of anti-foreign corruption laws, other jurisdictions—most notably Germany, the U.K., France, Brazil, China, and Nigeria—have gradually enhanced their enforcement activity levels.[33] Consequently, in an increasing number of cases, a single foreign corruption scheme has triggered duplicative enforcement actions in more than one jurisdiction.[34] In some of those cases, different enforcement actions were initiated simultaneously in several jurisdictions.[35] In other cases, enforcement actions were initiated consecutively, as in instances of *carbon copy* enforcement.[36]

Carbon copy enforcement—the most scathing form of duplicative enforcement—refers to successive enforcement action initiated by several sovereign states with respect to the same or similar nucleus of operative facts.[37] It is essentially a shortcut used by enforcement authorities which threatens to bring charges against—and thereby rapidly settles successive enforcement cases with—corporations that have previously settled their matter in another jurisdiction, often after admitting responsibility for the

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[32] *See* Spahn, *supra* note 16.

[33] *See* 2017 ENFORCEMENT OF THE ANTI-BRIBERY CONVENTION, *supra* note 3 (reporting that 560 individuals and 182 entities were sanctioned for foreign bribery since the Convention entered into force in 1999 and until the end of 2017). At least 125 of the sanctioned individuals have been sentenced to prison for foreign bribery, including at least eleven for prison terms exceeding five years. As of the end of 2017, over 500 investigations were ongoing in thirty Parties. At least 155 criminal proceedings (against 146 individuals and nine entities) are ongoing for foreign bribery in eleven Parties. The report also provides detailed information about the number of enforcement cases per jurisdiction. *Id.* at 5–6.

[34] *See infra* Section I.B.

[35] *Id.*

[36] *Id.*

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

underlying facts that constitute a transgression of foreign corruption laws.[38]

Dealing with a carbon copy enforcement action places a corporation between a rock and a hard place. Entering into a settlement agreement in one nation often means accepting responsibility for—and sometimes admitting guilt in relation to—a detailed statement that canvases the facts establishing the violation of foreign corruption laws. Additionally, many of the settlements, particularly with the DOJ and the SEC—by way of either non- or deferred prosecution agreements or plea agreements—include a prohibition against the corporation making any statement that may be construed as inconsistent with the statement of facts accompanying the settlement, while the authorities reserve sole discretion to assess corporate statements and their consistency with the relevant statement of facts.[39] Furthermore, many such

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[38] *See* Deferred Prosecution Agreement, United States v. Panalpina World Transport (Holding) Ltd., No. 10-cr-769, ¶ 24 (S.D. Tex. Nov. 4, 2010), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/11-04-10panalpina-world-dpa.pdf.

> PWT expressly agrees that it shall not, through its present or future attorneys, directors, officers, employees, agents, or any other person authorized to speak for PWT, make any public statement, in litigation or otherwise, contradicting the acceptance of responsibility by PWT set forth above or the facts described in the attached Statement of Facts. Any such contradictory statement shall, subject to cure rights of PWT described below, constitute a breach of this Agreement and PWT thereafter may be subject to prosecution as set forth in Paragraphs 18–21 of this Agreement. The decision whether any public statement by any such person contradicting a fact contained in the Statement of Facts will be imputed to PWT for the purpose of determining whether it has breached this Agreement shall be at the sole discretion of the Department. If the Department determines that a public statement by any such person contradicts in whole or in part a statement contained in the Statement of Facts, the Department shall so notify PWT, and PWT may avoid a breach of this Agreement by publicly repudiating such statement(s) within five (5) business days after receipt of such notification.

Id.

[39] *See id.* ¶ 6.

settlements also routinely include an obligation of the settling corporation to effectively cooperate with future investigations undertaken by other domestic or foreign authorities.[40] In such circumstances, even an attempt to defend against successive enforcement actions or to utilize local legal protections, such as invoking a right against self-incrimination, may result in a violation of the initial settlement, potentially immediately translating into an enforcement nightmare for corporations in the investigation.[41]

The practice of carbon copy enforcement has become the unfortunate reality of many culpable corporations. For instance, from 2009 to 2011, U.S. authorities entered into a series of significant settlements with four consortium members: the Halliburton subsidiary Kellogg Brown & Root Inc. ("KBR"); Eni/Snamprogetti Netherlands B.V.; JGC Corporation; and Technip S.A., all in relation to corrupt payments made to secure contracts to build liquefied natural gas ("LNG") facilities on Bonny Island, Nigeria.[42] As per the settlements with the DOJ and the SEC, in relation to their FCPA violations, the four consortium members paid

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> At the request of the Department, and consistent with applicable laws and regulations, including the Blocking Statute, PWT shall also cooperate fully with such other domestic or foreign law enforcement authorities and agencies, as well as the Multilateral Development Banks ("MDBs") in any investigation of PWT, or any of its present and former directors, employees, agents, consultants, subcontractors, and subsidiaries, or any other party, in any and all matters relating to corrupt payments, related false books and records, and inadequate internal controls.

Id.

[40] *See id.* ¶ 5.

[41] *See* Deferred Prosecution Agreement, United States of America v. Airbus SE, No. 1:20-cr-00021(TFH), ¶ 25 (D.C.C. Jan. 28, 2020), https://www.justice.gov/opa/press-release/file/1241466/download ("The Company shall be permitted to raise defenses and to assert affirmative claims in other proceedings relating to the matters set forth in the Statement of Facts provided that such defenses and claims do not contradict, in whole or in part, a statement contained in the Statement of Facts.").

[42] *JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $218.8 Million Criminal Penalty*, DEP'T JUSTICE (Apr. 6, 2011), https://www.justice.gov/opa/pr/jgc-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-2188.

USD 1.5 billion in penalties and disgorgement.[43] Less than two years after consortium member KBR had resolved its charges with U.S. authorities, the Economics and Financial Crimes Commission in Nigeria initiated enforcement actions against the consortium, its members, and several executives, with enforcement based on the same facts underlying the U.S. settlements. Those actions were eventually resolved in a USD 126 million payment of penalties and disgorgement.[44] Subsequently, in 2014, the consortium members entered into a USD 22.7 million settlement with the African Development Bank in relation to the tainted contracts.[45] Furthermore, the companies were also subject to additional successive enforcement actions in their home countries. For instance, KBR's U.K. subsidiary M.W. Kellogg Limited faced a civil recovery order of over USD 11 million confiscating the profits extracted through the tainted contracts.[46] Similarly, in 2013, Snamprogetti (then Saipem S.A.) was ordered by an Italian court to pay over USD 28 million in fines and disgorgement in connection with the same contracts.[47]

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[43] *See id.* ("The approximately $1.5 billion in criminal and civil penalties that have been imposed on the members of the joint venture far exceed their profits from the scheme. Foreign bribery is a serious crime, and as this case makes clear, we are investigating and prosecuting it vigorously.").

[44] *See* Jay Holtmeier, *Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities*, 84 FORDHAM L. REV. 493, 499 (2015).

[45] *See* Johann Benohr, *AfDB Charges Snamprogetti Netherlands B.V. US $5.7 Million in Monetary Sanction for Corrupt Practices*, AFR. DEV. BANK GROUP (May 28, 2014), https://www.afdb.org/en/news-and-events/afdb-charges-snamprogetti-netherlands-b-v-us-5-7-million-in-monetary-sanction-for-corrupt-practices-13233/ ("In total, the AfDB has collected US $22.7 million in fines from four companies, including Snamprogetti Netherlands B.V., involved in bribe payments in connection with the liquefied natural gas production plants project on Bonny Island, Nigeria.").

[46] *See* Lorraine Turner, *Update 1-KBR Unit Pays $11 MLN to Settle Nigeria Bribes Case*, REUTERS (Feb. 16, 2011), https://www.reuters.com/article/kbr-idAFLDE71F2FD20110216.

[47] Liam Moloney, *Milan Court Finds Saipem Guilty of Nigeria Corruption*, WALL ST. J. (July 11, 2013), https://www.wsj.com/articles/SB10001424127887324425204578599990427813164.

While, as America is a frontrunner, U.S. enforcement actions are often followed by the enforcement actions of other sovereign states, the reverse order of actions has also occurred, such as in the case of Alcatel-Lucent S.A.[48] In 2010, Alcatel-Lucent S.A. entered into a USD 137.4 million resolution with the DOJ and the SEC relating to corrupt practices of the company in Costa Rica, Honduras, Malaysia, and Taiwan.[49] This settlement was reached a few months after the company had already settled charges relating to its conduct in Costa Rica, with the Costa Rican government, for which it had to pay USD 10 million.[50] Similarly, in 2013, Chinese authorities brought charges against GlaxoSmithKline ("GSK") in connection with the promotion of GSK's products through bribery of public health officials in China.[51] Subsequently, the U.S. and U.K. authorities initiated an investigation into GSK's sales practices.[52] In 2014, the Chinese court in Changsha fined GSK USD 490 million following a conviction for bribery, and, in 2016, GSK also settled its matter with the SEC and paid a civil fine of USD 20 million for violating the FCPA.[53] The U.K.'s Serious Fraud Office's ("SFO")

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[48] *See* Richard L. Cassin, *Alcatel-Lucent Settles Bribery Case*, FCPA BLOG (Dec. 28, 2010, 12:38 PM), https://fcpablog.com/2010/12/28/alcatel-lucent-settles-bribery-case/.

[49] Deferred Prosecution Agreement, United States v. Alcatel-Lucent S.A., No. 10-cr-20907(AMS), (S.D. Fla. Dec. 20, 2010), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/12-20-10alcatel-lucent-dpa.pdf.

[50] Leslie Josephs, *Alcatel-Lucent to Pay $10 MLN in Costa Rica Case*, REUTERS (Jan. 21, 2010), https://www.reuters.com/article/alcatellucent-costarica-idUSN2121041320100121.

[51] *CSK China Investigation Outcome*, GLAXOSMITHKLINE (Sept. 19, 2014), https://www.gsk.com/en-gb/media/press-releases/gsk-china-investigation-outcome/.

[52] *GlaxoSmithKline Faces Criminal Investigation by Serious Fraud Office*, THE GUARDIAN (May 28, 2014), https://www.theguardian.com/business/2014/may/28/serious-fraud-office-investigates-glaxosmithkline; *see also* Andrew Ward, *SFO Opens Criminal Inquiry into GSK*, FIN. TIMES (May 27, 2014), https://www.ft.com/content/f059e6e8-e5d4-11e3-aeef-00144feabdc0 (both news articles covering the investigation initiated by the SFO into GSK).

[53] *See* Richard L. Cassin, *China Fines GSK $490 Million for Bribery*, FCPA BLOG (Sept. 19, 2014, 11:38 AM), https://fcpablog.com/2014/09/19/china-fines-gsk-490-million-for-bribery/.

investigation into GSK is still ongoing.[54] Another example is the case of SBM Offshore. On November 29, 2017, SBM Offshore entered into a USD 238 million Deferred Prosecution Agreement with the DOJ in connection with corruption schemes in Equatorial Guinea, Angola, Brazil, Kazakhstan, and Iraq.[55] The company's U.S. subsidiary agreed to plead guilty to one count of conspiracy to violate the FCPA's anti-bribery provisions. This resolution followed a previous USD 240 million settlement reached in November 2014 between SBM Offshore and the Dutch Public Prosecutor in relation to SBM Offshore's sales practices in Equatorial Guinea, Angola, and Brazil.[56] In the case of SBM Offshore, the duplicative enforcement was also demonstrated by separate enforcement actions which were taken by several authorities in Brazil relating to the company's conduct in Brazil and which resulted in two separate leniency agreements entered into on July 26, 2018 with the Brazilian authorities Ministério da Transparência e Controladoria-Geral da União ("CGU"), Advocacia Geral da União ("AGU"), and Petroleo Brasileiro S.A. ("Petrobras"), and on September 1, 2018 with the Brazilian Federal Prosecutor's Office ("Ministério Público Federal" or "MPF"), requiring the company to pay an additional USD 347

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[54] *See GlaxoSmithKline PLC*, SERIOUS FRAUD OFF., https://www.sfo.gov.uk/cases/glaxosmithkline-plc/ (Feb. 22, 2019) (reporting the ongoing investigation into GSK); *see also* Jaclyn Jaeger, *GlaxoSmithKline: An Update on SFO Investigation*, COMPLIANCE WK. (Feb. 8, 2018), https://www.complianceweek.com/glaxosmithkline-an-update-on-sfo-investigation/8780.article.

[55] *See* Deferred Prosecution Agreement, United States v. SBM Offshore N.V., No. 10-cr-686 (S.D. Tex. Nov. 7, 2017), https://www.justice.gov/opa/press-release/file/1014801/download.

[56] *See SBM Offshore N.V. Settles Bribery Case for US$ 240,000,000*, OPENBAAR MINISTERIE (Nov. 12, 2014, 13:16 CEST), https://www.om.nl/actueel/nieuws/2014/11/12/sbm-offshore-n.v.-betaalt-ususd-240.000.000-wegens-omkoping.

million.[57] Ultimately, SBM Offshore has paid a combined worldwide total penalty that exceeds USD 825 million.[58]

Altogether, with the proliferation of anti-foreign corruption laws in many countries, a single cross-border corruption scheme now has the potential to encourage enforcement authorities with overlapping jurisdictions to act—in parallel or successively—against corporations for the same or similar set of facts.

C. Inapplicability of the Double Jeopardy Principle

The rise of duplicative enforcement raises the question: aren't successive enforcement actions in relation to similar misconduct prohibited by one of the most ancient and fundamental legal principles of double jeopardy (or, as it known in Europe, *ne bis in idem*)?

The double jeopardy principle precludes serial prosecution for the same act.[59] It bars trying the same person more than once for the

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[57] See two settlements signed by SBM Offshore in Brazil: the first, *Leniency Agreement Signed Between SBM Offshore, Brazilian Authorities and Petrobras*, SBM OFFSHORE (July 26, 2018), https://www.sbmoffshore.com/?press-release=leniency-agreement-signed-between-sbm-offshore-brazilian-authorities-and-petrobras; the second, *Agreement Signed Between SBM Offshore and Brazilian Public Prosecutor*, SBM OFFSHORE (Sept. 1, 2018), https://www.sbmoffshore.com/?press-release=agreement-signed-between-sbm-offshore-and-brazilian-public-prosecutor.

[58] Other examples include, for instance, Statoil ASA, which resolved its FCPA matter in 2006 in the U.S. after already having been sanctioned in 2004 in Norway for the same acts. *See, e.g.*, *U.S. Resolves Probe Against Oil Company That Bribed Iranian Official*, DEP'T JUSTICE (Oct. 13, 2006), https://www.justice.gov/archive/opa/pr/2006/October/06_crm_700.html. In a similar example from 2011, Aon Corporation entered into a settlement agreement in the US in which it agreed to pay $16.2 million to resolve its FCPA matter. This settlement was entered into even though the company had already settled a matter relating to the same facts in the U.K. and agreed to pay a financial penalty of £5.25 million to the U.K.'s Financial Services Authority. *See Aon Corporation Agrees to Pay a $1.76 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act*, DEP'T JUSTICE (Dec. 20, 2011), https://www.justice.gov/opa/pr/aon-corporation-agrees-pay-176-million-criminal-penalty-resolve-violations-foreign-corrupt.

[59] *See* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 81 (1978).

same act, thereby seeking to safeguard the finality of criminal justice.[60] This principle is well established in most legal systems and is also recognized in several international treaties which specifically provide for protection against duplicative enforcement. For instance, the International Covenant on Civil and Political Rights declares that "no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."[61] Similar principles were adopted in several European treaties which prohibit duplicative criminal actions by two European countries.[62]

Does, then, the resolution of a foreign corruption matter in one country bar charges from being brought in another? The answer is no. There is no uniform, globally acceptable norm that prohibits successive prosecutions when the charges are brought by different sovereign states.[63] In the U.S., a *dual sovereign doctrine* is

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[60] *Id.*

[61] International Covenant on Civil and Political Rights, *adopted and opened for signature* Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

[62] Article 54 of the Convention to Implement the Schengen Agreement declares that "a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts." Convention Implementing the Schengen Agreement, June 14, 1985, art. 54, 2000 O.J. (L. 239) 35; Article 50 of the E.U. Charter of Fundamental Rights declares that "no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law." Charter of Fundamental Rights of the European Union, *ratified* Dec. 7, 2000, art. 50, 2000 O.J. (C 364) 20 (entered into force Dec. 1, 2009); Article 4 of Protocol No. 7 to the European Convention on Human Rights declares that "no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State." Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 22, 1984, E.T.S. No. 117 (entered into force Nov. 1, 1988); *see also* Davis, s*upra* note 23, at 63.

[63] OECD, RESOLVING FOREIGN BRIBERY CASES WITH NON-TRIAL RESOLUTIONS: SETTLEMENTS AND NON-TRIAL AGREEMENTS BY PARTIES TO THE ANTI-BRIBERY CONVENTION 167–68 (2019), https://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf.

applicable, according to which "laws enacted by separate sovereigns criminalizing the same conduct are necessarily separate *offenses* and therefore are not subject to a double-jeopardy bar when prosecuted successively."[64] Hence, companies that resolved a foreign corruption matter outside the U.S. are not shielded from successive enforcement in the U.S. in relation to the same conduct.[65] A similar approach to successive anti-foreign corruption prosecution has been followed in other jurisdictions.[66]

D. OECD Anti-Bribery Convention and UNCAC Guidance

The OECD Anti-Bribery Convention, introduced in Section I.A, encourages signatories to the Convention to promulgate legislation

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[64] David B. Owsley, *Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study*, 81 WASH. U. L.Q. 765, 767 (2003); *see also* United States v. Lanza, 260 U.S. 377, 382 (1922); Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U.L. REV. 769, 779 (2009); Daniel A. Principato, *Defining the "Sovereign" in Dual Sovereignty: Does the Protection Against Double Jeopardy Bar Successive Prosecutions in National and International Courts?*, 47 CORNELL INT'L L.J. 767, 767–85 (2014).

[65] *See* United States v. Jeong, 624 F.3d 706, 711 (5th Cir. 2010). A South Korean national who was convicted in 2008 in South Korea of paying bribes to American public officials was shortly afterwards arrested and indicted in the U.S. on the basis of the same bribery scheme. After Jeong was sentenced, based on a guilty plea, Jeong challenged the indictment on the grounds that the U.S. lacked jurisdiction to prosecute him for the offenses. In affirming the sentence, the U.S. Court of Appeals for the Fifth Circuit held that double jeopardy does "not attach when separate sovereigns prosecute for the same offense." *Id.* at 711.

[66] See, for instance, the decision by the Paris Court of Appeal of February 16, 2016 in the case of Vitol. In 2007, Vitol S.A. entered into a guilty plea in New York state court regarding payments made to the Iraqi regime of Saddam Hussein. Shortly afterwards, Vitol was prosecuted in France for the same conduct. On July 8, 2013, the Paris Criminal Court ruled in favor of Vitol on the basis of the *ne bis in idem* principle. On February 16, 2016, this decision was overturned by the Paris Court of Appeals. The court stated that although the factual basis in the U.S. proceedings was similar to that at issue in the French case, the two proceedings were based on different offenses. Stéphane Bonifassi, Bonifassi Avocats, *France*, *in* ANTI-CORRUPTION REGULATION 65 (Homer E. Moyer Jr. contributing ed., 11th ed. 2017), http://www.petersandpeters.com/wp-content/uploads/2017/04/GTDT-Anti-Corruption-Regulation-2017.pdf.

that allows for jurisdiction over corrupt conduct committed entirely, or in part, in the country's territory.[67] It also encourages signatories to secure jurisdiction and to act against their nationals' foreign corrupt actions, even when those actions were committed outside of their territory.[68] Having anticipated that such laws—which, as described in Section B above, were indeed promulgated by many signatory countries—may lead to overlapping jurisdictions, the Convention explicitly sought to pave a way that would allow preventing multiple, duplicative prosecutions for the same conduct. Hence, in Article 4.3, the Convention sets forth that when more than one signatory country has jurisdiction over an alleged foreign corruption offense, the countries involved—at the request of one of them—"shall consult with a view to determining the most appropriate jurisdiction for prosecution."[69] A similar approach was also followed by the UNCAC.[70]

Does, then, the Convention provide protection against multiple, duplicative enforcement by various sovereign states against the same corrupt conduct? The answer here is no as well. While the Convention provides for a mechanism to avoid multiple, duplicative enforcement, it does not explicitly prohibit instances of multiple sovereign states acting against a culpable person or entity.[71] Attempts to invoke the Convention in defending against duplicative enforcement based on the OECD Convention were rejected by the U.S. Court of Appeals for the Fifth Circuit, which held that the Convention requires only that two signatories with overlapping jurisdiction over a relevant offense must, "at the request of one of them," consult on jurisdiction.[72] Hence, the court concluded that

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[67] OECD Convention on Combating Bribery, *supra* note 1, art. 4, ¶ 1.

[68] *Id.* art. 4, ¶ 2.

[69] *Id.* art. 4, ¶ 3.

[70] *See* UNCAC, *supra* note 19, art. 42, ¶ 5 ("If a State Party exercising its jurisdiction under paragraph 1 or 2 of this Article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.").

[71] OECD, *supra* note 63, at 167.

[72] *See* United States v. Jeong, 624 F.3d 706, 711 (5th Cir. 2010).

nothing in the Convention should be read as preventing separate sovereign states from prosecuting for the same misconduct.[73]

E. Summing Up

The growing interest of many countries around the world in fighting foreign corruption has generated local anti-foreign corruption laws with far-reaching applications.[74] Individuals and corporations who operate internationally face an increased risk of multiple, duplicative enforcement in relation to the very same corrupt conduct in different countries. The double jeopardy principle, which is well established in many legal systems, as well as the OECD Convention and the UNCAC, which allow for the allocation of prosecution power to a lead sovereign state, do not bar duplicative enforcement by multiple sovereign states.[75] Hence, absent a global framework limiting jurisdiction over a foreign corruption matter to a single sovereign state, culpable persons and entities increasingly face multiple—parallel or successive—enforcement actions.

In what follows, this Article suggests an analytical framework for the assessment of the adverse social impact of duplicative enforcement and the limited success of emerging approaches to cope with it. But before turning to the assessment, the following Part presents the recently promulgated DOJ Anti-Piling On Policy, which aims to address the challenges arising from multiple anti-foreign corruption enforcement actions.

II. DOJ'S ANTI-PILING ON POLICY

On May 9, 2018, Deputy Attorney General Rod Rosenstein announced the DOJ's new Anti-Piling On Policy at the New York City Bar White Collar Crime Institute.[76] The policy—which was formally incorporated into Sections 1-12.100 and 9.28.1200 of the U.S. Attorneys' Manual—is grounded on the understanding that

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[73] *Id.*

[74] *Global Overview of Anti-Corruption Laws 2017*, *supra* note 22.

[75] *See* OECD, *supra* note 63, at 167.

[76] *See* Letter from Rod J. Rosenstein, *supra* note 5.

duplicative enforcement may be at odds with the basic principles of proportionality and fairness.[77] It prevents predictability and may have far-reaching collateral consequences. As put by Deputy Attorney General Rosenstein[78]:

> The aim [of the new policy] is to enhance relationships with our law enforcement partners in the United States and abroad, while avoiding unfair duplicative penalties. It is important for us to be aggressive in pursuing wrongdoers. But we should discourage disproportionate enforcement of laws by multiple authorities . . . . "Piling on" can deprive a company of the benefits of certainty and finality ordinarily available through a full and final settlement. We need to consider the impact on innocent employees, customers, and investors who seek to resolve problems and move on. We need to think about whether devoting resources to additional enforcement against an old scheme is more valuable than fighting a new one.[79]

Given this point of departure, the new DOJ policy sets forth the following four guiding principles for all U.S. prosecutors to follow when considering exercising enforcement powers.

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[77] *Id.*; *see also Coordination of Corporate Resolution Penalties and/or Joint Investigations and Proceedings Arising from the Same Conduct*, U.S. DEP'T JUSTICE, https://www.justice.gov/jm/jm-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings (last visited Mar. 16, 2020); *Principles of Federal Prosecution of Business Organizations*, U.S. DEP'T JUSTICE, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.1200 (last visited Mar. 16, 2020).

[78] *See* Letter from Rod J. Rosenstein, *supra* note 5. The discomfort with duplicative enforcement was highlighted also by the 2011 B20 Summit (an international meeting of business leaders from the G20 countries) in Cannes, France. B20 members have recommended enhancing inter-governmental cooperation concerning multi-jurisdictional bribery cases in order to avoid situations of double jeopardy. This way, the underlying causes of the offense may be better remediated. *See* Gerry Ferguson, *Issues of Concurrent Jurisdiction: Overdeterrence*, *in* GLOBAL CORRUPTION: LAW, THEORY AND PRACTICE 83 (2d ed. 2017).

[79] *See* Letter from Rod J. Rosenstein, *supra* note 5.

First, the policy reinforces the basic principle that prosecutors must not use their criminal prosecution powers as leverage in maximizing fines in civil settlements. Second, when multiple DOJ divisions investigate the same person for the same misconduct, those division components should coordinate their enforcement actions in order to avoid duplicative penalties. Third, DOJ prosecutors should coordinate with other federal, state, local, as well as foreign enforcement authorities in resolving a case with a company for the same misconduct. Fourth, the policy sets forth some factors that DOJ attorneys may consider when determining whether multiple penalties serve the interests of justice in a particular case. Such factors include: the egregiousness of the misconduct, statutory mandate requirements, the risk of delay in reaching a resolution, and the adequacy and timeliness of a company's disclosure and cooperation.

The policy reserves wide discretion for the DOJ, particularly with respect to whether and how to exercise the coordination with other law enforcers in pursuing corporations for the same misconduct. As of its public announcement, the DOJ has underscored the discretion that its prosecutors will exercise in dealing with matters subject to multi-jurisdictional enforcement risk.[80] Clearly, the DOJ's interest in avoiding disproportionate, duplicative enforcement should not be interpreted as guaranteeing the DOJ's sidestepping when the matter at hand is subject to enforcement action elsewhere.[81] A review of the DOJ's FCPA docket of recent years reveals that the new policy largely reflects in

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[80] *See id.* ("Our new policy provides no private right of action and is not enforceable in court, but it will be incorporated into the U.S. Attorneys' Manual, and it will guide the Department's decisions . . . . This provision does not prevent Department attorneys from considering additional remedies in appropriate circumstances, such as where those remedies are designed to recover the government's money lost due to the misconduct or to provide restitution to victims.").

[81] *See id.* ("Cooperating with a different agency or a foreign government is not a substitute for cooperating with the Department of Justice. And we will not look kindly on companies that come to the Department of Justice only after making inadequate disclosures to secure lenient penalties with other agencies or foreign governments. In those instances, the Department will act without hesitation to fully vindicate the interests of the United States.").

recent practices by the DOJ in cases involving multiple enforcement interests by sovereign states.[82] The following paragraphs briefly outline the main mechanisms adopted by the DOJ in recent enforcement cases, including those which unfolded after the announcement of the new policy: (i) multi-jurisdictional cooperation, (ii) crediting penalties payable due to foreign enforcement, and (iii) sidestepping.

A. Multi-Jurisdictional Cooperation

Less than a month after the promulgation of the Anti-Piling On Policy, the DOJ, along with the French Public Prosecutor's Office, entered into a joint settlement with the Paris-based global financial services institution Société Générale S.A. in relation to bribes paid to Libyan officials and other violations.[83] Société Générale agreed to pay a combined penalty of USD 860 million, of which USD 585 million related to the bribery allegations.[84] Interestingly enough, this joint settlement was a clear example of a piling on enforcement action. Prior to that settlement, Société Générale had already settled a related civil dispute with a Libyan investment authority in which it agreed to pay approximately USD 1.1 billion.[85] That said, the joint settlement marked the first *coordinated resolution* between the DOJ and the French Public Prosecutor's Office in a foreign corruption case.[86] The matter was pronounced by U.S. Acting Assistant Attorney General John P. Cronan as sending "a strong message that transnational corruption and manipulation of our markets will be

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[82] *See The FCPA Docket*, FCPA BLOG (Mar. 26, 2019), https://fcpablog.com/2019/03/26/the-fcpa-docket-march-2019/.

[83] *Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate*, DEP'T JUSTICE (June 4, 2018), https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan [hereinafter *Manipulating LIBOR Rate*].

[84] *Id.*

[85] Michael Stothard & Jane Croft, *SocGen Agrees €963M Settlement with Libyan Investment Authority*, FIN. TIMES (May 4, 2017), https://www.ft.com/content/7dc88450-3094-11e7-9555-23ef563ecf9a.

[86] *Manipulating LIBOR Rate*, *supra* note 83.

met with a global and coordinated law enforcement response."[87] In addition to coordinating settlement timing and penalties, one other important practical benefit, which the U.S.-France coordinated multi-jurisdictional enforcement yielded to Société Générale, was the DOJ's willingness to settle the matter without imposing a corporate monitor on Société Générale, due, in part, to the anticipated ongoing monitoring by the French anti-corruption agency, L'Agence Française Anticorruption, following the joint settlement.[88] In the absence of a coordinated resolution, Société Générale may have resolved the twin enforcement actions in separate occasions, thereby potentially suffering higher reputational damages resulting from the repeated adverse publicity; may have paid a higher total in penalties;[89] and may have been subject to a corporate monitor as per its U.S. settlement, in addition to the monitoring of L'Agence Française Anticorruption.[90]

Shortly after Société Générale's coordinated settlement, on September 27, 2018, U.S. authorities entered into another remarkable multi-jurisdictional coordinated settlement—this time along with the Brazilian MPF and the Brazilian state-owned oil and gas company Petrobras, which has been at the core of the *Lava Jato* scandal.[91] The settlement resolved allegations in relation to the

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[87] *Id.*

[88] *See id.*; *see also Deputy Assistant Attorney General Matthew S. Miner of the Justice Department's Criminal Division Delivers Remarks at the 5th Annual GIR New York Live Event*, DEP'T JUSTICE (Sept. 27, 2018), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-justice-department-s-criminal-division [hereinafter *Remarks at the 5th Annual GIR*] ("Another important aspect of that case was our determination that the company did not warrant a monitor due to its significant remediation, together with the company's risk profile and ongoing monitoring by L'Agence Française Anticorruption.").

[89] *Manipulating LIBOR Rate*, *supra* note 83. As described in more detail in Section II.B below, in determining the penalty in the U.S. settlement, the DOJ credited $292,776,444, which Société Générale paid to the French Public Prosecutor's Office under its agreement, equal to fifty percent of the total criminal penalty otherwise payable to the U.S. *Id.*

[90] *Id.*

[91] Federal prosecutors . . . launched Lava Jato in March 2014, after the Finance Ministry's intelligence unit discovered unusual bank transactions involving the state-owned oil company

central role that the company and its highest executives—including members of its Executive Board and Board of Directors—had played in facilitating hundreds of millions of U.S. dollars of corrupt payments to Brazilian politicians and political parties, and in cooking the books to conceal the bribe payments from investors and regulators.[92] The joint settlement requires Petrobras to pay a combined penalty of USD 853.2 million, of which the DOJ and the SEC will each collect ten percent, with the Brazilian MPF collecting the remaining eighty percent.[93] The joint settlement was referred to by DOJ officials as an example of the application of the Anti-Piling On Policy.[94]

> Petrobras. They suspected that Petrobras was accepting bribes from firms, including the construction giant Odebrecht, in exchange for contracts. . . . [B]y October 2018 Lava Jato had resulted in more than two hundred convictions for crimes, including corruption, abuse of the international financial system, drug trafficking, and money laundering.

Claire Felter & Rocio Cara Labrador, *Brazil's Corruption Fallout*, COUNCIL ON FOREIGN REL. (Nov. 7, 2018), https://www.cfr.org/backgrounder/brazils-corruption-fallout; *see also Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than $850 Million for FCPA Violations*, DEP'T JUSTICE (Sept. 27, 2018), https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations.

[92] *Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than $850 Million for FCPA Violations*, *supra* note 91.

[93] Petrobras separately agreed with the SEC to pay $933 million in disgorgement and prejudgment interest. The SEC agreed to offset that amount by a sum Petrobras has to pay based on a settlement in a related private class-action shareholders' suit. The latter totaled $2.95 billion, thereby more than offsetting the disgorgement and interest agreed upon with the SEC. *See Petrobras Reaches Settlement with SEC for Misleading Investors*, U.S. SEC. & EXCHANGE COMMISSION (Sept. 27, 2018), https://www.sec.gov/news/press-release/2018-215.

[94] *Remarks at the 5th Annual GIR*, *supra* note 88; *see also Principal Deputy Assistant Attorney General John P. Cronan of the Justice Department's Criminal Division Delivers Remarks at the Latin Lawyer/Global Investigations Review Anti-Corruption and Investigations Conference*, DEP'T JUSTICE (Oct. 18, 2018), www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-john-p-cronan-justice-department-s-criminal-0 [hereinafter *Anti-Corruption and Investigations Conference*] (In relation to the Petrobras case, Principal Deputy Assistant Attorney General Cronan specifically referred to the DOJ's close

Similarly, on June 25, 2019, TechnipFMC, a publicly traded company in the United States and a global provider of oil and gas services, entered into a coordinated settlement with the DOJ and with the Brazilian authorities and agreed to pay a combined total criminal fine of more than USD 296 million to resolve charges with the DOJ and with the Brazilian authorities AGU, CGU, and MPF, relating, among other things, to bribery payments to Brazilian officials. In regard to the total fine of USD 296 million, approximately USD 82 million were paid to the DOJ, and approximately USD 214 million were paid to the Brazilian authorities.[95]

At last, the very recent "Airbus case" similarly shows that the Piling On Policy of the DOJ has had an increased influence on the actual course of procedures regarding multi-jurisdictional enforcement.[96] After four years of intensive investigation into corrupt matters within aerospace company Airbus Group SE, enforcement authorities in France, the U.K., and the U.S. have successfully cooperated, producing analogous versions of a deferred prosecution agreement between prosecutors and Airbus on the 31st of January 2020. The settlement resolved allegations with respect to executives of Airbus setting up a massive conspiracy enabling the company to pay bribes to decision-makers and foreign officials in different countries. In this way, Airbus was able to achieve inappropriate business benefits and secure contracts with state-controlled as well as private entities. The trilateral settlement obliged Airbus to pay U.S. authorities approximately USD 527 million, the French authorities USD 2.3 billion, and the U.K. authorities USD 1.1 billion. All together the amount of this global monetary penalty is over USD 3.9 billion and is referred to as the

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relationship with Brazilian authorities as enabling one of the most significant FCPA resolutions.).

[95] *TechnipFMC PLC and U.S.-Based Subsidiary Agree to Pay Over $296 Million in Global Penalties to Resolve Foreign Bribery Case*, DEP'T JUSTICE (June 25, 2019), https://www.justice.gov/opa/pr/technipfmc-plc-and-us-based-subsidiary-agree-pay-over-296-million-global-penalties-resolve.

[96] *Four Years and Almost $4 Billion: Airbus Corruption Investigations End with Sky-High Fine*, ROPES & GRAY (Jan. 31, 2020), https://www.ropesgray.com/en/newsroom/alerts/2020/01/Four-Years-and-Almost-4-Billion-Airbus-Corruption-Investigations-End-with-Sky-High-Fine.

largest fine in FCPA enforcement history.[97] Similar to the case of Société Générale, Airbus's Deferred Prosecution Agreement with the DOJ does not oblige them to appoint an independent monitor because the DOJ considered the monitoring by L'Agence Française Anticorruption sufficient.[98]

Société Générale's, Petrobras's, Technip's, and Airbus's multi-jurisdictional coordinated resolutions continue a recent, growing wave of multi-jurisdictional cooperation between enforcement authorities around the globe when acting against foreign corruption. This cooperation was highlighted in various DOJ officials' speeches and press releases referring to the Anti-Piling On Policy.[99] As was recently underscored by Principal Deputy Assistant Attorney General Cronan[100]:

> The Department of Justice's close relationships with many of our foreign partners [are] more important

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[97] *Id.*

[98] *Id.*

[99] *See* Mike Koehler, *FCPA Enforcement Actions Against Foreign Companies from OECD Convention Peer Countries*, FCPA PROFESSOR (Jan. 22, 2019), http://fcpaprofessor.com/fcpa-enforcement-actions-foreign-companies-oecd-convention-peer-countries-3/. For instance, Sandra Moser, Principal Deputy Chief of the DOJ's Fraud Section, commented:

> Coordination with foreign countries will continue, and that number of coordinated resolutions will grow, including with new countries. This is important for several reasons. First and foremost, it is fair to companies. It encourages companies to cooperate across the board, because we understand that, at the end of a case, money paid out is derived from one pie. A resolving company should not have piled upon it duplicative fines via separate resolutions that do not credit one another. Although the "piling on" problem is not entirely solved by doing this (other countries may certainly try to reach additional resolutions), our efforts do mitigate this problem, and we are trying to do better in this regard.

Id. Similar statements about the importance of global cooperation in anti-foreign corruption enforcement were made by the newly appointed Director of the U.K.'s Serious Fraud Office, Lisa Osofsky. *See* Lisa Osofsky, *Ensuring Our Country Is a High Risk Place for the World's Most Sophisticated Criminals to Operate*, SERIOUS FRAUD OFF. (Sept. 3, 2018), https://www.sfo.gov.uk/2018/09/03/lisa-osofsky-making-the-uk-a-high-risk-country-for-fraud-bribery-and-corruption/.

[100] *See Anti-Corruption and Investigations Conference*, *supra* note 94.

> than ever both in investigating and prosecuting corporate corruption, and also in working toward fair and appropriate resolutions. For instance, of our eight corporate FCPA resolutions in the past fiscal year, four of them were coordinated with foreign authorities. This number of coordinated resolutions speaks volumes both to the significant increase in global efforts to combat corruption and to our steadfast commitment to coordinate with foreign authorities to avoid duplicative penalties.[101]

Other recent examples of joint resolutions related to the Petrobras corruption scheme include: Odebrecht and Braskem, who in December 2016 concluded the largest-ever multi-jurisdictional anti-corruption joint resolution leading to a combined total penalty payment of at least USD 3.5 billion in order to resolve charges with authorities in the U.S., Brazil, and Switzerland;[102] Rolls Royce, who in January 2017 reached a USD 800 million resolution with U.S., U.K., and Brazilian authorities;[103] and Keppel Offshore & Marine, who in December 2017 reached a USD 422 million resolution with U.S., Brazilian, and Singaporean authorities.[104] Other recent joint resolutions, unrelated to Petrobras, include: the Stockholm-based Telia Company AB and its Uzbek subsidiary Coscom LLC, who in September 2017 reached a joint foreign corruption resolution with U.S. authorities (the DOJ and SEC), the Public Prosecution Office of the Netherlands, and the Public Prosecutor's Office in Sweden, totaling USD 965,773,949 in relation to a scheme to pay bribes in

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[101] *See id.*

[102] *See 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*, DEP'T JUSTICE (Dec. 21, 2016), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.

[103] *See Rolls-Royce PLC Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case*, DEP'T JUSTICE (Jan. 17, 2017), https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act.

[104] *See Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay $422 Million in Global Penalties to Resolve Foreign Bribery Case*, DEP'T JUSTICE (Dec. 22, 2017), https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties.

Uzbekistan;[105] the Amsterdam-based VimpelCom Limited and its wholly owned Uzbek subsidiary Unitel LLC, who in February 2016 reached a joint resolution with the DOJ, the SEC, and the Dutch Prosecution Office in relation to its corruption scheme in Uzbekistan, totaling USD 795 million;[106] and the Brazilian aircraft manufacturer Embraer S.A., who in October 2016 entered into a joint resolution with the DOJ, the SEC, and Brazilian authorities, totaling USD 206 million in penalties.[107]

The Anti-Piling On Policy, hence, formalizes and reinforces the recent practice of cooperation between different sovereign enforcement authorities that are interested in a particular foreign corruption scheme, with the aim of reaching a coordinated resolution.

B. Crediting

Another mechanism used by U.S. authorities in recent foreign corruption matters is that of crediting penalties payable to foreign enforcement authorities when calculating the penalty to be imposed in the U.S.[108] For instance, in the case of Société Générale, the DOJ agreed to credit USD 292,776,444 that Société Générale agreed to pay to the French Public Prosecutor's Office under its settlement, which was equal to half of the total criminal penalty otherwise

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[105] *See Telia Company AB and Its Uzbek Subsidiary Enter into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan*, DEP'T JUSTICE (Sept. 21, 2017), https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965.

[106] *See 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 Scheme*, DEP'T JUSTICE (Feb. 18, 2016), https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million.

[107] *Embraer Announces the Resolution of Case with the US and Brazilian Authorities*, EMBRAER (Oct. 24, 2016), https://embraer.com/global/en/news?slug=2129-embraer-announces-the-resolution-of-case-with-the-us-and-brazilian-authorities.

[108] *See* Letter from Rod J. Rosenstein, *supra* note 5.

payable to the U.S.[109] Similarly, in the case of Petrobras, the DOJ agreed to credit the amount that Petrobras had to pay to the SEC and to Brazilian authorities under their respective agreements, with the DOJ and the SEC receiving ten percent (USD 85,320,000) each and Brazil receiving the remaining eighty percent (USD 682,560,000).[110] From the USD 933 million Petrobras agreed to pay the SEC in disgorgement and prejudgment interest, the SEC agreed to credit the amount Petrobras has to pay based on a settlement in a related private class-action shareholders' suit.[111] The latter totaled USD 2.95 billion, and thereby it more than offset the disgorgement and interest agreed with the SEC.[112] The same arrangements were made with TechnipFMC,[113] Odebrecht and Braskem,[114] Rolls

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[109] *Manipulating LIBOR Rate*, *supra* note 83.

[110] *Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than $850 Million for FCPA Violations*, *supra* note 91.

[111] *See Petrobras Reaches Settlement with SEC for Misleading Investors*, *supra* note 93.

[112] Kevin LaCroix, *Petrobras Settles U.S. Securities Suit Based on Corruption-Related Allegations for $2.95 Billion*, D&O DIARY (Jan. 3, 2018), https://www.dandodiary.com/2018/01/articles/securities-litigation/petrobras-settles-u-s-securities-suit-based-corruption-related-allegations-2-95-billion/.

[113] *See TechnipFMC PLC and U.S.-Based Subsidiary Agree to Pay Over $296 Million in Global Penalties to Resolve Foreign Bribery Case*, *supra* note 95 ("In related proceedings, the company settled with the Advogado-Geral da União (AGU), the Controladoria-Geral da União (CGU) and the Ministério Público Federal (MPF) in Brazil over bribes paid in Brazil. The United States will credit the amount the company pays to the Brazilian authorities under their respective agreements, with TechnipFMC paying Brazil approximately $214 million in penalties.").

[114] *See Odebrecht and Braskem Plead Guilty and Agree to Pay At Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History*, *supra* note 102 ("Under the plea agreement, the United States will credit the amount that Odebrecht pays to Brazil and Switzerland over the full term of their respective agreements, with the United States and Switzerland receiving 10 percent each of the principal of the total criminal fine and Brazil receiving the remaining 80 percent.").

Royce,[115] Keppel,[116] Telia and Coscom,[117] VimpelCom and Unitel,[118] and Embraer.[119]

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[115] *See Rolls-Royce PLC Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case*, *supra* note 103 ("Because the conduct underlying the MPF resolution overlaps with the conduct underlying part of the department's resolution, the department credited the $25,579,170 that Rolls-Royce agreed to pay in Brazil against the total fine in the United States.").

[116] *See Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay $422 Million in Global Penalties to Resolve Foreign Bribery Case*, *supra* note 104 ("The United States will credit the amount the company pays to Brazil and Singapore under their respective agreements, with Brazil receiving $211,108,490, equal to 50 percent of the total criminal penalty, and Singapore receiving up to $105,554,245, equal to 25 percent of the total criminal penalty.").

[117] *See Telia Company AB and Its Uzbek Subsidiary Enter into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan*, *supra* note 105 ("Under the terms of its resolution with the SEC, Telia agreed to a total of $457,169,977 in disgorgement of profits and prejudgment interest, and the SEC agreed to credit any disgorged profits that Telia pays to the Swedish Prosecution Authority (SPA) or OM, up to half of the total. Telia agreed to pay the OM a criminal penalty of $274,000,000 for a total criminal penalty of $548,603,972, and a total resolution amount of more than $1 billion. The Department of Justice agreed to credit the criminal penalty paid to the OM as part of its agreement with the company. The SEC agreed to credit the $40 million in forfeiture paid to the Department as part of its agreement with the company.").

[118] *See 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 Scheme*, *supra* note 106 ("Under the terms of its resolution with the SEC, VimpelCom agreed to a total of $375 million in disgorgement of profits and prejudgment interest, to be divided between the SEC and OM. VimpelCom agreed to pay the OM a criminal penalty of $230 million, for a total criminal penalty of $460,326,398.40, and a total resolution amount of more than $835 million. The department agreed to credit the criminal penalty paid to the OM as part of its agreement with the company. The SEC agreed to credit the forfeiture paid to the department as part of its agreement with the company.").

[119] *See Embraer Paying $205 Million to Settle FCPA Charges*, U.S. SEC. & EXCHANGE COMMISSION (Oct. 24, 2016), https://www.sec.gov/news/pressrelease/2016-224.html ("Under the settlement, Embraer must pay a $107 million penalty to the Justice Department as part of a deferred prosecution agreement, and more than $98 million in disgorgement and interest to the SEC. Embraer may receive up to a $20 million credit depending on the amount of disgorgement it will pay to Brazilian authorities in a parallel civil proceeding in Brazil. Embraer must retain an independent corporate monitor for at least three years.").

Importantly, entering into a joint and coordinated multi-jurisdictional settlement is not a condition for the credit mechanism to be applied.[120] In several cases, the DOJ has agreed to credit penalties payable in other jurisdictions in connection with a related enforcement action.[121] For instance, on June 4, 2018, the Maryland-based investment management firm Legg Mason Inc. entered into a non-prosecution agreement with the DOJ in relation to FCPA violations in connection with Legg Mason's participation, through a subsidiary, in a Libyan bribery scheme.[122] The company agreed to pay USD 64.2 million to resolve the matter.[123] This payment includes a disgorgement of USD 31.617 million, which the DOJ agreed to credit "against disgorgement paid to other law enforcement authorities within the first year of the agreement."[124] On August 27, 2018, Legg Mason resolved its matter relating to related allegations with the SEC, according to which the company was required to pay USD 34 million, of which USD 27.6 million were for disgorgement and the rest for pre-judgement interest.[125] This amount was offset against the disgorgement amount agreed

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[120] *See infra* notes 122–126.

[121] *Id.*

[122] *See Legg Mason Inc. Agrees to Pay $64 Million in Criminal Penalties and Disgorgement to Resolve FCPA Charges Related to Bribery of Gaddafi-Era Libyan Officials*, DEP'T JUSTICE (June 4, 2018), https://www.justice.gov/opa/pr/legg-mason-inc-agrees-pay-64-million-criminal-penalties-and-disgorgement-resolve-fcpa-charges.

[123] *Id.*

[124] *Id.*

[125] *See Legg Mason Charged with Violating the FCPA*, U.S. SEC. & EXCHANGE COMMISSION (Aug. 27, 2018), https://www.sec.gov/news/press-release/2018-168; *see also* Jennifer K. Park, Abena Mainoo, & Martine B. Fornere, *Legg Mason Settles FCPA Charge with SEC for $34.5 Million*, CLEARY ENFORCEMENT WATCH (Sept. 4, 2018), https://www.clearyenforcementwatch.com/2018/09/legg-mason-settles-fcpa-charge-sec-34-5-million/; Richard L. Cassin, *SEC Completes Legg Mason FCPA Enforcement Action*, FCPA BLOG (Aug. 27, 2018), http://www.fcpablog.com/blog/2018/8/27/sec-completes-legg-mason-fcpa-enforcement-action.html.

with the DOJ.[126] In light of the penalty imposed by the DOJ, the SEC did not impose any additional fine in this matter.[127]

Similarly, in November 2017, with respect to the Deferred Prosecution Agreement entered between the DOJ and SBM Offshore (referred to in Section I.B above), the DOJ announced that, when calculating the total penalty of USD 238 million, it had credited the USD 240 million penalty paid by the company to the Dutch Public Prosecutor's Office, as well as the penalties that, at the time, were likely to be paid to the Brazilian Public Prosecutor's Office.[128]

C. Sidestepping

In addition to joint resolutions and crediting penalties payable in other jurisdictions, U.S. authorities have, on rare occasions, declined prosecution altogether against a company that has been subject to foreign bribery enforcement actions by a foreign sovereign. In August 2018, the DOJ informed the U.K.-based seismology testing equipment producer Gürlap Systems Limited ("Gürlap") that it had decided to decline prosecution against the company in relation to alleged corrupt payments in South Korea.[129]

Apparently, in December 2015, the U.K. SFO commenced an investigation against Gürlap and several of its executives in relation to corrupt payments made by Gürlap executives to a public official and employee of the Korea Institute of Geoscience and Mineral Resources ("KIGAM") between 2002 and 2015.[130] Concurrently, the DOJ launched an investigation into the same set of events, which eventually led to money laundering charges brought against the

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[126] *Supra* preceding note.

[127] *See* Cassin, *supra* note 125.

[128] *See* Deferred Prosecution Agreement, United States v. SBM Offshore N.V., *supra* note 55, at 13.

[129] *See* Letter from Daniel S. Kahn, Deputy Chief, DOJ Criminal Div. to Matthew Reinhard, Miller & Chevalier Chartered (Aug. 20, 2018), https://www.justice.gov/criminal-fraud/page/file/1088621/download.

[130] *See Güralp Systems Founder and Former Managing Director Charged with Corruption over South Korea Contracts*, SERIOUS FRAUD OFF. (Aug. 20, 2018), https://www.sfo.gov.uk/2018/08/17/guralp-systems-founder-and-former-managing-director-charged-with-corruption-over-south-korea-contracts.

former director of KIGAM's Earthquake Research Center, Heon-Cheol Chi.[131] In July 2017, Mr. Chi was convicted of the money laundering, and in October 2017, he was sentenced to a fourteen-month period in a federal prison.[132] Meanwhile, as the investigation against Gürlap was ongoing, the SFO brought charges against Gürlap's founder and top executives.[133] As mentioned, in August 2018, the DOJ announced its decision not to prosecute Gürlap, specifically mentioning that it had reached this conclusion based on, among other things, the facts that Gürlap is a U.K. company, with its principal place of business in the U.K., and that Gürlap was currently "the subject of an ongoing parallel investigation by the U.K.'s Serious Fraud Office for violations of law relating to the same conduct and ha[d] committed to accepting responsibility for that conduct with the SFO."[134] Interestingly, in this case, the DOJ's decision not to prosecute—which, in any event, did not include disgorgement—was based on an ongoing foreign investigation which has not been completed as of yet.[135]

More recently, in early October 2019, the DOJ decided to close its investigations against Royal Dutch Shell and against Eni S.p.A. in relation to corruption allegations revolving around the acquisition of the OPL 245 oilfield in Nigeria.[136] Both companies face trial in

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[131] *See Director of South Korea's Earthquake Research Center Sentenced to 14 Months in Federal Prison for Money Laundering Stemming from Million Dollar Bribe Scheme*, DEP'T JUSTICE (Oct. 2, 2017), https://www.justice.gov/usao-cdca/pr/director-south-korea-s-earthquake-research-center-sentenced-14-months-federal-prison.

[132] *Id.*

[133] *Id.*; *see also Güralp Systems Founder and Former Managing Director Charged with Corruption over South Korea Contracts*, *supra* note 130 (announcing that both individual executives were charged with conspiracy to make corrupt payments).

[134] *See Gürlap Systems Ltd*, SERIOUS FRAUD OFF. (Dec. 23, 2019), https://www.sfo.gov.uk/cases/guralp-systems-ltd/.

[135] The DOJ's Deputy Assistant Attorney General Matthew S. Miner has confirmed that its declination in the Gürlap case is consistent with its new Anti-Piling On Policy. *See Remarks at the 5th Annual GIR*, *supra* note 88.

[136] *See* Ron Bousso, *U.S. Justice Department Drops Investigation into Shell over Nigerian Oil Deal*, REUTERS (Oct. 2, 2019), https://www.reuters.com/article/us-nigeria-shell/u-s-justice-department-drops-investigation-into-shell-over-nigerian-oil-deal-idUSKBN1WH1SD; Stephen Jewkes, *U.S. DOJ Closes*

Italy in relation to those allegations.[137] Royal Dutch Shell is also the subject of an investigation by the Dutch Public Prosecutor's Office in relation to that matter.[138] The DOJ's decisions in these cases were based, among other things, on enforcement actions both companies face in Europe.[139]

Consistent with the DOJ's sidestepping in the cases above, in another recent matter—this time involving the SEC, which has not officially adopted the Anti-Piling On Policy—the SEC declined enforcement against the Dutch banking giant ING Group N.V. after the latter resolved its money laundering matter with the Dutch Public Prosecutor's Office.[140] In this case, on September 4, 2018, ING entered into a remarkable settlement with the Dutch Public Prosecutor in relation to deficiencies in preventing the bank accounts held by the bank's clients from being used to launder hundreds of millions of euros.[141] According to the agreement, ING agreed to pay a penalty of approximately USD 900 million.[142] On the following day, ING disclosed that it had received a letter declining prosecution from the SEC.[143] No explicit confirmation

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Nigeria, Algeria Investigations into Eni, REUTERS (Oct. 1, 2019, 10:55 AM), https://www.reuters.com/article/us-eni-nigeria-us/u-s-doj-closes-nigeria-algeria-investigations-into-eni-idUSKBN1WG46U.

[137] Andrew Ward, *Eni and Shell Face Trial in Italy over Alleged Nigeria Corruption*, FIN. TIMES (Dec. 20, 2017), https://www.ft.com/content/20cba7e2-e574-11e7-97e2-916d4fbac0da.

[138] *See OPL 245 – RDS PLC Informed of DPP Preparing to Prosecute*, SHELL (Mar. 1, 2019), https://www.shell.com/media/news-and-media-releases/2019/opl245-rds-plc-informed-of-dpp-preparing-to-prosecute.html.

[139] Bousso, *supra* note 136.

[140] *ING Receives Notice from SEC on Conclusion of Investigation*, ING (Sept. 5, 2018), https://www.ing.com/Newsroom/All-news/Press-releases/ING-receives-notice-from-SEC-on-conclusion-of-investigation.htm.

[141] *See ING Pays 775 Million Euro Due to Serious Shortcomings in Money Laundering Prevention*, OPENBAAR MINISTERIE (Sept. 4, 2018), https://www.om.nl/vaste-onderdelen/zoeken/@103952/ing-pays-775-million/.

[142] Ruben Munsterman & Andrew Blackman, *ING to Pay $900 Million to End Dutch Money Laundering Probe*, BLOOMBERG (Sept. 4, 2018), https://www.bloomberg.com/news/articles/2018-09-04/ing-to-pay-784-million-in-fines-to-settle-dutch-criminal-case.

[143] *See ING Receives Notice from SEC on Conclusion of Investigation*, *supra* note 140.

was provided that the SEC's sidestepping was due to the Dutch settlement.[144] Nevertheless, the temporal sequence of events suggests that this may have been the reason for the SEC's declining to prosecute.

Having described the newly promulgated Anti-Piling On Policy and its practical implementation in recent foreign corruption cases, this Article in the next Part turns to a normative analysis of those practices.

III. PROPOSED CRITERIA FOR FUNCTIONAL ENFORCEMENT IN AN INTERNATIONAL CONTEXT

Enforcement frameworks addressing corporate misconduct and the incentives they provide to corporations have long been scrutinized in various streams of studies. For instance, Law and Economics scholars have prescribed two goals to enforcement systems aiming to address corporate misconduct: first, *deterring* corporations from violating the law; and second, motivating corporations to exercise control over their employees and take the required actions to *reduce occurrences of misconduct*.[145] Such functions could be fulfilled by educating corporate employees, providing them with tools and guidance, monitoring them as required, and acting upon their violations of corporate policies and of the law.[146]

The role of enforcement systems in incentivizing corporations to act proactively to reduce misconduct is based on the premise that corporations often have a better—or less costly, when using the Law and Economics jargon—ability to control their employees when compared to that of the state.[147] Hence, an enforcement system which is directed at addressing corporate misconduct—and, in the current context, foreign corruption—may achieve its social goals if,

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[144] *Id.*

[145] Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 700 (1997).

[146] *Id.*

[147] *Id.*; *see also* Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 144 (Alon Harel & Keith N. Hylton eds., 2012).

in addition to deterring corporations from violating the law by making violation an irrational choice for the organization, it also motivates corporations to address the risk of crime using their enhanced capabilities.[148]

Another important stream of research has focused on the role of enforcement systems in *encouraging compliance*, rather than *deterring violations*. Specifically, this approach is based on the Procedural Justice Theory, according to which behavioral choices are linked to one's perception of the level of fairness involved in decision-making and their views about the legitimacy of the process to which they are subject.[149] *Legitimacy*—which is a key element of that theory—is referred to as "a quality possessed by an authority, a law or an institution which leads others to feel obligated to obey its decisions and directives."[150] A large number of studies conducted on the impact of legitimacy on compliance and cooperation with law enforcement clearly indicate that the willingness to effectively comply with laws and to cooperate with enforcement authorities increases when the authorities and their actions are perceived as fair and reasonable, consistent, and merit-based.[151]

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[148] *See generally* Sharon Oded, *Coughing Up Executives or Rolling the Dice?: Individual Accountability for Corporate Corruption*, 35 YALE L. & POL'Y REV. 49 (2016) (discussing the role of enforcement policies from a law and economics perspective).

[149] TOM R. TYLER & STEVEN L. BLADER, COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT (Psychology Press 2000); Tom R. Tyler & Heather J. Smith, *Social Justice and Social Movements, in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 595–629 (D.G. Gilbert, S.T. Fiske, & G. Lindzey eds., 4th ed. 1998).

[150] Jeffrey Fagan, *Introduction*, 6 OHIO ST. J. CRIM. L. 123, 123–40 (2008) (introducing Symposium, *Legitimacy and Criminal Justice*); Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. J. CRIM. L. 307, 313–14 (2009) [hereinafter Tyler, *The Benefits of Self-Regulation*]; WESLEY SKOGEN & KATHLEEN FRYDL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 297 (2004).

[151] *See, e.g.*, Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211 (2012); Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483, 483–507 (1988); Fagan, *supra* note 150; Tyler, *The Benefits of Self-Regulation*, *supra* note 150; Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective on*

Accordingly, this stream of studies would emphasize traits of fairness, reasonableness, proportionality, basis in merit, and consistency as important traits of an enforcement system that seeks to promote effective compliance with anti-corruption laws.[152] Importantly, that last stream of research does not denigrate the importance of law enforcement—or even of its use of power, penalties, and harsh measures when those are needed to secure the social order.[153] That said, such measures—according to this approach—should be used prudently, as a last resort.[154]

Building on that backdrop, one may suggest that the challenges presented by duplicative anti-corruption enforcement may be alleviated if anti-corruption enforcement on the global level is structured such that it fulfills the following roles:

i. *Efficiently obtaining an optimal level of deterrence*: by holding corporations liable for foreign corruption and by imposing an expected fine that reflects the social harm caused by foreign corruption, corporations—which are the ultimate beneficiaries of their employees' conduct within the scope of their employment—are motivated to internalize the social harm when determining the course of their employees' actions.[155] When the enforcement system

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Voluntary Deference to Authorities, 1 PERSONALITY & SOC. PSYCHOL. REV. 323–45 (2003); Tom R. Tyler & Steven L. Blader, *The Group Engagement Model: Procedural Justice, Social Identity and Cooperative Behavior*, 7 PERSONALITY & SOC. PSYCHOL. REV. 349–61 (2003); Tom R. Tyler et al., *The Ethical Commitment to Compliance: Building Value-Based Cultures*, 50 CAL. MGMT. REV. 31, 31–51; Tom R. Tyler et al., *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization*, 11 J. EMPIRICAL LEGAL STUD. 751–85 (2014).

[152] *See* EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 5–6 (1982).

[153] *Legg Mason Inc. Agrees to Pay $64 Million in Criminal Penalties and Disgorgement to Resolve FCPA Charges Related to Bribery of Gaddafi-Era Libyan Officials*, *supra* note 122.

[154] *See* NEIL GUNNINGHAM, MINE SAFETY: LAW, REGULATION, POLICY 117 (2007).

[155] *See* Arlen & Kraakman, *supra* note 145, at 691; *see also* Oded, *supra* note 148, at 70–71 (explaining the role of enforcement policies in motivating corporations to internalize the social harm resulting from the conduct of their employees).

is attuned to produce an adequate level of adverse consequences to foreign corruption, corporations are likely to be deterred from engaging in corrupt behavior, thereby determining their strategies while staying away from corrupt practices.[156] An inadequate level of deterrence may generate undesired incentives to corporations. While insufficient levels of enforcement may fall short of deterring corporations, an excessive level may encourage socially undesirable over-precaution, such as corporations withdrawing from high-risk developing markets, where their involvement has the highest marginal benefit to society, or simply corporations investing efforts in covering their tracks, thereby reducing the level of detection.[157]

ii. *Encouraging self-control and self-reporting*: given the composite structure of corporations, whose actions are executed by flesh-and-blood individuals, and provided that the enhanced ability of corporations to control these individuals is better than that of enforcement authorities, a well-functioning enforcement framework must seek to encourage corporations to exercise such control capabilities to prevent, detect, investigate, and self-report potential incidents of foreign corruption, to take required actions to cooperate

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[156] *See* Oded, *supra* note 148.

[157] *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 879 (1998) ("[I]f damages exceed harm, firms might be led to take socially excessive precautions. A socially excessive precaution is one that costs more than the reduction of harm produced by it."); Anthony Ogus, *Criminal Law and Regulation*, *in* CRIMINAL LAW AND ECONOMICS 95–96 (Edward Elgar Publishing 2009).

> [S]evere penalties can lead to over-deterrence[.] . . . It may be the case that with mainstream crimes, such as theft, assault or arson, there is little or no social utility in the behavior which constitutes the offence, but regulatory offences are different[.] . . . The latter normally arise during the course of everyday activities, including industrial and commercial undertakings, which enhance social welfare. Of course, with insufficient precautions, those activities may generate harm which exceeds the social benefit, hence the regulatory control, but if the prospect of a severe penalty induces the firm either to reduce the amount of the activity or to invest in an excessive level of care, or both, social welfare losses are incurred.

Id.

with public investigations, and to take required remediation actions to prevent reoccurrence.[158]

iii. *Promoting a culture of compliance*: while overly harsh and disproportionate enforcement may encourage corporate evasion, antagonism, and resistance, a socially desirable enforcement framework must encourage corporations to engage in meaningful compliance and adopt genuine commitments to compliance.[159] Once the enforcement framework secures an adequate level of legitimacy—that is to say, once it demonstrates traits, such as fairness, reasonableness, proportionality, basis in merit, and consistency—it is likely to enlist corporations to adopt a meaningful and genuine attitude to compliance which would nurture a culture of compliance within the organization.[160] By fulfilling these roles, an anti-corruption enforcement framework may reach its social purpose. Such a system recognizes the unique composite structure of corporations and the roles they may play in inducing corporate compliance by their employees. At the same time, it is also responsive to the subtler messages produced by the style of enforcement, and it may encourage a true and genuine approach by corporations in addressing the risk of foreign corruption and corporate failures in that field.

In what follows, this Article uses the triple role of anti-corruption enforcement systems to assess the challenges raised by duplicative, multi-jurisdictional enforcement and the *extent* to which the emerging enforcement practices, as formalized by the Anti-Piling On Policy, are coping with those challenges.

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[158] *See* Arlen & Kraakman, *supra* note 145, at 693; *see also* Oded, *supra* note 148, at 70–71.

[159] *See* BARDACH & KAGAN, *supra* note 152, at 102, 104 ("[L]egalistic enforcement strategies that are indifferent to the insights and attitudes of key personnel in regulated enterprises destroy rather than build cooperation and thereby undercut the potential effectiveness of regulatory program[s] . . . . Resentment and hostility from those who are regulated are direct effects of legalism and its attendant unreasonableness.").

[160] Tyler, *The Benefits of Self-Regulation*, *supra* note 150.

IV. ASSESSING THE ANTI-PILING ON POLICY

The triple role of enforcement frameworks, as outlined above, provides fruitful ground for a systematic assessment of anti-corruption multi-jurisdictional enforcement. This Part evaluates each of the practices, formalized by the Anti-Piling On Policy, to cope with the challenges created by duplicative multi-jurisdictional enforcement.

A. Multi-Jurisdictional Cooperation

While the Anti-Piling On Policy demonstrates an interest in increasing cooperation and promoting coordination with other law enforcers, this policy falls short of setting out clear rules of the multi-jurisdictional game. First, as mentioned in Part II above, the policy reserves for DOJ prosecutors a wide discretion in determining whether, and to what extent, to avoid piling on enforcement, while clarifying that the DOJ's willingness to avoid piling on should not be interpreted as surrendering the DOJ's interest in corporate voluntary self-reporting.[161] Additionally, while the DOJ certainly has been one of the world's leading enforcement authorities in combating foreign corruption, its unilateral policy is not globally applicable, and other enforcement authorities—including U.S. authorities—may follow a different approach.[162]

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[161] *See* Letter from Rod J. Rosenstein, *supra* note 5 and the related main text.

> Cooperating with a different agency or a foreign government is not a substitute for cooperating with the Department of Justice. And we will not look kindly on companies that come to the Department of Justice only after making inadequate disclosures to secure lenient penalties with other agencies or foreign governments. In those instances, the Department will act without hesitation to fully vindicate the interests of the United States.

Id.

[162] Interestingly, as described above, in the recent matter on ING, the SEC seems to have been following a similar approach to the DOJ's when deciding to decline enforcement against ING right after the announcement of ING's record-breaking resolution with the Dutch Public Prosecutor. *See* Ward, *supra* note 137 and the related main text.

Furthermore, when multi-jurisdictional cooperation is obtained ad hoc in specific cases and is not established on known and agreed upon principles of cooperation, such practice may not fulfil the triple goal of anti-corruption enforcement systems.[163] To begin, with respect to the role of *efficiently obtaining an optimal level of deterrence*, multi-jurisdictional enforcement may indeed increase process efficiency and obtain an optimal level of deterrence. For instance, effective cooperation may lead to increased efficiency by promoting the exchange of information between enforcement authorities, thereby allowing for a faster and easier discovery of a multinational corruption scheme.[164] Similarly, when the cooperation results in a proportionate and adequate penalty, it may secure an optimal level of deterrence.[165] On the other hand, when the cooperation is unable to prevent the duplication of investigative actions, and in fact leads to an ever-expanding scope of investigation, it may increase the overall public spending and reduce efficiency. A similar outcome would be obtained when a joint resolution simply reflects a multi-layered penalty representing the sum of all penalties that would otherwise have been imposed by all authorities.

Similarly, when considering the impact of multi-jurisdictional cooperation on corporate incentives to engage in *self reporting*, the inability of corporations to predict the essence and nature of multi-jurisdictional cooperation may drive them away from investigating red flags and, even more so, from voluntarily self-reporting those

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[163] *See supra* Part III.

[164] Several mechanisms were established in recent years to facilitate the exchange of investigation-relevant information between enforcement authorities in different countries. Such mechanisms often take the form of Mutual Legal Assistance Treaties, entered into by two or more countries with the aim of exchanging information in the furtherance of law enforcement interest. Examples of such treaties include: the European Convention on Mutual Assistance in Criminal Matters, the United Nations Convention against Transnational Organized Crime, and the Convention on Mutual Administrative Assistance in Tax Matters. *See* OECD ANTI-CORRUPTION NETWORK FOR E. EUR. & CENT. ASIA, INTERNATIONAL CO-OPERATION IN CORRUPTION CASES 13–19 (2017), https://www.oecd.org/corruption/acn/OECD-International-Cooperation-in-Corruption-Cases-2017.pdf.

[165] Sharon Oded, *Deterrence-Based Regulatory Enforcement*, *in* CORPORATE COMPLIANCE: NEW APPROACHES TO REGULATORY ENFORCEMENT 15–47 (2013).

red flags to enforcement authorities.[166] In that respect, multi-jurisdictional cooperation is a double-edged sword: while such cooperation has the potential to ease the burden of the multi-front uncoordinated battle, it also presents the risk of dealing with an empowered mythological creature—a monstrous Hydra of enforcement—which may fuel the expansion of investigations in scope and jurisdiction.[167]

Lastly, and following the same logic, multi-jurisdictional cooperation may present a higher level of legitimacy, thereby promoting a culture of compliance. That would be the case when the rules and cooperation are transparent and known and when the process and its outcomes are largely predicable by corporations. That said, multi-jurisdictional cooperation may also dilute the sense of legitimacy, for instance, when the global cooperation is used to leverage any local advantage into a global enforcement achievement. For example, consider a foreign corruption matter which is investigated by both U.S. and Chinese prosecutors. While the U.S. recognizes legal privilege, Chinese law does not,[168] which means, in this case, that Chinese authorities may seize the legal advice provided to the corporation by its external counsel. When a multi-jurisdictional enforcement entails free and unrestrained exchange of information between interested authorities, the value of local laws' protections, such as legal privilege and the right against self-incrimination, may be lost.[169]

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[166] Andrew T. Bulovsky, *Promoting Predictability in Business: Solutions for Overlapping Liability in International Anti-Corruption Enforcement*, 40 MICH. J. INT'L L. 549, 571–73 (2019).

[167] According to Greek mythology, the Hydra (known also as the Lernaean Hydra) is a multi-headed monstrous serpent. For every one head chopped off, the Hydra would regrow two. *See* DANIEL OGDEN, DRAKON: DRAGON MYTH AND SERPENT CULT IN THE GREEK AND ROMAN WORLDS 30 (Oxford University Press 2013).

[168] King & Wood, *Attorney-Client Privilege: Extended to Foreign Lawyers in China?*, CHINA L. INSIGHT (Apr. 1, 2009), https://www.chinalawinsight.com/2009/04/articles/corporate-ma/attorneyclient-privilege-extended-to-foreign-lawyers-in-china/.

[169] Kyle Wombolt & William Hallatt, *Managing Multi-Jurisdictional Investigations*, GIR (Sept. 22, 2015), https://globalinvestigationsreview.com/chapter/1024352/managing-multi-jurisdictional-investigations.

Summed up, multi-jurisdictional cooperation has the potential to better fulfill the triple role of enforcement systems than does an uncoordinated approach. That said, absent a globally recognized multi-jurisdictional framework, multi-jurisdictional cooperation may fall short of presenting an ideal solution for the challenges raised by multi-jurisdictional enforcement. While the Anti-Piling On Policy seeks to increase a sense of justice and proportionality in enforcement, its limited applicability (limited to the DOJ only) and high level of ambiguity jeopardize its real social value.

B. Crediting

The practice of crediting penalties, which are payable in other jurisdictions in relation to the same misconduct, may be used as a means to secure an adequate level of deterrence. In other words, the total penalty imposed in relation to the same misconduct would not exceed proportionate boundaries. Having said that, when the credit mechanism is implemented outside of a joint resolution scenario, such as in the matters of Legg Mason and SBM Offshore described in Section II.B above,[170] its performance in fulfilling the roles of *efficiently obtaining an optimal level of deterrence* and *encouraging self-enforcement* is more limited. A credit mechanism by itself does not remedy the excessive level of global public spending in relation to the investigation, nor does it alleviate the heavy burden imposed on corporations due to duplicative enforcement processes. Additionally, in the very absence of a global common understanding regarding the adequacy of penalties, any credit mechanism could be used, instead, to disguise the specious reduction of an inflated penalty. As such, the legitimacy of enforcement frameworks relying on a credit mechanism—and thereby their ability to *encourage meaningful compliance and cooperation*—also depends on whether such credit mechanism is credible and whether its implementation is transparent and predictable.

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[170] *Supra* Section II.B.

C. Sidestepping

Sidestepping has the practical potential to eliminate multi-jurisdictional enforcement of foreign corruption. When this mechanism is applied, in a coordinated way, by all countries (except for the "leading enforcer") having a vested interest in a certain scheme, enforcement can be concentrated in the hands of a single leading enforcer, with foreign law enforcement authorities supporting the investigation as needed.[171] The identity of the leading enforcer may be determined by using various criteria, such as the corporation's "home country," the country where a majority of the scheme has taken place, the country most affected by the scheme, or the country having an otherwise major stake in the scheme. Each of these criteria (and possibly others)—as well as the individual abilities of each to determine the most socially desirable enforcer—requires a separate analysis, which exceeds the scope of this Article. For the purpose of the current analysis, it is sufficient to assume that a sidestepping mechanism may allow for a single-enforcer enforcement action, thereby eliminating the multiplicity of multi-jurisdictional enforcement.

When one enforcement authority vacates the enforcement stage to another with parallel interest and jurisdiction, enforcement may *efficiently obtain an optimal level of deterrence*, given the elimination of duplicative enforcement costs. Similarly, it may encourage *corporate self-enforcement*, including internal investigations and voluntary self-reporting by corporations who now recognize the multi-jurisdictional risk of detection and the single jurisdictional front of enforcement. Lastly, such a system may benefit from higher levels of legitimacy from a corporate perspective, thereby *promoting a culture of compliance*.

Nevertheless, the sidestepping, or "lead enforcer" system, is not free of challenges. While following the international initiatives discussed in Section A above,[172] many countries have largely aligned their legislation with respect to criminalizing foreign

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[171] Support may be provided, for instance, through exchange of information, experience, and knowledge. Wombolt & Hallatt, *supra* note 169; *see* OECD ANTI-CORRUPTION NETWORK FOR E. EUR. & CENT. ASIA, *supra* note 164.

[172] *Supra* Section I.A.

corruption,[173] and those laws and their enforcement substantially differ across law enforcers. For instance, where a multi-country bribery scheme is concerned—as is often the case in foreign corruption schemes—some authorities may only be interested in certain specific parts of the entire scheme, while other authorities are only interested in other, different parts. Consider, for instance, the Rolls Royce matter referred to above.[174] In this case, the DOJ and the SFO's broad jurisdictions led each authority to resolve charges against the company relating to long lists of countries—the DOJ settlement covered misconduct in Thailand, Brazil, Kazakhstan, Azerbaijan, Angola, and Iraq, while the SFO settlement covered China, India, Indonesia, Malaysia, Nigeria, Russia, and Thailand.[175] At the same time, given a more limited jurisdiction, the resolution with the Brazil Public Prosecutor's Office focuses on misconduct occurring in Brazil only.[176] In such circumstances, sidestepping by U.S. and U.K. jurisdictions would mean a very limited settlement with Brazilian authorities, leaving the great majority of the scheme unresolved.

Hence, a "sidestepping" or "leading enforcer" approach requires a global understanding with respect to the choice of the "lead enforcer," and it has to secure that the enforcement matter is not restricted, due to limited jurisdiction of the lead enforcer, to a fraction of the territory covered by the global scheme. Additionally, particularly in the case of successive proceedings, such a global understanding would have to take account of the risk of "forum shopping,"[177] in which scenario the incumbent corporation may choose to voluntarily self-report to a favorable jurisdiction, expecting that reaching a resolution in that favorable jurisdiction would estop duplicative charges in other, more aggressive jurisdictions.

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[173] *See* Davis, *supra* note 23 and the related main text.

[174] *See Rolls-Royce PLC Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case*, *supra* note 103.

[175] *See id.*

[176] *See id.*

[177] *See* Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1507–35 (1995).

CONCLUSIONS: TOWARDS A GLOBAL APPROACH TO A GLOBAL CHALLENGE

In a borderless corporate business world, and with the amplified commitment to fighting foreign corruption by enforcement authorities, multinational corporations are subject to an increased risk of multi-jurisdictional enforcement. Based on a combined approach, which synthesizes insights from the stream of studies presented above,[178] this Article proposes an analytical framework to assess the social desirability of multi-jurisdictional foreign corruption enforcement, as well as recently emerging practices that cope with its challenges.

The framework suggested here prescribes the three key roles of anti-foreign corruption enforcement frameworks: (i) efficiently obtain the optimal level of deterrence, (ii) encourage self-enforcement, and (iii) encourage meaningful compliance and cooperation. Armed with this framework, the Article demonstrates the key challenges arising from an uncoordinated multi-jurisdictional enforcement. Additionally, the same analytical framework is utilized to assess the social desirability of practices, as formalized by the Anti-Piling On Policy,[179] to cope with the challenges of multi-jurisdictional enforcement—that is, multi-jurisdictional cooperation, crediting, and sidestepping. The analysis reveals that, while each of those mechanisms may present an improvement over an uncoordinated enforcement framework, their social desirability is, at the same time, highly jeopardized by the lack of certainty and predictability from a corporate position and perspective.

The Anti-Piling On Policy, promulgated on May 9, 2018, recognizes the challenges raised by multi-jurisdictional enforcement and seeks to formalize practices which may alleviate some of the concerns raised by multi-jurisdictional enforcement.[180] This policy undoubtedly presents an important first step towards addressing the

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[178] *See supra* Part III.

[179] Letter from Rod J. Rosenstein, *supra* note 5; *see also Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute*, *supra* note 5 (stating the social desirability of the new policy).

[180] *Supra* preceding note.

problem of duplicative multi-jurisdictional enforcement. That said, the policy falls short of presenting a satisfactory resolution. Its main shortcoming is linked to the high level of uncertainty and unpredictability remaining even after its promulgation. First, the policy reserves for DOJ attorneys a wide discretion in determining whether, and to what extent, to avoid piling on actions.[181] Additionally, the policy is applicable to DOJ attorneys only and does not oblige any other U.S. or foreign authority.[182] As such—even after the promulgation of this unilateral policy and the observation of several recent enforcement cases in which it has been implemented—corporations are still facing a high level of uncertainty and unpredictability with respect to the way in which their respective matters will be handled globally.

Corruption is a global evil. While the criminalization of that evil has largely aligned across jurisdictions, the time has come for a global arrangement of enforcement practices. Given deep variances between legal systems and the known resistance of various sovereign states to hand over their sovereignty,[183] this Article advocates for neither a full alignment of national anti-foreign corruption law nor the establishment of a universal enforcement authority to replace currently active public prosecutors.[184] Instead,

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[181] *See* Letter from Rod J. Rosenstein, *supra* note 5 and the related main text.

[182] *See id.* This can be deduced from Rosenstein's statement: "Our new policy . . . will be incorporated into the U.S. Attorneys' Manual, and it will guide the Department's decisions." *Id.*

[183] *See* Davis, *supra* note 23, at 100 (referring to the adamant refusal of U.S. prosecuting authorities and courts to recognize any limits on their power to engage in prosecutions that duplicate prosecutions abroad, coupled with the near-total silence of the Department of Justice on the standards it will apply to respect negotiated outcomes in other countries).

[184] *See* Lindsey Hills, *Universal Anti-Bribery Legislation Can Save International Business: A Comparison of the FCPA and the UKBA in an Attempt to Create Universal Legislation to Combat Bribery Around the Globe*, 13 RICH. J. GLOBAL L. & BUS. 469, 469–92 (2014) (advocating for universal enforcement as a way to secure efficient international business and the productivity of enforcement); *see also* Eric C. Chaffee, *From Legalized Business Ethics to International Trade Regulation: The Role of the Foreign Corrupt Practices Act and Other Transnational Anti-Bribery Regulations in Fighting Corruption in International Trade*, 65 MERCER L. REV. 701, 701–31 (2014) (advocating that

it supports the production of a set of norms which would be agreed upon among countries enlisted in the global fight against foreign corruption, such as parties to the OECD Anti-Bribery Convention or UNCAC. The analytical framework proposed in this Article, which outlines the triple role of foreign corruption enforcement frameworks, could serve as a compass in generating principles which consider the following core elements[185]:

1. *General principle of efficiency and legitimacy*: Coordinated joint enforcement actions should be guided by the triple goal of enforcement frameworks, that is, (i) efficiently obtain the optimal level of deterrence, (ii) encourage self-enforcement, and (iii) encourage meaningful compliance and cooperation.

2. *Transparency and predictability*[186]: A global set of common, shared principles should support a transparent enforcement framework which secures a reasonable level of predictability and certainty for corporations.

3. *Tolerance*: To be attainable, the common, shared principles should accommodate the differences in countries' institutional and legal frameworks. Such frameworks preferably do not require a full alignment of laws, enforcement procedures, or penalty schedules of different legal systems.

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anti-foreign corruption laws should be part of international trade law due to the large number of public international law treaties regarding corruption).

[185] The proposed principles are inspired by the Recommendation regarding Non-trial Resolutions (or Negotiated Settlements) of Cases involving Foreign Bribery, by The Recommendation 6 Network. *International Guidelines for Non-Trial Resolutions of Foreign Bribery*, CORP. COMPLIANCE & ENFORCEMENT, https://www.nhh.no/en/research-centres/corporate-compliance-and-enforcement/guidelines-for-non-trial-resolutions/ (last visited Mar. 16, 2020). The author was a member of The Recommendation 6 Network.

[186] NORWEGIAN SCH. OF ECON., EXPLANATORY NOTES ADDRESSED TO THE WORKING GROUP ON BRIBERY 1–2 (2018) https://www.nhh.no/globalassets/departments/accounting-auditing-and-law/cce/explanatory-notes-final-2019.pdf.

4. *Inclusiveness and finality*: The common, shared principles preferably allow all potential enforcement authorities of interest to join the coordinated or joint investigation. At the same time, the common, shared principles must reasonably guarantee the finality of enforcement in relation to the same or similar misconduct. In that respect, mechanisms such as an opt-in system could be considered, in which every relevant authority receives a notification of a potentially relevant investigation. Subject to existing jurisdiction, each state would be allowed to opt in to a joint or coordinated investigation. Enforcers who have not opted in would be estopped from launching an enforcement matter with respect to the same or similar misconduct once a resolution has been achieved by others.

5. *Secured benefits of cooperation*: When an inclusive mechanism, as suggested above, is adopted, benefits existing in a participating jurisdiction for cooperative corporations (*e.g.*, penalty reduction due to voluntary self-reporting) should be preserved, even when the cooperation has been exercised towards one authority. For instance, when a corporation voluntarily self-reports its suspicions to the U.K. SFO—and throughout the investigation the scheme appears to have a U.S. angle as well—the U.S. DOJ is thereby also informed of the scheme, as per the inclusiveness and finality principle, and the corporation will still be entitled to a penalty reduction in the U.S. for self-reporting.

6. *Efficient coordination*: The coordination of multi-jurisdictional enforcement and the implementation of the common principles may justify the establishment of a Global Task Force to support law enforcement authorities and incumbent corporations' coordination. The coordination would promote a joint determination of scope, enforcement actions, and timelines and would preferably operate in a way that increases the efficiency of the process and minimizes the costs associated with the multiplicity of enforcement fronts, both to law enforcers and to investigated corporations.

7. *Preservation of legal rights*[187]: When possible, the coordinated enforcement matters should preserve the privileges and

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[187] *Id*. at 5–6.

rights that the incumbent corporation is entitled to in each jurisdiction. For instance, privileged rights should be preserved, and privileged documents should not be shared by those jurisdictions in which privilege rights are not recognized by local law, unless the incumbent corporation has voluntarily waived its rights.

8. *Joint resolution*: When possible, enforcement authorities should reach a joint resolution, which is preferably made public on a single day and secures the finality of proceedings, while avoiding unnecessary collateral effects.

9. *Reasonableness of penalties*[188]: The total penalty resulting from the various fronts of enforcement must be reasonable and proportionate, given the circumstances of the offenses. Should a credit mechanism be used, the credit mechanism should reflect a genuine calculus rather than the specious reduction of inflated penalties.

10. *Coordinated remediation*[189]: Measures employed by the various fronts of enforcement should take account of each other in order to prevent unnecessary duplication of efforts in securing remediation. For instance, in reference to the DOJ resolution of both the Société Générale and Airbus matters, the decision on the imposition of a corporate monitor should take into account other monitoring mechanisms employed by other sovereign states in relation to deficiencies uncovered as part of the investigation.[190]

Reaching a global common understanding among law enforcement authorities may further promote the achievements of global initiatives, which have successfully aligned the criminalization of foreign corrupt practices and which add value to those initiatives by securing their effective implementation. Such common, shared guiding principles may increase the transparency and the predictability of the multi-jurisdictional enforcement arena,

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[188] *Id.* at 2–4.

[189] *Id.* at 4–5.

[190] *See Remarks at the 5th Annual GIR*, *supra* note 88 and the related main text.

may serve the purposes of anti-foreign corruption enforcement, and may promote the global social goal effectively.

Notably, in line with the approaches followed by the existing bodies of research mentioned above, the framework of analysis proposed in this Article focuses on the effects of enforcement systems on the motivation of potentially culpable corporations. The questions of restitution, allocation of fines between sovereign states, and the compensation of victims exceed the boundaries of this analysis and may deserve further scrutiny in future studies.