

WHERE ARE WE TODAY IN THE INTERNATIONAL FIGHT AGAINST OVERSEAS CORRUPTION: AN HISTORICAL PERSPECTIVE, AND TWO PROBLEMS GOING FORWARD

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The goal of my comments is to take a step back and begin with an historical perspective on the collective, international effort to fight corruption, and then to suggest two problems that effort faces today. One of those problems is fairly obvious and much-discussed: some countries do much more than others to fight overseas bribery. The other is less obvious: the United States Department of Justice (DOJ) could do more to encourage robust international, collaborative efforts by being clearer on when it will recognize, and defer to, the outcomes of criminal investigations overseas.

To begin with a bit of history:

The relevant history began with the 1977 adoption of the Foreign Corrupt Practices Act (FCPA)¹ in the aftermath of Watergate; before that, making a bribe to an official in another country was generally tolerated, and no comprehensive legislation prohibited it.² For roughly twenty years the FCPA went largely unenforced by the DOJ.³ It is clear why: as originally adopted, as a practical matter it applied only to U.S. corporations and persons; it was commonly viewed as singling them out and putting them at a competitive disadvantage against non-U.S. multinationals that remained free from the risk of prosecution, and even benefited from a tax deduction for overseas bribes.

The turning point was the adoption of the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention)⁴ in 1997. Now signed by forty-one nations, its clear purpose

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1. 15 U.S.C. § 78dd-1(a) (2012).
2. NORTON ROSE FULBRIGHT, BUSINESS ETHICS AND ANTI CORRUPTION (6th ed. 2014).
3. Justin Blount & Spencer Markel, *The End of the Internal Compliance World as We Know It, or An Enhancement of the Effectiveness of Securities Law Enforcement? Bounty Hunting Under the Dodd Frank Act's Whistleblower Provision*, 17 FORDHAM J. CORP. L. 4, 1024-26 (2012).
4. *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, OECD (2011), https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [hereinafter *Convention on Combating Bribery*].

was to create a “level playing field” by obligating its signatory nations to adopt laws similar to the FCPA, and to enforce them. The real history of FCPA enforcement began with the implementation of the OECD Convention in roughly 2000; DOJ investigations since that date have steadily increased, with fines well into the billions of dollars having been paid to federal and state treasuries.⁵ Along the way, a virtual “cottage industry” of lawyers and other professionals specializing in FCPA investigations has developed.⁶

Viewed from the perspective of the OECD Convention and its core purpose, two significant problems exist today that inhibit the “level playing field” goal.

The first is simply that some countries have been more aggressive, effective, and successful in implementing their anti-bribery laws than others. This problem was not unforeseen. The OECD was mindful that simply adopting legislation conforming to OECD Convention prerequisites was not enough, and that robust—and essentially comparable—enforcement was key.⁷ To this end, it has done periodic reviews of its signatory nations’ enforcement efforts, and publishes country-by-country reviews, available online.⁸ International Non-Governmental Organizations (NGOs), such as Transparency International, also publish data and commentary comparing relative national success in prosecuting overseas bribery.⁹

One of the countries that has done relatively badly is France¹⁰: while it adopted legislation that prohibits overseas bribery in 2000, since then, not a single corporation has been convicted of that crime.¹¹ There are a number

5. Blount & Markel, *supra* note 3, at 1025.

6. *Id.*; KROLL, CHALLENGING CORRUPTION IN THE ENERGY SECTOR (2007–2008).

7. KROLL, *supra* note 6, at 1026.

8. *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, OECD, <http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdantibriberyconvention.htm> (last visited Apr. 2017) [hereinafter *OECD Country Reports*].

9. Corruption Perceptions Index 2016, TRANSPARENCY INT’L (Jan. 25, 2017), http://www.transparency.org/news/feature/corruption_perceptions_index_2016.

10. Frederick T. Davis, *The Fight Against Overseas Bribery - Does France Lag?*, ETHIC INTELLIGENCE (Jan. 2015), <http://www.ethic-intelligence.com/experts/7546-fight-overseas-briberyfrance-lag/>.

11. Frederick T. Davis, *Criminal Responsibility in France - Is it out of Step?*, ETHIC INTELLIGENCE (Jan. 2015), <http://www.ethic-intelligence.com/experts/8344-corporate-criminal-responsibility/>; Frederick T. Davis, *International Double Jeopardy: U.S. Prosecutions and the Developing Law in Europe*, AM. U. INT’L. L. REV. 68, 68–70 (2016) [hereinafter *International Double Jeopardy*].

of theories as to why this is the case, on which I¹² and others¹³ have written. While there may be issues of political will to prosecute acts that were relatively recently encouraged by means of a tax deduction, there are also a number of curious procedural impediments and disincentives to French prosecutions.¹⁴ But France is not alone, as the OECD and NGO reports point out.¹⁵

Failure to contribute to a “level playing field” despite binding treaty obligations to do so is obviously unacceptable. In the case of France, U.S. prosecuting authorities have reacted by energetically pursuing French companies that they deemed subject to U.S. prosecutorial power because of those companies’ “presence” in the United States: either through maintaining U.S. subsidiaries, because some part of the nefarious activities took place on U.S. soil, or perhaps because U.S. dollars were involved.¹⁶ Four very large, well-known companies—viewed as “national economic champions” in France—have entered guilty pleas and/or Deferred Prosecution Agreements (DPAs) with U.S. authorities, and have paid in total well over U.S. \$2 billion to U.S. treasuries.¹⁷ All four of them could have been and, in my opinion should have been, prosecuted in France.

12. Frederick T. Davis, *Limited Corporate Criminal Liability Impedes French Enforcement of Foreign Bribery Laws*, GLOBAL ANTICORRUPTION BLOG (Sept. 1, 2016), <https://globalanticorruptionblog.com/2016/09/01/guest-post-unduly-limited-corporate-criminal-liability-impedes-french-enforcement-of-foreign-bribery-laws/> [hereinafter *Limited Corporate Liability*].

13. Sarah Kryz, *France’s Failure to Fight Foreign Bribery: The Problem is Procedure*, GLOBAL ANTICORRUPTION BLOG (Dec. 14, 2015), <https://globalanticorruptionblog.com/2015/12/14/france-failure-to-fight-foreign-bribery-the-problem-is-procedure/>; Elizabeth Loftus, *Laissez-nous Faire: France is Foregoing an Opportunity to Fight Corruption, but Maybe It is the Wrong One*, GLOBAL ANTICORRUPTION BLOG (May 9, 2016), <https://globalanticorruptionblog.com/2016/05/09/laissez-nous-faire-france-is-foregoing-an-opportunity-to-fight-corruption-but-maybe-it-is-the-wrong-one/>.

14. Kryz, *supra* note 13.

15. *OCED Country Reports*, *supra* note 8.

16. *Id.*

17. *French Oil and Gas Company, Total S.A., Charged in the United States and France in Connection with an International Bribery Scheme*, U.S. DEP’T OF JUST. (May 29, 2013), <https://www.justice.gov/opa/pr/french-oil-and-gas-company-total-sa-charged-united-states-and-france-connection-international>, Transcript of Record at 2 [hereinafter *Total*]; *United States v. Technip S.A.*, No. 10-CR-439 (S.D. Tex. June 28, 2010), U.S. DEP’T OF JUST. (last updated June 9, 2015), <https://www.justice.gov/criminal-fraud/case/united-states-v-technip-sa-court-docket-number-10-cr-439> [hereinafter *Technip*]; *Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges*, U.S. DEP’T OF JUST. (Dec. 22, 2014), <https://www.justice.gov/opa/pr/alstom-sentenced-pay-772-million-criminal-fine-resolve-foreignbribery-charges> [hereinafter *Alstom*]; *Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay \$92 Million to Resolve Foreign Corrupt Practices Act Investigation*, U.S. DEP’T OF JUST. (Dec. 27, 2010), <https://www.justice.gov/>

This has not gone unnoticed in France. Clearly as a result of U.S. pressure via such prosecutions, in December 2016 France adopted the “Loi Sapin II,” which progressively goes into effect during 2017.¹⁸ This law attempts to reinforce French efforts to combat overseas bribery by creating a new agency tasked with leading this effort, by creating a new obligation for French companies to have a compliance program meeting certain standards, by enhancing whistleblower protections, and—most controversially—by adopting a sort of DPA, which has never existed in French criminal procedures.¹⁹ Whether these reforms will create results deemed sufficient by U.S. prosecutors and the world community remains unclear.²⁰

The second problem I will identify is less obvious, but is also important and is linked to the first: Non-U.S. efforts to prosecute overseas bribery are hampered by the absence of clear, credible statements from U.S. prosecutors that they will desist from prosecuting if a local prosecutor does so in good faith. Article 4.3 of the OECD Convention provides that in the event of multiple investigations of the same conduct, the countries involved should coordinate to determine “the most appropriate jurisdiction for prosecution,”²¹ clearly envisioning that such a prosecution would be single and not multiple. This has not happened, but rather two scenarios occur rather frequently. First, outcomes in one country—including negotiated ones—are sometimes followed by a “me too” prosecution in another.²² And second, multinationals facing multiple prosecutors often reach separate, sometimes but not always coordinated, agreements with each.²³

This matters because of the baleful, disruptive effect a U.S. prosecution has on efforts elsewhere. Simply put, U.S. prosecutors have powers that most of their European counterparts can only dream of: unfettered discretion, virtual absence of judicial control over investigations

opa/pr/alcatel-lucent-sa-and-three-subsiidiaries-agree-pay-92-million-resolve-foreign-corrup
[hereinafter *Alcatel-Lucent*].

18. Loi 2016-830 du 8 novembre 2016 de la Lute Contre les Manquements a la Probite, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE, Nov. 8, 2016, p. 3623.

19. Frederick T. Davis, Charlotte Gunka, & Andrew M. Levine, *France’s New Anti-Corruption Framework: Potential Impact for Businesses in a Multijurisdictional World*, N.Y.U. COMPLIANCE & ENFORCEMENT (Dec. 7, 2016), https://wp.nyu.edu/compliance_enforcement/2016/12/07/frances-new-anti-corruption-framework-potential-impact-for-businesses-in-a-multijurisdictionalworld/.

20. *Id.*; Frederick T. Davis, *France’s New Anticorruption Law—What Does It Change?*, GLOBAL ANTICORRUPTION BLOG (Mar. 2, 2017), <https://globalanticorruptionblog.com/2017/03/02/frances-new-anticorruption-law-what-does-it-change/>.

21. *Convention on Combating Bribery*, *supra* note 4, at 8.

22. *International Double Jeopardy*, *supra* note 11, at 67.

23. *See id.* (comparing several such multiple prosecutions).

and negotiated outcomes,²⁴ expansive views of their extraterritorial powers²⁵ coupled with the fact that more than eighty percent of international business deals are denominated in U.S. dollars, very helpful laws on corporate criminal responsibility,²⁶ the risk of huge corporate penalties and the ability to cumulate such penalties, investigations that last months rather than multiple years, powers of evidence-gathering from which corporations are virtually helpless in shielding incriminating information, virtual freedom from any double jeopardy/*ne bis in idem* constraints,²⁷ and flexible procedures such as DPAs and NPAs—all enable

24. See *United States v. Fokker Servs. B.V.*, 818 F.3d 733 (D.C. Cir. 2016), (reversing the District Court that had refused to accept a DPA to which the defendant and the prosecutor had agreed, ruling that under principles of separation of powers it is the prosecutor, not a judge, who determines issues such as substantive fairness and public interest. This is dramatically inconsistent with, among others, the judgment of a Crown Court in the United Kingdom (UK) that vigorously criticized the UK Serious Fraud Office (SFO) for agreeing to a negotiated outcome, on the ground that sentencing was a matter for judges, not for negotiation); see Peter Burrell & Graham More, *R v. Innospec-Serious Fraud Office Judicially Criticized Over Innospec Global Settlement*, LEXOLOGY (Mar. 31, 2010), <http://www.lexology.com/library/detail.aspx?g=846fcb16-9c54-4abc-80b0-28bd52237305>; see Frederick T. Davis, *First British Deferred Prosecution Agreement—the Implications*, ETHIC INTELLIGENCE (Dec. 2015), <http://www.ethic-intelligence.com/experts/10555-first-british-deferredprosecution-agreement/> (reasoning that the recently adopted UK version of a DPA, as well as the soon-to-be adopted French version in the *Loi Sapin II*, both require searching review by courts, in a public session, to determine the fairness and proportionality of a proposed agreement).

25. See Frederick T. Davis, *Recent Decisions on the Extraterritorial Reach of U.S. Criminal Laws*, ETHIC INTELLIGENCE (Sept. 2015), <http://www.ethic-intelligence.com/experts/9598-recent-decisions-extraterritorial-reach-U.S.-criminal-laws/>.

26. *Limited Corporate Liability*, *supra* note 12.

27. The U.S. double jeopardy laws favor U.S. prosecutors in two separate ways compared to European prosecutors: The Double Jeopardy clause of the U.S. Constitution has been interpreted to prohibit re-prosecution only by the “same sovereign,” so that it provides no protection for a person pursued criminally by both the federal government and a state. As a result, the DOJ recognizes no preclusive legal effect to a judgment issued by a US State or foreign country. Separately, U.S. law permits both the DOJ and the Securities & Exchange Commission (or another administrative agency) to seek large payments from the same defendant for the same acts on the ground that the latter are “administrative” and not criminal. As a result, a company investigated by authorities in the United States may face four separate adversaries: a federal prosecutor, a federal administrative agency, a state prosecutor, and a state administrative agency. And in fact, in the *BNP Paribas* case, for example, the French bank ultimately reached agreements with, and paid settlements of more than U.S. \$9 billion to, the DOJ, the Federal Reserve Bank, the New York District Attorney’s Office, and the New York Department of Financial Services); see *BNP Paribas Agrees to Plead Guilty and to Pay \$8.9 Billion*, U.S. DEP’T OF JUST. (June 30, 2014), <https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial>. Within Europe, a company may be protected on both of these issues: A number of European treaties prohibit multiple criminal prosecutions within Europe, and recent decisions by the European Court of Human Rights and by the Conseil Constitutionnel in France indicate limits on the ability of a European country to pursue both administrative and criminal

them to move more quickly, and to strike far more terror into the hearts of corporate decision-makers, than can European prosecutors. As a result, my strong sense from speaking with prosecutors, defense lawyers, and corporate counsel in France is that if a company feels it faces the risk of U.S. as well as French prosecution, it will focus its efforts on dealing with the U.S. risk in the first instance, and assume that French prosecutors will fall into place later. In essence, as I have put it elsewhere, the U.S. is positioned as the “ultimate arbiter” on the sufficiency of bribery prosecutions around the world²⁸—as well as the recipient of billions of dollars of criminal and administrative fines, and other payments, made on the basis of such prosecutions.

This situation could lead to trouble. The “level playing field” that the OECD Convention envisioned was not only a world in which companies of all nationalities faced the same prohibitions and comparable risks of prosecution, but in which prosecutors would have an equal say in outcomes. Given the relative ineffectiveness of many countries’ efforts, the fact that the U.S. prosecutors have attempted to fill this gap is neither surprising nor, in itself, wrong. But there are already indications of resentment in France, perhaps in other countries as well; a recent article in two mainstream national publications²⁹ referred to U.S. prosecutions of French companies as a “big racket” designed to make money for U.S. treasuries and to protect U.S. companies, and legislators in the National Assembly are gathering information in an apparent effort to combat this situation, including the possibility of retaliation.³⁰

remedies for the same conduct. See *International Double Jeopardy*, *supra* note 11; see also Antoine Kirry & Frederick T. Davis, *France*, in 6 INTERNATIONAL INVESTIGATIONS REVIEW 119, 124 (Nicolas Bourtin ed. 2016).

28. David Vascott, *IBA Paris: U.S. Remains the ‘Ultimate Arbiter’ on International Enforcement*, GIR (June 16, 2016), <http://globalinvestigationsreview.com/article/1036139/iba-paris-us-remains-the-“ultimate-arbiter”-on-international-enforcement>.

29. Julie de la Brosse, *Le Racket Géant des Amendes Economiques Infligées par les États-Unis*, L’EXPRESS L’EXPANSION (Oct. 11, 2016, 7:40 AM), http://expansion.lexpress.fr/actualite-economique/le-racket-geant-des-amendes-economiques-infligees-par-les-etats-unis_1848745.html; Virginie Robert, *Quand le Droit Devient une Arme de Guerre Economique; en Savoir Plus Sur*, LES ECHOS (Oct. 10, 2016, 6:00 AM), <https://business.lesechos.fr/directions-juridiques/droit-desaffaires/contentieux/0211354715383-quand-le-droit-devient-une-arme-de-guerreeconomique300816.php?wpPxc66aiPjwZJre.99>.

30. *Mission D’information Commune Sur L’extraterritorialité de la Législation Américaine*, ASSEMBLEE NATIONALE (Oct. 5, 2016), <http://www2.assemblee-nationale.fr/14/missions-d-information/missions-d-information-communes/mission-d-information-commune-sur-l-extraterritorialite-de-la-legislation-americaine>.

Without slowing their efforts to prosecute overseas corruption, U.S. prosecutors could do more to emphasize unambiguously that they will respect non-U.S. outcomes that are resolved in good faith and on an appropriate basis, and to articulate the criteria they use to determine the appropriateness or sufficiency of those outcomes. In recent months, senior DOJ officials have emphasized their willingness to work with their counterparts abroad, and apparently believe that those efforts are fruitful.³¹ However, when asked in public conferences what criteria they use to evaluate non-U.S. outcomes, their publicly available responses are vague.³² The DOJ issues careful and detailed “guidelines” on many aspects of their discretionary authority to charge offenses, but no such guidelines address the weight they will give to non-U.S. outcomes, or procedures multinationals should follow in that situation. And the DOJ’s recent track record is unclear. In 2014, the Dutch offshore giant SBM Offshore (SBM), which had announced in 2012 that it was under investigation by the DOJ, negotiated an outcome with Dutch authorities, followed immediately by a DOJ decision not to prosecute.³³ This gave heart to the prospect of deference to non-U.S. outcomes and perhaps unsurprisingly led to an immediate surge in the value of SBM’s shares in the marketplace, reflecting the immense monetary cost of the mere fact of being investigated by U.S. prosecutors.³⁴ More recently, in the Vimpelcom³⁵ and the Embraer³⁶ matters, the DOJ did not defer to non-U.S. prosecutions but rather shared the penalty payments (on a roughly 50/50 basis in the first, roughly 80/20 in favor of the U.S. in the second) with their counterparts. In the four

31. See Veronica Glick & Jonathan Tuttle, *Assistant Attorney General Caldwell’s Q&A Regarding FCPA Enforcement*, FCPA PROFESSOR (Nov. 4, 2016), <http://fcpaprofessor.com/assistant-attorney-general-caldwells-qa-regarding-fcpa-enforcement/>.

32. Waithera Junghae, *Mark Steward: FCA Will Not Rely on Internal Investigation Reports*, GIR (Oct. 10, 2016), <http://globalinvestigationsreview.com/article/1069048/mark-steward-fca-will-not-rely-on-internal-investigation-reports> (see comments of Andrew Weissmann, noting that “working with foreign authorities is a more recent phenomenon,” and is “very much a work in progress”).

33. Sean Hecker, Andrew M. Levine, & Taz R. Shahabuddin, *Small Country, Big Punch: The Netherlands Anti-Bribery Prosecution of SBM Offshore*, DEBEVOISE & PIMPTON, FCPA UPDATE 13 (Dec. 2014), http://www.debevoise.com/~media/files/insights/publications/2014/12/fcpa_update_dec_2014_final.pdf.

34. *Id.* at 22.

35. *Vimpelcom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution*, U.S. DEP’T OF JUST. (Feb. 18, 2016), <https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million>.

36. *Embraer Agrees to Pay More than \$107 Million to Resolve Foreign Corrupt Practices Act Charges*, U.S. DEP’T OF JUST. (Oct. 24, 2016), <https://www.justice.gov/opa/pr/embraer-agrees-paymore-107-million-resolve-foreign-corrupt-practices-act-charges>.

principal FCPA outcomes negotiated between U.S. authorities and French companies, involving Total, Technip, Alcatel, and Alstom, the DOJ sometimes praised their French counterparts for their “cooperation,” but did not share a single dollar of the more than \$2 billion paid in fines and forfeitures.³⁷ If those striking distinctions in outcome were based on principles, the principles are certainly not apparent. But unless the DOJ does more to recognize the sovereign concerns of its trading partners—whether by deferring to their prosecutions, or at a minimum sharing the proceeds, and making clear the principles it follows in doing so—it risks inhibiting those partners’ efforts and creating tensions with them.³⁸

37. *Total*, *supra* note 17; *Alstom*, *supra* note 17; *Technip*, *supra* note 17; *Alcatel-Lucent*, *supra* note 17.

38. Frederick T. Davis, *The US Needs To Show More Respect for Foreign Prosecutors*, GAB (Nov. 3, 2016, 7:30 AM), <https://globalanticorruptionblog.com/2016/11/03/guest-post-the-us-needs-to-show-more-respect-for-foreign-prosecutions/>; *see also* Michael Maruca, *Equitable Sharing, Not Deference: How US FCPA Enforcers Should Accommodate Foreign Interests*, GAB (Dec. 16, 2016, 10:00 AM), <https://globalanticorruptionblog.com/2016/12/16/equitable-sharing-not-deference-how-us-fcpa-enforcers-should-accommodate-foreign-interests>; Frederick T. Davis, *The Case for Greater US Deference to Foreign Anticorruption Prosecutions—A Response to Maruca*, GAB (Feb. 13, 2017, 10:00 AM), <https://globalanticorruptionblog.com/2017/02/13/guest-post-the-case-for-greater-us-deference-to-foreign-anticorruption-prosecutions-a-response-to-maruca/>.