Journal of International Business and Law

Volume 20 | Issue 1 Article 3

6-1-2020

Enforcement of the Foreign Corrupt Practices Act against Foreign Issuers: Helping or Hindering the Global Anti-Bribery and Anti-Corruption Movement?

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ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT AGAINST FOREIGN ISSUERS: HELPING OR HINDERING THE GLOBAL ANTI-BRIBERY AND ANTI-CORRUPTION MOVEMENT?

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I. INTRODUCTION

Between July 2018 and March 2019, three scandals came to light that revealed important issues surrounding the Foreign Corrupt Practices Act ("FCPA"). The first scandal involved employees in the Hong Kong-based subsidiary of a publicly-traded Swiss bank who engaged in a scheme to hire friends and family members of Chinese public officials to garner additional business.[1] In the second, executives at a Brazilian state-owned oil and gas company facilitated bribes to Brazilian politicians and political parties.[2] Finally, the third scandal featured affiliates of a German medical device company whose agents paid bribes to publicly employed health and government employees in Africa and the Middle East.[3] On the surface, bribery is the only thing these scandals have in common; however, each scandal also resulted in a hefty settlement with the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC").[4]

The FCPA, a law that prevents the bribery of foreign public officials,[5] was enacted in 1977 following Watergate-era revelations that American multinational corporations made questionable payments to foreign officials and foreign political parties for business purposes.[6]

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[1] *See* Press Release, U.S. Dep't of Just., Credit Suisse's Investment Bank in Hong Kong Agrees to Pay $47 Million Criminal Penalty for Corrupt Hiring Scheme that Violated the FCPA (July 5, 2018), https://www.justice.gov/opa/pr/credit-suisse-s-investment-bank-hong-kong-agrees-pay-47-million-criminal-penalty-corrupt; Press Release, SEC, SEC Charges Credit Suisse with FCPA Violations (July 5, 2018), https://www.sec.gov/news/press-release/2018-128.

[2] *See* Press Release, U.S. Dep't of Just., Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than $850 Million for FCPA Violations (Sept. 27, 2018), https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations; Press Release, SEC, Petrobras Reaches Settlement with SEC for Misleading Investors (Sept. 27, 2018), https://www.sec.gov/news/press-release/2018-215.

[3] *See* Press Release, U.S. Dep't of Just., Fresenius Medical Care Agrees to Pay $231 Million in Criminal Penalties and Disgorgement to Resolve Foreign Corrupt Practices Act Charges (Mar. 29, 2019), https://www.justice.gov/opa/pr/fresenius-medical-care-agrees-pay-231-million-criminal-penalties-and-disgorgement-resolve; Press Release, SEC, SEC Charges Medical Device Company with FCPA Violations (Mar. 29, 2019), https://www.sec.gov/news/press-release/2019-48.

[4] *See* Press Release, U.S. Dep't of Just., *supra* note 1; Press Release, SEC, *supra* note 1; Press Release, U.S. Dep't of Just., *supra* note 2; Press Release, SEC, *supra* note 2; Press Release, U.S. Dep't of Just., *supra* note 3; Press Release, SEC, *supra* note 3.

[5] *See* Foreign Corrupt Practices Act of 1977, Pub. L. No. 213, § 30(A), 91 Stat. 1494, 1495; Foreign Corrupt Practices Act of 1977 Amendment, Pub. L. No. 418, § 5003, 102 Stat. 1107, 1415 (1988); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 366, § 78dd-2, 112 Stat. 3302, 3304.

[6] Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO STATE L.J. 929, 934 (2012); *A Resource Guide to the Foreign Corrupt Practices Act*, DEP'T OF JUST. CRIM. DIV. & SEC ENF'T DIV. 2 (2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf [hereinafter *A Resource Guide*].

The business community initially raised concerns that the FCPA would harm American businesses and put them at a competitive disadvantage to foreign competitors who did not face similar restrictions.[7] However, this concern proved unfounded, at least initially, because the FCPA was infrequently enforced in the early years after its passage.[8]

Over time, perspectives changed, and influential corporations such as General Electric began to lobby for an international agreement that would prohibit bribery of foreign public officials.[9] In 1988, Congress amended the FCPA and directed President Reagan to negotiate an agreement with the Organisation for Economic Co-operation and Development ("OECD") to prohibit the bribery of foreign public officials.[10] Nearly a decade later, in late 1997, the OECD concluded its Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"), which requires signatories to adopt national laws prohibiting the bribery of foreign public officials.[11] The United States ("U.S.") quickly signed on to the OECD Convention in 1998 and amended the FCPA accordingly.[12]

Thereafter, the U.S. began enforcing the FCPA in earnest.[13] To date, more than forty other countries have ratified the OECD Convention and implemented local legislation in line with its requirements.[14] In the years following the OECD Convention, the global anti-bribery and anti-corruption movement continued to grow and expand through the 2003 United Nations Convention Against Corruption ("UN Convention") and the adoption of other expansive national laws, such as the United Kingdom's ("UK") Bribery Act of 2010 ("Bribery Act").[15] Nevertheless, despite globalization of the anti-bribery and anti-corruption movement, the U.S. remains by far the most active country in the world in terms of enforcing its national law prohibiting the bribery of foreign officials.[16]

Returning to the three scandals of Credit Suisse, Petrobras, and Fresenius discussed at the beginning of this paper: why were they fined for violating the FCPA? They are not U.S.-based companies, and their American affiliates did not participate in the actions that violated the FCPA.[17] The answer is that each company is a "foreign issuer" under the FCPA, meaning

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[7] Rachel Brewster, Enforcing the FCPA: International Resonance and Domestic Strategy, 103 VA. L. REV. 1611, 1628 (2017).

[8] *Id.* at 1614.

[9] *Id.* at 1630-31.

[10] *A Resource Guide*, supra note 6, at 3.

[11] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, 37 I.L.M. 1, 3 [hereinafter Convention on Combating Bribery].

[12] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Ratification Status, OECD (May 2018), http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf [hereinafter OECD]; see A Resource Guide, supra note 6, at 4 (discussing the amendments made to the FCPA).

[13] Brewster, *supra* note 7, at 1617.

[14] OECD, *supra* note 12.

[15] *See generally* United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41 [hereinafter UN Convention Against Corruption]; Bribery Act of 2010, c.23 (UK), https://www.legislation.gov.uk/ukpga/2010/23/contents.

[16] OECD Working Group on Bribery, *2018 Enforcement of the Anti-Bribery Convention*, OECD 2-4 (Dec. 2019) https://www.oecd.org/corruption/anti-bribery/OECD-Anti-Bribery-Convention-Enforcement-Data-2019.pdf [hereinafter *2018 Enforcement*].

[17] Press Release, U.S. Dep't of Just., *supra* note 1; Press Release, U.S. Dep't of Just., *supra* note 2; Press Release, U.S. Dep't of Just., *supra* note 3.

it is a foreign company that lists its securities on an American stock exchange.[18] Foreign issuers are subject to the FCPA, the same as domestic issuers (U.S-based publicly-listed companies) and domestic concerns (such as U.S. citizens, nationals, companies, partnerships, and associations).[19] In recent years, FCPA enforcement has increasingly focused on foreign issuers.[20] These foreign issuers routinely make up the majority of the top ten FCPA settlement fines, irrespective of how the fines are calculated.[21]

The foregoing facts are thought-provoking. Why does the U.S. pursue foreign issuers for FCPA violations?[22] In the cases of Credit Suisse, Petrobras, and Fresenius, these companies are headquartered in nations that ratified the OECD Convention and have put in place local implementing legislation prohibiting the bribery of foreign officials.[23] Therefore, one may question whether the FCPA enforcement actions pursued by the U.S. government against Credit Suisse, Petrobras, and Fresenius were appropriate and whether they helped or hindered the global anti-bribery and anti-corruption movement.

This paper argues that the U.S. should stop enforcing the FCPA against foreign issuers with a weak U.S. nexus because doing so actually undermines the global anti-bribery and anti-corruption movement. Section II begins by describing the global anti-bribery landscape and explaining how a single law, the FCPA, helped pave the way for a global anti-bribery movement. This section also includes an overview of the status of global enforcement efforts and the central role played by the FCPA. Section III analyzes recent FCPA enforcement trends and how they impact foreign issuers. Section IV examines how FCPA enforcement trends against foreign issuers undermine the global anti-bribery and anti-corruption movement. Finally, Section V proposes a recommendation for making anti-bribery enforcement more global.

II. GLOBAL ANTI-BRIBERY LANDSCAPE

In the last forty years, the world has seen a major change in the perception of bribery of foreign officials. In the wake of Watergate, the SEC discovered that American businesses

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[18] *A Resource Guide*, supra note 6, at 10-11.

[19] *A Resource Guide*, supra note 6, at 10-11.

[20] Annalisa Leibold, *Extraterritorial Application of the FCPA Under International Law*, 51 WILLAMETTE L. REV. 225, 233-38 (2015).

[21] Top 10 lists of FCPA fines are calculated differently from source to source with some looking at gross fines and others considering credits and deductions. *See* Richard L. Cassin, *Ericsson jolts the FCPA top ten list*, FCPA BLOG (Dec. 9, 2019, 8:28 AM), https://fcpablog.com/2019/12/09/ericsson-jolts-the-fcpa-top-ten-list/; *The Top Ten List of Corporate FCPA Settlements*, FCPA PROFESSOR (Dec. 9, 2019), http://fcpaprofessor.com/top-ten-list-corporate-fcpa-settlements-4/ [hereinafter FCPA PROFESSOR]; Foreign Corrupt Practices Act Clearinghouse (FCPAC), *Largest U.S. Monetary Sanctions by Entity Group*, STAN. L. SCH. (last visited Jan. 15, 2020), http://fcpa.stanford.edu/statistics-top-ten.html.

[22] Tim Worstall, *Isn't It Strange That U.S. Gets to Fine Alstom, A French Company, For Bribery Not in the U.S.?* FORBES (Dec. 22, 2014), https://www.forbes.com/sites/timworstall/2014/12/22/isnt-it-strange-that-the-us-gets-to-fine-alstom-a-french-company-for-bribery-not-in-the-us/#4c121c5eb36e.

[23] *See* OECD, *supra* note 12 (explaining that Switzerland, Germany and Brazil have each ratified and implemented the required local legislation prohibiting foreign bribery).

had paid hundreds of millions of dollars in bribes to foreign officials for business purposes.[24] Bribery was viewed as a cost of doing business, and in some countries, such as Germany, bribes were even an expense that could be deducted from corporate taxes.[25]

Starting with the enactment of the FCPA in 1977, the landscape began to slowly change. More than forty years later, bribery of foreign officials is a major compliance risk for companies across the globe.[26] Indeed, companies that run afoul of the FCPA face high costs in terms of legal fees, government-imposed fines, compliance monitors, and negative press.[27]

A. FCPA

The FCPA, a U.S. law prohibiting the bribery of foreign public officials,[28] was passed in 1977, amended in 1988, and again in 1998.[29] The latter amendments brought the FCPA in line with the provisions of the OECD Convention, which the U.S. ratified in 1998.[30] The law has two provisions: anti-bribery and accounting,[31] and enforcement responsibilities are shared by two federal agencies.[32] The DOJ is responsible for criminal enforcement of the anti-bribery provisions and, in certain cases, for civil enforcement of the FCPA,[33] while the SEC is responsible for civil enforcement of the FCPA's accounting provisions for companies under its jurisdiction.[34]

The FCPA applies to issuers, domestic concerns, and certain other persons and entities when acting in the U.S.[35] Issuers are companies that list or trade their stocks on an American exchange (in stock or American Depository Receipts) or are otherwise required to file SEC reports.[36] The DOJ/SEC guidance on the FCPA notes, "A company thus need not be a U.S. company to be an issuer. Foreign companies with American Depository Receipts that are listed on a U.S. exchange are also issuers."[37] Domestic concerns are:

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[24] *A Resource Guide*, supra note 6, at 3.

[25] Nora M. Rubin, A Convergence of 1996 and 1997 Global Efforts to Curb Corruption and Bribery in International Business Transactions: The Legal Implications of the OECD Recommendations and Convention for the United States, Germany, and Switzerland, 14 AM. U. INT'L L. REV. 257, 260-61 (1998).

[26] Mike Koehler, The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence, 43 IND. L. REV. 389, 396 (2010).

[27] *See* Press Release, Walmart, Inc., Walmart Reaches Agreements with the DOJ and the SEC to Resolve Their FCPA Investigations (June 20, 2019), https://news.walmart.com/2019/06/20/walmart-reaches-agreements-with-the-doj-and-the-sec-to-resolve-their-fcpa-investigations; Nandita Bose, Walmart to pay $282 million to settle seven-year global corruption probe, REUTERS (June 20, 2019), https://www.reuters.com/article/us-walmart-fcpa/walmart-to-pay-282-million-to-settle-seven-year-global-corruption-probe-idUSKCN1TL27J.

[28] *A Resource Guide*, supra note 6, at 2.

[29] *See generally* Foreign Corrupt Practices Act § 30(A); Foreign Corrupt Practices Act Amendment § 5003; International Anti-Bribery and Fair Competition Act § 78dd-2.

[30] *A Resource Guide*, supra note 6, at 4.

[31] *A Resource Guide*, supra note 6.

[32] *A Resource Guide*, supra note 6.

[33] *A Resource Guide*, supra note 6, at 4.

[34] *A Resource Guide*, supra note 6, at 4.

[35] *A Resource Guide*, *supra* note 6, at 10.

[36] *A Resource Guide*, *supra* note 6, at 11.

[37] *A Resource Guide*, *supra* note 6, at 11.

> Any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the United States or its states, territories, possessions, or commonwealths or that has its principal place of business in the United States.[38]

The FCPA also applies to "foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the U.S."[39]

This paper will focus on FCPA enforcement against foreign issuers.

1. Anti-bribery Provisions

The anti-bribery provisions of the FCPA prohibit foreign issuers from:

- making use of mails or any means or instrumentality of interstate commerce
- to corruptly offer, pay, or promise to pay
- directly or indirectly
- anything of value
- to a foreign public official
- to obtain or retain business.[40]

The means of interstate commerce is key for establishing jurisdiction over foreign issuers, as the connection to the U.S. is not as clear as in the case of domestic issuers and domestic concerns.[41] In the DOJ/SEC guidance, the agencies share their expansive view of interstate commerce:

> [P]lacing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce—as does sending a wire transfer from or to a United States bank or otherwise using the United States banking system, or traveling across state borders or internationally to or from the United States.[42]

2. Accounting Provisions

Foreign issuers are also subject to the FCPA's accounting provisions, which require that foreign issuers "(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;

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[38] *A Resource Guide*, *supra* note 6, at 11.

[39] *A Resource Guide*, *supra* note 6, at 11.

[40] 15 U.S.C. §78dd-1.

[41] *A Resource* Guide, *supra* note 6, at 11.

[42] *A Resource* Guide, *supra* note 6, at 11.

and (B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances" that transactions are properly authorized and recorded.[43]

B. OECD Convention

In 1997, the global anti-bribery landscape advanced with the adoption of the OECD Convention, which requires its signatory countries to implement corresponding national laws that make bribery of foreign officials a criminal offense.[44] Pursuant to Article 4, signatory countries are required to "take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory."[45] Furthermore, when multiple countries may have jurisdiction, one party may request that the parties consult to determine the most appropriate jurisdiction for prosecution.[46] To the extent permissible under its laws, signatory countries shall also provide each other with mutual legal assistance related to investigations and proceedings.[47]

Countries promptly signed on to the OECD Convention. By 2000, seventeen countries (including the U.S.) completed all steps to join the OECD Convention, including implementing the required local legislation.[48] Since then, the number of signatory countries has increased; as of May 2017, there are forty-four signatory countries—including all OECD countries and eight others.[49]

Signatory country responsibilities and implementation efforts are regularly monitored through peer reviews.[50] The OECD publishes the findings in phase and follow-up reports.[51] Each phase report covers an aspect of adherence to the OECD Convention.[52] Phase one reports evaluate the national implementing legislation.[53] Phase two reports examine whether the legislation is effectively implemented.[54] Phase three reports focus on enforcement, and phase four reports address specific country needs.[55] Phase three and phase four reports also examine outstanding recommendations from previous phase reports.[56]

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43 15 U.S.C. §78m(b)(2).

44 Convention on Combating Bribery, *supra* note 11, at art. 1.

45 Convention on Combating Bribery, *supra* note 11, at art. 4.1.

46 Convention on Combating Bribery, *supra* note 11, at art. 4.3.

47 Convention on Combating Bribery, *supra* note 11, at art. 9.

48 OECD, *supra* note 12.

49 OECD, *supra* note 12.

50 *A Resource Guide*, *supra* note 6, at 7.

51 *See OECD Anti-Bribery Convention*, OECD, http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited Oct. 1, 2020) (indicating country follow-up reports).

52 *Id.*

53 *A Resource Guide*, *supra* note 6, at 7.

54 *A Resource Guide*, *supra* note 6, at 7.

55 OECD, *supra* note 12.

56 *See Country monitoring of the OECD Anti-Bribery Convention*, OECD, http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm (last visited Oct. 1, 2020) (depicting further information about the phase reports).

C. Globalization of Anti-bribery Laws

1. UN Convention

In 2003, the global anti-bribery and anti-corruption landscape progressed further with the adoption of the UN Convention.[57] As of February 6, 2020, 187 parties signed on to the UN Convention.[58] The UN Convention is broader than the OECD Convention and requires signatory parties to address various forms of corruption, including both public and private sector bribery.[59] Like the OECD Convention, the UN Convention stresses the importance of mutual legal assistance.[60] The UN Convention also goes one step further and provides the framework for asset recovery, including direct recovery, confiscation, and return and disposal of assets.[61]

2. National Laws

In addition to advances at the international level, many countries have strengthened their national laws that prohibit bribery and corruption. The UK's Bribery Act of 2010 ("Bribery Act") may be the most well-known of these laws.[62] The Bribery Act prohibits both public and private sector bribery.[63] Like the FCPA, the Bribery Act can be applied extraterritorially.[64] A minimal nexus to the UK is required for corporations to fall under the Bribery Act's jurisdiction.[65] The law solely requires that the corporation be "incorporated or formed in the UK, or that the organisation carries on a business or part of a business in the UK (wherever in the world it may be incorporated or formed)."[66] In the last five years, the UK's Serious Fraud Office has also adopted the use of deferred prosecution agreements, similar to those used by the DOJ.[67]

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[57] *See generally* UN Convention Against Corruption, *supra* note 15.

[58] *See Signature and Ratification Status*, U.N., https://www.unodc.org/unodc/en/corruption/ratification-status.html (last visited Oct. 1, 2020).

[59] UN Convention Against Corruption, *supra* note 15, at ch. II.

[60] UN Convention Against Corruption, *supra* note 15, at ch. IV.

[61] UN Convention Against Corruption, *supra* note 15, at ch. V.

[62] *See generally* Bribery Act of 2010, c.23 (UK), https://www.legislation.gov.uk/ukpga/2010/23/contents.

[63] Bribery Act of 2010, c.23 (UK), https://www.legislation.gov.uk/ukpga/2010/23/contents.

[64] Bribery Act of 2010, c.23 (UK), https://www.legislation.gov.uk/ukpga/2010/23/contents.

[65] Bribery Act of 2010, c.23 (UK), https://www.legislation.gov.uk/ukpga/2010/23/contents.

[66] *The Bribery Act 2010: Guidance,* MINISTRY JUST. 9 (Mar. 2011), https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

[67] Joanna Dimmock et al., *Deferred Prosecution Agreements 5 Years On – the Americanization of UK Corporate Crime Enforcement* (May 2019), https://news.whitecase.com/260/13530/downloads/deferred-prosecution-agreements-5-years-on-the-americanisation-of-uk-corporate-crime-enforcement-v2.pdf.

In 2016, France strengthened its anti-corruption law with the passage of the Loi Sapin II ("Sapin II").[68] Some view this law as an attempt to address the criticism that France did not adequately address corruption in recent years.[69] Sapin II expands the jurisdiction of French courts and allows them "to prosecute acts of corruption committed abroad by any company that carries on business or part of its business in France."[70] The law mandates companies with more than 500 employees or €100 million in revenue to create anti-corruption compliance programs, which are monitored by the newly-created anti-corruption agency.[71] The law also permits the use of deferred prosecution agreements to resolve violations of the law.[72] In 2018, the first of these agreements was used to resolve a foreign bribery case with Société Génerale.[73]

The UK and France are not alone in strengthening their anti-corruption laws. For example, in 2015, the Gesetz zur Bekämpfung der Korruption (Law on Fighting Corruption) took effect in Germany.[74] This law expands the criminal offenses related to bribing public officials and includes provisions that support the law's extraterritorial application.[75] In 2014, Brazil also strengthened its anti-corruption laws through Law No. 12,846/2013.[76] Under the Brazilian law, companies may be fined civilly and administratively for acts of corruption against Brazilian or foreign public officials, including when violations of the law occur abroad.[77]

D. Global Enforcement of Anti-bribery Laws

Since the OECD Convention took effect, the U.S. has taken the lead by actively enforcing the FCPA.[78] Indeed, among OECD Convention countries, the U.S. sanctioned nearly seventy percent of criminal foreign bribery cases against legal persons between 1999 and

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[68] *See* George A. Stamboulidis et al., *New French Anti-Corruption Law: Companies Doing Business in France Must Be Aware,* BAKER HOSTETLER (Nov. 22, 2016), https://www.bakerlaw.com/alerts/new-french-anti-corruption-law-companies-doing-business-in-france-must-beware.

[69] *See id.*; Frederick T. Davis, *Where Are We Today in the International Fight Against Overseas Corruption: An Historical Perspective and Two Problems Going Forward*, 23 ILSA J. INT'L & COMP. L. 337, 340 (2017).

[70] Stamboulidis et al., *supra* note 68.

[71] Stamboulidis et al., *supra* note 68.

[72] Stamboulidis et al., *supra* note 68.

[73] *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention,* OECD 21 (2019), http://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf [hereinafter *Resolving Foreign Bribery Cases*].

[74] *German Law on Fighting Corruption – Strengthening Criminal Anti-Corruption Law and Criminal Anti-money Laundering Law – Has Entered Into Effect,* CLIFFORD CHANCE (Jan. 25, 2016), https://www.cliffordchance.com/briefings/2016/01/german_law_on_fightingcorruptionstrengthenin.html.

[75] *Id.*

[76] Rita Motta & Steven M. Bauer, *Brazilian Anti-Corruption Law: 7 Implications and Challenges for Companies Doing Business in Brazil,* LATHAM & WATKINS (Jan. 6, 2014), https://m.lw.com/thoughtLeadership/lw-brazil-anti-corruption-law.

[77] *Id.*

[78] *See 2018 Enforcement*, *supra* note 16, at 2-5 (showing in Tables 1A and 1B that the U.S. has been actively enforcing the FCPA).

2018.[79] Germany ranked second with five percent of the cases.[80] In the same period, the U.S. sanctioned over seventy-five percent of administrative and civil foreign bribery cases against legal persons.[81] The U.K. ranked second with nine percent of the cases.[82] As of 2018, nearly half of OECD signatory countries (twenty-one of forty-four) never sanctioned a natural or legal person for foreign bribery.[83] By June 2018, the figure finally crossed the fifty percent mark with twenty-three countries successfully concluding a foreign bribery action.[84]

The variation in concluding foreign bribery actions may reflect, in part, the weak enforcement mechanisms available under the OECD Convention.[85] For some scholars, the peer review process is key to ensuring signatory countries remain compliant.[86] Other scholars criticize the peer reviews' effectiveness and argue "public shaming only [leads] to minimal implementation."[87] Others argue that the "shame-game" has not been used fully and there still remains much more the OECD could do to apply pressure on noncompliant countries, such as issuing public statements and press releases.[88]

Another explanation for the differences in enforcement levels is that enforcement decisions are influenced by the norms and mechanisms in the implementing legislation, such as limitation provisions, broadly-written language, unclear administrative structures, and low fines or penalties.[89] Put another way, "as states implemented their OECD Convention obligations they drew on their existing laws and practices to combat corporate and economic crime. Given that states had distinct laws and practices in place to address corporate and economic crime, they developed distinct national approaches to combat foreign bribery."[90]

These distinct national approaches are evident when examining which countries enforce their national laws prohibiting foreign bribery and how those countries reach

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[79] *See 2018 Enforcement*, *supra* note 16, at 4 (showing in Table 1A that for criminal cases, the U.S. sanctioned 136 of the 203 legal persons).

[80] *See 2018 Enforcement*, *supra* note 16, at 2 (showing that Germany sanctioned 11 of the 203 legal persons in criminal cases).

[81] *See 2018 Enforcement*, *supra* note 16, at 5 (showing in Table 1B that the U.S. sanctioned 83 of the 108 legal persons in civil cases).

[82] *See 2018 Enforcement*, *supra* note 16, at 5 (showing in Table 1B that for administrative and civil cases, the UK sanctioned 10 of the 108 legal persons).

[83] *See 2018 Enforcement*, *supra* note 16, at 2-5.

[84] *See Resolving Foreign Bribery Cases*, *supra* note 73, at 19-20 (showing that as of June 30, 2018, 23 out of 44 countries have successfully concluded a foreign bribery action).

[85] *See* Convention on Combating Bribery, *supra* note 11, at 14, 26 (explaining that the OECD provides recommendation to signatory countries but does not have a mechanism to force compliance).

[86] Davis, *supra* note 69, at 338.

[87] Courtney Graves, *Beyond Good Intentions: The OECD Anti-Bribery Convention's Pursuit of Prescriptive Enforcement*, 38 SUFFOLK TRANSNAT'L L. REV. 419, 427 (2015).

[88] *See* Andrew Tyler, *Enforcing Enforcement: Is the OECD Anti-bribery Convention's Peer Review Effective?* 43 GEO. WASH. INT'L L. REV. 137, 156 (2011).

[89] *See generally* Heidi Frostestad Kuehl, *The "Fight Song" of International Anti-Bribery Norms and Enforcement: The OECD Convention Implementation's Recent Triumphs and Tragedies*, 40 U. PA. J. INT'L L. 465 (2019).

[90] Elizabeth Acorn, *Twenty Years of the OECD Anti-Bribery Convention: National Implementation and Hybridization*, 51 U.B.C. L. REV. 613, 631 (2018).

resolutions.[91] A 2019 OECD report on the use of non-trial resolutions noted that fifteen of the twenty-three signatory countries that successfully enforced at least one foreign bribery case used non-trial resolutions.[92] Of these fifteen countries, thirteen used non-trial resolutions more than half of the time.[93] Non-trial resolutions are the most common vehicle for enforcing foreign bribery cases among OECD Convention countries.[94] Indeed, seventy-eight percent of enforcement actions between February 15, 1999, when the OECD Convention entered into force, and June 30, 2018, used non-trial resolutions.[95]

While the global anti-bribery and anti-corruption movement is driven primarily by the U.S., some progress has been made toward it becoming truly global.

III. RECENT FCPA ENFORCEMENT TRENDS

Since joining the OECD Convention, the U.S. increased FCPA enforcement. According to data from the FCPA Clearinghouse,[96] there were forty-two enforcement actions resolved against individuals or entities between the enactment of the FCPA in December 1977 and its twenty-year anniversary in 1997.[97] In contrast, over the next twenty years, there were ***490*** enforcement actions resolved against individuals and entities—or eleven times more.[98]

The trend of increased FCPA enforcement serves as the backdrop for this section, which examines FCPA enforcement trends among issuers.[99] This section details trends in the following areas: enforcement, fines, resolution methods, and interpretation of the law. It also examines whether enforcement trends are similar or different for foreign and domestic issuers.

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[91] *See generally id.* at 660-69; Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 U.C. DAVIS L. REV. 497, 560-65 (2015); Kuehl, *supra* note 89, at 485-503; Sara C. Sáenz, *Explaining International Variance in Foreign Bribery Prosecution: A Comparative Case Study*, 26 DUKE J. COMP. & INT'L L. 271, 288 (2015).

[92] *See Resolving Foreign Bribery Cases*, *supra* note 73, at 19.

[93] *Resolving Foreign Bribery Cases*, *supra* note 73, at 20.

[94] *See Resolving Foreign Bribery Cases*, *supra* note 73, at 21.

[95] *Resolving Foreign Bribery Cases*, *supra* note 73, at 19.

[96] *See Foreign Corrupt Practices Act Clearinghouse (FCPAC)*, STAN. L. SCH., https://law.stanford.edu/foreign-corrupt-practices-act-clearinghouse-fcpac/# (last visited Sept. 30, 2020) ("The FCPA Clearinghouse operates as a database, a repository of original source documents, and a supplier of analytics, providing users with detailed information relating to enforcement of the FCPA.").

[97] *DOJ and SEC Enforcement Actions Per Year*, STAN. L. SCH., http://fcpa.standford.edu/statistics-analytics.html (last visited Sept. 15, 2020).

[98] *Id.*

[99] *See The Foreign Corrupt Practices Act: An Overview*, JONES DAY (Jan. 2010), https://www.jonesday.com/en/insights/2010/01/the-foreign-corrupt-practices-act-an-overview (explaining issuers in the context of the FCPA). *See FCPAC, supra* note 96. The analysis that follows uses data from the Foreign Corrupt Practices Act Clearinghouse. A company is an issuer in this analysis if the jurisdictional basis for the FCPA action was listed as "issuer." Issuers may include the subsidiaries of issuers if the jurisdictional basis for enforcement was based on the parent company being an issuer. For example, this is the case with enforcement actions against Credit Suisse AG and its subsidiary Credit Suisse (Hong Kong) Limited. Both these companies will be an issuer in this analysis.

ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT AGAINST FOREIGN ISSUERS: HELPING OR HINDERING THE GLOBAL ANTI-BRIBERY AND ANTI-CORRUPTION MOVEMENT?

A. Increased Enforcement

Table 1 shows FCPA enforcement against issuers from January 1, 1994, through December 31, 2019, and indicates that enforcement actions against issuers remained quite limited until 2000, with a maximum of one enforcement action per year.[100] Enforcement actions increased during the first half of the 2000s and eventually reached double digit numbers in 2005.[101] Thereafter, enforcement rates have continued to increase, reaching a total of thirty-five enforcement actions against issuers in 2016.[102]

Table 1 also shows the first enforcement action taken against a foreign issuer, the Italian company Montedison in 1996.[103] Nearly ten years had passed before the SEC initiated another action; this time it was against the Swiss company ABB.[104] The first time the DOJ enforced the FCPA against a foreign issuer was in 2006 against the Norwegian company Statoil.[105] Assistant Attorney General Alice S. Fisher took note of the DOJ's first enforcement action and commented, "Although Statoil is a foreign issuer, the FCPA applies to foreign and domestic public companies alike, where the company's stock trades on American exchanges."[106] Assistant Attorney General Fisher further commented, "This prosecution demonstrates the Justice Department's commitment vigorously to enforce the FCPA against all international businesses whose conduct falls within its scope."[107]

In the years following the Statoil case, enforcement actions against foreign issuers quickly increased.[108] The annual percentage of enforcement actions against foreign issuers reached fifty-three percent in both 2008 and 2018. In 2019, it climbed even higher to sixty percent of enforcement actions.[109] Throughout the twenty-six-year period, approximately thirty-two percent of issuer enforcement actions were against foreign issuers.[110]

Table 1 also details the prevalence of foreign issuers in enforcement actions; between 1994 and 2015, foreign issuers attributed to twelve percent of all issuers and twenty-four percent of all enforcement actions.[111] As mentioned in the notes accompanying Table 1, SEC data concerning the number of foreign issuers registered in the U.S. is not yet available for the

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100 *See infra* Table 1.

101 *See infra* Table 1.

102 *See infra* Table 1.

103 Complaint at 1, SEC v. Montedison, S.p.A., No. 1:96CVOZ631 (D.D.C. Nov. 21, 1996), http://fcpa.stanford.edu/fcpac/documents/1000/000100.pdf.

104 Consent of Defendant ABB LTD. at 1, SEC v. ABB Ltd., Civil Action No. 04-1141 (D.D.C. Nov. 30, 2004), http://fcpa.stanford.edu/fcpac/documents/4000/003095.pdf.

105 Deferred Prosecution Agreement at 1, United States v. Statoil, ASA, No. 3-12453 (S.D.N.Y., Oct. 13, 2006), http://fcpa.stanford.edu/fcpac/documents/4000/002838.pdf [hereinafter Statoil DPA].

106 Press Release, U.S. Dep't of Just., U.S. Resolves Probe Against Oil Company that Bribed Iranian Official (Oct. 13, 2006), https://www.justice.gov/archive/opa/pr/2006/October/06_crm_700.html.

107 *Id.*

108 *See infra* Table 1.

109 *See infra* Table 1.

110 *See infra* Table 1.

111 *See infra* Table 1.

years following 2015.[112] A conservative estimate can be identified based on data from prior years, allowing for approximate figures through 2019 to be calculated; therefore, between 1994 and 2019 foreign issuers were an estimated twelve percent of the issuer population but thirty-two percent of enforcement actions.[113]

[Table 1 follows on the next page.]

[112] *See infra* Table 1 and accompanying text.

[113] *See infra* Table 1.

ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT AGAINST FOREIGN ISSUERS: HELPING OR HINDERING THE GLOBAL ANTI-BRIBERY AND ANTI-CORRUPTION MOVEMENT?

TABLE 1: Comparison of Foreign Issuer Representation in the Issuer Population and Enforcement Actions

January 1, 1994 - December 31, 2019

Year	Issuers				Enforcement Actions				Difference (Actions Minus Issuers)
	Domestic	Foreign	Total	% Foreign	Domestic Issuers	Foreign Issuers	Total	% Foreign Issuers	
1994	1,844	657	2,501	35.63%	1	0	1	0.00%	-35.63%
1995	2,178	No data	No data	No data	0	0	0	No data	No data
1996	4,251	881	5,132	20.72%	0	1	1	100.00 %	79.28%
1997	6,540	1,019	7,559	15.58%	1	0	1	0.00%	-15.58%
1998	6,661	1,116	7,777	16.75%	0	0	0	0.00%	-16.75%
1999	6,495	No data	No data	No data	0	0	0	No data	No data
2000	6,388	1,310	7,698	20.51%	3	0	3	0.00%	-20.51%
2001	6,017	1,344	7,361	22.34%	5	0	5	0.00%	-22.34%
2002	6,523	1,319	7,842	20.22%	4	0	4	0.00%	-20.22%
2003	8,121	1,232	9,353	15.17%	0	0	0	0.00%	-15.17%
2004	8,209	1,240	9,449	15.11%	4	1	5	20.00%	4.89%
2005	8,596	1,236	9,832	14.38%	10	0	10	0.00%	-14.38%
2006	8,470	1,145	9,615	13.52%	3	3	6	50.00%	36.48%
2007	8,176	1,058	9,234	12.94%	20	3	23	13.04%	0.10%
2008	8,391	1,024	9,415	12.20%	9	10	19	52.63%	40.43%
2009	9,494	966	10,460	10.17%	11	2	13	15.38%	5.21%
2010	8,890	970	9,860	10.91%	20	11	31	35.48%	24.57%
2011	8,561	965	9,526	11.27%	15	6	21	28.57%	17.30%
2012	8,154	946	9,100	11.60%	8	4	12	33.33%	21.73%

2013	7,832	940	8,772	12.00%	11	3	14	21.43%	9.43%
2014	7,770	912	8,682	11.74%	11	1	12	8.33%	-3.40%
2015	7,659	923	8,582	12.05%	8	1	9	11.11%	-0.94%
2016	7,259	*950*	*8,209*	*13.09%*	19	16	35	45.71%	*32.63%*
2017	6,894	*950*	*7,844*	*13.78%*	7	4	11	36.36%	*22.58%*
2018	6,827	*950*	*7,777*	*13.92%*	8	9	17	52.94%	*39.03%*
2019	6,660	*950*	*7,610*	*12.48%*	8	12	20	60.00%	*47.52%*
Total 1994 – 2015	155,220	21,203	176,423	12.02%	144	46	190	24.21%	12.19%
Total 1994 – 2019	182,860	*25,003*	*207,863*	*12.03%*	186	87	273	31.87%	*19.84%*

Notes: Regarding domestic issuers, the number of SEC filings for Form 10-K (Annual Report) was used as a proxy for the number of domestic issuers. A foreign issuer may elect to file Form 10-K rather than Form 6-K, and therefore could be over-represented in these figures. The most recent data available from the SEC regarding foreign issuers is for 2015. Italicized figures in blue are estimates based on prior years' figures.

Sources: *Number of EDGAR Filings by Form Type*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/dera/data/dera_edgarfilingcounts (last visited February 8, 2020) (SEC filings for Form 10-K [Annual Report]); *International Registered and Reporting Companies*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/divisions/corpfin/internatl/companies.shtml (last visited February 8, 2020) (for foreign issuer figures) Enforcement actions data from Foreign Corrupt Practices Act Clearinghouse, http://fcpa.stanford.edu/. Search criteria to determine issuers: Jurisdictional Basis (Issuer, Domestic Concern, Foreign National) = Issuer; Status= Resolved; Business or Individual = Business

Table 2 shows that foreign issuers are overrepresented in both DOJ and SEC enforcement actions.[114] Between 1994 and 2019, foreign issuers made up forty percent of DOJ enforcement actions, while more than one in four SEC enforcement actions were against foreign issuers.[115]

[Table 2 follows on the next page.]

[114] *See infra* Table 2.

[115] *See infra* Table 2.

TABLE 2: DOJ and SEC Enforcement Actions Against Issuers January 1, 1994 - December 31, 2019							
Type of Entity	**DOJ Actions**	**% DOJ Actions**	**SEC Actions**	**% SEC Actions**	**Joint DOJ and SEC Actions**	**Total**	**% Total**
Domestic Issuers	52	59.77%	133	71.89%	1	186	68.13%
Foreign Issuers	35	40.23%	52	28.11%	0	87	31.87%
Total Issuers	87	100.00%	185	100.00%	1	273	100.00%

Source: Foreign Corrupt Practices Act Clearinghouse, http://fcpa.stanford.edu/. Search criteria to determine issuers: Jurisdictional Basis (Issuer, Domestic Concern, Foreign National) = Issuer; Status= Resolved; Business or Individual = Business.

The key takeaway from Tables 1 and 2 is that foreign issuers are disproportionately represented in FCPA enforcement actions compared to the issuer population.

B. Increased Fines

Table 3 details FCPA enforcement actions and the fines paid by issuers from January 1, 1994, through December 31, 2019.[116] Aside from the nearly twenty-five million dollars fine against Lockheed in 1994, the table shows that the issuance of large fines that have come to be associated with the FCPA only began in the mid-2000s.[117] Although total fines sometimes oscillate, Table 3 shows that the general trajectory of the total fines has been increasing over the last twenty-six years.[118]

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[116] *See infra* Table 3.

[117] United States v. Lockheed Corp., Nassar & Love, No. 1:94-CR-226 (N.D. Ga., June 22, 1994), http://fcpa.stanford.edu/fcpac/documents/3000/002003.pdf. *See also* United States v. Lockheed Corp., No. 1:94-CR-226-01 (N.D. Ga., Jan. 1, 1995), http://fcpa.stanford.edu/fcpac/documents/1000/000086.pdf.

[118] *See infra* Table 3.

Table 3 also shows that average fines varied considerably for domestic and foreign issuers during the last twenty-six years; the average fine for a domestic issuer is approximately $17 million, while for a foreign issuer, it is more than 6.5 times that amount (nearly $113 million).[119] Thus, not only are foreign issuers overrepresented in FCPA enforcement actions, foreign issuers also receive on average higher fines.

TABLE 3: Comparison of Fines Against Domestic and Foreign Issuers

January 1, 1994 - December 31, 2019

Year	Domestic Issuers			Foreign Issuers			Average Fine Difference (Foreign Minus Domestic)
	Total Fines	Total Actions	Average Fine	Total Fines	Total Actions	Average Fine	
1994	$24,945,275	1	$24,945,275	$0	0	$0	-$24,945,275
1995	$0	0	$0	$0	0	$0	$0
1996	$0	0	$0	$300,000	1	$300,000	$300,000
1997	$385,000	1	$385,000	$0	0	$0	-$385,000
1998	$0	0	$0	$0	0	$0	$0
1999	$0	0	$0	$0	0	$0	$0
2000	$1,144,200	3	$381,400	$0	0	$0	-$381,400
2001	$100,000	5	$20,000	$0	0	$0	-$20,000
2002	$650,000	4	$162,500	$0	0	$0	-$162,500
2003	$0	0	$0	$0	0	$0	$0
2004	$1,300,000	4	$325,000	$16,415,405	1	$16,415,405	$16,090,405
2005	$49,337,121	10	$4,933,712	$0	0	$0	-$4,933,712
2006	$15,225,601	3	$5,075,200	$57,500,001	3	$19,166,667	$14,091,467
2007	$135,860,187	20	$6,793,009	$5,481,513	3	$1,827,171	-$4,965,838

[119] *See infra* Table 3.

2008	$19,765,519	9	$2,196,169	$878,912,591	10	$87,891,259	$85,695,090
2009	$201,867,873	11	$18,351,625	$18,030,145	2	$9,015,073	-$9,336,552
2010	$170,076,026	20	$8,503,801	$1,002,188,957	11	$91,108,087	$82,604,286
2011	$120,192,645	15	$8,012,843	$129,473,649	6	$21,578,942	$13,566,099
2012	$130,899,841	8	$16,362,480	$44,634,731	4	$11,158,683	-$5,203,797
2013	$277,632,111	11	$25,239,283	$402,715,178	3	$134,238,393	$108,999,110
2014	$426,603,440	11	$38,782,131	$772,290,800	1	$772,290,800	$733,508,669
2015	$95,737,524	8	$11,967,191	$19,000,000	1	$19,000,000	$7,032,810
2016	$827,249,622	19	$43,539,454	$1,906,169,855	16	$119,135,616	$75,596,162
2017	$81,401,465	7	$11,628,781	$553,591,872	4	$138,397,968	$126,769,187
2018	$182,419,578	8	$22,802,447	$1,523,962,681	9	$169,329,187	$146,526,740
2019	$373,189,853	8	$46,648,732	$2,506,979,954	12	$208,914,996	$162,266,265
TOTAL	**$3,135,982,881**	**186**	**$16,860,123**	**$9,837,647,332**	**87**	**$113,076,406**	**$96,216,283**

Source: Foreign Corrupt Practices Act Clearinghouse, http://fcpa.stanford.edu/. Search criteria to determine issuers: Jurisdictional Basis (Issuer, Domestic Concern, Foreign National) = Issuer; Status= Resolved; Business or Individual = Business. The fines listed in this table are the total monetary sanctions for the action, as determined by the Foreign Corrupt Practices Clearinghouse. As previously discussed, there is debate in the FCPA community regarding how to calculate FCPA enforcement fines, and these figures would vary depending on the source used.

There are no controlling factors in Table 3 that could explain ***why*** an issuer received a specific fine. A study of FCPA data from 2004 until 2011 examined various factors that could impact the magnitude of sanctions.[120] The authors found that sanctions increased "with the size of bribe, the profit related to the bribe, the amount of business affected by the bribe, and with measures of the extensiveness of the FCPA violation," but noted that voluntary disclosure, cooperation, and remediation were not correlated with lower sanctions.[121] Further, the same study also concluded that "[t]he SEC and DOJ impose greater sanctions, all else equal, on

[120] Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, 11 J. EMPIRICAL LEGAL STUD. 409, 409 (2014).

[121] *Id.* at 426, 440.

foreign companies" but noted they "cannot rule out the possibility that this is because foreign firms engage in misconduct that is more egregious along dimensions we have not observed."[122] The authors of the study did not suggest what those other dimensions could be.[123]

There is no consensus in the anti-corruption community regarding how to calculate and compare the fines that companies have to pay for violations of the FCPA.[124] Nevertheless, Table 4 shows that foreign issuers rank prominently in top ten lists of FCPA enforcement fines; undeniably, in each list at least eight of the top ten enforcement fines were actions against foreign issuers as of December 31, 2019.[125]

[Table 4 follows on the next page.]

[122] *Id.* at 440.

[123] *Id.*

[124] *See* Cassin, *supra* note 21; FCPA PROFESSOR, *supra* note 21; FCPAC, *supra* note 21 (discussing the different approaches about how to calculate FCPA fines).

[125] *See infra* Table 4.

TABLE 4: Top 10 Enforcement Fines as of December 31, 2019

Rank	FCPA Blog		FCPA Professor		FCPA Clearinghouse	
	Company	Issuer Country	Company	Issuer Country	Company	Issuer Country
1	Petróleo Brasileiro (Petrobras)	Brazil	Telefonaktiebolaget LM Ericsson	Sweden	Petróleo Brasileiro (Petrobras)	Brazil
2	Telefonaktiebolaget LM Ericsson	Sweden	Mobile Telesystems (MTS)	Russia	Telefonaktiebolaget LM Ericsson	Sweden
3	Telia	Sweden	Siemens	Germany	Mobile Telesystems (MTS)	Russia
4	Mobile Telesystems (MTS)	Russia	Alstom	France	Siemens	Germany
5	Siemens	Germany	KBR / Halliburton	USA	Alstom	France
6	VimpelCom	Bermuda	Teva Pharmaceutical	Israel	KBR / Halliburton	USA
7	Alstom	France	Telia	Sweden	Société Générale	France
8	Société Générale	France	Och-Ziff	USA	Teva Pharmaceutical	Israel
9	KBR / Halliburton	USA	Total	France	Telia	Sweden
10	Teva Pharmaceutical	Israel	VimpelCom	Bermuda	Och-Ziff	USA

Sources: Cassin, *supra* note 21; FCPA PROFESSOR, supra note 21; FCPAC, supra note 21.

C. Non-Trial Resolutions

Starting in the mid-2000s, the DOJ ushered in an era in which it overwhelmingly used non-trial resolutions to enforce the FCPA's anti-bribery provisions.[126] In the 2004 InVision Technologies enforcement action, the DOJ used the first non-prosecution agreement ("NPA")

[126] *See* Koehler, *supra* note 91, at 514-15.

to resolve an FCPA enforcement action.[127] An NPA is a privately-negotiated agreement entered into by the DOJ and the business entity.[128] NPAs include a statement of facts, legal conclusions for which the business entity accepts responsibility, and details of any fines or related compliance undertakings of the business entity.[129] These agreements, which often take the form of letter agreements, are not filed with any court.[130]

In 2005, the DOJ settled with Monsanto in its first deferred prosecution agreement ("DPA") in an FCPA enforcement action.[131] DPAs are similar to NPAs: they are privately negotiated agreements between the DOJ and a business entity, which include a statement of facts, legal conclusions for which the business entity accepts responsibility, and details of any fines or related compliance undertakings of the business entity.[132] However, in a DPA, the DOJ agrees to defer prosecution of the business entity, and the agreement is filed with a court.[133]

As Table 5 shows, in the last fifteen years the DOJ has overwhelmingly opted for non-trial resolutions in FCPA enforcement actions.[134] Nearly eighty-six percent of enforcement actions against issuers since 2004 were resolved via DPAs or NPAs.[135] Furthermore, there is essentially no difference between how the DOJ resolves enforcement actions against domestic and foreign issuers. The DOJ resolved eighty-six percent of enforcement actions against domestic issuers using DPAs and NPAs.[136] It was slightly higher for foreign issuers at almost eighty-nine percent of enforcement actions.[137]

[Table 5 follows on the next page.]

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127 Agreement between the U.S. Dep't of Just., Crim. Div., Fraud Section & InVision Technologies, Inc. 1 (Dec. 3, 2004), http://fcpa.stanford.edu/fcpac/documents/2000/001428.pdf.

128 Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 934 (2010).

129 *Id.*

130 *Id.*

131 Deferred Prosecution Agreement at 1, United States v. Monsanto Co. (D.D.C. Jan. 6, 2005), http://fcpa.stanford.edu/fcpac/documents/3000/002036.pdf.

132 Koehler, *supra* note 128, at 934.

133 Koehler, *supra* note 128, at 934.

134 *See infra* Table 5.

135 *Infra* Table 5.

136 *Infra* Table 5.

137 *See infra* Table 5.

TABLE 5: Types of DOJ Resolutions Against Issuers January 1, 2004 - December 31, 2019						
Type of Entity	**DPAs**	**NPAs**	**Other**	**Total Resolutions**	**Total Enforcement Actions**	**% DPAs and NPAs in Enforcement Actions**
Domestic Issuers	16	27	9	52	50	86.00%
Foreign Issuers	24	7	7	38	35	88.57%
Total Issuers	39	34	16	89	85	85.88%

Source: Foreign Corrupt Practices Act Clearinghouse, http://fcpa.stanford.edu/. Search criteria to determine issuers: Jurisdictional Basis (Issuer, Domestic Concern, Foreign National) = Issuer; Status= Resolved; Business or Individual = Business. Two enforcement actions against domestic issuers had two resolutions. Three enforcement actions against foreign issuers had two resolutions. Therefore, five of the total enforcement actions had two resolutions. All enforcement actions with two resolutions included either a DPA or NPA in addition to another type of resolution.

Some scholars have expressed concerns about the prevalence of NPAs and DPAs. One such concern is that neither is authorized by the FCPA, nor any other legislation.[138] Prior to 2004, the DOJ essentially had two choices regarding enforcing the FCPA against issuers: charge or not charge.[139] In the early 2000s, the DOJ began to reconsider this approach after the prosecution of Arthur Anderson resulted in the company going out of business.[140] The DOJ published a memorandum in 2003 entitled "Principles of Federal Prosecution of Business Organizations," also known as the Thompson Memo, which said "in some circumstances . . . granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government's investigation."[141] Thereafter, the DOJ began to use DPAs and NPAs to resolve FCPA matters.[142] In essence, "the DOJ has come to view DPAs and NPAs as a sort of corporate harm-reduction strategy in an era of heightened enforcement" and "a boon for the extraction of ever-greater financial penalties."[143]

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138 Koehler, *supra* note 91, at 517.

139 Koehler, *supra* note 91, at 500.

140 *See* Koehler, *supra* note 91, at 501-02; Ellen Gutterman, *Banning Bribes Abroad: US Enforcement of the Foreign Corrupt Practices Act*, 53 OSGOODE HALL L.J. 31, 47 (2015); Sarah Routh, *Tweet to Defeat Government Bribes: Limiting Extraterritorial Jurisdiction under the Foreign Corrupt Practices Act to Combat Global Corporate Corruption*, 51 VAND. J. TRANSNAT'L L. 625, 632 (2018).

141 Memorandum from Larry D. Thompson, Deputy Att'y Gen. on Principles of Fed. Prosecution of Bus. Organizations, 6 (Jan. 20, 2013), https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf.

142 *See* Koehler, *supra* note 91, at 504.

143 Gutterman, *supra* note 140, at 47.

Other scholars have raised concerns that the prevalence of DPAs and NPAs results in a lack of judicial scrutiny.[144] As noted by one critic of DPAs and NPAs:

> . . . these documents provide fertile ground for the prosecution to advance expansive enforcement theories based on bare-boned and undeveloped factual assertions without having to meet the burden of proof beyond a reasonable doubt, given that the promise of avoiding the costly and risky endeavor of litigation through settlement provides every incentive to corporate defendants to accept the prosecution's position so long as the matter is resolved quickly and for the lowest fine possible.[145]

These concerns have led some scholars to question the quality of FCPA enforcement actions. They argue that DPAs and NPAs result in lower quality enforcements, which "contribute to a façade of FCPA enforcement."[146] In particular, this façade includes resolutions based on untested legal theories, limited and cursory statements of facts and allegations, inconsistent enforcement of similar activities, and bribery allegations resolved absent FCPA anti-bribery charges.[147]

D. Expansive Interpretations

As enforcement actions have increased due in part to reliance on non-trial resolutions, the DOJ and SEC have applied increasingly broad interpretations of FCPA.[148]

1. DOJ

One area where FCPA interpretation has grown to be particularly broad is in relation to jurisdiction, especially when the conduct has a tenuous connection to the U.S.[149] As discussed in Section II, a foreign issuer must use a means of interstate commerce for the DOJ to establish jurisdiction.[150] The DOJ has an expansive view that minor and pass-through activities are forms of interstate commerce.[151] For example, the 2019 NPA with the German company Fresenius states, "In Angola and Saudi Arabia, these agents and employees utilized the means and

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144 *See* Gutterman, *supra* note 140; Koehler, *supra* note 91; Koehler, *supra* note 128; Routh, *supra* note 140.

145 Barry J. Pollack & Annie Wartanian Reisinger, *Lone Wolf or the Start of a New Pack: Should the FCPA Guidance Represent a New Paradigm in Evaluating Corporate Criminal Liability Risks?* 51 AM. CRIM. L. REV. 121, 136 (2014).

146 Koehler, *supra* note 91, at 527; *see also* Koehler, *supra* note 128, at 934.

147 Koehler, *supra* note 128, at 910-91.

148 Gutterman, *supra* note 140, at 33-34.

149 Routh, *supra* note 140, at 641; *see also* Heather Diefenbach, *FCPA Enforcement Against Foreign Companies: Does America Know Best?*, 2 CORNELL INT'L L.J. ONLINE 47, 47 (2014).

150 *A Resource Guide*, *supra* note 6, at 11-12.

151 Gutterman, *supra* note 140, at 52.

instrumentalities of U.S. interstate commerce, including the use of internet-based email accounts hosted by numerous service providers located in the U.S."[152]

The 2019 DPA with the Russian company Mobile TeleSystems also provides an expansive interpretation of the means of interstate commerce:

> During the scheme, conspirators, including Associate A, Associate B, and certain MTS management, used U.S.-based email accounts to communicate with each other and other individuals about the scheme. In addition, MTS and Uzdunrobita made and caused to be made numerous corrupt payments that were routed through transactions into and out of correspondent bank accounts at financial institutions in New York, New York.[153]

Some NPAs, such as those with Petrobras and Credit Suisse, provide no clear description of the means of interstate commerce which resulted in FCPA violations, leaving one to ponder the nexus between the conduct in question and instrumentalities of interstate commerce in the U.S.[154] If the connection to interstate commerce was negotiated as part of the NPA, this was a disservice to the legal and business community who are seeking transparency and clarity from the DOJ regarding its interpretation of the FCPA.

2. SEC

The SEC has been equally aggressive in employing expansive views of its jurisdiction in relation to the FCPA's accounting provisions. In the two cases described below, SEC enforcement actions took place absent a corresponding criminal enforcement action by the DOJ.

The May 2019 Cease and Desist Order between the SEC and the Brazilian company Telefônica Brazil ("Telefônica") concerned corporate hospitality extended to Brazilian government officials around sporting event tickets in Brazil.[155] The Cease and Desist Order stated:

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[152] Agreement between the U.S. Dep't of Just., Crim. Div., Fraud Section & the U.S. Attorney's Office Dist. Ma. & Fresenius Medical Care AG & Co. KGaA, A-2 (Mar. 29, 2019), http://fcpa.stanford.edu/fcpac/documents/5000/003853.pdf [hereinafter Fresenius Agreement].

[153] Deferred Prosecution Agreement, United States v. Mobile TeleSystems PJSC (Feb. 28, 2019), https://www.justice.gov/criminal-fraud/file/1147381/download [hereinafter Mobile TeleSystems DPA].

[154] Agreement between the U.S. Dep't of Just., Crim. Div., Fraud Section & the U.S. Attorney's Office E. Dist. Va. & Petróleo Brasileiro S.A. – Petrobras (Sept. 27, 2018), http://fcpa.stanford.edu/fcpac/documents/5000/003744.pdf; Agreement between the U.S. Dep't of Just., Crim. Div., Fraud Section & the U.S. Attorney's Office E. Dist. N.Y. & Credit Suisse (Hong Kong) Ltd. (May 24, 2018), http://fcpa.stanford.edu/fcpac/documents/5000/003707.pdf (stating Credit Suisse Group AG shares were traded publicly on the New York Stock Exchange and was thus an "issuer" for the purposes of the FCPA).

[155] *See 2019 Year-End FCPA Update,* GIBSON DUNN 12 (Jan. 6, 2010), https://www.gibsondunn.com/wp-content/uploads/2020/01/2019-year-end-fcpa-update.pdf.

> The payments for the tickets were not accurately reflected in Telefônica Brazil's books and records, and the company failed to devise and maintain a sufficient system of internal accounting controls. This conduct arose in an environment in which the company failed to adequately enforce its corporate antibribery and anticorruption policies.[156]

The Telefônica enforcement action left the legal community questioning what the SEC expects from companies. The SEC concluded that the accounting provisions of the FCPA were violated but there were no findings of bribery or illicit or improper payments.[157] Indeed, according to one commentator, "The SEC seemingly polices behavior that it thinks *may* have happened (but is unwilling to state explicitly)."[158]

In 2018, a similar critique arose from the Cease and Desist Order with the Israeli company Elbit.[159] This case also did not allege bribery or illicit or improper payments.[160] Rather, Elbit's subsidiary Plaza was alleged to have "characterized the payments to the consultants in its books and records as legitimate business expenses for services rendered, when some or all of the funds may have been used to make corrupt payments to Romanian government officials or were embezzled."[161] The SEC reached these conclusions because there was "no evidence to suggest that Plaza conducted any due diligence" on the consultants and "there is no documentation or other evidence" showing the related services were provided.[162] In a commentary on the case, attorneys from Debevoise & Plimpton commented,

> ...the Elbit Order raises the question of whether the SEC's interpretation of the accounting provisions is too broad, as it suggests that the SEC need only find the absence of such documentation (without more) in order to make its case. We recognize that parties settle for a variety of reasons many of which have little to do with liability. However, it seems unlikely that the SEC would actually litigate such actions based on unsubstantiated, inchoate claims.[163]

E. FCPA Enforcement in a Nutshell

As shown above, foreign issuers are overrepresented in FCPA enforcement actions. Moreover, foreign issuers receive higher fines on average than domestic issuers—including

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[156] Cease & Desist Order at 2, In the Matter of Telefônica Brazil S.A, No. 3-19162 (May 9, 2019), http://fcpa.stanford.edu/fcpac/documents/5000/003862.pdf.

[157] *Corporate Hospitality Loses When the SEC is the Referee: Telefônica Agrees to $4M Penalty Involving Hospitality at Marquee Soccer Events*, 10 FCPA UPDATE (Debevoise & Plimpton), May 2019, at 8, https://www.debevoise.com/insights/publications/2019/05/fcpa-update-may-2019.

[158] *Id.*

[159] *Beyond "Virtual Strict Liability": SEC Brings First FCPA Enforcement Action of 2018,* 9 FCPA UPDATE (Debevoise & Plimpton), Mar. 2018, at 2, https://www.debevoise.com/insights/publications/2018/03/fcpa-update-march-2018 [hereinafter 2018 FCPA UPDATE].

[160] *Id.*

[161] Cease & Desist Order at 3-4, In the Matter of Elbit Imaging Ltd., No. 3-18397, (Mar. 9, 2018), http://fcpa.stanford.edu/fcpac/documents/5000/003639.pdf.

[162] *Id.* at 3.

[163] 2018 FCPA UPDATE, *supra* note 159.

some of the largest fines ever imposed. Enforcement actions have increased since the DOJ began to use NPAs and DPAs to settle FCPA violations. The DOJ uses non-trial resolution vehicles, such as NPAs and DPAs, equally against domestic and foreign issuers. The use of non-trial resolution vehicles has resulted in *de facto* case law that has developed absent judicial scrutiny. The result is aggressive and broad interpretations of the FCPA that are disproportionately applied to foreign issuers.

IV. FCPA ENFORCEMENT AGAINST FOREIGN ISSUERS: UNDERMINING THE GLOBAL ANTI-BRIBERY AND ANTI-CORRUPTION MOVEMENT

FCPA enforcement actions against foreign issuers have serious consequences. They undermine the global anti-bribery and anti-corruption movement, including the OECD Convention.

A. Undermining the OECD Convention

As discussed in Section II, all thirty-six OECD member countries and eight additional countries are signatories to the OECD Convention.[164] These countries include many of the world's largest economies, such as France, Germany, Japan, the U.K., and the U.S., as well as some of the fastest-growing economies, such as Brazil and Turkey.[165] As signatories to the OECD Convention, these countries have implemented national laws that make bribery of foreign officials a criminal offense.[166] They have also agreed to the OECD Convention's terms, which include the jurisdiction provisions laid out in Article 4.[167]

1. Article 4.1: Offense Committed in Whole or in Part in the Territory

Article 4.1 of the OECD Convention states: "Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory."[168] This means that the national laws implemented by OECD Convention signatory countries must prohibit the bribery of foreign officials within their national boundaries and have an enforcement mechanism.

Whenever the U.S. enforces the FCPA against foreign issuers, it claims to have jurisdiction. However, as shown in Section III, the DOJ has adopted an expansive interpretation of jurisdiction. For example, it has claimed jurisdiction based on electronic communication accounts hosted by U.S. service providers.[169] The SEC's interpretation of jurisdiction is even broader and does not require any actions to take place in the U.S.[170] The SEC claims jurisdiction

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164 OECD, *supra* note 12.

165 OECD, *supra* note 12.

166 Convention on Combating Bribery, *supra* note 11, at 4.

167 Convention on Combating Bribery, *supra* note 11, at 5.

168 Convention on Combating Bribery, *supra* note 11, at 5.

169 *See* Fresenius Agreement, *supra* note 152; Mobile TeleSystems DPA, *supra* note 153.

170 15 U.S.C. §78m(b)(2).

if the entity satisfies the definition of an issuer.[171] FCPA scholar Mike Koehler summarized the government's approach as follows, "much of the largeness of modern FCPA enforcement has resulted from corporate enforcement actions against foreign companies (based in many instances on mere listing of securities on U.S. markets and in a few instances on sparse allegations of a U.S. nexus in furtherance of an alleged bribery scheme)."[172]

This is not to say that every FCPA enforcement action against a foreign issuer is based on weak jurisdictional assertions. Some enforcement actions pursued by the DOJ against foreign issuers have had a stronger U.S. nexus and involved bribery by U.S.-based entities that belong to the foreign issuer.[173] However, this is the exception, not the norm.

Nevertheless, when the jurisdictional hook is weak, it is harder to make the case that the U.S. is the appropriate jurisdiction for enforcing a foreign bribery case. As noted by a legal scholar, "Where there is little connection between the bribery at issue in the case and the U.S., it is more likely that other countries may take issue with the U.S. acting as the global anti-corruption enforcer."[174] Other scholars have noted "mission creep" in FCPA enforcement and argued that this is likely to result in the perception that enforcement actions are illegitimate or improper.[175] Indeed, these views exist both domestically and internationally.[176]

2. Article 4.3: Most Appropriate Jurisdiction for Prosecution

Article 4.3 of the OECD Convention states: "When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution."[177] This provision reveals that the OECD Convention's drafters anticipated that multiple countries could claim jurisdiction over the same activity.[178]

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[171] *Id.*; *see also A Resource Guide*, *supra* note 6, at 11.

[172] *Discouraging "Piling On" Sounds Great, But It All Depends What "Piling On" Means*, FCPA PROFESSOR (May 11, 2018), http://fcpaprofessor.com/discouraging-piling-sounds-great-depends-piling-means/.

[173] Deferred Prosecution Agreement at 6, United States v. TechnipFMC plc, No. 19-CR-278 (E.D.N.Y. June 25, 2019); Plea Agreement at 8-9, United States v. TechnipFMC plc, No. 19-CR-279 (E.D.N.Y. June 25, 2019).

[174] Leibold, *supra* note 20, at 254.

[175] Charles F. Smith & Brittany D. Parling, *"American Imperialism": A Practitioner's Experience with Extraterritorial Enforcement of the FCPA*, 2012 U. CHI. LEGAL F. 237, 256 (2012).

[176] *See* Sean Hecker & Margot Laporte, *Should FCPA "Territorial" Jurisdiction Reach Extraterritorial Proportions?*, 42 INT'L L. NEWS 7, 7 (2013); *European Firms Are Increasingly Tackling The Scourge Of Bribery*, ECONOMIST (May 26, 2018), https://www.economist.com/business/2018/05/26/european-firms-are-increasingly-tackling-the-scourge-of-bribery; *America's Legal Forays Against Foreign Firms Vex Other Countries*, ECONOMIST (Jan. 19, 2019), https://www.economist.com/business/2019/01/19/americas-legal-forays-against-foreign-firms-vex-other-countries; Finbarr Bermingham, *Explained: How The US Uses Anticorruption Laws And Sanctions To Police The World*, SOUTH CHINA MORNING POST (Dec. 8, 2018), https://www.scmp.com/economy/china-economy/article/2176998/explained-how-us-uses-anticorruption-laws-and-sanctions-police.

[177] Convention on Combating Bribery, *supra* note 11, at 5.

[178] Davis, *supra* note 69, at 340; Frederick T. Davis, *International Double Jeopardy: U.S. Prosecutions and the Developing Law in Europe*, 31 AM. U. INT'L L. REV. 57, 62 (2016); Catherine Dunn, *Can't They Cooperate? Multinationals Bump Up Against Multijurisdiction Antibribery Probes. A Treaty Is Supposed to Sort Out Who Does What-But Hasn't So Far*, CORP. COUNS. (Mar. 1, 2012), https://www.law.com/corpcounsel/almID/1202541462077/; Jessie M. Reniere, *Fairness in FCPA Enforcement:*

According to some legal scholars, the use of the phrase "most appropriate jurisdiction" appears to indicate the parties should decide on a single country to have jurisdiction.[179] However, the OECD Convention neither provides criteria for determining the most appropriate jurisdiction, nor does it proscribe a consultation procedure.[180] On that basis, it is not surprising the OECD legal affairs director stated in 2012 that the clause had never been invoked.[181]

As a result, countries decide when and how to consult with each other.[182] This has resulted in various enforcement actions related to the same matters across multiple jurisdictions. In some cases, the DOJ has worked with law enforcement agencies in other countries to conduct investigations and coordinate enforcement actions.[183] For example, the DOJ and the Munich Public Prosecutor's Office each announced a settlement with Siemens, a German company, on the same day.[184] More recently, the DOJ and its Brazilian counterparts investigated the Brazilian company Petrobras, with both countries fining the company.[185]

According to the law firm Debevoise & Plimpton, the SEC and DOJ in the past five years have publicly acknowledged receiving assistance with their FCPA investigations from over forty countries.[186] Government authorities tout this coordination. In 2018, the SEC Co-Director of Enforcement noted that "the level of cooperation and coordination among regulators and law enforcement worldwide is on a sharply upward trajectory, particularly in matters

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A Call for Self-Restraint and Transparency in Multijurisdictional Anti-Bribery Enforcement Actions, 24 ROGER WILLIAMS U. L. REV. 167, 199-200 (2019).

179 Davis, *supra* note 69; Reniere, *supra* note 178, at 200.

180 Branislav Hock, *Transnational Bribery: When is Extraterritoriality Appropriate?* 11 CHARLESTON L. REV. 205, 323 (2017).

181 Dunn, *supra* note 178.

182 Alison Levitt, *IV. Structured settlements for corruption offenses: towards common standards?, in* IBA ANTI-CORRUPTION COMMITTEE: STRUCTURED CRIMINAL SETTLEMENTS SUBCOMMITTEE, STRUCTURED SETTLEMENTS FOR CORRUPTION OFFENCES TOWARDS GLOBAL STANDARDS 32, 35-36 (Abiola Makinwa & Tina Søreide eds., 2018).

183 Press Release, U.S. Dep't of Just., Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (Jan. 31, 2020), https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case; Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html [hereinafter Siemens Press Release].

184 Siemens Press Release, *supra* note 183.

185 Press Release, U.S. Dep't of Just., *supra* note 2.

186 *Recent FCPA Enforcement Activity: Hiring Practices, Technology Sales Channels, Travel & Entertainment, and Individual Accountability,* 11 FCPA UPDATE (Debevoise & Plimpton), Sept. 2019, at 11, https://www.debevoise.com/insights/publications/2019/09/fcpa-update-september-2019.

involving corruption."[187] DOJ officials note similar trends and regularly speak about cooperation between the department and its foreign counterparts.[188]

In other cases, the DOJ has pursued its own enforcement actions after a company reached a settlement in another jurisdiction.[189] For example, in June 2004, Norway's National Authority for Investigation and Prosecution of Economic and Environmental Crime ("Okokrim") fined the Norwegian company Statoil approximately $3 million for violating Norway's trading influence statute.[190] Two years later, Statoil entered into a DPA with the DOJ related to the same matter and was fined $10.5 million.[191] The DOJ credited the $3 million paid to Okokrim, leaving Statoil to pay a fine of $7.5 million.[192] The foregoing occurred even though Norway is a party to the OECD Convention.[193]

The French company Alstom and the U.K. company GlaxoSmithKline ("GSK") were also subject to FCPA enforcement actions after settling bribery-related cases in other jurisdictions.[194] In 2011, Swiss authorities fined Alstom's Swiss subsidiary approximately $2.7 million and ordered it to pay approximately $39.4 million in compensation for illegal profits derived from foreign bribery.[195] Three years later, Alstom and the DOJ entered into a Plea Agreement concerning many of the same activities.[196] The DOJ fined Alstom a record-setting $772 million, the largest up to that date.[197] In 2014, GSK was fined approximately $490 million by Chinese authorities for in-country bribery.[198] Two years later, GSK and the SEC entered into a Cease and Desist Agreement.[199] GSK paid fines of $20 million for violating the FCPA's

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187 Steven Peiken, Co-Dir., Div. of Enf't, SEC, Remarks at the IOSCO/PIFHS-Harvard Law School Global Certificate Program for Regulators of Securities Markets: The Salutary Effects of International Cooperation on SEC Enforcement (Dec. 3, 2018), https://www.sec.gov/news/speech/speech-peikin-120318.

188 *See e.g.,* Rod Rosenstein, Deputy Att'y Gen., U.S. Dep't of Just., Keynote Address on FCPA Enforcement Developments (Mar. 7, 2019), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-keynote-address-fcpa-enforcement; Rod Rosenstein, Deputy Att'y Gen., U.S. Dep't of Just., Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes.

189 *See* Daniel P. Boek, *The United States Foreign Corrupt Practices Act and Latin America: The Influence of Local Prosecutorial Efforts in Transnational White-Collar Litigation*, 24 INT. LAW: REV. COLOMB. DERECHO INT. 21, 36 (2014).

190 Statoil DPA, *supra* note 105, at 6.

191 Statoil DPA, *supra* note 105, at 14.

192 Statoil DPA, *supra* note 105, at 14-15.

193 OECD, *supra* note 12.

194 *See* Lindsay B. Arrieta, *How Multijurisdictional Bribery Enforcement Enhances Risks for Global Enterprises,* A.B.A. (June 20, 2016), https://www.americanbar.org/groups/business_law/publications/blt/2016/06/08_arrieta/.

195 Daniel L. Buhr & Simone Nadelhofer, *Swiss Subsidiary Fined for Inadequate Compliance Measures in Major Bribery Case*, 28 INT'L ENF'T L. REP. 72, 72 (2012).

196 Plea Agreement at 12-14, United States v. Alstom S.A., No. 14-CR-246 (D.Conn. Dec. 22, 2014) [hereinafter Alstom Plea Agreement].

197 *Id;* Sarah N. Lynch, *Alstom to pay record $772 million to settle bribery charges with U.S.*, REUTERS (Dec. 22, 2014), https://www.reuters.com/article/us-alstom-bribery/alstom-to-pay-record-772-million-to-settle-bribery-charges-with-u-s-idUSKBN0K01DF20141222.

198 *GlaxoSmithKline fined $490m by China for bribery*, BBC NEWS (Sept. 19, 2014), https://www.bbc.com/news/business-29274822 [hereinafter BBC NEWS].

199 Cease and Desist Order at 1, In the Matter of GlaxoSmithKline plc, No. 79005, 2016 WL 5571623 (Sept. 30, 2016), https://www.sec.gov/litigation/admin/2016/34-79005.pdf.

accounting provisions related to bribery in China.[200] These enforcement actions also took place even though France, Switzerland, and the U.K. are all OECD Convention signatories.[201]

In the previous examples, countries have used their national laws to punish both domestic bribery (in the case of GSK) and foreign bribery (in the cases of Statoil and Alstom).[202] Nonetheless, the U.S. still claimed jurisdiction, and the companies paid substantial fines to the U.S. government after already paying fines to other governments arising from the same matter. This approach stands in stark contrast to one that respects local enforcement of anti-bribery laws, which may vary from a typical U.S. enforcement action for any number of reasons, such as limited prosecutorial powers, other resolution mechanisms, and different sentencing schemes.[203] Two FCPA practitioners described the implications of the U.S. government's approach as follows:

> Even if the United States technically could assert jurisdiction in such a circumstance, it would be better off letting the company's home country proceed--whether or not the SEC and DOJ would agree with the ultimate outcome of that enforcement action. This principle respects the sovereignty of foreign nations and decreases the risk that United States conduct can be portrayed as heavy-handed or overreaching. A further step might be for United States regulators to first bring conduct that comes to their attention to the home country's regulator, in order to give that regulator the opportunity to take action.[204]

B. Undermining the Global Anti-bribery and Anti-corruption Movement

The current practice of FCPA enforcement against foreign issuers undermines the global anti-bribery and anti-corruption movement by contributing to an environment of uncertainty, which is fueled by incentives built into the system. Lastly, current enforcement practices expose the SEC and DOJ to questions about their motives.

1. Uncertainty

Foreign issuers operate in an environment of uncertainty.[205] When will the DOJ and SEC pursue enforcement actions? How broadly and aggressively will the DOJ and SEC

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200 *Id.* at 2, 7.

201 OECD, *supra* note 12.

202 *See generally* BBC NEWS, *supra* note 198; Statoil DPA, *supra* note 105; Alstom Plea Agreement, *supra* note 196.

203 *See* Kuehl, *supra* note 89, at 504-07 (discussing why enforcement actions vary across jurisdictions); *Structured Settlements for Corruption Offences Towards Global Standards?*, INT'L BAR ASS'N 35-36 (Dec. 2018), https://www.ibanet.org/LPD/Criminal_Law_Section/AntiCorruption_Committee/Projects.aspx [hereinafter INT'L BAR ASS'N]; Davis, *supra* note 69, at 340-42 (discussing prosecutorial powers).

204 Smith & Parling, *supra* note 175, at 255.

205 Nathan Golden, *Conspicuous Prosecution in the Shadows: Rethinking the Relationship Between the FCPA's Accounting and Anti-Bribery Provisions*, 104 IOWA L. REV. 891, 906 (2019).

interpret the FCPA? Will an email that passes through a U.S. server establish jurisdiction? As shown in the cases of GSK, Statoil, and Alstom, foreign issuers also face uncertainty about whether they will be subject to double jeopardy.[206] Writing in 2017, an FCPA practitioner called on U.S. prosecutors to commit to respecting non-U.S. outcomes that are resolved appropriately and in good faith—and to explain the criteria to determine whether that happened.[207]

In 2018, the DOJ issued a memo about its approach to enforcement actions if multiple jurisdictions may be investigating the same conduct ("Piling on Memo").[208] The Piling on Memo called on U.S. attorneys to "endeavor, as appropriate, to coordinate with and consider the number of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct."[209]

Unfortunately, the Piling on Memo lacks detail and provides no predictability.[210] It does not alleviate concerns that companies may be exposed to double jeopardy and prosecuted for the same activities in multiple jurisdictions.[211] The DOJ can pursue its own enforcement actions even if another country has fined the company for the same underlying activity.[212] Therefore, it is unlikely that the Piling on Memo will be anything more than superficial non-binding guidance.

The DOJ and SEC could advance the global anti-bribery and anti-corruption movement by exercising self-restraint. A principle that some scholars have argued seems noncontroversial is deference to a country that is willing to combat bribery at home.[213] Another proposal advocates a principle of self-restraint when the U.S. nexus is minimal, and other countries with stronger ties are enforcing their own laws.[214]

To date, the U.S. government has not shown a policy of restraint, which exposes it to criticism that it acts as the ultimate enforcer of foreign bribery or as the world's policeman.[215] Other critiques label the U.S. government's approach as imperialistic.[216] The consequences are summarized by an FCPA practitioner:

> The adamant refusal of United States prosecuting authorities and courts to recognize any limits on their power to engage in prosecutions that duplicate

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206 Arrieta, *supra* note 194.

207 Davis, *supra* note 69, at 343.

208 Rod Rosenstein, Deputy Att'y Gen., *Policy on Coordination of Corporate Resolution Penalties,* U.S. DEP'T OF JUST. (May 9, 2018), https://www.justice.gov/opa/speech/file/1061186/download.

209 *Id.*

210 *See* Reniere, *supra* note 178, at 172.

211 *See generally* Davis, *supra* note 178 (discussing the concerns regarding double jeopardy and multiple prosecutions); Dunn, *supra* note 178; Reniere, *supra* note 178; Michael B. Van Alstine, *Treaty Double Jeopardy: The OECD Anti-Bribery Convention and the FCPA*, 73 OHIO STATE L.J. 1321, 1331 (2012).

212 *See* Davis, *supra* note 178, at 63-70; Reniere, *supra* note 178, at 177, 199.

213 Smith & Parling, *supra* note 175, at 255.

214 *See* Reniere, *supra* note 178, at 208.

215 *See* Davis, *supra* note 69, at 342; Diefenbach, *supra* note 149, at 52; *The Trouble with America's Extraterritorial Campaign Against Business,* ECONOMIST (Jan. 19, 2019), https://www.economist.com/leaders/2019/01/19/the-trouble-with-americas-extraterritorial-campaign-against-business.

216 *See* Smith & Parling, *supra* note 175; Diefenbach, *supra* note 149, at 51; Golden, *supra* note 205, at 893, 916.

> 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 by declining prosecution, does a disservice to the goal of the OECD Convention, and to the goal of coordinated prosecutions generally, because it creates a disincentive to other countries to adopt flexible outcomes such as a DPA, and to companies that might otherwise elect to enter into discussions with authorities in their "home" country or in a country with a substantial interest in the matter.[217]

2. Incentives

The DOJ's and SEC's aggressive approach to FCPA enforcement against foreign issuers is supported by a system of incentives, which hinder the global anti-bribery and anti-corruption movement.[218] A 2011 report by the New York City Bar Association examined the trend of increased enforcement and noted that prosecutors are rational actors who seek to perform well and measure their performance in terms of wins and losses.[219] In the corporate enforcement context, wins are settlements that result in large fines.[220] The report argues that, "The logic is straightforward: FCPA enforcement efforts provide prosecutors with an effective means to obtain sizeable settlements, thus punishing past wrongs and deterring future violations."[221]

The incentive to behave as a rational actor is not in and of itself problematic. However, in the absence of judicial oversight of the SEC and DOJ, the results become perverse: "prosecutors can claim that all kinds of foreign payments violate the FCPA when neither the payer nor Congress would have ever expected that," and prosecutors act with confidence that "they will not have to defend their legal theories in court."[222] The same scholar argued that this behavior has serious consequences:

> This is increasingly earning the DOJ and SEC a lot of easy money, and resulting in a number of unfair prosecutions. Perhaps more importantly, it creates incredible uncertainty about what United States and even foreign companies can do in foreign countries - making it harder for everyone to do business. This status quo flies in the face of the FCPA's noble goals.[223]

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217 Davis, *supra* note 178, at 100.

218 Comm. on Int'l Bus. Transactions, *The FCPA and Its Impact on International Business Transactions—Should Anything Be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption*, 17, 23 N.Y.C. BAR ASS'N (Dec. 2011), https://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf.

219 *Id.* at 18.

220 *Id.*

221 *Id.*

222 Golden, *supra* note 205, at 906.

223 Golden, *supra* note 205, at 906.

Enforcement actions can also be viewed as cash cows.[224] A former DOJ prosecutor noted:

> This is the one area of government activity that actually brings money in rather than shoots money out. We're talking about literally billions of dollars that the government is able to collect ... as long as there's a budget issue it's not too cynical to say that ... generating revenue is a factor in bringing these cases.[225]

Other former government officials have made similar assessments. A former SEC official wrote that, "Governments will keep pursuing corrupt business practices for one very simple reason—it is lucrative."[226] Referring to the FCPA, a former DOJ official remarked, "The government sees a profitable program, and it is going to ride that horse until it cannot ride it anymore."[227] In a 2019 podcast, a former SEC official candidly said, "Frankly, if you bring in a couple billion dollars a year, you just keep on going."[228] These examples justify the argument that "FCPA enforcement is more about generating funds for the government rather than punishing and deterring corruption."[229]

3. Motives

The prevalence of enforcement actions against foreign issuers has led some scholars and FCPA practitioners to question both the DOJ's and SEC's motives. These lines of critique center on whether enforcement actions against foreign issuers are forms of protectionism, whether the FCPA is used as a foreign policy tool, and whether large fines paid to the U.S. government are appropriate when the U.S. nexus is minimal.

The enforcement action against the French company Alstom garnered criticism from the European press and has been touted as an example of protectionism.[230] The allegations are that investigations into Alstom pushed it to sell some of its assets to its U.S. competitor, General Electric.[231] A report into the investigation and sale noted that, "[t]he legal process and the commercial one became uncomfortably intertwined" and that the sale to General Electric was approved by shareholders on the same day Alstom signed documents with the DOJ admitting

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[224] *See "Total"ly Milking the FCPA Cash Cow?,* FCPA PROFESSOR (June 3, 2013), http://fcpaprofessor.com/totally-milking-the-fcpa-cash-cow/ (discussing these views).

[225] Brian Mahoney, *FCPA Enforcement Will Stay Robust Beyond Obama's 2nd Term*, LAW 360 (Nov. 6, 2012), https://www.law360.com/articles/392138/fcpa-enforcement-will-stay-robust-beyond-obama-s-2nd-term.

[226] Michael F. Perlis & Wrenn E. Chais, *Investigating the FCPA,* FORBES (Dec. 8, 2009), https://www.forbes.com/2009/12/08/foreign-corrupt-practices-act-opinions-contributors-michael-perlis-wrenn-chais.html#.

[227] Joseph Rosenbloom, *Here Come the Payoff Police* 12 CORPORATE COUNS. 1, 14 (2010).

[228] *"Frankly, If You Bring in A Couple Billion Dollars A Year, You Just Keep on Going," And Other Musings from Former FCPA Prosecutors*, FCPA PROFESSOR (Apr. 2, 2019), http://fcpaprofessor.com/frankly-bring-couple-billion-dollars-year-just-keep-going-musings-former-fcpa-prosecutors/.

[229] Reniere, *supra* note 178, at 183.

[230] *See How the American takeover of a French national champion became intertwined in a corruption investigation,* ECONOMIST (Jan. 17, 2019), https://www.economist.com/business/2019/01/17/how-the-american-takeover-of-a-french-national-champion-became-intertwined-in-a-corruption-investigation.

[231] *See id.*

to the charges.[232] The reporting noted, "The broader worry is that the DOJ's investigations distorted Alstom's sale process, giving an edge to a potential American purchaser."[233] A former FCPA unit chief with the DOJ confirmed the general protectionism concerns at a 2019 seminar:

> I think, frankly, once people got into office and into place, they suddenly realized that the law helps try to level the playing field for U.S. companies since most of the top ten biggest cases are actually non-U.S. companies that have been hit by FCPA enforcement . . . and that has continued unabated.[234]

Concerns about whether the FCPA is being used as a foreign policy tool were renewed in 2018 when Attorney General Jeff Sessions announced the DOJ's China Initiative, which describes the government's national security strategy toward China.[235] One of the goals is to identify FCPA cases where Chinese companies compete with American companies.[236] An analysis of the China Initiative noted it "is a paradigm shift for the DOJ, which previously has rejected any suggestion that it targets companies from a specific country."[237] A former FCPA prosecutor expressed concerns that the initiative could result in allegations that the government unfairly targets Chinese individuals and companies.[238] Lawyers from Debevoise & Plimpton commented that the announcement prompted many to consider whether the FCPA was being weaponized.[239] They further noted that singling out China "opens FCPA enforcement up to further charges of overreach and politicization."[240]

Another line of criticism concerns the appropriateness of FCPA fines when the U.S. nexus is weak. This argument notes that, "Since the majority of monetary penalties come from foreign companies, there are serious questions of whether the governments 'victimized' by their own organizations should receive the proceeds instead of the U.S. Treasury."[241] This argument concentrates on cases where the U.S. enforcement action is piled on to enforcement actions in

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232 *Id.*

233 *Id.*

234 Am. Bar Ass'n Crim. Just. Section, *Through the Looking Glass: A Glimpse at International Criminal Enforcement in 2019,* YOUTUBE (Sept. 13, 2019), https://www.youtube.com/watch?v=xpo9d4CbHG0 (quoting Charles Duross at the 17-minute mark).

235 Press Release, U.S. Dep't of Just., *Attorney General Jeff Session's China Initiative Fact Sheet* (Nov. 1, 2018), https://www.justice.gov/opa/speech/file/1107256/download.

236 *See id.*

237 Jodi Wu et al., *A Shift in U.S. FCPA Policy—Should Chinese Companies be Worried?*, KIRKLAND & ELLIS (June 10, 2019), https://www.kirkland.com/publications/article/2019/06/a-shift-in-us-fcpa-policy_should-chinese-companies.

238 Clara Hudson, *DOJ Focus on China: "Is This a Weaponizing of the FCPA?" – Kathleen Hamann Quoted in Global Investigations Review*, PIERCE ATWOOD LLP (Dec. 27, 2018), https://www.pierceatwood.com/update/doj-focus-china-weaponizing-fcpa-kathleen-hamann-quoted-global-investigations-review.

239 *The Year 2018 in Review: Continued Globalization of Anti-Corruption Enforcement,* 10 FCPA UPDATE (Debevoise & Plimpton), Jan. 2019, at 28, https://www.debevoise.com/insights/publications/2019/01/fcpa-update-january-2019.

240 *Id.* at 29.

241 Diefenbach, *supra* note 149, at 52.

other jurisdictions, such as the case involving the Norwegian company Statoil.[242] One legal scholar noted, "If the conduct had been punished, and the harm to the victim repaired, it is hard to see what motive the DOJ might have had aside from revenue."[243] Similar concerns surround the Petrobras enforcement action.[244]

A slightly different criticism involved the French company Alcatel-Lucent, which was fined in 2010 for violating the FCPA.[245] The Costa Rican Instituto Constarricense de Electricidad responded by petitioning a U.S. court "for protection of its rights as a victim" of Alcatel-Lucent's bribery scheme.[246] Commenting on this case, FCPA scholar Mike Koehler noted, "I am not sure where criminal fines should go when a *French* company bribes *Costa Rican* 'foreign officials,' but I am pretty sure that the answer should not be 100% to the U.S. Treasury."[247]

V. MAKING ENFORCEMENT GLOBAL

This paper has shown that enforcement actions against foreign issuers generally have a weak U.S. nexus. Nonetheless, foreign issuers are disproportionately fined for FCPA violations and, on average, receive larger fines than domestic issuers. These actions undermine the global anti-bribery and anti-corruption movement, including the OECD Convention. There is a pressing need for a solution. In fact, a 2018 International Bar Association report identified as "imperative," a framework for anti-bribery cooperation among governments and noted it "remains the work of the next decade."[248] This section proposes such a framework.

The OECD should develop a binding procedure related to Article 4.3 of the OECD Convention and remove the language that consultation takes place upon request of a party.[249] Indeed, the weakness of Article 4.3 is that countries can only request consultation if they are informed of the matter.[250] The amended Article 4.3 should require a country that becomes aware of possible foreign bribery to inform the OECD Convention countries that have a nexus to the act. Once the countries are informed, the governing principle should be that the matter is prosecuted in the jurisdiction with the closest nexus to the act of bribery. Therefore, the following order in which countries can claim jurisdiction should be as follows:

1. Prosecution in the jurisdiction where the public official was bribed;

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242 Diefenbach, *supra* note 149, at 51.

243 Golden, *supra* note 205, at 918.

244 *Issues to Consider from the Petrobras Enforcement Action*, FCPA PROFESSOR (Sept. 28, 2018), https://fcpaprofessor.com/issues-consider-petrobras-enforcement-action/. The headline on the FCPA Professor blog on the day the settlement was announced says it all: "Brazil State-Owned Co. Allegedly Facilitates Payments to Brazilian Politicians and Political Parties and U.S. Collects Net $170 Million in FCPA Enforcement Action. *See Brazil State-Owned Co. Allegedly Facilitates Payments To Brazilian Politicians And Political Parties And U.S. Collects Net $170 Million In FCPA Enforcement Action*, FCPA PROFESSOR (Sept. 27, 2018), http://fcpaprofessor.com/brazil-state-owned-co-allegedly-facilitates-payments-brazilian-politicians-political-parties-u-s-collects-net-170-million-fcpa-enforcement-action/.

245 *Is ICE a Victim? And an Open Question!*, FCPA PROFESSOR (May 25, 2011), http://www.fcpaprofessor.com/is-ice-a-victim-and-an-open-question.

246 *Id.*

247 *Id.*

248 INT'L BAR ASS'N, *supra* note 203, at 25.

249 Convention on Combating Bribery, *supra*, note 11, at 5.

250 Convention on Combating Bribery, *supra*, note 11, at 5.

2. Prosecution in the bribing entity's place of incorporation (if different);
3. Prosecution in the place of incorporation of the bribing entity's parent company;
4. Prosecution in countries with extraterritorial laws (e.g., FCPA, Bribery Act).

Each jurisdiction should be required to decide whether to prosecute a matter, pass it to the next level, or coordinate enforcement with another jurisdiction. This approach adds transparency, accountability, and predictability in foreign bribery enforcement actions and places pressure on jurisdictions to address foreign bribery locally, where its impacts are most closely felt.

This approach also adds legitimacy by respecting the enforcement of national laws. If countries fail to prosecute bribery or are unable to do so because their laws are too weak, these deficiencies will be clearly visible, which can provide the impetus to strengthen national laws. Each country will need to demonstrate its commitment to combatting bribery and corruption.

VI. CONCLUSION

The U.S. should stop enforcing the FCPA against foreign issuers with a weak U.S. nexus. This paper has shown that FCPA enforcement actions against foreign issuers generally have a weak U.S. nexus. Nonetheless, foreign issuers are disproportionately fined and, on average, receive larger fines than domestic issuers. These actions result in uncertainty, questions about the U.S. government's motives, and a system of incentives that undermine the global anti-bribery and anti-corruption movement. To bring the global anti-bribery and anti-corruption movement to the next level and make enforcement global, this paper has proposed amending the OECD Convention to include a procedure to determine the most appropriate jurisdiction for prosecution.