**Michigan Journal of International Law**

Volume 40 | Issue 3

2019

# Promoting Predictability in Business: Solutions for Overlapping Liability in International Anti-Corruption Enforcement

Andrew T. Bulovsky
*University of Michigan Law School*

# PROMOTING PREDICTABILITY IN BUSINESS: SOLUTIONS FOR OVERLAPPING LIABILITY IN INTERNATIONAL ANTI-CORRUPTION ENFORCEMENT

*Andrew T. Bulovsky**

## Introduction

Multi-national corporations ("MNCs") are increasingly subject to liability in multiple jurisdictions for the same conduct. Overlapping liability is more than a hypothesized trend. As countries increasingly enforce their anti-corruption legislation, "concurrent investigations and prosecutions by multiple countries . . . will become a fixture in the global anti-corruption enforcement landscape."[1] In fact, in light of recent duplicative prosecutions, overlapping liability has already begun to affect MNCs.

Perhaps the most flagrant example of these "carbon copy" prosecutions[2] comes from charges against the TSKJ Consortium,[3] which allegedly bribed Nigerian officials in exchange for liquefied natural gas contracts.[4] The U.S. Department of Justice (the "DOJ") and the Securities and Exchange Commission (the "SEC") recovered more than $1.5 billion from the TSKJ Consortium.[5] At the same time, however, Nigeria brought charges against the consortium and several executives over conduct that "mirrored" the same

* J.D. Candidate, University of Michigan Law School (2019); M.Sc., University of Oxford (2016); M.Sc., London School of Economics (2015). My sincere thanks to Professor Timothy Dickinson for his support, guidance, and continued friendship. Additional thanks to my fiancée, Jenna Pavelec, for her invaluable edits and support. Finally, thank you to my family for helping me nurture my interest in international law and development.

1. For more background on the rise of duplicative prosecutions and additional examples, see Jay Holtmeier, *Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities*, 84 Fordham L. Rev. 493, 495 (2015).

2. Andrew S. Boutros & T. Markus Funk, *"Carbon Copy" Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World*, 2012 U. Chi. Legal F. 259, 260 (2012).

3. The TSKJ Consortium was a joint venture that consisted of four companies: Kellogg, Brown, & Root (a Halliburton subsidiary), Eni-Snamprogetti Netherlands BV, JGC Corporation, and Technip, S.A. Richard L. Cassin, *JGC Confirms DOJ Investigation*, The FCPA Blog (July 12, 2010, 8:02 AM), http://www.fcpablog.com/blog/2010/7/12/jgc-confirms-doj-investigation.html.

4. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009), https://www.sec.gov/news/press/2009/2009-23.htm.

5. Press Release, U.S. Dep't of Justice, JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $218.8 Million Criminal Penalty (Apr. 6, 2011), http://www.justice.gov/opa/pr/jgc-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-2188.

allegations the company and its executives resolved in the United States.[6] The companies were forced to settle with the Nigerian government.[7] In addition to enforcement actions in the United States and Nigeria, the consortium also faced $22.7 million in penalties from the African Development Bank,[8] a £7 million disgorgement in the United Kingdom,[9] and a € 24.5 million disgorgement in Italy.[10]

These sovereigns' decisions to subject the TSKJ Consortium to multiple and duplicative prosecutions for the same underlying conduct illustrates an evolving dilemma in international anti-corruption enforcement.[11] As countries' willingness and interest to enforce anti-corruption legislation increase, MNCs may find themselves subject to overlapping liability and multi-jurisdictional penalties.[12] With no clear mechanism for determining where and to what extent an MNC might be liable, MNCs face an environment of legal uncertainty.

Corruption negatively impacts economies by distorting markets and inhibiting development.[13] Indeed, corruption and bribery impinge upon the "overall governance environment and the efficiency of the state apparatus, erode the ability of the government to collect revenues from formal tax channels, and ultimately undermine sustainable economic development and the rule of law."[14] But the TSKJ Consortium dilemma demonstrates a poten-

---

6. Boutros & Funk, *supra* note 2, at 259–60.

7. *Id.*

8. Press Release, African Dev. Bank Grp., AfDB Charges Snamprogetti Netherlands B.V. US $5.7 million in Monetary Sanction for Corrupt Practices (May 28, 2014), http://www.afdb.org/en/news-and-events/article/afdb-charges-snamprogetti-netherlands-b-v-us-5-7-million-in-monetary-sanction-for-corrupt-practices-13233.

9. MW Kellogg, a wholly-owned subsidiary of Kellogg, Brown & Root, was required to pay £7 million. Press Release, UK Serious Fraud Office, MW Kellogg Ltd to Pay £7 Million in SFO High Court Action (Feb. 16, 2011), https://www.foley.com/files/FCPA23feb11SFOKelloggRelease.pdf.

10. Liam Moloney, Milan Court Finds Saipem Guilty of Nigeria Corruption, WALL STREET J. (July 11, 2013, 3:32 PM), https://www.wsj.com/articles/SB10001424127887324425204578599990427813164.

11. *See* Elizabeth K. Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT'L L. 1, 30 (2012).

12. *See* Meg Beasley, *Dysfunctional Equivalence: Why the OECD Anti-Bribery Convention Provides Insufficient Guidance in the Era of Multinational Corporations*, 47 GEO. WASH. INT'L L. REV. 191, 193 (2015).

13. Leah M. Trzcinski, *The Impact of the Foreign Corrupt Practices Act on Emerging Markets: Company Decision-Making in a Regulated World*, 45 N.Y.U. J. INT'L L. & POL. 1201, 1280 (2013); *Combating Corruption*, WORLD BANK (Oct. 4, 2018), http://www.worldbank.org/en/topic/governance/brief/anti-corruption.

14. Marie Chêne, *Evidence of the Impact of Facilitation Payments*, TRANSPARENCY INT'L (July 1, 2013), www.transparency.org/files/content/corruptionqas/The_impact_of_facilitation_payments.pdf; *see also* Johann Graf Lambsdorff, *Causes and Consequences of Corruption: What Do We Know from a Cross-Section of Countries?*, *in* INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION 3, 23–25 (Susan Rose-Ackerman ed., 2006).

tial consequence of overlapping liability: MNCs may be disincentivized from voluntarily self-disclosing and cooperating with authorities because working with officials in one country might very well expose the company to liability in another.[15] Worse, the uncertainty imposed on MNCs from redundant prosecutions may deter MNCs and individuals from reaching a settlement agreement or admitting their culpability for fear of being estopped from taking a different position in another jurisdiction, which may very well have different legal standards for the conduct in question.[16] Simply, large criminal and civil penalties actually may "dissuade corporations from investigating purported misconduct and reporting detected crimes."[17] The incentive not to cooperate with authorities is heightened at the international level. After a guilty plea in one jurisdiction, MNCs may face duplicative prosecutions from other countries as governments seek "political credit for anti-corruption efforts, revenge against opposition groups, or revenues for depleted national treasuries from large fines and penalties."[18]

Nothing in existing international frameworks guards against corporate double jeopardy, so any country with a jurisdictional hook can pile on penalties for a single offense. Moreover, countries have not been receptive to attempts to cry double jeopardy. In July 2015, the Federal Chamber of Criminal Cassation of Argentina (*Cámara Federal de Casación Penal*) allowed the prosecution of a defendant for bribing Argentine officials despite his defense that he was already prosecuted in Germany for the same conduct.[19] More recently, in March 2018, the French Supreme Court (*Cour de Cassation*) explicitly rejected a company's invocation of double jeopardy as a defense.[20] The French and Argentine courts' decisions to reject double jeopardy as a defense, coupled with the redundant prosecutions in the TSKJ Consortium example, demonstrate why MNCs or individuals have little incentive to cooperate with investigators in a different jurisdiction. Overzeal-

15. *See* Robert W. Tarun & Peter P. Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Leniency Policy*, 47 AM. CRIM. L. REV. 153 *passim* (2010).

16. *See* Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big To Debar?*, 80 FORDHAM L. REV. 775, 819 (2011).

17. Tarun & Tomczak, *supra* note 15, at 154.

18. Spahn, *supra* note 11, at 30; *see also* CNN Wire Staff, *Halliburton Settles Nigeria Bribery Claims for $35 Million*, CNN (Dec. 21, 2010, 8:46 PM), http://www.cnn.com/2010/WORLD/africa/12/21/nigeria.halliburton/index.html ("Many observers in Nigeria regarded the charges as a publicity stunt by the financial crimes commission ahead of national elections in April and as a symbolic effort to display resolve against government corruption.").

19. Holtmeier, *supra* note 1, at 515.

20. Stéphane Bonifassi, *French Supreme Court Finds No Double Jeopardy Based On Foreign Plea Agreement*, FCPA BLOG (Apr. 5, 2018, 8:22 AM), http://www.fcpablog.com/blog/2018/4/5/stephane-bonifassi-french-supreme-court-finds-no-double-jeop.html (describing the court's holding that Vitol, the Swiss oil trader involved in bribes related to the United Nations' Oil-for-Food program in Iraq, could not invoke double jeopardy as a defense after pleading guilty in a New York court in 2017 and paying $17 million in fines and penalties).

ous and overlapping prosecution has rendered international anti-corruption enforcement "uneven, underdeveloped, and unpredictable."[21]

This Note evaluates solutions to the problems of overlapping liability in general and multi-jurisdictional disgorgement in particular.[22] Part I traces the origins of international anti-corruption efforts and provides an overview of the Foreign Corrupt Practices Act (the "FCPA").[23] It then discusses the two most significant international anti-corruption conventions: the OECD's Convention on Combatting Bribery of Foreign Officials in International Business Transactions (the "OECD Convention")[24] and the United Nations Convention Against Corruption ("UNCAC").[25] Part II lays out the problems created by the lack of a formal mechanism to prevent overlapping liability—a phenomenon that violates the common law concept known as double jeopardy[26] and the analogous civil law principle *ne bis in idem* (not twice in the same thing).[27] Part III proposes a formal mechanism to militate against the problems noted in Part II and argues that these provisions should be housed in a series of bilateral agreements akin to those that exist in international antitrust enforcement. Ultimately, this Note stresses the need for a more proportional and predictable method of ensuring that MNCs are not subject to overlapping liability and provides an actionable means for doing so.

## I. The Global Fight Against Corruption

The FCPA was the first major piece of international anti-corruption legislation.[28] Since its passage in 1977, the number and scope of anti-corruption legislation around the globe increased rapidly.[29] Section I.A highlights the history of the FCPA, its influence on the global anti-corruption battle, and

---

21. Spahn, *supra* note 11, at 6.

22. *See* discussion *infra* Section II.B.

23. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78m, 78dd, 78ff (2012).

24. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. No. 105-43 [hereinafter OECD Convention].

25. United Nations Convention Against Corruption, *opened for signature* Dec. 9, 2003, S. Treaty Doc. No. 109-6, 2349 U.N.T.S. 41 [hereinafter UNCAC].

26. *Double Jeopardy*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining double jeopardy as "[t]he fact of being prosecuted or sentenced twice for substantially the same offense."); *see also* U.S. CONST. amend. V. (stating that "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .").

27. *See* John A.E. Vervaele, *The Transnational* Ne Bis In Idem *Principle in the EU Mutual Recognition and Equivalent Protection of Human Rights*, 1 UTRECHT L. REV. 100, 102 (2005).

28. Brian C. Harms, *Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption*, 33 CORNELL INT'L L.J. 159, 170–71 (2000).

29. *See* discussion *infra* Section I.B.

the penalties and jurisdictional scope of the DOJ and SEC. Section I.B discusses the far-reaching jurisdictional mandates of the OECD Convention and UNCAC.

### A. *The FCPA: Catalyzing the Modern Anti-Corruption Movement*

In early 1974, special prosecutors and the Watergate Committee[30] uncovered evidence of illegal campaign contributions, money laundering through foreign countries, and the use of campaign funds to secure government contracts.[31] Over the next several years, the SEC identified over $300 million in foreign bribery by more than 400 U.S. corporations.[32] With government officials implicated from countries across the world, it became apparent that corruption was a global problem.[33] Although the Organization of American States adopted a resolution condemning "any act of bribery" in 1975,[34] and the United Nations General Assembly denounced corrupt practices writ large,[35] neither resolution included enforcement or monitoring provisions.[36] But in 1977, the United States amended the 1934 Securities Exchange Act to include the FCPA,[37] thus becoming the first country to criminalize the bribery of foreign officials.[38]

In its current incarnation, the FCPA relies on two primary approaches to combat international corruption. First, it criminalizes bribing foreign officials,[39] stating that it is illegal to make "an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization giving anything of value . . . for the purposes of secur-

30. Establishment of Select Committee on Presidential Campaign Activities, S. Res. 60, 93d Cong. (1973).

31. Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. 593, 595 (2002).

32. *Id.*

33. *Id.* (noting that the uncovered evidence implicated governmental officials from countries as diverse as Japan, Ghana, Iran, Mexico, the Philippines, Venezuela, and Italy).

34. Org. of American States, OAS Res. CP/RES. 154 (167/75*), Behavior of Transnational Enterprises Operating in the Region and Need for a Code of Conduct to Be Observed by Such Enterprises*, *in* 14 I.L.M. 1326 (1975).

35. G.A. Res. 3514, Measures Against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved (Dec. 15, 1975).

36. Schroth, *supra* note 31, at 596.

37. *See* Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78m, 78dd, 78ff (2012).

38. Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 930 (2012) ("In the mid-1970s, Congress journeyed into unchartered territory. After more than two years of investigations, deliberation and consideration, what emerged in 1977 was the Foreign Corrupt Practices Act (FCPA).").

39. For a discussion of the ambiguity in the statutory definitions within the FCPA, see Matthew W. Muma, *Toward Greater Guidance: Reforming the Definitions of the Foreign Corrupt Practices Act*, 112 MICH. L. REV. 1337, 1356 (2014).

ing any improper advantage."[40] This provision applies to issuers,[41] U.S. domestic concerns,[42] and individuals and companies who act "with a territorial nexus to the United States."[43] Second, the FCPA contains accounting provisions. These provisions impose a record-keeping requirement that obliges companies to maintain accurate books and records as well as to implement a "system of internal accounting controls sufficient to provide reasonable assurances" for compliance with accounting regulations.[44] Violations of these provisions are jointly prosecuted by the DOJ and the SEC, with the former primarily investigating criminal violations and the latter focusing its efforts on civil violations.[45]

Punishment for violating the FCPA can be severe. In addition to punitive fines of millions of dollars,[46] the DOJ may impose criminal penalties on individuals of up to twenty years' imprisonment for violations of the accounting provisions[47] and up to five years for violations of the anti-bribery provisions.[48] Moreover, the DOJ can subject corporations to monitors[49] and force them to implement or improve compliance programs in exchange for deferred prosecution agreements ("DPAs") and non-prosecution agreements ("NPAs").[50] The SEC, too, wields significant discretion in imposing civil penalties, typically consisting of fines and injunctions.[51] Since 2004, when ABB Ltd. disgorged $5.9 million for illicit profits procured in connection with bribes in Angola, Nigeria, and Kazakhstan,[52] the SEC has increasingly sought disgorgement of ill-gotten gains.[53] While disgorgement is typically

---

40. 15 U.S.C. § 78dd-1(a).

41. 15 U.S.C. § 78dd-1. An "issuer" is a company with a security registered on a national securities exchange. *See* 15 U.S.C. § 78c(a)(8) (2012).

42. 15 U.S.C. § 78dd-2. Domestic concerns include U.S. citizens, legal residents, all U.S. corporations, and their agents and employees (regardless of nationality). *See* Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1627 (2017).

43. Brewster, *supra* note 42, at 1627; *see* 15 U.S.C. § 78dd-3.

44. 15 U.S.C. § 78m(b)(2)(B)(i)-(ii).

45. *See* STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 82–83 (2d ed. 2010).

46. 15 U.S.C. § 78ff(a).

47. *Id.*

48. *Id.* §§ 78dd-2(g), 78dd-3(e), 78ff(c)(2).

49. Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1742 (2007).

50. Mary Miller, *More Than Just a Potted Plant: A Court's Authority To Review Deferred Prosecution Agreements Under the Speedy Trial Act and Under Its Inherent Supervisory Power*, 115 MICH. L. REV. 135, 136 (2016); Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 933 (2010).

51. 15 U.S.C. § 78dd-2(d) (2012).

52. Litigation Release No. 2049, SEC Sues ABB Ltd. in Foreign Bribery Case (July 6, 2004), https://www.sec.gov/litigation/litreleases/lr18775.htm.

53. *See* Koehler, *supra* note 50, at 982.

the purview of the SEC, the DOJ has occasionally sought disgorgement, such as its 2017 enforcement action against Biomet after the company violated its DPA.[54]

The FCPA not only allows for severe penalties—its reach is expansive.[55] The FCPA allows the U.S. government to assert jurisdiction over corporations with only a modicum of a connection to the United States.[56] For instance, a phone call routed through the United States or a single email could provide sufficient jurisdictional grounds.[57] The potential for a small, even unintentional connection, to subject a corporation to another country's jurisdiction is all the more troubling in the digital age, when electronic communications and data are often housed in servers abroad.[58] And when it comes to monitoring corruption, government agencies are no longer the only watchdogs. For example, in 2016, an anonymous civilian source leaked the "Panama Papers," which resulted in a worldwide press release of the news.[59] In a digitally connected world, the potential to identify and disseminate information about corruption is greater than ever.[60] As a result, international regulatory anti-corruption efforts are only accelerating.[61] This heightened focus on enforcement—both at home and abroad—opens up the possibility of "carbon copy" prosecutions and redundant penalties across multiple jurisdictions.[62]

---

54. *See* SHEARMAN & STERLING LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 4, 13 (2018), https://www.shearman.com/-/media/Files/Perspectives/2018/01/January-2018-FCPA-Digest-Recent-Trends.pdf.

55. *See* Muma, *supra* note 39, at 1338 (noting that the FCPA is broad and the limitations to that reach are uncertain); Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 283–84 (1997).

56. Lucinda A. Low & Timothy P. Trenkle, *U.S. Anti-Bribery Law Goes Global: Standards Tightening Up*, BUS. L. TODAY, July–Aug. 1999, at 14.

57. *Id.*

58. *Cf.* United States v. Microsoft Corp., 138 S. Ct. 1186 (2018) (per curiam) (declining to consider whether a U.S. provider of email services must disclose digital information housed abroad after Congress passed the CLOUD Act).

59. *See* FRESHFIELDS BRUCKHAUS DERINGER LLP, ANTI-BRIBERY AND CORRUPTION: GLOBAL ENFORCEMENT AND LEGISLATIVE DEVELOPMENTS 2017, at 4 (2017), https://www.freshfields.com/globalassets/services-page/global-investigations/publication-pdfs/gi-abc-guide-2017.pdf.

60. *See* Lawrence J. Trautman, *Following the Money: Lessons from the Panama Papers*, 121 PA. ST. L. REV. 807, 862 (2017).

61. *See* SHEARMAN & STERLING LLP, *supra* note 54, at 2; *See* Koehler, *supra* note 50, at 981.

62. Boutros & Funk, *supra* note 2, at 260.

### B. *International Anti-Corruption Efforts: The OECD Convention and UNCAC*

In 1988, Congress amended the FCPA[63] and encouraged the OECD to pass legislation that would help combat bribery.[64] In the wake of these renewed anti-corruption efforts, the OECD created the Ad Hoc Group on Illicit Payments.[65] Soon, what began as a trickle of international interest in combatting corruption became a cascade as the world passed regional and global anti-corruption conventions.[66] This Note focuses on the global anti-corruption conventions due to their potential jurisdictional reach in international anti-corruption enforcement. First, the OECD passed the Convention on Combating Bribery of Foreign Officials in International Business Transactions (the "OECD Convention") in 1997.[67] Second, the United Nations passed the Convention Against Corruption ("UNCAC") in 2003.[68]

Broadly speaking, the OECD Convention and UNCAC are similar in that they implore countries to implement anti-corruption legislation at the national level.[69] In the years following passage of the OECD Convention and UNCAC, countries have passed major anti-bribery legislation, most notably the United Kingdom.[70] The OECD Convention's text is comparable to

---

63. *See* Omnibus Competitiveness Act of 1988, Pub. L. No. 100-418, sec. 5003, 102 Stat. 1107, 1416–1417 (1988) (codified at 15 U.S.C. §§ 78dd-1–3, 78ff (2012)).

64. OECD WORKING GRP. ON BRIBERY, ANNUAL REPORT OF THE OECD WORKING GROUP ON BRIBERY 2014 (2014), http://www.oecd.org/daf/anti-bribery/WGB-AB-AnnRep-2014-EN.pdf.

65. *Id.*

66. The impact of regional anti-corruption conventions has largely been neglected by the legal academy. Although beyond the scope of this Note, future research might address how regional conventions have affected overlapping liability. Such regional conventions include (1) the Inter-American Convention Against Corruption, Mar. 29, 1996, S. TREATY DOC. No. 105-39; (2) the Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S. No. 173; (3) the European Union Convention on the Fight Against Corruption Involving Officials of the European Community or Officials of Member States, May 26, 1997, 37 I.L.M. 12; and (4) the African Union Convention on Preventing and Combatting Corruption, July 11, 2003, 43 I.L.M. 5, https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption.

67. OECD Convention, *supra* note 24.

68. *See* UNCAC, *supra* note 25.

69. *Compare*, OECD Convention, *supra* note 24, art. 12 ("The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention."), *with* UNCAC, *supra* note 25, art. 65 ("Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.").

70. *See* Jessica A. Lordi, *The U.K. Bribery Act: Endless Jurisdictional Liability on Corporate Violators*, 44 CASE W. RES. J. INT'L L. 955, 964 (2012).

the FCPA in both its anti-bribery[71] and accounting provisions.[72] It also encourages countries to adopt criminal and civil penalties for bribery.[73] For example, it asks countries to "take such measures as may be necessary to provide that the bribe and the proceeds of the bribery . . . or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation . . . ."[74] UNCAC is more thorough in its detailing of acceptable punishment guidelines for countries. It beseeches them to "the greatest extent possible . . . to enable confiscation" of "[p]roceeds of crime"[75] and "property, equipment or other instrumentalities used in or destined for use in offenses . . . ."[76]

Both conventions embrace a far-reaching definition of jurisdiction. Under the OECD Convention, so long as the offense is committed in part of its territory, a country "shall take such measures as may be necessary to establish its jurisdiction . . . ."[77] Not only does the OECD Convention compel countries to exercise jurisdiction, it encourages them to construe their jurisdiction "broadly so that an extensive physical connection to the bribery act is not required."[78] UNCAC contains similar language and level of jurisdictional empowerment. It provides that each country "shall adopt such measures as may be necessary to establish its jurisdiction over the offenses in accordance with this Convention . . . ."[79]

While the broad jurisdictional mandates found in the OECD Convention and UNCAC theoretically make it easier for countries to prosecute and combat corruption, the mandates also expose MNCs to overlapping liability given that international business transactions, by definition, include more than one country. Substantial international participation in the OECD Convention and UNCAC augment these overlapping liability concerns. To date, forty-four countries (thirty-six OECD countries and eight non-OECD countries) have signed the OECD Convention,[80] and 186 countries are parties to

---

71. *Compare* OECD Convention, *supra* note 24, art. 1 (establishing that it is unlawful to "offer, promise or give any undue pecuniary or other advantage, . . . to a foreign public official"), *with* 15 U.S.C. § 78dd-1(a) (2012) (proscribing the bribery of any foreign official).

72. *Compare* OECD Convention, *supra* note 24, art. 8 (requiring "the maintenance of books and records, financial statement disclosures, and accounting and auditing standards" to prevent bribery or the hiding of bribery), *with* 15 U.S.C. § 78m(b)(2)(A)–(B) (2012) (mandating issuers to "make and keep books, records, and accounts," in addition to "maintain[ing] a system of internal accounting controls" to prevent bribery).

73. OECD Convention, *supra* note 24, art. 3, ¶¶ 1–3.

74. *Id.* art. 3, ¶ 3.

75. UNCAC, *supra* note 25, art. 31, ¶ 1(a).

76. *Id.* art. 31, ¶ 1(b).

77. OECD Convention, *supra* note 24, art. 4, ¶ 1.

78. *Id.* cmt. n.25.

79. UNCAC, *supra* note 25, art. 42, ¶ 1.

80. *OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions*, OECD, http://www.oecd.org/corruption/oecdantibriberyconvention.htm (last visited Apr. 2, 2019).

UNCAC.[81] As a result, it is important to determine the effects this extensive jurisdictional reach—and concomitant liability risk—have on the international business environment.

## II. THE PROBLEMS WITH OVERLAPPING LIABILITY

The FCPA, OECD Convention, and UNCAC leave corporations vulnerable to multiple prosecutions and multiple sanctions for a single instance of unlawful activity. Section II.A details the rise in enforcement efforts and the lack of a formal mechanism to resolve issues of overlapping liability. Section II.B describes the use of disgorgement as a remedy in anti-corruption enforcement and explains why overlapping liability proves particularly problematic in the disgorgement context. Finally, Section II.C identifies the theoretical and practical problems of overlapping liability and its potential to undermine international development.

### A. *Negative Externalities of Overlapping Liability*

As countries are increasingly interested in anti-corruption enforcement, overlapping liability will become an increasingly significant problem. Indeed, the coming years "may see more investigations commencing locally that lead to enforcement action in several jurisdictions."[82] A global interest in combating corruption might not present a problem if the international anti-corruption regime had formal mechanisms to militate against overlapping liability. As it stands, however, international anti-corruption enforcement only addresses overlapping liability "in a limited way, if at all."[83] Indeed, the OECD Convention's only acknowledgement of overlapping liability is to promote cross-country consultation with "a view to determining the most appropriate jurisdiction for prosecution."[84] UNCAC simply encourages countries to consult "with a view to coordinating their actions."[85] Even if countries are able to successfully coordinate their enforcement actions, MNCs will still find themselves liable in more than one jurisdiction.

Given the broad jurisdictional powers granted to countries via the FCPA, the OECD, and UNCAC—and the concomitant lack of a formal mechanism to resolve cases where more than one sovereign has jurisdic-

81. *See United Nations Convention Against Corruption: Signature and Ratification Status*, UNITED NATIONS OFF. ON DRUGS & CRIME, https://www.unodc.org/unodc/en/corruption/ratification-status.html (last updated June 26, 2018).

82. FRESHFIELDS BRUCKHAUS DERINGER LLP, *supra* note 59, at 4.

83. INT'L BAR ASS'N, REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 229 (2009), https://documents.law.yale.edu/sites/default/files/Task%20Force%20on%20Extraterritorial%20Jurisdiction%20-%20Report%20.pdf [hereinafter REPORT OF THE TASK FORCE].

84. OECD Convention, *supra* note 24, art. 4, ¶ 3.

85. UNCAC, *supra* note 25, art. 42, ¶ 5.

tion—the risk of overlapping liability is "substantial."[86] This is problematic under the common law principle known as double jeopardy[87] and the analogous civil law principle *ne bis in idem* (not twice in the same thing).[88] Even though the United States has not yet adopted a doctrine of international double jeopardy,[89] the concern is not just juridical in nature: it is also related to the practical effect redundant prosecutions have on MNCs.

Redundant prosecutions, or "carbon copy" prosecutions, refer to "successive, duplicative prosecutions by multiple sovereigns for conduct transgressing the laws of several nations, but arising out of the same common nucleus of operative facts."[90] The concern is not only that MNCs might face redundant and costly investigations but also that the risk of successive prosecution breeds uncertainty in the international business environment.[91] This uncertainty undermines MNCs' good-faith attempts to comply with regulations,[92] which is compounded by the lack of guidance on specific actions that would give rise to liability.[93] Ultimately, the lack of predictability with respect to anti-corruption enforcement creates a "perverse circular pattern" in which businesses cannot predict the extent of their liability even if they invest in compliance programs.[94] And with internal investigations costing up to $20 million,[95] MNCs have little incentive to work toward compliance or voluntarily disclose suspected violations because these steps present MNCs with a substantial risk of liability in multiple jurisdictions.[96] Overlapping li-

86. *See* Michael P. Van Alstine, *Treaty Double Jeopardy: The OECD Anti-Bribery Convention and the FCPA*, 73 OHIO ST. L.J. 1321, 1326–29 (2012).

87. *See* U.S. CONST. amend. V.

88. Vervaele, *supra* note 27, at 100.

89. United States v. Jeong, 624 F.3d 706, 712 (5th Cir. 2010) (quoting United States v. Martin, 574 F.2d 1359, 1360 (5th Cir. 1978)).

90. Boutros & Funk, *supra* note 2, at 269.

91. *See* David C. Weiss, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 503–05 (2009); *cf.* George Bittlingmayer, *Regulatory Uncertainty and Investment: Evidence from Antitrust Enforcement*, 20 CATO J. 295, 321–22 (2001) (noting that regulatory uncertainty in antitrust has led to underinvestment).

92. *See* Mike Koehler, *Grading the Foreign Corrupt Practices Act Guidance*, 7 WHITE COLLAR CRIME REP. 961, 963 (2012).

93. *See* Irina Sivachenko, *Corporate Victims of "Victimless Crime": How the FCPA's Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance*, 54 B.C. L. REV. 393, 405–06, 410 (2013) (stating that the DOJ's Resource Guide lacks specificity with what constitutes a bribe, making it difficult for businesses to comply).

94. *Id.* at 415.

95. Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and Its Consequences*, 7 N.Y.U. J.L. & BUS. 247, 278 (2010).

96. *See* Sivachenko, *supra* note 93, at 415 (noting that corporations have little incentive to invest in compliance programs because there is no guarantee that enforcement authorities will take these good faith actions into account).

ability thus provides perverse incentives for companies and individuals by over-deterring positive behavior—such as undertaking internal investigations[97] or choosing to voluntarily self-disclose identified wrongdoing[98]—for fear of it being used against them in multiple enforcement actions.

Uncertainty with respect to an MNC's potential liability also has a chilling effect on international investment as a whole.[99] Corruption is particularly endemic in emerging economies,[100] which means that MNCs seeking to invest in these countries must navigate liability "minefields" to do so.[101] The "inherent unpredictability of human and government conduct" makes it even more difficult for MNCs to internalize their liability risks in these jurisdictions.[102] Given these risks, MNCs may be more reluctant to invest in emerging economies.[103] These countries are in the greatest need of foreign capital.[104] With less investment, however, they face relatively lower rates of economic growth[105] and difficulties improving living standards.[106] Enhanced

---

97. *See* Tarun & Tomczak, *supra* note 15, at 212 (claiming that corporations are less likely to undertake an internal investigation if potential discovery of identified wrongdoing would lead to enforcement).

98. *Id.* at 206–07 (noting that, all else being equal, a larger sanction "may create a disincentive for corporations to report voluntarily detected FCPA violations"); Stevenson & Wagoner, *supra* note 16, at 819.

99. *See The Committee on Foreign Investment: One Year After Dubai Ports World, Hearing Before H. Comm. on Fin. Servs.*, 110th Cong. 2 (2007) (statement of David Marchick, Partner, Covington & Burling LLP) (explaining that "uncertainty can chill investment"); Margaret Ryznar & Samer Korkor, *Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing*, 76 MO. L. REV. 415, 418 (2011) (suggesting that FCPA enforcements counterproductively chill investments in certain markets); Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 371–72 (2010) (noting that corporate liability under the FCPA correlates with a decline in U.S. business activity).

100. Philip M. Nichols, *Corruption as an Assurance Problem*, 19 AM. U. INT'L L. REV. 1307, 1309 (2004).

101. Peter G. Strasser, *The Foreign Corrupt Practices Act: Through the Lens of Azerbaijan and the Republic of Georgia*, 61 LA. B.J. 260, 261 (2014).

102. *See* JESWALD W. SALACUSE, THE THREE LAWS OF INTERNATIONAL INVESTMENT 25 (2013) ("An investor may promise to build a factory in a country but never build it. A host government may enact a low corporate tax rate in one year with a promise never to raise it, yet pass legislation to increase taxes drastically the day after an investor makes an investment.").

103. *See* Spalding, *supra* note 99, at 371–73; *see also* Andrew T. Bulovsky, *Promises Unfulfilled: How Investment Arbitration Tribunals Mishandle Corruption Claims and Undermine International Development*, 118 MICH. L. REV. (forthcoming 2019) (arguing that companies are responsive to the risks of international investment and may choose to forgo investment altogether if the risks are too high).

104. Spalding, *supra* note 99, at 371, 403; Weiss, *supra* note 91, at 502 (noting that international investment would help emerging countries by way of infrastructure projects).

105. *Combating Corruption*, *supra* note 13 ("Corruption impedes investment, with consequent effects on growth and jobs.").

106. *See* Jonathan Bonnitcha, *Foreign Investment, Development and Governance*, 7 J. INT'L DISP. SETTLEMENT 31, 33 (2016); C. Raj Kumar, *Corruption, Development and Good*

liability risks thus contribute to an uncertain investment environment for MNCs, which has a particularly pernicious effect on developing countries.

### B. *Disgorgement in International Anti-Corruption Efforts*

Disgorgement is a readily available remedy for countries across the world seeking to enforce anti-corruption legislation.[107] The purpose of disgorgement is to deprive a wrongdoer of its unjust enrichment.[108] Unlike fines or injunctive measures, disgorgement is not intended to punish, only to prevent the violator from reaping ill-gotten gains.[109] In other words, disgorgement is not intended to compensate a wronged party but is instead meant to recoup the benefits of the wrongful act in the first place.[110] Accordingly, U.S. courts have held that disgorgement may not exceed the profits a company realizes as a result of its allegedly unlawful activity.[111] Indeed, after ill-gotten gains have been disgorged, further disgorgement for the same conduct would be "clearly punitive in its effect."[112] Confining the use of disgorgement to its proper purpose is important because regulators have other measures that they can turn to if punitive relief is appropriate.

On the international stage, subjecting MNCs to overlapping liability risks expanding disgorgement beyond its traditional usage and purpose.[113] The FCPA, the OECD Convention, and UNCAC all rely on disgorgement as a remedy.[114] So, in the face of enforcement risks from more than one country, MNCs may be subjected to disgorgement in multiple jurisdictions.[115] Significantly, in addition to disgorgement risks from multiple juris-

---

*Governance: Challenges for Promoting Access to Justice in Asia*, 16 MICH. ST. J. INT'L L. 475, 543 (2008).

107. *See infra* nn. 119–124 and accompanying text.

108. SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 102 (2d Cir. 1978); SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987) (holding that the purpose of "disgorgement is to make sure that wrongdoers [may] not profit from their wrongdoing."); Janigan v. Taylor, 344 F.2d 781, 786 (1st Cir. 1965) (stating that "it is simple equity that a wrongdoer should disgorge his fraudulent enrichment").

109. *See* Elizabeth S. Stong, *Basics of the SEC's Disgorgement Remedy*, 43 PRAC. LAW., Apr. 1997, at 67, 68–69.

110. Weiss, *supra* note 91, at 485.

111. *See* SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978) (holding that a "court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing").

112. Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, 734 F. Supp. 1071, 1076 (S.D.N.Y. 1990), *rev'd*, 967 F.2d 742 (2d Cir. 1992).

113. *See* Sasha Kalb & Marc Alain Bohn, *Disgorgement: The Devil You Don't Know*, CORP. COMPLIANCE INSIGHTS (Apr. 12, 2010), https://www.corporatecompliance insights.com/disgorgement-fcpa-how-applied-calculated (noting that disgorgement is not meant to be punitive and that any disgorgement beyond the calculable amount earned due to illicit activity would constitute punishment).

114. *See* Weiss, *supra* note 91, at 499.

115. *Id.* at 492.

dictions, MNCs may be liable for sanctions from multilateral development banks ("MDBs").[116] Indeed, if an MNC engages in misconduct connected to a World Bank (or another MDB) contract, it may be subject to other sanctions from the Bank as well.[117] These concerns are all the more salient as regulators increasingly turn to disgorgement as a remedy.[118]

Disgorgement has long existed in the SEC's enforcement arsenal[119] but has only been employed in the anti-corruption context since 2004.[120] Despite statutory authorization to disgorge ill-gotten gains from the Penny Stock Reform Act, the SEC did not pursue disgorgement in the FCPA context until the passage of the Sarbanes-Oxley Act ("SOX") in 2002.[121] After the Enron scandal,[122] the U.S. Congress passed SOX, focusing more government attention on addressing suspicious corporate behavior.[123] Since the early 2000s, the SEC has increasingly used disgorgement in its enforcement actions.[124]

Additionally, as discussed above,[125] both the OECD Convention and UNCAC encourage signatories to enact domestic legislation that enables seizure or confiscation of ill-gotten gains.[126] A review of countries' implementing laws reveals that the majority provide for confiscation or forfeiture

---

116. *See The World Bank Group's Sanctions Regime: Information Note*, WORLD BANK, http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/The_World_Bank_Group_Sanctions_Regime.pdf.

117. *See* Timothy Dickinson et al., *Implications of the World Bank Sanctions Regime for International Business*, PAUL HASTINGS (Dec. 3, 2014), http://www.paulhastings.com/publications-items/details/?id=1213e369-2334-6428-811c-ff00004cbded (noting the risk of debarment for companies).

118. *See* Koehler, *supra* note 50, at 981.

119. *See* Weiss, *supra* note 91, at 485.

120. *Id.* at 486.

121. Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (2002); *see* Weiss, *supra* note 91, at 486 (discussing the extent of SOX's influence on FCPA enforcement).

122. Troy Segal, *Enron Scandal: The Fall of a Wall Street Darling*, INVESTOPEDIA (Sept. 20, 2018), https://www.investopedia.com/updates/enron-scandal-summary (last updated Feb. 9, 2019) (detailing the history of Enron and how the company's dubious accounting practices contributed to its eventual collapse when it declared bankruptcy in December 2001).

123. *See* DEMING, *supra* note 45, at 692.

124. *See* SHEARMAN & STERLING LLP, *supra* note 54, at 13; *see also* Weiss, *supra* note 91, at 486–87.

125. *See supra* Section I.B.

126. *See* OECD Convention, *supra* note 24, art. 3, ¶ 3 (requiring countries to "take such measures as may be necessary to provide that the bribe and the proceeds of the bribery . . . or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable"); UNCAC, *supra* note 25, art. 31, ¶ 1 (granting countries the authority to "the greatest extent possible . . . to enable confiscation" of "[p]roceeds of crime" and "[p]roperty, equipment or other instrumentalities used in or destined for use in offenses").

of profits that result from the illicit activity.[127] Several countries specify that these "disgorgement-like" penalties are mandatory,[128] while others provide for "extended confiscation," which applies to the confiscation of assets or property that is "more probably . . . than not" the proceeds of criminal activity.[129] These provisions would not be a problem but for their broad jurisdictional reach and the potential for redundant usage across countries.

The OECD Convention in particular endorses a far-reaching definition of jurisdiction.[130] An observer of the OECD Convention negotiations stated that its "interpretation is clear: even the slightest of connections is sufficient" to justify an enforcement action.[131] This enforcement is occurring primarily in countries with a large share of world exports. The most recent Transparency International report notes that OECD signatories with "moderate" or "active" enforcement account for 30.8% of total world exports.[132] With nearly one-third of world exports coming from countries enforcing the OECD Convention—and international anti-corruption enforcement increasing[133]—numerous MNCs are at risk of carbon copy prosecutions and disgorgement from multiple jurisdictions.

### C. *The Theoretical and Practical Problems of Multi-Jurisdictional Disgorgement*

On both theoretical and practical grounds, disgorgement's use as a remedy in international anti-corruption efforts is questionable. Theoretical justifications for punishment often fit a retributivist or utilitarian rationale.[134] Yet neither theory provides satisfactory justification for overlapping liability or

---

127. *See, e.g.*, OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN AUSTRIA (2012), http://www.oecd.org/daf/anti-bribery/Austriaphase3reportEN.pdf (noting that Austria provides for the forfeiture of "assets that were obtained for or by the commission of an act punishable by law").

128. Weiss, *supra* note 91, at 492 n.111 (citing to reports that Slovenia, Italy, Poland, Norway, and Brazil require confiscation of a bribe's proceeds after conviction).

129. OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN SWEDEN (2012), https://www.oecd.org/daf/anti-bribery/Swedenphase3reportEN.pdf.

130. *See* Brewster, *supra* note 42, at 1664–65.

131. *See* Mark Pieth, *Article 4: Jurisdiction*, *in* THE OECD CONVENTION ON BRIBERY: A COMMENTARY, 267, 276–77 (Mark Pieth et al. eds., 2013).

132. Transparency International is a leading global civil society organization fighting corruption.

GILLIAN DELL & ANDREW MCDEVITT, TRANSPARENCY INT'L, EXPORTING CORRUPTION: PROGRESS REPORT 2018: ASSESSING ENFORCEMENT OF THE OECD CONVENTION ON COMBATTING FOREIGN BRIBERY 4 (2018).

133. *See* SHEARMAN & STERLING LLP, *supra* note 54, at 2.

134. For a discussion of the panoply of justifications for punishment, see JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 551–53 (8th ed. 2016); *see also* John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 77 (2010).

multi-jurisdictional disgorgement. First, because disgorgement is not intended as a punitive remedy, it cannot be justified under retributivism, which seeks to punish wrongdoers for the sake of punishment.[135] Second, multi-jurisdictional disgorgement is inappropriate under utilitarianism. Utilitarianism sees punishment as intrinsically bad and argues that punishment is only justified when it results in overall benefits to society.[136] It is grounded in the principle of proportionality: a view that punishment must not be excessive relative to the crime for which it is inflicted.[137]

Proportionality is important because it underlies a country's claim to legitimacy and is the basis for a modern legal system.[138] A country holds a monopoly on the legitimate use of force within its territory.[139] A country's usage of power, however, is only legitimate if it exercises this force proportionally.[140] A perfectly proportional punishment in the disgorgement context would strip companies of the exact amount gained through their unlawful activity, thereby removing the incentive to engage in the behavior in the first place.[141] However, overlapping liability means that multiple countries could seek disgorgement of the same ill-gotten gains, resulting in corporations paying out sums that far exceed their illicit profits.[142] This renders

135. Immanuel Kant, The Science of Right (1790), *reprinted in* 42 Great Books of the Western World: Kant 395, 447 (Robert Maynard Hutchins et al. eds., 1989) (stating that punishment ought to be "pronounced over all criminals proportionate to their internal *wickedness;*") (emphasis in original); Don E. Scheid, *Kant's Retributivism*, 93 Ethics 262, 263 (1983).

136. Jeremey Bentham, An Introduction to the Principles of Morals and Legislation (1781), *reprinted in* 1 The Works of Jeremy Bentham 1, 91–96 (John Bowring ed., 1995).

137. James T. McHugh, *Utilitarianism, Punishment, and Ideal Proportionality in Penal Law: Punishment as an Intrinsic Evil*, 10 J. Bentham Studies 1, 1 (2008).

138. *See* George P. Fletcher, A Crime of Self-Defense: Bernhard Goetz and the Law on Trial 18 (1988) ("A legal system is possible only if the state enjoys a monopoly of force. When private individuals appeal to force and decide who shall enjoy the right to 'life, liberty, and the pursuit of happiness,' there can be no pretense of the rule of law.").

139. *See* Max Weber, *Politics as a Vocation*, *in* The Vocation Lectures 32, 33 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., 2004).

140. Youngjae Lee, *Why Proportionality Matters*, U. Pa. L. Rev. 1835, 1839 (2012) (claiming that "the government cannot preserve its legitimacy as the sole rightful holder of the power to punish unless it respects the restrictions on its use of force, including proportionality.").

141. *See* Weiss, *supra* note 91, at 506.

142. While a deterrence rationale might be used to defend multi-jurisdictional disgorgement, deterrence is "best served through a purely utilitarian theory of punishment," Matthew Haist, *Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism*," 99 J. Crim. L. & Criminology 789, 793 (2009), which values punishment proportionate to the crime. Weiss, *supra* note 91, at 506. Moreover, because multi-jurisdictional disgorgement delivers disproportionate punishment, even when taking into account "a multiplier based on the likelihood of being caught," it stills fails a utilitarian test and is therefore theoretically unjustifiable. *Id.*

MNCs vulnerable to disproportionate punishment. Therefore, multi-jurisdictional disgorgement fails a utilitarian test.

These theoretical concerns are exacerbated by practical difficulties of determining the benefit to an MNC from an unlawfully secured contract. U.S. case law supports calculating disgorgement as the net economic gain from unlawful activity.[143] In securities trading, this is a relatively simple calculation because it a value measurement between two points in time.[144] The amount to be disgorged is the unjust enrichment of one party at the expense of the other.[145] But in international bribery, it is difficult to know whether a firm would have received a contract but for the illicit payment. Indeed, disgorgement calculations "resemble speculation, or, at best, rough estimates."[146] Further, because these uncertainties are typically resolved against defendants,[147] these calculations weaken disgorgement's theoretical foundations[148] and undermine disgorgement's use as a proportional remedy.[149] Importantly, even if the net economic gain from an improper payment can be calculated, not all contracts result in profits for the party awarded the contract. If a hypothetical party bribed its way to two contracts, one with a net economic gain and the other a net economic loss, would the latter be credited to the former? Unlikely.[150]

These theoretical and practical pitfalls are only exacerbated if multiple jurisdictions require disgorgement for the same offense. As it stands, there is no formal mechanism determining which jurisdictions may bring an enforcement action under the FCPA or the domestic legislation implemented by countries in the wake of the OECD Convention and UNCAC. This leaves MNCs vulnerable to disproportionate and redundant punishment. Until a formal mechanism transparently details the extent of a company's liability, foreign direct investment in emerging economies will be slowed and international development will suffer.[151]

143. *See* Elaine Buckberg & Frederick C. Dunbar, *Disgorgement: Punitive Demands and Remedial Offers*, 63 BUS. LAW., Feb. 2008, at 347, 349.

144. *Id.* at 353.

145. *Id.*

146. Weiss, *supra* note 91, at 475.

147. James Tyler Kirk, *Deranged Disgorgement*, 8 J. BUS. ENTREPRENEURSHIP & L. 131, 153 (2014) (citing U.S. case law demonstrating that the SEC is given the benefit of the doubt when calculating disgorgement).

148. Caprice L. Roberts, *Supreme Disgorgement*, 68 FLA. L. REV. 1413, 1437–38 (2016) (discussing the Supreme Court's approval of disgorgement as a deterrence mechanism in *Kansas v. Nebraska*, 135 S. Ct. 1042 (2015)).

149. *Id.* at 1437.

150. Thank you to Professor Timothy Dickinson for this thoughtful hypothetical.

151. *See supra* nn. 99–106and accompanying text.

## III. Solutions to Overlapping Liability

A formal mechanism that limited overlapping liability and multi-jurisdictional disgorgement would increase predictability for MNCs. Increased predictability would benefit a given MNC because it would be on notice regarding "which sovereigns it may be subject to and to what degree they will cooperate."[152] This knowledge would enable MNCs to internalize their liability risks and make more accurate assessments of whether or not to invest.[153] Section III.A describes the requisite features for a mechanism that would help limit overlapping liability and promote cooperation between jurisdictions. Section III.B explains why the first solution—a centralized mechanism in either the OECD Convention or UNCAC—will not adequately promote the needed level of proportionality or predictability. Section III.C explains why the second solution—a decentralized mechanism consisting of a series of bilateral agreements—represents a more realistic path forward.

### A. *The Formal Mechanism: Requisite Provisions*

Commentators have expressed an interest in a formal mechanism to guard against duplicative enforcement actions, but they have been unable to agree on the basic provisions that such a mechanism should contain and the most appropriate framework for implementation.[154] This Note contributes to this debate by proposing a theoretical framework that considers the current lack of proportionality[155] and predictability[156] that result from overlapping liability and multi-jurisdictional disgorgement. To mitigate these concerns, this Note proposes a mechanism containing the following provisions: (1) a presumption that the country with the strongest jurisdictional ties to the allegedly unlawful activity will commence the anti-corruption action, (2) a multi-jurisdictional prohibition against double jeopardy, and (3) a commitment to seeking proportional punishment, including limiting disgorgement to the calculable amount of ill-gotten gains.

---

152. Weiss, *supra* note 91, at 501–02.

153. *See* Salacuse, *supra* note 102, at 25; Bulovsky, *supra* note 103.

154. *See* Beasley, *supra* note 12, at 194–95 (arguing that an international standard defining liability, defenses, and sanctions for bribery would help militate against companies trying to find loopholes in countries' domestic legislation); Weiss, *supra* note 91, at 514 (noting that a formal instrument would create more certainty for companies); Rachel Brewster, *The Domestic and International Enforcement of the OECD Anti-Bribery Convention*, 15 U. Chi. J. Int'l L. 84, 105 (2014) (stating that a clear standard for enforcement would help governments know which other countries are not adequately enforcing domestic anti-corruption legislation); Thomas J. Bussen, *Midnight in the Garden of* Ne Bis in Idem*: The New Urgency for an International Enforcement Mechanism*, 23 Cardozo J. Int'l & Comp. L. 485, 510–11 (2015) (proposing a mechanism within the UN to centralize anti-corruption enforcement actions).

155. *See* Roberts, *supra* note 148, at 1437; Weiss, *supra* note 91*passim*.

156. *See* Spahn, *supra* note 11, at 2, 6; Sivachenko, *supra* note 93, at 415.

First, a proportional and predictable mechanism must contain a decision-making process for determining which jurisdiction will take the lead on enforcement.[157] Such a process would be fact-specific and could apply a presumption that the jurisdiction with the strongest territorial ties to the allegedly unlawful activity would take the lead.[158] The precise terms of what constitutes the strongest jurisdictional ties would need to be negotiated. While vague terms could be applied subjectively, clearer terms would help promote predictability.[159] Clearer terms would include a consideration of "the links between the state and the conduct, the links between the conduct and another state wishing to exercise jurisdiction, where the case might be more conveniently heard, and the interests of justice."[160] The presumption that the country with the strongest jurisdictional ties would lead the enforcement action maps onto intuitions about legitimacy: extraterritoriality feels less fair.[161] While there has been a promising trend toward greater international cooperation in the investigation of anti-corruption cases over the past several years,[162] an important next step toward ensuring international buy-in and promoting predictability would be to create a presumption that jurisdiction follows territorial ties. Not only does extraterritorial enforcement risk damaging the legitimacy of anti-corruption efforts, it can also hamper other countries' efforts to strengthen their own anti-corruption programs.[163] In light of these concerns, the mechanism should provide that the party with the strongest ties to the conduct in question will lead the enforcement action.[164]

Second, the mechanism must prohibit double jeopardy.[165] As exemplified by TSKJ Consortium, MNCs may be subjected to multiple enforcement actions for the same conduct.[166] This has a chilling effect on international

157. *See* REPORT OF THE TASK FORCE, *supra* note 83, at 21–22, 25. Another important consideration is whose law should apply to the enforcement action. This inquiry is beyond the scope of this Note but warrants further attention in future work.

158. *Id.* at 24.

159. *See id.*

160. *Id.*

161. *See* Mateo J. de la Torre, *The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets*, 49 CORNELL INT'L L.J. 469, 477 (2016) (arguing that stretching the bounds of jurisdiction undermines the legitimacy of enforcement actions under the FCPA).

162. *See* SHEARMAN & STERLING LLP, *supra* note 54, at 25–26.

163. *See* de la Torre, *supra* note 161, at 494 (arguing that foreign countries who have relied on the efforts of U.S. actions under the FCPA have been deprived of the incentive to develop and improve their own anti-corruption programs).

164. REPORT OF THE TASK FORCE, *supra* note 83, at 25 (describing commonly employed discretionary doctrines permitting countries to refrain from exercising jurisdiction in favor of proceedings in another jurisdiction).

165. *See* Spahn, *supra* note 11, at 21 (calling for additional cooperation in investigations as well as respect for the principles of double jeopardy and *ne bis in idem*).

166. *See, e.g.*, *supra* nn. 3–10 and accompanying text.

business,[167] disincentivizes compliance and due diligence,[168] and undermines growth in emerging markets.[169] To increase the predictability of enforcement actions, the mechanism must prevent other countries from undertaking carbon copy prosecutions.[170] A mechanism that prohibited double jeopardy and *ne bis in idem* would assuage concerns that an MNC might be subjected to an unpredictable level of liability.

While the double jeopardy bar would prevent over-enforcement, there are concerns that it would have two primary unintended consequences. First, a prohibition on double jeopardy might result in haphazard investigations.[171] The concern is that, with unbridled discretion to pursue enforcement actions, prosecutors from multiple countries would engage in a race to the bottom in a rush to obtain a payout.[172] Others are concerned with corporate capture[173]—that is, when a home country pursues an action, thereby triggering the double jeopardy bar, but proceeds to collude with an MNC in a "sweetheart-deal" to bring only nominal charges.[174] The latter concern is unlikely, however, because a criminal conviction in even one corruption case "triggers the mandatory debarment sanctions adopted by the EU."[175] Regardless, it is worth watching for MNCs acting to take advantage of these sanction arbitrages.[176]

The third provision borrows from coordination efforts in international antitrust enforcement. Since the United States passed the International Antitrust Enforcement Assistance Act (the "IAEAA") in 1994,[177] U.S. agencies

167. *See* Spalding, *supra* note 99, at 371–72 (noting that aggressive enforcement of the FCPA and concomitant liability on companies has resulted in reduced economic growth in countries where the conduct that triggered the enforcement action occurred); Tarun & Tomczak, *supra* note 15, at 206–07 (claiming that a large sanction "may create a disincentive for corporations to report voluntarily detected FCPA violations"). This Note argues that, if one enforcement action (for example, under the FCPA) has the potential to reduce investment in a country and disincentivize self-reporting detected crimes, then several levels of liability (that is, enforcement actions from multiple countries) will exacerbate these concerns.

168. *See* Sivachenko, *supra* note 93, at 415.

169. *See* Ryznar & Korkor, *supra* note 99, at 418; Spalding, *supra* note 99, at 376.

170. Boutros & Funk, *supra* note 2, at 260.

171. *See* Bussen, *supra* note 154, at 509.

172. *Id.* (commenting that the race to the finish line would undermine the rule of law and the overall credibility of anti-corruption efforts).

173. *See* Patrick X. Delaney, *Transnational Corruption: Regulation Across Borders*, 47 VA. J. INT'L L. 413, 439 (2007) (defining corporate capture as when corporate interests "effectively hijack[] the regulatory process to their own ends").

174. Spahn, *supra* note 11, at 43.

175. *Id.*

176. *See* Tomer Broude & Doron Teichman, *Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity*, 62 VAND. L. REV. 795, 799 (2009).

177. International Antitrust Enforcement Assistance Act of 1994, Pub. L. No. 103-438, 108 Stat. 4597 (codified as amended in 15 U.S.C.).

are empowered to enter into bilateral agreements with other countries[178] and cooperate directly with them by sharing business information uncovered in the course of antitrust investigations.[179] These bilateral agreements help coordinate enforcement and guard against redundant prosecutions.[180] Within this system, countries decide which polity is the most appropriate jurisdiction to enforce its national regulations.[181] These antitrust agreements include cooperation provisions[182] that are similar to those contained in mutual legal assistance treaties ("MLATs") in anti-corruption enforcement.[183] However, while MLATs require countries to support each other's investigations,[184] the bilateral agreements found in antitrust enforcement operate under the principle of comity.[185]

Comity is a broad concept that refers to a country's willingness to limit or forgo exercising jurisdiction, even when it may be adversely affected.[186] U.S. courts have justified comity both as a means to respect foreign sovereignty[187] and as a way to protect parties' expectations in international commerce.[188] The principle itself has "long been recognized as the most appropriate way for U.S. courts to resolve conflicts in private law between

178. *See, e.g.*, Memorandum of Understanding on Antitrust Cooperation Between the United States Department of Justice and the United States Federal Trade Commission on the One Hand, and The Russian Federation Anti-Monopoly Service, on the Other Hand (Nov. 10, 2009), https://www.justice.gov/sites/default/files/atr/legacy/2009/11/12/251836.pdf.

179. Edward T. Swaine, *Cooperation, Comity, and Competition Policy*, *in* COOPERATION, COMITY, AND COMPETITION POLICY 3, 19 (Andrew T. Guzman ed., 2011).

180. Holtmeier, *supra* note 1, at 518.

181. *See* REPORT OF THE TASK FORCE, *supra* note 83, at 48.

182. *See* Olga Petrovsky, *International Antitrust Agreement: Premature Proposal and Practical Solutions*, 22 N.Y. INT'L L. REV. 131, 134–35 (2009) (noting that the principles of (1) notification, (2) information exchange, (3) cooperation, and (4) consultation collectively require countries to notify each other of information that might warrant enforcement by the other, exchange information about the implicated MNCs, and provide assistance throughout a given enforcement action).

183. *See* MUTUAL LEGAL ASSISTANCE TREATIES, https://www.mlat.info (last visited Apr. 2, 2019).

184. *See* T. Markus Funk, *Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges*, FED. JUD. CTR. INT'L LITIG. GUIDE (2014), https://www.fjc.gov/sites/default/files/2017/MLAT-LR-Guide-Funk-FJC-2014.pdf (defining mutual legal assistance treaties as binding commitments between two countries to assist each other to obtain evidence to support investigations or prosecutions in the requesting country).

185. Holtmeier, *supra* note 1, at 518.

186. Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 5–6 (1991).

187. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) (commenting that the interests of international comity require respecting the decisions of foreign and transnational tribunals, "even assuming that a contrary result would be forthcoming in a domestic context.").

188. *See, e.g.*, Scherk v. Alberto-Culver Co., 417 U.S. 506, 516–17 (1974) (justifying comity on the grounds that "orderliness and predictability" are "essential to any international business transaction.").

juridical systems."[189] Comity has been relatively successful in antitrust enforcement: shortly after the United States passed the IAEAA, the United States and the European Union signed the 1998 Positive Comity Agreement between the United States and the European Union.[190] For more than twenty years, this treaty has helped "reduce the costs associated with duplicative prosecution and thereby streamline international enforcement."[191] In addition, other treaties, such as the bilateral agreement between the United States and Japan,[192] have helped militate against redundant prosecutions and the excessive extraterritorial application of either country's laws.[193]

To minimize redundant prosecutions and assuage corporate concerns about overlapping liability, anti-corruption enforcement should adopt the principle of comity. In the anti-corruption context, a mechanism that incorporates comity would create a reciprocal and mutually reinforcing set of expectations through what is known as "mutual recognition"—a principle whereby countries hold each other responsible for their unilateral actions.[194] Countries would be expected to follow agreed-upon principles and would be responsible to one another for upholding their commitments.[195] For instance, the provision could limit the maximum amount to be disgorged to the amount of determinable gains that directly result from the conduct in question. In so doing, these mutually reinforced expectations would contribute to

---

189. Donald Earl Childress III, *International Conflict of Laws and the New Conflicts Restatement*, 27 DUKE J. COMP. & INT'L L. 361, 373 (2017) (citing Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U. CALIF. DAVIS L. REV. 11, 30 (2010)).

190. Agreement on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, E.U.-U.S., June 4, 1998, T.I.A.S. No. 12958, 37 I.L.M. 1070.

191. Holtmeier, *supra* note 1, at 519.

192. Agreement Concerning Cooperation on Anticompetitive Activities, Oct. 7, 1999, Japan-U.S., https://www.justice.gov/atr/agreement-between-government-united-states-america-and-government-japan-concerning-cooperation.

193. *See* Matthew Cooper, Comment, *The Role of Positive Comity in U.S. Antitrust Enforcement Against Japanese Firms: A Mixed Review*, 10 PAC. RIM L. & POL'Y J. 383, 395–97 (2001) (noting that, despite lingering concerns about the extraterritorial application of U.S. or Japanese laws in the antitrust context, a bilateral agreement would help settle jurisdictional conflicts).

194. *See* Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government*, 68 LAW & CONTEMP. PROBS. 263, 264 (2005) (stating that mutual recognition, derived originally from EU law, refers to one country's acceptance of another country's regulatory system and that this acceptance "is reciprocal and simultaneous").

195. Public international law operates according to norms that govern the conduct of countries and international organizations. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (AM. LAW INST. 1986). For comity to be successful, countries would need to exercise restraint in the extraterritorial or redundant application of their anti-corruption legislation. This would need to emerge as a norm in the international legal order.

an international anti-corruption enforcement regime that is more predictable and better respects proportionality.[196]

Collectively, these three provisions would produce a more transparent, proportional, and predictable international anti-corruption regime. In turn, increased transparency and predictability should increase compliance as companies and regulators alike benefit from a more robust understanding of the risks involved in a given transaction or contract.[197] Accordingly, the above are essential provisions for a formal mechanism, regardless of where they are codified.

### B. *Amending the OECD Convention or UNCAC Provides Insufficient Certainty*

One solution for minimizing overlapping liability would be to amend the articles in the OECD Convention and UNCAC that cover jurisdiction[198] and sanctions.[199] This, at least theoretically, would be a more comprehensive means to implement the three provisions outlined above than creating new conventions or agreements involving a handful of countries.[200] Implementing a mechanism in the OECD Convention or UNCAC could be achieved in one of two ways. First, the conventions could rely on the doctrine of "functional equivalence,"[201] which empowers countries to implement the conven-

---

196. *See* McHugh, *supra* note 137, at 1.

197. *See* James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1248 (2007).

198. Article 4 of the OECD Convention addresses jurisdiction. Article 4(3) in particular implores countries to consult with one another to determine who has "the most appropriate jurisdiction for prosecution." OECD Convention, *supra* note 24, art. 4. This, however, does not prevent multiple countries from bringing an enforcement action. *See* Brewster, *supra* note 42, at 1665 (noting that the OECD Convention purposefully provided for a far-reaching definition of jurisdiction). Therefore, to militate against redundant prosecutions, the provisions related to jurisdiction should be placed in the OECD Convention as Article 4(5). As for UNCAC, Article 42 covers jurisdiction, making it the ideal location to prohibit redundant prosecutions. UNCAC, *supra* note 25, art. 42. Therefore, the jurisdictional provisions could be added to UNCAC as Article 42(7).

199. Article 3 of the OECD Convention covers sanctions. *See* OECD Convention, *supra* note 24, art. 3. Therefore, Article 3(5) would ensure that enforcement actions result in proportional punishments. As for UNCAC, Article 30 addresses prosecution, adjudication, and sanctions under the Convention. Article 30(1) in particular implores parties to take into account the "gravity" of an offense, making it an optimal location to include further language about disgorgement. UNCAC, *supra* note 25, art. 30, ¶ 1. Therefore, the proportionality requirements could be added as part of Article 30(1).

200. See *infra* Sections III.B and III.C for a discussion of the trade-offs between placing the solution in a centralized or decentralized framework.

201. Functional equivalence is first noted in the Preamble to the OECD Convention, which "[r]ecognis[es] that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence." OECD Convention, *supra* note 24, pmbl. In UNCAC, functional equivalence is found in Articles 31 and 55, which call for coun-

tions as they see fit—so long as they are applied in a way that achieves the conventions' goals.[202] Alternatively, the conventions could create a single, uniform standard to apply evenly across countries. But, for the reasons explained below, it is unlikely that either of these options would effectively implement the mechanism identified in Section III.A.

The doctrine of functional equivalence is unsatisfactory because it would subject MNCs to an unacceptable level of uncertainty. Functional equivalence reflects the notion that countries are different and that formal legislation might not fully capture the ways in which a country pursues anti-corruption actions.[203] Under a functional equivalence approach, there would be no harmonization across jurisdictions because functional equivalence prioritizes the ends of a country's efforts to combat corruption rather than its means.[204] While functional equivalence respects countries' cultural practices and legal institutions as a whole, it inevitably results in incongruent standards across jurisdictions.[205]

While incongruent standards may not be problematic in their own right, when these standards are "concurrently and cumulatively applied to MNCs," they produce an environment that is "disproportionately hostile to MNCs because it fails to recognize the legal uncertainty arising from operation in numerous spheres with different laws."[206] Simply, country-by-country implementation would be "neither functional nor equivalent" because it would create dissimilar standards and leave MNCs vulnerable to an unpredictable anti-corruption enforcement regime.[207] Therefore, the functional equivalence approach fails to provide sufficient certainty to MNCs considering investing or operating in jurisdictions with a relatively higher risk of corruption.

On the other hand, changing the OECD Convention or UNCAC to implement the mechanism as a single, uniform standard would likely prove insufficient. The OECD Convention and UNCAC cover nearly every country in the world.[208] Counterintuitively, however, this large number of countries creates difficulties for implementing the mechanism proposed by this Note: to secure sufficient buy-in from countries around the world, the mechanism would likely be watered down to account for countries' idiosyncratic en-

tries to adopt measures "to the greatest extent possible within [their] domestic legal system." UNCAC, *supra* note 25, arts. 31, 55.

202. *See* Pieth, *supra* note 131, at 270.

203. *Id.*

204. *Id.*

205. *See* Beasley, *supra* note 12, at 201 (arguing that, in practice, functional equivalence has allowed for different laws in different jurisdictions).

206. *Id.*

207. *Id.* at 193.

208. *See supra* nn. 80–81 and accompanying text.

forcement preferences and definitions of corruption.[209] For example, UNCAC purposefully uses "vague terminology" to promote longevity in its application.[210] However, in striving to reach as many countries as possible, its lack of "mandatory language" renders much of UNCAC "toothless."[211] Simply, as an "aspirational framework," it would be difficult to achieve consensus for a mechanism that meaningfully promoted proportionality and predictability under UNCAC.[212]

The OECD Convention has fewer signatories than UNCAC, thereby slightly assuaging concerns about the difficulty in reaching consensus regarding final language. However, the OECD Convention lacks guidance on the enforcement efforts countries are expected to undertake.[213] In other words, the OECD Convention allows countries to interpret their obligations under the Convention in a way that allows them to formally comply by only enacting domestic legislation while neglecting to fully enforce it.[214] While a uniform standard is theoretically appealing, empirical data suggests that it would not be enforced. For instance, the OECD Convention covers forty-four countries, accounting for approximately 65% of world exports and over 75% of foreign direct investment outflows.[215] However, only eleven of these forty-four countries engage in "active" or "moderate" enforcement of the Convention.[216] In other words, thirty-three countries—three-quarters of OECD signatories—engage in "limited"[217] or "little or no enforcement."[218] Ultimately, half of the Convention's signatories "have failed to prosecute

209. *Cf.* Ophelie Brunelle-Quraishi, *Assessing the Relevancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis*, 2 NOTRE DAME J. INT'L & COMP. L. 101, 140 (2011) ("It seems that two fundamental principles of UNCAC, transparency and impartiality, were watered down during the negotiations of the monitoring mechanism in order to please the largest number of Member States.").

210. *Id.* at 164.

211. *Id.* at 164–65.

212. Beasley, *supra* note 12, at 215.

213. Brewster, *supra* note 154, at 105.

214. *Id.*

215. *See* DELL & MCDEVITT, TRANSPARENCY INT'L, *supra* note 132, at 6.

216. The United States, Germany, the United Kingdom, Italy, Switzerland, Norway, and Israel engage in "Active Enforcement," while Australia, Sweden, Brazil, and Portugal engage in "Moderate Enforcement." *Id.* at 4.

217. France, the Netherlands, Canada, Austria, Hungary, South Africa, Chile, Greece, Argentina, New Zealand, and Lithuania engage in "Limited Enforcement." *Id.*

218. China, Japan, South Korea, Hong Kong, Singapore, India, Spain, Mexico, Russia, Belgium, Ireland, Poland, Turkey, Denmark, the Czech Republic, Luxembourg, Slovakia, Finland, Colombia, Slovenia, Bulgaria, and Estonia engage in "Little or No Enforcement." *Id.* China, Hong Kong, India, and Singapore are not parties to the OECD Convention but were included in the most recent Transparency International report because each country accounts for 2% or more of world exports. Costa Rica, Iceland, and Latvia are parties to the OECD Convention but could not be classified due to their low shares of world exports. Peru became a party to the Convention in July 2018, which is too recent for inclusion in this report.

any foreign bribery case since they joined the Convention."[219] These countries' inaction "violates their obligations under the Convention."[220] In light of this data, it appears unlikely that the proposed mechanism, even if its text was widely agreed-upon and placed in the OECD Convention or UNCAC, would actually result in enforcement.

### C. *Bilateral Agreements Represent the Most Realistic Path Forward*

A decentralized solution—by way of a series of bilateral agreements between countries—is the most promising way to implement the mechanism proposed by this Note.[221] Specifically, it represents the most realistic path forward for ameliorating the perverse incentives presented by the lack of proportionality and predictability in the current international anti-corruption enforcement regime.[222] Ultimately, a series of bilateral agreements is preferable because it would be more comprehensive in practice and would help minimize conflicts between countries, which would increase the legitimacy of international anti-corruption enforcement.

First, a decentralized series of bilateral agreements would be more comprehensive in practice than the OECD Convention or UNCAC because bilateral agreements are necessarily negotiated between a smaller number of countries than a centralized solution at the international level.[223] For example, the current state of OECD enforcement is limited,[224] which is due in part to the ambiguity of its requirements.[225] These ambiguities make it difficult for countries to enforce their own domestic obligations under the OECD and for other countries to discern when a country is engaging in under-enforcement.[226] The concern is that "[t]he less clear the obligation, the harder it is for states to determine if there is a violation and what a proportionate

219. FRITZ HEIMANN, ÁDÁM FÖLDES & SOPHIA COLES, TRANSPARENCY INT'L, EXPORTING CORRUPTION: PROGRESS REPORT 2015: ASSESSING ENFORCEMENT OF THE OECD CONVENTION ON COMBATTING FOREIGN BRIBERY 6 (2015).

220. *Id.*

221. *See supra* Section III.A.

222. *See supra* Section II.A.

223. While it is unlikely that every bilateral agreement will be identical, the mechanism proposed by this Note does not require perfect harmonization. If anything, the mechanism is benefitted by the potential "*laboratory effects*" of multiple bilateral agreements, whereby countries can experiment with the specific provisions in the agreements. *Cf.* Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 791 (1999) (emphasis in original) (explaining that individual nations would be more effectively able to specify the terms of their contractual relations relative to achieving an international consensus).

224. *See* DELL & MCDEVITT, TRANSPARENCY INT'L, *supra* note 132, at 4.

225. Brewster, *supra* note 154, at 101.

226. *Id.* at 100–01.

response involves . . . ."[227] Therefore, solutions that improve clarity with respect to a given country's obligation to enforce anti-corruption legislation should also improve predictability for MNCs.

Simply, bilateral agreements would be relatively more effective at incorporating countries' nuanced cultures, economies, and societies,[228] which would help create tailored—and less ambiguous—enforcement programs.[229] Less ambiguous enforcement programs would benefit countries enforcing anti-corruption legislation and MNCs alike. With clearer laws, countries would be able to better monitor the enforcement of domestic law[230] under the provisions of the bilateral agreements and could hold each other reciprocally responsible for enforcement.[231] This Note suggests that the jurisdiction with the strongest ties to the allegedly unlawful activity would be required to take the lead in enforcement.[232] Countries' ability to monitor one another—combined with a clearer set of expectations about which country would lead the enforcement action—might help traditionally under-enforcing countries strengthen their own anti-corruption programs.[233] This would be beneficial for the anti-corruption regime as a whole because it would make for a more comprehensive international anti-corruption regime.[234] Furthermore, it would free up prosecutorial resources in countries that have typically enforced anti-corruption at a relatively high level.[235] Clearer laws would also help MNCs better predict their liability and thus internalize the risk of investing in a given polity. This transparency would help MNCs decide whether to invest or operate in a given country and could result in an increase in foreign direct investment in developing countries.[236]

Second, bilateral agreements are a preferable framework for the proposed mechanism because they would help minimize conflict between countries and thereby promote the legitimacy of anti-corruption enforcement. Commentators have noted that stretching claims to extraterritorial ju-

---

227. *Id.* at 94.

228. *See* de la Torre, *supra* note 161, at 494.

229. *See* Brewster, *supra* note 154, at 92, 104 (defining anti-corruption legislation and "market-engaging" and noting that "the standards for evaluating whether a state is abiding by a good faith effort to enforce its own market-engaging legislation are not well-defined.").

230. *See id.* at 104 ("On a spectrum of transparent to opaque, market-engaging agreements trend toward the opaque, making these agreements difficult to monitor.").

231. *See id.* at 93–94 ("Reciprocity requires being able to observe whether another party is abiding by its agreement and tailoring the response to be proportionate to the defection.").

232. *See supra* Section III.A.

233. *See* de la Torre, *supra* note 161, at 483 ("FCPA fines from foreign defendants resulting from foreign conduct are amounts that could otherwise strengthen the capabilities of foreign prosecutors to regulate the same conduct.").

234. *See id.* at 483–84.

235. *Id.* at 495.

236. *See supra* nn. 99–103 and accompanying text.

risdiction could create a legitimacy crisis for legislation.[237] Indeed, the extraterritorial application of one country's laws "across borders is an undeniable source of transnational tension and strife."[238] These concerns become even more pertinent when one considers that countries have different definitions and cultural understandings of what constitutes corruption.[239] Further, increased anti-corruption efforts across the globe[240] make it more likely for a conflict to arise between countries over whether a given act constitutes an unlawful activity.[241] Thus, proposals for international anti-corruption enforcement that would help reduce conflict between countries would also help increase the legitimacy of the global anti-corruption regime.

The mechanism proposed by this Note and international antitrust enforcement rely heavily on the principle of comity. In the international antitrust context, bilateral agreements that invoke comity have helped minimize jurisdictional over-reaching and thereby mitigated conflict between countries.[242] For instance, international cooperation with respect to cartel enforcement has helped "resolve conflicts arising out of extraterritorial jurisdiction."[243] Not only has the incorporation of comity into bilateral agreements helped reduce conflicts in antitrust enforcement, but it has also helped increase the legitimacy of the system as a whole by guarding against redundant prosecutions, which promotes a more proportional enforcement environment. According to the International Bar Association's Task Force on Extraterritorial Jurisdiction, redundant prosecutions violate the due process rights of the accused.[244] The violation of due process undermines "the perceived legitimacy of the prosecution."[245] Therefore, to the extent that comity and bilateral agreements help guard against redundant prosecutions, they also help increase the legitimacy of the enforcement regime itself.

The proposed mechanism relies on comity and prohibits double jeopardy, while bilateral agreements help establish clearer laws and facilitate accountability. Together, comity incorporated into bilateral agreements should

237. *See, e.g.*, Marie T. Batz, Comment, *A Comparative Analysis of United States and European Union Jurisdiction in Extraterritorial Antitrust Law & The Need for International Standards*, 9 DUQ. BUS. L.J. 65, 88 (2007) (stating that the "possibility of global backlash exists, and will continue to exist, if the United States and the European Union continue to systematically assert extraterritorial jurisdiction in all international antitrust cases").

238. Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 433 (1999).

239. *See* Jan Wouters et al., *The International Legal Framework Against Corruption: Achievements and Challenges*, 14 MELB. J. INT'L L. 1, 45 (2014).

240. *See* SHEARMAN & STERLING LLP, *supra* note 54, at 42.

241. *See* Wouters et al., *supra* note 239, at 45.

242. *See* Holtmeier, *supra* note 1, at 518 (noting that comity and bilateral agreements have helped antitrust enforcement guard against redundant prosecutions).

243. REPORT OF THE TASK FORCE, *supra* note 83, at 57.

244. *See id.* at 186–87.

245. *Id.* at 187.

result in a more "fair and efficient prosecution of [MNCs]."[246] Multiple areas of law—international securities regulation,[247] international crime,[248] and international antitrust[249]—already rely on comity. As such, it presents a promising foundation for international anti-corruption enforcement. And, if successful, these principles could be extended to cover MDB contracts to further militate against redundant sanctions.[250] Much like proposals for MLAT reform, these agreements, if made publicly available and easily accessible, would provide a more transparent international business environment for MNCs than currently exists.[251] At the very least, this would attenuate critiques that international anti-corruption standards are a form of legal imperialism.[252]

This Note does not propose lessening standards in international anti-corruption enforcement by allowing countries to create increased exceptions for corrupt behavior; rather, it aims to promote proportionality and predictability in international business and create a more legitimate enforcement system. To that end, it prioritizes the interests of legitimacy over perfect harmonization.[253] To the extent that proportionality and predictability are values in the international anti-corruption enforcement regime, bilateral agreements would likely prove an efficacious path forward.

---

246. *See id.* at 73.

247. *See id.* at 26 (noting the usage of mutual recognition for securities regulation in the European Union to simplify regulatory requirements).

248. *See* Tomer Broude & Doron Teichman, *Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity*, 62 VAND. L. REV. 795, 842–43 (2009) (observing that the United Nations Convention Against Organized Crime ("CATOC") operates in part on the basis of mutual recognition to set minimum international crime control standards).

249. *See* Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT'L L.J. 173, 203 (2005) (detailing the use of cooperative arrangements in international antitrust enforcement actions).

250. An analysis of how the mechanism would apply to MDBs is outside the scope of this Note, but this Note nonetheless presents essential elements of any mechanism in the anti-corruption context designed to increase proportionality and predictability, laying the groundwork for future studies on MDB reform.

251. *See Options for MLAT and Law Enforcement Cooperation*, MUTUAL LEGAL ASSISTANCE TREATIES, https://www.mlat.info/policy-analysis-docs/options-for-mlat-and-law-enforcement-cooperation-reform (last visited Apr. 2, 2019) (noting that an improvement to MLATs includes making them publicly available and easily accessible).

252. *See* de la Torre, *supra* note 161, at 476–77.

253. For a discussion of the difficulty of unifying commercial law within a single international standard, see Stephan, *supra* note 223, at 792 ("It also seems likely that enlisting a single country in the implementation of a novel legal rule would be much easier than establishing consensus.").

## Conclusion

What began with the FCPA in the 1970s has grown into a global anti-corruption regime[254] that has dramatically increased enforcement over the past decade.[255] Increased enforcement has exposed MNCs to overlapping liability and carbon copy prosecutions—both of which violate double jeopardy. These problems are particularly pronounced in the disgorgement context because MNCs may be subject to disproportionate punishment for allegedly unlawful conduct that rests on shaky theoretical and practical grounds. Collectively, these problems create a chilling effect on foreign direct investment,[256] which has an especially pernicious effect on developing countries in need of foreign capital.[257] Under the mechanism proposed by this Note, companies will still have to consider whether to voluntarily disclose cases of bribery identified within the MNC.[258] However, with a better understanding of which country will likely lead an enforcement action—and with a prohibition on double jeopardy, meaning they will not be negatively affected in other jurisdictions[259]—MNCs will have a clearer understanding of their liability. In turn, MNCs will have a stronger incentive to invest in compliance programs and disclose suspected violations in the first place.[260]

The proposed mechanism, if vested in bilateral agreements, would help create a more transparent, proportional, and predictable set of expectations for countries enforcing anti-corruption legislation and MNCs making decisions of whether or not to engage in business abroad.[261] Ultimately, this could help create a more robust international business environment—one that balances the interests of MNCs and anti-corruption enforcement officials.

---

254. Spahn, *supra* note 11, at 49.

255. *See* Shearman & Sterling LLP, *supra* note 54, at 6.

256. *See* Ryznar & Korkor, *supra* note 99, at 418; Spalding, *supra* note 99, at 371–73.

257. *See* Spalding, *supra* note 99, at 371.

258. *See* Joseph P. Covington & Iris E. Bennett, *Signs of Life in International Anti-Bribery Enforcement—Recent Enforcement of Anti-Bribery Laws Outside the U.S. and Issues to Consider for a Multi-Jurisdictional Defense Strategy*, Jenner & Block LLP (2009), https://jenner.com/system/assets/assets/1118/original/covington_bennett_pdf.pdf?1317312702 (noting that the decision for whether a company should disclose to the U.S. before, after, or at the same time as foreign authorities requires "a fact-specific analysis under the circumstances").

259. *See* Stevenson & Wagoner, *supra* note 16, at 819.

260. *See* Sivachenko, *supra* note 93, at 415.

261. *See supra* Section III.C.