TRANSNATIONAL BRIBERY: WHEN IS EXTRATERRITORIALITY APPROPRIATE?

Branislav Hock[*]

ABSTRACT 306
I. INTRODUCTION 307
II. APPROPRIATENESS OF EXTRATERRITORIAL ENFORCEMENT 311
A. Controversial Way to Regulate Foreign Markets 311
B. Extraterritoriality as Inter-Governmental Communication 313
C. Extraterritoriality as Inter-Governmental Communication and International Bribery 315
III. REGULATION OF FOREIGN BRIBERY 316
A. Foreign Bribery Law in the Historical Context 316
B. Territoriality and Nationality Jurisdiction: Wide Reach 319
1. U.S. Law: FCPA 321
2. German Law 322
C. The Most Appropriate Jurisdiction: Too Wide to Coordinate? 323
IV. ANTI-BRIBERY ENFORCEMENT ACTIVITY US AND GERMANY 326
A. The United States 326
B. Germany 327

* Ph.D. researcher at Tilburg Law and Economics Center, Tilburg University Warandelaan 2 PO Box 90153, 5000 LE Tilburg, the Netherlands. b.hock@uvt.nl. Earlier versions of this article were presented at the 2014 Stanford International Junior Faculty Forum at Stanford Law School, the QMUL Postgraduate Legal Research Conference 2015 at Queen Mary University of London, the International Law and Domestic Law-Making Processes at University of Basel, the American Society of International Law, Anti-Corruption Law Interest Group at the Wharton School - University of Pennsylvania, and seminars at Tilburg University. I would like to specially thank Tilmann Altwicker, Zlatina Georgieva, Suren Gomtsian, Elina Karpacheva, Andrew Spalding, Ilya Zlatkin, and Evelyne Schmid for helpful suggestions and comments. The paper also benefited from comments by the participants of the conferences and seminars listed above.

V. U.S. ENFORCEMENT SCHEMES - SIEMENS AND BONNY ISLAND 328
A. Endemic Bribery: "Siemens as a Single Briber" 329
1. The Core of the Enforcement Scheme—U.S. and Germany 329
2. Follow-up Enforcement 332
3. Applicable Laws 333
B. Bonny Island Project: "We'll Get Them All" 336
1. The Core of the Enforcement Scheme 336
2. Follow-up Enforcement 340
3. Applicable Laws 342
C. Enforcement Practice and Appropriate Jurisdiction ... 343
1. U.S.-Wide Jurisdiction 343
2. German Enforcement is Limited 345
3. Coordination and Cooperation—Unity of the Case is Blurred 347
VI. CONCLUSION 350

ABSTRACT

This paper explores when extraterritorial application of national laws is an appropriate solution to global problems. As a case study, the paper analyzes enforcement of national anti-bribery legislation based on the Anti-Bribery Convention of the Organization for Economic Cooperation and Development (OECD Convention). In recent years, the extraterritorial enforcement of national legislation has increased. The scope of such legislation covers many multinational corporations (MNCs) acting worldwide. While this way of governing MNCs makes it more effective for governments to hold them accountable for a number of global problems they cause, extraterritoriality might serve self-interests of major economies, thus destabilizing markets, principles of international order, and trust among the international community of states. The OECD international anti-bribery regime is an exemplary case to study because some OECD members, such as the U.S., have increasingly been using their anti-bribery laws extraterritorially. Drawing upon the economic and international relations literature, the starting point of the article is that extraterritoriality is appropriate if it serves the main policy goal of the international regulatory regime

in which it functions. This article analyzes the main policy goal of the OECD regime, which is based on the principle of competitive neutrality, meaning that all corporations compete on a level playing field. The paper concludes that extraterritoriality is a dynamic phenomenon that is appropriate when used by a small number of major economies in an initial stage of the anti-bribery regulatory framework. In the analyzed case, the increasing anti-bribery enforcement is found to be accompanied by substantive and procedural fragmentation of the underlying legislation that prevents the OECD members from efficiently cooperating, coordinating their actions, and using their full potential to hold MNCs accountable for transnational bribery.

I. INTRODUCTION

The undesirable transnational activities of MNCs that cause major global problems such as financial breakdowns, infringements of human rights, and corruption have been increasingly subject to new extraterritorial forms of national governmental regulation, meaning the broad application and enforcement of national laws to subjects acting beyond the borders of a given country.[1] While extraterritoriality makes it more effective to prosecute MNCs, the literature indicates that extraterritorial enforcement might also serve national self-interests, thus destabilizing markets, principles of international order, or international relations between states.[2] Therefore,

1. JEAN-YVES HUWART & LOÏC VERDIER, ECONOMIC GLOBALISATION ORIGINS AND CONSEQUENCES 34 (OECD 2013); Klaus M. Leisinger, *The Role of Corporations in Shaping Globalization with a Human Face*, *in* 10 MPI STUDIES ON INTELL. PROP., COMPETITION AND TAX L., THE ROLE OF LAW AND ETHICS IN THE GLOBALIZED ECONOMY 27 (Joseph Straus eds. 2009); Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 AM. J. COMP. L. 87, 94 (2014); Anupam Chander, *Unshackling Foreign Corporations: Kiobel's Unexpected Legacy*, 107 AM. J. INT'L L. 829, 834 (2013); Nicola Jägers, et al., *The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case Against Shell*, AM. J. INT'L L. UNBOUND e-36, e-37 (2014), https://perma.cc/5ZJJ-G2RW; Jonathan Remy Nash, *The Curious Legal Landscape of the Extraterritoriality of U.S. Environmental Laws*, 50 VA. J. INT'L L. 997, 998 (2010); Jennifer A. Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas*, Corporate Social Responsibility Initiative Working Paper No. 59 (2010).

2. *See* Jacob Schuman, *Developments in the Law - Extraterritoriality*, 124

despite increasing use, extraterritoriality is controversial, and it is not clear when extraterritoriality is an appropriate response to the undesirable transnational activities of the MNCs.

One of the denominators of the appropriateness of extraterritoriality is that it is an effective law enforcement tool of a regime. The question that has not been fully researched is when extraterritorial enforcement of national laws contributes to the effectiveness of the regime in which it functions. The case study that follows will explore this question through the OECD's treatment of international bribery that depends on national extraterritorial enforcement. The regime based on the OECD Convention[3] was chosen because its implementation standard and the focus on the enforcement and detection mechanisms of its signatories makes it the most advanced international convention that prohibits the supply side of bribery.[4] It is true that the United Nations Convention against Corruption (UNCAC)[5] is another important instrument, but the UNCAC still has not completed the review stage focusing on implementation, and, therefore, is not the key subject of analysis in this paper.[6]

The theoretical basis of this article is set in Part II, which discusses the literature in the fields of international relations and economic dealings with the extraterritorial application of the law. The literature implies that the appropriateness of national

---

HARV. L. REV. 1226 (2011).

3. Organization for Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43, reprinted in 37 I.L.M. 1 [hereinafter Convention on Combating Bribery].

4. The Transparency International considers the OECD Convention as "widely regarded as the gold standard for treaty monitoring." TRANSPARENCY INT'L, EXPORTING CORRUPTION, PROGRESS REPORT 2013: ASSESSING ENFORCEMENT OF THE OECD CONVENTION ON COMBATING FOREIGN BRIBERY 2 (2013) [hereinafter PROGRESS REPORT 2013].

5. United Nations Convention Against Corruption, *opened for signature* Dec. 9, 2003, 2349 U.N.T.S. 41.

6. BRUCE ZAGARIS, INTERNATIONAL WHITE COLLAR CRIMES: CASES AND MATERIALS 137-138 (2015); MARCO ARNONE & LEONARDO S. BORLINI, CORRUPTION: ECONOMIC ANALYSIS AND EVOLUTION OF THE INTERNATIONAL LAW AND INSTITUTIONS 255–270 (2014); CECILY ROSE, INTERNATIONAL ANTI-CORRUPTION NORMS: THEIR CREATION AND INFLUENCE ON DOMESTIC LEGAL SYSTEMS 97–99 (2015).

extraterritorial enforcement for the regime's goals is changing depending on its size, the level of enforcement, or the clarity of the regime's norms.[7] For example, in a regime with a small membership, national extraterritorial enforcement might incentivize outsiders to join the regime. However, if membership increases, the regime might face new credibility problems, such as the strategic enforcement or clarity problems connected with the understanding of the compliance standards with the regime's norms.[8] Therefore, the effectiveness of extraterritorial enforcement is dependent on the construction of an international regime—meaning its actors, norms, and processes.

From that perspective, this article will analyze when national extraterritorial enforcement of the OECD-based anti-bribery laws is an effective law enforcement tool of the OECD regime. The main rationale of the OECD regime is to establish competitive neutrality, meaning a situation in which no corporation operating in a relevant market enjoys any undue competitive advantage.[9] In other words, the OECD aims to establish a level playing field for all corporations on the global market.[10] At the same time, it is recognized that competitive neutrality requires multilateral approach of national enforcers.[11] Therefore, this article argues that two conditions are necessary in order to strengthen competitive neutrality: (a) corporations on

7. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); R. FALVEY, et al., AN ECONOMIC ANALYSIS OF EXTRATERRITORIALITY 15 (1999); WILLIAM D. FERGUSON, COLLECTIVE ACTION AND EXCHANGE: A GAME-THEORETIC APPROACH TO CONTEMPORARY POLITICAL ECONOMY (2013).

8. For more on the interaction between the credibility and clarity problems, *see generally* Robert Gibbons & Rebecca Henderson, *Relational Contracts and Organizational Capabilities*, 23 ORG. SCI. 1350, 1351–52 (2012); *see also* Jens Prüfer, *Economic Governance Today: The Credibility Problem and the Clarity Problem*, SIOE (Aug. 26, 2015), https://perma.cc/V3GB-Z4X3.

9. ORG. FOR ECON. CO-OPERATION & DEV., COMPETITIVE NEUTRALITY: MAINTAINING A LEVEL PLAYING FIELD BETWEEN PUBLIC AND PRIVATE BUSINESS 9 (2012), https://perma.cc/AB2S-B64H [hereinafter COMPETITIVE NEUTRALITY]. *See also* ORG. FOR ECON. CO-OPERATION & DEV., INFORMATION SHEET ON THE OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (2011), https://perma.cc/U6DX-TXVN [hereinafter INFORMATION SHEET ON COMBATING BRIBERY].

10. INFORMATION SHEET ON COMBATING BRIBERY, *supra* note 9, at 32.

11. *Id.*

the global market do not conceal bribery through complicated corporate-veil systems or forum-shopping strategies; and (b) the OECD countries are able to coordinate enforcement and cooperate between each other.

Part III analyzes the key provisions of the OECD Convention and refers to the implementation and enforcement of the OECD Convention standard in U.S. law, because this jurisdiction is dominant in foreign bribery enforcement.[12] In Part IV, this article provides a more quantitative analysis. It mainly analyzes the enforcement activities of the U.S. and Germany following the ratification of the OECD Convention. Part V is more qualitative. It uses Bonny Island and Siemens enforcement schemes—which resulted in the two biggest enforcement actions in the history of foreign bribery enforcement—as case studies, focusing mainly on the substantive laws covering the foreign bribery activities, national jurisdiction, and coordination and cooperation mechanisms between the OECD enforcers.[13] This article then concludes by delineating some key obstacles that limit the OECD regime in reaching competitive neutrality.

Although a number of states, such as the U.S. and Germany, have adopted a variety of relatively effective enforcement approaches in fighting international bribery, they face a number of legal issues that make it difficult to coordinate their actions and cooperate with each other. Most importantly, extraterritorial enforcement is complicated because acts of international bribery might be fought through a number of concurrent legislations; for example, via money laundering or accounting provisions. Moreover, national procedures are also fragmented, and it is not feasible to define *ex ante* many coordination norms that would govern who should be in charge of the enforcement. Therefore, current regulatory paradigms cannot deal with substantive and procedural fragmentations accompanying national extraterritorial enforcement that remain highly political.

12. PROGRESS REPORT 2013, *supra* note 4, at 87.

13. For the discussion about factual and formal regimes, *see* STEPHEN D. KRASNER, STRUCTURAL CONFLICT: THE THIRD WORLD AGAINST GLOBAL LIBERALISM (1985).

II. APPROPRIATENESS OF EXTRATERRITORIAL ENFORCEMENT

A. Controversial Way to Regulate Foreign Markets

While extraterritoriality makes it easier to prosecute MNCs for their transnational bribes, it could also cause many problems. Some scholars claim that using extraterritoriality to govern the activities of the MNCs in foreign countries is moral imperialism.[14] It means that, for example, the U.S. extraterritorial enforcement in Nigeria is largely the imposition of American legal and cultural standards in foreign markets.[15] Instead of imposing American moral values, the Nigerian authorities and citizens might be better off if they define for themselves how the MNCs should be doing business in Nigeria, and sanction the MNCs if they do not comply with such a benchmark. Therefore, even if extraterritoriality limits bribery in developing countries, it might dictate to these countries values that they do not share.

Extraterritorial application of foreign bribery is seen as a necessary—but to a great extent ideological—practice of leading economies.[16] Spahn argues that international bribery is a problem of class, and the corrupt relationships between MNCs and the governments of developing countries cannot be eliminated merely by soft approaches.[17] Kennedy, however, points out that despite the fact that not many dispute that international corruption is detrimental, the initiatives fighting it remain great ideological projects.[18] He claims that:

14. Philip M. Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 CORNELL INT'L L. J. 627, 645 (2000); Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223, 231 (1999).

15. Maxwell Adeleye, *Nigeria: Multi-National Corporations in the Nigerian Community*, DAILY INDEPENDENT (LAGOS) (Feb. 20, 2015), https://perma.cc/A7N4-2ZAE.

16. *Id.*

17. Elizabeth K. Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 MINN. J. INT'L L. 155, 208 (2009).

18. David Kennedy, *The International Anti-Corruption Campaign*, 14 CONN. J. INT'L L. 455, 465 (1999).

It clearly taps into a widespread sense of illegitimacy—we must all oppose corruption. When one begins to define the object of this quite general condemnation not just morally but in terms of the rule of law, and to specify its link to retarded economic development, quite familiar difficulties emerge. Suddenly the effort to battle corruption becomes an effort to stigmatize some economic policies and some legal regimes at the expense of other precisely without analyzing their distributional or social consequences in any specific detail.[19]

In this line of argument, the changes in foreign countries related to extraterritorial application of foreign legislation are not merely the question of moral values, but they also have important political and economic consequences.[20] Spalding, for instance, sees anti-bribery enforcement as the imposition of economic sanctions against emerging markets.[21] In addition, many other scholars discussed that the U.S. overseas enforcement of the Foreign Corrupt Practices Act of 1977 (FCPA)[22] is too demanding.[23] Despite the fact that extraterritorial enforcement might limit some bribery, it can negatively influence economic growth or the attraction of foreign direct investment in developing countries.[24] Notwithstanding the fact that some firms might stop bribing, the overall economic situation in these countries might worsen because many firms

19. *Id.*

20. *Id.*

21. *See* Andrew B. Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351 (2010); *see also* Alvaro Cuervo-Cazurra, *Who Cares about Corruption?*, 37 J. INT'L BUS. STUDIES 803, 807 (2006).

22. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

23. *See generally* Marie M. Dalton, *Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act*, 2 N.Y.U. J. L. & BUS. 583 (2006); Amy D. Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 495–97 (2011); Mike Koehler, *The Facade of FCPA Enforcement*, 41 GEO. J. OF INT'L L. 907 (2010); Spalding, *supra* note 22; Daniel P. Ashe, Comment, *The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the U.S. Foreign Corrupt Practices Act*, 73 FORDHAM L. REV. 2897, 2899 (2005).

24. EDWARD ELGAR, RESEARCH HANDBOOK ON INTERNATIONAL COMPETITION LAW (Ariel Ezrachi ed. 2012).

may prefer to leave the market due to a high risk of prosecution in their home countries.[25]

B. Extraterritoriality as Inter-Governmental Communication

A number of scholars have theorized that extraterritoriality could be seen as a way of inter-governmental communication—a domestic response to global problems that influences and takes into account responses of other enforcers.[26] Parrish argues that this kind of response is unilateral rather than multilateral and collaborative, and thus rarely results in a sustainable solution that would correct distortions of global economy.[27] Coffee, on the other hand, provides that in some fields it can be seen that, if used by several major economies, extraterritoriality could mitigate systemic risks and set an initial stage of an international regulatory standard.[28] Such a development can also be seen in the area of foreign bribery—such as when the American unilateral initiative against international corruption resulted in the adoption of the OECD Anti-Bribery Convention.[29] Accordingly, the question that should follow is how does extraterritoriality function once the initial stage is surpassed?

Slaughter and Zaring explain the dynamic changes following the initial stage. They argue that if multiple authorities enforce a new standard, the existing regime can reach a new, and better, equilibrium only if enforcers find political and legal instruments allowing them to cooperate and coordinate their actions, rather than using extraterritoriality as a foreign policy tool.[30] Similarly, the economic literature provides that "each country would benefit

25. Cuervo-Cazurra, *supra* note 21, at 803.

26. *See* John C. Coffee, *Extraterritorial Financial Regulation: Why E.T. Can't Come Home*, 99 CORNELL L. REV. 1259, 1261 (2014); Austen L. Parrish, *Domestic Responses to Transnational Crime: The Limits of National Law*, 23 CRIM. L. FORUM 275 (2012).

27. *See generally* Parrish, *supra* note 26.

28. *See generally* Coffee, *supra* note 26.

29. Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight against Corruption*, 31 J. OF LEGAL STUD. S141, S163 (2002).

30. ANNE-MARIE SLAUGHTER & DAVID T. ZARING, EXTRATERRITORIALITY IN A GLOBALIZED WORLD 27–28 (Aug. 7, 2015) https://perma.cc/8V7K-LMMX; *see also* Slaughter, *supra* note 7.

from cooperative multilateral actions taken by other countries, acting in their combined interests."[31] In other words, market success depends on resolving coordination and enforcement problems that usually follow the initial stages of a new regulatory mechanism.[32]

Other theoretical literature[33] provides that the resolution of coordination and cooperation problems is particularly difficult in environments with weak international treaties and organizations where powerful nations are the only active enforcers. Extraterritorial enforcement by the powerful may elicit transnational collective action that may remain only a sub-optimal equilibrium. Sandler provides:

> The need for greater cooperation on some issues, raised by globalization, is met with nations shunning cooperative responses. The most powerful nations will control the agenda and will agree to join only loose arrangements that maintain their autonomy and further their agenda. The number of nations will continue to increase and this growth in the number of agents will only heighten the difficulty of cooperation and the preservation of uncoordinated pursuit of national priorities. Such an anarchic state is not an equilibrium because the most powerful nations will serve to legitimize rules and institutions to limit the need to protect one's assets from plunder through conflict, pollution, or other means.[34]

In practice, however, Sandler admits that even the most powerful nations might sacrifice some of their autonomy to international or multi-stakeholder organizations such as the OECD if this is in the self-interest of the parties—for instance, improving their communication.[35] The OECD Working Group on Bribery in International Business Transactions that provides review of the implementation and the enforcement of the

31. FALVEY, *supra* note 7, at 16.

32. FERGUSON, *supra* note 7; *see also* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

33. *See* TODD SANDLER, GLOBAL COLLECTIVE ACTION (2004).

34. *Id.* at 8.

35. *Id.*

Convention is exactly such a body.[36]

C. Extraterritoriality as Inter-Governmental Communication and International Bribery

Not many scholars have researched the national enforcement of international bribery laws from the perspective of political economy and international relations theories. Some scholars explained patterns of U.S. international bribery enforcement; Davis and Choi, for example, found mixed evidence as to why the U.S. engaged in a unilateral enforcement of the law.[37] Abbott and Snidal argued earlier that the U.S. regulation resulted in the adoption of the OECD Anti-Bribery Convention because of the interplay of values and interests of the current OECD members.[38]

Some scholars used game theoretical models in order to describe the internationalization of international bribery.[39] In 2002, Tarullo claimed that "the U.S. pressure succeeded only in getting other countries to sign the Convention, not in changing the underlying game being played by other countries."[40] Turk, however, recognized that in some instances there is an over-enforcement of U.S. regulation prohibiting international bribery in developing countries.[41] Although, on the other hand, Turk claims that when it comes to the demand side of bribary many countries' foreign public officials' have either no capacity or interest to enforce the law.[42] Differing from Turk's views, Kaczmarek and Newman found that countries that experienced American extraterritorial application of anti-bribery laws were

36. *See* Fabricio Pagani, *Peer Review as a Tool for Co-Operation and Change: An Analysis of an OECD Working Method*, 11 AFR. SEC. REV. 15, 19 (2002).

37. Kevin E. Davis & Stephen J. Choi, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, 11 J. EMP. L. STUD. 409 (2014).

38. *See* Abbott & Snidal, *supra* note 29, at S141.

39. Ferguson, *supra* note 7.

40. Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 667 (2004).

41. Matthew C. Turk, *A Political Economy Approach to Reforming the Foreign Corrupt Practices Act*, 33 N.W. J. INT'L. L. & BUS. 325, 330 (2013).

42. *Id.*

"twenty times more likely to enforce their national rules."[43] They also claim that such an enforcement has "far-reaching spillover effects, unintentionally altering national decision-making in other countries."[44] Therefore, even scholars who discuss extraterritoriality in the context of international bribery provide mixed evidence about the appropriateness of extraterritoriality. With this in mind, Part III will analyze the main institutional features of the OECD regime.

III. REGULATION OF FOREIGN BRIBERY

This section focuses on analyzing the basis of the foreign bribery regulatory framework. The core of the foreign bribery regulation lays in international treaties.[45] Nevertheless, national laws play a crucial role as well. Hence, the issue of appropriate jurisdiction is also discussed in the context of German and U.S. laws. This preliminary analysis focuses on what Berman calls "legal jurisdiction," i.e., a set of provisions determining (1) that national laws apply and (2) that a given state can decide a case.[46]

A. Foreign Bribery Law in the Historical Context

The adoption of the first comprehensive set of domestic norms on transnational bribery goes back to 1977, when the U.S. adopted its FCPA.[47] The FCPA makes it an offense to provide[48] anything of value to a foreign official for purposes of securing any improper advantage in order to assist the actor in obtaining or retaining business. Thus, in contrast to American regulation of domestic bribery, the FCPA is special because it concentrates on

43. Sarah C. Kaczmarek & Abraham L. Newman, *The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation*, 65 INT'L ORG. 745, 747 (2011).

44. *Id.* at 765.

45. *See, e.g.*, Convention on Combating Bribery, *supra* note 3.

46. Paul S. Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L. L. 485 (2005).

47. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95, 213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

48. "Provider" includes an offer, payment, promise to pay, or authorization of the payment. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(a)(a).

bribe givers and does not address foreign public officials who are accepting the bribes; *i.e.*, it exclusively affects the supply side of the bribery transaction.[49] Furthermore, the FCPA only addresses public bribery in the context of international business, and covers foreign bribes that are provided to "foreign public officials."[50] Finally, yet importantly, the FCPA is unique because of its jurisdictional provisions that allow prosecutors to reach a wide range of domestic and foreign subjects.[51]

The process of moving from a unilateral American legislative initiative to international anti-corruption movement took more than 20 years; it was only in 1997 that the OECD Convention was signed.[52] In this context, the Convention commits the world's leading exporting countries to prohibiting the bribery of foreign public officials in international business transactions.[53] It is true that the Convention currently operates in conjunction with a much broader system established by the UNCAC,[54] but despite the UNCAC's important impact on the various anti-corruption standards adopted by its signatories, it is outside the scope of this article. The OECD Convention should be understood as a separate case study from that of the UNCAC, and as the basis of the analysis of appropriate jurisdiction in the foreign bribery context in this article.

At the center of the OECD Convention is Article 1, which specifies substantive elements constituting the offense of bribery of foreign public officials.[55] However, the Convention is not limited just to the definition of the offense of bribery. Article 2 provides that each party shall establish the liability of legal persons in accordance with national legal principles of each Party.[56] Article 3 then sets a minimal standard on sanctioning.[57] Furthermore, the Convention contains specific substantive

49. *See id.* at §78dd-1(a).
50. *Id.*
51. *See id.* at §§78dd-1–78dd3(1).
52. Convention on Combating Bribery, *supra* note 3, at 6.
53. *Id.* at 12.
54. *Id.* at 20, 41.
55. *Id.* at 7.
56. *Id.*
57. *Id.* at 8, 16.

requirements on money laundering (Article 7),[58] accounting standards (Article 8),[59] mutual legal assistance (Article 9),[60] and extradition (Article 10).[61] Importantly, the Convention also provides procedural rules related to jurisdiction (Article 4);[62] enforcement (Article 5);[63] and a program of systematic monitoring and follow-up (Article 12).[64]

Throughout the years, the Convention has furthered joint action and multilateral anti-corruption cooperation between countries, international organizations, businesses, and civil society.[65] What can be observed is the shift from markets where foreign bribery was not regulated at all (before 1977), through one where only the U.S. formally prohibited foreign bribery (1977-1998), to today's situation where 41 countries have adopted the Convention.[66]

However, many challenges remain. The possible implementation problems are probably the least troubling because of the sophisticated monitoring mechanisms of the OECD Convention.[67] What remains a real problem is that foreign bribery is still under-regulated because many countries have not ratified the Convention.[68] Furthermore, most of the countries that have ratified the Convention struggle to enforce it mainly because of high enforcement costs.[69] Last but not least, if states implement broad jurisdiction as required,[70] there should ideally be multiple jurisdictions covering each case of foreign bribery.

58. *Id.* at 9.
59. *Id.*
60. *Id.* at 10.
61. *Id.*
62. *Id.* at 8.
63. *Id.* at 9.
64. *Id.* at 11.
65. *Id.* at 21.
66. FCPA, 15 U.S.C. Pub. L. No. 95-213, 91 Stat. 1495 (codified as amended in scattered sections of 15 U.S.C.).
67. PROGRESS REPORT 2013, *supra* note 4, at 2.
68. *Id.* at 44.
69. TRANSPARENCY INT'L, EXPORTING CORRUPTION, PROGRESS REPORT 2015: ASSESSING ENFORCEMENT OF THE OECD CONVENTION ON COMBATING FOREIGN BRIBERY 7–8 (2015) [hereinafter PROGRESS REPORT 2015].
70. Convention on Combating Bribery, *supra* note 3, at 8.

This raises the question of whether international or national laws provide a mechanism mitigating a number of coordination problems, such as when the law can deal with a situation where no country finds appropriate jurisdiction, or where more than one country would sanction the same act of bribery.

B. Territoriality and Nationality Jurisdiction: Wide Reach

According to the OECD, the main rationale behind regulation of foreign bribery is promotion of economic and social well-being of people by "helping governments . . . to restore confidence in markets and the institutions and companies that make them function."[71] This is connected with the ideal of "competitive neutrality," *i.e.*, a situation in which no competitor that operates in a relevant market enjoys any undue competitive advantages or disadvantages.[72] Therefore, in order to reach this policy goal, the foreign bribery jurisdiction should be wide enough to reach global corporations. Competitive neutrality cannot be achieved if corporations can hide behind complicated systems of corporate veils or use forum-shopping strategies.[73] In this way, jurisdiction is appropriate when it is wide enough to reach all such companies. This thesis is further refined by two jurisdictional principles inherent to the OECD Convention—territoriality and nationality.

The principle of territoriality is the leading standard of the OECD Convention.[74] Article 4(1) provides that "each Party shall . . . establish its jurisdiction . . . when the offence is committed in whole or in part in its territory."[75] It also must be added that "the territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required."[76] This standard provides that any means of interstate commerce—such as the use of emails, telephones, or banking

71. ORG. FOR ECON. COOPERATION AND DEV., BETTER POLICIES FOR BETTER LIVES 9 (2011), https://perma.cc/5RNT-GWSX.

72. COMPETITIVE NEUTRALITY, *supra* note 9, at 9.

73. *See id.* at 11, 60.

74. *See* Convention on Combating Bribery, *supra* note 3, at 16.

75. *Id.* at 8.

76. Convention on Combating Bribery, *supra* note 3, at 16.

systems—are sufficient for an establishment of territorial jurisdiction.[77]

The word "committed," under Article 4(1),[78] may be interpreted in such a way that an (1) act itself (subjective territoriality), or (2) the effects of such an act (objective territoriality) occurred within the territory of a given state.[79] The latter, known as the effects doctrine,[80] is especially problematic because it may be asserted over a wide range of foreign activities.[81] As the OECD Convention does not provide any clear limitations, national enforcement authorities can use broad jurisdictional claims based on acts—or effects of acts—that have a minimal link to a territory of a given country.[82]

An alternative to the principle of territoriality is the principle of nationality, which requires an assertion of jurisdiction against a state's own nationals who committed a crime abroad, referred to as active nationality.[83] Article 4(2) of the OECD Convention provides that "[e]ach [p]arty which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles."[84] The right to assert jurisdiction on the basis of nationality is undisputed.[85] Nevertheless, the globalization of economies implies uncertainties when using this principle.[86] Most importantly, there is no single test to establish the nationality of MNCs.[87] Thus, the parties might take into

77. *Id.*

78. *Id.*

79. Michael Barton Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y. B. INT'L. L. 145, 193 (1973).

80. *Id.* at 153.

81. *Id.* at 195.

82. Zerk, *supra* note 1, at 18–19; Schuman, *supra* note 2.

83. Zerk, *supra* note 1, at 19, 47.

84. Convention on Combating Bribery, *supra* note 3, at 16.

85. Akehurst, *supra* note 79, at 156; Paul Arnell, *The Case for Nationality Based Jurisdiction*, 50 INT'L & COMP. L. Q. 955 (2001); ROBERT CRYER, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 47–49 (2007).

86. Akehurst, *supra* note 79, at 156.

87. Elizabeth K. Spahn, *Multijurisdictional Birbery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT'L L. 1, 44 (2012).

account place of incorporation, the corporation's seat, the place where the most business is done, or the "nationality" of the corporation's controlling entity.[88] This requires parties to fill in these gaps by their national laws or by the enforcement practices. This discretion allows the parties to claim jurisdiction against a wide range of MNCs or to stay silent. The following text briefly discusses the implementation of the OECD Convention's standard in U.S. and German law.

1. U.S. Law: FCPA

The FCPA recognizes both nationality and territoriality jurisdiction.[89] Generally, the FCPA asserts territoriality jurisdiction over both nationals and foreigners who act within the territory of the U.S.[90] The FCPA also contains "the alternative jurisdiction" theory based on the principle of nationality.[91]

U.S. authorities claim that territoriality jurisdiction will be interpreted and applied broadly to three main categories of actors: issuers, domestic concerns, and any other persons and entities while in the territory of the U.S.[92]

> 1) An "issuer" is a company that has a class of securities registered under Section 12 of the Securities & Exchange Act.[93] Thus, foreign companies organized outside the U.S. can also qualify as issuers.
>
> 2) A "domestic concern" is any citizen, national, or resident of the U.S. and any corporation or other legal entity which has its principal place of business in the U.S. or which is organized under U.S. law.[94]
>
> 3) "Any persons other than an issuer or a domestic concern" is

88. Danielle Ireland-Piper, *Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine*, 9 UTRECHT L. REV. 68 (2013).

89. CRIM. DIV. OF THE U.S. DEP'T OF JUST. & THE ENF'T DIV. OF THE U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 10 (2012), https://perma.cc/2Y72-RCLG [hereinafter RESOURCE GUIDE.].

90. *Id.* at 11.

91. *Id.* at 12.

92. *Id.* at 10; *see also* 15 U.S.C. §§ 78dd-1(a)–78dd-3(a).

93. RESOURCE GUIDE, *supra* note 89, at 10, 11.

94. *See* 15 U.S.C. § 78 dd-2(h)(1).

any person other than a national that engages in any acts in the territories of the U.S.[95] Such persons include business entities.

2. German Law

Similarly to the FCPA, German law also recognizes the principles of nationality and territoriality.[96] Section 3 StGB provides that German criminal law applies if an act is committed in German territory.[97] It must be noted that in Germany, bribery is a conduct crime, which means that the crime is completed once an act—not necessarily an effect of the act—takes place.[98] Nevertheless, the notion of "commitment" as used in StGB is broader. Section 9(1) StGB provides that: "an act is committed at every place the perpetrator acted . . . should have acted, or at which the result, which is an element of the offense, occurs or should occur according to the understanding of the perpetrator."[99] Germany also recognizes nationality jurisdiction over acts of German citizens committed abroad.[100] However, the principle of nationality seems to be narrower than in the case of the Bribery Act and the FCPA. What may lead to this limiting is that under German law, the corporate sanction is an "incidental consequence" of a criminal offence committed by the natural person.[101]

To conclude, firstly, the Convention requires that the territorial basis for jurisdiction is to be interpreted broadly and that nationality jurisdiction is de facto mandatory for all the parties.[102] The analysis shows that the selected national systems, to a great extent, comply with these requirements, and even common law jurisdictions that used to be absolutely territorial

95. ORG. FOR ECON. COOPERATION & DEV., U.S. REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION (1999), https://perma.cc/8FCA-LXXT [hereinafter 1997 RECOMMENDATION].

96. Strafgesetzbuch [StGB] [Penal Code] § 7 (Ger.).

97. *Id.* at § 3.

98. *Id.* at § 8.

99. *Id.* at § 9.

100. *Id.* at § 5.

101. *Id.* at § 5.7.

102. Convention on Combating Bribery, *supra* note 3, at 16.

have recognized the principle of nationality.[103] Secondly, the analysis revealed that the discussed countries adopted broad jurisdictional frameworks. These legal systems may capture wide ranges of foreign subjects who commit bribery outside of the territories of these jurisdictions.

C. The Most Appropriate Jurisdiction: Too Wide to Coordinate?

Next to the wide jurisdictional ambit, competitive neutrality requires coordination of enforcement.[104] The Preamble of the OECD Convention states that "all countries share a responsibility to combat bribery in international business," and calls for the "prompt criminalisation [sic] of such bribery in an effective and co-ordinated [sic] manner . . . ."[105] In order to address this issue, the Convention offers a coordination mechanism based on a consultation procedure between relevant Parties in Article 4(3), which provides that "[w]hen more than one [p]arty has jurisdiction over an alleged offence described in this Convention, the [p]arties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution."[106]

Article 4(3) has an "open" character. Most importantly, it does not specify what the most appropriate jurisdiction is and how a jurisdictional conflict between parties should be resolved procedurally. In other words, the OECD Convention provides no substantive criteria and no procedural mechanism that would govern such a consultation. Moreover, the consultation mechanism does not provide for any legal consequences in case the parties do not reach an agreement about what the most appropriate jurisdiction is. According to the literature, no public international law sufficiently addresses the question.[107]

---

103. Prior to 1998, the FCPA was based only on territorial jurisdiction. *See* 1997 RECOMMENDATION, *supra* note 95.

104. COMPETITIVE NEUTRALITY, *supra* note 9, at 87.

105. Convention on Combating Bribery, *supra* note 3, at 6.

106. *Id.* at 8.

107. Bribery and Corruption Committee et. al., *Bribery and Corruption*, *in* REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 201, 229–30

Thus, it is mainly up to the national legal orders to decide whether and how they limit their discretion. The U.S. and Germany both recognize the possibility of consulting with a view toward determining the most appropriate jurisdiction for prosecution.[108] Both of them also ratified the UNCAC that provides some additional guidance, mainly incentivizing bilateral agreements regarding coordination.[109] However, Germany and the U.S. have not codified any general coordination norm. In practice, the U.S. provides regular consultations.[110] Germany refers to the European Convention on Mutual Assistance in Criminal Matters,[111] diplomatic consultations, and an extradition request that provides limited legal bases for such a consultation conducted by the German authorities.[112]

A weak or non-existent coordination mechanism might lead to a situation in which several enforcers prosecute the same act of bribery that may lead to a waste of resources for the enforcement authorities. In recent years, because of an increasing number of active enforcers and the anti-bribery enforcement actions, this has become a practical concern.[113] The question is whether Article 4(3) of the OECD Convention establishes a standard protecting this situation. Some argue that the Convention itself is the source of such a protection.[114] However, the provision can be also interpreted in a way that the Parties have an obligation to consult and not to decline prosecution if the other party already decided the case.[115] No matter which interpretation stands, the practical outcome is that it is up to the parties how they implement the provision and how they act in practice when facing a case prosecuted or decided

(2008).

108. *Id.* at 230.

109. *See id.*

110. *See* INFORMATION SHEET ON COMBATING BRIBERY, *supra* note 9, at 5.

111. *See* European Convention on Mutual Assistance in Criminal Matters, C.E.T.S. No. 30 §21 (1959).

112. *See generally* Strafgesetzbuch [StGB] [Penal Code] (Ger.).

113. Elizabeth K. Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT'L L. 1, 21 (2012).

114. *Id.* at 19.

115. Michael P. Van Alstine, *Treaty Double Jeopardy: The OECD Anti-Bribery Convention and the FCPA*, 73 OHIO ST. L. J. 1321, 1346–50 (2012).

elsewhere.

Both civil law and common law systems have developed mechanisms to prevent some of the possible jurisdictional overlaps. Civil law uses the old Roman law principle called *ne bis in idem* that is, in a way, similar to the principle of double jeopardy in common law jurisdictions.[116] However, these principles usually apply only to domestic cases.[117] U.S. law does not apply any general standard preventing jurisdictional overlap at the international level.[118] Moreover, the U.S. Supreme Court uses the so-called "dual sovereignty" doctrine that limits the effective use of double jeopardy when more than one sovereign is prosecuting the case.[119] Colangelo, in his extensive analysis of double jeopardy, comments: "by labeling successively prosecuting entities separate sovereigns, the Court permits multiple prosecutions and ends all further discussion under the Constitution's Double Jeopardy Clause."[120] The U.S. authorities approach the issue of overlapping jurisdiction on a case-by-case basis while also taking into account many variables. The U.S. claims that this is necessary because in many cases their counterparties do not cooperate—even if the US provides them with necessary evidence for a given bribery case.[121]

To give an example from a civil law jurisdiction, the OECD reports indicate that Germany is open to cooperation with other enforcers.[122] However, the German authorities are otherwise silent about the issue of overlapping jurisdictions.[123]

116. JACINTA ODUOR ET AL., LEFT OUT OF THE BARGAIN: SETTLEMENTS IN FOREIGN BRIBERY CASES AND IMPLICATIONS FOR ASSET RECOVERY 58–59 (2014), https://perma.cc/3KUW-WGDM.

117. *Id.*

118. *Id.* at 59.

119. Anthony J. Colangelo, *Double Jeopardy And Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U.L. REV. 769, 773 (2009).

120. *Id.*

121. ORG. FOR ECON. CO-OPERATION & DEV., UNITED STATES PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED STATES 22–3 (2010), https://perma.cc/7GSF-ZWC2.

122. ORG. FOR ECON. CO-OPERATION & DEV., GERMANY PHASE 3 REPORT ON IMPLEMENTATING THE OECD ANTI-BRIBERY CONVENTION IN GERMANY 48, 18.2.1 (2011), https://perma.cc/X6DK-EYSM [hereinafter GERMANY PHASE 3 REPORT].

123. *Id.*

Furthermore, the problem with *ne bis in idem* is that the principle traditionally prevents a subsequent prosecution and conviction of the same matter only in criminal matters.[124] Moreover, it usually applies only once a court reaches a final decision.[125]

IV. ANTI-BRIBERY ENFORCEMENT ACTIVITY US AND GERMANY

A. The United States

The U.S. is the leader in the enforcement of foreign bribery laws.[126] Robust U.S. enforcement is, however, a relatively recent practice, as the U.S. has only conducted most of its big bribery cases since 2007.[127] While from 2002 to 2006 the DOJ and the SEC conducted an average of three enforcement actions against corporations per year, it increased to an average of 14.25 enforcement actions between 2007 to 2014.[128] US authorities imposed financial penalties in the form of fines, disgorgement, and pre-judgment interest in the amounts of $87 million in 2006, $1.8 billion in 2010, and $1.57 billion in 2014.[129] In recent years, the trends suggest that the U.S. agencies focus on a relatively small number of global bribery schemes that generate high value of penalties; in 2014 for instance, the U.S. pursued actions against Alstom ($772 million), Alcoa ($384 million), Avon ($135

124. Spahn, *supra* note 113, at 48.

125. *Id.*

126. Branislav Hock, *Foreign Bribery Enforcement: Credibility and Clarity Problems*, 2016 OECD INTEGRITY FORUM 8 (2016), https://perma.cc/8W7N-GL99.

127. *Id.*

128. *Id.*

129. *See* SHEARMAN AND STERLING, LLP, FCPA DIGEST: CASES AND REVIEW RELEASES RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977 vi (2015), https://perma.cc/D26Z-3CNL. Statistics slightly differ depending on the source; to compare, *see also* THE FCPA BLOG, *FCPA Blog Lists* (2016), https://perma.cc/24ZY-QA5Y; Mike Koehler, *A Foreign Corrupt Practices Act Narrative*, 22 MICH. ST. INT'L L. REV. 961 (2014); *see also* Adam M. Burton & Michael B. Runnels, *The Foreign Corrupt Practices Act and New Governance: Incentivizing Ethical Foreign Direct Investment in China and Other Emerging Economies*, 34 CARDOZO L. REV. 295 (2012).

million), and Hewlett-Packard ($108 million).[130]

B. Germany

German enforcement against corporations occurs at a much lower rate than in the U.S.[131] The TI data indicate that from January 2011 to December 2014 Germany concluded ten major cases (but only two major cases in the last two years) as compared to sixty-two U.S. cases.[132] Germany acquired a high amount of points that contributed to its status of the second most active enforcer because it concluded sixty-four minor cases compared to only forty-six minor cases in the U.S.[133] Furthermore, Germany scored high because of their enforcement against natural persons rather than big multinational corporations.[134] On the one hand, according to the OECD monitoring reports, from January 2005 to December 2010, sixty-nine individuals were sanctioned,[135] while from March 2011 to March 2013, 141 individuals were sanctioned in twenty-one cases.[136] On the other hand, the Phase 3 report indicates that between 2007 and 2010, six legal persons were subjected to an administrative sanction after a court decision.[137] The Phase 3 follow up report states that there were six other legal persons sanctioned up until March 2013.[138] This study has not identified any other major case after March 2013, which means that from January 2011 to December 2015, Germany concluded, in total, twelve corporate enforcement actions.

Out of the twelve corporate actions, three are related to the Siemens enforcement scheme.[139] In addition, Germany was also

130. SHEARMAN AND STERLING, *supra* note 129, at vi.

131. PROGRESS REPORT 2015*, supra* note 69, at 13.

132. *Id.*

133. *See id.*

134. *Id.*

135. GERMANY PHASE 3 REPORT, *supra* note 122, at 9.

136. ORG. FOR ECON. CO-OPERATION & DEV., GERMANY FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS 3 (2013), https://perma.cc/P5SY-JCKB [hereinafter GERMANY FOLLOW UP REPORT].

137. GERMANY PHASE 3 REPORT, *supra* note 122, at 9.

138. GERMANY FOLLOW UP REPORT*, supra* note 136.

139. GERMANY PHASE 3 REPORT, *supra* note 122, at 10, 13.

an original enforcer in four significant enforcement actions that were not publicized. Firstly, German prosecutors successfully sanctioned two units of MAN AG: the Truck unit,[140] and the Turbo engines unit.[141] According to the FCPA Blog, MAN AG has paid €250 million in fines and investigation costs.[142] Secondly, the Phase 3 follow up report refers to "a fine pursuant to § 30 OWiG in the amount of approximately EUR 140,000,000,"[143] according to secondary sources imposed against Ferrostaal AG by the Munich I Public Prosecutor's Office.[144] Finally, the Trace Compendium and other sources refer to an agreement by LINDE AG to pay the state of Bavaria €35 million to resolve corruption allegations.[145] Unfortunately, these enforcement actions cannot be analyzed because German authorities rarely publicize information about concluded foreign bribery cases—a practice for which Germany faces criticism.[146]

V. U.S. ENFORCEMENT SCHEMES - SIEMENS AND BONNY ISLAND

The previous section draws a basic regulatory framework, assuming that national enforcement captures foreign bribery schemes through a relatively coherent set of specific anti-bribery norms. However, we will see that when it comes to the application of law in concrete cases, many other national legal

140. Decision of Munich I Public Prosecution office against the Trucks unit of MAN. Fine €78,3 mil., pursuant to §§ 130 and 30 OWiG. *See* GERMANY PHASE 3 REPORT, *supra* note 122, at 22–23 n.49.

141. Decision of a Munich I Regional Court pursuant against the Turbo engines Unit of MAN. Fine €75,3, pursuant to §§ 30 OWiG and §§ 334 and 222 StGB. *See id.*

142. Claudia Letzien, *MAN AG Discloses $344 Million in Penalties and Costs for Bribe Scandal*, THE FCPA BLOG (April 10, 2014), https://perma.cc/P2CD-MRJB.

143. GERMANY FOLLOW UP, *supra* note 136, at 9.

144. Ferrostaal AG is a former subsidiary of MAN SE. *FERROSTAAL*, TRACE INT'LCOMPENDIUM (2015), https://perma.cc/7FZV-DP9F.

145. LINDE, TRACE INT'L COMPENDIUM (2015), https://perma.cc/F4B2-FXDB; Joe Palazzolo, *Linde To Pay 35 Million Euros To Settle Corruption Allegations*, THE WALL STREET JOURNAL (June 8, 2011, 3:34 PM), https://perma.cc/4B98-LWKD.

146. *See* GERMANY PHASE 3 REPORT, *supra* note 122, at 25–26, 42.

provisions are relevant and may influence anti-bribery enforcement.[147] The following part contains an analysis of two enforcement schemes—Siemens and Bonny Island. The illegal activities of the violators are very different from each other. The first one is an example of endemic bribery of a corporation that has developed a culture of corruption and was charged for thousands of payments in substantively unrelated projects. The other is a substantively homogenous scheme in which many corporations engaged in bribery. We will see that enforcers use a number of legal paths through which they captured foreign bribes.[148] The analysis is divided into two stages: First, the main characteristics of the enforcement schemes are introduced; Second, the results of the analysis are presented.

A. Endemic Bribery: "Siemens as a Single Briber"

Siemens Aktiengesellschaft (Siemens AG) was, at the end of 2008, a multinational corporation organized under German law with its main offices in Berlin and Munich.[149] As a global market player in telecommunications, electronics, electrical engineering, transportation, and medicine, Siemens employed roughly 405,000 employees and operated through its subsidiaries, agents, and other groups and individuals in some 190 countries.[150] As of March 12, 2001 onward, Siemens was listed on the New York Stock Exchange (NYSE).[151]

1. The Core of the Enforcement Scheme—U.S. and Germany

Siemens has been subject to various corruption scandals in multiple jurisdictions.[152] In 2006, the Italian authorities

147. *Id.* at 16–19.

148. "Enforcement scheme" refers to cases related to the same or similar subject matter. These cases might be concluded by enforcement agencies all around the world.

149. Complaint at 3, Sec. & Exch. Comm'n v. Siemens Aktiengesellschaft, 1:08-cv-02167 (D.C.C. Dec. 15, 2008) [hereinafter Complaint].

150. *Id.*

151. Statement of Offense at 1, United States v. Siemens Aktiengesellschaft, No. 1:08-cr-00367-RJL (D.C.C. Dec. 15, 2008) [hereinafter Statement of Offense].

152. *See, e.g.*, Complaint, *supra* note 149; *see also* SIEMENS AG, TRACE INT'L

sanctioned Siemens for bribing the Italian energy utility corporation Enel.[153] The German prosecutor in Darmstadt consequently opened a criminal investigation against several Siemens employees to complement the Italian enforcement.[154] The German authorities at that time did not sanction the company.[155]

The core of the Siemens enforcement scheme lies in U.S. and German cases covering a number of charges. For instance, the SEC determined that Siemens accepted responsibility for bribes in projects such as the construction of metro transit system in Venezuela, construction of metro trains and signaling devices in China, building and servicing power plants in Israel, installation of mobile telephone service in Bangladesh, and in the design and installation of a traffic system in Russia.[156] Siemens also participated, via its French, Turkish, and other subsidiaries, in the Oil-For-Food Program bribery scheme in Iraq.[157]

At the first stage, Germany and the U.S. sanctioned Siemens for paying bribes.[158] The U.S. SEC concluded that between March 12, 2001 and September 2007 Siemens made 4,283 bribery payments totaling approximately $1.4 billion.[159] Foreign public officials received bribes through a variety of mechanisms, such as direct payments to business consultants, payments to intermediaries, or slush funds controlled by non-Siemens trustees.[160] Siemens even established special cash desks in their offices that served for its employees to withdraw cash for the

COMPENDIUM (2015), https://perma.cc/756T-DTD3.

153. STOLEN ASSET RECOVERY INITIATIVE, SIEMENS AG (ITALY SETTLEMENT), https://perma.cc/W394-QXXL.

154. GERMANY PHASE 3 REPORT, *supra* note 122, at 13.

155. The OECD points out that in the Enel case, individuals were charged with an offense other than foreign bribery because that time the German Court did not consider Enel's representatives as foreign public officials. *See* GERMANY PHASE 3 REPORT, *supra* note 122, at 13.

156. Complaint, *supra* note 149, at 2.

157. *Id.*

158. *Id.*

159. *Id.* at ¶ 13. However, the DOJ provides slightly different numbers; *see* Statement of Offense, *supra* note 151, at 21.

160. *See* SIEMENS AG, TRACE INT'L COMPENDIUM, *supra* note 152.

purpose of bribery.[161]

At the second stage, Siemens violated German and U.S. laws because it systematically circumvented internal controls and falsified books and records.[162] In order to escape potential investigation based on domestic anti-corruption laws, Siemens was already falsifying its transactions before bribery of foreign public officials was criminalized at the international level.[163] During the German and U.S. investigations, it became clear that "[f]rom the 1990s through 2007, Siemens engaged in a systematic and widespread effort to make and to hide hundreds of millions of dollars in bribe payments across the globe."[164] Siemens used, for example, off-books accounts, false invoices, and fake consulting agreements.[165]

The main line of U.S. and German cases consists of seven settlements between the company and the German and the American authorities, with one being reached in 2007[166] and six in 2008 (the main case).[167] The following overview shows these settlements in more detail.

> 1) October 4, 2007: Germany, Munich Public Prosecution Office v. Siemens AG. The Munich district court ordered Siemens AG to pay €201 million ($285 million) for bribes of Siemens's Telecommunications Unit in Russia, Nigeria and Libya. Two-hundred million Euros included unlawfully obtained economic advantages; €1 million served as an additional administrative fine.[168]
>
> 2) December 15, 2008: Siemens AG v. Germany, Munich Public Prosecution Office. This settlement was part of the main

161. *See* Statement of Offense, *supra* note 151, at 22.

162. Department's Sentencing Memorandum at 4, U.S. v. Siemens Aktiengesellschaft/Argentina/Bangladesh/Venezula, No. 1:08-cr-00367-RJL (D.C.C. Dec. 15, 2008).

163. Complaint, *supra* note 149, at 7.

164. *Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations*, U.S. DEP'T JUST. (Dec. 15 2008), https://perma.cc/5634-H62P.

165. *Id.*

166. SIEMENS AG, TRACE INT'L COMPENDIUM, *supra* note 152, at 7.

167. *Id.*

168. SIEMENS AG, SIEMENS ANNUAL REPORT 2007, (2008), https://perma.cc/9K54-B4ES.

case that Germany coordinated with the US authorities (see 3-5 below). The Munich district court ordered Siemens to pay €394.75 million ($529 million) for unlawfully obtained economic advantages and €250,000 as an administrative penalty.[169]

3) December 15, 2008: United States v. Siemens AG, DOJ. On the same day as the German authorities, the DOJ settled with Siemens for $448.5 million in criminal fines.[170] Furthermore, sanctions also included implementation of a rigorous compliance system and a four-year review by an independent compliance monitor.[171]

4) December 12, 2008: United States v. Siemens S.A. (Argentina)/United States v. Siemens Bangladesh Limited/United States v. Siemens S.A. (Venezuela).[172] In three separate proceedings, the DOJ settled with three wholly-owned Siemens subsidiaries. For each of them, the DOJ imposed a $500,000 criminal fine.[173]

5) December 15, 2008: United States v. Siemens AG, SEC. The SEC, in a civil proceeding, also settled with Siemens AG where the corporation agreed to pay $350 million in disgorgement of wrongful profits.[174]

2. Follow-up Enforcement

After these cases, other jurisdictions investigated and punished Siemens for its bribes, with the World Bank, Nigeria, and Greece conducting the most significant cases.[175] Firstly, the World Bank settled in July 2009 with Siemens in relation to its co-financed project in Russia.[176] The consequences for Siemens were significant as it agreed to refrain from bidding on the World Bank's projects for two years, to dedicate $100 million to combat corruption, and the World Bank debarred the Siemens'

169. SIEMENS AG, TRACE INT'L COMPENDIUM, *supra* note 152, at 6.
170. Department's Sentencing Memorandum, *supra* note 162, at 14.
171. For calculation of the fine and its justification, *see id.* at 11.
172. *Id.*
173. *Id.* at 14–15.
174. SIEMENS AG, TRACE INT'L COMPENDIUM, *supra* note 152, at 18.
175. *See generally id.*
176. *Id.* at 7.

subsidiary in Russia for four years.[177]

Secondly, in November 2010, Siemens settled in Nigeria on the basis of the Nigerian domestic anti-corruption law.[178] The settlement is confidential, but secondary sources imply that $46 million was paid to the Nigerian government.[179]

Thirdly, in April 2012, the Greek parliament adopted an *ad hoc* legislation that allowed Greece to settle with Siemens for approximately €270 million ($355.7 million).[180] Due to the general character of the settlement—and a special immunity granted to Siemens for all bribes until the day of the settlement—it is not clear what particular projects the settlement covered.[181]

3. Applicable Laws

The Siemens case shows that the German and the U.S. settlements cover a broad range of illicit conduct, including unrelated business projects. Applicable laws that captured these activities are presented in Table 1 below. Germany demonstrated that in two settlements. In the 2007 enforcement against Siemens's Telecommunication Unit, the German court held Siemens AG liable as part of the criminal proceedings, pursuant

177. Press Release, World Bank Grp., Siemens to Pay $100m to Fight Corruption as Part of World Bank Group Settlement (July 2, 2009), https://perma.cc/C9L4-Y7HL.

178. HALLIBURTON/KBR, TRACE INT'L COMPENDIUM (2015), https://perma.cc/ZLA3-4DNQ.

179. *Id.*

180. Press Release, Siemens AG, Siemens & the Hellenic Republic Reach a Settlement Agreement and Mark a New Beginning (Apr. 5, 2012), https://perma.cc/WJQ8-ADDM.

181. The Stolen Asset Recovery Initiative claims that the matter being settled was defined as:

> [A]ny and all matters, claims, and allegations to date, whether known or unknown relating to corruption; payments to (or promises to pay) third parties; other illegal activities on the part of Siemens, including without limitation all matters investigated by any Greek, German, or U.S. authority or [Siemens' law firm], including matters covered by Siemens' 2008 settlement with the German authorities and the SEC and DOJ in the United States.

See ODUOR, *supra* note 116, at 134.

to § 30 OWiG and in conjunction with § 334 StGB (offering a bribe) and § 266(1) StGB (breach of trust) against its former employees.[182] This enforcement action does not fully capture the systemic character of the Siemens bribing and relates to crimes of specific individuals.[183] However, one year later, the German authorities acted more loosely and imposed an independent regulatory fine through a prosecution of natural persons.[184] Moreover, they applied § 30 OWiG in conjunction with § 130 OWiG, which allowed them to capture the breach of a supervisory duty, meaning that the German courts also covered acts of lower-ranked employees committing offences because of insufficient supervision by managers and other relevant employees.[185]

The U.S. enforcement action included criminal settlements of the DOJ and a civil settlement of the SEC.[186] The DOJ settled with Siemens based on a violation of the FCPA's internal controls, and books and records provisions under 15 U.S.C. §§78m(b)(2)(A),[187] 78m(b)(2)(B),[188] 78m(b)(5),[189] and 78ff(a).[190] Although the DOJ took into account many individual acts of bribery when determining a criminal fine,[191] the settlement punishes a systemic failure. The SEC acted differently, although it also based its fines on the FCPA's anti-bribery provisions

182. GERMANY PHASE 3 REPORT, *supra* note 122.

183. Note that corporate liability is in Germany determined by a liability of natural persons. *Id.*

184. They based their claim on application of § 30(1) (4) OWiG and an exception under § 30(4).

185. *See* Bernd von Heintschel-Heinegg, *Nochmals Schmiergeldaffaire: Staatsanwaltschaft München I erlässt Bußgeldbescheid in Höhe von 395 Millionen € gegen Siemens*, BECK-BLOG (Dec. 12, 2008), https://perma.cc/MYC2-X4CK.

186. Press Release, U.S. Dep't of Just., Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), https://perma.cc/Y6XS-MBGM.

187. Richard L. Cassin, *Final Settlements For Siemens*, THE FCPA BLOG (Dec. 15, 2008, 7:22 PM), https://perma.cc/57AW-MNV7; *see also* Statement of Offense, *supra* note 151.

188. Cassin, *supra* note 187.

189. *Id.*

190. *Id.*

191. *Id.*

under 15 U.S.C. §§ 78dd-1.[192] The DOJ did not charge Siemens AG with the violation of the anti-bribery provisions, despite the language of the settlement, which gives the impression that the DOJ collected sufficient evidence to do so.[193]

Abbreviations C = Conspiracy	**Settlement US**			
Relevant Provisions	**Anti-Bribery** § 78dd-1,2 or 3		**(1): Books and Records** §§78m(b)(2)(A) **(2): Internal Controls** 78m(b)(2)(B) **(3): Knowingly** 78m(b)5	
	DOJ	SEC	DOJ	SEC
Siemens AG		**78dd1**	**(1)(2)(3)**	**(1)(2)(3)**
Siemens Argentina			**C- (1)(3)**	
Siemens Bangladesh	**C - 78dd3**		**C- (1)(3)**	
Siemens Venezuela	**C - 78dd3**		**C- (1)(3)**	
	Settlement Germany			
Relevant Provisions	**Criminal Proceeding Against Individual** 30 OWiG + STgB		**Independent** 30 (4) OWiG + 130 OWiG	
Siemens AG (2007)	30 OWiG + 334/266(1) STgB			
Siemens AG (2008)			30 (1)(4) OWiG + 130 OWiG	

Table 1: Fragmentation of Substantive Laws

Last but not least, the settlements with Siemens' headquarters are complemented with relatively minor charges directed at foreign subsidiaries of the company.[194] These included bribes to foreign public officials on behalf of Siemens' headquarters, while Siemens AG recorded the bribes as legitimate expenses in its books and records.[195] Thus, the DOJ charged them with conspiring with Siemens AG to violate the FCPA's books and records provisions under 15 U.S.C. §§78m(b)(2)(A) and §§78m(b)(5).[196] Furthermore, Siemens Bangladesh and Siemens Venezuela were also charged with conspiracy to violate the anti-bribery provisions under 15 U.S.C.

192. *See* Complaint, *supra* note 149, at 1.
193. *See* Statement of Offense, *supra* note 151.
194. Subsidiaries paid $500,000 each. *See id.*
195. *See id.*
196. *See id.*

§§78dd(3).[197] Table 2 below shows an overview of the bribery charges.

B. Bonny Island Project: "We'll Get Them All"

The TSKJ joint venture was established in 1991 in order to bid for contracts related to the Bonny Island Project, the project focused on designing and building liquefied natural gas production plants in Nigeria.[198] The TSKJ consisted of four members:

> a) Kellogg Brown & Root, LLC, (KBR, LLC), which was a wholly owned U.S. subsidiary of the Halliburton Company—a US "issuer" (Halliburton). After January 2009, a wholly owned subsidiary of Kellogg Brown & Root Inc., became a U.S. "issuer" (KBR, Inc.);
>
> b) Technip SA (Technip), was a company organized under French law and from August 2001 until November 2007 acted as an "issuer" within the meaning of the FCPA;
>
> c) Snamprogetti Netherlands B.V. (Snamprogetti), a company organized under Dutch law, was a wholly owned subsidiary of ENI S.p.A. (ENI), an Italian "issuer." ENI sold Snamprogetti to Saipem S.p.A. (Saipem) in 2006. ENI owns 43% of Saipem, which constitutes a controlling share; and
>
> d) JGC Corporation (JGC), a company headquartered in Tokyo, Japan.

1. The Core of the Enforcement Scheme

The TSKJ operated in Nigeria through several subsidiaries and agents that, between 1995 and 2004, acted on behalf of the TSKJ.[199] These companies were:

> a) LNG Service, a company based in Madeira, Portugal (LNG Madeira). The TSKJ established LNG Madeira to conclude

197. *See id.*; *see also* Press Release, *supra* note 186.

198. Complaint at 2–3, United States v. Kellogg Brown & Root LLC, No. 4:09-cr-00071 (S.D. Tx. 2009) [hereinafter Kellogg Brown Complaint].

199. *Id.*

contracts with their agents based in Gibraltar and Tokyo;[200]

b) M.W. Kellogg Limited (MWKL), a UK subsidiary of KBR and JGC that these companies used in order to channel funds to the LNG Madeira;[201]

c) Tri-Star Investments Ltd. (Tri-Star Gibraltar), a consulting corporation based in Gibraltar, an agent of the TSKJ;[202] and

d) Marubeni Corporation (Marubeni), a company headquartered in Tokyo, Japan,[203] another agent of the TSKJ.[204]

Nigeria LNG, established by the Nigerian government, had the right to award contracts related to the Bonny Island Project.[205] The biggest shareholder of Nigeria LNG was the government owned Nigerian National Petroleum Corporation (NNPC), which owned a 49% share.[206]

The TSKJ took part in the Bonny Island Project between the years 1995-2004.[207] During that time, Nigeria LNG awarded the TSKJ four contracts worth $6 billion in order to design and build natural gas plants.[208] The TSKJ members participated in the Project equally.[209] The TSKJ bribed officials and employees of Nigeria LNG, in order to win the contracts.[210] It hired two agents, Tri-Star Gibraltar and Marubeni, and used them for bribing—Tri-Star paid over $130 million to higher-ranked

200. Indictment, United States v. Jeffrey Tesler, et al., No. H-09-098 (S.D. Tex. Feb. 17, 2009) [hereinafter Indictment].

201. Michael Peel & Thomas Catan, *UK Failed to Tackle Nigeria Bribes Claim*, FINANCIAL TIMES, Oct. 13, 2004, https://perma.cc/X4PG-MM8Z.

202. Ken Silverstein, *Investigation Widens in Nigeria Oil Case Involving Halliburton*, L.A. TIMES, Oct. 4, 2013, https://perma.cc/GZD6-H56P.

203. Press Release, U.S. Dep't of Just., Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $54.6 Million Criminal Penalty (Jan. 17, 2012), https://perma.cc/9BVV-XLGE [hereinafter Press Release, Marubeni].

204. *Id.*

205. *Nigeria LNG Establishes N156 Billion Financing Scheme for Contractors*, PREMIUM TIMES, Dec. 4, 2013, https://perma.cc/FRA8-24FM.

206. *Id.*

207. Kellogg Brown Complaint, *supra* note 198, at 7.

208. *Id.* at 8.

209. *Id.*

210. *Id.* at 6.

officials, while Marubeni paid over $50 million to lower ranked officials.[211] The money allocated for bribing was sent from LNG Madeira's account in Amsterdam to Swiss, Monaco, and Japanese banks controlled by the agents.[212] Bank transfers to Switzerland and Monaco were sent via correspondent accounts in New York.[213] This fact played an important role in asserting jurisdiction over the members of the joint venture.[214]

In 2003, the French authorities were already investigating a former high official of Technip because of bribery schemes in Africa and Asia.[215] The official informed the French authorities about other bribery schemes, including the Bonny Island case.[216] Consequently, the French opened an investigation that triggered the attention of U.S., Swiss, and Nigerian authorities.[217]

From 2008 until 2012, the United States enforced its anti-bribery laws against all members of the TSKJ, the Marubeni as their agent, and several individuals.[218] The enforcement scheme consisted of five related cases divided into eight criminal and civil settlements with the DOJ and the SEC.[219] All of these cases deal with the same subject matter. The following overview discusses these settlements in more detail.

a) KBR, LLC, KBR, Inc., and Halliburton - $579 million

On February 11, 2009, the DOJ and the SEC, in their coordinated enforcement action, sanctioned KBR, LLC, and its

211. Indictment, *supra* note 200.

212. *Id.*

213. *Id.*

214. *See* RESOURCE GUIDE, *supra* note 89, at 7–11, 13.

215. Richard L. Cassin, *KBR: Nigerians Tell Their Own Story*, THE FCPA BLOG (2009), https://perma.cc/S6PU-5EPP.

216. *Id.*

217. *Id.*

218. The U.S. resolution started with investigation against Albert "Jack" Stanley, KBR formed chief executive officer (CEO). In addition, other individuals settled with the U.S. authorities: Jeffrey Tesler, a UK lawyer who was a bribing agent of the TSKJ and Wojciech Chodan, a KBT manager in the UK. It is noteworthy that Tesler agreed to forfeit $149 million. *See* Richard L. Cassin, *Stanley, Tesler, and Chodan Sentencings Postposed*, THE FCPA BLOG (Jan. 31, 2012), https://perma.cc/2WVD-SH69.

219. Press Release, Marubeni, *supra* note 203.

parent companies, Halliburton and KBR, Inc.[220] It is important to note that KBR, LLC, plead guilty and settled criminal charges with the DOJ for $402 million.[221] However, Halliburton paid most of the fine—$382 million—because of an indemnification agreement that Halliburton and KBR entered into during their separation in 2009.[222] Furthermore, the SEC settled with Halliburton and KBR, Inc. for a civil penalty of $177 million; Halliburton paid the civil sanction.[223] The indemnification agreement did not prevent KBR from all sanctions as it had, for instance, an obligation to be reviewed by an independent monitor for three years.[224]

b) Technip - $338 million

On June 28, 2010, the second member of the TSKJ settled with the DOJ and the SEC—Technip entered into a deferred prosecution agreement ("DPA") with the DOJ to pay $240 million.[225] Furthermore, the SEC settled with Technip for a civil sanction of $98 million and disgorged gains obtained from their bribery.[226]

c) Snamprogetti - $365 million

On July 7, 2010, the third member of the TSKJ settled with the DOJ and the SEC when Snamprogetti entered into a DPA with the DOJ to pay $240 million.[227] Furthermore, the SEC entered into a civil settlement with ENI and Snamprogetti.[228]

220. *Id.*

221. Press Release, U.S. Department of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009), https://perma.cc/Y4V8-LSZH.

222. SHEARMAN AND STERLING, *supra* note 129, at 295 (citing SEC v. Halliburton, Co., et al., No. 4:09-cv-00399 (S.D. Tex. 2009)).

223. *Id.*

224. *Id.*

225. Deferred Prosecution Agreement at 7, United States v. Technip S.A., No. H-10-439 (S.D. Tex. June 28, 2010).

226. SHEARMAN AND STERLING, *supra* note 129, at 100 (citing U.S. v. Kellogg Brown & Root LLC, No. 4:090-cr-00071 (S.D. Tex. 2009)).

227. Note also that ENI and Saipem were part of the settlement on behalf of Snamprogetti; *see* Deferred Prosecution Agreement at 1, 6, United States v. Snamprogetti Neth. B.V., No. H-10-460 (S.D. Tex. Jul. 7, 2010).

228. SHEARMAN AND STERLING, *supra* note 129, at 73 (citing U.S. v.

They agreed jointly and severally to disgorge $98 million of gains obtained because of their bribery.[229] ENI paid the fine, as it had agreed to indemnify Saipem for potential losses and charges resulting from the TSKJ investigations.[230]

d) JGC - $218.8 million

On April 6, 2011, the last member of the TSKJ settled with the DOJ: JGC entered into DPA with the DOJ to pay $218.8 million.[231]

e) Marubeni - $54.6 million

On January 17, 2012, Marubeni, an agent of the TSKJ, entered into a DPA with the DOJ to pay $54.6 million.[232]

All of the defendants, as part of their settlements, agreed to several other sanctions, such as retaining independent compliance monitors and independent consultants.[233] Some of them also agreed to implement better compliance and ethics programs.[234]

2. Follow-up Enforcement

The U.S. cases were not the only ones, as the Nigerian, U.K., and Italian authorities also investigated and punished the members of the TSKJ for their bribes in the Bonny Island Project.[235] Firstly, the Nigerian authorities, between 2010 and 2011, sanctioned all of the TSKJ's members based on Nigerian domestic anti-corruption laws.[236] The settlements are confidential, but secondary sources indicate that the companies paid approximately $126 million: JGC $28.5 million,

Snamprogetti Netherlands B.V., No. 1:10-cr-00460 (S.D. Tex. 2010)).

229. *Id.*

230. SAIPEM, ANNUAL REPORT 2009 (2010), https://perma.cc/A33A-5WW4.

231. Deferred Prosecution Agreement at 7, United States v. JGC Corp., No. 11-cr-260 (S.D. Tex. Apr. 6, 2011).

232. Press Release, Marubeni, *supra* note 203.

233. *Id.*

234. *Id.*

235. Dauda Garuba, *NIGERIA: Halliburton, Bribes and the Deceit of "Zero Tolerance" for Corruption*, NRGI BLOG (April 9, 2009), https://perma.cc/X5Q3-NB8R.

236. *Id.*

Snamprogetti $32.5 million, KBR/Halliburton $35 million, and Technip $30 million.[237] These settlements, similar to those in the Siemens case, granted wide immunities to the companies and individuals, including Dick Cheney, the former Halliburton CEO and former U.S. vice president.[238]

Secondly, on February 16, 2011, the UK Serious Fraud Office ("SFO") took actions to the High Court against MWKL, the UK-based subsidiary of KBR and JPG.[239] The SFO reported that MKWL settled for over £7 million (over $11 million) for a civil sanction.[240] The Court ordered the disgorgement of profits that MWKL acquired as the result of the anti-bribery violations of the third parties.[241] MWKL also agreed to improve its internal control mechanisms.[242] As a result, the Court did not apply the UK's foreign bribery laws, choosing instead Part 5 of the Proceeds of Crime Act 2002.[243]

Thirdly, on July 11, 2013, the Court of Milan in Italy ordered Snamprogetti to pay over €24.5 million (over $31.8 million) for confiscation of illegally obtained gains related to the Bonny Island Project.[244] Moreover, the company paid €0.6 million ($0.78 million) as an administrative fine.[245] The company unsuccessfully appealed the decision in February 2015.[246] Currently, the Court of Cassation is examining the decision.[247]

237. *Id.*

238. *Id.*

239. Robert Amaee & John Rupp, *U.K. Bribery and Corruption Enforcement Update Civil Orders*, 3 FIN. FRAUD L. REP. 511, 512 (2011).

240. STOLEN ASSET RECOVERY INITIATIVE, BONNY ISLAND LIQUEFIED NATURAL GAS BRIBE SCHEME (TSKJ CONSORTIUM)/KBR-M.N. KELLOGG LTD., https://perma.cc/BAT3-KAGP.

241. *Id.*

242. Press Release, U.K. Serious Fraud Office, MW Kellogg Ltd to pay £7 million in SFO High Court action (Feb. 16, 2011), https://perma.cc/U6MY-8GQW.

243. *Id.*

244. SAIPEM, ANNUAL REPORT 2014, at 126 (2015), https://perma.cc/7C6K-JPYU.

245. *Id.*

246. Press Release, Saipem, Milan Court of Appeal Decision Will Have No Financial Impact. Company to File Further Appeal With Italian Court of Cassation (Feb. 19, 2015), https://perma.cc/V5DL-6VHJ.

247. *Id.*

3. Applicable Laws

The Bonny Island case covers a single, decade-long bribery scheme.[248] In this scheme, several companies coming from various jurisdictions acted towards the same end.[249] The U.S. enforcement agencies settled with five of these companies.[250] The DOJ and the SEC based their settlements on substantive violations of the FCPA's anti-bribery provisions, company books and records, and internal controls provisions; they also factored in the charges of conspiracy and the aiding and abetting of these violations.[251]

Abbreviations A = Aiding and Abetting C = Conspiracy	**Anti-Bribery** § 78dd-1,2 or 3		**(1): Books and Records** §§78m(b)(2)(A) **(2): Internal Controls** 78m(b)(2)(B) **(3): Knowingly** 78m(b)5	
	DOJ	SEC	DOJ	SEC
Settlement 1: KBR LLC/KBR Inc/Halliburton				
KBR LLC	**78dd2** **C - 78dd1**	**78dd1** most of the fine paid by Halliburton		**A - (1) (2)** most of the fine paid by Halliburton
KBR Inc				
Halliburton				**(1) (2)**
Settlement 2: Technip				
Technip	**78dd1** **C - 78dd1,2**	**78dd1**		**(1) (2)**
Settlement 3: Snamprogetti (all fines paid by ENI)				
Snamprogetti	**C - 78dd1,2** **A - 78dd2**	**78dd1**		**(3)**
ENI				**(1) (2)**
Settlement 4: JGC				
JGC	**C - 78dd1,2** **A - 78dd2**			
Settlement 5: Marubeni				
Marubeni	**C - 78dd1,2** **A - 78dd2**			

Table 2: Applicable Laws in Bonny Island Enforcement Scheme

Table 2 above shows that the DOJ did not apply the record-keeping and internal controls provisions. Rather, the DOJ settled

248. Press Release, Marubeni, *supra* note 203.

249. *Id.*

250. *Id.*

251. William J. Stuckwisch & Matthew J. Alexander, *The FCPA's Internal Controls Provision: Is Oracle an Oracle for the Future of SEC Enforcement?*, 28 CRIM. JUST. 3 (2013).

with the members of the TSKJ and Marubeni by applying the anti-bribery provisions.[252] KBR and Technip were sanctioned for substantive violations while the others were qualified as accomplices, either by conspiracy or by aiding and abetting to KBR's and Technip's violations.[253] The SEC, in contrast to the DOJ, enforced not only the anti-bribery provision but also the record-keeping and internal controls provisions. Nevertheless, the SEC covered only "issuers" and their subsidiaries, *i.e.*, KBR, Technip, and Snamprogetti.

C. Enforcement Practice and Appropriate Jurisdiction

The U.S. is the absolute leader in the OECD Convention's enforcement, and uses a number of techniques in order to capture a wide range of bribery activities on the global market.[254] The two examples above show that the U.S. authorities use broad jurisdictional claims reaching the activities of corporations, their agents, subsidiaries, and other affiliated persons taking part all around the world.[255]

1. U.S.-Wide Jurisdiction

1) Territorial Nexus Interpreted Broadly: The U.S. authorities interpret what constitutes a nexus with their territory broadly.[256] For instance, we see a discussion of whether the U.S. authorities may claim jurisdiction once the bribery payments were channeled through a correspondent bank account in the U.S.[257] Most likely, such a transfer is not by itself a sufficient ground for U.S. jurisdiction, because it has always been

252. Compare with the Siemens case, where the DOJ did not use the anti-bribery provisions at all. *See generally* Department's Sentencing Memorandum, *supra* note 162.

253. For instance, C-78dd1 means that a given company conspired with an issuer, whole C-78dd2 stands for conspiracy with a domestic concern such as KBR, LLC.

254. ELIZABETH ACORN, THE POWER OF PROCUREMENT IN THE FIGHT AGAINST FOREIGN BRIBERY, 2016 OECD INTEGRITY FORUM (2016).

255. *Id.*

256. SHEARMAN & STERLING, *supra* note 129, at xii.

257. *Id.* at 276.

mentioned in combination with other arguments.[258] For instance, in the Hewlett-Packard (HP) bribery scheme, HP Poland organized a trip for an official to San Francisco, or in another instance, management of HP Russia discussed the Russian GPO project with HP in the United States via an email which was routed through the United States.[259] We saw above that JGC Corporation—a Japanese non-issuer—allegedly used the U.S. correspondent account, but was rather charged with conspiracy and aiding and abetting[260] under §§78dd-1 and 2.[261]

2) Conspiracy, aiding and abetting charges: Many foreign companies are reached by the use of conspiracy and aiding and abetting charges.[262] For instance, only one member of the TSKJ was a U.S.-based company, but at the end, all non-U.S. members of the joint venture and their foreign agent fell under U.S. jurisdiction.[263] For example, Marubeni, a foreign agent of the TSKJ, was charged despite the fact that it never acted while in the US.[264] It is therefore irrelevant whether potential actions of non-U.S. companies take any action in the U.S. once at least one co-conspirator was under U.S. jurisdiction. Similar claims also appeared in charges against the Siemens' foreign subsidiaries.

3) Liability for acts of others: Once a given company is an issuer, the U.S. authorities cover all subsidiaries controlled by the issuer, practically treating them as a parent company.[265] Together with the use of conspiracy charges, this allows authorities to cover all elements of formal and informal corporate structures, including foreign agents.[266] We also see that the U.S. authorities skip piercing of the corporate veil analysis in other

258. *Id.*

259. *See id.* at 8; *see also* Press Release, Dep't of Just., Hewlett-Packard Russia Agrees to Plead Guilty to Foreign Bribery, (Apr. 9, 2014), https://perma.cc/CU97-S6FP.

260. SHEARMAN AND STERLING, *supra* note 129, at 50.

261. 15 U.S.C. § 78dd-1 (2013); 15 U.S.C. § 78dd-2 (2011).

262. PROGRESS REPORT 2013, *supra* note 4.

263. *See supra* part 5.

264. *Id.*

265. PROGRESS REPORT 2013, *supra* note 4.

266. *Id.*

cases, such as against Ralph Lauren.[267]

2. German Enforcement is Limited

German enforcement against corporations is much lower than U.S. enforcement practices.[268] Germany has concluded ten major cases between 2011 and 2014, with only two cases in the last two years, compared to 62 U.S. cases.[269] According to Transparency International, Germany acquired a high amount of points that contributed to its status as the second most active enforcer because it concluded 64 minor cases compared to 46 cases in the U.S.[270] Furthermore, Germany scores high because of their enforcement against natural persons rather than big multinational corporations.[271] The lack of enforcement may lay in a number of political, economic, and legal reasons.

Firstly, the use of conspiracy, aiding and abetting charges, or de facto strict liability over foreign subsidiaries of multinational corporations is not present in German enforcement.[272] Furthermore, Germany does not recognize criminal liability of corporations, and the corporate sanction is the consequence of a criminal offense committed by a natural person.[273]

Secondly, some of the U.S. techniques that make enforcement so effective undermine the German rule of law. In this light, the lack of enforcement toward corporations may be connected with more deeply rooted differences between Europe and the U.S. in recognizing some essential legal concepts and principles, such as

267. Press Release, U.S. Dep't of Just., *Ralph Lauren Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $882,000 Monetary Penalty*, (Apr. 22, 2013), https://perma.cc/Z96F-S9SW; *see also* Koehler, *supra* note 23.

268. PROGRESS REPORT 2015, *supra* note 69, at 12.

269. *Id.* at 13.

270. *Id.*

271. GERMANY PHASE 3 REPORT, *supra* note 122, at 25.

272. Karin Madisson, *Duties and Liabilities of Company Directors under German and Estonian Law: a Comparative Analysis*, 7 RGSL RESEARCH PAPERS 3, 14 (2012).

273. Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring Uniquely American Doctrine Through Comparative Criminal Procedure*, 118:126 YALE L. J. 126, 129 (2008).

due process considerations.[274] The way U.S. agencies proceed with their cases—using their bargaining power in settlements, vague corporate liability charges, or leveraging jurisdiction based on conspiracy charges—may not be possible in Germany because these practices would not pass the constitutional scrutiny of the German Federal Constitutional Court.[275]

Thirdly, the U.S. is the leader in the OECD Convention's enforcement not because of its laws on jurisdiction and effective procedures, but mainly because of its position in the global market.[276] The U.S. can leverage its jurisdiction towards a significant amount of multinational corporations and lower the high costs of enforcement by punishing complex bribery schemes.[277] On the other hand, Germany and other countries—such as the U.K. or Switzerland—may not be in a position that would allow them to enforce in such a magnitude.

All these aspects may put a country like Germany into a position where the costs of an original enforcement action are too high. Nevertheless, even if this is the case, countries such as Germany are crucial for the U.S. because without their cooperation, even dedicated enforcement leaders would not catch some global bribery schemes in their complexity, or even at all. Germany provides additional evidence and other enforcement assistance and thereby decreases the enforcement costs to U.S. authorities.[278] Currently, Germany and similar jurisdictions can be considered an important partner and follow-up enforcement country that has a difficult time catching foreign bribery schemes because of their complexity, and cannot be expected to conduct many significant enforcement actions by itself.

274. *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, para. 2, Apr. 11, 1950, E.T.S. No. 5.

275. BUNDESVERFASSUNGSGERICHTS-GESETZ, BVERFGG [FEDERAL CONSTITUTIONAL COURT ACT], GERMAN LAW ARCHIVE, *translated in* FEDERAL LAW GAZETTE I 1474 (Aug. 31, 2015), https://perma.cc/VF83-JD5M.

276. *United States Mission to the Organization for Economic Cooperation and Development*, USOECD, https://perma.cc/2HA3-GP2H.

277. *Id.*

278. Diskant, *supra* note 273, at 143–44.

3. Coordination and Cooperation—Unity of the Case is Blurred

This case analysis points towards significant substantive and procedural fragmentation that makes coordination and cooperation, even within the OECD, difficult.[279] This difficulty relates to the leeway given by the principle of functional equivalence that lays at the heart of the OECD Convention.[280] Functional equivalence, for example, allows enforcers to decide how the case will be constructed and qualified, and allows the use of multiple proceedings.[281] In this light, designing *ex ante* norms on cooperation and coordination within the OECD may not be appropriate, or even possible, because we struggle to define what constitutes the unity of a foreign bribery case. The following paragraphs discuss the key aspects of substantive and procedural fragmentation.

1) Substantive Law Fragmentation and Types of Foreign Bribery Schemes

There is usually not a single briber and a single act of bribery. Depending on the strategy of a given enforcer, foreign bribery enforcement actions may present these acts in several different ways.

The Siemens scheme is an example of an endemic bribery scheme that is not confined to one bribery payment, but rather includes an array of different transactions scattered throughout the world.[282] What can be seen is that it covers a set of thousands of individual bribes conducted by Siemens' agents, subsidiaries, and other persons acting on its behalf.[283] In other words, Germany and the U.S. were sanctioning systemic violations of

279. Moreover, the fact that many countries are outside the OECD regime is also important because these countries may have significantly different views whether and how to prosecute bribery of foreign public officials.

280. Paragraph 2 of the Commentaries to the OECD Convention provides that: "This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system." Convention on Combating Bribery, *supra* note 3, at 14.

281. REPORT ON THE CROSS BORDER ENFORCEMENT OF PRIVACY LAWS 16 (2006).

282. Complaint, *supra* note 149, at 2.

283. *Id.*

multiple foreign bribery laws.

On the other hand, the Bonny Island scheme included a much smaller number of projects, but many corporations participated in the bribery.[284] The scheme is relatively homogenous as it focuses on a single subject matter and transaction.[285] This is different from the Siemens case, which covered a much broader range of activities.[286] The main issue is that although the U.S. authorities focused on a single subject matter, the enforcement covered nearly every entity involved in the bribery.[287] This way of enforcement best fits the idea of extraterritorial jurisdiction that is important in reaching the illegal activities of MNCs in all of their complexity.

One more example may be considered. There are a number of cases—such as the FIFA corruption scandal—where bribe-givers and bribe-takers are two constituent elements of a foreign bribery scheme.[288] Despite the fact that the latter are, in principle, outside the scope of foreign bribery laws, enforcement authorities can sometimes extend their jurisdiction and capture them as well.[289] For instance, we can see that organization such as FIFA can be infiltrated by a mafia-like organization that corrupts the entire process.[290] All members of such an organization may then be captured under special laws, such as the Racketeer Influenced and Corrupt Organization Act (RICO).[291] It is true that FIFA is not in essence an FCPA case, but the activities of marketing organizations, *vis-à-vis* quasi-public associations, nevertheless still represent one way foreign

284. Kellogg Brown Complaint, *supra* note 198, at 1.

285. *Id.* at 3.

286. *See generally* Complaint, *supra* note 149.

287. *Id.*

288. *Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption*, DEP'T OF JUST. (May 27 2015), https://perma.cc/CEM2-HBR9.

289. Joseph A. Fleishman, *FIFA Corruption Scandal Raises Unique Issues in Extradition Law*, N.C. J. OF INT'L L. 18 (2016).

290. FINANCIAL ACTION TASK FORCE, MONEY LAUNDERING THROUGH THE FOOTBALL SECTOR (July 2009), https://perma.cc/2JXW-53XY.

291. Organized Crime Control Act, Pub. L. No. 91-452, 18 U.S.C. §§ 1961-68 (1970).

bribery enforcement may be constructed and enforced.[292]

In all, there is always the consideration of an authority on how the case will be constructed appropriately through its facts, and what substantive laws should be applied to such a construction. For instance, enforcement authorities may tend to apply accounting provisions to situations encompassing thousands of bribes in a substantively unrelated project.[293] In fact, these activities might be seen as the continuation of one crime that is attributable to one company. Alternatively, they can apply the anti-bribery provisions to activities of multiple companies that conspire to win a single project.[294] Secondly, interpretation of these facts is crucial because it can lead to the application of various substantive laws factually capturing foreign bribes through means such as accounting, internal controls, foreign bribery laws, export laws, or domestic bribery laws.[295] This substantive concurrence may have serious impacts on many related procedural and substantive questions such as jurisdiction, coordination and cooperation.

2) Procedural Fragmentation

Furthermore, the functional equivalence and legal gaps in the OECD Convention may allow enforcement agencies to use multiple types of proceedings. Criminal, administrative, or civil proceedings include a number of decisions and legally relevant facts, some of them developed only in practice. Thus, defining "case" in a formal manner would not be useful because, for instance, national enforcement authorities negotiate agreements with defendants, aiming to speed up the process.[296] The defendant might provide evidence about its corrupt activities in exchange for non-prosecution or deferred prosecution, and lower penalties. These practices are formally part of a particular legal

292. For further information about the scheme, *see* Indictment, United States v. Webb et al., No. 15-cr-0252 (RJD) (RML) (E.D.N.Y. 2015).

293. R. CHRISTOPHER COOK & STEPHANIE CONNOR, THE FOREIGN CORRUPT PRACTICES ACT: AN OVERVIEW 2 (Jan. 2010).

294. Convention on Combating Bribery, *supra* note 3, at 39.

295. *Id.* at 10, 21–22, 25, 35–37.

296. *See* SCOTT D. HAMMON, THE U.S. MODEL OF NEGOTIATED PLEA AGREEMENTS: A GOOD DEAL WITH BENEFITS FOR ALL 1 (Oct. 17, 2006), https://perma.cc/D8C4-HRF9.

proceeding, but they are not final judgments wherein we could identify all relevant acts. For instance, in the Siemens case, the original enforcers—the U.S. and Germany—divided the enforcement scheme into seven interrelated settlements.[297]

If we come back to Table 1 above, for instance, it shows how the provisions of different national laws—FCPA, OWiG and STgB—applied to Siemens' foreign bribery activities.[298] We see that different enforcement authorities—SEC, DOJ and German prosecutors—used various substantive laws to capture foreign bribes.[299] The charges have civil and criminal, as well as administrative, character.[300] Furthermore, we see that some subsidiaries were captured via conspiracy charges.[301] Table 1 represents only the original, coordinated German and U.S. enforcement action.[302] However, many other domestic OECD and non-OECD members, along with the World Bank, followed up the already-complicated enforcement scheme. Therefore, in the light of these findings, the coordination of the broad jurisdictional claims is blurred and hard to achieve at the international level. This might lead to wasted enforcement resources and prevent OECD members from efficiently cooperating, coordinating their actions, and using their full potential to hold MNCs accountable for transnational bribery.

VI. CONCLUSION

The OECD Convention represents a "soft law" regulatory mechanism that lacks centralized anti-bribery enforcement authority. Furthermore, despite its effective implementation mechanism that unites 41 countries with many different legal and economic backgrounds, the Convention leaves many important jurisdictional issues to the discretion of national

297. STEPTOE & JOHNSON, LLP, INTERNATIONAL LAW ADIVISORY – RECORD U.S. AND GERMAN SETTLEMENTS OF THE SIEMENS CASE REFLECT NEW PENALTIES OF CORRUPTION CASES (Jan. 8, 2009), https://perma.cc/ME7J-WN9J.

298. *See supra* Table 1.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

states. We saw that the U.S. is the leader in the Convention's enforcement and uses conspiracy, aiding and abetting charges, or charges based on de facto strict liability of corporations over their foreign subsidiaries. These practices help the U.S. capture a large part of the global market.

In theory, extraterritoriality is seen as a unilateral, rather than multilateral and collaborative, practice. This practice can indeed function in initial stages of international regulatory regimes and is appropriate in situations where anti-bribery enforcement is lacking. As time passes, however, political and legal instruments related to extraterritoriality might not be able to cope with the dynamic structural changes of the regime and start preventing competitive neutrality and further development of the regime. The regime can only reach a new equilibrium if enforcers find political and legal instruments of shared responsibility or jurisdictional authority over foreign bribery spaces. This will be, at least within the scope of the OECD Convention, extremely challenging.

We should further focus on three main areas. Firstly, we should acquire more knowledge about how substantive and procedural norms and practices in the fields of money laundering, export controls or accounting and auditing contrast with foreign bribery. Secondly, the procedural issues must be taken seriously by nations that should acknowledge the importance of principles that may not be common in their jurisdictions. Foreign bribery enforcement cannot be optimal without balancing some principal legal clashes such as the flexibility and effectiveness of prosecution, separation of powers, and elementary due process requirements. We have to acknowledge that extraterritoriality functions differently in the hands of big economies and small economies. Germany and other countries, such as the U.K. or Switzerland, should be considered as important partners and follow-up enforcement countries. At the same time, we see that these countries have difficulties in catching foreign bribery schemes in their complexity, and cannot be expected to regularly lead many significant enforcement actions alone in the near future. In the current framework, it is crucial for these, and even smaller economies, to be active by providing evidence and other assistance in order to allow

enforcement leaders such as the U.S. to lower their enforcement costs by punishing complex bribery schemes. Smaller economies would then be able to, at least to a certain extent, influence and control the leader's enforcement either through factual or legal means.

While the OECD regulatory framework is an important instrument in the fight against transnational corruption and bribery, there are other frameworks for coordination of extraterritorial enforcement, when, for instance, it comes to anti-money laundering initiatives. We should consider integrating foreign bribery enforcement under the broader scope of these frameworks and financial crime regulation. If, however, the above-mentioned fragmentation becomes too much of a barrier to cooperation and coordination, the enforcement would remain highly political. Most probably, possible future enforcement from countries, such as Russia and China, may only further increase coordination problems. If that becomes the case, we should think about how political and "exemplary" extraterritorial enforcement may coexist with alternative anti-corruption regulatory mechanisms—such as private self-regulation or multi-stakeholder initiatives—that might be more credible, clear, and trustworthy than national states.