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CRIMINAL LIABILITY

Two former federal prosecutors continue to predict that as the world shrinks even further as a result of the global marketplace, a phenomenon they previously identified and described, "carbon copy prosecutions"—that is, charges being brought in different foreign jurisdictions for the same conduct—will continue to increase in frequency, size, scope, and force. Simply stated, the authors warn, carbon copy prosecutions are here to stay.

The Evolution and Status of 'Carbon Copy Prosecutions': An Anticorruption Phenomenon Here to Stay

BY ANDREW S. BOUTROS AND T. MARKUS FUNK

One emerging trans-national trend we have tracked for some time—and first wrote about in 2012—is the phenomenon of "carbon copy prosecutions." Stripped to its core, when we first developed the term carbon copy prosecution back in 2011, we described the following: "When foreign or domestic Jurisdiction A files charges based on a guilty plea or charging document from Jurisdiction B." (Boutros coined the term "carbon copy" prosecutions during a presentation he and Funk delivered in Toronto in the summer of 2011 at the ABA Annual Meeting Presidential Showcase Panel.) Since that time, the term has gained considerable currency; countless law firm client updates now regularly report on instances of carbon copy prosecutions, and most recently Deputy Attorney General Rod Rosenstein in late 2017 spoke about it in virtually identical terms: "One concern is about multiple law enforcement and regulatory agencies pursuing a single entity for the same or substantially similar conduct."

The old (indeed, by contemporary legal standards perhaps "ancient") days of one-dimensional government investigations appear to be over. Here we explain why duplicative, serial enforcement actions are now part and parcel of the enforcement landscape, despite a healthy ongoing debate over the need for, and fairness of, such serial enforcements. Carbon copy prosecutions have already left their seemingly permanent mark and have joined the international vernacular dealing with cross-border corruption matters. Our continued prediction is that, as globalization continues to shrink the world, carbon copy prosecutions will continue to increase in frequency, size, scope, and force. Simply stated, carbon copy prosecutions are here to stay.

The Basics

On occasion, a company will reach a negotiated resolution with U.S. authorities on international bribery-related charges—whether through a nonprosecution agreement (NPA), a deferred prosecution agreement (DPA), or a guilty plea. Although in those cases the U.S. authorities may be perfectly satisfied with the resolution, the authorities in other countries where the bribery (and harm) actually occurred may for good reason not equally view their interests as being vindicated. In those situations, there exists a bona fide risk that the other countries will initiate prosecutions based on the

same operative facts as, and admissions arising out of, the U.S. investigation and resolution.

Relatedly, if an individual company officer is even tangentially involved or implicated in a U.S.-negotiated resolution, that officer—even if not named at all in the resolution—now faces the specter of potential criminal charges overseas. The officer, therefore, has a strong incentive to ensure that the resolution does not name him or her and describes the officer's conduct in the most positive light (or at least neutrally).

The net effect of today's DOJ and SEC FCPA settlement policies demanding that defendants not later disclaim their culpable conduct is that when a company enters into a negotiated resolution with U.S. enforcers, it is essentially powerless to defend against—much less deny—the factual basis on which the resolution is based. This all but ensures that a company that settles with the DOJ—or both the DOJ and SEC in parallel proceedings—will have little or no choice but to settle with foreign authorities, should such authorities choose to exercise jurisdiction and enforce their corollary anticorruption laws.

A country's incentive to vindicate its own laws, moreover, is not insubstantial, especially when a company or individual has already admitted, in another proceeding (say, in the United States), to violating local law. Accordingly, both named parties and non-parties implicated in a resolution in one country ought to give due consideration to the potential impact of that resolution in another territory, especially in light of intensifying trends pointing to coordinated multinational cooperation and successive enforcement proceedings.

The Early Halliburton Example

In February 2009, oilfield services giant Halliburton Co. settled with U.S. authorities for a then-record-breaking $579 million to put an end to charges that one of its former units bribed Nigerian officials to obtain multibillion-dollar contracts to build liquefied natural gas facilities on Bonny Island, Nigeria. The resolution no doubt brought a sigh of relief to those Halliburton executives who had been under investigation but who, at the conclusion of the U.S. probe, had not been criminally or civilly charged. For many of them, however, that relative calm ended on Dec. 7, 2010, when Nigerian anticorruption authorities released a 16-count criminal complaint against Halliburton, several related companies, and many of their C-suite executives for conduct that mirrored—and that the companies to a great extent had already publicly admitted to being part of in—the resolved U.S. criminal and administrative cases.

Even more, the announcement garnered worldwide headlines due to its inclusion of former U.S. Vice President Richard Cheney, the one-time Halliburton CEO. Nigerian authorities also sought extradition of the defendants (including Cheney), invoking its longstanding extradition treaty with the U.S. The U.S. and Nigeria entered into an extradition treaty on Dec. 22, 1931, which went into effect on June 24, 1935. See 47 Stat 2122 (1931), codified at 18 USC §§ 3181–96).

Within two weeks, Halliburton settled the Nigeria case. But the message sent by the actions of the Nigerian authorities was loud and clear. First, if a corporation reaches a negotiated resolution with U.S. authorities on international bribery-related charges—whether through an NPA, a DPA, or a guilty plea—there is a bona fide risk that other countries will initiate prosecutions based on the same facts as, and admissions arising out of, the US investigation and resolution. Second, if an individual corporate officer is even tangentially involved or implicated in a U.S.-negotiated resolution, that corporate officer—even if not named at all in the resolution—faces potential criminal charges overseas. The officer, therefore, has a strong incentive to ensure that the resolution either does not name him or her or describes the officer's conduct in the most positive light (or at least neutrally).

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Carbon Copy Prosecutions: A New Fixture in the International Enforcement Arena

A Definition and Explanation of Carbon Copy Prosecutions

As noted at the outset, we use the term ''carbon copy prosecutions'' to refer to successive, duplicative prosecutions by multiple sovereigns for conduct transgressing the laws of several nations, but arising out of the same common nucleus of operative facts. Although such actions may have been an ''emerging'' trend six years ago, today we view carbon copy prosecutions as a seemingly permanent fixture in the equation used to conduct and resolve international anticorruption investigations.

For years—especially during the early gestation period of cross-border corruption enforcement actions—corporate targets concerned themselves primarily with whether they would face liability from *both* the DOJ and SEC for overseas conduct violating the Foreign Corrupt Practices Act (FCPA). However, exposure to liability from a single sovereign is no longer the singular concern. Now, companies and their executives and

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agents cannot afford to focus exclusively on the enforcement arms of the DOJ and SEC, both acting on behalf of the unitary, monolithic sovereignty of the United States. Today's international enforcement picture is much more complex. (For example, in addition to civil and criminal liability, wrongdoers face debarment under the World Bank's antifraud and corruption policy. See *World Bank Sanctions Procedures* § 9.01 (World Bank Group Jan. 1, 2011). See also Pascale Dubois, *Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank's Sanctions System*, 2012 U Chi Legal F 195, 227–28 (2012)).

First, an increasing number of nations are enacting—or at least contemplating—enhanced anticorruption laws. For example, Brazil, China, Russia, Thailand, and the United Kingdom have passed new (or at least ''newer'') and enhanced anticorruption legislation, while India continues to make headways. Australia, France, Mexico, Indonesia, Jordan, Morocco, Taiwan, and the Ukraine, furthermore, are among those countries also to have recently proposed or adopted anticorruption measures. More importantly for purposes of this article, and as more recent foreign enforcement actions demonstrate, more and more nations are actively *enforcing* their own local anticorruption laws. As such, serious consideration must be given to the increasing likelihood of successive prosecutions by multiple sovereigns for the same core conduct that gives rise to U.S. liability.

Of course, an important distinction must be made between the theoretical risk of prosecution and a foreign nation's actual, demonstrated willingness to prosecute. (Indeed, the statistics show that foreign enforcements continue to considerably lag behind U.S. enforcement activities. *See* T. Markus Funk and M. Bridget Minder, *The FCPA in 2011 and Beyond*, 6 Bloomberg L Rep—Corporate and M&A Law at 10 (''[A]lthough the world may, indeed, be . . . passing more local anti-corruption legislation . . . its collective zeal to actually enforce anti-corruption laws continues to significantly lag.'')

To be sure, for years companies and others have known and understood—at least on a theoretical level—that from an international jurisdictional standpoint, an illegal act committed in one nation could give rise to liability in another nation that prohibits the same or a similar act (or conduct facilitating the commission of the illegal act). For example, a bribe paid overseas by a U.S. agent to a foreign official not only offends the FCPA and the U.S. Travel Act (18 USC § 1952), but it almost certainly violates the local laws where the bribe was paid and accepted. Even more, with the proliferation of extraterritorial provisions in the criminal laws of nations that prohibit international bribery, a single improper payment can trigger liability not only in the U.S. under the FCPA *and* in the country where the bribe took place, but in *every* jurisdiction that claims a codified interest in putting an end to foreign bribery by those that carry on a business, or part of a business, within its territories. (One such example is the UK Bribery Act, which includes a jurisdictional provision that captures within its reach all entities and partnerships that ''carr[y] on a business, or part of a business, in any part of the United Kingdom,'' even if the improper payment itself has no territorial connection to the United Kingdom. Bribery Act 2010, c 23 s 7(5) (UK)).

But carbon copy prosecutions do not refer to questions of overlapping jurisdiction among nations, nor does the term implicate hypothetical enforcement opportunities arising out of the quilt-like pattern of overlapping foreign laws that prohibit international bribery. Instead, it describes the real-world, burgeoning—and now here-to-stay—phenomenon of consecutive prosecutions (or at least investigations) in multiple jurisdictions for the same (or similar) underlying conduct. (Carbon copy prosecutions are also to be distinguished from global resolutions across countries, such as the global settlements (or proposed global settlements) involving: (1) Siemens (resolution with U.S. and Germany), (2) BAE Systems PLC (resolution with the U.S. and U.K.), and (3) Innospec Inc (resolution with the U.S. and U.K.)

Indeed, two key features of these prosecutions are:

(1) the *timing* in which often foreign governments bring their follow-on actions, and

(2) the *subject matter* of these enforcement actions.

Turning from the general to the specific, more recent enforcement trends tell a story of foreign countries initiating largely *similar* (if not nearly identical) foreign proceedings with increased frequency *after* a company has already resolved its FCPA liability with US authorities, whether by way of an NPA, a DPA, or a guilty plea. In this regard, one organization, the Socio-Economic Rights and Accountability Project (SERAP), petitioned the Nigerian government to ''urgently take steps to seek adequate damages and compensation against multinational corporations who have been found guilty in the U.S. of committing foreign bribery in Nigeria.'' In fact, in an effort to provide specific, actionable information to the Nigerian government in support of its petition, SERAP identified by name those companies that had already admitted to having committed FCPA violations in Nigeria, yet had received no, or in SERAP's views too little, punishment under Nigerian law.

According to SERAP:

> While settlement by Halliburton Co and Kellogg Brown & Root LLC (KBR) in Nigeria has amounted only to US $35 million, the corporation has paid over $727 million in settlement and damages in the US. Similarly, Technip SA has paid $338 million in settlement in the US, but has not paid any damages in Nigeria. Snamprogetti Netherlands BV and ENI SpA paid only $32.5 million in Nigeria, but has [sic] paid $365 million in the US.
>
> JGC Corp paid $28.5 million in Nigeria but paid $218.8 million in the US; MW Kellogg paid no damages in Nigeria, but has paid £7 million in the UK. Also, Julius Berger Nigeria Plc has paid only $29.5 million in Nigeria, while Willbros International has paid over $41 million in the US but has made no payment in Nigeria. Panalpina paid $82 million in US, but no payment has been made in Nigeria. The Royal Dutch Shell Plc has paid only $10 million in Nigeria whereas it has paid $48.2 million in the US.
>
> . . . Pride International paid $56.1 million in the US but made no payment in Nigeria; Noble Corp has paid $8.1 million in the US but no payment made in Nigeria; Tidewater Inc has paid $15.7 million in the US but no payment in Nigeria; Transocean Inc made payment of $20.6 million in the US but no payment made in Nigeria; Shell Nigerian Exploration and Production Co. Ltd paid $18 million in the US but no payment in Nigeria; and Siemens AG paid only $46 million in Nigeria, whereas it paid $800 million in the US.

In the face of this, the Nigerian government in fact has reached settlements with some of the entities identified by SERAP, including for $6 million with Tidewa-

ter and $2.5 million with Noble. (*See* Stolen Asset Recovery Initiative, *Asset Recovery Watch*, available at http://star.worldbank.org/corruption-cases/assetrecovery.)

When faced with such serial, linear enforcement proceedings, companies can be expected to resolve their successive enforcement actions in a manner similar to their original resolution.

Indeed, the DOJ has recently addressed the challenges presented by carbon copy prosecutions. In a speech to the Clearing House's 2017 Annual Conference on Nov. 8, 2017, DAG Rosenstein referred to a "piling on problem," wherein "multiple law enforcement and regulatory agencies pursu[e] a single entity for the same or substantially similar conduct." He cautioned that punishing the same conduct more than once "has the potential to undermine the spirit of fair play and the rule of law" and "deprive a company, as well as its employees, customers, and investors, of the benefits of certainty and finality ordinarily available through a full and final settlement." Rosenstein promised that, in response to this problem, the DOJ is "committed to making a concerted effort to apportion penalties among both international and domestic agencies, where appropriate," citing as an example to a December 2016 FCPA plea agreement with a Brazilian petrochemical company where the DOJ credited the defendants for the amounts they paid to foreign law enforcement agencies. Rosenstein also pointed to the DOJ's increasing coordination with antitrust and tax regulators in foreign countries and reported that the DOJ was "considering proposals to improve coordination in [multi-jurisdictional] situations and to help avoid duplicative and unwarranted payments."

At the same time, Rosenstein was clear that his comments did not mean that the DOJ would never pursue fines or penalties that could be construed as overlapping. He stressed that "[t]here may be situations where the penalties in a foreign country are not an adequate substitute for those imposed by U.S. authorities, or where the punishment by another enforcement authority does not make all victims whole, including the U.S. Government and taxpayers." He also emphasized the need for the DOJ to dis-incentivize companies from forum shopping internationally by making their disclosures only to more lenient foreign regulators, stating that the DOJ will "use all lawful tools to ensure that wrongdoers do not escape justice." In other words, carbon copy prosecutions are here to stay.

Practical Implications of Carbon Copy Prosecutions

When a company enters into a negotiated resolution with the DOJ, it must allocute; that is, it must *admit, accept, and acknowledge* responsibility for the underlying conduct that gave rise to liability. In the case of a guilty plea, a court is not permitted to accept a guilty plea unless it "determine[s] that there is a factual basis for the plea." (Fed. R. Civ. P. 11(b)(3)). Moreover, a district court's acceptance of a guilty plea is a "factual finding" that a defendant is guilty of the charge.

In contrast, and until January 2012, the SEC had a long-standing policy of settling cases by allowing a party neither to admit nor to deny the agency's allegations in the civil injunctive complaint or administrative order. But on Jan. 7, 2012, the SEC announced a modification to the "settlement language [appropriate] for cases involving criminal convictions where a defendant [ ] admit[s] violations of the criminal law." "[T]he new policy does not require admissions or adjudications of fact beyond those already made in criminal cases, but eliminates language that may be construed as inconsistent with admissions or findings that have already been made in the criminal cases." The policy applies regardless of whether the criminal resolution comes in the form of a conviction, NPA, or DPA. Naturally, then, the Statement of Facts in a criminal plea agreement—especially in those cases with parallel SEC enforcement exposure—can prove to be the most negotiated (and contested) portion of such a resolution.

Similarly, when a company admits to the factual basis in a DOJ-based DPA or NPA, the terms of the agreement typically *bar* the company from making any public statement *contradicting* the factual basis. Moreover, these agreements ordinarily empower the DOJ alone to determine whether a company has breached its agreement and taken a position contradicting the factual basis.

The net effect of these DOJ and SEC policies is that when a company enters into a negotiated resolution with the DOJ—particularly in those cases with parallel SEC enforcement actions—it is in real terms powerless to defend against, much less deny, the factual basis on which the resolution is based. (*See* Andrew S. Boutros, et al., *Response, Prosecution Agreements: A View from the Trenches and a Proposal for Reform*, 93 Va L Rev In Brief 121, 128–29 (2007) (describing FirstEnergy's predicament of potentially violating its DPA because of a "highly nuanced, legalistic argument" it made in submitting a claim for insurance coverage)). This all but ensures that a company that settles with the DOJ—or both the DOJ and SEC in parallel proceedings—will have little or no choice but to settle with foreign authorities, should such authorities choose to exercise jurisdiction and enforce their corollary anticorruption laws.

Historically—and even more so today—the principal reason that companies meticulously negotiate the factual statements included in out-of-court settlements is to blunt the onslaught of potential follow-on derivative and employment lawsuits, tort and contract law claims, securities fraud actions, and private actions under the Racketeer Influenced and Corrupt Organizations Act (RICO). (The authors explain: The whole point of a DPA is that companies may not be able to weather the storm of an indictment without it; upon indictment, companies are likely to face fundamental instability, downgrading of creditworthiness, loss of market share, diminution of stock value, market and reputational damage, debarment from certain industries, regulatory proceedings, and class actions.)

By keeping the factual statement as simple as possible, companies position themselves to be able to defend themselves more vigorously against these piggyback civil actions, while at the same time avoiding claims that they are contradicting the negotiated factual statements. In today's international anticorruption climate, however, such concerns transcend civil liability and reach the very real possibility of sequential liability to foreign sovereigns. (An enforcement action based upon Article 53 of the U.N. Convention Against Corruption could allow a country such as Nigeria to come into a U.S. court and seek compensation from a U.S. company that has committed bribery in Nigeria or require

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the DOJ/SEC to recognize a foreign country that has ratified the UNCAC as the ''legitimate owner'' of profits disgorged or fines and penalties paid to the U.S. government as a result of a FCPA violation.)

Noteworthy Examples of Carbon Copy Prosecutions

Alcatel-Lucent

Take, for example, Alcatel-Lucent SA—a case involving a *double dose* of carbon copy prosecutions. In January 2010, the French-based telecommunications equipment and services provider agreed to pay $10 million to the Costa Rican government to settle charges that it had paid some $7 million in kickbacks to Costa Rican government officials (including $800,000 that went directly to former Costa Rican President Miguel Angel Rodriguez) to win a 2001 cellular telephone equipment contract valued at $149 million. The settlement ''marked the first time in Costa Rica's history that a foreign corporation agreed to pay the government damages for corruption.''

Less than a year later, in December 2010, US authorities announced that Alcatel-Lucent and three of its subsidiaries had resolved a pending six-year FCPA investigation. As part of this resolution, Alcatel-Lucent agreed to pay a combined $137.4 million to the DOJ and SEC to resolve a variety of FCPA violations arising from millions of dollars of improper payments to foreign officials in Costa Rica, Honduras, Malaysia, and Taiwan. Specifically, to settle the SEC's civil complaint, Alcatel-Lucent agreed to pay $45.4 million in disgorgement to the SEC and also consented to an injunction from future violations of the FCPA's antibribery, books-and-records, and internal controls provisions.

To resolve its criminal case with the DOJ, Alcatel-Lucent agreed to proceed by way of criminal information (as opposed to indictment) and entered into a three-year DPA that included a nearly forty-five page statement of facts chronicling years of improper payments and lax controls. Significantly, as part of its prosecution agreement, Alcatel-Lucent also agreed to cooperate with foreign authorities in their investigations.

Specifically, Alcatel-Lucent's DPA stated:

> At the request of the Department, and consistent with applicable law and regulations . . . Alcatel-Lucent shall also cooperate fully with such other domestic or foreign law enforcement authorities and agencies, as well as the Multilateral Development Banks (''MDBs''), in any investigation of Alcatel-Lucent, or any of its present and former officers, directors, employees, agents, consultants, contractors, subcontractors, and subsidiaries, or any other party, in any and all matters relating to corrupt payments, related false books and records, and inadequate internal controls, and in such manner as the parties may agree.

Alcatel-Lucent also agreed that:

> With respect to any information, testimony, documents, records or other tangible evidence provided to the Department pursuant to this Agreement, Alcatel-Lucent consents to any and all disclosures, subject to applicable law and regulations . . . to other governmental authorities, including United States authorities and those of a foreign government, and the MDBs, of such materials as the Department, in its sole discretion, shall deem appropriate.

Three of Alcatel-Lucent's subsidiaries resolved their criminal cases by pleading guilty to charges of conspiring to violate the FCPA, and each agreed to a 43-three page consolidated statement of facts. As part of their plea agreements, the Alcatel-Lucent subsidiaries agreed that, ''at the request of the Department,'' the subsidiaries would ''cooperate fully with foreign law enforcement authorities and agencies.''

Two days later, Honduran authorities responded to the news of Alcatel-Lucent's U.S. resolution by announcing that they would *reopen* their investigation against Alcatel-Lucent and, more specifically, into the now-admitted conduct that occurred in Honduras and gave rise to Alcatel-Lucent's U.S. liability. According to news reports, ''Honduran anti-corruption prosecutor Henry Salgado said Honduras will ask the U.S. Securities and Exchange Commission to supply the information on which the settlement was based, [in order] to identify those [in Honduras who were] involved.'' According to Salgado, ''[i]n this case, international assistance should be asked for, in order to access the file and see who made the payments to [the Honduran government officials]. . . . If we accept the guilt, there must be people's names. We expect international collaboration.'' Such collaboration, according to the news reports, meant that the ''plan'' would be to ''petition'' the SEC and DOJ for information. This news came despite the fact that the ''Alcatel relationship had already been investigated [ ] by the Honduran High Court of Auditors, who found no improprieties.''

Nigerian-Based Carbon Copy Prosecutions

The Bonny Island Prosecutions: Halliburton Although carbon copy prosecutions are a globally emerging (and growing) trend, the movement became especially pronounced in Nigeria.

Take, for example, the case of the earlier-mentioned Bonny Island joint venture, in which the TSKJ consortium—Technip, SA, a French company; Snamprogetti Netherland BV, a Dutch company; Halliburton Co., a U.S. company; and JGC Corp., a Japanese company—paid some $182 million in third party consulting fees, with the expectation that some of those fees would be used to pay bribes to Nigerian officials. Three of the joint venture participants are of particular relevance here: KBR and its parent companies Halliburton and KBR Inc; Snamprogetti and its parent company ENI SpA; and JGC.

When, in February 2009, Halliburton's former subsidiary KBR pleaded guilty to five counts of violating the FCPA, it admitted to being part of the TSKJ consortium that had paid at least $182 million in consulting fees. As discussed above, these fees were used in part to pay bribes to Nigerian government officials between 1995 and 2004, with the goal of securing engineering, procurement, and construction contracts to build liquefied natural gas facilities. The contracts were valued at approximately $6 billion and led to KBR profits of approximately $235.5 million. As part of its plea agreement, KBR agreed to pay a $402 million criminal fine. Simultaneously, KBR's current and former parent companies—KBR Inc and Halliburton, respectively—entered into civil settlements with the SEC based on alleged internal control failures and falsified corporate books and records. The two entities agreed to disgorge jointly $177 million in profits derived from the FCPA violations. In total, Halliburton, KBR Inc, and KBR agreed to a total payment package of $579 million to resolve their FCPA matters.

Less than two years later, in early December 2010—*after* Halliburton, KBR Inc., and KBR had resolved their Bonny Island criminal and civil liability in the U.S.—Nigeria's anticorruption agency, the Economic and Financial Crimes Commission, filed a 16-count criminal complaint, based on the *same* Bonny Island activities, against KBR, Halliburton, and current and former executives of each. The charges against KBR's then-current CEO were lodged notwithstanding KBR's claim that the CEO joined KBR *after* the conclusion of the conduct associated with the Bonny Island projects.

Similarly, the Nigerian government charged Vice President Cheney even though, according to Cheney's lawyer, ''[t]he Department of Justice and the Securities and Exchange Commission investigated that joint venture extensively and found no suggestion of any impropriety by Dick Cheney in his role of CEO of Halliburton.'' Despite this, news outlets reported that, according to Nigerian authorities, an arrest warrant for Cheney (and presumably others) would be ''issued and transmitted through Interpol,'' typically the first step in an extradition process.

According to some, ''[i]t [was] believed the Nigerian authorities want[ed] to probe the case further *from their perspective*,'' notwithstanding the U.S. investigation. Others speculated that the Nigerian probe was politically motivated: ''There could [have] be[en] political calculations at play in the new charges. Nigerian President Goodluck Jonathan face[d] a[n] [up]coming primary election in the nation's ruling party against former Vice President Atiku Abubakar,'' and ''the charges c[a]me as the election loom[ed].'' Either way, at the time, KBR insisted that it would ''continue to vigorously defend itself and its executives if necessary, in th[e] matter'' and it described the actions of the Nigerian government as ''wildly and wrongly asserting blame.''

Less than two weeks later, however, KBR's fight ended when Halliburton agreed to pay $35 million to the Nigerian authorities to settle bribery allegations of ''distribution of gratification to public officials.'' According to Halliburton's statement on the issue:

> Pursuant to [the settlement] agreement, all lawsuits and charges against KBR and Halliburton corporate entities and associated persons have been withdrawn, the [Federal Government of Nigeria (FGN)] agreed not to bring any further criminal charges or civil claims against those entities or persons, and Halliburton agreed to pay US$32.5 million to the FGN and to pay an additional US$2.5 million for FGN's attorneys' fees and other expenses.

Halliburton also ''agreed to provide reasonable assistance in the FGN's effort to recover amounts frozen in a Swiss bank account of a former . . . agent [associated with the Bonny Island projects] and affirmed a continuing commitment with regard to corporate governance.''

Snamprogetti & JGC Corp.

A similar pattern ensued with Snamprogetti and JGC Corp., two additional members of the TSKJ consortium. In July 2010, the Italian energy company ENI SpA and its Dutch subsidiary Snamprogetti resolved FCPA charges arising out of their shares of bribes paid in connection with the Bonny Island projects. ENI and Snamprogetti jointly settled their civil cases with the SEC and agreed to disgorge $125 million in profits. Snamprogetti also entered into a DPA with the DOJ to resolve two criminal counts of FCPA-related violations and agreed to pay a $240 million criminal fine. Less than five months later, Snamprogetti agreed to pay $32.5 million to settle a carbon copy prosecution brought by Nigerian authorities for the same conduct that gave rise to its FCPA liability. In return, the ''Federal Government of Nigeria agreed to dismiss all charges against Snamprogetti . . . and to renounce to [sic] any civil claims and criminal charges in any jurisdiction'' against the company.

Similarly, in January 2011, JGC Corp. agreed to pay $28.5 million to Nigerian authorities to resolve its portion of the bribes paid by the TSKJ consortium. But in a reversal of the typical order of enforcement proceedings, four months later, JGC Corporation entered into a prosecution with the DOJ to resolve criminal FCPA charges.As part of its US-based resolution, JGC Corporation agreed to pay a $218.8 million criminal fine.

Shell and Siemens

In 2010, the Nigerian Economic and Financial Crimes Commission brought additional carbon copy prosecutions against FCPA defendants that had resolved international bribery cases with U.S. authorities. First, Royal Dutch Shell Plc (Shell) paid $10 million to Nigerian authorities in December 2010 after already having paid $48.15 million in criminal fines, disgorgement of profits, and interest to US authorities in November 2010. Second, Siemens AG paid $46.5 million to Nigerian authorities in November 2010 after having paid $800 million to U.S. authorities to resolve the largest-ever FCPA matter in U.S. history and $569 million to the Munich, Germany, Public Prosecutor's Office—for a total combined payment of nearly $1.4 billion—in December 2008.

Indeed, Siemens has been the subject of a variety of other anticorruption carbon copy enforcement actions and debarment proceedings besides its resolutions with U.S., German, and Nigerian authorities. For example, on March 9, 2009, Siemens was notified by the Vendor Review Committee of the U.N. Secretariat Procurement Division (UNPD) that it was being suspended from the UNPD vendor database for a minimum period of six months. Siemens' suspension ''stemmed from [its] guilty plea in December 2008 to violations of the U.S. Foreign Corrupt Practices Act.'' Although Siemens sought to lift the suspension on Dec. 22, 2009, it remained disqualified from U.N. contracting opportunities until Jan. 14, 2011, at which point Siemens was invited to re-register with the UNPD.

Similarly, on July 2, 2009, ''in the wake of the company's acknowledged past misconduct in its global business,'' Siemens entered into global settlement with the World Bank Group in which it agreed to pay $100 million over the next 15 years to support anticorruption work. Siemens also agreed to up to a four-year debarment for its Russian subsidiary and a voluntary two-year cease-and-desist from bidding on World Bank business for Siemens AG and all of its consolidated subsidiaries and affiliates. In addition, in February 2012, Siemens agreed to pay the Greek government €270 million (approximately $336 million) to resolve bribes dating back to the 1990s. The Greek Parliament approved the settlement on April 5, 2012. Despite the fact that Siemens has resolved the above matters, it continues to ''remain[ ] subject to corruption-related investigations in several jurisdictions around the world.''

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Other Examples

U.S. authorities have sometimes carbon copied other jurisdictions, as well. For example, in 2013, a Ukrainian subsidiary of Archer-Daniels-Midland Company, Alfred C. Toepfer International, entered a guilty plea in the Central District of Illinois to violating the FCPA by paying bribes to Ukrainian officials in exchange for tax refunds. The plea agreement recognized that German authorities had previously prosecuted the same conduct and gave Toepfer $1,338,387 in credit to account for the German fine, resulting in U.S. criminal penalties of $17.8 million. A parallel SEC proceeding ended in a consent judgment requiring the company to pay roughly $36.5 million in disgorgement and prejudgment interest.

Similarly, in 2014, the DOJ and SEC settled with ZAO Hewlett-Packard A.O. over charges of Russian bribery. The DOJ's plea agreement acknowledged a previous German investigation and payment by ZAO HP and ultimately assessed a fine of $58.8 million. U.K.-based pharmaceutical company Glaxo-Smith-Kline was likewise prosecuted first in China and then in the U.S. over allegations that it bribed health officials and doctors in China to prescribe its products. In September 2014, a Chinese court fined the company $490 million; it then paid a $20 million civil penalty to the SEC in 2016. In November 2016, the Indian Central Bureau of Investigation filed corruption charges against Embraer SA, which had resolved similar charges with Brazil and the U.S. in October 2016. And Dutch oil services company SBM Offshore NV paid a $238 million to U.S. authorities and entered into a deferred prosecution agreement in November 2017 for bribing government officials in Brazil, Angola, Equatorial Guinea, Kazakhstan, and Iraq. SBM was first investigated by Dutch Authorities and paid a $240 million settlement there in 2014, and also reached a $342 million settlement with Brazilian authorities in 2016.

And although they are not carbon copy prosecutions in the sense we have defined that term, a few additional recent U.S. prosecutions have reflected international cooperation and purported to resolve corruption allegations for multiple international jurisdictions. These ''global'' resolutions are worth noting. For example, in January 2017, Rolls Royce Plc ''agreed to pay the U.S. nearly $170 million as part of an $800 million global resolution to investigations by the department, U.K. and Brazilian authorities into a long-running scheme to bribe government officials in exchange for government contracts.'' The allegations against Rolls Royce included bribery of officials in Thailand, Brazil, Kazakhstan, Azerbaijan, Angola, and Iraq, and the company also agreed in separate contemporaneous settlements to pay $604,808,392 to the U.K.'s Serious Fraud Office (SFO)and $25,579,170 to Brazil's Ministerio Publico Federal. Similar recent cases of international cooperation and coordination have included Odebrecht SA, VimpelCom Ltd, and Telia Company AB.

Carbon Copy Prosecutions: Evaluating The Cost-Benefit Considerations (And Self-Reporting Options)

The recent trend toward transnational carbon copy prosecutions has created some unavoidable forks in the road for those mired in internal investigations and follow-on government-led actions. At the initial stage of disclosure, for example, companies now must evaluate not only whether to voluntarily disclose potential FCPA violations to U.S. authorities, but they must also consider whether, and to what extent, to make simultaneous—or nearly simultaneous—*front-end* self-disclosures to foreign authorities. Of course, real costs and benefits inform this analysis.

Potential Benefits of Early Multi-Sovereign Disclosures to U.S. and Foreign Authorities

1. Front-End Considerations On one side of the ledger, simultaneous multi disclosures to U.S. and foreign officials ensure that the very entity that presumably benefited from the improper payments, or on whose behalf the improper payments were made, promptly and directly delivers the bad news to interested government authorities. Multi-sovereign disclosures also ensure that foreign governments are—or, at least, can be said to be—treated equally to the U.S. government. Indeed, early multi disclosures are an acknowledgement at some level that the foreign jurisdiction that is the site of the crime, and whose government officials may have actually been corrupted, has at least an equally great interest in vindicating its own local laws.

Moreover, U.S. authorities may favorably view such transnational disclosures. Such disclosures demonstrate a corporate commitment to making aggrieved sovereigns whole, or, at a minimum, reflect respect for the local jurisdictions. Prompt and direct local disclosures also avoid a scenario in which foreign governments are caught off guard with headline-grabbing news of corrupt conduct committed by their own officials. Multi-front disclosures enable local governments to get ahead of a potential media crisis and are likely to place the company in better stead with the local jurisdictions. (*See* Andrew S. Boutros, et al., *FCPA Investigations: Working Through a Media Crisis*, 22 Bloomberg Law White Collar Crime Rep 3 (Nov 29, 2007).

In short, early disclosures empower local authorities to gain control of a situation; to remove or otherwise contain corrupt public officials earlier rather than later in the process; and to respond proactively to allegations of government corruption.

Multi-front disclosures also tend to reduce the likelihood of duplicative investigatory work, both for law enforcement authorities and private counsel, and thus have the potential to lead to economies of scale. Early multi-sovereign disclosures ensure that potentially interested foreign and domestic governments are consulted from the beginning on matters relating to the investigation, including, for example, how the investigation can be conducted; what additional follow-up items might be pursued; and what local legal or factual concerns should be addressed during an otherwise U.S.-focused investigation. Such disclosures also make it more likely that foreign governments will be willing to cooperate and coordinate *both* with U.S. authorities *and* with company counsel in their collective efforts to interview witnesses, obtain permission to enter the local jurisdictions, and otherwise obtain and export relevant material from the local jurisdictions to the United States.(One example of a law that makes removal of material from a jurisdiction difficult is China's law on the protection of State secrets. *See* Congressional-

Executive Commission on China (CECC), *Law of the People's Republic of China on Guarding State Secrets*, (Dec 13, 2003)).

2. Back-End Considerations At the back-end, early multi-sovereign disclosures are also more likely to lead to global settlements, with the benefits of coordinated resolutions and across-the-board finality. For example, coordinated worldwide disclosures and ensuing investigations generally increase the likelihood that a corporation can successfully petition U.S. authorities for one-for-one credit for any compensatory or penal payment made to local authorities as part of a global resolution. The converse is also true; by cooperating and complying with local authorities from the beginning of an investigation, a company might be more successful in its effort to dissuade a foreign government, even the United States, from bringing a carbon copy prosecution. Even beyond questions of prosecutorial discretion, however, the substantive laws of other nations and other related treaty obligations may well create serious advantages that favor—or disadvantages that cut against—early front-end multi-sovereign disclosures.

3. International Double Jeopardy a Key Consideration As a matter of U.S. law, ''[t]he Constitution of the United States has not adopted the doctrine of international double jeopardy.'' (*See United States v Martin*, 574 F2d 1359, 1360 (5th Cir 1978). *See also United States v. Jeong*, 624 F.3d 706, 712 (5th Cir 2010) (''Double jeopardy thus does not attach when separate sovereigns prosecute the same offense, as here.''); *Mow v United States*, 730 F2d 1308 (9th Cir 1984) (describing a contrary argument as ''frivolous'')). That is, ''prosecution by a foreign sovereign does not preclude the United States from bringing criminal charges.'' (*See United States v Richardson*, 580 F2d 946, 947 (9th Cir 1978). As the Supreme Court stated in the context of successive state-state prosecutions, ''[w]hen a defendant in a single act violates the peace and dignity of two sovereigns by breaking the laws of each, he has committed two distinct offences,'' and as such, ''it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable.'' *Heath v Alabama*, 474 US 82, 93 (1985)). Nor does the Double Jeopardy Clause ''prevent extradition from the United States for the purpose of a foreign prosecution following prosecution in the United States for the same offense.'' (*See Elcock v United States*, 80 F Supp 2d 70, 75 (EDNY 2000). *See also United States v. Guevara*, 443 Fed. App'x 641, 644 (2d Cir 2011); *In re Ryan*, 360 F Supp 270, 274 (EDNY 1973), affd 478 F2d 1397 (2d Cir 1973) (''There is no constitutional right to be free from double jeopardy resulting from extradition to the demanding country.'')).

But the same rule does not hold true in other nations—''[t]here are [ ] limitations on multiple prosecutions by different sovereign jurisdictions established by treaty or [foreign] domestic laws.''

For example, Richard Alderman, while then the director of the U.K.'s SFO, discussed key differences between the U.S. and the U.K. approaches to the double jeopardy doctrine, as well as the doctrine's effects on the U.K.'s ability to bring a carbon copy prosecution. Using the BAE enforcement action to expound upon the operation and application of the U.K. double jeopardy doctrine, Alderman candidly explained that when BAE ''agreed to plead guilty to offences brought by the U.S. Department of Justice[,] [t]hat plea of guilty had consequences so far as the SFO's investigation was concerned.'' (*See* Mike Koehler, *A Conversation with Richard Alderman Regarding BAE*, FCPA Professor Blog (March 15, 2011)). According to Alderman, because BAE ''pleaded guilty in the U.S. to offences relating to Central and Eastern Europe[,] [u]nder the U.K. law of double jeopardy, it was no longer possible for the SFO investigation relating to Central and Eastern Europe to continue.'' (*Id.*) Given that ''the law on double jeopardy differs as between the U.S. and the U.K.,'' Director Alderman stated rather explicitly that ''the SFO needed to terminate the investigations relating to Central and Eastern Europe once [BAE's] plea of guilty was entered in the U.S.'' (*Id.*)

Alderman next explained that the U.K. double jeopardy analysis depends not on the offense charged by the original charging jurisdiction, but rather on the underlying facts used to support the offense, regardless of the offense itself. (*Id.*) Specifically, Alderman responded as follows when presented with a question regarding the SFO's prosecution of BAE after BAE entered into its resolution with U.S. authorities:

■ Question: As to the double jeopardy issue, the offense BAE pleaded guilty to in the U.S. was not a corruption offense, but rather a charge of conspiracy to make false statements to the U.S. government including as to its compliance with the provisions of the FCPA. . . . [C]ertain of the factual allegations supporting this non-corruption offense related to Central and Eastern Europe. Are you suggesting that simply because facts are alleged in a U.S. prosecution to support a non-corruption charge, that the U.K. is thereby prohibited from bringing a corruption charge as to those facts?

■ Answer: Yes. [The U.K.] double jeopardy law looks at the facts in issue in the other jurisdiction and not the precise offence. Our law does not allow someone to be prosecuted here in relation to a set of facts if that person has been in jeopardy of a conviction in relation to those facts in another jurisdiction. As a result I could not continue to consider whether to prosecute BAE for an offence relating to Central and Eastern Europe once BAE had pleaded guilty in the U.S. (*Id.*)

Thus, in deciding whether to make front-end or back-end multi-sovereign disclosures, careful consideration should be given to the double jeopardy doctrine and practices of the local jurisdiction (and of any other interested nation with extraterritorial anticorruption jurisdictional reach).

Potential Costs of Early Multi-Sovereign Disclosures to U.S. and Foreign Authorities

Early multi-sovereign disclosures—and the cascading consequences that flow from them—are also not without distinct potential drawbacks. To state the obvious, such disclosures have the prospect of exponentially complicating investigations. They could necessitate that resources be allocated across different continents, with teams of professionals simultaneously interacting with different government personalities, constituents, cultures, and priorities. They could require organizations to staff and coordinate worldwide investigations moving at different paces, with different scopes and focuses, and responding to varying levels of governmental sophistication.

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Parallel cross-border investigations can also implicate conflicting substantive laws, procedural rules, modes of evidence gathering, and data privacy rights. They can expose *persons*—not just companies—to sequential prosecutions by multiple sovereigns, absent a treaty or local law to the contrary.(*See United States v Jeong*, 624 F3d 706, 711–12 (5th Cir 2010) (upholding a defendant's sequential U.S.-based conviction following his South Korean conviction for the same conduct and holding that Article 4.3 of the OECD's Anti-Bribery Convention ''does not prohibit two signatory countries [such as the United States and South Korea] from prosecuting the same offense'' because the OECD Convention only requires countries with concurrent jurisdiction to consult with one another upon request). They could lead foreign sovereigns to charge—and seek the extradition of—U.S. executives or non-U.S. personnel before the completion of the U.S. investigation. They have the potential to cause local persons implicated in the underlying conduct—or even material witnesses with relevant information—not to cooperate with a joint U.S.-local sovereign investigation. And, in the view of some, early disclosures to—and coordinated efforts on the part of—foreign governments may all but ensure that foreign sovereigns bring their own tagalong enforcement actions, as proof positive of their commitment to fight corruption and to secure concrete, tangible results for their early involvement in, and assistance with, the U.S. investigation. In fact, in investigations of potentially improper payments in multiple jurisdictions, one foreign government might choose to break away from the pack and strike first, insisting on settling its matters first, even in those cases where the global investigation is, as a whole, far from complete. (Alcatel-Lucent's resolution with Costa Rican authorities, which occurred nearly a year before Alcatel-Lucent settled its FCPA case with US authorities, might be one such example as previously discussed).

Quarterbacking these myriad issues—much less doing so in a seamless and efficient manner—poses serious challenges at a variety of levels. As one practitioner summarized, ''[i]nterest from law enforcement agencies from other countries significantly increases the complexities surrounding when, and to whom, to self-report, how and when to conduct internal investigations, what to do with the results of the internal investigation, and how to structure global settlements with multiple countries with conflicting legal jurisprudence.''

Not to be Overlooked: The Potential Collateral Estoppel Effects of Foreign Judgments

As a historical matter, the critical issue of the potential collateral estoppel effects of carbon copy prosecutions often receives inadequate attention. By way of illustration, assume a company's employee brings a whistleblower retaliation action in India. The case is fully and fairly litigated between the company and the employee, and the employee prevails. There is a very real chance that—barring something improper about the India-based litigation—if the employee also brings a whistleblower action in a U.S. court, key factual disputes may be deemed to have been resolved in the foreign litigation.

The Nuts and Bolts of Collateral Estoppel

Collateral estoppel, also known as ''issue preclusion,'' is a common law estoppel doctrine that prevents a party from relitigating an issue. Put another way, once a court has decided an issue of fact or law necessary to its judgment, collateral estoppel precludes relitigation of the same *issue* in a different lawsuit involving the parties to the first case. In contrast, res judicata, also known as ''claim preclusion,'' bars litigation of the same *case* between the same parties.

Collateral estoppel can also apply to criminal cases. Unlike double jeopardy, which generally requires a prior acquittal or conviction to preclude the proceedings, collateral estoppel is not similarly limited. To the contrary, ''collateral estoppel is applicable in criminal cases only when double jeopardy is not.'' And in respect of issues resolved in foreign proceedings, provided the foreign proceedings were fair, impartial, and compatible with U.S. conceptions of due process of law, facts resolved in foreign courts can have a preclusive effect on subsequent proceedings in U.S. courts. What follows is a brief discussion of the steps involved in determining whether the relitigation of a particular issue is likely to be collaterally estopped.

'Standard' Two-Stage Collateral Estoppel Analysis

The question of whether collateral estoppel bars relitigation of certain factual disputes requires two analytical steps.

1. Does the U.S. Recognize the Foreign Judgment? In U.S. courts, the Full Faith and Credit Clause of the U.S. Constitution dictates whether a court in one state will recognize the judgment issued in the court of another state. Judgments of foreign nations' courts and tribunals, in contrast, can potentially be recognized domestically under federal law by resorting to the (somewhat ''squishy'') doctrine of comity—a principle more akin to courtesy than compulsion. Former Seventh Circuit Judge Richard Posner, in the case of *United States v Kashamu*, 656 F3d 679 (7th Cir 2011), summarized the concept of comity as ''a doctrine of deference based on respect for the judicial decisions of foreign sovereigns (or of U.S. states, which are quasi-sovereigns).'' But commentators, as well as Supreme Court decisions, have criticized the doctrine of comity because of its elusive definition.

Under the doctrine of comity, foreign judgments are entitled to recognition if they:

- Were made upon appropriate notice;
- Presented the opportunity for a full and fair presentation of evidence;
- Were before a foreign court of competent jurisdiction, which operated in a legal system likely to provide for the impartial administration of justice in disputes between the citizens of that foreign nation and other nations; and
- Did not prejudice the litigants' rights as U.S. citizens or otherwise contravene U.S. public policy.

Conversely, then, reasons for *not* recognizing a foreign judgment include:

- The rendering foreign court lacked jurisdiction;
- The judgment offended US public policy;
- The judgment was tainted by fraud; or

- The judgment prejudiced the rights of US citizen-litigants by failing to accord them due process or to adhere to generally accepted notions of jurisprudence.

Once a litigant has cleared the foreign-judgment-recognition hurdle, the inquiry shifts to whether the scope of the preclusive effect of the foreign judgment is governed by the laws of the rendering foreign state, the U.S., or its states. The Restatement, commentators, and courts have been unable to reach consensus on this question.

2. What Is the Scope of the Judgment's Preclusive Effect? The decision concerning which jurisdiction's collateral estoppel rules apply to a foreign judgment is complicated by the fact that the Full Faith and Credit Clause does not compel the outcome. Some courts avoid answering this difficult conflict of laws question altogether, either by finding a perceived conflict or by adopting the parties' choice of law (the latter, for obvious reasons, making this step particularly easy).

a) Minority practice: default to rendering state's issue preclusion law. The minority practice is simply to default to the rendering foreign state's issue preclusion law. Reasons supporting this approach include that it treats the foreign court no differently than one domestic court would treat another domestic court and that it prevents unfair surprises to litigants who formed their expectations based on litigation in a particular legal regime.

b) Majority practice: apply US collateral estoppel rules to the foreign judgment. There are valuable benefits from applying U.S. rules of collateral estoppel to foreign judgments. Applying U.S. issue preclusion rules is administratively easier for U.S. courts and arguably less costly for parties. To the extent that U.S. rules are broader than foreign rules of issue preclusion, moreover, the U.S. rules better advance the underlying rationale for claim and issue preclusion. Finally, application of domestic preclusion rules protects the interests of U.S. citizens, who might have been involuntarily hauled into, and successfully defended against a case filed in, a foreign court.

The Collateral Estoppel Take-Away

In order to avoid costly collateral estoppel mistakes, practitioners must understand the complex and intricate collateral estoppel principles of the rendering foreign state, and should concurrently evaluate the possible follow-on impact of foreign litigation and any potentially applicable collateral estoppel rules. Regardless of whether a U.S. court follows the minority or prevailing approach to evaluating the collateral estoppel effects of foreign judgments, the practitioner should be prepared to explain precisely how adopting or declining to follow the collateral estoppel principles of a rendering foreign jurisdiction advances the underlying rationales of collateral estoppel, res judicata, comity, and U.S. public policy.

Conclusion

The phenomenon of carbon copy prosecutions has arrived and staked a claim in the international anti-corruption enforcement paradigm. A country's incentive to vindicate its own laws is not insubstantial, especially when a company or individual has already admitted, in a foreign proceeding, to violating local law. Accordingly, both named parties and non-parties implicated in a resolution in one country ought to give due consideration to the potential impact of that resolution in another territory, especially in light of increasing trends pointing to coordinated multinational cooperation and successive enforcement proceedings. The days of one dimensional government investigations appear to be over for good. Duplicative, serial enforcement actions are now part and parcel of the enforcement landscape, despite a healthy ongoing debate over the need for, and fairness of, serial enforcements. Our continued prediction is that, as globalization makes the world smaller, what we call carbon copy prosecutions will increase in frequency, size, scope, and force.

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