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GLOBALIZED CORPORATE PROSECUTIONS

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INTRODUCTION

IN the past, domestic prosecutions of foreign corporations were not particularly noteworthy. Scholars had little reason to examine issues raised by prosecutions of foreign firms. Courts rarely had the occasion to analyze jurisdiction in such cases. Foreign nations did not complain that the United States inappropriately prosecuted their firms or questioned their criminal law or enforcement capabilities. All of this has changed. Federal prosecutors now advertise how they target foreign corporations. The Department of Justice (“DOJ”) publicizes its goal to “root out global corruption”¹ and to

¹ Alice Fisher, Assistant Attorney Gen., U.S. Dep’t of Justice, Address at the American Bar Review National Institute on the Foreign Corrupt Practices Act (Oct.

use a variety of tools to ensure “the stability and security of domestic and global markets.”² Foreign firms, and their employees, are increasingly convicted of a range of crimes including antitrust violations, environmental crimes, Foreign Corrupt Practices Act (“FCPA”) violations, tax fraud, wire fraud, and bank fraud.

Three notable cases that I discuss in Parts I, II, and III, respectively, provide a snapshot view of this shift. The FCPA prosecution of German multinational industrial firm Siemens AG involved payments of \$1.4 billion in bribes to government officials in sixty-five countries. Siemens spent half a billion dollars in legal fees investigating the case internally and then pleaded guilty, paying an \$800 million fine and another \$800 million in fines to German prosecutors.³ Second, the tax fraud prosecution of the Swiss bank UBS AG resulted in a deferred prosecution agreement—a \$780 million fine—and an unprecedented agreement to divulge the names of thousands who failed to pay U.S. taxes, contrary to Swiss privacy laws and sparking a diplomatic firestorm, but then a treaty.⁴ Third, a mass of prosecutions in the United States and six other countries targeted \$1.8 billion in kickbacks to the Saddam Hussein regime associated with the former U.N. Oil for Food program in Iraq, “conceivably the largest international anti-corruption investigation ever.”⁵

In this Article, I explore these important foreign corporate prosecutions and develop empirical data describing them as a group. First, I describe in Part I how a global approach towards corporate prosecutions developed. Foreign firms seek leniency to avoid potentially catastrophic consequences of a conviction at the hands of U.S. prosecutors. They do not face such consequences at home. Corporate criminal liability is a form of American Excep-

16, 2006), available at <http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf>.

² Criminal Division, U.S. Dep’t of Justice, FY 2011 President’s Budget 4 (2011), available at <http://www.justice.gov/jmd/2011justification/pdf/fy11-crm-justification.pdf> (describing strategic priorities of the Criminal Division).

³ See *infra* Section I.A.

⁴ See *infra* Section II.A.

⁵ Claudius O. Sokenu, *Clarifying Travel and Entertainment Under the FCPA*, N.Y.L.J., Mar. 13, 2008, at 4; see *infra* Section III.A.

tionalism.⁶ Most countries in Europe and the world lack corporate criminal liability generally and only recently have enacted a handful of specific corporate crime statutes.⁷ Foreign countries impose civil regulatory fines and individuals may be prosecuted, but firms rarely face prosecution. Corporations have some incentive to cooperate with local regulators, but cooperating with U.S. prosecutors is imperative. Not only is there broad respondeat superior liability for corporations in the United States for criminal acts of employees, but federal criminal law is also broader and far more punitive than that in other countries.⁸ Federal prosecutors possess extraordinarily wide discretion as compared to their counterparts around the globe.⁹ The consequences of a criminal indictment or a conviction in the United States can sometimes be significant, though certainly not always. Firms may be debarred by regulators or from government contracting, they may face high fines, and they can suffer harm to their reputations. As a result, foreign firms often negotiate settlements when misconduct is self-reported or exposed by competitors or employees.

In the past decade, federal prosecutions of corporations were reshaped by a novel strategy. Prosecutors began increasingly to offer firms leniency. They entered deferred and non-prosecution agreements that allowed the firm to avoid both an indictment and a conviction in exchange for the adoption of structural reforms to improve compliance.¹⁰ A wave of such corporate prosecution agreements received sustained attention by the U.S. Congress, the

⁶ See Sara Sun Beale & Adam G. Safwat, What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability, 8 *Buff. Crim. L. Rev.* 89, 89–90, 133–34 (2004); Edward B. Diskant, Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure, 118 *Yale L.J.* 126, 129–31 (2008).

⁷ V.S. Khanna, Corporate Criminal Liability: What Purpose Does It Serve?, 109 *Harv. L. Rev.* 1477, 1488–90 (1996) (comparing vicarious liability standards).

⁸ See, e.g., Daniel C. Richman & William J. Stuntz, Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution, 105 *Colum. L. Rev.* 583, 628–29 (2005); *infra* Section I.B.

⁹ See, e.g., Kate Stith, The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion, 117 *Yale L.J.* 1420, 1422 (2008).

¹⁰ See Brandon L. Garrett, Structural Reform Prosecution, 93 *Va. L. Rev.* 853, 888–90 (2007) (detailing the emergence by 2003 of the DOJ's deferred prosecution approach).

American Bar Association (“ABA”), scholars, the white collar defense bar, and business associations. The result has been judicial decisions, federal legislation (introduced but not enacted), General Accountability Office (“GAO”) reports, an ABA task force, and a series of revisions and additions to the DOJ’s guidelines for corporate prosecutions.¹¹

In the midst of hue and cry over corporate prosecutions, no one has studied prosecutions of foreign firms. Yet as I have found, foreign firms, unlike domestic firms, often do not receive a deferred prosecution. The deferred prosecution approach, as it turns out, is dominant in certain types of prosecutions but not in others. One might expect that different types of corporate crime would be handled differently, and as it turns out, this affects foreign firms. Foreign firms typically plead guilty and receive a conviction.¹²

To investigate whether and how that occurs, I obtained archived U.S. Sentencing Commission data and assembled a hand-collected database of more than 1,000 corporate guilty plea agreements. In the past, corporate convictions were of less interest. Chiefly domestic firms would plead guilty, but most were small, unremarkable firms unable to pay any fine, and even for larger or public firms the fines were often fairly small.¹³ Available evidence suggests that fines began to increase following the adoption of the 1993 Organizational Sentencing Guidelines, and in recent years fines have increased further (as have civil penalties).¹⁴ Corporate guilty pleas

¹¹ See *infra* Section I.C. I currently serve as a reporter on the ABA’s Corporate Monitor Task Force. The views discussed here are solely my own.

¹² See *infra* Section I.D; see also Pamela H. Bucy, *Why Punish? Trends in Corporate Criminal Prosecutions*, 44 *Am. Crim. L. Rev.* 1287, 1301 (2007) (citing greater use of pre-indictment agreements due to perception that corporate indictments are “overkill”); Garrett, *supra* note 10, at 906–07 (noting that most firms charged plead guilty, but most are small firms).

¹³ See, e.g., John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 *Mich. L. Rev.* 386, 388 (1981) (noting literature on history of “insignificant” corporate fines); Garrett, *supra* note 10, at 888–90.

¹⁴ See Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, in *Research Handbook on Criminal Law* (Keith Hylton & Alon Harel eds., forthcoming 2011) (manuscript at 6) (on file with the Virginia Law Review Association) (describing average fines ranging from \$5.7 to \$17.3 million from 2006–2008 for firms paying nonzero fines); Cindy R. Alexander, Jennifer Arlen & Mark A. Cohen, *Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public*

are now of greater interest, since large firms, including large foreign firms like Siemens, now plead guilty—a less favorable result than firms receive by negotiating deferred prosecution agreements and avoiding a conviction.

In addition, foreign firms pay, on average, higher fines than otherwise comparable domestic firms. As I will describe, a regression estimates that for otherwise comparable firms, a foreign firm will receive a fine that is on average twenty-two times larger than the fine of a domestic firm. I do not, however, suggest that prosecutors treat foreign firms differently than similarly situated domestic firms. Several reasons may explain the number and type of foreign corporate convictions and the higher average fines. One would expect prosecutors to pursue only more substantial foreign firms and only in more serious cases, given the practical obstacles to investigating foreign violations. Convicted foreign firms are also disproportionately public firms and large firms. Foreign firms may also be disproportionately among the more serious violators. Foreign firms in some instances may be more willing to self-report or accept a conviction (making such cases relatively low-hanging fruit for federal prosecutors). Particularly in the more serious cases, prosecutors may view not just foreign criminal penalties, but also foreign civil penalties, as inadequate. Other explanations for the composition of these foreign corporate convictions are explored in greater depth. Again, my goal is not to suggest differential treatment, but to describe foreign corporate prosecutions and the need to assess their newly prominent role.

I note also that foreign corporate prosecutions are not a world unto themselves, and they can raise issues also present in domestic prosecutions. For example, extraterritorial acts may be the basis for prosecuting a domestic firm, including for acts by a foreign subsidiary. Related issues arise in the context of prosecutions of indi-

Firms, 42 *J.L. & Econ.* 393, 416, 419–20 (1999) (presenting empirical data showing higher total sanctions after the Organizational Sentencing Guidelines were adopted in 1991 and developing inadequacies of U.S. Sentencing Commission reporting of data on corporate convictions); Mark A. Cohen, Theories of Punishment and Empirical Trends in Corporate Criminal Sanctions, 17 *Managerial & Decision Econ.* 399, 401 (1996) (finding an average fine of only \$108,000 among corporations convicted of federal crimes from 1984–1990).

vidual employees of foreign subsidiaries. Related issues also arise in civil regulatory enforcement actions against foreign firms. Prosecutors also target non-legitimate entities that are foreign, such as organized crime and criminal enterprises. Prosecutions of foreign corporations, however, raise distinct questions that are the focus of this Article.

In Part II of this Article, I develop how foreign firms are chiefly convicted of a few crimes, particularly antitrust, environmental, and FCPA violations. I cannot do justice here to any one of those areas, each of which is a rich subject. I instead give an overview of how, in each of the key areas, federal prosecutors have made obtaining foreign corporate convictions a priority. They have tended to prosecute larger firms and have obtained larger fines than in the average corporate conviction, and in each area, the trend towards more significant foreign prosecutions has become particularly striking in the past decade. Each of those areas has several features in common, in addition to the large numbers of foreign corporate prosecutions. Notably, in each area, all or most of these foreign corporate cases are handled by Main Justice, creating an institutional center for such prosecutions, often with State Department consultation.¹⁵ In each area, the DOJ adopts informal or formal internal procedures to guide such prosecutors. For example, international law norms of comity are incorporated into the DOJ Antitrust Division's Corporate Leniency Program guidelines.¹⁶ Federal prosecutors cooperate with foreign prosecutors to jointly pursue multinational crime. Treaties and cooperation agreements cement such efforts. In each area discussed, enforcement against foreign firms has accelerated following ratification of treaties or entering cooperation or mutual assistance agreements.¹⁷ In each area, reporting or self-reporting typically brings the cases to the U.S. prosecutors' attention.

In Part III, I explore theoretical justifications for prosecutions of foreign firms. U.S. prosecutors may have important reasons to exercise authority in ways counterparts abroad do not. Globalization

¹⁵ See *infra* Section II.B.

¹⁶ See *infra* Part II.

¹⁷ See *infra* Part II.

increases the flow of capital, goods, and services across borders, but brings with it business-related crime. Some foreign crimes, like bribery, may create “an uneven playing field for U.S. companies doing business overseas.”¹⁸ In response, prosecutors take a multinational approach. On the one hand, by prosecuting firms that pay bribes, engage in fraud, or fix prices, they hope to deter crime around the globe. U.S. prosecutors may also need to impose harsher fines on foreign firms to successfully deter criminality that is more easily concealed abroad. On the other hand, some foreign firms may plead guilty because they will not suffer the same collateral or reputational harms as a domestic firm. Crimes committed abroad may not cost a firm its U.S. customers, and conversely, a U.S. conviction may not affect the firm’s reputation in a home country that lacks corporate criminal liability.

In 1990, Justice Brennan deplored the extraterritorial expansion of federal criminal law, stating, “The enormous expansion of federal criminal jurisdiction outside our Nation’s boundaries has led one commentator to suggest that our country’s three largest exports are now ‘rock music, blue jeans, and United States law.’”¹⁹ In the civil context, doctrines such as *forum nonconveniens*, “act of state” doctrine, and comity were developed and extraterritorial jurisdiction has been much debated.²⁰ In contrast, litigation of jurisdiction is almost non-existent in corporate prosecutions, because firms plead guilty rather than litigate such issues. As a result, foreign corporate prosecutions raise unresolved questions regarding the scope of prosecutorial discretion, jurisdiction, and judicial review.²¹

¹⁸ Fisher, *supra* note 1, at 1.

¹⁹ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 281–82 (1990) (Brennan, J., dissenting) (quoting V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 *Int’l Law.* 257, 257 (1980)).

²⁰ See Curtis A. Bradley & Jack L. Goldsmith, *Foreign Relations Law: Cases and Materials* 547–48 (2d ed. 2006); Anne-Marie Slaughter & David Bosco, *Plaintiff’s Diplomacy*, 79 *Foreign Aff.* 102, 115 (2000); see also *infra* Section III.C.

²¹ See Ellen S. Podgor, *Globalization and the Federal Prosecution of White Collar Crime*, 34 *Am. Crim. L. Rev.* 325, 340–41 (1997); see also Pamela Karten Bookman, Note, *Solving the Extraterritoriality Problem: Lessons from the Honest Services Statute*, 92 *Va. L. Rev.* 749, 754–55, 773, 784 (2006).

In this Article, I conclude by arguing that, due to their new prominence and importance, prosecutions of foreign firms should be more carefully reviewed. The pull of U.S. corporate prosecutions is realigning enforcement strategies abroad, in ways both intended and unintended. These prosecutions are affecting business decisions, including by discouraging investment in developing nations²² and causing firms to restructure governance to reflect reforms favored by U.S. prosecutors.²³ I have previously argued that deferred prosecution agreements operate as a form of “structural reform” that should be revised, supervised, and have their effectiveness assessed.²⁴ Any restraints on prosecutorial power will primarily consist of internal procedures adopted by prosecutors themselves, since judicial review of settlements is highly deferential. While criminal law scholars perennially suggest to no avail that prosecutors constrain their discretion, the corporate crime context is different. The DOJ has responded promptly to criticism and repeatedly constrained its discretion using written guidelines. Perhaps for better and for worse, foreign corporate prosecutions have escaped that scrutiny. Federal prosecutors could more formally consider norms of comity, foreign law, and governance norms as part of their negotiation of corporate agreements.

More important than adoption of such guidelines would be a broader review of the goals of foreign corporate prosecutions, which have developed separately in unrelated areas in an unreflective manner. There is not just a concern that the DOJ is too aggressive in prosecuting foreign firms, but also the opposite concern that it is not aggressive enough. Prosecutors may be exercising discre-

²² For example, Swiss logistics conglomerate Panalpina withdrew operations from Nigeria due to FCPA compliance concerns (which the DOJ cited as part of “substantial remedial measures”). *Deferred Prosecution Agreement* at 5, *United States v. Panalpina World Transport (Holding) Ltd.* (S.D. Tex. Nov. 4, 2010), available at <http://www.justice.gov/opa/documents/panalpina-world-transport-dpa.pdf>; see also Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 *Fla. L. Rev.* 351, 366–78 (2010).

²³ See, e.g., Sharie A. Brown, *Identification of “Red Flags” for Possible Violations of Key U.S. Laws for Companies Operating Overseas*, 1791 *Practising L. Inst. Corp.* 427 (2010) (describing best practices in regulatory areas affecting global operations).

²⁴ See Garrett, *supra* note 10, at 887–93.

tion too cautiously, fearing the expense of pursuing foreign firms, allowing subsidiaries to take blame for the parent's conduct, failing to impose serious enough fines, or neglecting to hold individual employees sufficiently responsible.²⁵ Perhaps foreign firms can and should be targeted in other substantive areas.

Too harsh or too lax, too many or too few—these normative questions about the exercise of prosecutorial discretion, the negotiation of settlements such as plea agreements, and the supervision of corporations after they are convicted cannot be answered from publicly available information about the prosecution of foreign firms. These important questions implicate the opaque machinery of prosecutorial discretion. Nor are prosecutors long accustomed to engaging in a regulatory role, either domestically or when reforming the governance of foreign firms. Given the new importance of foreign corporate prosecutions, however, as part of a larger policy discussion, we should more carefully evaluate the preeminent role that federal prosecutors play as global corporate criminal law enforcers and multinational regulators of corporate governance.

I. FOREIGN CORPORATE PROSECUTIONS AND CONVICTIONS

This Part focuses on *how* these foreign prosecutions are pursued—the next Parts will turn to *why* and *when* such prosecutions should occur. The first Section that follows describes the Siemens case, one of the more remarkable recent foreign corporate prosecutions. The second Section explores a form of American Exceptionalism: corporate criminal liability. The third Section discusses what happens after a prosecution of a foreign firm is initiated under the DOJ's new approach towards corporate prosecutions. Firms enter deferred prosecution agreements or, more commonly, they plead guilty. In the last Section, I present data (also described and illustrated in the Appendix) on convictions of foreign corporations.

²⁵ See James B. Stewart, *Bribery, but Nobody was Charged*, N.Y. Times, June 25, 2011, at B1; see also *infra* note 270.

A. The Siemens Case

One recent example illustrates how U.S. prosecutors have come to stand astride the world of corporate criminal enforcement. The case of Siemens Aktiengesellschaft (“Siemens”), a German multinational corporation, and three of its subsidiaries in Argentina, Venezuela, and Bangladesh, was a truly global prosecution. The case involved “more than \$1.4 billion in bribes to officials in 65 countries in Asia, Africa, Europe, the Middle East and the Americas.”²⁶ Bribes ranged from payments to secure contracts in Venezuelan mass transit projects to kickbacks paid under the U.N. Oil for Food Program in Iraq.²⁷ The Securities and Exchange Commission (“SEC”) Enforcement Division Director called the bribery “unprecedented in scale and geographic reach.”²⁸

U.S. prosecutors would end up taking the lead in this multinational case, but it began, of all places, in the principality of Lichtenstein. In 2004, a bank in Lichtenstein noticed unusual transactions involving Siemens offshore accounts and informed Siemens, as well as bank regulators in Germany and Switzerland, who in turn contacted regulators in Austria and Italy.²⁹ Two years later, in 2006, German police arrested Siemens officials and seized documents at more than thirty Siemens offices. The DOJ and the SEC, upon hearing of those raids, began to investigate the matter themselves. The FCPA prohibits certain payments to foreign officials and failure to record payments to foreign officials. The FCPA applies to foreign corporations and their agents, if listed on U.S. exchanges or if covered acts were committed in U.S. territory.³⁰ The main DOJ office in Washington, D.C. exclusively handles FCPA prosecutions, while the SEC also handles matters related to the FCPA accounting and reporting requirements. In the Siemens case, the DOJ and

²⁶ Press Release, U.S. Dep’t of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), <http://www.usdoj.gov/opa/pr/2008/December/08-crm-1105.html>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ David Crawford & Mike Esterl, Inside Bribery Probe of Siemens: Liechtenstein Bank Triggered an International Hunt, *Wall St. J.*, Dec. 28, 2007, at A4.

³⁰ See 15 U.S.C. § 78dd-1 (2006) (issuers); *id.* § 78dd-2 (U.S. persons); *id.* § 78dd-3 (foreign persons).

the SEC “closely collaborated with the Munich Public Prosecutor’s Office.”³¹ The press release on the matter noted that this cooperation was made possible by the mutual legal assistance provisions of a 1997 treaty, the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention”).³²

In response, Siemens’s board decided to conduct a massive internal investigation. Siemens spent over \$500 million investigating the case.³³ Attorneys at Debevoise & Plimpton alone billed hundreds of millions of dollars investigating for Siemens. They reviewed transactions in more than sixty-five countries³⁴ and uncovered over \$1 billion in bribe payments that had not been found by European regulators.³⁵

Unlike many large firms that are prosecuted but avoid any conviction by entering a deferred or non-prosecution agreement, Siemens pleaded guilty. A plea bargain entered in the U.S. District Court for the District of Columbia included \$450 million in fines paid by Siemens and its subsidiaries to the DOJ, \$350 million in fines paid to the SEC, and another \$800 million in fines paid to the Munich Public Prosecutor’s Office.³⁶ Had Siemens been convicted at a trial, the fines would have been far greater. The plea agreement cited a Sentencing Guidelines fine range of \$1.35 to \$2.7 billion.³⁷ Federal prosecutors also cited to Siemens’s extraordinary efforts to cooperate. The lower fine was not all. Siemens pleaded

³¹ Press Release, U.S. Dep’t of Justice, *supra* note 26.

³² *Id.*; see also Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43 (1998), 37 I.L.M. 1 [hereinafter OECD Convention].

³³ Mike Esterl et al., *Siemens Internal Review Hits Hurdles*, *Wall St. J.*, Jan. 23, 2008, at A18.

³⁴ David Crawford & Mike Esterl, *Siemens Ruling Details Bribery Across the Globe*, *Wall St. J.*, Nov. 16, 2007, at A1.

³⁵ Esterl et al., *supra* note 33.

³⁶ Press Release, U.S. Dep’t of Justice, *supra* note 26; Press Release, U.S. Sec. & Exch. Comm’n Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), <http://www.sec.gov/news/press/2008/2008-294.htm>.

³⁷ Plea Agreement, *United States v. Siemens Aktiengesellschaft*, No. CR-8-367, ¶ 4 (Dec. 15, 2008) [hereinafter *Siemens Plea Agreement*], available at <http://www.usdoj.gov/opa/documents/siemens.pdf>.

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guilty only to violations of FCPA accounting requirements and not to payment of illegal bribes, which are also prohibited by the FCPA (and which Siemens paid on a grand scale). In so doing, Siemens apparently avoided debarment from U.S. government contracting.³⁸

The plea agreement included a range of structural reforms. Siemens agreed to undertake ongoing compliance obligations. Siemens created a new compliance and ethics program designed to detect and prevent FCPA violations and other corruption.³⁹ Siemens agreed to hire a corporate monitor for four years to supervise compliance efforts and a separate “Independent U.S. Counsel” from Gibson, Dunn & Crutcher to monitor FCPA compliance.⁴⁰ Siemens also agreed to commit “no further crimes” and cooperate with the U.S. government in ongoing investigations, particularly of Siemens employees.⁴¹ The corporate monitor who was selected, Dr. Theo Waigel, had been a German Minister of Finance and was the first non-American monitor appointed in a federal prosecution.⁴² The selection of a German monitor to oversee compliance at a German corporation makes some sense, reflecting a kind of deference to foreign norms. His retention represents a new kind of cross-national prosecution collaboration.

There were additional convictions. Three foreign subsidiaries, Siemens Argentina, Siemens Bangladesh, and Siemens Venezuela, all also pleaded guilty and agreed to pay comparatively modest \$500,000 fines.⁴³ Munich prosecutors also convicted former Siemens employees.⁴⁴ U.S. prosecutors have not yet prosecuted any employ-

³⁸ See Siri Schubert & T. Christian Miller, *Where Bribery Was Just a Line Item*, N.Y. Times, Dec. 21, 2008, at BU1.

³⁹ Siemens Plea Agreement, *supra* note 37, ¶ 11.

⁴⁰ *Id.* ¶ 12.

⁴¹ *Id.* ¶ 10.

⁴² See *Friend or Foe? Selecting a Compliance Monitor*, TRACEblog (Feb. 05, 2009, 2:27 PM), <http://traceblog.org/2009/02/05/friend-or-foed-selecting-a-compliance-monitor>.

⁴³ See Press Release, U.S. Dep’t of Justice, *supra* note 26.

⁴⁴ See, e.g., *Ex-Siemens Execs Found Guilty in Bribery Case*, Reuters, Apr. 20, 2010, available at Factiva, Doc. No. LBA0000020100420e64k00114.

ees of Siemens, but investigations are still ongoing, including, apparently, into the former CEO and other top managers.⁴⁵

Now Siemens touts a corporate culture change. Siemens hired a massive compliance team and reorganized its governance structure to incorporate compliance for each group. It is entering “collective actions” or compliance agreements with leading competitors in an effort to promote industry-wide compliance with anti-bribery laws.⁴⁶

B. American Corporate Crime Exceptionalism

Siemens was not alone. Foreign firms may take extraordinary measures to comply with U.S. prosecutors. The importance of U.S. markets may be part of the reason. U.S. securities markets (not just consumer markets) are part of the story, since federal prosecutors may have jurisdiction premised at least in part on the foreign firm listing securities in the United States. U.S. regulators can also play a crucial role, since disclosures to regulators may give rise to an investigation and perhaps a prosecution. Yet European countries regulate lucrative consumer and securities markets, and they adopt some criminal prohibitions mirroring those in the United States. A set of essential differences between the approaches of the United States and foreign countries towards corporate criminality explains the ascendance of the United States as a magnet for organizational prosecutions. Federal prosecutors in the United States possess broad discretion, combined with respondeat superior liability and sweeping federal criminal statutes. The three are related, and they buttress a de facto regime in which firms strongly benefit from seeking to cooperate with U.S. prosecutors.

First, federal prosecutors in the United States possess broad discretion to pursue criminal charges, or not, against organizations. They can promise leniency, including through the use of amnesty or immunity from prosecution, an agreement not to prosecute, or

⁴⁵ See Juergen Dahlkamp & Jorg Schmitt, U.S. Investigators Go After Former Siemens CEO, *Der Spiegel* (Dec. 9, 2010), <http://www.spiegel.de/international/germany/0,1518,druck-733587,00.html>.

⁴⁶ See David Hechler, Comeback Company: Siemens Fights to Recover From Bribery Scandal, *Law.com* (Oct. 28, 2009), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202434970012>.

deferred prosecution. Or they can seek an indictment and conviction, with possibly dire consequences for the corporations, although typically resulting in a plea bargain and not a trial. A set of “Principles of Federal Prosecution of Business Organizations” in the U.S. Attorney’s Manual provides guidelines that prosecutors consider when deciding what course to pursue against an organization.⁴⁷ However, those guidelines lay out a set of factors that themselves permit broad discretion.

Second, the respondeat superior standard in the United States creates the possibility for entity liability for the acts of agents. A corporate person may be liable for a single criminal act by a single agent acting in the scope of employment and with the intent to benefit the corporation (and those requirements have been interpreted broadly).⁴⁸ A convicted firm may receive substantial penalties under the Federal Organizational Sentencing Guidelines and a series of specialized sentencing statutes.⁴⁹

Third, broad respondeat superior liability applies to an array of federal criminal statutes, many of which are themselves wide-ranging in their scope and apply to willful and fraudulent conduct, broadly defined.⁵⁰ The Sarbanes-Oxley Act created new criminal prohibitions, required greater corporate disclosures, enhanced sen-

⁴⁷ See Principles of Federal Prosecution of Business Organizations, U.S. Attorney’s Manual §§ 9-28.000–300 (2008), available at <http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf>.

⁴⁸ See *N.Y. Cent. R.R. v. United States*, 212 U.S. 481, 493–95 (1909); *United States v. Cincotta*, 689 F.2d 238, 241–42 (1st Cir. 1982); see also Kathleen F. Brickey, *Corporate Criminal Liability* §§ 1:01–04 (1984). Scholars have long argued that the respondeat superior standard should be modified. See, e.g., Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 *N.Y.U. L. Rev.* 687, 735–36 (1997); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 *J. Legal Stud.* 833, 848–49 (1994); Pamela H. Bucy, *Corporate Ethos: A Standard for Corporate Criminal Liability*, 75 *Minn. L. Rev.* 1095, 1099 (1991). But see Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 *Harv. J.L. & Pub. Pol’y* 833, 858 (2000); see also Garrett, *supra* note 10, at 875–86. The Organizational Sentencing Guidelines and revised prosecution guidelines were in part a response to concerns that fines for corporate crimes were too low but also that compliance and cooperation was not rewarded. See *id.* at 875–93.

⁴⁹ See U.S. Sentencing Guidelines Manual § 8C1.1 (2005); see also *infra* Section I.D.

⁵⁰ See Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 *Stan. L. Rev.* 1613, 1662–63 (2007).

tences, and provided new enforcement resources;⁵¹ the Dodd-Frank legislation provided the SEC with still additional enforcement resources, also providing greater incentives for whistleblowers to report criminal acts.⁵²

In addition, potentially severe collateral and reputational consequences can flow from an indictment or conviction. Fines may be substantial, but far more grave a threat to a corporation may be a determination by U.S. regulators that based on a conviction the firm is disqualified from doing business with the government, unqualified to audit public companies, or should have a state license revoked.⁵³ Prosecutors frequently investigate and pursue actions in tandem with regulators, and despite the focus on prosecution tactics, it may be the regulatory consequences that are the most severe for the firm (while the criminal prosecutions may be most severe for the employees). Additional civil penalties, private class action suits, and state prosecutions may all follow.

As Professor Sara Sun Beale has developed, however, and as some empirical studies suggest, those collateral and direct consequences are not inevitable. They can be greatly overstated in the literature, and they may vary greatly depending on the type of firm and case.⁵⁴ The reputation of an accounting firm may be greatly affected by fraud allegations, whether the enforcement proceeding is civil or criminal. But customers who buy Siemens kitchen appliances may not be particularly troubled by the payment of bribes in a third world development project. If regulators decide not to debar a firm, then the collateral consequences of a conviction may be

⁵¹ See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C. and other titles).

⁵² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); see, e.g., Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 Fla. L. Rev. 937, 940-56 (2003).

⁵³ For provisions imposing collateral consequences for a corporate conviction, see Garrett, *supra* note 10, at 879 n.112.

⁵⁴ Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 Am. Crim. L. Rev. 1481, 1500-01 (2009); see also *infra* notes 296-99 and accompanying text.

greatly minimized.⁵⁵ Some firms may face uncertainty about which consequences will materialize and which will not. Others may have little to fear, though they may still prefer to settle on better terms than the likely sentence at a trial.

Prosecutors drive the corporate crime regime and define the terms of settlements with relatively little opportunity for judicial review. As one federal judge has put it, where prosecutions are “a matter of life and death to many companies,” prosecutors then hold “the proverbial gun to [the corporation’s] head.”⁵⁶ Judge Gerard Lynch has described federal prosecutors as playing “the role of God.”⁵⁷ As I have developed in a prior article, U.S. prosecutors now often do not seek to impose maximum fines, but rather use that threat to secure cooperation and compliance.⁵⁸ Deferred prosecution or non-prosecution agreements typically require cooperation and implementation of a compliance program supervised by an independent monitor. Thus, unlike foreign systems involving purely civil fines, the enforcement regime in the United States is a “composite” regime in which punitive criminal consequences are available but not often imposed in lieu of securing what I have described as structural reforms.⁵⁹ Not only may firms bargain with U.S. prosecutors, but as persons subject to criminal punishment, firms retain the corporate work-product privilege.⁶⁰ That means they have something else to offer in exchange for leniency, namely, waiver of the privilege, which provides prosecutors access to materials that could be invaluable for prosecution of individual employees.

⁵⁵ For criticism of unwillingness to debar firms that violate the FCPA, see Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 *Fordham L. Rev.* (forthcoming 2011).

⁵⁶ *United States v. Stein (Stein I)*, 435 F. Supp. 2d 330, 336, 381 (S.D.N.Y. 2006).

⁵⁷ Gerard E. Lynch, Panel Discussion: The Expanding Prosecutorial Role from Trial Counsel to Investigator and Administrator, 26 *Fordham Urb. L.J.* 679, 682 (1999).

⁵⁸ See Garrett, *supra* note 10, at 855.

⁵⁹ See *infra* Subsection III.B.3.

⁶⁰ *Upjohn Co. v. United States*, 449 U.S. 383, 394–95 (1981). For a comparison of U.S. and foreign approaches, see sources cited *supra* note 6; see also Jennifer Arlen, *Corporate Criminal Liability in the United States: Using Prosecutorial Discretion to Enlist Corporations’ Aid in the War Against Crime*, in *Corporations and Criminal Justice: Past and Future* (Alberto Alessandri ed., 2009).

European prosecutors brandish far less lethal forms of force. European countries have long lacked criminal respondeat superior liability and chiefly rely on regulations to take civil action against corporations. In recent years they have begun to add criminal penalties, but often using narrow standards limiting entity criminal liability to conduct involving managers and high-level officers.⁶¹ Such corporate criminal penalties are increasingly enacted abroad in areas in which foreign U.S. prosecutions are common, such as anti-trust and bribery.⁶² European countries otherwise typically prefer a range of milder, non-monetary sanctions.⁶³ In some areas, such as criminal antitrust, many countries outside the United States still do not criminalize the underlying conduct for individuals, much less corporations.⁶⁴

Even the most severe penalties available in Europe do not place all-or-nothing discretion in the hands of European prosecutors. The adversarial system in the United States creates an unusually prosecution-friendly dynamic by placing great discretion in the hands of prosecutors, but it also gives corporations more to gain by cooperating. In an inquisitorial system, prosecutors lack the same leverage, particularly since they cannot plea bargain. Continental judges marshal the evidence; review charges, facts, and sentences; and exercise great discretion at each stage.⁶⁵

Despite fundamental differences in corporate prosecution regimes, U.S. and many foreign prosecutors share broad extraterrito-

⁶¹ See Beale & Safwat, *supra* note 6, at 110, 160 (describing how “[t]he modern trend in Western Europe of imposing criminal responsibility on corporations began in 1970 and continues to the present time” and “[a]lthough many European countries base criminal liability on respondeat superior, it is often complemented with liability based on organizational or management failures”). The U.K.’s new Bribery Act is, however, an exception, and it will be interesting to observe its enforcement. See *infra* note 262 and accompanying text.

⁶² See Beale & Safwat, *supra* note 6, at 129–35.

⁶³ *Id.* at 159.

⁶⁴ See Organisation for Economic Co-operation and Development, *Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation 28* (2005), available at <http://www.oecd.org/dataoecd/30/2/36600303.pdf> (noting “[t]rend [t]owards [c]riminalisation” but citing only the United Kingdom, Israel, and Norway as having introduced criminal sanctions, and noting reluctance to prosecute in those countries).

⁶⁵ See Diskant, *supra* note 6, at 151–52.

rial jurisdiction over many crimes. For example, in the area of foreign bribery, in addition to the United States, a series of foreign countries adopt broad jurisdiction.⁶⁶ Parallel and overlapping investigations and prosecutions may occur across several countries, although many countries coordinate such actions by treaty. U.S. prosecutors may have great difficulty investigating cases, with evidence located in foreign countries and a need to extradite offenders.⁶⁷ However, as in the Siemens case, a foreign corporation may prioritize reporting and compliance with U.S. authorities over the corporation's domestic authorities. After all, the foreign authorities will often at best impose a civil fine, while U.S. authorities may obtain a conviction resulting in an unpredictable range of potentially catastrophic consequences.

C. The DOJ's Evolving Deferred Prosecution Approach

The Siemens case provides just one striking illustration of how, in recent years, U.S. prosecutors have targeted foreign corporations more than ever before. The scholarly literature on the post-Enron rise in organizational prosecutions has focused on the rise of deferred or non-prosecution agreements through which the firm avoids an indictment and a conviction.⁶⁸ A defining moment in the recent history of corporate crime occurred in 2002, when the prosecution of Arthur Andersen contributed to the firm's collapse. The firm faced a threat that, as a repeat violator, the SEC would dis-

⁶⁶ See David C. Weiss, Note, The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence, 30 Mich. J. Int'l L. 471, 493 (2009) (describing trend towards "broad" jurisdiction).

⁶⁷ See Glenn W. MacTaggart, Determining the Extraditability of Fugitives, Fed. Law., Feb. 2004, at 27.

⁶⁸ See Preet Bharara, Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants, 44 Am. Crim. L. Rev. 53, 73-74, 104 (2007); Buell, supra note 50, at 1667; Lawrence D. Finder & Ryan D. McConnell, Devolution of Authority: The Department of Justice's Corporate Charging Policies, 51 St. Louis U. L.J. 1, 3 (2006); Garrett, supra note 10, at 886-87; Christopher A. Wray & Robert K. Hur, Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice, 43 Am. Crim. L. Rev. 1095, 1097, 1103 (2006); Eric Lichtblau, In Justice Shift, Corporate Deals Replace Trials, N.Y. Times, Apr. 9, 2008, at A1.

qualify the firm from auditing any public corporations.⁶⁹ Choosing to risk a trial, the firm withdrew from settlement negotiations and was convicted at a trial, triggering the firm's disintegration.⁷⁰ After the demise of Andersen, federal prosecutors were widely seen as attempting to avoid such dire consequences for employees who played no role in the wrongdoing.⁷¹ Instead, federal prosecutors began to enter early negotiated settlements prior to any indictment.

A wave of corporate prosecution agreements followed the adoption of this deferred prosecution strategy. The target firms included some of the largest in America.⁷² However, corporate prosecutions did not become more frequent. In fact, as I depict in the Appendix, as deferred and non-prosecution agreements increased in number over the past decade, the number of corporate convictions declined (as, by the way, did federal prosecutions of individual persons for white collar offenses).⁷³ Although the deferred prosecution approach provided more leniency, it drew heavy and sustained scrutiny, particularly regarding issues of special concern to the white collar defense bar, including perceived threats to payment of attor-

⁶⁹ See SEC Rules of Practice, 17 C.F.R. § 201.102(e) (2003); Kathleen F. Brickey, *Andersen's Fall from Grace*, 81 Wash. U. L.Q. 917, 921 (2003).

⁷⁰ Brickey, *supra* note 69, at 918.

⁷¹ See Garrett, *supra* note 10, at 901.

⁷² See Brandon L. Garrett & Jon Ashley, *Federal Organizational Prosecution Agreements*, University of Virginia School of Law, http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.suhtml (last updated Oct. 20, 2011) (providing links to individual scanned agreements and data coded concerning each agreement).

⁷³ See *infra* app. In contrast, corporate prosecutions steadily increased in the 1990s following the adoption of the Organizational Sentencing Guidelines (although in part these data may be explained by improved data collection by the Sentencing Commission). See *infra* app. Over the past several decades, federal criminal prosecutions have generally increased in number each year, but many crimes that are the subject of corporate prosecutions, such as fraud and regulatory offenses, have decreased. See Admin. Office of the U.S. Courts, Statistics Division, *Federal Judicial Caseload Statistics tbl.D-2* (2010), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/D02DMar10.pdf> (providing statistics on defendants in proceedings commenced in federal court in twelve-month periods between 2006 and 2010); see also Lucian E. Dervin, *New Crimes and Punishments: A Case Study Regarding the Impact of Over-Criminalization on White Collar Criminal Cases 10-14* (June 24, 2011) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1872004 (describing the decline in administration of justice-related prosecutions since 2001).

ney's fees, waiver of attorney-client privilege, and retention of corporate monitors.⁷⁴ Others raised the quite different criticism that the agreements represented a "gentler" and overly lenient approach towards corporate crime.⁷⁵ In response to outcry, both houses in Congress convened hearings,⁷⁶ the President of the ABA called the DOJ guidelines on corporate prosecutions "an affront to the Bill of Rights,"⁷⁷ several pieces of federal legislation were introduced,⁷⁸ the GAO investigated features of corporate prosecutions,⁷⁹ and the DOJ repeatedly sought to mollify such critics.⁸⁰

⁷⁴ See sources cited *supra* note 68.

⁷⁵ See, e.g., Gretchen Morgenstern & Louise Story, *Behind the Gentler Approach to Banks by U.S.*, N.Y. Times, July 7, 2011, at A1.

⁷⁶ See Lynn Browning, *Justice Department is Reviewing Corporate Prosecution Guidelines*, N.Y. Times, Sept. 13, 2006, at C3 (describing comments by deputy attorney general at Senate Judiciary Committee hearing, noting that DOJ might revise guidelines); see also *Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements: Hearing Before the H. Subcomm. on Commercial and Administrative Law of the H. Comm. of the Judiciary*, 111th Cong. (2009), available at http://judiciary.house.gov/hearings/hear_090625.html; *Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?: Hearing Before the H. Subcomm. on Commercial and Administrative Law of the H. Comm. of the Judiciary*, 110th Cong. (2008), available at http://judiciary.house.gov/hearing/hear_031108_2.html.

⁷⁷ Michael S. Greco, *U.S. Should Rethink Attorney-Client Policy*, *The Mont. Law.*, May 2006, at 24.

⁷⁸ See, e.g., *Attorney-Client Privilege Protection Act of 2007*, S. 186, 110th Cong. (2007).

⁷⁹ U.S. Gov't Accountability Office, *GAO-10-110, Corporate Crime: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness* (2009), available at <http://www.gao.gov/products/GAO-10-110>.

⁸⁰ An ABA Task Force was convened to address privilege-waiver issues raised by recent corporate prosecutions, and a "Committee on Capital Markets Regulation" called for an end to such prosecutions. See ABA Task Force on Attorney-Client Privilege, *Report to the House of Delegates 17* (2006); Nicolas Grabar, *Interim Report of the Committee on Capital Markets Regulation*, 1601 *Practicing Law Inst. Corp.* 11, 113 (2007). For work critical of prosecutorial overreaching in recent corporate prosecutions, see, for example, Bharara, *supra* note 68, at 56. The U.S. House of Representatives convened hearings (at two of which the author testified), examining corporate prosecution agreements. During that time, the DOJ repeatedly revised its guidelines on corporate prosecutions. See *infra* notes 81–82 and accompanying text. For a piece critiquing the criticism of DOJ policy, see George M. Cohen, *Essay, Of Coerced Waiver, Government Leverage, and Corporate Loyalty: The Holder, Thompson, and McNulty Memos and Their Critics*, 93 *Va. L. Rev. In Brief* 153, 160 (2007).

The DOJ made a series of revisions to the U.S. Attorney's Manual Principles of Federal Prosecution of Business Organizations. Those Principles were first issued by the Department of Justice in 1999 by then-Deputy Attorney General Eric Holder, and they explained factors federal prosecutors should consider when deciding whether to charge a corporation. The guidelines were revised in 2003 in response to Enron and other financial scandals to encourage the use of deferred and non-prosecution agreements as an alternative to a prosecution. That crucial revision was popularly called the "Thompson Memo," after the Deputy Attorney General who issued it.⁸¹ As corporate deferred and non-prosecution agreements became more widely used, the Principles were again revised in response to criticism and congressional hearings in 2006 and again in 2008.⁸² The DOJ also issued separate guidelines on retention of corporate monitors and it is considering further revisions. In response to a GAO inquiry, the DOJ has also said that it now plans to assess effectiveness of the agreements and will try to develop "performance measures."⁸³ While prosecutors retain broad discretion to charge corporations, in no other area do federal prosecutors provide such detailed guidelines to explain and to limit (albeit in a non-binding way) how they exercise their discretion. Nor are there comparable areas in which prosecutors so frequently make revisions to guidelines that constrain their own discretion.

Amidst the flurry of commentary and criticism of the DOJ's newly aggressive corporate prosecution approach, none has focused on the presence of foreign firms among the targets. The DOJ's Principles do not discuss prosecutions of foreign firms, except to note that "in the case of national or multinational corpora-

⁸¹ Memorandum from Deputy Attorney Gen. Larry D. Thompson, U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys, U.S. Dep't of Justice (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

⁸² Memorandum from Deputy Attorney Gen. Mark R. Filip, U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys, U.S. Dep't of Justice 9 (Aug. 28, 2008), available at <http://www.justice.gov/dag/readingroom/dag-memo-08282008.pdf>; Memorandum from Deputy Attorney Gen. Paul J. McNulty, U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys, U.S. Dep't of Justice 11 n.3 (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

⁸³ See U.S. Gov't Accountability Office, *supra* note 79, at 20.

tions, multi-district or global agreements may be necessary.”⁸⁴ Nor have foreign firms raised objections, as domestic firms have done, to the DOJ’s corporate prosecution approach.

As corporate prosecution agreements began to mount in numbers, I began to maintain an online public database of such agreements with the assistance of the University of Virginia Law Library. That database of more than 200 agreements is the most complete resource available concerning deferred and non-prosecution agreements entered by federal prosecutors with organizations.⁸⁵ Prosecutors have obtained deferred or non-prosecution agreements with thirty-three foreign firms between 2001 and 2010 for crimes ranging from wire fraud, banking and securities fraud, health care fraud, tax fraud, antitrust, and with the largest group, twenty agreements, involving FCPA violations.⁸⁶

Deferred prosecution agreements typically focus not just on payment of fines and restitution, but as in the Siemens plea agreement, on what I have termed “structural reforms” reminiscent of institutional reform in public law litigation.⁸⁷ The agreements can be broad and intrusive. They reshape corporate governance and often require firms to hire independent monitors with sweeping powers to implement compliance programs and access documents.⁸⁸ They

⁸⁴ See Principles of Federal Prosecution of Business Organizations, *supra* note 47, § 9-28.1000 n.8.

⁸⁵ See Garrett & Ashley, *supra* note 72.

⁸⁶ Those pre-indictment agreements are: Barclays Bank (money laundering); BAWAG (banking and securities fraud); Canadian Imperial Bank of Commerce (bank fraud); Credit Suisse (export violations); Deutsche Bank AG (tax fraud); German Bank HVB (tax fraud); Hitachi Corp. (antitrust); Lloyds TSB Bank PLC (export violations); NEC Corporation (antitrust); Smith and Nephew (health care fraud and anti-kickback statute); Sportingbet (illegal internet gambling); United Bank for Africa (money laundering); UBS AG (tax fraud). The twenty pre-indictment agreements involving FCPA violations are: ABB Ltd., Aibel Group Ltd., A.B. Volvo (also wire fraud, U.N. Oil for Food program); AGCO (also wire fraud, a U.N. Oil for Food program case); Akzo-Nobel, Alcatel-Lucent S.A., CNF France, CNF Italia, Daimler A.G., DaimlerChrysler China Ltd., Fiat S.P.A., Ivenco, Novo Nordisk A/S (also wire fraud, a U.N. Oil for Food Program case); Panalpina World Transport, Paradigm B.V., Technip S.A., Transocean, Shell Nigeria Exploration and Production Company Ltd., Statoil, and Snamprogetti Netherlands B.V. Each can be read at the University of Virginia Law Library resource website, Garrett & Ashley, *supra* note 72.

⁸⁷ See generally Garrett, *supra* note 10.

⁸⁸ See *id.* at 893–902.

impact individual employees by requiring firms to cooperate in ongoing criminal investigations, including by sometimes waiving attorney-client privilege.⁸⁹

Siemens did not benefit from such a deferred prosecution agreement. Siemens was indicted and pleaded guilty. The Siemens case is no outlier. In prosecutions of large foreign firms, guilty pleas are far more common than in prosecutions of domestic firms. Some have called the consequences of a “mere indictment” a “death sentence” for a firm.⁹⁰ Yet large numbers of substantial foreign firms plead guilty and receive a conviction, apparently without suffering such consequences. What explains this?

In this Article, I develop how, in prosecutions of foreign firms, corporate prosecution agreements often do not take the more lenient deferred or non-prosecution form. Instead, the firms are often indicted and then convicted pursuant to a guilty plea. To investigate corporate guilty pleas, I hand-collected, with substantial help from research assistants and the University of Virginia Law Library, a second corporate prosecution database: a database of corporate guilty plea agreements.⁹¹ I have limited the dataset to agreements in the decade from 2001 to 2010. I assembled a dataset of 1011 corporate convictions with findings illustrated in the Appendix. In the cases located, all but five firms pleaded guilty. Fourteen percent of the firms were foreign (142 of 1011), that is, they were incorporated outside the United States. The largest numbers

⁸⁹ *Id.*

⁹⁰ See Bharara, *supra* note 68, at 75, 104.

⁹¹ This database is available online on an accompanying research resource web page hosted by the University of Virginia Law Library. See Brandon L. Garrett & Jon Ashley, *Federal Organizational Plea Agreements*, University of Virginia School of Law, http://lib.law.virginia.edu/Garrett/plea_agreements/home.php. I thank Jon Ashley of the University of Virginia Law Library for indispensable assistance in creating and updating this webpage. More than 1000 corporate convictions were identified through a series of searches of DOJ web pages, agency press releases, SEC filings, news reports, and Westlaw. Of 1011 convictions identified, plea agreements could be located online, on Westlaw docket searches, or using PACER, in 480 cases. In four cases there was a criminal trial. In the remaining cases, information about the plea agreements was obtained through docket sheets or prosecution press releases. Agreements from 2001–2010 are analyzed here. While some agreements from the 1990s were located, during that time federal prosecutors did not reliably post guilty plea agreements or press releases online, nor was PACER in use, making such documents far more difficult to locate.

of foreign firms were convicted of antitrust offenses (53), environmental offenses (50), and FCPA violations (21).⁹² Such prosecutions of foreign firms are likely to continue if not accelerate. As I will discuss in the next Part, in each of those areas the DOJ has advertised its goal to increase foreign corporate prosecutions. Some prosecutions are related, as prosecutors identify industries in which violations seem pervasive and use cases to leverage industry compliance.

The shift is not limited to prosecutions of foreign companies, but rather it extends to prosecutions of foreign individuals employed by domestic or foreign firms or their subsidiaries. The FBI recently conducted its first FCPA undercover operation, “a two-city sting worthy of a George Clooney caper” that has so far netted twenty-two arrests of executives at arms suppliers.⁹³ Criminal Division head Lanny Breuer commented, “The message is that we are going to bring all the innovations of our organized crime and drug war cases to the fight against white-collar criminals.”⁹⁴ In a *New York Times* article exploring the “[w]orldwide [r]each” of the U.S. Attorney’s Office for the Southern District of New York, focusing on efforts to prosecute narcotics traffickers and terrorists, U.S. Attorney Preet Bharara explained that “crime has gone global and national security threats are global.”⁹⁵ In this Article, I focus just on issues raised by prosecuting foreign firms. I note, however, that a chief ostensible purpose in prosecuting foreign firms is to secure cooperation in investigating and prosecuting employees, who may be foreign as well.⁹⁶

⁹² See *infra* Subsection I.D.2. In addition, six firms were convicted of export-related violations, three for fraud, two for obstruction of justice, two for false statements, one for racketeering, one under the False Claims Act, one for violating Alaska cruise ship regulations, one for money laundering, and one for food and drug-related violations.

⁹³ Diana B. Henriques, F.B.I. Snares Weapons Executives in Bribery Sting, *N.Y. Times*, Jan. 21, 2010, at A3.

⁹⁴ *Id.*

⁹⁵ See Benjamin Weiser, For Prosecutor in New York, A Global Beat, *N.Y. Times*, Mar. 28, 2011, at A1.

⁹⁶ See Brandon L. Garrett, Corporate Confessions, 30 *Cardozo L. Rev.* 917, 940 (2009); Lisa Kern Griffin, Compelled Cooperation and the New Corporate Criminal Procedure, 82 *N.Y.U. L. Rev.* 311, 337 (2007).

I also do not focus here on a second related and important subject: civil regulatory enforcement against foreign firms. U.S. regulators increasingly engage in extraterritorial enforcement in a range of areas.⁹⁷ For example, the SEC files civil enforcement actions under the accounting provisions of the FCPA.⁹⁸ Scholars have raised complex questions concerning the appropriate reach of U.S. statutes and regulators and the role of judicial review.⁹⁹ Criminal prosecutions have not received the same attention. They can raise different issues than statutes, civil suits, or regulations. Although civil enforcement, for example, can involve substantial fines and compliance-related orders, it does not involve criminal punishment, and the collateral consequences may be less dire. In contrast to enforcement approaches of other countries, expansive criminal penalties and prosecutorial discretion distinguish enforcement in the United States.

D. Two Corporate Conviction Datasets

Foreign firms regularly plead guilty and then enter a plea agreement. This challenges our understanding of organizational prosecutions as exemplified by the deferred prosecution agreement. Why do foreign firms typically plead guilty and receive convictions? And why do they do so for certain crimes and in certain types of cases? Data from prosecution agreements and plea agreements cannot give us complete answers to those questions. While they may show us the end result in cases that prosecutors do pursue, they do not tell us what cases prosecutors do not pursue. Prosecutors do not typically explain why they pursue some cases and not others. My data shed light on this phenomenon, but as with any ef-

⁹⁷ See generally Austen L. Parrish, Reclaiming International Law From Extraterritoriality, 93 *Minn. L. Rev.* 815, 847–52 (2009) (“U.S. domestic laws, applied extraterritorially, are now routinely used to influence international policy.”).

⁹⁸ See, e.g., Paul V. Gerlach & George B. Parizek, The SEC’s Enforcement of the Foreign Corrupt Practices Act, in 3 *Foreign Corrupt Practices Act Reporter* §§ 14-1, 3 (2d ed. 2007).

⁹⁹ See, e.g., Stephen J. Choi & Andrew T. Guzman, Portable Reciprocity: Rethinking the International Reach of Securities Regulation, 71 *S. Cal. L. Rev.* 903, 905–07 (1998); Jane C. Ginsburg, Extraterritoriality and Multiterritoriality in Copyright Infringement, 37 *Va. J. Int’l L.* 587, 592–99 (1997); Detlev F. Vagts, Extraterritoriality and the Corporate Governance Law, 97 *Am. J. Int’l L.* 289 (2003).

fort to study the “black box” of prosecutorial discretion, any answers ultimately lie with prosecutors themselves, who typically do not track the exercise of their discretion carefully.¹⁰⁰ Nevertheless, data from two sources, the U.S. Sentencing Commission and public guilty plea agreements, suggest a consistent story. Statements and guidelines issued by federal prosecutors will fill out that story.

We know little about corporate convictions and guilty pleas generally. As noted, deferred and non-prosecution agreements have received scrutiny by Congress, the GAO, the DOJ, judges, the Bar, scholars, and corporations. Corporate convictions have not received such attention. Indeed, one sees popular commentary claiming that the DOJ adopts a “too big to prosecute” approach to corporate leniency¹⁰¹ when in fact large corporations are still routinely convicted. There are far more corporate convictions, chiefly in the form of guilty pleas, than deferred and non-prosecution agreements. Corporate guilty pleas deserve careful attention.

A guilty plea is different in kind from a deferred prosecution agreement, which may be entered largely without judicial oversight. A guilty plea involves an indictment and then a conviction entered by the court. On the one hand, the bargain for the firm *may* be less favorable than a deferred or non-prosecution agreement, as the firm faces a more imminent threat of a trial. On the other hand, perhaps a deferred or non-prosecution agreement would be otherwise less favorable if the firm bargains to obtain the added procedural benefit of avoiding an indictment. The threat of a trial is not entirely hypothetical. A few firms, like Arthur Andersen, risk a trial and are convicted each year. Additional firms are acquitted at trial or have the charges dismissed by prosecutors. However, as in prosecutions of individual persons, the vast majority of corporations, more than ninety percent, plead guilty.¹⁰²

¹⁰⁰ Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 *Iowa L. Rev.* 125, 129 (2008).

¹⁰¹ William Greider, *How Wall Street Crooks Get Out of Jail Free*, *The Nation*, Mar. 23, 2001, at 11–14.

¹⁰² Compiling data from the Commission datasheets from 2000–2008, 176 firms were convicted at a trial, or 9% of 1924 total firms. U.S. Sentencing Commission, 2000–2009 Sourcebooks of Federal Sentencing Statistics [hereinafter 2000–2009 Sourcebooks], available at http://www.ussc.gov/Data_and_Statistics/. In 2009, 96% of firms pleaded guilty (7 of 177 were convicted at a trial). U.S. Sentencing Commission, 2009

When negotiating a guilty plea with a corporation, the parties are more constrained, since unlike a deferred prosecution agreement, a judge must approve a plea agreement. Unlike a deferred prosecution agreement, a plea agreement is governed by the advisory Organizational Sentencing Guidelines, which state, for example, that a corporation shall pay restitution to identifiable victims; pay fines by, among other things, calculating offense levels, culpability scores, and multipliers; and have opportunities for mitigation, based on, for instance, having an effective compliance and ethics program.¹⁰³ The parties may enter a guilty plea that includes a sentencing recommendation, and that recommendation, while not binding on the judge, has great force. If the judge accepts the agreement, the judge must also accept the agreement concerning the applicable sentencing range. Thus, the judge may not alter the sentencing recommendation without rejecting the entire agreement.¹⁰⁴

Judges have limited discretion to reject a plea agreement under Federal Rule of Criminal Procedure 11, for example, if they find it contrary to the interests of justice or the purposes of the Sentencing Guidelines.¹⁰⁵ Judges rarely do so, although one judge recently rejected a plea by the Guidant Corporation as too lenient.¹⁰⁶ In an-

Sourcebook of Federal Sentencing Statistics, tbl.53 (2009) [hereinafter 2009 Sourcebook], available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/Table53.pdf. As noted, in my hand-collected data set, records were located for only five firms convicted at a trial.

¹⁰³ U.S. Sentencing Guidelines Manual § 8B1.1 (2010) (restitution); id. § 8B2.1 (effective compliance and ethics program); id. § 8C2.3 (determining offense level); id. § 8C2.5 (determining culpability score); id. § 8C2.6 (determining minimum and maximum multipliers).

¹⁰⁴ See Fed. R. Crim. P. 11(c)(1)(C); see, e.g., *In re Morgan*, 506 F.3d 705, 712 (9th Cir. 2007) (holding that court must make an “individualized assessment” of the plea agreement); *United States v. Smith*, 417 F.3d 483, 487 (5th Cir. 2005) (“A district court may properly reject a plea agreement based on the court’s belief that the defendant would receive too light of a sentence.”); see also Keith Schneider, *Judge Rejects \$100 Million Fine for Exxon in Oil Spill as Too Low*, N.Y. Times, Apr. 25, 1991, at A1. Fine information was obtained for most agreements. Even where the agreement was silent and left the final fine determination to the judge, prosecutors often announced the fine imposed in a press release, or it was reported on PACER.

¹⁰⁵ See Garrett, *supra* note 10, at 875–82, 922–25.

¹⁰⁶ See *Judge Rejects Guidant Settlement After Doctors Call for Harsher Punishment*, AboutLawsuits.com (Apr. 28, 2010), <http://www.aboutlawsuits.com/judge-rejects-guidant-settlement-9840>. A judge did the same as to a proposed SEC consent

other case, a judge scuttled a plea agreement arguing that the firm should not be held responsible, but rather its employees, who were then subsequently prosecuted individually.¹⁰⁷ Victims may intervene and object to an agreement as too lenient or as providing insufficient restitution.¹⁰⁸ Further, the judge may impose probation on a corporation.¹⁰⁹ While prosecutors can require firms to retain monitors, and often do so in deferred prosecution agreements, in the guilty plea context the probation office will typically monitor a firm. In addition, the judge must order a convicted firm that can pay to provide restitution to any identifiable victims.¹¹⁰ Thus, guilty pleas receive more judicial scrutiny and may involve more punitive terms than deferred prosecution agreements.

The DOJ offers only general guidance on how prosecutors should exercise their broad discretion when entering a plea agreement with a corporation. The U.S. Attorney's Manual guidelines emphasize that a guilty plea should only be sought in a serious case, involving participation of higher-level corporate officials, and where neither civil actions nor prosecutions of individual employees, nor a deferred prosecution agreement, would be sufficient to adequately prevent future crimes. Thus, corporate guilty pleas should impose "substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters or corporate monitors."¹¹¹ Not only may the terms be more punitive than in a deferred prosecution, but the conviction may bring reputational

decree regarding Bank of America Corp. See *SEC v. Bank of Am. Corp.*, 653 F. Supp. 2d 507, 508 (S.D.N.Y. 2009).

¹⁰⁷ See *U.S. v. Wampler*, 624 F.3d 1330, 1332–33 (10th Cir. 2010) (describing how the court rejected a plea agreement because it "unjustly let the company's principals off the hook").

¹⁰⁸ See, e.g., *U.S. v. BP Prods. N. Am. Inc.*, 610 F. Supp. 2d 655, 660 (S.D. Tex. 2009).

¹⁰⁹ U.S. Sentencing Guidelines Manual § 8D1.1(a) (2010) (describing circumstances when a court "shall" order probation); see also Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 *Am. J. Crim. L.* 1, 4 (1988).

¹¹⁰ U.S. Sentencing Guidelines Manual § 8D1.1 (2010).

¹¹¹ See *Principles of Federal Prosecution of Business Organizations*, *supra* note 47, § 9-28.1300. Federal prosecutors have similarly emphasized in remarks that "the magnitude, duration, or high-level management involvement in the disclosed conduct may warrant a guilty plea and a significant penalty." See Fisher, *supra* note 1, at 6.

and collateral costs. The corporation must admit guilt.¹¹² Regulatory agencies may debar a firm following a conviction, which may substantially affect its ability to do business.¹¹³

These broad statements do not clarify what types of firms are prosecuted and plead guilty. I turn next to two sets of data to shed light on corporate convictions: first, data from the U.S. Sentencing Commission, and second, to a set of data that I hand-collected.

1. Sentencing Commission Dataset

The U.S. Sentencing Commission publishes limited data regarding federal sentencing of corporations, and in addition, more detailed underlying data collections are archived at the Interuniversity Consortium for Political and Social Research (“ICPSR”).¹¹⁴ For example, the Commission’s public tables do not say whether convicted firms are foreign or domestic, but their underlying data-sheets collect that information.

The Commission’s archived data provide a deep overview of federal corporate prosecutions, although as I will discuss, the data are incomplete.¹¹⁵ By the Commission’s accounting, in recent years, federal prosecutors have convicted an average of 210 firms per year.¹¹⁶ Most, though certainly not all, are small, unremarkable

¹¹² Principles of Federal Prosecution of Business Organizations, *supra* note 47, § 9-28.1300 (“As with natural persons, pleas should be structured so that the corporation may not later ‘proclaim lack of culpability or even complete innocence.’ Thus, for instance, there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.” (citing U.S. Attorney’s Manual §§ 9-27.420(b)(4), 9-27.440, 9-27.500)).

¹¹³ *Id.* (“Where the corporation was engaged in fraud against the government (e.g., contracting fraud), a prosecutor may not negotiate away an agency’s right to debar or delist the corporate defendant.”).

¹¹⁴ These Commission spreadsheets are available on ICPSR and are on file with the Virginia Law Review Association. They are cited by year, for example, “2008 Commission Datafile.” See ICPSR, Organizations Convicted in Federal Criminal Courts Series, <http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/85> (last visited Oct. 18, 2011).

¹¹⁵ For a detailed discussion of the gaps in the Commission’s data, see Alexander et al., *supra* note 14, at 402–03.

¹¹⁶ According to the Commission data available on ICPSR, a total of 2101 firms were convicted from 2000–2009. From 1991–1999, an average of 131 firms (1183 total) were convicted per year. Those convictions also include a handful of convictions of government entities.

firms. Such firms may be alter egos of a small criminal enterprise, prosecuted to secure assets or simply to liquidate the offending entity.¹¹⁷ Many are already defunct or unable to pay any fine.¹¹⁸ According to the Commission's available data, only a handful of firms with more than 1000 employees are convicted each year, and few have more than 200 employees.¹¹⁹

Foreign firms convicted by federal prosecutors were larger—on average they had 2500 employees—and they received strikingly higher fines. In the available Commission datasheets, covering 2000–2009,¹²⁰ the Commission identified 120 foreign firms convicted, or 6% of 2101 total firms.¹²¹ The average fine for all firms, domestic and foreign, was \$3,809,000. For smaller firms, the fines were far less. For firms with fewer than fifty employees, the average fine was only \$152,000 and for firms with fewer than 200 employees, it was \$1,111,000. Foreign firms averaged fines of \$19,711,000 as compared with \$1,599,000 for domestic firms.

However, the Commission's datasheets are missing data important to the questions examined here. Problems with Commission data have apparently been longstanding. In Cindy Alexander, Jennifer Arlen, and Mark Cohen's landmark 1999 study of the effects of the 1991 adoption of the Organizational Sentencing Guidelines on corporate sanctions, they found Commission data highly incomplete. They warned future researchers to "proceed with caution before drawing inferences" from the Commission's organizational convictions data, where the Commission itself had acknowledged that its data "are neither comprehensive nor representative."¹²² In particular, they found that the Commission was missing data on

¹¹⁷ See Sentencing Guidelines Manual § 8C.1.1 (2010) (stating that the court may set the fine to divest a firm that "operated primarily for a criminal purpose" of "all its net assets").

¹¹⁸ For example, in 2008, 48 of 199 firms were unable to pay all of the fine, and 63 received no fine (some fell into both categories). See 2008 Commission Datafile, *supra* note 114.

¹¹⁹ See *infra* note 121. In 2009, the Commission listed 6 firms as having 5000 or more employees and 2 more as having 1000 or more; the average firm size was 291 employees. Data were missing for 39 firms, however.

¹²⁰ 2010 data are not yet available in ICPSR.

¹²¹ Six of those foreign firms were convicted at a trial and 165 domestic firms were convicted at trial (data were missing for the remaining 12 of 183 firms tried).

¹²² Alexander et al., *supra* note 14, at 402 & n.26.

larger public firms that paid large monetary sanctions—the more significant cases of the most interest to researchers. As a result, Alexander, Arlen, and Cohen constructed a new data set by hand-collecting data on convictions of public corporations from 1988–1996, and in doing so found far higher median fines and larger numbers of publicly held firms convicted than had been reported by the Commission.¹²³ The Commission collects data on corporations sentenced under Chapter Eight of the Organizational Sentencing Guidelines, but apparently relies on data self-reported by the courts,¹²⁴ and therefore does not follow up and obtain data not reported as used to sentence the particular firm. For example, far less data may be included for corporations convicted of crimes, like environmental crimes, for which firms are not sentenced under Chapter Eight, but rather under alternative fine provisions or crime-specific provisions.¹²⁵ In its 2009 Annual Report, the Commission noted the ongoing problem of incomplete reporting and missing information, particularly with smaller datasets like organizational data, though it added that reporting problems have been reduced over time.¹²⁶

¹²³ *Id.* (finding a \$3.1 million median fine for Guidelines-constrained public firms, while the Commission data showed a median fine of \$70,000); see also Cindy R. Alexander, Jennifer Arlen, & Mark A. Cohen, *Evaluating Trends in Corporate Sentencing: How Reliable are the U.S. Sentencing Commission's Data?*, 13 *Fed. Sent'g Rep.* 108, 109–10 (2000) (describing a “striking” contrast between Commission data and data independently gathered from public sources concerning federal corporate convictions from 1988–1996 and a failure to report “a disproportionately large number of cases in which big fines were imposed”).

¹²⁴ 2009 U.S. Sentencing Commission Ann. Rep. 33 (describing document submission process).

¹²⁵ *Id.* at 42. If the Commission's charge is to collect information on individual and corporate sentencing, relying solely on self-reporting may omit important information, including information that might be quite simple to obtain. For example, it would require little work to note whether each firm convicted is public, even if that information is not supplied by the court. I made a request to the Commission for underlying Commission data with identifiers in order to supplement the data in that way and create a more complete dataset (which could then be reported without identifiers) but the request has not been accepted to date.

¹²⁶ *Id.* at 34–35; see also 1996 U.S. Sentencing Commission Ann. Rep. 32, 38 n.61 (“The Commission's current datafile does not include a highly publicized case . . . nor a number of other organizational convictions and fines obtained as a result of negotiated plea agreements.”).

2. Publicly Reported Convictions Dataset

To develop a more complete picture of these foreign prosecutions, I hand-collected data on all publicly reported corporate convictions, locating the text of guilty plea agreements, docket sheets, and SEC filings and press releases describing terms of agreements. My dataset is smaller than the Commission dataset, but it includes more information than the Commission does on larger firms of far greater interest. The dataset of publicly reported corporate convictions includes 1011 cases, all but five of which involved guilty pleas, and 14% or 142 of which were foreign firms.¹²⁷ These data disproportionately include larger firms.¹²⁸ On the other hand, I located material on only about half of the approximately 2000 corporate prosecutions that the Commission reported during roughly the same time period. Convictions of smaller firms are often not publicly reported; non-public firms, for example, obviously need not provide financial statements or report convictions to the SEC. Some cases may be sealed and may not appear in federal court docket sheets.

This dataset has near-complete coverage of convictions of the larger firms. Of the 1011 firms, 125 were public firms (twenty-seven of which were foreign corporations). The Commission datasheets report only sixty-three “openly traded” firms convicted from 2000–2009.¹²⁹ Information on the size of firms was sometimes available, particularly in cases in which plea agreements were obtained; at least ninety were firms that had more than 1000 employees. The Commission reported only seventy-one such firms during the pe-

¹²⁷ I did not include in the dataset the 2002 conviction of Arthur Andersen, LLP, which was reversed on appeal by the U.S. Supreme Court. See Charles Lane, *Justices Overturn Andersen Conviction*, Wash. Post, June 1, 2005, at A1. I also note that over 200 additional convictions were located as this Article approached publication, chiefly through a newly available Bloomberg database. While these data have not been included in the analysis, the materials concerning those cases have been added to the accompanying research website as a research resource. The hope is to eventually locate information concerning all corporate convictions in the past decade.

¹²⁸ See *infra* app., for a description of the methodology, and Garrett & Ashley, *Federal Organizational Plea Agreements*, *supra* note 91, to view the agreements.

¹²⁹ Again, the Commission data are missing information on the ownership structure of many firms. Firms included in the SEC Edgar database were coded in my hand-collected database as public.

riod from 2000–2009 (2010 Commission data were not available at the time this Article was published).¹³⁰ While the Commission data cover slightly different years and have missing information on firm size, these data give me confidence that most guilty pleas of large and public firms—the firms of the greatest interest—were located in public reports.¹³¹

In this dataset of 1011 plea agreements, 14% or 142 were foreign firms. Eight additional cases involved a domestic subsidiary of a foreign parent (the parent typically received a civil settlement or a deferred prosecution agreement). The Commission reports fewer foreign corporate convictions, 120, from 2000–2009. Again, the Commission is missing the relevant data for some firms. Neither my dataset nor the Commission's has complete coverage.¹³² How-

¹³⁰ See 2000–2009 Sourcebooks, *supra* note 102, tbl.54. Another 129 firms had more than 200 employees, more than the 113 the Commission reported in that time period. *Id.* In the vast majority of cases in which all that was obtained were docket sheets, no information was obtained on firm size, as no information was available on whether the firm was sentenced based on size of the relevant unit or firm.

¹³¹ In the 2000–2009 datasheets, firm size information is missing for 848 of 2101 firms (although as noted, this is one area where the Commission data are more complete and include far more information than could be obtained in the hand-collected dataset). Data on firm size may be missing where firms are not necessarily sentenced under U.S. Sentencing Guidelines Manual § 8C2.5(b), which includes as sentencing enhancement factors whether the relevant part of the firm had 10, 50, 200, 1000, or 5000 or more employees. U.S. Sentencing Guidelines Manual § 8C2.5(b) (2010). Thus, almost half of the firms convicted in 2009 were not sentenced under that section. The Commission noted that the firms in still additional cases may have not been fined under U.S. Sentencing Guidelines Manual § 8C2.2 due to a “preliminary determination of inability to pay fine,” further suggesting a high proportion of small firms. 2009 Sourcebook, *supra* note 102 tbl.54. Firm size information would also be missing for firms sentenced under the alternative fine provision, 18 U.S.C. § 3571 (2006), which describes upper and lower limits for fines generally. Firms may also be sentenced under fine provisions included in underlying offenses, which may be high enough that aggravating factors under U.S. Sentencing Guidelines Manual § 8 result in a fine exceeding maximums under the alternative fine provisions. Further, for some offenses, the Guidelines do not apply. See, e.g., U.S. Sentencing Guidelines Manual §§ 8C2.1, 10 (2010) (not including environmental offenses); 33 U.S.C. § 1319(c)(1)(A)–(B) (2006) (Clean Water Act fines accruing each day of the violation). Finally, the reported data on firm size has this limitation: even where size information is present, it may reflect sentencing based on the number of employees in the relevant unit and not the size of the entire firm. U.S. Sentencing Guidelines Manual § 8C2.5 cmt. 2 (2010).

¹³² The Commission's datasheets are missing place of incorporation information for 297 of 2101 firms in the 2000–2008 timeframe. The Commission's data are also different since they are collected by fiscal year. Its data do not yet include fiscal year 2010

ever, this suggests nearly complete coverage of foreign corporate convictions in the hand-collected dataset.

I note that while I focus on the place of incorporation of the corporation, some corporations, while incorporated abroad and coded as foreign, may be subsidiaries of a domestic parent. This occurred in sixteen cases in the same dataset. On the flip side, foreign firms that would suffer serious consequences may be more likely to seek an arrangement where a subsidiary pleads guilty, while the parent receives a deferred prosecution or civil settlement. This occurred in 25 cases in my dataset.

The use of guilty pleas in this context is striking, as compared with the increased use of deferred or non-prosecution agreements for domestic firms. The composition of foreign corporate guilty plea agreements was weighted towards antitrust (53) and environmental offenses (48),¹³³ as well as FCPA violations (21). Those areas track Commission data on crimes with the largest mean fines and the highest numbers of corporate convictions and on foreign corporate convictions.¹³⁴ These areas do not mirror the crimes commonly subject to deferred prosecution agreements, however, five of which involved antitrust and most of which involved a form of fraud.¹³⁵ These results instead likely flow from a shift over the last two decades in DOJ priorities, which I detail in the next Part.

The foreign firms convicted of federal crimes are frequently very large and receive large fines. An Antitrust Division table displayed prosecutions involving fines over \$10 million, including firms with household names: British Airways, DeBeers, and Samsung Electronics—and only nine of the seventy-three firms fined over \$10

at the time of publication of this Article. In 2008, though its time frame is fiscal year-based, the Commission reported 12 foreign firms and 115 domestic firms convicted, with data missing in 72 cases. I obtained information on far fewer 2008 cases but located 17 foreign convictions. This gives me confidence that I located almost all such foreign convictions, although both my data and the Commission's data are likely partially incomplete.

¹³³ Two additional firms were convicted at trial of environmental offenses.

¹³⁴ See 2009 Sourcebook, *supra* note 102 tbl.52. The 2000–2009 datasheets list 34 foreign firms convicted of environmental crimes, 26 convicted of antitrust violations, and far fewer for other offenses (and 27 with no data).

¹³⁵ See *infra* app.

million were domestic.¹³⁶ In the hand-collected dataset of corporate convictions, the *average* fine for foreign firms was \$38,112,000 (far higher than the average fine of \$17,783,000 for the foreign firms in the Commission data). The average fine for domestic firms in this dataset was \$7,540,000. Of the forty-six firms fined \$50 million or more, twenty-three were foreign firms (and twenty-one of those foreign firms were convicted in antitrust cases).

The table below juxtaposes the data on deferred and non-prosecution agreements with data from the Sentencing Commission and the hand-collected publicly reported agreements presented here for the first time. In the table, I compare the last ten years of available data from the U.S. Sentencing Commission (fiscal years 2000–2009) with publicly reported agreements and deferred and non-prosecution agreements (from the time period 2001–2010). This comparison confirms that in each dataset, foreign firms were concentrated among those that received higher fines.

Table 1: Foreign Firms and Average Fines

	Deferred and Non-Prosecution Agreements (2001–2010)	U.S. Sentencing Commission (2000–2008)	Publicly Reported Convictions (2001–2010)
Total firms	185	2,101	1,011
Foreign firms	33 (18%)	120 (6%)	142 (14%)
Average fine	\$24,198,000	\$3,809,000	\$11,425,000
Average foreign fine	\$26,361,000	\$17,783,000	\$38,112,000

The higher average fines among foreign firms are particularly evident in the hand-collected set of publicly reported agreements, where the average fine for a foreign firm was \$38,112,000 as compared with an average fine generally of \$11,425,000 (and an aver-

¹³⁶ Antitrust Division, U.S. Dep't of Justice, *Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More* (July 12, 2011), available at <http://www.justice.gov/atr/public/criminal/sherman10.pdf>; see also Thomas O. Barnett, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Address at the Georgetown Law Global Antitrust Enforcement Symposium: Global Antitrust Enforcement 2 (Sept. 26, 2007), available at <http://www.usdoj.gov/atr/public/speeches/226334.pdf> (stating that, in five years, the Antitrust Division imposed \$1.9 billion in fines, 90% of which involved foreign defendants).

age for domestic firms of \$7,540,000). Foreign firms do receive leniency and they constitute 18% of firms that receive deferred and non-prosecution agreements. However, large and public firms are disproportionately represented among the firms that receive deferred and non-prosecution agreements. About two-thirds (66% or 122 of 185) of the firms receiving deferred and non-prosecution agreements were public firms (and others were subsidiaries of public firms).¹³⁷ In contrast, among firms that received convictions, only 125 of 1,011 were public, and most, as discussed above, are small, non-public, and unable to pay a fine. There is a smaller percentage of foreign firms in that group. The average fines include cases in which no fines were issued. I note also that fines alone do not reflect restitution, forfeiture, or other civil penalties paid by firms; in some cases those civil consequences may be substantial, if not the primary cost to the firm.¹³⁸

One natural question these results raise is whether differences in average fines between foreign and domestic firms can be accounted for by other important features of the prosecutions, such as whether the firm was public or the type of crime for which the firm was prosecuted. After all, the groups of firms, domestic and foreign, are quite different in their aggregate composition. It could be that across the board, public firms, for example, are larger and receive large deterrent fines or that the Antitrust Division generally pursues larger cases resulting in larger fines. To examine this further, several regressions were conducted analyzing whether a firm being public, domestic or foreign, or type of crime corresponded to the fine ultimately imposed upon conviction. Because so many firms received zero fines and because of the highly heterogeneous nature of the cases, a log regression was selected as the most in-

¹³⁷ See Garrett & Ashley, *supra* note 72. Of the 33 foreign firms receiving deferred and non-prosecution agreements from 2001–2010, two-thirds, or 22 of 33, were publicly listed in the United States (and five more were subsidiaries of publicly listed firms).

¹³⁸ Information about other civil penalties, restitution, forfeiture, disgorgement, and the like, is on the spreadsheets made available online. See *id.* The average restitution (including forfeiture and disgorgement) for convicted corporations in the hand-collected dataset was \$3,323,000.

formative.¹³⁹ As one might have expected, the results showed that higher fines corresponded with firms that were public and foreign and also those prosecuted for FCPA and antitrust offenses. The regression estimates that, for otherwise comparable firms, a foreign firm will receive a fine that is on average 22 times larger (between 12 and 41 times larger) than the fine of a domestic firm. The table below illustrates these results.

Table 2: Effects on Log Fines

Variable	Coefficient (Standard Error)	Exponential of the Coefficient (Multiplicative Impact)	(95%, confidence interval)
Foreign	3.08 (0.32)	21.75	(11.50, 41.14)
Public	2.94 (0.41)	18.84	(8.35, 42.51)
Antitrust	2.94 (0.45)	18.90	(7.76, 46.05)
Environmental	1.10 (0.33)	2.99	(1.56, 5.74)
FCPA	3.36 (0.68)	28.84	(7.63, 109.04)
Fraud	-1.77 (0.52)	.17	(0.06, 0.47)
Immigration	-2.31 (1.06)	.10	(0.01, 0.79)
Money Laundering	-4.47 (1.24)	.01	(0.00, 0.13)

Note: Linear regression on log fines, R squared=.263, n=918

In the final Part of this Article, I will turn to theoretical justifications for U.S. prosecutions of foreign firms and for use of guilty pleas rather than deferred prosecutions. The data presented so far, however, suggest several overlapping explanations.

Again, there is no suggestion here that foreign firms are treated differently than comparable domestic firms, although they receive

¹³⁹ I note that my goal is not to predict fines of future firms, but simply to describe convictions and sentences over the past decade. The linear regression and other regressions produced results suggesting that effects were far from uniform among the data, which certainly makes sense given the vast differences between prosecutions of small firms unable to pay fines and large international concerns. That is the reason why the log regression was selected. The log regression was conducted for one plus the fine, to address the problem that so many of the cases involved zero fines (135 of the 918 observations). I also note that there were 918 observations because not all of the 1011 cases had complete information on the amount of the fine, type of crime, place of incorporation, and whether the firm was public.

higher fines on average. Taken as a group, foreign firms are quite differently situated than domestic firms that are convicted. The higher fines in the foreign prosecutions themselves suggest that prosecutors may simply pursue far more serious matters when they decide to prosecute foreign firms, while declining to pursue cases involving less serious conduct or foreign firms unable to pay a fine. Perhaps the cases also disproportionately involved more serious matters deserving a conviction and not a deferred prosecution agreement.

Second, prosecutors say they have increasingly pursued foreign firms to protect U.S. consumers and U.S. firms from unfair foreign competition or corruption.¹⁴⁰ Foreign firms may also dominate certain industries that do not comply with U.S. laws.

Third, while they do not offer this reason, federal prosecutors in the United States cannot always effectively detect or investigate crimes committed abroad. Federal prosecutors may seek harsher penalties (that is, guilty pleas and large fines) to maintain a more effective deterrent against foreign firms more capable of eluding punishment.

Fourth, prosecutors may be more selective in their pursuit of foreign firms due to the costs of such prosecutions. They pursue foreign firms less often than domestic firms and perhaps only when they engage in more blameworthy or harmful conduct. Antitrust cases, as noted, fit this model, if cartel behavior is attributed to high-level employees and if the firm is viewed as more blameworthy. One also sees this reason reflected in cases where the subsidiaries that more directly participated in the criminality plead guilty, but the parent company receives a deferred prosecution agreement.¹⁴¹

Finally, there are other explanations that the data collected would not reflect. Guilty pleas may be more palatable to target firms for particular types of crimes. For example, reputational and

¹⁴⁰ See Fisher, *supra* note 1, at 1.

¹⁴¹ A recent example is in the Alcatel-Lucent cases, in which three subsidiaries pleaded guilty. See Press Release, U.S. Dep't of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay \$92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), <http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html>.

collateral consequences of a conviction for foreign bribery may be not so dire. Alternatively, foreign firms may not have a concentrated lobbying presence in the United States, with prosecutions spread over many countries. Prosecutions of foreign firms have not received sustained criticism or caused modifications to DOJ guidelines.

In the next Part, I explore foreign corporate convictions in four key areas—antitrust, environmental, foreign corrupt practices, and fraud—to develop in a more fine-grained way why prosecutors have chosen to prosecute more foreign firms and how the DOJ has crafted its approach in each context to accommodate practical and foreign policy concerns.

II. INTERNAL AND INTERNATIONAL REGULATION OF FOREIGN CORPORATE PROSECUTIONS

Other nations may resent and oppose the pull of U.S. prosecutors. This is particularly so for cases affecting important national interests or industries and when foreign law permits the target's conduct. I start by discussing the United Bank of Switzerland ("UBS") case, a case of outright conflict between U.S. and foreign criminal law. The case highlights the role played by internal prosecutorial guidelines as well as diplomatic efforts between nations. I then turn to the four substantive areas in which foreign corporate prosecutions are most common. I cannot do justice to the complexities of each enforcement area nor the substantial literatures they have engendered. My purpose is to develop why in each area foreign corporate prosecutions play an important role and how the DOJ has addressed the unique challenges posed by such prosecutions in two general ways. First, internal DOJ regulations can avert diplomatic disputes arising from prosecutions of foreign firms. Centralized review is possible where these foreign prosecutions have almost all been conducted in areas handled by Main DOJ and not the various U.S. Attorney's Offices. Second, international rules, such as treaties, or more informal cooperation agreements or understandings between nations or in conjunction with international organizations, may help to resolve disputes.

A. Collision and Conflict: The UBS Prosecution

In 2009, UBS AG, the largest bank in Switzerland, signed a deferred prosecution agreement with federal prosecutors in the Southern District of Florida. The bank admitted to the widespread use of sham accounts to conceal assets of U.S. citizens seeking to evade taxes. It actively marketed the “Swiss Solution,” assisting rich clients to hide assets in offshore “dummy” corporations.¹⁴² It paid prosecutors \$780 million in fines and agreed to cooperate by divulging the names and accounts of U.S. customers whom it assisted in avoiding taxes in the United States.¹⁴³

UBS was caught in a bind. The IRS and federal prosecutors sought the names of clients who avoided U.S. taxes. Swiss banking law, however, had not only long allowed banks to protect client confidentiality, but also made it a crime to violate client confidentiality. In contrast, tax evasion, or failure to disclose assets or income, is not a crime in Switzerland.¹⁴⁴ Only what Swiss law terms tax fraud, which is defined as willful conduct, is illegal. UBS would either violate Swiss banking privacy laws or it would face prosecution in the United States. United States and Swiss law directly conflicted, but no court reviewed the case. UBS settled the case on the eve of hearings before the U.S. Senate. The agreement adopted a compromise. Swiss law did permit banks to disclose names of individuals who actively sought to evade taxes, not by merely failing to disclose assets or income, but by using other willfully deceptive means such as creation of fictitious entities.¹⁴⁵ The United States obtained only 150 names under that agreement. U.S. citizens, however, promptly sued UBS in Switzerland, arguing that this violated Swiss bank secrecy laws.¹⁴⁶

¹⁴² Lynnley Browning, *A 2nd Inquiry Hits UBS, Pressed for 52,000 Names*, N.Y. Times, Feb. 20, 2009, at B1.

¹⁴³ Press Release, U.S. Dep’t of Justice, *UBS Enters into Deferred Prosecution Agreement* (Feb. 18, 2009), <http://www.justice.gov/opa/pr/2009/February/09tax-136.html>.

¹⁴⁴ Lynnley Browning, *Group of Rich Americans Sues UBS to Keep Names Secret in Tax Case*, N.Y. Times, Feb. 25, 2009, at B5.

¹⁴⁵ David S. Hilzenrath, *UBS Revealed Far Less Than U.S. Sought in Tax Case*, Wash. Post, Feb. 20, 2009, at D1.

¹⁴⁶ See Browning, *supra* note 144.

The IRS, meanwhile, continued to pursue a subpoena in a parallel civil action, seeking information for 52,000 account holders. UBS angrily responded that this request “simply ignores the existence of Swiss law and sovereignty.”¹⁴⁷ It added, “[t]o the extent that the IRS is not satisfied with treaties that the U.S. government has negotiated, that concern should be remedied through diplomacy, not an enforcement action.”¹⁴⁸ A DOJ official responded that it was “not going head to head with the Swiss government.”¹⁴⁹ Yet the Swiss government was an integral part of negotiations with the IRS, the DOJ, and UBS.

By August 2010, the IRS finally received an agreement to obtain the names of only 4550 account holders, but not the tens of thousands of others with such accounts. The Swiss government stated that only accounts larger than one million Swiss francs, or with certain types of false documents or account activity, would be disclosed. The Swiss government would also allow taxpayers an opportunity to file administrative appeals of the decision to disclose their account information.¹⁵⁰ Indeed, a special task force was set up to expedite appeals and new judges were hired to help handle such appeals.¹⁵¹

In response, the IRS used another technique. The IRS declared an amnesty program in which, if account holders voluntarily disclosed offshore accounts and agreed to pay back taxes, they could avoid prosecution and higher penalties. More than 14,000 came forward during the amnesty.¹⁵² In response, other banks asked cli-

¹⁴⁷ Carrick Mollenkamp, *UBS Customers Shielded by Swiss Law, Bank Says*, *Wall St. J.*, Feb. 23, 2009, at A6.

¹⁴⁸ *Id.*

¹⁴⁹ Lynnley Browning, *UBS Executives May Face Prosecution in Tax Evasion Inquiry*, *N.Y. Times*, Mar. 5, 2009, at B3.

¹⁵⁰ Matthew Saltmarsh, *Switzerland to Add Judges for UBS Appeals*, *N.Y. Times*, Sept. 19, 2009, available at <http://www.nytimes.com/2009/09/19/business/global/19ubs.html>.

¹⁵¹ *Id.*

¹⁵² Curt Anderson, *IRS Settles with 14,700 over Foreign Accounts*, *Associated Press*, Nov. 17, 2009, available at 2009 WLNR 23424661.

ents to waive confidentiality requirements, fearing that they too might be prosecuted.¹⁵³

The settlement did not provide all that each side desired. Most remarkable, though, was the degree to which it involved a diplomatic resolution. Yet the settlement did not settle matters. A Swiss federal administrative court ruled that UBS could not disclose the name of a U.S. taxpayer, reasoning that Swiss law does not prohibit tax evasion. The deferred prosecution agreement and IRS settlement appeared jeopardized. Prosecutors said they would renew their suits should UBS not comply by an August 24 deadline.¹⁵⁴ Negotiations continued, resulting in a tax treaty between Switzerland and the United States, approved by the Swiss Parliament in June 2010.¹⁵⁵ The prosecution was finally resolved not just through prosecution, settlement, and diplomacy, but also through a treaty that was the product of prosecutorial pressure. And prosecutors are still using information from UBS clients to pursue other foreign banks; Deutsche Bank just entered a non-prosecution agreement with the DOJ with a massive \$553,633,000 fine.¹⁵⁶ There have been few federal tax prosecutions of foreign firms, but that may change.

This example suggests how a criminal prosecution, although it can pose a severe threat to a foreign corporation, may provide just one part of the enforcement picture. Prosecutors were a party to negotiations involving UBS and the Swiss and U.S. governments, and in which the IRS was also pursuing civil actions, an amnesty program, and enforcement against individual taxpayers. Foreign policy considerations and interests of other administrative agencies and foreign regulators may operate alongside prosecutors in foreign corporate prosecutions. Such considerations would not be ap-

¹⁵³ See Sharona Coutts, *UBS and the Taxpayers' Hidden Billions*, Propublica (Aug. 25, 2009), <http://www.propublica.org/ion/bailout/item/ubs-and-the-taxpayers-lost-billions-725>.

¹⁵⁴ Lynnley Browning, *Swiss Ruling Jeopardizes Deal for UBS Clients' Names*, N.Y. Times, Jan. 23, 2010, at B2.

¹⁵⁵ See Lynnley Browning, *Swiss Approve Deal for UBS to Reveal U.S. Clients Suspected of Tax Evasion*, N.Y. Times, June 18, 2010, at B3.

¹⁵⁶ See Memorandum from Preet Bharara, U.S. Attorney, S.D.N.Y., U.S. Dep't of Justice, to Mark F. Pomerantz, Paul, Weiss, Rifkind, Wharton & Garrison LLP 3 (Dec. 21, 2010), available at http://lib.law.virginia.edu/Garrett/prosecution_agreements/pdf/deutschebank.pdf.

parent from the text of a guilty plea agreement itself and would perhaps not be reflected in a DOJ press release, except where other agencies are thanked for their cooperation. Although unobserved from the outside, institutional considerations may drive enforcement. As the next Sections will develop, open conflicts like the UBS case may not arise very often, in part because of institutional efforts to limit discretion and use treaties and cooperation of foreign governments to guide the prosecution approach.

B. The Practice of Foreign Corporate Prosecutions

At first glance, one might think federal prosecutors are entirely or at least formally indifferent to the unique challenges posed by prosecutions of foreign firms. Although the successive DOJ Guidelines detail factors prosecutors should consider when deciding whether to prosecute a corporation, those guidelines do not discuss prosecutions of foreign firms. No principles of comity or international relations are mentioned. In particular subject areas, however, the DOJ adopted internal practices, some public and some tacit, sensitive to concerns of international comity. As one would expect in an area raising diplomatic concerns, informal practice involves consultation and collaboration with the State Department and with foreign prosecutors. The DOJ has an Office of International Affairs that coordinates international agreements, among other foreign policy related efforts.¹⁵⁷ In some areas, formal treaties provide the framework for a prosecution strategy, while in others mutual assistance agreements provide for cooperation at the enforcement level, or more informally, prosecutors work with international organizations or collaborate with foreign colleagues. Different types of prosecutions are handled by different groups within the DOJ in conjunction with different regulators and different enforcement rules and dynamics. Next, I separately examine areas in which the DOJ has adopted its most explicit procedures regarding international comity and in which prosecutions of foreign firms now most commonly occur: antitrust, environmental, FCPA, and fraud prosecutions.

¹⁵⁷ See U.S. Dep't of Justice, Office of Int'l Affairs, <http://www.justice.gov/criminal/about/oia.html> (last visited Oct. 18, 2011).

1. Antitrust Enforcement

The most prominent area in which the DOJ has prosecuted foreign firms is antitrust. The Antitrust Division's approach towards offering leniency to encourage reporting and cooperation was a precursor for prosecution strategies now used in corporate prosecutions generally—although in important respects, the Division's is an outlier approach towards corporate prosecutions. The Division had long pursued civil actions against international cartels, raising complex issues much discussed in the literature.¹⁵⁸ The Division has also increasingly conducted criminal prosecutions of international cartels. Of the 1011 guilty plea agreements examined, 116 involved antitrust prosecutions. Almost half (53) were of foreign firms, including, as noted above, many of the cases involving the most impressive multi-million dollar fines.

Over the past decade, enforcement against foreign firms has accelerated as the DOJ focused on prosecuting larger and international cartels.¹⁵⁹ In 1991, less than 1% of firms prosecuted by the Division were foreign-based. By 1999, approximately 50% were foreign-based.¹⁶⁰ An Assistant Attorney General noted in a 2007

¹⁵⁸ See, e.g., Wyatt Wells, *Antitrust and the Formation of the Postwar World* 1–3 (2002); see also Salil K. Mehra, *Extraterritorial Antitrust Enforcement and the Myth of International Consensus*, 10 *Duke J. Comp. & Int'l L.* 191, 191–92 (1999).

¹⁵⁹ Gary R. Spratling & D. Jarrett Arp, *International Cartel Investigations: Evaluating Options and Managing Risk in Multi-Jurisdictional Criminal Antitrust Investigations*, 1788 *Practising L. Inst. Corp.* 229, 233–34 (2010); R. Hewitt Pate, Acting Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, *Address Before the ABA Section of Antitrust Law: The DOJ International Antitrust Program—Maintaining Momentum* (Feb. 6, 2003), available at <http://www.usdoj.gov/atr/public/speeches/200736.pdf>.

¹⁶⁰ Gary R. Spratling, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, *Advanced Criminal Antitrust Workshop: Criminal Antitrust Enforcement Against International Cartels* 5 (Feb. 21, 1997), available at <http://www.justice.gov/atr/public/speeches/1056.pdf> (describing how, in 1991, only 1% of Antitrust Division corporate defendants were foreign, while by 1996, 20% were foreign). The percentage was 50% by 1999. Scott D. Hammond, Dir. of Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, *Presentation at the New York State Bar Association Annual Meeting: A Summary Overview of the Antitrust Division's Criminal Enforcement Program 2* (Jan. 23, 2003), available at <http://www.usdoj.gov/atr/public/speeches/200686.pdf>; Gary R. Spratling, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, *Presentation at the American Conference Institute 7th National Conference on FCPA: International Cartels: The Intersection Between*

speech that international cartel investigations accounted for almost half of investigations and “[m]ore than ninety percent” of fines imposed, adding that “[b]ecause of the international nature of many cartels . . . enforcement takes on a global dimension.”¹⁶¹ Many of these prosecutions are of a mixed nature, with a typical international cartel involving a United States corporation cooperating with several foreign cartel members.¹⁶²

The issue of extraterritorial jurisdiction in antitrust enforcement has been the subject of scholarship, litigation, and federal legislation, but almost exclusively with respect to civil and private suits brought in U.S. courts.¹⁶³ In contrast, federal criminal prosecutions have raised fewer questions in part because of the DOJ’s approach. In antitrust, two separate approaches have guided prosecutions of foreign firms.

First, unlike in most other areas of DOJ practice, internal written guidelines explicitly incorporate international comity norms. The Guidelines list eight factors considered when making enforcement decisions, including the effects of the conduct on the United States, the degree of conflict with foreign law or policy, and

FCPA Violations and Antitrust Violations 2 (Dec. 9, 1999) [hereinafter Spratling, International Cartels], available at <http://www.usdoj.gov/atr/public/speeches/3981.pdf>.

¹⁶¹ Thomas O. Barnett, Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice, Presentation at the Georgetown Law Global Antitrust Enforcement Symposium: Global Antitrust Enforcement 2 (Sept. 26, 2007), available at <http://www.usdoj.gov/atr/public/speeches/226334.pdf>.

¹⁶² Id. Those multinational cartel prosecutions may also overlap with FCPA prosecutions; international cartels may use illegal bribes to cement their control. See Spratling, International Cartels, *supra* note 160, at 1 (“[T]here is a recurring intersection of conduct that violates both the Sherman Antitrust Act and the Foreign Corrupt Practices Act.”).

¹⁶³ See Susan E. Burnett, Comment, U.S. Judicial Imperialism Post *Empagran v. F. Hoffmann-LaRoche*? Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust, 18 *Emory Int’l L. Rev.* 555, 559–65 (2004); Edward D. Cavanagh, The FTAIA and Subject Matter Jurisdiction Over Foreign Transactions Under the Antitrust Laws: The New Frontier in Antitrust Litigation, 56 *SMU L. Rev.* 2151, 2152 (2003); Susan Beth Farmer, Introduction: Competition Without Borders: Antitrust Law and the Challenge of Globalization, 107 *Dick. L. Rev.* 725, 725–26 (2003); Klaus-Heiner Lehne, Stop U.S. Judicial Overreach, *Wall St. J. Eur.*, Nov. 17, 2003, at A9. See generally *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004). But see Podgor, *supra* note 21, at 325–26 (discussing jurisdictional issues relating to international federal prosecution).

the comparative effectiveness of foreign enforcement.¹⁶⁴ The Guidelines note: “Agencies also take full account of comity factors beyond whether there is a conflict with foreign law.”¹⁶⁵ Further, they encourage consideration of the use of “appropriate diplomatic channels,” and “consider whether their activities would interfere with or reinforce the objectives of the foreign proceeding, including any remedies contemplated or obtained by the foreign antitrust authority.”¹⁶⁶ The DOJ also adopts mutual assistance agreements with a series of foreign countries to promote joint investigations.¹⁶⁷

Second, Antitrust Division policy has made consistent application of the Guidelines less critical. That is because the Division has focused almost exclusively on cases involving self-reported conduct by members of cartels. Such cartels typically involve participation of higher officials engaged in setting prices and non-competition arrangements. The federal prosecution guidelines state that punishing the firm may be far more justified for acts that are “directed by its management” or “condoned by upper management” as well as for the “seriousness of the crime.”¹⁶⁸ The DOJ now considers cartel behavior extremely serious (the Supreme Court called collu-

¹⁶⁴ Those factors are:

- (1) the relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad;
- (2) the nationality of the persons involved in or affected by the conduct;
- (3) the presence or absence of a purpose to affect U.S. consumers, markets, or exporters;
- (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad;
- (5) the existence of reasonable expectations that would be furthered or defeated by the action;
- (6) the degree of conflict with foreign law or articulated foreign economic policies;
- (7) the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and
- (8) the effectiveness of foreign enforcement as compared to U.S. enforcement action.

U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Enforcement Guidelines for International Operations § 3.2 (1995), available at <http://www.usdoj.gov/atr/public/guidelines/internat.htm>.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Burnett, *supra* note 163, at 633–34.

¹⁶⁸ See Principles of Federal Prosecution of Business Organizations, *supra* note 47, § 9-28.400–500.

sion, for example, “the supreme evil of antitrust”¹⁶⁹) and it may tend to involve participation by upper management.

In contrast to the large numbers of guilty pleas in antitrust cases, only five of the deferred or non-prosecution agreements that the DOJ has entered involved antitrust charges.¹⁷⁰ Another reason explains the dominance of convictions in the antitrust context. Some firms do receive leniency and avoid a conviction, but they receive complete leniency, and not even a deferred or non-prosecution agreement. The Antitrust Division provides such rewards under its Corporate Leniency Program, first created in 1978, but revised in 1993 to make participating much more attractive.¹⁷¹ The first-reporter firm now receives automatic and complete amnesty from prosecution if it cooperates. Having been turned in by one of their own, the other cartel members have every incentive to simply plead guilty and cooperate rather than face a trial. Indeed, to further encourage cooperation, the DOJ now provides credit, though not full amnesty, to a “second-in” or subsequently reporting cartel member that cooperates fully after the first firm obtains amnesty.¹⁷²

The Leniency Program provides strong incentives for individuals and not just firms to defect. A firm obtaining leniency also obtains it for employees, officers, and directors, and in addition, in 1994 the DOJ adopted a leniency policy for individuals who report cartel behavior.¹⁷³ The DOJ has increasingly prosecuted individual em-

¹⁶⁹ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

¹⁷⁰ The four entered between 2001 and 2010 are the Hitachi Corp., NEC, NetVasant, and Pasha Forwarders cases. In 2011, a fifth case resulted in a non-prosecution agreement with UBS AG. See Garrett & Ashley, *supra* note 72.

¹⁷¹ See Antitrust Division, U.S. Dep't of Justice, Corporate Leniency Policy (Aug. 10, 1993), available at <http://www.usdoj.gov/atr/public/guidelines/0091.htm>; see also D. Daniel Sokol, *Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement*, 77 *Antitrust L.J.* (forthcoming 2011) (describing the practice of this program).

¹⁷² See Scott D. Hammond, Deputy Assistant Attorney Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Address at the 54th Annual American Bar Association Section of Antitrust Law Spring Meeting: Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations 5 (Mar. 29, 2006), available at <http://www.usdoj.gov/atr/public/speeches/215514.pdf>.

¹⁷³ Antitrust Division, U.S. Dep't of Justice, Leniency Policy for Individuals (Aug. 10, 1994), available at <http://www.usdoj.gov/atr/public/guidelines/0092.htm>.

ployees, including substantial numbers of foreign employees of foreign firms.¹⁷⁴

The Antitrust Division's approach pre-dates and also departs from the DOJ's Principles of Federal Prosecution of Business Organizations. After all, the Leniency Policy does not reward compliance, but instead self-reporting and, more importantly, turning in the other members of the cartel. A first-reporting firm need not have a compliance program to receive immunity, nor does compliance earn a firm leniency. Indeed, the DOJ guidelines note that given the serious nature of antitrust crimes, a prosecution may be *mandated*, despite a firm's effective compliance programs.¹⁷⁵ Thus, as a matter of policy, we rarely see deferred or non-prosecution agreements. Instead, firms either receive immunity or they are prosecuted.

What explains the surge in foreign prosecutions? Cartel enforcement against foreign firms in the 1980s met with noncooperation and even outright resistance, such as foreign statutes designed to block such prosecutions; some foreign countries had no competition law or simply required cartels to register with authorities.¹⁷⁶ The 1993 revisions in the DOJ Leniency Policy introduced amnesty and increased the incentives to self-report, and most international cartels are now resolved through cooperation of firms receiving amnesty under the policy.¹⁷⁷ A chain of high-profile DOJ international cartel prosecutions, beginning with the 1996 lysine cartel prosecutions, and the accompanying "dramatic" increase in fines

¹⁷⁴ J. Anthony Chavez, *International Cartel Enforcement: Creating a Fear of Detection*, 1811 *Practising L. Inst. Corp.* 929, 955–59 (2010); see also Spratling & Arp, *supra* note 159, at 246. The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 also enhanced penalties for individual cartel participants. See Pub. L. No. 108–237, § 215(a), 118 Stat. 661, 668 (2004) (codified at 15 U.S.C. § 1 (2006)).

¹⁷⁵ See Principles of Federal Prosecution of Business Organizations, *supra* note 47, § 9-28.800.

¹⁷⁶ See D. Daniel Sokol, *International Antitrust Institutions, in Cooperation, Comity, and Competition Policy* 187, 191 (Andrew T. Guzman ed., 2011); D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 *Berkeley Bus. L.J.* 37, 46 (2007); Julian M. Joshua & Donald C. Klawiter, *The UK "Criminalization" Initiative*, *Antitrust*, Summer 2002, at 67, 68 (2002).

¹⁷⁷ Harvey I. Saferstein, *The Practical Aspects of Corporate Antitrust Compliance Programs*, 1436 *Practising L. Inst. Corp.* 691, 863–64 (2004).

over the past decade, publicized the harsh consequences of cartel behavior.¹⁷⁸

During the same period of time, there has been convergence as foreign countries adopted prohibitions on cartels and increasingly enforced anti-cartel rules themselves, including through new criminal sanctions and increasing fines.¹⁷⁹ The DOJ carrot and stick strategy caught on. The Antitrust Division made a major priority of promoting international cooperation and convergence, including by working with the International Competition Network (“ICN”) and the OECD. Such efforts have accompanied a “convergence in leniency programs,” in which at least forty-eight other countries adopted leniency-type programs.¹⁸⁰ This “made it easier and more attractive for companies to simultaneously seek and obtain amnesty in the United States, Europe, Canada and other jurisdictions.”¹⁸¹ The convergence increased with cooperation agreements, coordinated and parallel investigations, and prosecutions.¹⁸² Moreover, incentives for a firm to self-report and obtain leniency are greater if it may obtain leniency in multiple jurisdictions, with the alternative that others may self-report and the firm will be left to face civil and criminal enforcement in multiple jurisdictions. The United States informally cooperates and shares information with other jurisdictions so that a firm can make simultaneous amnesty applications to authorities in the United States and other countries.¹⁸³ In the past, foreign corporations may have been less likely to self-report and obtain leniency, but they may be more culturally and strategically willing to do so now that they can receive leniency both at home and abroad. If they do so, we might then see a reduc-

¹⁷⁸ J. Anthony Chavez, *More Aggressive Action to Curb International Cartels*, 1739 *Practising L. Inst. Corp.* 807, 813–16, 836 (2009).

¹⁷⁹ See Spratling & Arp, *supra* note 159, at 242–44, 250–54.

¹⁸⁰ Barnett, *supra* note 136, at 2; see also Chavez, *supra* note 174, at 937–38.

¹⁸¹ Barnett, *supra* note 136, at 2; see also Gary R. Spratling & D. Jarrett Arp, *The International Leniency Revolution* 8–9 (2003), available at <http://www.gibsondunn.com/publications/pages/TheInternationalLeniencyRevolution.aspx>. However, on endemic delays in European Union antitrust investigations and prosecutions, see James Kanter, *An Old Chip Cartel Case Is Brought to a Swift End*, *N.Y. Times*, May 20, 2010, at B13.

¹⁸² See Chavez, *supra* note 178, at 839; Spratling & Arp, *supra* note 159, at 255–61.

¹⁸³ Spratling & Arp, *supra* note 159, at 258–59.

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tion in foreign antitrust convictions, at least in converging countries.

Thus, several reasons may explain a rise in antitrust prosecutions of foreign firms. The DOJ has made such prosecutions a heightened priority, and in doing so obtained extremely large fines. The DOJ also adopts norms of international comity that limit its exercise of discretion, though how meaningful those limits are cannot be observed from the outside; the DOJ has not publicized decisions not to pursue criminal antitrust prosecutions in deference to foreign sovereigns. Foreign countries, far from resisting extraterritorial application of antitrust laws, have begun to adopt parallel prohibitions and enforcement strategies themselves. Success can build on success. Each conviction reinforces the strength of such leniency policies. As other countries cooperate and adopt parallel approaches, convergence may encourage still additional self-reporting by foreign and domestic firms. These international cartel cases are complex, involving firms across multiple jurisdictions. Nevertheless, they share some similarities with other areas discussed. As discussed in the sections that follow, in two other self-contained areas of federal criminal practice, there has been a dramatic rise in prosecutions of foreign corporations. Both are characterized by increased international cooperation. Further, whistleblowing employees and self-reporting also play important roles in other areas where we see large numbers of foreign corporate prosecutions.

2. *Environmental Crimes*

A large subset of corporate guilty pleas (227) involved environmental crimes (with five more trial convictions).¹⁸⁴ The cases involved Clean Air and Clean Water Act violations, among others. One would expect that most environmental crimes would involve pollutants deposited within the United States. Fifty environmental prosecutions, however, were of foreign firms and most involved pollution occurring outside the United States.

¹⁸⁴ See *infra* app.; see also spreadsheet accompanying data website, Garrett & Ashley, *supra* note 91.

Federal prosecutors have increasingly prosecuted pollution on the high seas and not in U.S. navigable waters. As in the other types of foreign corporate prosecutions discussed, treaties play an integral role. The prosecutions are of foreign-flagged vessels, using the record-keeping provisions of the Act to Prevent Pollution from Ships (“APPS”), which itself implements an international treaty concerning oil pollution, ratified by the United States in 1980.¹⁸⁵ The APPS prohibits ships in international waters, more than twelve nautical miles from the coast, from discharging more than fifteen parts per million of oil in waste-water. Ships discharge bilge water from their engines and other piping, and that water may include oil, lubricants, cleaning fluids, and other waste. Ships are required upon docking at a U.S. port to provide an Oil Record Book, signed by the ship’s chief engineer, and make their documentation, as well as the ship itself, available to the Coast Guard for inspection.¹⁸⁶ If foreign vessels provide false records concerning oil discharges, they may be prosecuted, not for the polluting conduct itself, which occurs on the high seas, but for making false statements to federal officials. As a result, courts have rejected jurisdictional challenges since jurisdiction is premised on the false reporting while at the U.S. port.¹⁸⁷ As in other areas, however, few firms contest jurisdiction and instead they overwhelmingly plead guilty.

APPS cases typically have been brought against foreign ship owners. Only two out of forty-three of the APPS convictions located involved domestic firms and the forty-one others were foreign. After all, few commercial shipping concerns flag or register their vessels in the United States. In 1993, the DOJ Environment and Natural Resources Division (“ENRD”), the U.S. Coast Guard, and the Environmental Protection Agency’s Criminal Investigation

¹⁸⁵ The Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901–15 (2006); see International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 12 I.L.M. 1319, amended by Protocol, Feb. 17, 1978, 17 I.L.M. 546 (also known as MARPOL); see also H.R. Rep. No. 96-1224, at 1–2 (1980).

¹⁸⁶ See Oil Record Book, 33 C.F.R. § 151.25(a) (2009); id. § 151.23(a).

¹⁸⁷ See *United States v. Jho*, 534 F.3d 398, 401 (5th Cir. 2008); see also *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303, 309 (2d Cir. 2009). Indeed, many such cases also involve charges of false statements. See, e.g., *Jho*, 534 F.3d at 401. Further, U.S. authorities may choose to refer a matter to the home country if it is also a treaty signatory. 33 U.S.C. § 1908(f) (2006).

Division, began a Vessel Pollution Initiative to “detect, investigate, and prosecute illegal vessel discharges of oily wastes, plastics, and other wastes that are in violation of U.S. environmental laws.”¹⁸⁸ Over the years, prosecutions accelerated and foreign firms operating vessels increasingly faced large fines.¹⁸⁹ The DOJ currently averages approximately two to four new vessel pollution cases per month.¹⁹⁰ Many prosecutions involve falsified oil record books, and in addition, situations where engineers on the ship hid signs of discharge by building a “magic pipe” to bypass the filtration system and dump oily bilge water directly into the ocean.¹⁹¹

The prosecutions grew from a perception that illegal dumping was “rampant and so pervasive within the maritime community.”¹⁹² Prosecutors warned that the Vessel Initiative would continue until the number of referrals “dwindle[s] to zero.”¹⁹³ The prosecutions take advantage of whistleblower provisions in the APPS rewarding seamen who report oily discharges to the United States. Without such reports, the Coast Guard might never detect a “magic pipe” or false entries. The rewards to whistleblowers can be significant. A crewmember may receive as much as half of the criminal fine in the millions of dollars.¹⁹⁴ In contrast, non-reporting senior crew-

¹⁸⁸ U.S. Env'tl. Prot. Agency, Cruise Ship Discharge Assessment Report, E.P.A. Doc. No. 842-R-07-005, § 1.4 (2008).

¹⁸⁹ Nicholas H. Berg, Bringing It All Back Home: The Fifth and Second Circuits Allow Domestic Prosecutions for Oil Record Book Violations on Foreign-Flagged Vessels, 34 Tul. Mar. L.J. 253, 277 (2009).

¹⁹⁰ Lawrence I. Kiern, Partner, Winston & Strawn LLP, Presentation: Environmental Compliance (June 18, 2007).

¹⁹¹ Richard A. Udell, Senior Trial Attorney, Env'tl. Crimes Section, U.S. Dep't of Justice, Presentation Before INTERTANKO: Criminal Vessel Enforcement (Mar. 21, 2005).

¹⁹² Jeanne M. Grasso & Allison L. Barlotta, Presentation at the 2005 International Oil Spill Conference: Criminal Prosecutions and the Maritime Industry: A Worldwide Trend (May 15, 2005).

¹⁹³ Jeanne M. Grasso & Jonathan K. Waldron, Presentation at the 2003 International Oil Spill Conference: Trends in Criminal Enforcement in the Marine Industry: More Targets and Expanding Theories of Liability (Apr. 6–10, 2003).

¹⁹⁴ 33 U.S.C. § 51908(b) (2006) (“An amount equal to not more than 1/2 of such penalties may be paid by the Secretary, or the Administrator as provided for in this chapter, to the person giving information leading to the assessment of such penalties.”). Such awards have also resulted in attorneys’ fees litigation. See, e.g., *United States v. Overseas Shipholding Grp., Inc.*, 625 F.3d 1, 6–7 (1st Cir. 2010).

members have been prosecuted and convicted.¹⁹⁵ Practitioners also attribute the acceleration of prosecutions to improvements in detection technology used by the Coast Guard, greater media coverage of ocean dumping, and the DOJ's increased skill in litigating such cases.¹⁹⁶

These cases are resolved by convictions and not by deferred prosecution agreements. A majority of the cases are brought by the Environmental Crimes Section of ENRD at Main Justice or led by them. There is no explicit rule assigning it such cases, but ENRD has developed expertise and a practice area for bringing vessel pollution cases. Another reason why cases may often be referred to them is that many such cases involve multi-district issues, which may be more efficiently handled by Main Justice. Nor is there a rule or policy statement that in APPS cases firms will be prosecuted and not receive deferred or non-prosecution agreements. Why has the practice developed such that the cases all involve guilty pleas (and a few trials by firms willing to take that risk)? It may be that these shipping concerns are foreign, do not have securities listed in the United States, and a conviction in the United States is not of pressing concern. On the other hand, even if the fines are not themselves prohibitively large, immediate compliance with U.S. authorities may be extremely important, given the central importance of U.S. ports to the global shipping market. Another explanation is that under the Organizational Guidelines, one significant factor in deciding whether to prosecute a firm is whether a civil action would suffice. With substantial civil penalties available (and the potential to attach the ship in rem or deny clearance to any ship),¹⁹⁷ prosecutors may feel that only the most serious cases deserve prosecution. A "magic pipe" case may involve inten-

¹⁹⁵ See, e.g., Press Release, U.S. Dep't of Justice, Polembros Shipping Ltd. Sentenced for Crimes Related to Pollution from Cargo Ship Traveling to New Orleans (Dec. 9, 2009), <http://www.justice.gov/opa/pr/2009/December/09-enrd-1320.html>; Press Release, Fed. Bureau of Investigation, Charlotte Division, Ship Management Firm Pleads Guilty and Is Sentenced for Violating Federal Pollution Law (June 7, 2010), <http://charlotte.fbi.gov/dojpressrel/pressrel10/ce060710.htm>.

¹⁹⁶ See, e.g., Grasso & Waldron, *supra* note 193.

¹⁹⁷ 33 U.S.C. § 1908(b) (2006) (civil fines); *id.* § 1908(d)–(e) (in rem proceedings and ship clearance).

tional misconduct, after all, though perhaps not tolerated by high-level administration in the shipping company home office.

The formation of an initiative to combat ocean dumping is part of an increased awareness of the need to try to secure compliance with U.S. environmental laws by multinational firms.¹⁹⁸ As in other areas, enforcement accelerated once prosecutors settled on a strategy and became comfortable winning cases. Now that the approach is well established, the burden of initiating new cases, which typically result in a guilty plea, may be fairly slight. Enforcement may mount as long as shipping concerns continue to violate the APPS.

3. FCPA Enforcement

Few individuals or organizations, much less foreign corporations, were prosecuted in the first two decades after the FCPA was enacted. The recent expansion in its use can be traced to a treaty, international cooperation, and a new approach by the DOJ, all of which parallels in some respects what I have just described in the antitrust and ocean-dumping contexts.

In 1977, the FCPA was enacted in the wake of the Watergate scandal and revelations that corporations regularly bribed government officials.¹⁹⁹ The statute makes it a crime to pay certain types of bribes to foreign officials and, second, in its civil accounting provisions, it obliges issuers to keep accurate books and records and maintain a system of accounting internal controls.²⁰⁰ The SEC has authority to enforce the FCPA civilly, shared with the DOJ, which can also prosecute criminal FCPA violations.²⁰¹ While for decades FCPA prosecutions were rare, they accelerated after 1998.²⁰² The

¹⁹⁸ In addition to the APPS cases, there were nine other prosecutions of foreign firms for environmental crimes, including Clear Air Act and Clean Water Act violations, and trafficking in internationally protected wood. See Garrett & Ashley, *supra* note 91.

¹⁹⁹ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78a, 78m, 78dd-1 to dd-3, 78ff (2006)).

²⁰⁰ See *id.* § 78m.

²⁰¹ See Gerlach & Parizek, *supra* note 98. The DOJ may file civil actions against non-issuers in addition to pursuing criminal actions.

²⁰² See Lee C. Buchheit, G. Mitu Gulati & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 *Duke L.J.* 1201, 1252 (2007) (noting that in the first twenty-seven years after the statute was enacted, the DOJ brought only thirty-nine prosecutions).

defense bar now carefully scrutinizes recent trends in FCPA enforcement and highlights “aggressive enforcement” and “larger penalties.”²⁰³

As in the areas just discussed, the observed rise in investigations and prosecutions may have several overlapping explanations. For years, U.S. corporations complained that the playing field was not level, and foreign firms were advantaged in foreign markets because they were able to pay bribes to foreign officials without consequences. In 1998, the FCPA was amended in part to comply with the OECD Convention.²⁰⁴ The amendments expanded the coverage of the statute and provided for broader “alternative jurisdiction” over extraterritorial acts by domestic firms.²⁰⁵ For foreign firms, the amendments retain nexus requirements that a foreign issuer “make use of the mails or any means or instrumentality of interstate commerce” in furtherance of the bribery acts, and foreign non-issuers must do so “while in the territory of the United States.”²⁰⁶ The adoption of the OECD convention made extraterritorial application of the FCPA far more palatable, and convergence in part explains the rise in FCPA enforcement. Thirty-eight countries have

²⁰³ Shearman & Sterling LLP, *Recent Trends and Patterns in FCPA Enforcement 2* (Feb. 13, 2008), http://www.shearman.com/files/upload/FCPA_Trends.pdf; see also R. Christopher Cook & Stephanie Connor, *The Foreign Corrupt Practices Act: Enforcement Trends in 2010 and Beyond 2–3* (2010), <http://www.jonesday.com/files/Publication/f0950ee5-18bb-496f-acfe-662b219a108e/Presentation/PublicationAttachment/ada2352f-00b0-4240-aeef-250a23629ba8/FCPA%20Enforcement%20Trends.pdf>; Joseph P. Covington, Larry P. Ellsworth & Iris E. Bennett, *FCPA Enforcement Trends 1–2* (Oct. 24, 2007), http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C1879%5CFCPAEnforcementTrends.pdf.

²⁰⁴ See OECD Convention, *supra* note 32; International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at 15 U.S.C. §§ 78dd-1 to 78dd-3, 78ff (2006)). Earlier 1988 amendments added an affirmative defense permitting a showing that the payment “was lawful under the written laws and regulations” of the foreign county or a “reasonable and bona fide expenditure” incurred by the foreign official. 15 U.S.C. § 78dd-1(c) (2006).

²⁰⁵ 15 U.S.C. § 78dd-2(i) (2006) (providing for “alternative jurisdiction” over domestic “person[s]” “irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce”).

²⁰⁶ *Id.* §§ 78dd-1(a), dd-3(a).

ratified the OECD Convention.²⁰⁷ Parties to it are required to institute criminal penalties for the bribery of foreign officials that are “effective, proportionate, and dissuasive.”²⁰⁸ Parties must also “take such measures as may be necessary to establish . . . jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.”²⁰⁹ The OECD Convention also includes mutual assistance provisions, utilized, for example, in the Siemens case.²¹⁰ Thus, British law enforcement cooperated in serving arrest warrants in the undercover operation described in Part I; Assistant Attorney General Lanny Breuer commented that “international cooperation is growing every day and getting better and better.”²¹¹ The United Nations adopted a Convention Against Corruption in 2003 and other international institutions have adopted anti-corruption norms.²¹² Enforcement by OECD parties has increased in recent years, although the United States still prosecutes many more cases than any other country.²¹³ The OECD has also influenced federal courts that have broadly interpreted the

²⁰⁷ See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of March 2009 (2009), <http://www.oecd.org/dataoecd/59/13/40272933.pdf>.

²⁰⁸ OECD Convention, *supra* note 32, art. 3.

²⁰⁹ *Id.* art. 4. See also OECD, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD Doc. AF/E/IME/BR(97)17/REV1 art. 4 (1997), available at <http://www.justice.gov/criminal/fraud/fcpa/docs/combatbribe2.pdf>.

²¹⁰ OECD Convention, *supra* note 32, art. 12 (“The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention.”); see also Steven Pearlstein, Cashing in on Corruption, *Wash. Post*, Apr. 25, 2008, at D1 (noting “valuable help from foreign governments since the signing of a global convention” including by giving “U.S. investigators access to secret bank accounts and foreign tax records”).

²¹¹ See Henriques, *supra* note 93.

²¹² See Marika Maris & Erika Singer, Foreign Corrupt Practices Act, 43 *Am. Crim. L. Rev.* 575, 594–96 (2006); Kenneth B. Reisenfeld, Policy on Convention Against Corruption, 2005 *A.B.A. Sec. Int’l L. Rep.* 1 (2005), available at http://www.abanet.org/intlaw/policy/crimeextradition/conventioncorruption08_05.pdf.

²¹³ See Fritz Heimann & Gillian Dell, Transparency International, Progress Report 2008: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 7–8 (2008), available at <http://www.transparency.org/content/download/33627/516718> (noting “significant enforcement in sixteen countries”).

FCPA's provisions, perhaps also accounting for the rise in prosecutions.²¹⁴

During the same period, the DOJ consistently called FCPA prosecutions one of its highest priorities. The FBI created a unit dedicated to FCPA investigations.²¹⁵ Meanwhile, the SEC also increased its civil enforcement in the area and created a unit specializing in FCPA investigations.²¹⁶ There has been a marked trend towards far larger fines and penalties. Perhaps most remarkable was the Siemens probe with investigation costs of more than \$500 million.²¹⁷ The DOJ has prosecuted FCPA matters increasingly and, by its own description, aggressively.²¹⁸ The numbers of FCPA prosecutions have increased from a handful each year to several dozen a year.²¹⁹ Perhaps over 120 FCPA investigations are pending and about a third of reported investigations involve foreign organizations.²²⁰ There has also been a rise in prosecutions of individual

²¹⁴ See, e.g., *United States v. Kay*, 359 F.3d 738, 744–45, 754–56 (5th Cir. 2004) (noting ambiguity in statute as to business nexus requirement of “improper advantage” portion of the statute and adopting a broader interpretation of that provision based on a review of legislative history and congressional intent to implement the OECD); see also *United States v. Kozeny*, 493 F. Supp. 2d 693, 705 (S.D.N.Y. 2007) (reviewing the reasoning of *Kay* and concluding that “the FCPA’s business nexus element was intended to be construed broadly”).

²¹⁵ Sue Reisinger, *Why are More Companies Self-Reporting Overseas Bribes?*, Corp. Couns. (July 16, 2007), <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?i=1184231196297>.

²¹⁶ Robert Khuzami, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm’n, Remarks Before the New York City Bar: My First 100 Days As Director of Enforcement (Aug. 5, 2009), available at <http://www.sec.gov/news/speech/2009/spch080509rk.htm>; see also Weiss, *supra* note 66, at 481 (describing more aggressive SEC approach in past decade, including increased use of disgorgement remedies).

²¹⁷ See Esterl et al., *supra* note 33.

²¹⁸ Ivan Dominguez, Survey of DOJ Criminal Division Priorities: Assistant AG Breuer Addresses NACDL Conference, *The Champion*, Nov. 2009, at 10, 10.

²¹⁹ Priya Cheria Huskins, FCPA Prosecutions: Liability Trends to Watch, 60 *Stan. L. Rev.* 1447, 1449 (2008); Pearlstein, *supra* note 210 (“[E]qually important has been a step-up in enforcement At the Justice Department, a team that used to have the equivalent of two people assigned to FCPA now has as many as 12 prosecutors, assisted by a new team of FBI agents dedicated to these cases.”); see also Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 *Ind. L. Rev.* 389, 389 (2010).

²²⁰ See Criminal Division, U.S. Dep’t of Justice, *supra* note 2, at 21–22; Gibson Dunn, 2010 Mid-Year FCPA Update (July 8, 2010), <http://www.gibsondunn.com/Publications/Pages/2010Mid-YearFCPAUpdate.aspx> (announcing that “Assistant At-

employees for FCPA violations, and the first corporation was convicted at a trial for FCPA violations.²²¹

The increase in FCPA activity is not just the product of affirmative enforcement efforts. In response to a perceived threat of prosecution, most new cases originate from voluntary self-reporting.²²² As then-DOJ Deputy Chief Mark Mendelsohn put it, “[i]f we call them before they call us, it’s not where they want to be.”²²³ The Dodd-Frank Act may increase reporting by individual employees with its whistleblower bounty program, including for those reporting FCPA violations.²²⁴

In FCPA cases, the DOJ has targeted more foreign firms than ever before, although the majority of targets are domestic.²²⁵ While this Article focuses on prosecutions of foreign firms, I underscore that the distinction may be particularly irrelevant in some prosecu-

torney General [Lanny] Breuer confirmed 140 active FCPA investigations at the DOJ”); Dionne Searcey, U.S. Cracks Down on Corporate Bribes, *Wall St. J.*, May 26, 2009, at A1 (“At least 120 companies are under investigation . . . up from 100 at the end of last year.”).

²²¹ Amanda Bronstad, *Defenders Strike Out in FCPA Cases*, *Nat. L.J. & Legal Times*, May 16, 2011; Koehler, *supra* note 219, at 404–06; Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 *Ga. L. Rev.* 489, 526–30 (2011); Lanny A. Breuer, Assistant Attorney Gen., Crim. Div., U.S. Dep’t of Justice, *Speech at the Franz-Hermann Brüner Memorial Lecture at the World Bank* (May 25, 2011), available at <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-110525.html>.

²²² Stephen Fishbein, *Recent Trends and Patterns in FCPA Enforcement*, 1652 *Practising L. Inst. Corp.* 225, 236 (2007) (“24 of the 27 newly disclosed FCPA investigations in 2005–2007 were voluntarily disclosed to the SEC or the DOJ. . . . By contrast, the government initiated the majority of the reported investigations in both 2002 and 2003.”); Marie Leone, *Coming Clean About Bribery*, *CFO.com* (Apr. 3, 2006), <http://www.cfo.com/article.cfm/> (quoting Criminal Fraud Section Deputy Chief describing FCPA self-reporting “boom”).

²²³ See Searcey, *supra* note 220.

²²⁴ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1740, 1841–42 (2010).

²²⁵ Fishbein, *supra* note 222, at 231–32 (“While the majority of investigations in 2003 and 2004 focused on U.S. corporations, the ratio of investigations of U.S. corporations to foreign corporations increased significantly in 2004. Of the 20 ongoing investigations launched in 2004, 15 concerned U.S. companies or U.S./foreign corporations, while only four concerned purely foreign corporations. The numbers have been similar in 2005–2007, with 23 of the 33 ongoing investigations having concerned U.S. companies or U.S./foreign corporations and only twelve having concerned foreign corporations.”).

tions. After all, a firm incorporated in the United States may be multinational, with subsidiaries abroad. Where the employees of a foreign subsidiary paid bribes, whether the parent corporation is incorporated in the United States or a foreign country may not make much practical difference. In either case, the bribes were paid in a foreign country and often by foreign employees of a foreign subsidiary.

To provide one example, in 2006 the DOJ prosecuted Statoil, a Norwegian company, indeed one in which a majority stake is owned by the government of Norway.²²⁶ Jurisdiction was likely proper; Statoil listed securities in the United States and transferred \$5 million through the U.S. wires as part of the criminal transaction. Yet Statoil had already been prosecuted and paid a \$3 million fine to Norwegian authorities.²²⁷ However, the DOJ emphasized that the “willingness to resolve this investigation by a deferred prosecution agreement” was in part because of the separate Norwegian prosecution.²²⁸ The case highlights how FCPA investigations can raise complex enforcement problems. Parallel prosecutions by foreign countries are now more common.²²⁹ Investigation may touch on sensitive issues, where underlying cases involve conduct with high-level foreign government officials. Relevant bank accounts may be government accounts or owned by senior officials.

There was a concern early on that the DOJ’s role in enforcing the FCPA could “engender resentment and hostility.”²³⁰ With increased enforcement, one would expect guidance on enforcement priorities. Some limitations and guidance are built into the struc-

²²⁶ Robert C. Blume & J. Taylor McConkie, *Navigating The Foreign Corrupt Practices Act: The Increasing Cost Of Overseas Bribery*, *Colo. Law.*, Aug. 2007, at 97.

²²⁷ *In re Statoil*, ASA, Exchange Act Release No. 54,599, 89 SEC Docket 283, 286 (Oct. 13, 2006) (Order Instituting Cease-and-Desist Proceedings), available at <http://www.sec.gov/litigation/admin/2006/34-54599.pdf>. The \$3 million was, however, credited against the \$10.5 million fine imposed by the SEC and the DOJ. *Id.*

²²⁸ See Fisher, *supra* note 1, at 4.

²²⁹ Fishbein, *supra* note 222, at 235 (listing a series of recent parallel investigations); see also Shearman & Sterling LLP, *supra* note 203, at 6 (“In addition to FCPA enforcement in the United States, companies are increasingly facing parallel investigations in foreign jurisdictions under other nations’ anticorruption laws.”).

²³⁰ Steven R. Salbu, *Transnational Bribery: The Big Questions*, 21 *Nw. J. Int’l L. & Bus.* 435, 453, 462 (2001) (suggesting non-governmental organizations (“NGOs”) “supplanted governmental organizations in the international battle against corruption”).

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ture of the FCPA. First, DOJ reserves FCPA enforcement to the main DOJ Criminal Fraud Section, preventing the problem of differing standards and practices among the U.S. Attorney's Offices.²³¹ The U.S. Attorney's Manual makes this explicit, requiring the "express authorization" of the Criminal Division.²³² The Manual adds:

Any information relating to a possible violation of the FCPA should be brought immediately to the attention of the Fraud Section of the Criminal Division. . . . Close coordination of such investigations and prosecutions with the Department of State, the United States Securities and Exchange Commission (SEC) and other interested agencies is essential.²³³

The FCPA also has an unusual structural provision, pursuant to a 1988 amendment, that adds a different sort of deference to corporate actors. Unlike in typical criminal cases, potential violators can seek, in writing, opinions from the DOJ as to whether a transaction violates the FCPA.²³⁴ The DOJ has thirty days to issue an opinion and an affirmative opinion provides a binding decision creating a rebuttable presumption that the transaction complies with the FCPA.²³⁵ That notice procedure has been little used in the past, but opinions under the procedure have been solicited more often in recent years.²³⁶ The FCPA provided that the DOJ could, in the year following enactment of the 1988 revisions, issue guidelines

²³¹ See, e.g., Criminal Division, U.S. Dep't of Justice, Fraud Section: Activities Report (2008), available at <http://www.justice.gov/criminal/fraud/documents/reports/2008/actrpt08.pdf> ("The Fraud Section is responsible for all investigations and prosecutions under the [FCPA] The Section also has policy responsibility with respect to criminal enforcement of the FCPA and administers the Department's FCPA Opinion Procedure").

²³² U.S. Attorney's Manual § 9-47.110 (2011) ("No investigation or prosecution of cases involving alleged violations of Sections 103 and 104, and related violations of Section 102, of the Foreign Corrupt Practices Act . . . shall be instituted without the express authorization of the Criminal Division.").

²³³ Id.

²³⁴ See 28 C.F.R. §§ 80.1–80.2 (1994); 15 U.S.C. §§ 78dd-1(e), 78dd-2(f) (2006).

²³⁵ See 28 C.F.R. §§ 80.8, 80.10. However, the opinion procedure was little used from 1980–1994. See Don Zarin, *Doing Business Under the Foreign Corrupt Practices Act* § 12-3-5 (1995).

²³⁶ See Professor Bowman Says It's Either Regulation or Criminal Prosecution, Take Your Pick, *Corp. Crime Rep.*, Sept. 22, 2008, at 4.

further defining FCPA violations. However, the DOJ declined to do so.²³⁷

As noted, over half of the foreign corporations that received deferred or non-prosecution agreements from 2001–2010, 20 of 33 firms, were prosecuted for FCPA violations, and 21 of the 29 firms that pleaded guilty to FCPA violations were foreign firms. There is little observable difference between the cases resolved by a guilty plea and by a deferred prosecution agreement. Both types include noteworthy cases with record fines. Perhaps the different outcomes are due to unobservable factors. First-reporting firms in an industry may receive leniency, perhaps tending to obtain a non-prosecution agreement, somewhat like in the Antitrust Leniency Program. Self-reporting firms may generally tend to receive non-prosecution versus deferred prosecution agreements.

For some firms, the collateral consequences of an indictment or a conviction may be severe, while for other firms like Siemens, where a guilty plea ultimately does not result in debarment from government contracting, plea conviction may be palatable. Making the enforcement outcomes still more complex, the SEC may also civilly enforce FCPA provisions, providing an alternative to either prosecution outcome. In many noteworthy cases, like the Siemens case, the DOJ and SEC bring parallel actions and firms enter into simultaneous civil settlements with the SEC and prosecution agreements with Main DOJ.²³⁸ The SEC and DOJ informally cooperate and exchange information as they investigate cases, and the SEC refers more serious cases to the DOJ for prosecution.²³⁹

²³⁷ See 15 U.S.C. §§ 78dd-1(d), 78dd-2(e) (2006); U.S. Dep't of Justice, Anti-Bribery Provisions, 55 Fed. Reg. 28,694 (July 12, 1990) ("After consideration of the comments received, and after consultation with the appropriate agencies, the Attorney General has determined that no guidelines are necessary. . . . [Compliance] would not be enhanced nor would the business community be assisted by further clarification of these provisions.").

²³⁸ See SEC Files Settled Foreign Corrupt Practices Act Charges Against Siemens AG for Engaging in Worldwide Bribery with Total Disgorgement and Criminal Fines of Over \$1.6 Billion, Litig. Release No. 20829, 94 SEC Docket 2869, 2869–70 (Dec. 15, 2008).

²³⁹ Where their enforcement authority can often overlap, informal cooperation between the SEC and the DOJ determines whether the SEC, DOJ, or both will handle a given matter. See Gerlach & Parizek, *supra* note 98, § 14-3.

The FCPA regime is narrower than it could be—particularly given that executive power is at its height in the area, with treaty power, a broad statute, wide prosecutorial discretion, and issues involving foreign policy. As Professor Ellen Podgor has written, the statute was “specifically tailored to address the concern of unchecked prosecutorial discretion in the international sphere.”²⁴⁰ Prosecutors consult with regulators, they permit firms to ask for advisory opinions in advance, and they offer leniency some, but not all, of the time. On the other hand, courts have not narrowed the statute, and prosecutors have not provided general guidance or guidance on questions that arise in the context of corporate prosecutions, such as, for example, when a guilty plea or leniency is appropriate.²⁴¹

The rise in FCPA prosecutions bears a family resemblance to trends in the antitrust and environmental areas. As in those areas, Main DOJ handles the prosecutions, enforcement accelerated over time as noteworthy convictions were obtained and as treaties cemented cooperation with other countries, and, in turn, prosecutions have generated more self-reporting and compliance efforts by firms.

4. Exports, Fraud, Money Laundering, and Support of Terrorism

A range of general criminal statutes apply extraterritorially but do not on their face implicate foreign corporations. Fraud prosecutions dominate domestic deferred and non-prosecution agreements, but far fewer foreign firms are convicted under such provisions. Only five firms in the hand-collected convictions database were convicted of such fraud-related crimes. Instead, foreign corporate prosecutions were concentrated in areas like the FCPA, antitrust, and ocean dumping that all tend to involve extraterritorial conduct and are handled by specialized units at Main DOJ. In such cases, additional RICO, conspiracy, or wire and mail fraud charges may accompany the primary charges.

²⁴⁰ Podgor, *supra* note 21, at 332.

²⁴¹ On the lack of clarity concerning a series of statutory requirements, where there are few judicial decisions much less litigated cases in the FCPA area, see Mike Koehler, *The Façade of FCPA Enforcement*, 41 *Geo. J. Int'l L.* 907, 907 (2010).

Another related family of statutes has to do with international commerce; these statutes particularly lend themselves to prosecutions of foreign organizations. A range of crimes related to export violations may directly implicate foreign firms moving goods internationally, and six of the foreign guilty pleas involved such violations. Other statutes share the aim to prevent the use of financial institutions to transfer illegal funds, including transfers abroad. Those statutes include those related to banking fraud, money laundering, and material support of terrorism, as well as illegal imports and exports.²⁴² In the money laundering area, DOJ adopts a policy that “Criminal Division (Asset Forfeiture & Money Laundering Section) (AFMLS) approval is required” before any investigation based solely on extraterritorial jurisdictional provisions.²⁴³ The U.S. Attorney’s Manual cites to “the potential international sensitivities, as well as proof problems, involved in using these extraterritorial provisions.”²⁴⁴ This constitutes an unusually explicit recognition that foreign prosecutions raise special issues—not just practical problems of proof, but questions of “international sensitivities.” Adopting a still different approach, in support of terrorism cases, the State Department designates organizations for which material support is forbidden only after consultation with the Attorney General, Department of the Treasury and Congress, and notice and opportunity to be heard as required under the Due Process Clause.²⁴⁵ As I will discuss next, such comity-based policies could be adopted more broadly.

²⁴² One recent deferred prosecution agreement concerning bank fraud involved the German bank BAWAG P.S.K. and allegations that it helped Refco’s CEO conceal unpaid loans. The conduct was centered in the United States. See Letter from Michael J. Garcia, U.S. Attorney, S.D.N.Y., U.S. Dep’t of Justice, to Andrew Levander & Guy Petrillo, Dechert LLP (June 2, 2006), available at <http://www.law.virginia.edu/pdf/faculty/garrett/bawagpsk.pdf>.

²⁴³ U.S. Attorney’s Manual § 9-105.300 (1997).

²⁴⁴ *Id.*

²⁴⁵ See 8 U.S.C. §§ 1189(c), 1189(a)(2)(A)(i) (2006); *Nat’l Council of Resistance v. Dep’t of State*, 251 F.3d 192, 208 (D.C. Cir. 2001) (“[T]he Secretary must afford the limited due process available to the putative foreign terrorist organization prior to the deprivation worked by designating that entity as such with its attendant consequences, unless he can make a showing of particularized need.”).

III. LIMITS OF FOREIGN ORGANIZATIONAL PROSECUTIONS

Parts I and II of this Article explored developments that are in tension. As described in Part II, prosecutors adopt internal regulations to delimit the scope of foreign entity prosecutions, and externally use treaties, international organizations, and cooperation agreements to influence a cooperative prosecution agenda. However, as described in Part I, such prosecutions are increasing in ambition and scope in ways that can trigger international conflict and controversy. This Part aims to explore that tension and suggests ways that foreign entity prosecutions can be further theorized and limited through a set of guiding principles.

A. Collaboration and Conflict

A particularly noteworthy example of a collaborative approach towards FCPA investigations was the investigation into oil companies participating in the United Nations Iraq Oil for Food program. One commentator called it “conceivably the largest international anti-corruption investigation ever,” and the investigation, led by former Federal Reserve Chairman Paul Volcker, “implicated 2253 companies worldwide and \$1.8 billion in alleged ‘kickbacks’ to the Iraqi regime of Saddam Hussein,” involving the DOJ, the SEC, “two U.S. Attorney’s Offices, four congressional committees, the Manhattan District Attorney’s Office, the Department of Treasury’s Office of Foreign Asset Control, the United Nations, and at least six foreign governments, to date.”²⁴⁶

The Independent Inquiry Committee that initially led the investigation and produced a series of reports was convened by the United Nations, with an international membership.²⁴⁷ The findings led to investigations in a number of countries. The DOJ investigations resulted in a series of FCPA prosecutions of firms that participated in the Iraq Oil for Food program, many of which in turn

²⁴⁶ Sokenu, *supra* note 5, at 4; see also Independent Inquiry Committee, Report on the Manipulation of the Oil-For-Food Programme By the Iraqi Regime (Oct. 27, 2005), <http://www.iic-offp.org/story27oct05.htm>.

²⁴⁷ Independent Inquiry Committee, About the Committee, <http://www.iic-offp.org/about.htm> (last visited Oct. 14, 2011).

resulted in deferred prosecution agreements.²⁴⁸ Additional non-FCPA prosecutions have been brought by the Manhattan District Attorney's Office—not all prosecutions of foreign firms are federal. Perhaps because of diplomatic issues involved, such foreign prosecutions by state or local prosecutors have been conducted in conjunction with federal prosecutors.²⁴⁹

By way of contrast with that collaborative approach, take the BAE case. The United Kingdom long had a very different approach towards anti-corruption enforcement. Though British authorities had investigated several matters, they had yet to prosecute any alleged participant in foreign bribery.²⁵⁰ Beginning in the 1980s, the British multinational defense company BAE sold more than \$40 billion worth of fighter jets, helicopters, and other aircraft to Saudi Arabia.²⁵¹ Allegations that the deal was obtained through massive bribes to the Saudi royal family surfaced by the mid-1980s, but a British investigation was conducted and its findings were made secret. It later emerged that hundreds of millions of dollars were diverted to Saudi Prince Bandar bin-Sultan, including through an account jointly used by BAE and the British Ministry of Defense, and with lurid allegations of funds used to entertain Saudi royals during visits to the U.K.²⁵² Not only the British, but also the Saudis, had a stake in any investigation or prosecution of the matter.

In response to those revelations, another inquiry began in the Serious Fraud Office (“SFO”). After two years, that SFO investigation was dropped, with Prime Minister Tony Blair explaining in 2007 that the investigation “would have been devastating for our

²⁴⁸ Examples include the AB Volvo, Chevron, El Paso, Flowserve, Ingersoll-Rand, Innospec Inc., Textron, and York International deferred prosecution agreements. See Garrett & Ashley, *supra* note 72.

²⁴⁹ See, e.g., Julia Preston, U.S. Company Admits Oil-For-Food Bribes, *N.Y. Times*, Oct. 21, 2005, at A12.

²⁵⁰ Neil Roland, UK, Japan and Canada Failing to Crack Down on Bribes Says Watchdog Group, *Fin. Week*, June 25, 2008.

²⁵¹ David Pallister, The Arms Deal They Called the Dove: How Britain Grasped the Biggest Prize, *The Guardian*, Dec. 15, 2006, at 6.

²⁵² Josh Meyer, U.S. Probing BAE Payoff Allegations, *L.A. Times*, June 15, 2007, at A20; Kevin Sullivan, Saudi Reportedly Got \$2 Billion for British Arms Deal, *Wash. Post*, June 8, 2007, at A15.

relationship with an important country with whom we cooperate closely on terrorism, on security, [and] on the Middle East Peace process.”²⁵³ The Saudis apparently told the British that, should the investigation continue, they would no longer cooperate with anti-terrorism efforts and a sale of seventy-two Eurofighter jets would be jeopardized.²⁵⁴ The British High Court conducted an inquiry and found the termination of the SFO inquiry unlawful and that the rule of law had been damaged by “abject surrender” to a “blatant threat” from the Saudis.²⁵⁵ But then that ruling was reversed in 2008 by the Law Lords.²⁵⁶

The U.S. State Department spoke out against the British Government’s failure to investigate BAE and then the DOJ began to investigate. A DOJ request for assistance was rebuffed by British officials—in violation of OECD treaty obligations.²⁵⁷ Lacking any cooperation from BAE or the British Government, the DOJ obtained information from a former BAE executive, who provided testimony describing hundreds of millions of dollars in bribe payments and financial records. In 2008, BAE’s CEO and several directors were detained, searched, and issued subpoenas in Houston during a layover of their flight.

Hoping to ward off a U.S. prosecution, the SFO planned to enter a settlement, but the status of any such settlement was thrown into doubt by a ruling from a Crown Court judge in another case that prosecutors had no authority to enter a plea bargain, and only a court could impose a sentence.²⁵⁸ A U.K. prosecution could have

²⁵³ Nelson D. Schwartz & Lowell Bergman, *Payload: Taking Aim at Corporate Bribery*, N.Y. Times, Nov. 25, 2007, at BU1.

²⁵⁴ David Howarth, *Mystery of the Saudi ‘Threat,’* The Guardian, Aug. 1, 2008, available at <http://www.guardian.co.uk/commentisfree/2008/aug/01/bae.saudi-arabia>.

²⁵⁵ Christopher Hope & James Kirkup, *BAE Bribery Case Could Be Reopened*, The Telegraph, Apr. 11, 2008, at 1.

²⁵⁶ Christopher Hope, *SFO Was Right to Call Off Saudi Corruption Inquiry*, Say Law Lords, The Telegraph, July 30, 2008, at 4.

²⁵⁷ David Leigh & Rob Evans, *U.S. Obtains Swiss Records and Flies in British Witness in BAE Investigation*, The Guardian, Nov. 26, 2007, at 4, available at <http://www.guardian.co.uk/world/2007/nov/26/bae.armstrade>.

²⁵⁸ Helen Power, *Fraud Office to Re-interview BAE Chiefs As Legal Adviser Says it Has a Strong Case*, The Times, Dec. 18, 2009, at 10; Alex Spence, *Judge’s Comments Throw into Doubt BAE’s £30m Pact Over Fraud Inquiry*, The Times, Mar. 27, 2010, at 67.

had dire consequences, because under European Union law, BAE could be de-barred from government contracting.²⁵⁹ The impasse lasted for years.

That is, until February 2010, when the case came to a swift conclusion. BAE Systems PLC, the U.S. subsidiary of BAE, entered a guilty plea with the DOJ, agreeing, among other admissions, that it violated the Arms Export Control Act and made false statements to the government concerning FCPA compliance. BAE Systems also agreed to pay \$400 million in fines, create a compliance program to detect FCPA violations, hire a corporate monitor, and enter three years of corporate probation.²⁶⁰ With the U.S. subsidiary pleading guilty, however, the parent avoided a conviction entirely. As in the Siemens agreement, the BAE agreement provides that the monitor be a U.K. citizen, approved by the U.K. (“Her Majesty’s Government”) and with appropriate security clearance.²⁶¹

Meanwhile, in April 2010 the U.K. enacted a Bribery Act regulating foreign bribery which took effect July 1, 2011.²⁶² The SFO also adopted guidelines that mirror DOJ guidelines for corporate prosecutions, including rewards for self-reporting and the use of monitors.²⁶³ In the foreword to the new act, then-Justice Secretary Jack Straw emphasized that “[t]he UK is determined to work closely with its international partners to tackle bribery.”²⁶⁴ Perhaps a sign of things to come, rather than prosecute Innospec Inc. for foreign bribery, in 2007 the DOJ referred the case to the SFO,

²⁵⁹ See U.S. Sentencing Memorandum, *U.S. v. BAE Systems PLC*, No. 1:10-cr-035, at 15 (D.D.C. Feb. 22, 2010), available at <http://www.justice.gov/criminal/pr/documents/03-01-10%20bae-sentencing-memo.pdf>.

²⁶⁰ See Letter from Paul E. Pelletier, Acting Chief, & Mark F. Mendelsohn, Deputy Chief, Crim. Div., Fraud Section, U.S. Dep’t of Justice, to Lawrence Byrne, Linklaters LLP 2, 9 (Feb. 4, 2010), available at <http://www.justice.gov/criminal/pr/documents/03-01-10bae-plea-%20agreement.pdf>.

²⁶¹ *Id.* app. C.

²⁶² See Bribery Act, 2010, c. 23, § 6 (Eng.); Alex Bailin, Revamped Bribery Act is Giving Firms the Jitters, *The Guardian*, Apr. 1, 2011, available at <http://www.guardian.co.uk/law/2011/apr/01/revamped-bribery-act-firms-jitters>.

²⁶³ See Letter from Richard Alderman, Dir., Serious Fraud Office, to Marcus A. Asner, Arnold & Porter LLP (Dec. 7, 2009), available at http://www.arnoldporter.com/public_document.cfm?id=14970&key=7A2.

²⁶⁴ Ministry of Justice, Bribery: Draft Legislation (Mar. 2009), <http://www.official-documents.gov.uk/document/cm75/7570/7570.pdf>.

which then obtained a guilty plea.²⁶⁵ Others speculate that, “so as not to be outdone in this area of traditional U.S. dominance,” U.S. enforcers may be even more aggressive.²⁶⁶ Still, it is less likely that the same tensions would exist today now that the United States and U.K. share a similar approach. Should other countries converge, collaboration and deference may increase.

B. The Goals of U.S. Corporate Criminal Liability

Two scenarios implicate the fundamental goals of foreign corporate prosecutions. The first is the situation in which the alleged conduct does not significantly impact the United States. The second is the situation in which a foreign country has itself already prosecuted the entity.

As to the first, prosecutors have strong incentives to target foreign conduct that significantly affects the United States. Many foreign corporate prosecutions involve direct harm to the United States, such as antitrust prosecutions of cartels that inflate prices for U.S. consumers or tax fraud cases involving harm to the U.S. Treasury. An increasingly active area for corporate prosecutions involving direct harm is Food Drug & Cosmetic Act (“FDCA”) prosecutions, in which misbranded or unapproved drugs or medical devices are sold in the United States.²⁶⁷ Other statutes target less direct harm. Bribery of foreign officials harms the United States indirectly by placing non-bribing U.S. firms at a competitive disadvantage (a level-playing-field rationale). Foreign money laundering harms the United States because criminal enterprises can use illicit networks to finance their schemes (a corrupt channels rationale).

²⁶⁵ See Press Release, Fed. Bureau of Investigation, Innospec Inc. Pleads Guilty to FCPA Charges, Defrauding the United Nations, and Violating the U.S. Embargo Against Cuba (Mar. 18, 2010), <http://www.fbi.gov/washingtondc/press-releases/2010/wfo031810.htm>.

²⁶⁶ See Andrew Weissmann & Alixandra Smith, U.S. Chamber Institute for Legal Reform, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act 5* (2010), available at http://www.instituteforlegalreform.com/sites/default/files/restoringbalance_fcpa.pdf.

²⁶⁷ See, e.g., Plea Agreement, *United States v. Genescience Pharmaceutical Co.*, No. 10-144-02 (D.R.I. Oct. 1, 2010), available at http://lib.law.virginia.edu/Garrett/plea_agreements/pdf/GeneScience.pdf.

Second, U.S. prosecutors may prosecute a firm even if a foreign country has already done so. As then-DOJ Deputy Chief Mark Mendelsohn put it, the United States does not recognize any notion of “international double jeopardy.”²⁶⁸ The DOJ does credit resolutions in foreign jurisdictions and often waits before pursuing a matter to observe whether there is foreign enforcement action. Mendelsohn added, “as a discretionary matter, we do pay attention to what our foreign counterparts are doing, particularly where a company may be headquartered in a foreign jurisdiction.”²⁶⁹ Yet it is worth exploring the least deferential possible DOJ posture. Why might the United States prefer not to abstain even if foreign prosecutors already imposed a substantial punishment on the firm? There are several reasons.

1. Individual Prosecutions

First, an overriding goal of prosecuting corporations is not just to deter corporate criminality, but also to gain the corporation’s cooperation in prosecuting individual wrongdoers. A separate U.S. prosecution may be justified if foreign authorities did not sufficiently hold individuals accountable. The guilty plea and deferred prosecution agreements do not discuss whether there were any accompanying prosecutions of individual employees, and at the time of a corporate agreement, criminal investigations of individuals may be ongoing. While DOJ has said that such prosecutions are a priority, we do not know whether firms are in fact effectively cooperating or what the results have been.²⁷⁰ Such considerations may play a critical role in decisions to prosecute foreign firms. After all, federal guidelines emphasize that prosecuting a firm is no substi-

²⁶⁸ See Gibson, Dunn & Crutcher LLP, 2008 Year-End FCPA Update (Jan. 5, 2009), <http://www.gibsondunn.com/publications/Pages/2008Year-EndFCPAUpdate.aspx>.

²⁶⁹ Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007, 22 *Corp. Crime Rep.* 36 (2008) [hereinafter Mendelsohn], available at <http://www.corporatecrimereporter.com/mendelsohn091608.htm>.

²⁷⁰ The same concern has been raised in the U.S. In hearings before the U.S. Senate, Senator Arlen Specter criticized the DOJ for “the long list of prosecutions and fines without any jail sentences” in the FCPA context. Sue Reisinger, *Specter Blasts Fine-Only Approach to FCPA Enforcement*, *Law.com* (Dec. 1, 2010), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202475479945>.

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tute for prosecuting culpable individuals.²⁷¹ As noted, in the United States, the firm may waive privilege and provide documents that are otherwise work-product protected, which may substantially assist federal prosecutors.

2. Retribution

Second, prosecutors could view a U.S. prosecution as a means to separately hold the firm accountable to U.S. citizens in U.S. courts. Such a rule would treat prosecutions as a moral necessity, even if not necessary to adequately punish, deter future acts, or compensate victims. Such arguments make more sense in the context of morally accountable individuals than in the context of artificial legal entities. That is not to say, however, that federal prosecutors do not treat corporations as moral actors. Professor Dan Kahan, for example, has argued that they should,²⁷² while other scholars oppose respondeat superior liability for corporations.²⁷³ Prosecutors do seek to morally condemn firms. This is apparent in the text of guilty plea and deferred prosecution agreements, which invariably include a firm's admission of wrongdoing and acceptance of responsibility for criminal acts of employees. Such admissions have a moral purpose, though they also serve a practical purpose to bind the firm should it breach the agreement or deny having engaged in the prohibited conduct.²⁷⁴

3. Rehabilitation and Structural Reform

Although DOJ charging guidelines do not speak to foreign corporate prosecutions, they state generally that prosecutors should abstain if a regulator would impose "effective enforcement ac-

²⁷¹ U.S. Attorney's Manual § 9-28.200(B) (2008), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.200 ("Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation.").

²⁷² Dan M. Kahan, Social Meaning and the Economic Analysis of Crime, 27 *J. Legal Stud.* 609, 619 (1998).

²⁷³ See *supra* note 48.

²⁷⁴ See Garrett, *supra* note 96, at 923.

tions.”²⁷⁵ Domestically, this may often be the case. Indeed, the SEC now pursues deferred and non-prosecution agreements modeled on the DOJ approach.²⁷⁶ Federal prosecutors do pursue firms that receive regulatory fines abroad. One reason may be that foreign fines may be too low to deter or ensure that firms bear the costs of their crimes. In addition, foreign imposition of fines alone does not capture the goals of the current prosecution regime in the United States, which seeks to do more than impose deterrent fines, but rather to use agreements to secure cooperation and foster compliance through the adoption of structural reforms.²⁷⁷

Thus, the DOJ explained that although Statoil paid a \$3 million penalty to the government of Norway, the additional \$10.5 million penalty and the three-year deferred prosecution agreement were a “just resolution” because the DOJ agreement required Statoil to “hire an FCPA compliance consultant.”²⁷⁸ Similarly, the DOJ explained that Schnitzer Steel earned leniency because of its “exceptional cooperation” and “significant remedial steps, including the implementation of a robust compliance program.”²⁷⁹ Even if other countries adopt leniency programs, foreign prosecutors lack the discretion and power that makes such a regime effective.

Several reasons explain our regime rewarding cooperation and compliance. The United States has long permitted criminal liability for firms, in contrast to, for example, Europe, where such a change would be considered “invasive and fundamental.”²⁸⁰ A strict corporate criminal liability regime, as Professors Jennifer Arlen and Reinier Kraakman have conceptualized, could discourage firms from reporting crime. After all, if a firm will be held strictly criminally

²⁷⁵ See Principles of Federal Prosecution of Business Organizations, *supra* note 47, § 9-28.1100(B).

²⁷⁶ Press Release, Sec. & Exch. Comm’n, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), <http://www.sec.gov/news/press/2010/2010-6.htm>; see also Press Release, Sec. & Exch. Comm’n, Tenaris to Pay \$5.4 Million in SEC’s First-Ever Deferred Prosecution Agreement (May 17, 2011), <http://www.sec.gov/news/press/2011/2011-112.htm>.

²⁷⁷ See Garrett, *supra* note 10, at 861; see also Peter J. Henning, Corporate Criminal Liability and the Potential for Rehabilitation, 46 *Am. Crim. L. Rev.* 1417, 1426 (2009).

²⁷⁸ See Fisher, *supra* note 1, at 4.

²⁷⁹ *Id.* at 5.

²⁸⁰ See, e.g., *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* 5 (Katalin J. Cseres et al. eds., 2006).

liable for the acts of its agents, then it would have every incentive to cover up misconduct.²⁸¹ Even if law enforcement did uncover a violation, a fine might not encourage the firm to adopt compliance measures. After all, such measures may perversely increase the firm's liability by leading the firm to uncover more violations.²⁸² Alternatively, a mixed-liability or "composite" approach rewards cooperation and adoption of compliance measures, while also imposing fines.²⁸³ Organizational Sentencing Guidelines and prosecutors have adopted elements of such an approach.²⁸⁴

In other respects, as Arlen and Kraakman noted, the regime the United States has adopted does not resemble any ideal composite regime. The changes in the years since the DOJ began to pursue its deferred prosecution approach may have exacerbated some of those flaws. The fines imposed pursuant to deferred prosecution agreements may not be sufficient to deter, as they vary widely (and are sometimes *de minimis*).²⁸⁵ The compliance measures that prosecutors require range widely and it is not clear to what extent prosecutors review or supervise their effectiveness.²⁸⁶ These faults may flow from the fact that the U.S. regime is not a true duty-based regime in which good faith is a defense, because there is no defense that a court adjudicates. Instead, prosecutors exercise nearly unfettered discretion in negotiating and supervising settlement agreements.²⁸⁷

Organizational plea agreements depart even more from an ideal composite regime. Although most firms that plead guilty receive probation, very few, about five percent, have court-ordered and supervised compliance programs.²⁸⁸ While some guilty plea agreements specify that probation is recommended, often it is left to the judge to decide whether monitoring is necessary. The antitrust con-

²⁸¹ Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. Rev. 687, 707–08 (1997).

²⁸² Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. Legal Stud. 833, 836, 860 (1994).

²⁸³ Arlen & Kraakman, *supra* note 281, at 690.

²⁸⁴ U.S. Sentencing Guidelines Manual § 8C2.5(f)–(g) (1993); see *supra* Section I.B.

²⁸⁵ See Garrett, *supra* note 10, at 900.

²⁸⁶ U.S. Gov't Accountability Office, *supra* note 79, at 1–6.

²⁸⁷ Arlen, *supra* note 60, at 2–3.

²⁸⁸ 2009 Sourcebook, *supra* note 102 tbl.53.

text even more critically departs from any composite regime. Prosecutors provide complete immunity to first-reporters, regardless of whether they adopt compliance measures.²⁸⁹ Further, guilty plea agreements in the antitrust context typically do not include compliance or monitoring requirements, perhaps on the rationale that high level officers often approve of price-fixing schemes. The approach leverages leniency to secure self-reporting, but not compliance, unless ordered as part of corporate probation.

Guilty pleas may, however, serve an unappreciated role as a backstop to the more lenient approach using deferred and non-prosecution agreements. The two can be used in conjunction. In a case dealing with groups of related corporations, in 2007, three subsidiaries of Vetco International Ltd. all pleaded guilty to FCPA violations concerning bribes paid to Nigerian officials concerning deepwater oil drilling; and a formally wholly owned subsidiary, Aibel Group, Ltd., entered a deferred prosecution agreement, along with its own subsidiaries.²⁹⁰ Yet in 2008, that same firm, Aibel Group Ltd., a United Kingdom corporation, reported that it had continued to violate the FCPA. This breached the deferred prosecution agreement, which required that the firm comply with the FCPA. Having breached, the firm pleaded guilty and was ordered to serve two years of supervised organizational probation requiring periodic reports on implementation of anti-bribery measures.²⁹¹ A conviction may be inevitable after a breach of a deferred prosecution agreement.

Perhaps just in its broad outlines, the U.S. approach is like a composite regime. U.S. prosecutors may be less likely to defer to

²⁸⁹ See Principles of Federal Prosecution of Business Organizations, *supra* note 47, § 9-28.750.

²⁹⁰ See Deferred Prosecution Agreement, *United States v. Aibel Group Limited*, No. H-07-005 (S.D. Tex. Feb. 6, 2007), available at http://lib.law.virginia.edu/Garrett/prosecution_agreements/pdf/vetco.pdf; Plea Agreement, *United States v. Vetco Gray UK Limited*, No. H-07-004, (S.D. Tex. Feb. 6, 2007), available at http://lib.law.virginia.edu/Garrett/plea_agreements/pdf/Vetco_Gray_UK_Ltd.pdf.

²⁹¹ Press Release, U.S. Dep't of Justice, Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay \$26 Million in Criminal Fines (Feb. 6, 2007), http://www.justice.gov/opa/pr/2007/February/07_crm_075.html; see also Press Release, U.S. Dep't of Justice, Aibel Group Ltd. Pleads Guilty to Foreign Bribery and Agrees to Pay \$4.2 Million in Criminal Fines (Nov. 21, 2008), <http://www.justice.gov/opa/pr/2008/November/08-crm-1041.html>.

foreign prosecutors or regulators who simply impose a fine, rather than obtain cooperation and adoption of structural reforms. After all, the U.S. approach is animated by the view that fines do not provide sufficient incentives to disclose wrongdoing. The novel U.S. prosecution regime itself provides a justification to sometimes go it alone.

4. Globalized Deterrence

When federal prosecutors explain why they increasingly pursue foreign firms, they do not cite to any of the rationales discussed so far; their speeches rest on generalities. They cite different rationales in different contexts. They may generally cite a goal to improve global markets. In the FCPA context, federal prosecutors note that corruption not only “stifles economic growth” and “destabilizes markets,” but it also creates “an uneven playing field for U.S. companies doing business overseas.”²⁹² An aggressive approach towards money laundering and illicit finance is part of the war on terror.²⁹³ In the environmental ocean-dumping context, violators may chiefly be foreign corporations. In the antitrust context, prosecutors discuss globalization of cartel enforcement, including because international cartels may include both domestic and foreign corporations as members.²⁹⁴ However, as noted, prosecutors do not offer a general theory or approach towards foreign corporate prosecutions.

It would certainly make sense for U.S. prosecutors to seek harsher penalties since foreign entities may be less easily deterred. After all, foreign firms may more easily evade detection, they may be more expensive and difficult to investigate and prosecute, and they may more easily fail to comply with a judgment. Prosecutors could enhance their deterrent threat by imposing harsher penalties in the relatively fewer cases that they pursue. This explanation is

²⁹² See Fisher, *supra* note 1, at 1.

²⁹³ Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 *Harv. Int'l L.J.* 121, 135–36 (2007).

²⁹⁴ See *supra* notes 162, 179–83.

not one offered by federal prosecutors, but it could justify higher average fines in foreign corporate prosecutions.

A related and simple justification for foreign corporate prosecutions is that some of the worst violators happen to be foreign. Some industries, like the commercial shipping industry, are dominated by foreign firms. Foreign firms may operate under far less stringent regulations. Thus, while European countries have introduced their own leniency programs for antitrust violations, their relatively more modest civil fines do not provide the same deterrent threat as does criminal liability in the United States, much less the same incentives to self-report and self-correct.²⁹⁵

This discussion has focused on foreign firms in, say, Europe, in which markets and corporations are heavily regulated, but where there are quite different approaches towards prosecutions. Corporate prosecutions are concentrated in such countries. The need for deterrence may be very different in countries that lack effective regulation and in which corruption is widespread. U.S. prosecutors have targeted corporations for paying bribes in such countries, but target firms have tended to be multinational firms like Siemens based in the first world: the United States, Europe, South Korea, and Japan. Prosecutors have targeted few firms in countries that score high on international corruption indexes, for example, China and Russia. Perhaps firms in more regulated countries can be more easily deterred, while firms in an environment in which corruption is widespread cannot be effectively reformed. Targeting such firms may make best use of limited enforcement resources, particularly where prosecutors depend on firms to self-report and cooperate.

5. Reputation

Related to this discussion, U.S. prosecutors may seek to send a message that large foreign firms cannot act with impunity, even if as a practical matter they are more difficult to prosecute. Professor Sam Buell has argued corporate criminal liability has an important

²⁹⁵ See, e.g., *Criminalization of Competition Law Enforcement*, supra note 280, at 4.

“blaming function.”²⁹⁶ Corporations depend on goodwill of clients and customers. Studies have found evidence of reputational harm far greater than fines imposed on firms.²⁹⁷ Foreign firms selling securities in the United States may face a greater reputational harm. On the other hand, one study suggests that firms suffer few costs when prosecuted for bribery alone, while in contrast, they face larger costs when, as is typical, they are also prosecuted for misreporting financial statements.²⁹⁸ Firms solely prosecuted for crimes less closely connected with representations to shareholders, clients, or consumers may not suffer serious reputational harms.²⁹⁹ As noted, some foreign firms that plead guilty and do not obtain a deferred prosecution agreement may not be particularly concerned about the reputational harm of a U.S. conviction. Where their home country does not recognize the concept of corporate criminal liability, they may view a U.S. conviction of the corporate entity as artificial, remote, and inconsequential absent some more concrete harm.

6. Foreign Policy

Foreign policy reasons might explain decisions not to prosecute. U.S. prosecutors may defer to foreign prosecution efforts even if the foreign prosecution regime does not accomplish all of the goals that U.S. prosecutors hope to achieve using a composite and “structural reform” approach. The United States might at times defer if another country imposes stringent fines, even absent the assurance that an adequate compliance program was being imple-

²⁹⁶ Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 *Ind. L.J.* 473, 501 (2006). John C. Coffee, Jr. developed shortcomings of a reputation-focused approach towards corporate criminal liability. See Coffee, *supra* note 13, at 424–34.

²⁹⁷ Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 *J.L. & Econ.* 489, 493 (1999); Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear From Committing Criminal Fraud*, 36 *J.L. & Econ.* 757, 758–59 (1993).

²⁹⁸ See Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *Bribery: Business as Usual?* (Mar. 16, 2010) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1573222.

²⁹⁹ See Jonathan M. Karpoff, John R. Lott, Jr. & Eric W. Wehrly, *The Reputational Penalties for Environmental Violations: Empirical Evidence*, 68 *J.L. & Econ.* 653, 668 (2005).

mented. And at times, for diplomatic and strategic reasons, the United States might not pursue a matter at all even where foreign countries fail to pursue the matter.

Similar reasons can explain a desire to prosecute, at least in the more serious cases. What better way to encourage other countries to adopt similar criminal prohibitions than to threaten to prosecute their corporations should they not take up the mantle themselves? The BAE story is a success story. The threat of a U.S. prosecution helped to leverage new legislation in the U.K. Similarly, the UBS prosecution led to a change in Swiss banking secrecy laws. Convergence may be due to successes of the U.S. Leniency Program, but perhaps also the threat of U.S. prosecutions.

Suppose that none of the above reasons justify a prosecution. Perhaps that is hard to imagine—these overlapping justifications could explain a broad range of prosecutions of foreign firms. Yet as I develop next, judicial review may be quite limited. The best recourse for a firm may be to convince prosecutors that a case is unnecessary.

C. Judicial Review

Extraterritorial criminal jurisdiction over foreign corporations raises a host of novel and fascinating legal questions. Whole bodies of doctrine largely developed in the civil context have never been applied to prosecutions of foreign corporations. It may remain unclear whether they are applicable for quite some time. Despite the novelty of such questions, jurisdictional limits will likely not pose severe constraints. First, they may rarely be litigated; even in close cases organizations have strong reasons to settle. Second, the reach of U.S. statutes under the Commerce Clause is extremely broad. Third, foreign firms that list securities in the United States are subject to SEC disclosure requirements that can prompt self-reporting and then prosecutions.

Judicial review is highly deferential in federal criminal settlements generally, and the same holds true in cases involving corporations.³⁰⁰ Courts conduct only a limited review of deferred, non-

³⁰⁰ See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *Stan. L. Rev.* 869, 871–72 (2009).

prosecution, or plea agreements that typically resolve organizational prosecutions.³⁰¹ A few judges have raised important concerns about such agreements, but not of the sort that might benefit foreign firms—judges have hesitated to approve deals that they viewed as too lenient and that did not sufficiently protect the public interest.³⁰² Where judicial review is highly deferential in the typical context in which the firm has entered a settlement with prosecutors, a court is unlikely to consider the sorts of questions raised in the previous part concerning the larger foreign policy implications of charging a foreign organization. As the Court has said,

the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil.³⁰³

The Sections that follow are concerned with the unusual questions that could be raised should a court rule whether a court has jurisdiction over a foreign entity prosecution, and second, whether a court might consider less defined norms of international comity developed in the civil context when deciding whether there is jurisdiction.

1. Jurisdiction

Although jurisdictional issues are not typically litigated in entity prosecutions, case law may develop if the DOJ pursues aggressive interpretations of extraterritorial jurisdiction over foreign entities. However, the reach of U.S. courts is quite broad, and many cases involve false statements to U.S. officials, some contact with inter-

³⁰¹ See Garrett, *supra* note 10, at 924.

³⁰² See Binyamin Appelbaum, U.S. Judges, Perceiving Leniency in Bank Settlements, *Sound Off*, N.Y. Times, Aug. 24, 2010, at B1.

³⁰³ *Chicago & S. Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948).

state commerce, or jurisdiction over issuers on U.S. exchanges, in which the value of the securities would be affected by the crime.³⁰⁴

2. *Comity*

Issues of international comity, in the sense that domestic enforcers might hesitate to proceed, typically apply in cases involving “legislative, executive or judicial acts of another nation,” such as under the “act of state” doctrine or foreign sovereign immunity.³⁰⁵ The “act of state” doctrine provides a limit based on a “policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil” where such adjudications “might embarrass the Executive Branch of our Government in the conduct of our foreign relations.”³⁰⁶ However, the doctrine likely does not reach conduct at issue in criminal prosecutions, such as purely commercial conduct of foreign governments, or more common, acts of non-state corporations and conduct that does not require judgment as to the legality of acts of foreign officials. The act of state doctrine has never been applied in a criminal prosecution, but the Court has also indicated that the doctrine should not apply if the executive, through a prosecutor, expresses no need for judicial abstention.³⁰⁷

More generalized and ambiguous norms of “prescriptive” comity would apply in a criminal case.³⁰⁸ The Restatement (Third) of Foreign Relations Law of the United States, which the U.S. Supreme

³⁰⁴ See, e.g., Westbrook, *supra* note 221, at 550–53 (describing application of the FCPA to foreign subsidiaries).

³⁰⁵ See, e.g., *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303–04 (1918); *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895); see also Stephan, *infra* note 332, at 637–39.

³⁰⁶ *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 409 (1990) (“The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.”); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697 (1976).

³⁰⁷ *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) (“We conclude that where the Executive Branch . . . expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts.”).

³⁰⁸ Restatement (Third) of the Foreign Relations Law of the United States § 403 (1987) (describing limitations of prescriptive jurisdiction).

Court and federal courts frequently consult in such matters, calls for restraint in exercising jurisdiction over another state or the laws of another state. The Restatement develops factors to be considered when deciding whether jurisdiction is appropriate.³⁰⁹ The Restatement notes that prosecutions, particularly white collar, should rarely be conducted for substantially foreign conduct. The reporters' notes state:

It is generally accepted by enforcement agencies of the United States government that criminal jurisdiction over activity with substantial foreign elements should be exercised more sparingly than civil jurisdiction over the same activity, and only upon strong justification. No case is known of criminal prosecution in the United States for an economic offense (not involving fraud) carried out by an alien wholly outside the United States.³¹⁰

Few decisions address such questions in the criminal context. In civil antitrust prosecutions, the Court ruled in *Hartford Fire Insurance Co. v. California* that no issues of comity are raised where a foreign firm is prosecuted and its home nation has different antitrust rules, unless the firm would be held to incompatible norms of conduct.³¹¹ The Court cited the Restatement comment that a conflict exists not where law differs, but only "where a person subject to regulation by two states can[not] comply with the laws of both."³¹² Thus, comity plays a decidedly limited role. As the U.S. Court of Appeals for the First Circuit put it, reversing dismissal of a criminal antitrust prosecution of a Japanese corporation, "[c]omity is more an aspiration than a fixed rule."³¹³ Absent direct conflict, like in the UBS case, few cases will raise conflicts sufficient to implicate norms of comity.

Other uses of international law could potentially limit extraterritorial prosecutions. The lack of corporate criminal liability in foreign states could be invoked. The Restatement describes how the

³⁰⁹ Id. § 403(2).

³¹⁰ Id. § 403 n.8.

³¹¹ 509 U.S. 764, 798–99 (1993).

³¹² Id. at 799 (quoting Restatement (Third) of the Foreign Relations Law of the United States § 403 cmt. e (1987)).

³¹³ *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8–9 (1st Cir. 1997).

lack of a sufficient connection to the United States could render jurisdiction “unreasonable,” as can the other state’s “interest in regulating the activity.”³¹⁴ Yet rulings by U.S. courts do not create strong limits. *Forum nonconveniens* doctrine could also conceivably apply to require dismissal for comity and fairness reasons where a better-suited foreign jurisdiction is available.³¹⁵ It is similarly unclear whether that civil doctrine applies in a criminal prosecution.

Finally, federal courts could entertain motions to stay criminal proceedings if foreign prosecutions are pending.³¹⁶ Federal prosecutors at times do so in deference to foreign enforcement. For example, a settlement in the Akzo Nobel N.V. case incorporated comity concerns by imposing a fine conditionally should its subsidiary, N.V. Organon, not pay fines to Dutch authorities. The DOJ announced that within 180 days N.V. Organon was expected to reach a resolution with the Dutch National Public Prosecutor’s Office, “wherein it will pay a criminal fine of approximately €381,000 in the Netherlands. If N.V. Organon fails to reach a timely resolution with the Dutch Public Prosecutor, Akzo Nobel will pay \$800,000 to the United States Treasury.”³¹⁷ Ultimately, the DOJ entered an agreement with “no additional penalty” because the firm did settle with Dutch authorities.³¹⁸

In other cases, there has not been the same deference to foreign prosecutors, perhaps for some of the reasons discussed earlier. As noted, the DOJ prosecuted Statoil, a Norwegian company majority-owned by the government of Norway,³¹⁹ although Statoil had al-

³¹⁴ Restatement (Third) of the Foreign Relations Law of the United States § 403(2)(a)-(g) (1987); see also *Hartford Fire Ins.*, 509 U.S. at 818–19 (Scalia, J., dissenting).

³¹⁵ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981).

³¹⁶ Austen L. Parrish, *Duplicative Foreign Litigation*, 78 *Geo. Wash. L. Rev.* 237, 237, 249 (2010) (advocating expanded use of judicial stays in cases asserting extra-territorial litigation).

³¹⁷ Press Release, Dep’t of Justice, *Akzo Nobel Acknowledges Payments Made by its Subsidiaries to Iraqi Government Under the U.N. Oil for Food Program, Enters Agreement with the Department of Justice* (Dec. 20, 2007), http://www.justice.gov/opa/pr/2007/December/07_crm_1024.html.

³¹⁸ See Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007, *supra* note 269, at 2.

³¹⁹ Blume & McConkie, *supra* note 226, at 97.

ready been prosecuted and paid a \$3 million fine to Norwegian authorities.³²⁰ The DOJ emphasized that “[t]he Department will not hesitate to enforce the FCPA against foreign-owned companies.”³²¹

3. *Substantive Interpretation of Statutes*

Courts may strictly interpret jurisdictional provisions of statutes, as they do not lightly assume Congress meant to permit extraterritorial jurisdiction of criminal law outside U.S. territory. The Supreme Court has ruled that a rebuttable presumption arises that Congress does not intend, unless the statute says otherwise, to provide extraterritorial jurisdiction.³²² Lower courts had found exceptions to the presumption, such as in the RICO context, and also in the securities and antitrust contexts, but the Court may have put such decisions to rest in its most recent ruling in *Morrison v. National Bank of Australia*, stating that the presumption against extraterritoriality applies in “all cases.”³²³

Although the Court signaled a narrower approach towards presuming extraterritoriality, prosecutions of foreign firms do not tend

³²⁰ In re Statoil, ASA, Exchange Act Release No. 54,599, 89 SEC Docket 283 (Oct. 13, 2006), available at <http://www.sec.gov/litigation/admin/2006/34-54599.pdf>. That \$3 million was credited against the \$10.5 million fine imposed by the SEC and the DOJ. Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007, *supra* note 269, at 2.

³²¹ Fisher, *supra* note 1, at 4.

³²² *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 244–45, 248 (1991).

³²³ *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869, 2881, 2887–88 (2010) (holding that the presumption would apply in “all cases” and further holding that Section 10b of the Securities and Exchange Act applied only to securities listed in the United States and not to securities listed abroad but traded in the United States through American Depositary Receipts); see also Bradley & Goldsmith, *supra* note 20, at 624–31; Podgor, *supra* note 21, at 338–39. Congress clarified and narrowed the extraterritorial reach of the Sherman Act in the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), 15 U.S.C. § 6a (2006) (stating the Sherman Act shall not apply to commerce with foreign nations unless that conduct has “a direct, substantial, and reasonably foreseeable effect” on domestic commerce). See also James R. Martin & Jodi Trulove, *Empagran—Practical Considerations from the Trenches*, Antitrust, Fall 2009, at 72 (providing an overview of caselaw interpreting the FTAIA). The Court had ruled the presumption against extraterritorial jurisdiction “should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the [g]overnment’s jurisdiction, but are enacted because of the right of the [g]overnment to defend itself against obstruction, or fraud wherever perpetrated.” *United States v. Bowman*, 260 U.S. 94, 98 (1922).

to raise close issues as to the extraterritorial reach of the relevant statutes. As the Court noted in *Morrison*, in a case involving securities listed in the United States, the harm to the United States is direct regardless of whether the issuer is domestic or foreign.³²⁴ Similarly, cases involving reports of oil discharge made to U.S. authorities, cartels that fix prices for goods bought by U.S. consumers, or failure to report bribes in reports to the SEC all directly implicate U.S. jurisdiction. Absent direct harm felt in the United States, jurisdiction may also be premised on a “protective principle” at stake, where there is a potential harm to U.S. interests or national security.³²⁵ In one additional context, the U.S. Supreme Court recently ruled to permit additional prosecutions involving extraterritorial harm. In 2005, the Court put to rest a circuit split by ruling that prosecutions under the federal wire fraud statute involving fraud to deprive foreign countries of tax revenues were not barred by the common law “revenue rule” that a court cannot enforce foreign revenue laws.³²⁶

Judges could take a different approach, and even if they assume a statute reaches extraterritorial conduct, they could interpret substantive provisions to avoid impacting issues of international comity. For example, statutory exceptions in the FCPA take note of practices in foreign countries, such as “facilitating or expediting” payments regarding “routine governmental action,” colloquially called “grease payments.”³²⁷ Courts or prosecutors could clarify what constitutes a grease payment.³²⁸ The statute includes an affirmative defense that conduct was “lawful under the written laws and regulations” of the foreign country.³²⁹ Neither courts nor prose-

³²⁴ *Morrison*, 130 S. Ct. at 2884–85.

³²⁵ Barry E. Carter et al., *International Law* 649–54 (4th ed. 2003); see also *United States v. Birch*, 470 F.2d 808, 811–12 (4th Cir.1972) (interpreting the protective principle and applying it in the context of counterfeiting official U.S. documents beyond U.S. territorial bounds).

³²⁶ *Pasquantino v. United States*, 544 U. S. 349, 368 (2005). Circuits had been split on recognition of the rule in fraud cases. *Id.* at 354.

³²⁷ 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (2006).

³²⁸ See Charles B. Weinograd, *Clarifying Grease: Mitigating the Threat of Overdeterrence by Defining the Scope of the Routine Governmental Action Exception*, 50 *Va. J. Int'l L.* 509, 535–37 (2010) (proposing legislative clarification of the standard for grease payments).

³²⁹ 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (2006).

cutors have significantly clarified the meaning of those provisions, leaving it uncertain what conduct those FCPA provisions, and other important provisions, prohibit.³³⁰

D. Foreign Corporate Prosecutions and International Law

Foreign corporate prosecutions do not neatly fall on either side of international law debates between “sovereignists,” who believe that U.S. sovereignty is harmed by expansive domestic application of international law, and “internationalists,” who welcome increased application of international law in U.S. courts.³³¹ Prosecutions are a quintessential exercise of U.S. sovereign power. However, they do not raise the same issues surrounding the proper role of federal judges in adjudicating disputes concerning foreign events and international law, or interpretation of treaties or other international commitments.³³² Unlike cases brought by private litigants whose choice of a U.S. forum might undermine foreign policy, prosecutors within the executive branch choose the forum. Judges play a reduced role where few of the criminal cases are adjudicated and almost all are resolved in negotiated settlements.

³³⁰ 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b), 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (2006); see Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat To Global Harmony*, 20 Mich. J. Int'l L. 419, 425 (1999) (criticizing FCPA as “moral imperialism”); Jennifer Dawn Taylor, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 La. L. Rev. 861, 875 (2001) (“The dividing line between discretionary activity and non-discretionary activity is theoretical and an activity’s characteristics often seem to overlap in many practical circumstances.”); see also *United States v. Kay*, 359 F.3d 738, 744–45, 754–56 (5th Cir. 2004) (adopting a broad interpretation of the “improper advantage” and business purpose test under the FCPA).

³³¹ See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 873 (1997) (challenging the notion that customary international law is federal common law); Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 Yale L.J. 1564, 1569 (2006) (identifying the competition between the sovereignists and internationalists); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 Ohio St. L.J. 649, 653 n.16 (2002) (summarizing the academic debate over the functional justification for special rules relating to foreign relations law between so-called “New Sovereignists” and “internationalists”).

³³² See Stephen B. Burbank, *The World in Our Courts*, 89 Mich. L. Rev. 1456, 1459–60 (1991); Paul B. Stephan, *A Becoming Modesty—U.S. Litigation in the Mirror of International Law*, 52 DePaul L. Rev. 627, 628 (2002).

Although prosecutions of foreign firms do not typically receive judicial review, extraterritoriality can create conflicting or parallel litigation. As I have described, federal prosecutors may abstain because a prosecution was pursued abroad, or they may not. Some commentators have argued that extraterritorial jurisdiction can benefit countries that lack effective, fair judicial systems for resolving commercial disputes.³³³ On one view, foreign prosecutors may refer cases to U.S. prosecutors to take advantage of U.S. enforcement resources. Others decry mounting globalization of private litigation involving foreign plaintiffs and defendants in U.S. courts, and explore a tension between domestic authority and one nation's courts attempting to assert control over the development of transnational and global norms.³³⁴ Questions regarding the role of judicial dialogue in promoting transnational norms and regulatory competition, and even whether U.S. courts should cite to foreign law at all, have been met with some controversy.³³⁵ Similarly, the U.S. government has opposed the International Criminal Court, with opposition softening to some degree over time but still raising concern that the United States be subjected to external or international criminal law norms.³³⁶

In contrast, when federal prosecutors conduct transnational litigation, prosecutors define the norms.³³⁷ They do so against the backdrop of broad statutes and bargaining removed from judicial oversight. It is not a judicial dialogue, but one among prosecutors

³³³ Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 *Cornell L. Rev.* 1, 3 (2008) ("The law can enable litigants from countries with ineffective judicial systems to have their cases adjudicated in the courts of other nations that have better-functioning judicial systems."); see also Melissa A. Waters, *Mediating Norms and Identity*, 93 *Geo. L.J.* 487, 490 (2005).

³³⁴ Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 *Va. J. Int'l L.* 251, 253 (2006); Harold Hongju Koh, *Transnational Legal Process*, 75 *Neb. L. Rev.* 181, 183–86 (1996).

³³⁵ See Anne-Marie Slaughter, *Judicial Globalization*, 40 *Va. J. Int'l L.* 1103, 1103–05, 1114–15 (2000).

³³⁶ Leila Nadya Sadat, *The Nuremburg Paradox*, 58 *Am. J. Comp. L.* 151, 156 (2010).

³³⁷ See, e.g., Evan P. Lestelle, *The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, And Extraterritorial Jurisdiction*, 83 *Tul. L. Rev.* 527, 542–43 (2008) (arguing that adoption of parallel norms by nations forming the "supply side" of foreign public bribery is crucial to success of anti-corruption efforts).

as executive actors, perhaps secondarily involving regulators and legislators who enact underlying substantive criminal prohibitions.

A world with increasingly parallel prosecution of global crime creates more intersection, overlap, and conflict,³³⁸ but unlike in the civil context, in the criminal context the United States has less to fear from encroaching extra-territorial application of criminal law. The United States instead benefits from a different kind of American Exceptionalism.³³⁹ The United States is the leading exporter of transnational norms defining corporate crime. Recognizing that the United States is playing a policymaking role is one step towards formalizing that role and being more explicit about its purposes. As the United States continues to pursue foreign corporations, further guidance should articulate the goals of such efforts and their limits.

Countries influence each other's criminal law by example, collaboration, and diplomatic pressure. The United States applies soft forms of pressure to conform to criminal enforcement methods. The hard threat of a U.S. prosecution creates a stronger incentive to emulate U.S. approaches. U.S. prosecutors also sometimes face diplomatic pressure from other countries in high-profile cases. We may see more pressure from other countries as the policy and practice of nations becomes increasingly connected in the field of criminal law.³⁴⁰ After all, the United States depends on active cooperation of other nations in a host of enforcement efforts. Prosecutors increasingly develop a collegial and collaborative approach to their international work. One example was the way that U.S. prosecutors aggressively pursued foreign firms under the FCPA, but only after the signing of the OECD treaty. In a range of contexts, from bank regulation to antitrust, U.S. prosecutors increasingly collaborate with other countries. Mutual assistance treaties cement this work. Federal prosecutors increasingly make treaty re-

³³⁸ The problems described here relate to the more general problem of extraterritoriality. See Parrish, *supra* note 97, at 820 ("The rise of extraterritorial domestic law (law unilaterally applied to the conduct of foreigners abroad) poses a greater threat to democratic sovereignty than traditional sources of international law.").

³³⁹ Harold Hongju Koh, *On American Exceptionalism*, 55 *Stan. L. Rev.* 1479, 1480–87 (2003).

³⁴⁰ Ethan A. Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 *Harv. Int'l L.J.* 37, 75–76 (1990).

quests of foreign governments to obtain access to evidence,³⁴¹ and they depend on cooperation when requesting foreign seizure of assets after a conviction.³⁴² Just as treaties have helped form the basis of our current foreign corporate prosecution regimes, treaties cementing norms against corruption and fraud may continue to lead to a more collaborative approach to corporate prosecutions generally.

E. Prosecutorial Guidelines and Remedies

Taking it as a given that the United States will remain a prosecution magnet, questions remain how federal prosecutors should approach their role. Ellen Podgor argues that “[b]efore proceeding into the international arena with white collar prosecutions, there needs to be a clear understanding of what is considered criminal conduct subject to U.S. prosecution.”³⁴³ While agreeing with that statement, firms rarely litigate jurisdiction, criminal procedure rights, or the scope of criminal prohibitions. As a result, the most likely source for limitations on prosecutorial discretion, given the limited ability of courts to review its exercise, will be self-imposed guidelines. Firms continually demand more specific guidance from Main DOJ in the area of corporate prosecutions. Unlike other areas of criminal law in which prosecutors see no need to provide targets with such guidance, the DOJ has promulgated an ever-changing series of memos and guidelines on corporate prosecutions. None of that guidance speaks specifically to foreign prosecutions. The value of DOJ guidance in corporate prosecutions is in some cases equivocal. Perhaps more important is that prosecutors review internally the effectiveness of their exercise of discretion. In foreign corporate prosecutions, such efforts would be useful now that there are more of them. DOJ may conclude that there are

³⁴¹ Danforth Newcomb, *FCPA Digest: Cases And Review Releases Relating To Bribes To Foreign Officials Under The Foreign Corrupt Practices Act Of 1977*, 1737 *Practising L. Inst. Corp.* 553, 579–80 (2009) (noting increase in foreign evidence requests).

³⁴² One remarkable FCPA prosecution of an individual resulted in an agreement with the Kazakh government to release proceeds to a World Bank trust fund for public welfare projects in Kazakhstan. *Id.* at 581–82.

³⁴³ See Podgor, *supra* note 21, at 346.

good reasons for the range of practices that have evolved, but in other areas, consistency may be appropriate. One possibility would apply some set of procedures in all foreign corporate prosecutions; doing so could still preserve some crime-specific procedures, such as the Antitrust Division Leniency Program.

As Professor Rachel Barkow has argued, internal procedures may not just guide, but also structure the exercise of such discretion.³⁴⁴ In corporate prosecutions involving foreign entities or extra-territorial conduct, the DOJ could consider a more formal across-the-board requirement that prosecutions of foreign firms be approved by Main Justice with consultation of the State Department. Of course, Main Justice review is already typical in corporate prosecutions, and that is a positive thing. Under current guidelines, U.S. Attorney's Offices must also submit to Main Justice the names of independent monitors proposed to be retained in a corporate prosecution agreement.³⁴⁵ A centralized review requirement would ensure uniformity in areas now handled by U.S. Attorney's Offices. It is no accident that almost all of the foreign corporate guilty pleas were handled by Main Justice, which is far better situated to address foreign policy concerns. The DOJ Office of International Affairs coordinates with foreign prosecutors and the State Department.³⁴⁶ Requiring Main DOJ involvement would just codify existing practices in FCPA and Antitrust cases.

Additional internal procedures could provide guidance to entities and not just line prosecutors. The FCPA procedure permitting written opinions is a noteworthy example, in which firms can ob-

³⁴⁴ See Barkow, *supra* note 300, at 911–14 (discussing shortcomings of the use of prosecutorial guidelines or open processes and arguing that structural reforms including internal separation of functions can better improve exercise of discretion); Garrett, *supra* note 10, at 913 (noting that, to the extent that prosecutors internally regulate using guidelines concerning charging of organizations, additional clarity is needed, particularly as to remedies).

³⁴⁵ See Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., to the Heads of Dep't Components & U.S. Attorneys on Selection & Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, at II.1 (Mar. 7, 2008), available at <http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf>.

³⁴⁶ Barkow, *supra* note 300, at 913–14 (recommending internal separation of functions in prosecutors' offices, including separating investigatory and advocacy from adjudicative functions).

tain guidance when it is most useful—before committing potentially criminal acts. Such procedures could be expanded to other contexts. In addition, reasons for choosing whether to pursue a conviction or offer leniency could be made more transparent in areas, like in the APPS ocean dumping cases, where it is not always clear to observers why firms receive convictions and not leniency.

A second type of guidance could involve the adoption of formal rules of comity, in which foreign prosecution or enforcement would be given weight. This would extend the current Organizational Guidelines to foreign prosecutions, which ask prosecutors to consider whether civil or regulatory alternatives suffice to remediate the wrongdoing.³⁴⁷ The Antitrust Division, as discussed, already has such guidelines, listing factors including degree of harm felt in the U.S., conflict with foreign law or policy, and comparative enforcement capabilities of foreign prosecutors. The Guidelines should ask that prosecutors weigh whether foreign efforts would adequately punish the firm and individual wrongdoers. Further, the DOJ should explicitly consider foreign collateral consequences of a prosecution. Of course, if foreign countries fail to regulate cartels or other behavior that directs harm at the United States, their tolerance should not carry weight.

Whether foreign authorities prosecute individual wrongdoers could also be made an explicit part of the calculus. Just as parent corporations should not always avoid the consequences of criminality where subsidiaries plead guilty, individual wrongdoers should not always avoid consequences solely imposed on the corporate form. The DOJ has said that it is a higher priority to pursue foreign culpable individuals in these corporate cases; it is difficult to tell from the outside how frequently that occurs. Particularly if leniency is offered to firms in exchange for cooperation, one would want to know whether cooperation in fact produces successful individual prosecutions.

Finally, the DOJ could adopt remedial guidelines expressing some norm of deference to corporate governance practices and regulations generally accepted internationally or in foreign nations.

³⁴⁷ See Principles of Federal Prosecution of Business Organizations, *supra* note 47, § 9-28-1100.

The remedial stage in corporate prosecutions generally is not transparent. Little is known about whether compliance programs and monitors are effective. Remedies could be overreaching and imposing inconsistent governance norms—or they could be tepid and not carefully supervised.

Those guidelines could also highlight reasons why deference would not be justified and why obtaining certain structural reforms or other remedies may be particularly important. In some cases, as in the UBS case, U.S. prosecutors may have strong reasons to proceed despite conflicting foreign law. As in that case, diplomatic negotiations may be called for, and formal guidelines might be of less use. However, if foreign law expresses similar goals and seeks to prohibit similar conduct, but adopts a different enforcement approach or different compliance norms, deference may be appropriate. After all, the compliance requirements of deferred prosecution agreements may be far-reaching, as are the powers of the monitors who implement those provisions. What if U.S.-based monitors take on such a role regarding foreign corporations? When the monitor appointed to supervise compliance at Bristol-Myers Squibb asked that the firm terminate its CEO,³⁴⁸ there was outcry that prosecution agreements had gone too far.³⁴⁸ Should a monitor aggressively intervene in corporate governance of a foreign firm, as monitors can be empowered to do, the result could be quite counterproductive.

Collaboration with foreign prosecutions may alleviate such tensions. The DOJ has made important moves in that direction. In the Siemens case, as noted, a German monitor was appointed. In the Statoil case, the monitor was required under the deferred prosecution agreement to act “in conformity with Norwegian law.”³⁴⁹ Use of foreign monitors, as in the Siemens case, could be encouraged in cases raising issues of foreign law or compliance practices.

The DOJ could also reference compliance norms adopted by international bodies. For example, the OECD has continued to issue detailed reports encouraging member nations to adopt a set of

³⁴⁸ See Richard Epstein, *The Deferred Prosecution Racket*, *Wall St. J.*, Nov. 28, 2006, at A14.

³⁴⁹ See *Deferred Prosecution Agreement, United States v. Statoil, ASA*, at 9 (S.D.N.Y. 2006), available at <http://www.law.virginia.edu/pdf/faculty/garrett/statoil.pdf>.

compliance best practices.³⁵⁰ Prosecutors and monitors sometimes tailor remedies to reflect their extraterritorial reach. Guidelines could recommend doing so more explicitly. For example, FCPA compliance programs often include mechanisms for central review of retention of agents in foreign countries.³⁵¹ The DOJ suggests that firms look for “red flags,” including certain types of unusual payments.³⁵² Over time, more specific best practices and remedies may give firms clearer notice of what prosecutors expect.

The DOJ has not recommended any set of best practices for remedying corporate crime in any context, much less in foreign prosecutions specifically. Remedies typically require implementation of a compliance program, with procedures, training, and reporting designed to prevent and detect future misconduct, overseen by an independent monitor.³⁵³ I have argued that the DOJ should evaluate corporate prosecution agreements, develop performance measures, and state best practices to be followed by firms and monitors.³⁵⁴ If the DOJ does so, remedies may provide clearer guidance to firms on how to demonstrate cooperation and compliance—and perhaps we would have more reason to think that particular remedies are working.³⁵⁵ As U.S. prosecutors proselytize their approach, other countries may increasingly pursue similar

³⁵⁰ OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Nov. 26, 2009), available at <http://www.oecd.org/dataoecd/11/40/44176910.pdf> (including “Good Practice Guidance on Internal Controls, Ethics and Compliance” adopted in February 2010).

³⁵¹ See Deferred Prosecution Agreement, *United States v. Monsanto Co.*, app. B, at 2–5 (D.D.C. 2005), available at <http://www.law.virginia.edu/pdf/faculty/garrett/monsanto.pdf> (requiring “a committee to supervise the review of . . . the retention of any agent, consultant, or other representative for purposes of business development or lobbying in a foreign jurisdiction”).

³⁵² U.S. Dep’t of Justice, Lay-Person’s Guide to the Foreign Corrupt Practices Act Antibribery Provisions, <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> (last visited Oct. 18, 2011).

³⁵³ Hector Gonzalez & Claudius O. Sokenu, Foreign Corrupt Practices Act Enforcement After *United States v. Kay*, 1588 Prac. L. Inst. Corp. 125, 154 (2007), available at <http://www.wlf.org/upload/Sokenu.pdf> (“Six of the eight settled FCPA cases . . . included an agreement by the issuers to retain an independent consultant acceptable to the SEC . . .”).

³⁵⁴ See Garrett, *supra* note 10, at 931–35.

³⁵⁵ See David Zaring, Rulemaking and Adjudication in International Law, 46 Colum. J. Transnat’l L. 563, 567 (2008) (describing role of disseminating best practices in efforts to promulgate non-binding international regulatory norms).

remedies, perhaps allowing their prosecutors to acquire more power, such as the ability to plea bargain.³⁵⁶ If so, then the United States would have successfully exported a novel corporate criminal liability regime.³⁵⁷ Certainly, if prosecutors are declining to impose larger criminal fines in exchange for obtaining cooperation and compliance, they should be more carefully asking not just whether the cooperation was valuable, but whether the compliance remedies are working to prevent future wrongdoing.

CONCLUSION

The over-federalization of criminal law and conflict with state criminal law has been debated for some time, but new questions are raised by globalization of federal criminal law and conflict with foreign criminal law.³⁵⁸ The use of prosecutions to pursue an international regulatory agenda is new. The extensive data collected and examined tell part of this emerging story, but prosecutorial discretion still remains a “black box.” Very little information exists in any area concerning how any prosecutors exercise their discretion. In the context of foreign prosecutions, we cannot know why prosecutors decided to pursue particular convictions or how they negotiated particular results in cases resolved by agreement. Nor can we know how often or why they declined to prosecute in other cases. Federal prosecutors do not systematically review corporate charging decisions themselves, and we do know that discretion is exercised differently across different divisions and offices. We can also observe the conviction outcomes obtained. Many are large-scale cases and taken together they represent an important development in federal criminal law. Moreover, the data from the U.S. Sentencing Commission and the data hand-collected from hun-

³⁵⁶ See David Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, 5 *Chi. J. Int'l L.* 547, 551 (2005).

³⁵⁷ For arguments in favor of regulatory competition, see Paul B. Stephan, *The Political Economy of Choice of Law*, 90 *Geo. L.J.* 957, 962 (2002).

³⁵⁸ See, e.g., Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 *Hastings L.J.* 979, 979–90 (1995); Darryl K. Brown, *Democracy and Decriminalization*, 86 *Tex. L. Rev.* 223, 269 (2007); Sanford H. Kadish, *The Folly of Overfederalization*, 46 *Hastings L.J.* 1247, 1247–50 (1995).

dreds of plea agreements are quite consistent with prosecutors' descriptions of their new enforcement priorities.

In a range of areas, prosecutors increasingly pursue important cases against foreign firms and obtain large fines and convictions. The expansion is likely to continue and more should be done to explore its nature and significance. To be sure, prosecutions are only a small part of efforts by the United States to influence foreign markets. Regulators do so by pursuing civil enforcement, and diplomatic efforts through international organizations, treaties, and negotiations are longstanding. Such traditional means for asserting U.S. influence can be quite effective. Prosecutions, however, add a new, blunt, and powerful tool to target foreign corporate crime. Even if foreign enforcement increases and foreign standards come to mirror U.S. standards, U.S. prosecutors may continue to view prosecutions of foreign firms as a way to level the playing field for U.S. firms, obtain structural reforms that foreign prosecutors do not pursue, and promote U.S. norms.

The United States bears special responsibility as the *de facto* leader in efforts to prosecute corporations around the world. A lack of clear standards is not surprising in an area where approaches have evolved along parallel tracks in specialized areas of federal criminal practice and where firms almost universally negotiate settlements to avoid a trial. Nor is it entirely desirable. Federal prosecutors realigned their role internationally when they began more aggressively pursuing corporate convictions. While foreign corporate prosecutions emerged in separate enforcement areas, they share structural elements as a group. Prosecutors should examine their overarching priorities when acting as global prosecutors and multinational corporate governance regulators. Foreign countries and firms may increasingly demand and receive additional guidance in the form of clear standards, remedies, and charging guidelines. Upon examination, the response may not just be the adoption of limiting principles. In some areas, it may become clear that more aggressive enforcement is necessary. As remedies are evaluated, more effective structural reforms and compliance remedies may be deployed over time. Whether the United States can maintain its leadership position will depend on the sound judgment that prosecutors exercise, since courts will play

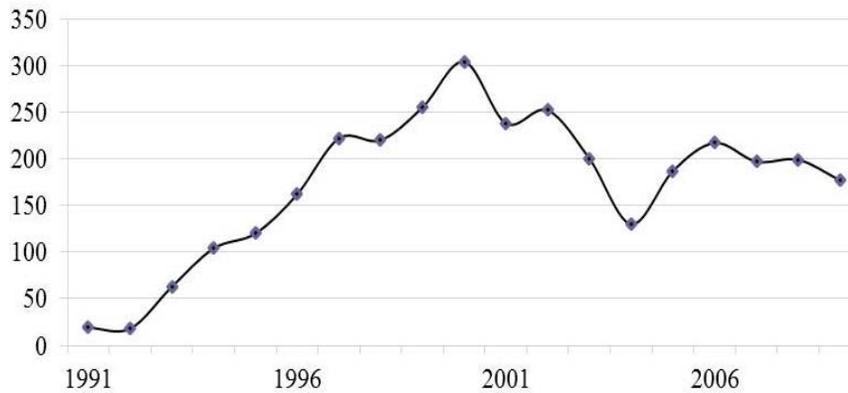
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a backseat role, if at all, given the limited scope of judicial review. How federal prosecutors shoulder that mantle will define our position as the global corporate prosecution hegemon.

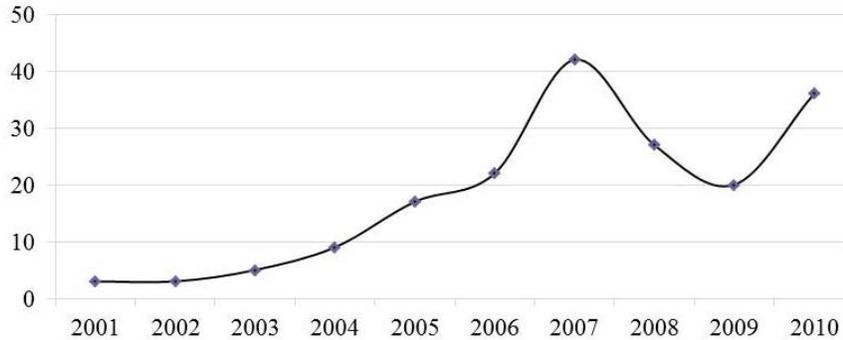
APPENDIX

According to the U.S. Sentencing Commission, the number of total federal corporate convictions has averaged 210 per year since 2000. This followed a gradual rise in convictions in the early 1990s when the Commission began collecting data on organizational convictions (but part of that rise may be due to improved data collection during the 1990s).

Figure 1: Federal Corporate Convictions (Commission Data)



The Sentencing Commission figures do not include deferred or non-prosecution agreements. The decline in corporate convictions after 2002 accompanied an expansion in the use of corporate deferred prosecution agreements. The following table depicts the rise in the use of federal corporate deferred and non-prosecution agreements. Those agreements have been made available online. See Garrett & Ashley, *supra* note 72.

Figure 2: Number of Deferred and Non-Prosecution Agreements

In addition, a hand-collected database of corporate convictions was constructed. As described in the Article, 1011 federal corporate guilty pleas entered after January 1, 2001 were identified with substantial help from Jon Ashley of the University of Virginia Law Library and research assistants. Those agreements were identified in several stages. Plea agreements were located using searches of DOJ and U.S. Attorney's Office websites, which post press releases and sometimes the agreements themselves online (a more common practice in recent years), and by contacting such offices. SEC database searches located additional agreements reported by corporations to the SEC. News searches and Westlaw searches were also used to identify additional agreements. Plea agreements were obtained and have been made available online, along with a spreadsheet detailing these data.³⁵⁹ As described, the agreements not publicly reported were disproportionately small firms not listed or required to report convictions to the SEC.

Second, for 982 firms, including many hundreds for whom no plea agreement could be located, docket sheets were located. Jon Ashley and I searched the "Dockets" database on WestlawNext and ran multiple searches specifying "plea agreement," "USA," and terms such as "incorporated" or "LLC." Jon Ashley downloaded the results and obtained the docket sheets themselves from PACER. Some cases were eliminated where the firm had

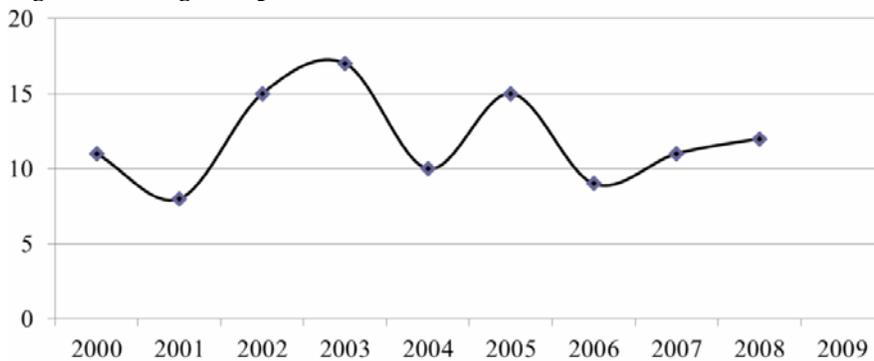
³⁵⁹ Garrett & Ashley, *supra* note 91.

charges dismissed or was acquitted at trial, or where in fact the charges were civil in nature. The docket sheets were also useful as a supplement to plea agreements, since docket sheets typically noted the final sentence and fine imposed, while plea agreements might only specify a sentence range for court approval. As noted, over two hundred additional agreements were located using a newly available Bloomberg database as this Article approached publication, and while not included in the analysis here, they have been made available on the resource website online.

Third, for a handful of firms, DOJ and U.S. Attorney's Office websites included press releases describing corporate convictions, but neither docket sheets nor plea agreements could be located.

The table below illustrates numbers of foreign corporate convictions identified by Commission datasheets. For about one-third of firms, place of incorporation data were missing.

Figure 3: Foreign Corporate Convictions (Commission Data)



As described in the Article, for both Commission data and public agreements in the hand-collected dataset, foreign corporate convictions involved higher average fines.

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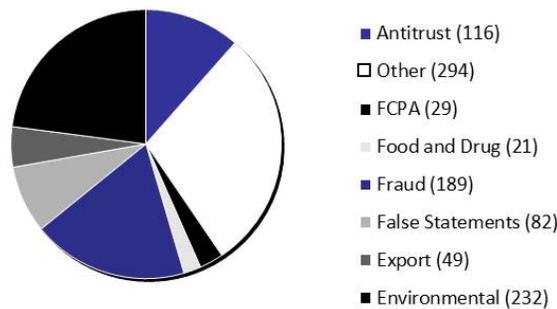
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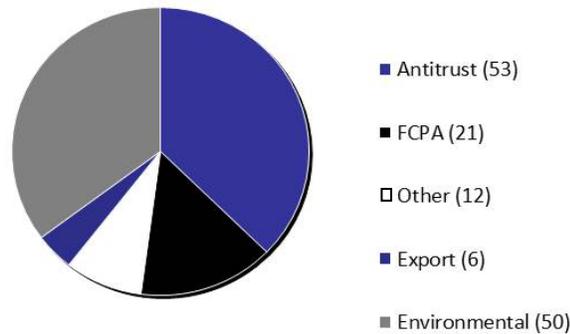
Table 3: Average Corporate Fines

Type of Firm	Domestic Firms	Foreign Firms	All Firms
Sentencing Commission Data (2000–2008)	\$1,337,000	\$17,783,000	\$3,809,000
Public agreements (2001–2010)	\$7,540,000	\$38,112,000	\$11,425,000
Deferred and Non-Prosecution Agreements (2001–2010)	\$24,198,000	\$26,361,000	\$24,351,000

The corporate convictions in the hand-collected dataset were concentrated in a few main areas, chiefly environmental crimes (232), a range of types of fraud (189), antitrust (116), false statements (82), FCPA (29), immigration violations (27), money laundering (25), food and drug-related violations (21), and export violations (49).

Figure 4: Types of Corporate Convictions

The foreign corporate convictions located in the hand-collected dataset, chiefly plea agreements, were of a broadly similar composition, although far more dominated by both antitrust and environmental cases.

Figure 5: Types of Foreign Corporate Convictions

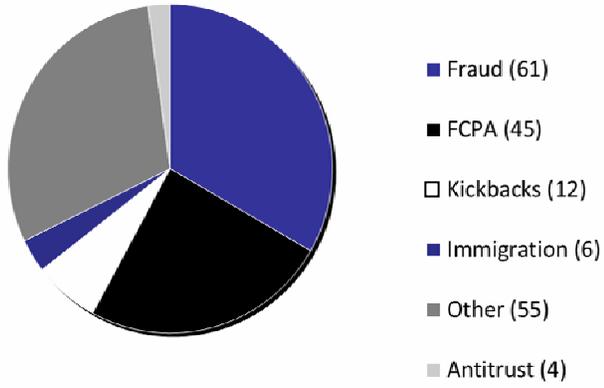
By way of comparison, among deferred or non-prosecution agreements entered with corporations from 2001–2010, far fewer were entered with foreign firms, 16% (33 of 185 cases). The composition of those cases was also quite different. As described, far more of those deferred and non-prosecution agreements generally involved some type of fraud, 33% (61 of 185 cases). Unlike in the dataset of public corporate convictions, few deferred or non-prosecution agreements involved antitrust prosecutions. Only four deferred or non-prosecution agreements during that time-period were in antitrust cases, which were the most common type of foreign corporate conviction in the hand-collected public convictions dataset. Similarly, only three deferred or non-prosecution agreements involved environmental crimes, which were the single largest category in the corporate convictions dataset. By contrast, 61% of the foreign cases (20 of 33 cases) were FCPA cases.

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Figure 6: Deferred and Non-Prosecution Agreements



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