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Is the DOJ FCPA Enforcement Hegemony Dead?

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For nearly 15 years, the United States has had the worldwide corruption enforcement stage to itself, reaping billions of dollars in fines and settlement payments from companies that have acknowledged engaging in bribery in foreign countries. That monopoly, however, may soon end. In a report entitled *Left Out of the Bargain*,[1] the World Bank recently observed that "the country of enforcement was different from the country where the official was bribed or allegedly bribed"[2] and that the country of enforcement has rarely shared its financial recoveries with the countries where the corruption occurred. Motivated by the potential financial recovery in a time where governments are struggling financially and aware of the financial benefit the U.S. has gained from corruption abroad, we believe that countries that have largely ignored corruption enforcement may become more active. As a result, companies may face additional punishment as multiple sovereigns pursue penalties for the same conduct.

Corruption Around the World

Corruption of government officials takes place everywhere, and the level of corruption varies significantly from country to country.[3] According to Transparency International, which publishes an index detailing perceived levels of corruption in 177 countries, nations like Afghanistan, North Korea and Somalia are perceived as highly corrupt, while New Zealand and Denmark are seen as having low levels of corruption.[4] The U.S. is about average among developed countries in corruption of its public officials, ranking 19th out of 177, on a par with Uruguay, between Ireland and Japan, and behind 11 countries in Europe.[5]

Historically, each sovereign's enforcement efforts to stop corruption also have differed widely. The U.S. has been the dominant "global sheriff" through the Department of Justice's aggressive use of the Foreign Corrupt Practices Act (FCPA). As a result, the U.S. government has reaped in significant monetary penalties from entities around the world.

The Adoption and Expansion of the Foreign Corrupt Practices Act

In 1977, the United States enacted the FCPA[6] "for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business."[7] As initially enacted, the law applied only to "[a]ll US persons" and "[c]ertain foreign issuers of securities" but did not apply to foreign firms that engaged in bribery in foreign countries which had some connection

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1 Jacinta Anyango Oduor, Francisca M.U. Fernando, Agustin Flah, Dorothee Gottwald, Jeanne M. Hauch, Marianne Mathias, Ji Won Park and Oliver Stolpe, *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, World Bank, 2014.

2 *Id.* at 25.

3 *See* http://cpi.transparency.org/cpi2013/results/.

4 *Id.*

5 *Id.*

6 15 U.S.C. §§ 78dd-1 et seq.

7 *See* http://www.justice.gov/criminal/fraud/fcpa/.

to an act taking place in the United States.[8] In 1998, the United States extended the reach of the law to "foreign firms and persons who cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the United States."[9] The U.S. justified this expansion because such foreign firms did not "have similar restrictions and could engage in this corrupt activity without fear of penalty" and because some of the United States' "trading partners have subsidized such activity by permitting tax deductions for bribes paid to foreign public officials."[10]

Since 1998, the DOJ has steadily ramped up federal enforcement of the FCPA. Until the United Kingdom adopted the Bribery Act in 2010, the United States stood alone in seeking to enforce public corruption occurring in a foreign country. It can be surmised that as federal prosecutors began making use of the FCPA as amended in 1998, they discovered that few foreign corporations that had engaged in bribery abroad were truly beyond the reach of the amended law: Many had some U.S. domestic contacts or a U.S. partner that had facilitated the bribery in some way. So, in a worldwide playing field in which it was the only effective competitor until 2010, United States prosecutors have engaged in increasingly vigorous FCPA enforcement.

While the DOJ frequently touts its FCPA enforcement efforts, it does not maintain a single database providing overall objective measures of its efforts. Public remarks by DOJ officials on FCPA enforcement typically focus only on the period in which the current administration has been in office or commence with an arbitrary starting point in the recent past.[11] Knitting together information from a variety of sources, we estimate that the United States has recovered in excess of $4 billion over the past 15 years (since the 1998 amendments) in payments from corporations because of bribery their employees have engaged in in foreign countries.

There are clear patterns in the DOJ FCPA enforcement. For its part, the DOJ has largely had two primary goals: winning a financial settlement and securing an admission that the company and/or its employees violated the FCPA by bribing a foreign official.[12] The settling companies appear to be willing to meet those objectives, so long as the settlement is extra judicial and not subject to review, modification or revision by a federal court in the United States. Thus, while the DOJ scored, the companies gained complete closure, knowing that there was no other global sheriff and no effective local sheriff in the country where the bribery occurred.

The World Bank Report

Recognizing the disconnect between the governments that predominantly seek FCPA recovery and the location where that corruption occurred, the World Bank recently conducted an exhaustive study of global corruption enforcement and issued its report, aptly titled *Left Out of the Bargain*. As detailed in the report, between 1999 and July 2012, there were 395 settled cases involving foreign bribery and

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8 *Id.*

9 *See* http://www.justice.gov/criminal/fraud/fcpa/.

10 Statement of President William J. Clinton, November 10, 1998 (http://www.justice.gov/criminal/fraud/fcpa/docs/signing.pdf).

11 *See, e.g.,* Speech by Attorney General Eric Holder, May 31, 2010, http://www.justice.gov/ag/speeches/2010/ag-speech-100531.html ("Since 2004, we have prosecuted 37 different corporations for foreign bribery-related offenses, levying criminal penalties in excess of $1.5 billion"); Speech by Acting Assistant Attorney General Mythili Raman, June 17, 2013, http://www.justice.gov/criminal/pr/speeches/2013/crm-speech-130617.html) ("And just since 2009, the Department has entered into over 40 corporate resolutions … resulting in approximately $2.5 billion in monetary fines."); Speech by Deputy Attorney General James Cole, November 19, 2013, http://www.justice.gov/iso/opa/ dag/speeches/2013/dag-speech-131119.html ("Since I took office in January 2011, the Department has reached 27 corporate resolutions and publicly announced that 28 individuals have been charged with FCPA and FCPA-related violations … [and those] corporate cases resulted in penalties of $785 million and there is more to come.").

12 The DOJ has frequently touted the financial recoveries in virtually all public pronouncements regarding the success of its FCPA enforcement efforts. *See, e.g.*, supra n. 13.

related offenses resulting in recoveries of $6.9 billion for the prosecuting country. Of that $6.9 billion, $5.9 billion was collected by countries "where the country of enforcement was different from the country where the official was bribed or allegedly bribed."[13] Of that $5.9 billion recovered, 97 percent ($5.77 billion) was kept by the prosecuting country and only 3 percent ($197 million), was returned to the country where the crime had occurred.

While the World Bank reports that 70 percent of the cases were prosecuted by the United States, it does not indicate which country reaped the greatest financial gain from the prosecution of bribery that took place in a different country. Nor does the report ever identify those countries that have most often failed to return money to the countries where the crimes occurred. However, it is clear from the report and DOJ's publicly touted enforcement of the FCPA since 1998,[14] that the U.S. has earned the lion's share of the $5.9 billion and that it has benefitted handsomely from such cases — without returning most of that recovery to the countries that suffered through the criminal conduct. The World Bank reports that the United States, from funds it recovered between 2006 and 2009, returned only $120.18 million to three countries,[15] while Attorney General Eric Holder has acknowledged an actual repatriation to other countries of only $156 million between 2004 and 2010.[16] The World Bank report further expressed concerns about "(i) the lack of participation by or coordination with other affected jurisdictions in the settlement process, (ii) the opacity of the terms and contents of settlements, and (iii) the limited judicial oversight in many cases."[17]

Looking Ahead: Practical Considerations for Companies

While the global political impact of the World Bank report is hard to predict, companies subject to U.S. FCPA enforcement should expect an increase in the following risks when considering the terms of a resolution with the United States. While these comments are focused on U.S. investigations, given the passage of the U.K. Bribery Act and that country's recent entry into the worldwide corruption enforcement marketplace, the same considerations should apply to negotiations with the United Kingdom.

- **Increased Host Country Visibility**. The company should expect either the awareness of, or direct participation in, the investigation by the country in which the bribe took place. While the U.S. is not required to disclose any investigation or resolution of such investigation, in light of the World Bank report, the DOJ may disclose such investigation and/or potential resolution to enforcement authorities in the country where the bribery took place. Whether a notified country sits back quietly and awaits the outcome of the DOJ investigation will depend on whether it may want a piece of the action and, if so, whether it thinks more can be gained from awaiting the completion of the U.S. proceedings.
- **Potential Follow-on Enforcement**. When the host country for the bribery does not participate in the U.S. investigation or settlement, the company should expect, and plan for, such country or countries to conduct follow-on enforcement. Emboldened by the financial award from an FCPA settlement with the United States, many developing countries with budget issues may pursue their own enforcement actions. Indeed, given that most companies are required to admit certain facts as part of a deferred or nonprosecution agreement with the DOJ, it may be very difficult for a company to defend itself in a follow-on investigation in a

13 *Id.* at 25.

14 *See* http://www.justice.gov/criminal/fraud/fcpa/.

15 Oduor *et al., supra* n. 1 at 81.

16 Speech by Attorney General Eric Holder, May 31, 2010, http://www.justice.gov/ag/speeches/2010/ag-speech-100531.html ("Since 2004, my country has repatriated more than $156 million in the proceeds of corruption to its victims abroad, and is in the process of repatriating an additional $68 million.").

17 *See* Oduor *et al., supra* n. 1 at 97-98.

developing country. One possible solution to insulate or reduce the overall exposure would be to require the DOJ to return a percentage of its recovery to the foreign country in which the bribery occurred as part of any settlement. While federal prosecutors may not like sharing U.S. recoveries with the foreign country that has failed to enforce its own bribery laws, the DOJ may find it politically difficult to publicly oppose such a provision. One potential risk in including such provision, however, is its lack of enforceability outside the United States. The country in which the bribery took place may not, by any treaty or law, be required to accept that amount as its share and may readily pocket that sum while embarking on efforts to secure more.

- **Multiple Punishments**. Companies should anticipate that follow-on prosecutions might lead to an increase in the overall financial exposure and the imposition of multiple punishments for the same conduct. Legal forces that rein in successive punishments in the U.S. involving multiple sovereigns — the Constitution's supremacy and double jeopardy clauses and the DOJ's Petite Policy covering dual and successive prosecution — will be of little assistance when negotiating with a foreign country not subject to those laws. Conduct seemingly resolved with U.S. authorities may burst wide thereafter in the country where the bribery took place, or in another country whose government suspects such bribery also may have occurred within its borders and has an admission of bribing public officials in its hands.

Indeed, the same trend of "me-too" prosecutions occurred with False Claims Act cases in the United States. Fifteen years ago, the DOJ pursued virtually all FCA enforcement in the United States. While federal prosecutors secured recoveries through settlements that included state losses (recovery of payments by state Medicaid programs), until approximately 2004, state prosecutors were largely content to let federal prosecutors take the lead in negotiating the amount of settlement and its principle terms. Those days are long gone. Now, a company may face criminal and civil investigation and federal and state FCA suits, and those state actions, pursued by state governments with strapped budgets, may precede, be concurrent or follow-on after the resolution of any federal investigation.

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While this is a grim prediction of significantly increased future enforcement activity, the risk can be well-managed through effective compliance programs and appropriate internal investigative responses in the event that facts regarding foreign bribery surface. The risk also must be managed through appropriate responses to DOJ inquiries, requests or proposals, as well as careful consideration of whether to approach the affected foreign governments. The playbook followed by many companies and counsel in the past in resolving FCPA investigations with the United States government — especially detailed admissions of fact in deferred and nonprosecution agreements — may not work as effectively in the future as potential new players enter the shifting enforcement environment.