SETTLEMENTS AGREEMENTS AND INTERNATIONAL COOPERATION: PROMOTING EFFICIENCY IN THE FIGHT AGAINST TRANSNATIONAL CORRUPTION

A Thesis

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"The fight against corruption is one of the most important challenges facing the international community. This is not only a moral battle. It is also a stride for business efficiency, the effectiveness of the public administration, and ultimately for growth and development. This is one of those challenges that countries just cannot fight on their own, because corruption now has global membranes, and therefore demands global cooperation."

Angel Gurría, 2013

Introduction

With globalization, commercial borders almost disappeared, and corporations became multinational players, operating practically everywhere.[1] Besides, multinational corporations gained importance as economic and social actors of development influencing public policy by moving production to another location to increase efficiency and profitability or to invest in a country in which there are tax incentives or human labor is cheaper.[2] As a result of this growing importance of corporations, their influence on countries and regions may undermine governments central role as a regulator, leading to corporate wrongdoing, affecting important fields such as trade, economy, finance, and dot.com world.[3] And beyond that, there was a regulatory vacuum at a global level since up to the end of the 20th Century did not exist any mechanism preventing such behavior and imposing sanctions.

Therefore, corporations acted in an environment where lack of enforcement and sanctions resulted in pervasive effects for competition, providing leeway to exercise influence on government decisions and expenditures, without competition and investments on innovation.[4]

This resulted in a global movement leading international organizations such as the United Nations (UN) and the Organization for Economic Cooperation and Development (OECD) to enact binding instruments, the United Nations Convention Against Corruption (UNCAC) and the OECD Combating Bribery of Foreign Officials in Commercial

[1] Richard Lewis Dixon, *The Challenge & Complexities of Nation-State Sovereignty in the Era of 21st Century Internationalism* (June 15, 2011).
[2] Andreas Georg Scherer and Guido Palazzo, *Globalization, and Corporate Social Responsibility* (2008). The Oxford Handbook of Corporate Social Responsibility, A. Crane, A. McWilliams, D. Matten, J. Moon, D. Siegel, eds., pp. 413-431, Oxford University Press, 2008.
[3] *Id.* at 2.
[4] Paolo Mauro, *The Effects of Corruption on Growth, Investment, and Government Expenditure* (September 1996). IMF Working Paper, Vol., pp. 1-28.

Transactions (Anti-Bribery Convention), for leveling the playing field and to incentivize government deterrence action within each jurisdiction.[5]

As a result, regulators from different countries have increased enforcement actions against corporations, businessmen, and public officials not only at the national level but also those suspected of wrongdoing related to international transactions.[6] Nevertheless, despite the positive outcomes at the national level, an interesting negative effect has emerged, which is an overlap on enforcement. For instance, if a corporation from country A breaks the law in country B and has operations in country C, it can face liability in all three jurisdictions. But not only that, even if the corporation decides to cooperate with authorities from all three countries, it may have to struggle with three different resolutions, since each country has specific regulations. The most common solution is a settlement agreement, but with different outcomes, varying the monetary sanction, required measures regarding compliance, including monitoring and, in the worst scenario, exclusion from government contracting for a certain period or even a dissolution of the legal person, as will be shown later, which certainly means a corporate death penalty.

In response to that, companies are investing several millions of dollars structuring compliance departments, hiring qualified personal, training employees, and reviewing business processes to promote, at least in theory, a culture of integrity.[7]

Having said that, this thesis aims to present the actual challenges facing enforcement authorities and corporations around the world, the importance of international cooperation to minimize enforcement overlap, reinforce the use of

[5] *Supra note* 3, at 12.
[6] International Bar Association, *Structured Settlements for Corruption Offences Towards Global Standards?* IBA Anti-Corruption Committee: Structured Criminal Settlements Subcommittee (2018), available at https://www.oecd.org/corruption/anti-bribery/IBA-Structured-Settlements-Report-2018.pdf.
[7] Miriam H. Baer, *Governing Corporate Compliance*, Boston College Law Review, Vol. 50, No. 1, 2009; Brooklyn Law School, Legal Studies Paper No. 166.

settlement agreements as the most effective corruption deterrent instrument, and propose a potential solution that promotes convergence among enforcement authorities, providing uniformity, predictability, and transparency, which increases efficiency in the fight against transnational corruption.

To accomplish the analysis and propose an attainable solution, this thesis is divided into five chapters. In chapter one, it will be presented a specific view of corruption as a complex phenomenon, main concerns and effects in economies and societies, undermining competition, and increasing poverty. Chapter two will provide an overview of the global scenario and reasons that led to the enactment of the main conventions against corruption - the UNCAC and OECD Anti-Corruption Convention, their main provisions concerning enforcement, international cooperation, and implementation by countries. Also, the main achievements regarding their implementation after two decades of existence will be explained.

Chapter three focuses on settlements or non-trial agreements, explaining why they are used, when it is advantageous to settle instead of prosecuting a corporation, and how jurisdictions such as the U.S., Brazil, and Switzerland resolve most of the cases. Consideration of recent joint-resolution cases is presented in chapter four, with a focus on the settlements with SBM Offshore, Odebrecht, and Technip, with an overview of each case, how international cooperation worked, and what was the resolution achieved within each jurisdiction involved in terms of sanctions and requirements. Finally, in chapter five, actual constraints are addressed and the enactment of a recommendation to increase efficiency and promote convergence on investigations and enforcement proceedings under the OECD Working Group on Bribery in International Business Transactions (WGB) is proposed.

Chapter One: What is Corruption?

1.1. History and Context

As corruption cases are on the news every single day and are increasingly a concern for societies all over the globe, one may think that it is a modern-day problem. However, corruption has been a concern for societies since ancient times. The Code of Hammurabi from 22nd century B.C. is the first legal document setting out punishment for corrupt public officials.[8] The difference today is that the world has never been so interconnected and now it is possible to measure how corruption impacts societies and how it affects development. In this regard, recent surveys have shown, as never before, how much importance people give to the problem of corruption. Also, the results of these surveys seem to call for more enforcement since the results show a lack of confidence in public officials and government efforts to tackle corruption. [9]

Corruption is a complex topic studied by different scholars from several fields such as sociology, political science, economics, and law but none of these disciplines is

[8] Ajit Mishra, *The Economics of Corruption*, Oxford University Press, London (2005).

[9] In a survey on 34 emerging and developing countries people responded that crime (83%) and corruption (76%) are the main problems in their society. Crime and Corruption Top Problems in Emerging and Developing Countries, Pew Research Center, (November 6, 2014), (accessed on 03/03/2020 at 11:12 P.M.), https://www.pewresearch.org/global/2014/11/06/crime-and-corruption-top-problems-in-emerging-and-developing-countries/. *See also*, the U.S. Corruption Barometer 2017, carried out by Transparency International, resulted in 7 out of 10 people believe the government is failing to fight corruption and 44% of Americans believe that corruption is pervasive in the White House. Corruption in the USA: The Difference a Year Makes (December 12, 2017), (accessed on 03/03/20 at 11:29 P.M.), https://www.transparency.org/news/feature/corruption_in_the_usa_the_difference_a_year_makes. *See also*, the Transparency International survey from 2017 reached expressive results from a global perspective: 25% percent of people worldwide paid bribes to access public services in the past 12 months and 57% of people said their government was doing "badly" at fighting corruption. Global Corruption Barometer: Citizens' Voices from around the world (November 14, 2017), (accessed on 03/03/20 at 11:29 P.M.), https://www.transparency.org/news/feature/global_corruption_barometer_citizens_voices_from_around_the_world.

solely able to explain the causes of corruption.[10] And more importantly, to date no science has ever been able to find a vaccine for this disease but just some palliative medicine. In this scenario of uncertainty and more complex relations involving corporations doing business everywhere and affecting people's lives, government regulators usually serve as a last resort protecting fairness in business and promoting enforcement to reduce corruption and level the playing field.

1.2.Definition

As mentioned before, several fields of social science have studied the corruption phenomena and as a result there are myriad definitions of the term corruption. The classical and most recognized definition, which is commonly used by Transparency International is *the abuse of entrusted power for private gain* can be exemplified as the request of an "undue fee" from public official for granting a license to a business operation. Nonetheless, such a definition is too simplistic to explain cases of grand corruption involving multinational corporations doing business globally, and that influences government decisions. Therefore, a broader concept connecting state capture and corruption in which corporations can influence the shape of public policies and regulations in their best interests to the detriment of public interests is necessary to better explain how complex tackling corruption has become in the modern era.[11] Here corruption means the *privatization of public policies*, for example, corporations drive decisions on what, when, and where a road will be built, an airport construed, and so on.

[10] *Id.* at 4. The study from the International Monetary Fund presents some possible causes for corruption are given, "from legal and economic perspectives, the extent of government intervention with pervasive regulations and excessive discretion by public officials, trade restrictions to protect players from competition, including international competitors, price control to maintain gains and profits, subsidizing certain industries, and from a sociological view, factors as public officials favoring relatives and friends."

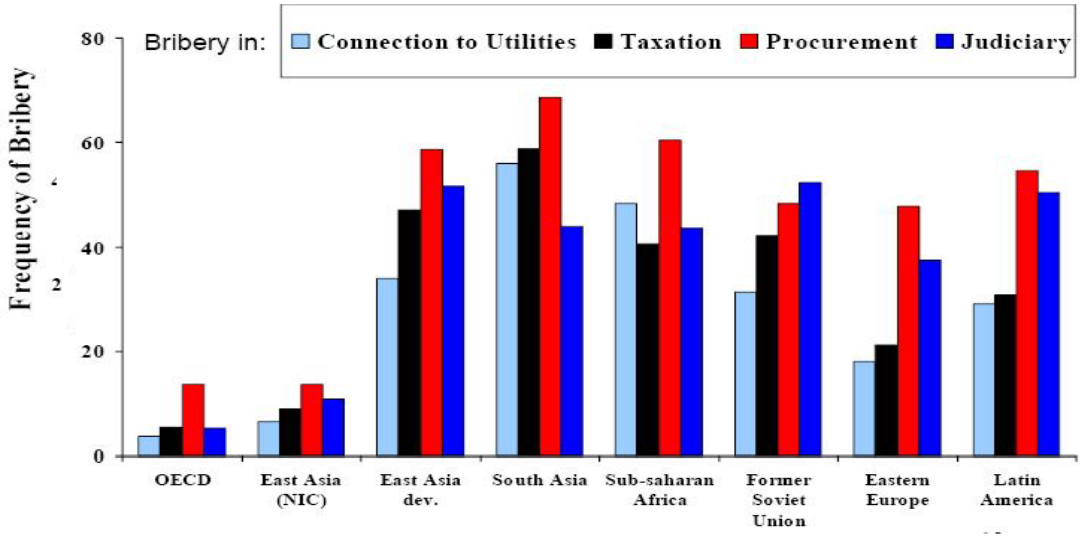
[11] Joel Hellman and Daniel Kaufmann, *Confronting the Challenge of State Capture in Transition Economies,* IMF Finance and Quarterly Magazine, September 2001, Vol. 38, Number 3, 2001.

But it becomes even more complicated once private sector and businessmen can decide if a specific sector will be favored and how this will occur, such as building roads instead of railroads or creating barriers, such as lowering tax to protect certain business sectors.

1.3.Effects

From an economic perspective, corruption effects undermine investment since there is always an "undue fee" for entering the market, no real competition, but instead collusion among competitors, and a need to have connections with key public officials to enter the market, to gain or retain business. Such an unfair model increases prices, lessening competition, and leads the government to provide low-quality services. Also, the effects of corruption may affect foreign direct investment since there is always uncertainty on public procurement fairness and if the rule of law will be followed. In a survey carried out by the OECD results have shown these uncertainties have an impact on both developed and underdeveloped countries as below:[12]

Figure 1: Frequency of Bribery v. Sectors



Source: OECD.

[12] OECD, *Integrity in Public Procurement*. (2007).

From a social perspective, corruption has devastating effects on societies, undermining people's trust in government, lessens the quality of life as investments are not directed in benefit of people but instead to personal and private interests, and, finally, creating a barrier to emerging countries developing. Explained in another way, corruption allows corporations to gain or retain business not by competing or investing in innovation and R&D, but by paying a "business fee" while the affected societies continue to struggle to provide basic needs such as health, education, and sanitation.[13]

In sum, captured societies face a pervasive and cyclical environment leading "to misallocation of public and private resources, diminishing allocative and productive efficiency", as corruption "perpetuates and exacerbates social and economic inequalities, enabling interest groups to maintain and expand their influence and power", "blocking reforms to protect certain interests, nurturing a vicious cycle of inequality that entails health, environmental and security threats."[14]

Despite the negative effects, some authors such as Huntington, Leff, and Lui[15] argue that corruption may be necessary to grease the wheels of growth and increase efficiency in business transactions. In their opinion, increasing bureaucracy, red tape, and excessive taxation have together a negative effect on reducing efficiency and increasing the cost of business. So, in an optimal efficiency model, bribery may speed up the process,

[13] As an example of social effects of corruption in emerging countries, Audit reports released from 2003 to 2013 by the Brazilian Office of the Comptroller General (CGU), the agency that oversees and audits public expenditures, shows that 70% of corruption and fraud in public procurement relates to 3 areas: education, health, and sanitation, leading to a conclusion that most affected people from corruption are the ones with low income and basic social and infrastructure needs, (accessed on March 7, 2020, at 1:14 P.M.), https://exame.abril.com.br/brasil/70-dos-esquemas-de-corrupcao-no-brasil-afetam-saude-e-educacao/.

[14] OECD (2017), *Preventing Policy Capture: Integrity in Public Decision Making*, OECD Public Governance Reviews, OECD Publishing, Paris.

[15] Daniel Kaufmann and Shang-Jin Wei, *Does Grease Money Speed Up the Wheels of Commerce?* (December 1999). World Bank Policy Research Working Paper No. 2254.

lowering taxation and increasing business transaction efficiency. Also, if this is a correct global movement by the OECD, the UN and countries to curb corruption will tend to fail.

Nevertheless, this hypothesis shall be rebutted for several reasons, leading to a conclusion that, in fact, corruption puts "sand in the wheels." First, public officials may speed up the process to a certain level, but project approval may depend on several actors who can slower approval. Second, corrupt officials may create restrictions or barriers just as an opportunity to take advantage. Third, in more corrupt countries there is less predictability on the rule of law, increasing uncertainty, and risks that impact foreign direct investment.[16]

[16] Pierre-Guillaume Meon and Khalid Sekkat, *Does corruption grease or sand the wheels of growth?*, Public Choice (2005) 122: 69-97, available at https://projects.iq.harvard.edu/gov2126/files/meonsekkat_2006.pdf.

Chapter Two: International Conventions on Corruption and International Cooperation

2.1. International scenario

Corruption has been studied for the last five decades[17] but up to mid-nineties was a concern just at the domestic level, with the exception to this the Foreign Corrupt Practices Act (FCPA).[18] The U.S. regulation from 1977, which has provisions sanctioning legal and natural persons for foreign bribery and fraud in accounting records was the first tentative step taken by a government to curb corruption at the international level. During the late 70s, as the Watergate scandal[19] came into place and the Securities and Exchange Commission (SEC) submitted a report[20] to a Senate commission revealing that hundreds of corporations have falsified records in public documents with knowledge from top managers, counsel, and outside auditors, several discussions were held in the U.S. Congress. Ultimately, the FCPA was promulgated as a tentative to recover trust in business and restore confidence in the free market[21] prohibiting bribery of foreign public officials and requiring corporations to maintain reliable internal accounting and recordkeeping controls. [22]The Department of Justice (DOJ) has jurisdiction to bring

[17] *Supra note 9*, at 5-6.
[18] Foreign Corrupt Practices Act of 1977, (15 U.S.C. §§ 78dd-1, et seq.) [hereinafter FCPA].
[19] Kevin E. Davis, *Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism?* (July 1, 2012). NYU Annual Survey of American Law, Vol. 67, No. 3, 2012; NYU School of Law, Public Law Research Paper No. 12-51.
[20] Securities and Exchange Report on Questionable and Illegal Corporate Payment and Practices (accessed on March 3, 2020 at 2:30 P.M.), https://www.sec.gov/spotlight/fcpa/sec-report-questionable-illegal-corporate-payments-practices-1976.pdf.
[21] *Supra note* 18, at 499.
[22] Jessica Tillipman, *The Foreign Corrupt Practices Act Fundamentals*. Thomson Reuters/West. (2008), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1923190.

charges over issuers[23] and their officers, related to anti-bribery provisions[24] and the SEC has jurisdiction over issuers and their officers.

However, up to the beginning of the 1990s enforcement actions against corporations remained few and far between within an average of 2 resolutions per year.[25] Probably, as a recognition that U.S. companies faced disadvantages over foreign competitors which continued to pay bribes to gain business as a business strategy. Aware of that unfair advantage and under pressure from corporations, U.S. authorities started to pressure international organizations such as the UN and the OECD. The U.S. Congress become more explicit in its demands with the 1988 amendments of the FCPA which directed the President to negotiate an international agreement among members of the OECD, including a follow-up report after one year, with proposed solutions and actions to be considered if negotiations failed.[26]

These movements show not only an attempt to raise the standard of corruption deterrence but also a recognition that the playing field can only be leveled with international cooperation.[27]After 8 years of group meetings and rounds of discussions, the Anti-Bribery Convention was approved in 1997 by all 29 original members and 5 non-member countries and entered into force.[28]

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[23] An issuer is usually a public company that must be registered or required to file reports with SEC.

[24] A Resource Guide to the U.S. Foreign Corrupt Practices Act, [hereinafter FCPA Resource Guide], available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

[25] The FCPA Clearinghouse database, a partnership with the Stanford Law School and Sullivan & Cromwell law firm [hereinafter FCPA Clearinghouse], will be used to present data, http://fcpa.stanford.edu/index.html.

[26] 1988 Amendments *supra* note 17; § 5003(d)(1)(2)(A)(ii).

[27] Id. § 5003(d)(2)(A)(iii).

[28] *See* International Monetary Fund, *OECD Convention on Combating Foreign Bribery Public Officials in International Business Transactions*, Policy Development and Review Department (2001). An ad hoc working group was established in 1989 to carry out a comparative review on national legislation. To accelerate the process and since conventions are binding (hard law) and more difficult to pass, countries agreed to a non-binding recommendation (soft law). In 1994 a (C(94)75/Final), incentivizing countries to take "*effective measures to detect, prevent, and combat*

Despite that, more was necessary as even though the OECD encompasses three dozen developed countries, representing 90 percent of foreign direct investment and 70 percent of world exports,[29] grand corruption occurs mainly in non-developed countries with developing societies.[30] In sum, the Anti-Bribery Convention attacked the bribing side, known in some countries as active corruption, without touching the receiving side, known as passive corruption.

Over the years the United Nations also promoted meetings, studies and discussions related to corruption, but it was not keen to enact a binding instrument to regulate the matter so the Anti-Bribery Convention certainly sent a positive signal encouraging the UN to take the next step, passing a broader global instrument. In 2001 the UN created an ad hoc committee to negotiate a unique instrument against corruption and in 2003 the United Nations Convention Against Corruption was approved by approximately 129 countries during a Conference held in Merida, Mexico,[31] and it now has 189 signatory parties.

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bribery of foreign public officials in international business." Later the ad hoc working group become the Working Group on Bribery in International Bribery Transactions (WGB). A Revised Recommendation was issued in 1997, including WGB role as monitoring countries provisions implementation and oversight of members full implementation of proposed provisions. Finally, a debate between go forward with a recommendation or pursue the enactment of a convention was discussed and fortunately that latter was possible, and the Convention was signed in December 2017, available at https://www.imf.org/external/np/gov/2001/eng/091801.pdf.

[29] Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?* (March 1, 2005). Journal of International Economic Law 8(1), 191-229, 2005, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2557193.

[30] According to available data since 1980 all companies combined paid USD 17.24 billion in 239 FCPA-related enforcement actions. From this total the 5 cleanest countries, considering the 2019 Corruption Perception Index (CPI), Denmark, New Zealand, Finland, Singapore, and Sweden paid USD 2.49 billion (14.4%) and corporations headquartered in the top ten cleanest countries were responsible for 31.5% of all FCPA settlements (accessed on May 2, 2020, at 2:24 P.M.), https://fcpablog.com/2020/01/24/is-the-cpi-upside-down/. See also, location of improper payments in FCPA-related investigations: China, Brazil, India, Mexico, Russia, Indonesia, Angola, Argentina, Saudi Arabia, and Venezuela (accessed on May 2, 2020 at 2:29 P.M.), http://fcpa.stanford.edu/.

[31] Rajesh Babu Ravindran, *The United Nations Convention Against Corruption: A Critical Overview* (March 1, 2006), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=891898.

The effects of these conventions after twenty years are well-known, they have changed significantly the way corporations do business and forced national governments to face corruption more effectively. These efforts led countries to pass or amend domestic regulations on subjects such as international cooperation, criminalization of foreign bribery, promoting transparency, addressing asset recovery, creating and enhancing enforcement over legal persons.

2.2. Anti-Bribery Convention Provisions

The Anti-Bribery Convention's main feature, as set out in Article 1, relates to the criminalization of foreign bribery and requires countries to adopt measures to include or amend criminal codes such that offering, promising or giving any undue pecuniary or other advantages directly or indirectly to a foreign public official shall be considered a crime. Thus, one can conclude that countries ought to enact laws like the FCPA, which may limit corporations to keep using bribes or related improper business practices to have undue advantage over competitors.

Also, the Anti-Bribery Convention requires that efforts shall not focus only on enforcement against natural persons such as businessmen but also legal persons. So, Article 2 emphasizes a need that legal persons also be liable for bribing. The reason for that follows the same path as the FCPA having corporations to be accountable for avoiding using an employee as a scapegoat. However, Article 2 does not mandate criminalization which could otherwise have been a problem since in some countries such as Brazil legal persons are not subject to criminal liability, with exception of environmental crimes.[32] On the other hand, some traditional civil law countries such as

[32] Mariana Mota Prado, Lindsey D. Carson, and Izabela Correa, *The Brazilian Clean Company Act: Using Institutional Multiplicity for Effective Punishment*, (October 13, 2015). Osgoode Legal Studies Research Paper No. 48/2015, available at https://ssrn.com/abstract=2673799 or http://dx.doi.org/10.2139/ssrn.2673799.

Italy, France, and Germany, which might have been expected to take the administrative/civil liability approach provided for the criminalization of legal persons after the enactment of the Anti-Bribery Convention.[33]

Regarding sanctions, Article 3 demands effective, proportionate, and dissuasive criminal penalties to natural and legal persons, demanding equivalent monetary sanctions within countries without criminal sanctions for corporations. The goals were to increase awareness of the consequences for legal persons, irrespective of the penalty being criminal, civil, or administrative. As will be shown on SBM Offshore, Odebrecht, and Technip cases in chapter four, no matter what kind of sanction is imposed, the outcome must enable government enforcement to create a deterrence effect on corporations.

The jurisdiction provision on Article 4 has fundamental importance for this thesis while the Anti-Bribery Convention mandates each country to establish jurisdiction and "When more than one Party has jurisdiction over an alleged offense described in this Convention, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution." So, one may conclude that a corporation involved in foreign bribery in more than one country shall be liable just in one jurisdiction which will be decided by government authorities based on the most appropriate jurisdiction for prosecution. Nevertheless, this method of resolution is not being used in the actual scenario and for the reasons to be explained later, shall not be adopted as a mandatory rule.

Inspired by the FCPA, Article 8 of the Anti-Bribery Convention, mandates legal persons to maintain reliable financial records, follow accounting principles and auditing standards to prevent fraud related to foreign bribery. Also, as Article 3, requires countries

[33] *See*, Ricardo Wagner de Araujo, *Fighting Corruption and Promoting Integrity in Public Procurement: A Comparative Study Between Brazil and the United States*, Institute of Business Issues, The George Washington University (2013), available at https://minervaprogramgwu.wordpress.com/minerva-research-papers-2/.

to implement effective, proportionate and dissuasive sanctions to prevent corruption as most of the foreign bribery cases have shown a close relation with accounting fraud and off-records financial operations, being the Odebrecht case a remarkable example of how far wrongdoing can go as the company created a unique area known as the "Division of Structured Operations", which later was found to be a department responsible to manage off-the-record bribing payments to public officials in Brazil and abroad.[34]

Concerning cooperation, Article 9 defines it as mutual legal assistance, requires to be effective, and emphasizes its importance not only for criminal offenses but also for non-criminal proceedings. This is a particularly relevant provision as some countries adopt mixed regimes, of criminal, civil, and administrative sanctions and in others there is no criminal liability for legal persons. Within the actual scenario international cooperation has fundamental importance while being utilized by several jurisdictions in different formats, formally and informally, to enhance resolutions related to foreign bribery.[35]

Finally, regarding monitoring, the Convention provides participating countries a two-step evaluation, first self-evaluating by responding to questionnaires, and second a mutual evaluation where countries evaluate other signatory countries under the scrutiny and directions from the Working Group on Bribery.[36] Thus, besides international cooperation, the WGB became an essential body to harmonize possible frictions among

[34] Odebrecht has settled with different jurisdictions such as the U.S., Brazil, and Switzerland. However, not all documents in all jurisdictions are public. Detailed information regarding the "Division of Structured Operations" and its operation was made public by the U.S. Department of Justice, (accessed on March 16, 2020, at 1:47 P.M.), https://www.justice.gov/criminal-fraud/file/920096/download.

[35] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (2019), available at http://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf.

[36] *Supra note* 24, at 8.

countries, revise evaluation reports, propose changes, and report annually to the Council of Ministers.[37]

2.3. United Nations Anti-Corruption Convention Provisions

Conversely to the Anti-Bribery Convention that aimed to be very specific, targeting sanctions against legal or natural persons bribing foreign officials, the UNCAC has a broader ambit and is divided into four main subjects: prevention, criminalization, international cooperation, and asset recovery.[38] Initially, regarding prevention, a whole chapter addresses its importance within the public and private sector, sending a clear message that governments alone do not suffice in the fight against corruption, and, thus, the private sector must also join the movement. About the former, the Convention suggests the establishment of independent anti-corruption bodies,[39] adoption of policies to recruit, manage, train, and promote public officials based on merit and aptitude,[40] legislative or administrative measures concerning financing political campaigns and political parties[41], promoting transparency and preventing conflicting of interest[42], and, finally, creating a fair system of public procurement.[43] In regards to the private sector, the UNCAC prescribes measures to enhance cooperation with the public sector, such as promoting cooperation with law enforcement agencies, enactment of codes of conduct in business practices, increasing transparency, preventing conflict of interests, and

[37] As an annex to the Anti-Bribery Convention, the *Revised Recommendation of the Council on Combating Bribery in International Business Transactions* describes WGB's main duties and responsibilities.
[38] *See* generally*, United Nations Convention Against Corruption', Convention highlights*, available at https://www.unodc.org/unodc/en/treaties/CAC/convention-highlights.html.
[39] Article 6 of the UNCAC.
[40] Article 7 of the UNCAC.
[41] *Id.*
[42] *Ibid.*
[43] Article 9 of the UNCAC.

improvement of internal controls to prevent fraud.[44] In between private and public sectors, the Convention emphasizes the importance of civil society, such as people and non-private actors, on the process, aiming to increase transparency and participation in decision making.[45]

In chapter three, the Convention stimulates the adoption of measures to criminalize not only classic active and passive corruption[46] such as bribing and embezzlement but also other more sophisticated forms as trading in influence and concealment and laundering the proceeds of corruption. Also, the Convention mandates that national and public officials are treated equally, being liable for the above-mentioned conducts, no matter being a national or foreign public official.[47] However, regarding legal persons, the Convention follows the Anti-Bribery Convention, and jurisdictions must endeavor the adoption of effective and dissuasive criminal or non-criminal measures.[48] No doubt the UNCAC has a much wider spectrum than the Anti-Bribery Convention, requiring Parties to strengthening their efforts to pass or amend laws to include criminalization of passive bribery and money laundering, to create or designate a body to prevent corruption, to enact codes of conduct for public officials, and to adopt measures to enhance civil society participation in the prevention and fight against corruption.

In respect to international cooperation, countries agreed in chapter four to cooperate in criminal, civil, and administrative proceedings related to corruption, [49]

[44] Article 12 of the UNCAC.
[45] Article 13 of the UNCAC.
[46] Article 15 of the UNCAC establishes active bribery, "(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, so that the official act or refrain from acting in the exercise of his or her official duties"; and passive bribery "(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, so that the official act or refrain from acting in the exercise of his or her official duties."
[47] Article 16 of the UNCAC.
[48] Article 26 of the UNCAC.
[49] Article 43 of the UNCAC.

prosecuting offenders and utilizing mutual legal assistance in several different ways, from taking evidence and statements to freezing and seizing proceeds of crime.[50]

Finally, the Convention binds countries to cooperate on asset recovery. The International Monetary Fund (IMF) estimates that the total amount of money laundered annually is equivalent to 3 to 5 percent of the world's gross domestic product (GDP), and a large amount of this activity comes from corruption. [51]

2.4. Implementation Legislation

Regarding the Anti-Bribery Convention there are 44 signatories, which includes non-OECD members. The main feature of the instrument is the mandatory monitoring process to ensure the implementation and fulfillment of obligations and is based on a peer-review system that ends with a publicly available report. The evaluation process encompasses, four phases: Phase 1: evaluate the adequacy of a country's legal framework to fight foreign bribery and implement the Convention; Phase 2: assesses whether a country is applying this legislation in practice; Phase 3: focuses on enforcement and cross-cutting issues, and unimplemented recommendations from Phase 2; and Phase 4: focuses on enforcement and cross-cutting issues tailored to specific country needs, and unimplemented recommendations from Phase 3.

The monitoring process is continuous and initiates in Phase 1 with a questionnaire to be answered by a signatory country with a sole intent to verify the adequacy of national regulations with the Anti-Bribery Convention and after analysis to issue a report with conclusions on country's performance and propose improvements.

[50] Article 46 of the UNCAC.
[51] Supra note 30, at 207.

Surely countries face different constraints to adopt standards required and the aim is to promote improvements with follow-up evaluations. For instance, the first evaluation of Chile in 2004[52] considered that the responsibility of legal persons should be enhanced as there was no possibility to impose fines on legal persons, which should preclude the country to reach effective, proportionate, and dissuasive non-criminal sanctions. Later in 2014, during the Phase 3[53] evaluation, a new regulation was enacted and fine up to USD 1.4 million shall be imposed on a legal person. So, advancements were accomplished but evaluators concluded that the amount was not enough to have a deterrence effect. Then, in 2016 while Phase 4[54] the evaluation was in place a new amendment increased the maximum fine to be imposed to a legal entity to USD 21.5 million. This example has shown the effectiveness of the monitoring system and its positive effects on country improvements.

Certainly, accomplishing the terms agreed on the Anti-Bribery Convention may take longer, depending on political will to pass a new regulation, to amend an act, or to enhance enforcement against individuals and legal entities. The Chilean case has shown that improvements regarding acceptable monetary sanctions took 12 years to be reached. Further, countries face different issues and are still at different levels regarding the implementation of the Anti-Bribery Convention.

About the UNCAC, the Implementation Review Mechanism (IRM) was adopted in 2010[55] and is based on principles such as transparency, efficiency, impartiality, non-

[52] OECD, Chile: Phase 1, Review of Implementation of the Convention and 1997 Recommendation (2004), available at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/33742154.pdf.
[53] OECD, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Chile (2014), available at http://www.oecd.org/daf/anti-bribery/ChilePhase3ReportEN.pdf.
[54] OECD, Phase 4 Report: Chile, Implementing the OECD Anti-Bribery Convention, available at http://www.oecd.org/corruption/anti-bribery/OECD-Chile-Phase-4-Report-ENG.pdf.
[55] See supra note 30, at 220-222, Article 63 of the UNCAC recommends implementation of review mechanisms and some countries such as Austria and the Netherlands suggested its creation at the Conference of State Parties in 2003.

punitive, and opportunity to share good practices. The evaluations are conducted by two members, one from the same region, and up to date two cycles were performed. The first cycle initiated in 2010 and finished in 2014, with 180 countries being evaluated on matters related to the UNCAC provisions on Criminalization and Law Enforcement and International cooperation. The second cycle initiated in 2015 within a goal to evaluate provisions related to Preventive measures and Asset recovery and is supposed to be concluded within 5 years. Similarly to what the WGB represents for the OECD, the Conference of the States Parties of the UNCAC established in 2011 the Implementation Review Group (IRG), that aims to "have an overview of the review process to identify challenges and good practices and to consider technical assistance requirements to ensure effective implementation of the Convention."[56]

With almost 200 countries as signatories and provisions beyond criminalization of foreign bribery, the UNCAC requires additional efforts to be fully implementated. So, review mechanisms play a central role in its success and two main concerns may arise. First, developing countries fear being evaluated and deficiencies are exposed to criticisms and pressure. Second, developed countries might argue the existence of unnecessary overlap among conventions monitoring processes, requiring coordination among different international organizations to incentivize commitment.[57]

[56] Resolution 3/1 of the Conference of the States Parties to the UNCAC, 2011, available at https://www.unodc.org/documents/treaties/UNCAC/Publications/ReviewMechanism-BasicDocuments/Mechanism_for_the_Review_of_Implementation_-_Basic_Documents_-_E.pdf.

[57] Ophelie Brunelle-Quraishi, *Assessing the Relevancy and Efficacy of the United Nations against Corruption: A Comparative Analysis*, Notre Dame Journal of International & Comparative Law: Vol. 2: Iss. 1, Article 3, available at http://scholarship.law.nd.edu/ndjicl/vol2/iss1/3.

Chapter Three: Settlement or Non-Trial Agreements

3.1. Definition

It is difficult to find an exact and standard definition for settlement or non-trial agreements since several jurisdictions use different forms of negotiated resolutions to solve corporate corruption cases. In some countries there is criminal liability for legal persons, while some others only provide for civil and/or administrative liability. For this work, a settlement or non-trial agreement is an instrument used by enforcement authorities around the world to resolve corporate [58] wrongdoing, including foreign bribery, collusion, price-fixing, or other types of economic offenses, without a full trial, bringing charges, filing a suit before a court, or debarment proceedings. It encompasses resolutions at criminal, civil and/or administrative level, and these settlement agreements usually involve a monetary sanction, full cooperation by legal or natural persons, and/or compliance recommendations which the corporation must implement.[59]

3.2. When? Why? How?

International Conventions incentivize cooperation with enforcement authorities to increase corruption deterrence and improve the effectiveness of investigations. For example article 37 of the UNCAC has provisions requiring private parties to cooperate with enforcement authorities, including providing useful information and evidence to enhance investigations. In practice, enforcement authorities might reduce sanctions or even not prosecute some cases if there is substantial cooperation with an investigation or prosecution if the cooperation is considered essential to the investigation. One such

[58] Due to the scope of this thesis focus will be given on resolutions with legal persons. Nevertheless, settlement or non-trial agreements related to corruption or other criminal offenses are also used to reach resolutions also with natural persons. *Id.* 30, at 3.
[59] *Supra note* 6, at 16.

example is the U.S. Justice Manual that provides specific guidance to prosecutors on weight factors to be considered for prosecution considering "the corporation's willingness to cooperate, including as to potential wrongdoing by its agents" as a mitigating factor.[60]

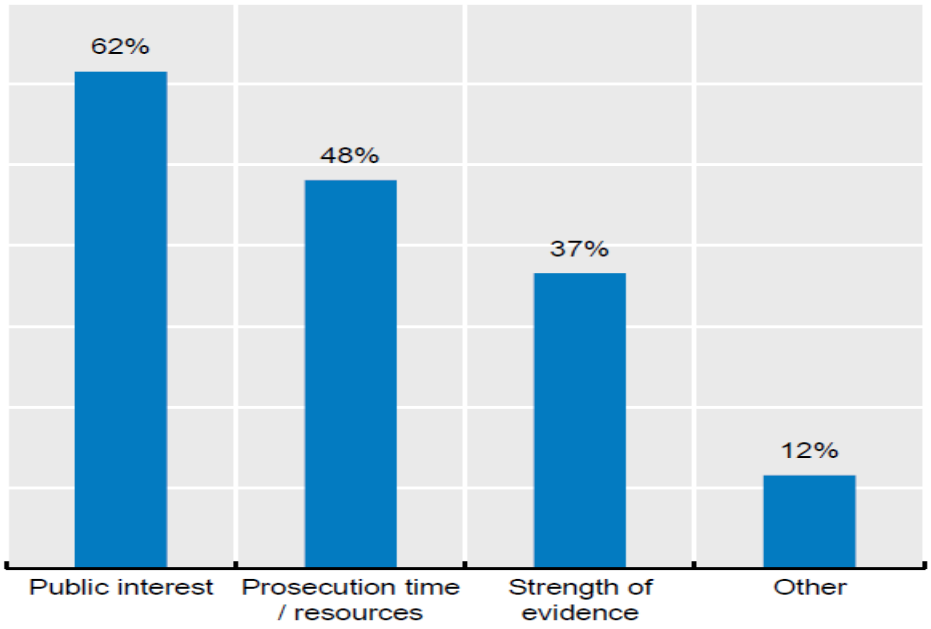
According to the OECD non-trial resolutions are the most used instruments in foreign bribery-related cases among member parties representing 78% of the total.[61] A broader study conducted by the International Bar Association (IBA) concluded that 57 countries have some sort of negotiated process for settlement of foreign bribery offenses between government and legal persons.[62]

Despite the frequent use of settlement agreements, one can argue are actual advantages or disadvantages of a resolution in comparison to litigation. There is not a one-size-fits-all answer as countries face different practical issues, but certainly there are some common challenges from both sides, enforcement authorities, and private sector, that incentivize settlements ahead of litigation.

For the enforcement authorities, the main factors to consider while deciding which approach to take are public interest, timely enforcement action, and strength of evidence, according to an OECD survey[63]:

Figure 2: Factors considered by authorities when deciding to resort to a resolution

[60] U.S. Attorney Manual § 9-28.700.
[61] *Supra note* 30, at 13.
[62] OECD (2016), *The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report.*
[63] *Supra note* 30, at 68.



As discussed in chapter one, corruption has pervasive effects in societies from undermining economic development and harming foreign direct investment to capturing public policy decisions and preventing people from benefiting from basic public goods such as infrastructure. The sum of those factors might undermine people's trust in government and institutions, which in the worst-case scenario may lead to a democracy disruption. In the public interest perspective, enforcement authorities' intent is to promote the common good, restore people's confidence in government institutions, and guaranteeing that recovered assets will be redirected to society's basic needs.

Also, investigations of such cases usually last for several years before resolving - even in the U.S., a country well known for its expertise on enforcement actions related to foreign bribing involving complex investigations.[64] One such example is the Walmart case, in which investigations of suspected foreign bribes in Brazil, Mexico, and other

[64] According to the FCPA Clearinghouse the average length to an FCPA Related Investigation is 38 months.

countries began in 2012 after a series of articles at the New York Times, and a final resolution with U.S. authorities only came into place in 2019.[65]

Further, as foreign bribery is a sophisticated offense, it is difficult to uncover without self-disclosure, a whistleblower, or another kind of corporate cooperation. These investigations often involve multinational companies and their overseas subsidiaries, pose procedural and practical barriers, requiring tremendous efforts to gather evidence such as files, documents, and testimonies, dealing with issues involving legal privilege and rely most of the time on mutual legal assistance.

Additionally, from personal and practical experience, [66] cost is always a concern as an agency or department must handle several responsibilities,[67] invest resources to hire and train personnel, acquire software and technical devices, and decide which investigation to prioritize among several, and designate specific personnel to investigate, analyze information and documents and negotiate a final resolution.[68]

On the other side of the equation, corporations under investigation must also decide the path to follow and balance incentives for self-disclosing and cooperating with authorities to reach a settlement agreement or face the risk of defending itself in a usually costly and long litigation process. Previous data from different sources have shown that the former is the usual option and there are some reasons for that choice.

The first reason is to reduce or mitigate sanctions that, without a settlement agreement, would probably be significantly higher. There are several types of sanctions

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[65] DOJ Press Release, https://www.justice.gov/opa/pr/walmart-inc-and-brazil-based-subsidiary-agree-pay-137-million-resolve-foreign-corrupt.

[66] The author is a Federal Auditor at the Brazilian Office of the Comptroller General and since the Clean Companies Act, entry into force in 2014 has been a member of settlement committees.

[67] According to the FCPA Clearinghouse the average monthly cost for an FCPA-related investigation is $1,8 million.

[68] In certain countries such as the U.S. and France, enforcement authorities have certain discretion to decide in which cases to bring or drop charges. Conversely, in other countries such as Switzerland and Brazil, enforcement authorities' tasks are mandatory. *See id*. 6.

that a corporation could face, such as fines based on the amount of bribe paid, fines based on revenues, confiscation, and disgorgement of profits, and even being precluded from government contracts (commonly known as debarment).[69] So, corporations tend to do a rational or intuitive calculation of the pros and cons involved before deciding which way to follow.

Second, the benefits must be clear and predictable otherwise resolution by settlement agreements will be just a remote option even if in theory incentives are beneficial to corporations. Thus, if there are no practical examples of enforcement and case law where sanctions are imposed, the deterrence effects will be not in place, and corporations willing to behave correctly tend to be reduced. But if there is no clear message, orientation, or guidance from enforcement authorities and regulations on the benefits corporations get from a settlement agreement, there is a low probability of reaching such a kind of resolution. Therefore, clear guidance on what will be taken into account, admission of facts, full or partial cooperation, self-reporting, and effective compliance program must be posited to achieve positive results.

A third reason is reputation. In a world in which concepts such as corporate social responsibility (CSR) dictates a new business standard, reputation may lead corporations to succeed or fail.[70] The Enron case is a good example of a multinational corporation that

[69] OECD-Star, *Identification, and Quantification of the Proceeds of Bribery* (2012), OECD Publishing, available at http://www.oecd.org/daf/anti-bribery/50057547.pdf. *See also*, Valdir Moysés Simão and Marcelo Pontes Vianna, *O Acordo de Leniência na Lei Anticorrupção – histórico, desafios e perspectivas*. São Paulo: Trevisan, 2017.

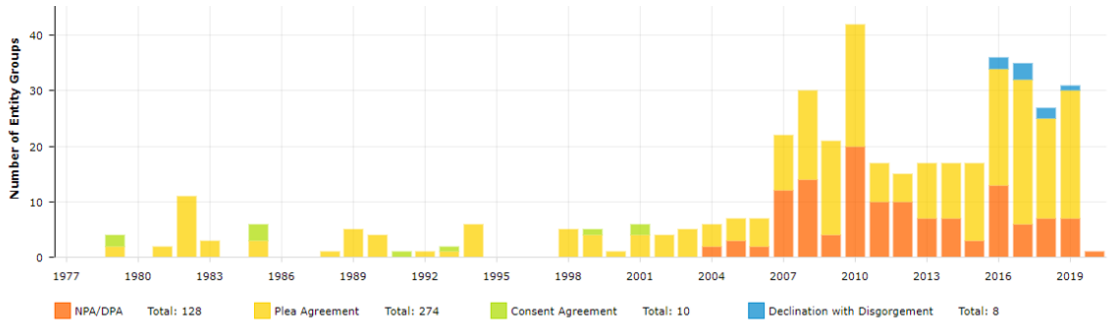
[70] Daniel T. Bross (2014), Business and the Millenium Development Goals: The Role of Business in Society: The Microsoft Vision. In Oliver F. Williams, *Sustainable Development: The UN Millenium Development Goals, the UN Global Compact, and the Common Good*, University of Notre Dame Press (2014), p. 20: "According to classical economic theory, as business was considered socially responsible if it maximized profits while operations within the law. This is a low bar compared to today's more progressive view that corporations while continuing to earn healthy profits, should also exercise good governance principles and pursue responsible business practices that benefit not only their shareholders but also their employees, customers, and partners as well as the society in which they all coexist."

can be affected by the loss of reputation. Enron was a top 7 corporation on the Fortune 500 list and rated the most innovative large company in America and few months after information regarding a violation of accounting and financial statements become public filed bankruptcy.[71]

3.3. U.S. Enforcement Overview

There is a tradition in the U.S. to utilize settlements as a tool to resolve all sorts of matters whether civil, criminal, and administrative matters, with natural[72] and legal persons[73] avoiding litigation before a court. In regards to the Foreign Corrupt Practices Act the percentage is even higher reaching technically 100%[74] of cases involving legal entities.[75] In research on civil and criminal investigations conducted by the DOJ and the SEC results presented show that nearly all cases were resolved by non-trial resolutions.

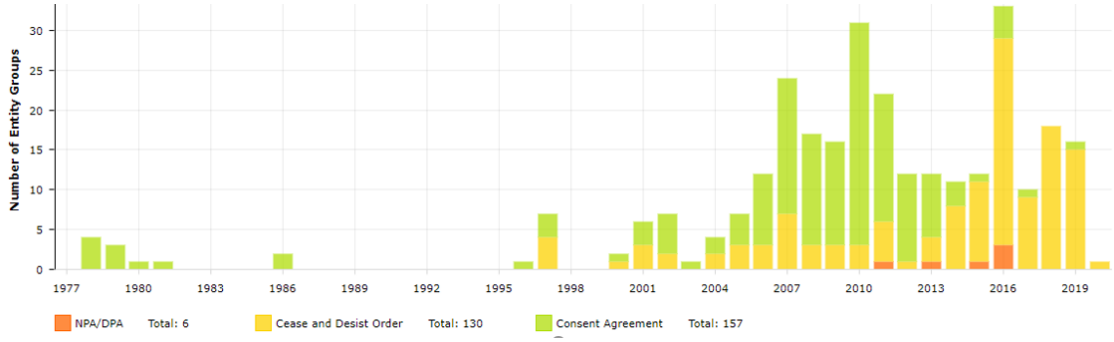
Figure 3: DOJ Resolutions from 1977 to 2019



[71] Paul A. Argenti and Bob T. Druckenmiller, *Reputation and the Corporate Brand* (2003). Tuck School of Business Working Paper No. 03-13.
[72] Around 95% of criminal offenses at Federal level do not go to a trial before a court, but instead are resolved by a sort of settlement such as guilty plea. *See*, Oren Gazal-Ayal, and Avishalom Tor, *The Innocence Effect* (August 21, 2011). Duke Law Journal, Vol. 62.
[73] The U.S. Department of Justice Manual (JM) has specific guidance regarding settlements with natural and legal persons. *See* at 9-28.000 Principles of Federal Prosecution of Business Organizations, available at https://www.justice.gov/criminal-fraud/file/838416/download?utm_medium=email&utm_source=govdelivery
[74] In *U.S. v. Lindsey*, in 2011, the DOJ secured the first conviction of a legal person under the FCPA. However, the decision was reversed within the same year based on prosecutorial misconduct (accessed on May 2, 2020, at 2:18 A.M.), http://fcpaprofessor.com/lindsey-manufacturing-case-officially-over/.

Source: FCPA Clearinghouse.

Figure 4: SEC Resolutions from 1977 to 2019



Source: FCPA Clearinghouse.

Nevertheless, some authors criticize this overwhelmingly use of non-trial resolution to resolve almost all corporate wrongdoing cases from a sense that negotiation with corrupt actors may harm the government and society.[76]

The rationale used by U.S. authorities for this use of non-trial resolution is that they aim to promote corporate rehabilitation to preserve the economy and protecting jobs and consumers through free economic and capital markets.[77] To achieve those goals enforcement authorities incentivize self-disclosing, crediting cooperation, imposing monetary sanctions, and, in some cases, require monitorship.[78]

The U.S. is recognized as a pioneer in enforcement actions against foreign bribery, leading global efforts to deter corporate corruption around the world. As the figures above

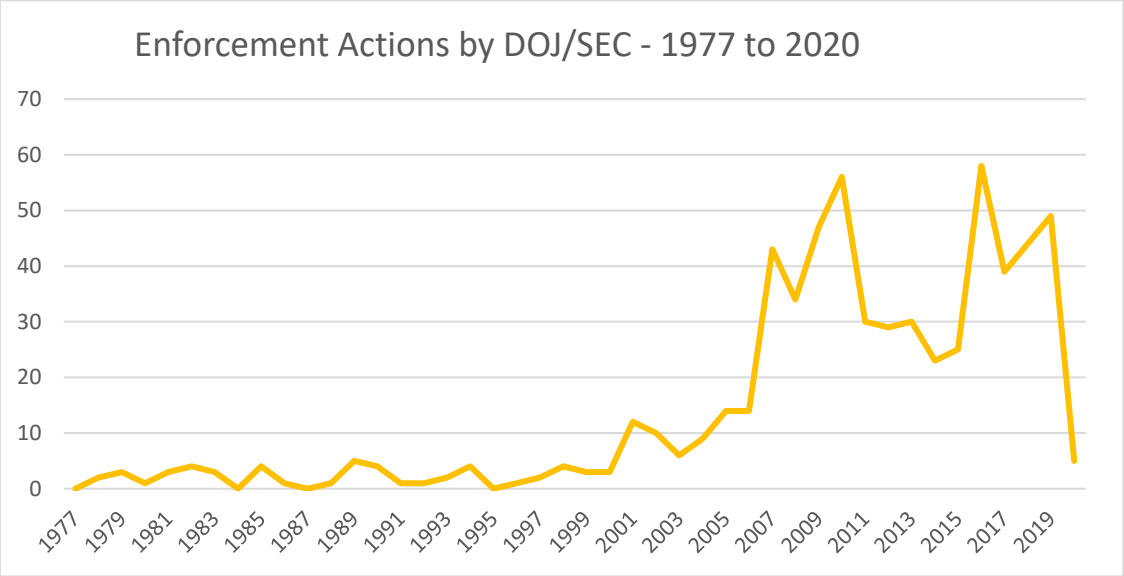
[76] Regarding corporations that use bribe and fraud as a business model, there are allegations that monetary sanctions serve as a cost of doing business and non-trial resolution has no deterrence effect since corporations keep acting in the same way. *See*, Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (2014), Harvard University Press; *see also*, in Drury d. Stevenson and Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 Fordham L. Rev. 775 (2011), "Debarment from future federal government contracts, even temporarily, is an unused sanction for FCPA violations, even though Congress provided for this punishment by statute. Debarment offers a far more potent deterrent than fines and penalties, as multinational contractors that conduct business with the United States are much less likely to view the sanction as merely a cost of doing business.", available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1811126.

[77] *Supra note* 67, at 9-28.100 - Duties of Federal Prosecutors and Duties of Corporate Leaders.

[78] *Id.* at 22.

show the DOJ and SEC increased enforcement since the beginning of the 21st Century when compared to the first 20 years of the FCPA coming into force. From a total of 629 enforcement actions since its enactment, 577 or 92% relates to the last 20 years.

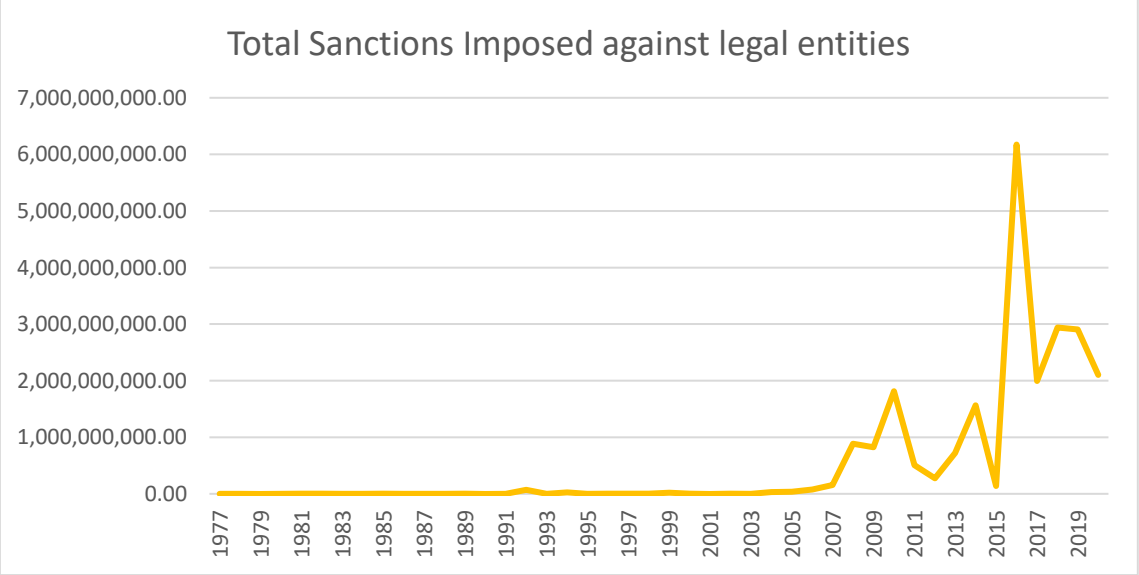
Figure 5: DOJ and SEC Enforcement Actions per Year



Source: FCPA Clearinghouse.

As a result of this enhanced enforcement, the U.S. government has imposed monetary sanctions of more than $23 billion since the FCPA entered into force.

Figure 6: Total sanctions imposed by U.S. enforcement authorities from 1977 to 2020:



Source: FCPA Clearinghouse.

Finally, in recent years the DOJ issued important documents indicating its commitment to enhancing efforts to investigate wrongdoing related to the FCPA, the FCPA Resource Guide,[79] the Yates memo in 2015,[80] a pilot program in 2016,[81] and the FCPA Corporate Enforcement Policy,[82] all of them to incentivize companies to self-disclose FCPA wrongdoing, cooperate with the Fraud Section, and encourage companies to implement robust and effective anti-corruption compliance programs.

3.3.1. Non-Prosecution Agreement (NPA), Deferred Prosecution Agreement (DPA), Plea Agreement, Cease and Desist Order, and Administrative Consent

Within the U.S. there is a myriad of forms for resolutions of corporate wrongdoing, but only the most used forms of settlement agreements/resolutions of corporate criminal, civil liability will be addressed in this study. These are NPA, DPA, pleas agreements, cease and desist orders, and administrative consents.

Concerning criminal resolutions, the Principles of Federal Prosecution within the U.S. Justice Manual provide discretion to prosecutors to decide whether to bring charges against corporations, which gives latitude to pursue alternative methods of resolutions instead of having the usually long and costly trial. Jurisdiction for criminal cases lies with the Department of Justice and as presented in figure 3, in more than 95% of cases prosecutors handle two main types of non-trial resolutions. The first one is an alternative

[79] *Id.* at 24.
[80] DOJ Memorandum issued by former Deputy Attorney General Sally Quillian Yates, so-called "Yates Memo" (accessed on April 5, 2020 at 11:36 P.M.), https://www.justice.gov/archives/dag/file/769036/download.
[81] DOJ Enforcement Plan and Guidance (accessed on April 5, 2020 at 11:42 P.M.), https://www.justice.gov/archives/opa/blog-entry/file/838386/download.
[82] 9-47.120 – FCPA Corporate Enforcement Policy (accessed on April 5, 2020, at 11:45 P.M.), https://www.justice.gov/criminal-fraud/file/838416/download.

to a criminal trial, which includes both non-prosecution agreements and deferred-prosecution agreements.[83]

Under an NPA prosecutors do not bring charges against a corporation if it agrees with the terms proposed. The terms of a DPA are quite similar, but here prosecutors bring charges against corporations but postpone further proceedings for a certain period to see if the corporation complies with the terms of the resolution, which usually includes a monetary sanction, waive of the statute of limitations, admission of relevant facts, while not admitting guilt, cooperation with the government, and other requirements depending on the case. Finally, at the end of the relevant period, if the agreed conditions are fulfilled prosecutors ask the court for dismissal of the charges.[84]

The second form of resolution is a plea agreement in which a corporation admits guilt to wrongdoing and receive some form of reward for cooperation. This is different from an NPA or a DPA because here the corporation is charged crime, admits guilt, and is convicted by a court. So, even though the plea agreement is not technically a non-trial resolution, it provides an incentive or alternative to avoid full trial by allowing corporations to receive lower a sanction such as a fine if there is cooperation with prosecutors.[85]

The Securities and Exchange Commission in recent years have also adopted NPA and DPA to resolve civil matters related to U.S. issuers,[86] but in just a few cases, with the

[83] JM at 9-27.200.
[84] *Supra note* 6, at 407.
[85] For more on plea agreements see Rule 11 of the Federal Rules of Criminal Procedure, available at https://www.uscourts.gov/sites/default/files/rules-of-criminal-procedure.pdf.
[86] Supra note 71, at 11, "A company is an 'issuer' under the FCPA if it has a class of securities registered under Section 12 of the Exchange Act 46 or is required to file periodic and other reports with SEC under Section 15(d) of the Exchange Act. In practice, this means that any company with a class of securities listed on a national securities exchange in the United States, or any company with a class of securities quoted in the over-the-counter market in the United States and required to file periodic reports with SEC, is an issuer. A company thus need not be a U.S.

first example in 2011 with Tenaris S.A.[87] The SEC's rationale is the same used by its counterparts at the DOJ and the guidance set out in the SEC Enforcement Manual,[88] which emphasizes the corporation's will to fully cooperate. Besides, the Agency issued in 2010 a so-called Enforcement Cooperation Program incentivizing cooperation with its investigations, highlighting that "The program gives SEC investigators access to high-quality, firsthand evidence, resulting in stronger cases that can shut down fraudulent schemes earlier than otherwise would be possible."[89]

Nevertheless, figure 3 data show that in more than 99% of cases SEC resolutions involve administrative proceedings such as a cease and desist letter order in 44% of cases or a consent agreement in 54% of cases. Regarding the former, the SEC may obtain an order from an administrative law judge (ALJ) requiring a corporation to cease or desist of past, present, or future violation of securities laws. Regarding the latter, the SEC may enter an administrative agreement and impose sanctions such as monetary penalties and obtain disgorgement, which may preclude the agency from pursuing a separate civil action.

There are no clear answers about SEC preference for such instruments, but a clue may be the expertise the agency obtained along the years and the possibility to go before ALJs, avoiding courts as would occur in a DPA case, its jurisdiction that excludes criminal matters, and, finally, the achievement of positive results.

company to be an issuer. Foreign companies with American Depository Receipts that are listed on a U.S. exchange are also issuers."

[87] According to table 3, SEC used NPA/DPA in just 6 cases, being the first one in 2011, a DPA with Tenaris S.A., a global manufacturer of steel pipe that operates under the laws of Luxembourg for bribing Uzbekistan public officials, https://www.sec.gov/news/press/2011/2011-112-dpa.pdf.

[88] U.S. SEC Enforcement Manual (accessed on April 7, 2020 at 3:28 P.M.), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

[89] U.S. SEC, Enforcement Cooperation Program (accessed on May 3, 2020 at 6:22 P.M.), https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml.

Finally, the DOJ and SEC have increased cooperation over the years, with 101 joint FCPA-related enforcement actions since 1977, 96 (95%) of them from 2004 to 2020, which result in a harmonized environment between enforcement authorities, avoiding unfruitful disputes and enhancing effectiveness against corruption.

3.4. Brazil Enforcement Overview

The fight against corruption in Brazil can be divided into two different periods, before and after 2014. The country is an original signatory of the UNCAC and the Anti-Bribery Convention that required the enactment of regulations or amendments in existing regulations to criminalize or hold natural and legal persons accountable for foreign bribery and related offenses. Two provisions related to crimes committed by a natural person against a foreign public administration, active bribery, and traffic of influence in international business transactions were added to the Penal Code in 2002.[90] On the other side, the liability of legal persons for foreign bribery was not addressed up to 2013, even though the OECD specifically addressed the problem during its country evaluations in [2004 and 2010].[91]

[90] OECD, English non-official version (accessed on April 7, 2020 at 5:53 P.M.), http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/33783624.pdf.

[91] OECD, *Brazil: Phase 1, Review of Implementation of the Convention and 1997 Recommendation* (2004). Final Report addressed the lack of liability for legal persons for the offense of bribery of a foreign public official, available at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/33742137.pdf; *see also*, OECD, Brazil: Phase 2, *Review of Implementation of the Convention and 1997 Recommendation* (2007). Final Report recommended "With respect to the liability of legal persons, the Working Group acknowledges the recent initiatives taken by Brazil in this area and recommends that Brazil (i) take urgent steps to establish the direct liability of legal persons for the bribery of a foreign public official; (ii) put in place sanctions that are effective, proportionate and dissuasive, including monetary sanctions and confiscation, available at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/39801089.pdf; *see also*, OECD, Follow-up on Phase 2 report, *Brazil: Phase 2, Follow-Up Report on the Implementation of the Phase 2 Recommendations* (2010). The final report stated that "A key concern of the Working Group during Brazil‟s Phase 2 review was the lack of legislative provisions for liability of legal persons for foreign bribery offenses. The

During 2013 two main events, one at the domestic level and another at the international level triggered concerns for the government that led to the enactment of the Clean Company Act. In June 2013 a movement began with people protesting against twenty cents increase on bus fare. The protests spread to several cities in the country with millions of people on the streets demanding justice, political accountability, and better use of public resources.[92] On the international front, Brazil's Phase 2 OECD evaluators had urged the country to pass legislation to introduce corporate liability, and the evaluators were supposed to conduct Phase 3 evaluation in the first quarter of 2014. Finally, in July the Brazilian Congress passed Law No 12,846, known as the Clean Company Act, with provisions for civil and administrative liability of legal persons for foreign bribery, enabling the country to fulfill its international obligations and join nations such as the U.S. and the UK in the fight against corruption. The Act entered into force in

Working Group welcomed reports from Brazil of the recent introduction to Congress, on 8 February 2010, of a Draft Bill on the administrative and civil liability of legal persons for acts of corruption committed against the National and foreign Public Administration. However, the Working Group noted that at this point Brazil has still not implemented effective liability of legal persons for foreign bribery and urged Brazil to pass this legislation promptly" available at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/45518279.pdf..

[92] Lindsay B. Arrieta, *Taking the Jeitinho out of Brazilian Procurement: The Impact on Brazil's Anti-Bribery Law*, 44 Pub. Cont. L.J. 157 (2014), available at https://heinonline.org/HOL/LandingPage?handle=hein.journals/pubclj44&div=10&id=&page=.

January 2014[93] and a few months later the Car Wash case started, [94] and almost immediately non-trial resolutions were tested.[95]

The Brazilian enforcement system encompasses multiple actors, each with jurisdiction to impose sanctions on corporations. This multitude of actors is probably nowadays the main concern preventing a more effective work against corruption.

The Clean Company Act has a specific provision in its Article 9 establishing the jurisdiction of the Office of the Comptroller General to enforce foreign bribery as follows:

> The Office of the Comptroller General (CGU) is responsible for the investigation, the proceeding of and the decision on the wrongful acts provided for in this Law committed against the foreign public administration, subject to the provision outlined in Article 4 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, enacted by Decree N. 3,678, of November 30, 2000.

Besides, the Federal Prosecution Service (FPS), based on a systemic interpretation of the legislation and internal prosecutorial regulations, also negotiates leniency agreements related to foreign bribery. The FPS has jurisdiction to bring criminal charges against individuals who usually have a connection with the corporation. Thus, the rationale used is to gather evidence from both, individuals and legal persons and reach a

[93] Important to reinforce, as a rule, Brazilian law does not provide corporate criminal liability, with an exception for environmental crimes under Law No 9,605/1998.

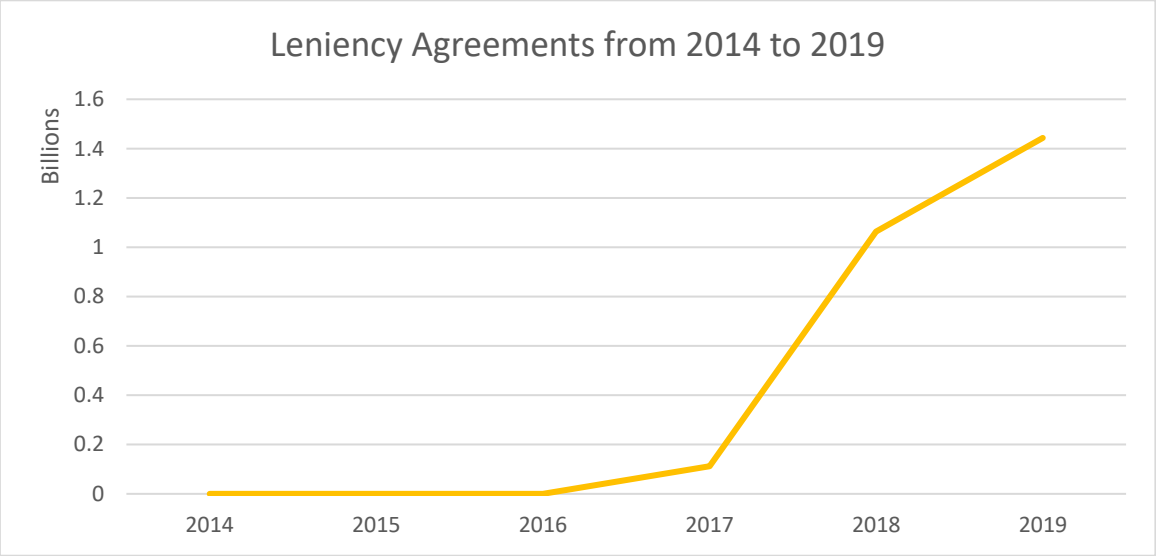
[94] "The Car Wash case started with investigations conducted by the Brazilian authorities targeting a money-laundering scheme being run through a prosaic car wash service. The investigators discovered that large Brazilian contractors had organized a cartel to defraud Petrobras, the Brazilian state-owned oil company. The cartel, through money laundering schemes, bribed Petrobras' officers to engage in certain actions or omissions during the bidding processes. Part of the kickbacks went to funding political campaigns and to improper personal benefits for the leaders of the main political parties. Soon, investigations expanded, revealing similar schemes in several other state-owned companies and projects with public financing. Those schemes involved highly-placed officials in Brazil, including the last three presidents, as well as in other countries. The dramatic expansion of investigations 1 -which from a modest "car wash" investigation came to embroil public and private domestic elites, and to create spill-over effects in almost fifty jurisdiction[n].” Michelle R. Sanchez-Badin & Arthur Sanchez-Badin, *Anticorruption in Brazil: From Transnational Legal Order to Disorder*, 113 AJIL Unbound 326 (2019).

[95] Since the Clean Company Act entered into force 11 settlement agreements were reached by the Office of the Comptroller General (accessed on April 7, 2020 at 3:34 P.M.), https://www.gov.br/cgu/pt-br/assuntos/responsabilizacao-de-empresas/lei-anticorrupcao/acordo-leniencia.

unique resolution. Also, the Attorney General's Office (AGO) has jurisdiction to file civil suit over corporations for the same offenses mentioned above, which might jeopardize a corporation and disincentivize cooperation and harm non-trial resolutions. In sum, to be more effective agencies must increase coordination as the Odebrecht, SBM Offshore, and Technip cases that will be presented later have shown as just in the Brazilian side three agencies were involved.

Regarding non-trial resolutions related to the Car Wash Operation and other offenses, the CGU has settled with 11 companies[96] reaching the total amount of $2,61 billion.[97]

Figure 7: CGU Leniency Agreements per Year



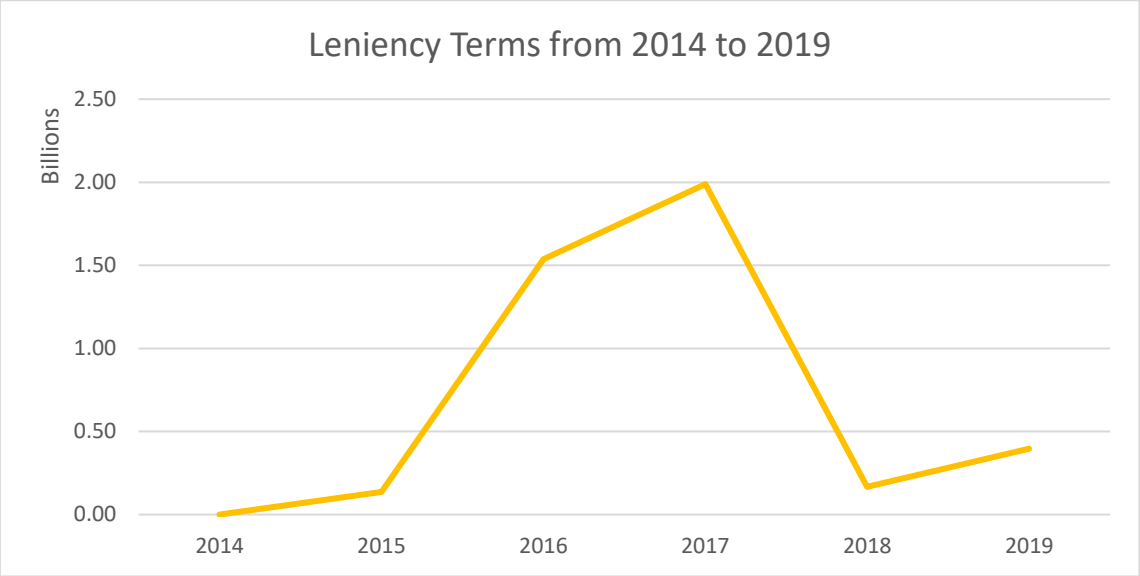
Source: Office of the Comptroller General.

Also, non-trial resolutions with the Federal Prosecution Service initiated with the Car Wash Operation in 2014 and spread around the country since conversely to the CGU, in which leniency agreements are conducted by the same department, each prosecutor has

[96] Resolutions involved not only foreign bribery but also collusion, fraud in public procurement, and domestic bribery.
[97] It was used as an exchange rate of USD 1,00 = R$ 5,22.

enforcement authority to negotiate leniency agreements. According to the FPS website have been 29 resolutions, 13 of them related to the Car Wash case[98] and the amount involved reached approximately $4.2 billion.[99]

Figure 8: FPS Leniency Terms per Year



Source: Federal Prosecution Service.

Certainly, enforcement scenario related to corporate liability in Brazil has changed significantly since 2014, but there are still improvements to be achieved. The multiplicity of actors and disputes for leading investigations has been a concern and attempts to reduce frictions and improve cooperation among agencies are still ongoing.[100] Further,

[98] Federal Prosecution Service Practical Guide 5th Chamber for Coordination and Review (accessed on April 9, 2020 at 11:49 P.M.), http://www.mpf.mp.br/atuacao-tematica/ccr5/publicacoes/guia-pratico-acordo-leniencia/. The FPS has a specific webpage regarding the Car Wash case which mentions 19 settlement agreements (accessed on April 9, 2020 at 11:52 P.M.), http://www.mpf.mp.br/grandes-casos/lava-jato/resultados.
[99] *Id.* at 85.
[100] In September 2019 CGU, FPS and the Attorney General's Office (AGO) organized a joint Week Conference on Fighting Transnational Corruption (accessed on April 10, 2020, at 01:03 A.M.), https://www.gov.br/cgu/pt-br/assuntos/noticias/2019/09/cgu-agu-e-mpf-realizam-semana-de-combate-a-corrupcao-transnacional/ascomcguadalb-20190903-img_8268.jpg/view; see also, during meetings between representatives from the Office of the Comptroller General, the Attorney General's Office, the Superior Court of Justice, the Federal Court of Accounts and the Superior Court of Justice that leniency agreements might be required Judicial Approval (accessed on April 12, 2020, at 12:47 A.M.), https://www.conjur.com.br/2019-dez-20/stj-responsavel-homologar-acordos-leniencias-agu.

coordination between CGU and FPS undoubtedly advanced and as will be shown in the next chapter, the Technip case is an example of a fruitful partnership no only at the international level but also among domestic agencies.[101]

3.4.1. Leniency Agreements

The Clean Company Act introduced corporate liability at both administrative and civil level but the possibility for settlement agreements was established just as an alternative to administrative liability proceedings.

Thus, by law, non-trial resolutions regarding corruption in general, which includes foreign bribery, are called leniency agreements as stated in Article 16, paragraph 10 of the CCA:

> The Office of the Comptroller General (CGU) is the competent authority to enter into leniency agreements in the federal Executive Branch, as well as on cases of wrongful acts committed against the foreign public administration.

In this sense, corporations that wish to reach settlement agreements related to offenses committed at a domestic level against the federal government, such as collusion or fraud in public procurement, domestic bribe, and offenses at international level such as foreign bribery must deal with the CGU.[102]

To benefit from a leniency agreement the requirements of Article 16 must be met. First, resolutions are not possible for individuals but just with legal persons, in case the

[101] In June 2019 it was announced the first Global Settlement Agreement involving the CGU, the FPS, the AGO, and the DOJ with Technip.

[102] CGU is an agency of the federal government in charge of matters related to protecting public assets and enhancing transparency through audits, disciplinary proceedings, combat and corruption prevention, and ombudsman activities. CGU is also in charge of technically supervising all the departments making up the internal control system, the disciplinary system, and the ombudsman's units of the federal executive branch, providing normative guidance as required. Also, CGU monitors the implementation of international conventions such as the UNCAC and Anti-Bribery Convention in Brazil and represents the country within international organizations. (accessed on April 11, 2020, at 6:01 P.M.), https://www.gov.br/cgu/pt-br/.

entity decides to collaborate with investigations and ongoing administrative proceedings to identify other entities or individuals involved in the wrongdoing, and such collaboration results in the gathering of evidence expeditiously.

Second, to resolve, corporations are required to be the first one to come to authorities and show a willingness to cooperate with the investigations. The CCA adopted in some respects the same rationale from an antitrust perspective while dealing with cartel cases, allowing leniency agreements just for the first company to come forward. Nevertheless, there are several situations to be considered. For instance, if just one corporation is involved in wrongdoing, it does not make sense to use the term first one. Also, taking again the Car Wash case as an example, corporations were involved in different and complex operations while doing business with oil and gas state-owned enterprise Petrobras and there was a need to allow more than one entity to cooperate to break the schemes.[103]

The entity must also cease and admit wrongdoing, and fully cooperate with the investigations. Therefore, legal entities are required to identify wrongdoing, provide documents such as files, archives, statements, and testimony to serve as evidence, and present internal investigation reports. Also, it is necessary to identify individuals and corporations involved in the wrongdoing.

Further, corporations are required to create or reinforce compliance programs and demonstrate their effectiveness for preventing, detecting, and deterring wrongdoing. To give predictability and transparency on what the enforcement authorities require for these

[103] To resolve this problem, Federal Decree No. 8,420/2015 clarified that a legal entity while seeking to enter into a leniency agreement must "be the first to state its interest in cooperating with the investigation of the specific wrongful act, when such circumstance is relevant", available at https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/14-16November2016/GoodPractices/2016.91/Brazil.pdf.

compliance programs a federal decree[104] and additional soft guidance such as a[105] and a manual[106] were issued.

It is also important to mention that under Article 17, administrative offenses related to fraud in public procurement, that could lead to debarment or exclusion from contracting with the government, maybe settled with leniency agreements which incentivize corporations to cooperate with enforcement authorities avoiding the risk of a so-called corporate death penalty.[107]

Under Article 19 the AGU and FPS have autonomous authority to file civil actions against corporations for the same offenses. Thus, coordination among CGU, AGU, and FPS is essential to a government's perspective not to promote overdeterrence and for the private sector to incentivize self-disclosure. The problem was partially resolved when a joint administrative ordinance between the CGU and the AGU was issued and the Attorney General's Office became a part of all settlement agreements reached with the CGU.[108]

However, FPS jurisdiction to file civil actions remains and prosecutors are using leniency agreements too. The legal basis is a systemic interpretation of the Brazilian Constitution, the UNCAC, the United Nations Convention against Transnational Organized Crime, the Civil Code, the Code of Civil Procedures, and other regulations and guidance is issued by the FPS Anti-Corruption Chamber. [109]

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[104] *Id.*
[105]n Administrative Ordinance No. 909/2015.
[106] Practical Manual for Evaluation of Integrity Programs on Administrative Liability Proceedings (accessed on April 11, 2020 at 8:26 P.M.), https://www.gov.br/cgu/pt-br/centrais-de-conteudo/publicacoes/etica-e-integridade/arquivos/manual-pratico-integridade-par.pdf.
[107] The author argues that debarment is so harmful to a corporation that in many situations its effects are the same as capital punishment. Steven L. Schooner, *The Paper Tiger Stirs: Rethinking Suspension and Debarment,* 13 Public Procurement Law Review (2004).
[108] Joint Administrative Ordinance CGU/AGU No. 004/2019.
[109] The Anti-Corruption Chamber issued leniency agreements and confidentiality templates, technical studies and orientation, guidance for conducting negotiations, and public information

The FPS Anti-Corruption Chamber which has two main tasks regarding leniency agreements. First, it provides general guidance, through manuals and official documents. Second, it for approval of all settlements, which provides uniformity and transparency to corporations and the public.

Certainly not having a one-stop-shop to settle is a concern in Brazil as legal entities must sit negotiate at least two instruments, one with CGU and AGU, and another with FPS, which tends to increase uncertainty and lead to distrust, harming cooperation. Nevertheless, the numbers above and recent news show that corporations were not only keen to search for resolutions and but that the number of companies willing to cooperate with enforcement authorities is increasing.[110]

3.5. Switzerland Enforcement Overview

Switzerland is well known for its precise and costly watches, tasteful chocolates, and ski resorts. The country is also known as a haven due to its tradition for financial stability and bank secrecy rules, being responsible for around 30% of the world's private wealth held outside a costumer's country of residence, which may be a product of offenses such as foreign bribery and money laundering.[111] Nevertheless, Swiss bank secrecy, a tradition since the 1930s that protects the client's identity, has been severely criticized by European countries and the United States for preventing clients from being

regarding approved leniency agreements. See generally, Models and Orientation at http://www.mpf.mp.br/atuacao-tematica/ccr5/publicacoes/guia-pratico-acordo-leniencia/.

[110] In an interview on December 2019, the Attorney General mentioned that apart of 11 leniency agreements already settled by CGU and AGU there were around 23 or 24 ongoing negotiations, 15 in a partnership with U.S. authorities, to reach a total amount of $5 billion (accessed on April 13, 2020, at 12:33 A.M.), https://www.poder360.com.br/governo/agu-projeta-recuperar-r-25-bilhoes-com-acordos-de-leniencia-em-2020/.

[111] OECD, Switzerland*: Phase 1, Review of Implementation of the Convention and 1997 Recommendation* (2000).

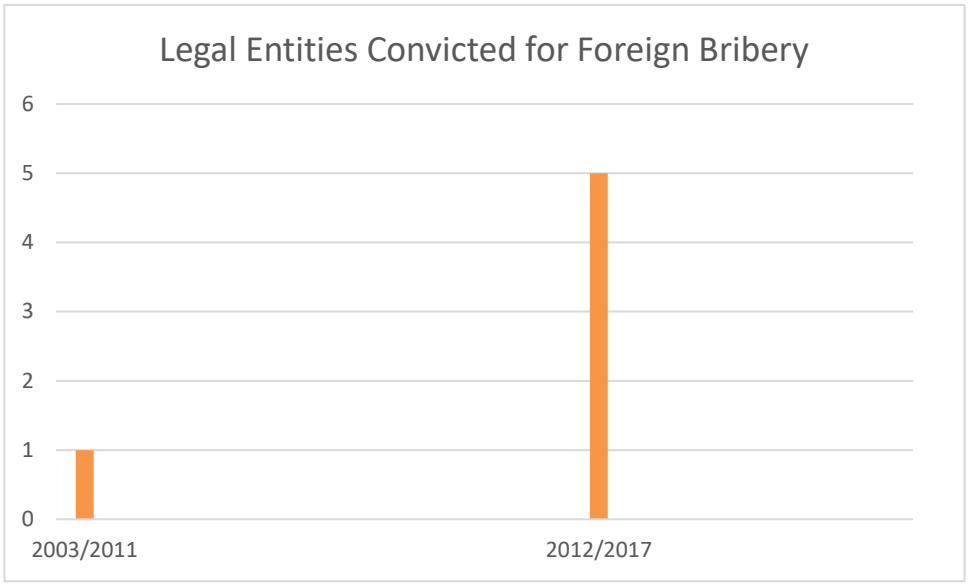
prosecuted for tax evasion and money laundering creating a negative image.[112] Press coverage exposing Swiss bankers helping corrupt public officials, politicians, and dictators, several from poor countries, to hide assets from corruption also raised awareness at domestic level and international organizations.[113]

Soon after approving the Anti-Bribery Convention Switzerland amended its criminal code to criminalize individuals for bribery of foreign officials.[114] Later, criminal liability of legal persons who engaged in foreign bribery was introduced in the criminal code in 2003 and updated in 2007.[115] Despite changes permitting prosecution of individuals and legal entities for foreign bribery the country was criticized for the lack of cases related to foreign bribery enforcement actions.[116]

In the years that followed, the scenario has changed from 1 conviction from 2003 to 2011, to 5 convictions from 2012 to 2017, as a result of the increasing enforcement actions related to foreign bribery conducted by the Swiss Office of the Attorney General (OAG).

Figure 9: OAG Convictions from 2003 to 2017

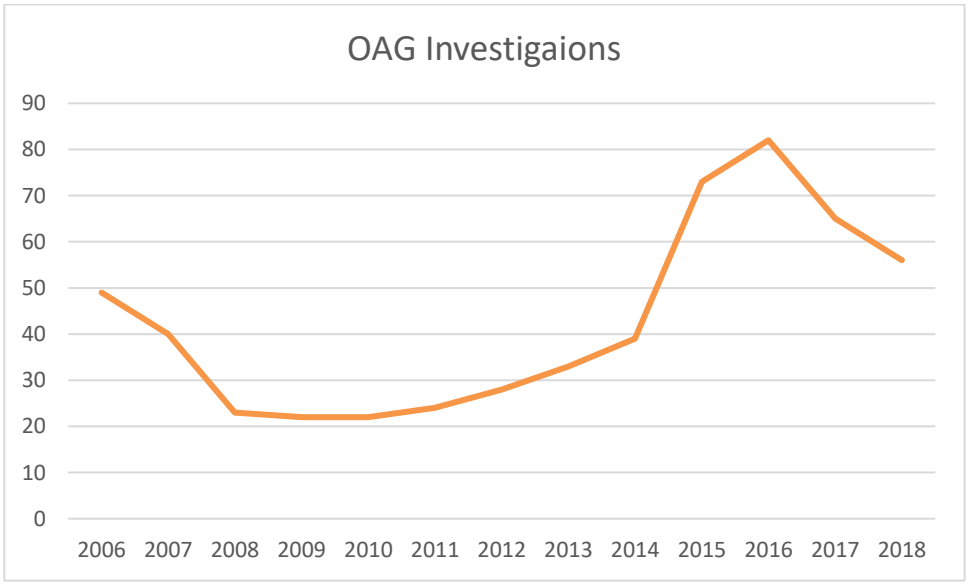
[112] After European Union pressure over Switzerland an agreement was signed in 2003 but relied mostly upon tax evasion concerns introducing a withholding tax up to 35%. Alexandre Ziegler, Francois-Xavier Delaloye and Michel A. Habib, Negotiating Over Banking Secrecy: The Case of Switzerland and the European Union (October 2005). *See also*, Allaire Urban Karzon, *International Tax Evasion: Spawned in the United States and Nurtured by Secrecy Havens*, 16 Vand. J. Transnat'l L. 757 (1983).
[113] *Supra note* 102, at 6.
[114] *Id*. at 2.
[115] OECD, Switzerland*: Phase 3, Report on Implementing the OECD Anti-Bribery Convention in Switzerland* (2011).
[116] OECD, Switzerland: Phase 3, Report on Implementing the OECD Anti-Bribery Convention in Switzerland (2011), available at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Switzerlandphase3reportEN.pdf.



Source: OECD, Switzerland: Phase 4, *Report Implementing the OECD Anti-Bribery Convention*.

Also, several investigations related to foreign bribery are ongoing which shows a clear response of the proactiveness of the Swiss authorities and a commitment to curbing corruption at the international level.

Figure 10: OAG Foreign Bribery Investigations from 2006 to 2018



Source: Swiss Office of Attorney General Annual Reports.[117]

[117] The year reports from 2006 to 2018 are available at the Swiss Attorney General's Office webpage (accessed on April 15, 2020 at 3:37 P.M.),

All in all, the Swiss authorities have taken important steps to implement and amend legislation to fully implement the Anti-Bribery Convention provisions regarding the criminalization of individuals and corporations for foreign bribery. The country is one of the few jurisdictions evaluated four times by the OECD Working Group on Bribery[118] with significant advancements in enforcement proceedings between evaluations. Nonetheless, a recommendation that could have a significant impact on international cooperation is the need to reform the legislation regarding mutual legal assistance to remove certain procedural obstacles.[119] Despite these remaining challenges, the country played an essential role in the Odebrecht case, with close cooperation with authorities from Brazil and the U.S., leading to a global resolution that is a landmark in the fight against corruption.

3.5.1. Summary Punishment Order

Non-trial resolutions[120] - in Switzerland called summary punishment orders – are established in Article 352 of the Swiss Code of Criminal Procedure. This provides prosecutors with jurisdiction to settle without bringing a case before a court, simplifying procedures and reducing costs.[121] All foreign bribery cases in Switzerland were concluded by such an instrument but this differs from a leniency agreement in Brazil or an NPA in the U.S., as regardless of a consensual agreement between parties it results in

https://www.bundesanwaltschaft.ch/mpc/en/home/taetigkeitsberichte/taetigkeitsberichte-der-ba.html.

[118] The country was evaluated by OECD and parties during the years 2000, 2005, 2011, and 2018.

[119] Press Release on 03/27/2018, OECD recommendation, available at http://www.oecd.org/corruption/switzerlands-significant-foreign-bribery-enforcement-should-be-accompanied-by-harsher-penalties-and-private-sector-whistleblower-protection.htm.

[120] Besides summary punishment orders Swiss authorities might utilize a so-called simplified procedure, which requires parties to bring the case before a court. However, since there is just one case resolved by such an instrument, the Banknotes which was fined of CHF 1 (one), it will not be analyzed in this thesis.

[121] *Supra note* 30, at 21.

a conviction of the legal entity. However, conversely to a typical U.S. plea agreement in which parties must go before a court, there is no court involved in the proceeding, and prosecutors perform a quasi-judicial role.[122] If the corporation disagrees with the sanction it is possible to reject the terms within ten days otherwise the summary penalty order becomes a final judgment.[123]

Lastly, as Swiss prosecutors increase the number of enforcement actions the results should be public to promote transparency and let people access information. Despite that, differently from Brazil and the U.S., unfortunately resolutions terms are not publicly available on the OAG website but just to "interested parties."[124]

[122] *Id.* at 27.
[123] *Id.*
[124] According to the OAG website "freedom of information does not mean that persons who are not parties to the proceedings have an unrestricted right of access to all summary penalty orders. And "Requests for access cannot be allowed to jeopardize the smooth running of the criminal justice system.", (accessed on April 29, 2020, at 02:50 A.M.), https://www.bundesanwaltschaft.ch/mpc/en/home/zugang-zu-amtlichen-dokumenten/strafbefehle--einstellungs--und-nichtanhandnahmeverfuegungen.html. *See also*, During the country evaluation under the Anti-Bribery Convention in 2018 civil society representatives criticize the lack of transparency, indicating that "despite requests to the OAG, they have never had access to summary punishment orders in foreign bribery cases.", available at http://www.oecd.org/corruption/anti-bribery/Switzerland-Phase-4-Report-ENG.pdf.

Chapter Four: Cases

The three cases that will be presented in this chapter, SBM Offshore, Odebrecht, and Technip involved non-trial resolutions in different jurisdictions and required coordination and cooperation among several authorities at both international and domestic levels. There are some reasons for selecting those cases. First, to demonstrate the increasing level of international cooperation reached over the years and, second, to emphasize the importance of promoting efficiency in the fight against corruption.

4.1. SBM Offshore

4.1.1. Facts

SBM Offshore is a Dutch public company that operates in the oil and gas drilling sector providing equipment such as Floating Production Storage and Offloading (FPSO) vessels to various markets, including Brazil, Angola, Equatorial Guinea, Kazakhstan, and Iraq. The company operated through various subsidiaries such as SBM USA and SBM do Brasil. From 1996 to 2012 SBM Offshore paid a total of USD 180 million in commissions for intermediaries and sales representatives and part of it was used to pay bribes for foreign officials to obtain or retain contracts with state-owned oil companies such as Petrobras in Brazil and Sonangol in Angola. Due to those actions, enforcement authorities in Brazil, the U.S., and the Netherlands initiated investigations.[125]

4.1.2. Investigations

In 2012 SBM Offshore voluntarily disclosed to the Dutch Prosecutor's Office (Openbaar Ministerie) and the U.S. DOJ it was conducting a self-investigation regarding

[125] DOJ, Press Release, November 29, 2017 (accessed on April 29, 2020 at 5:35 P.M.), https://heinonline.org/HOL/LandingPage?handle=hein.journals/pubclj44&div=10&id=&page=.

alleged improper payments and the scope of the investigation was decided after consultation with the Dutch prosecutors and lasted for two years. With Brazil there was no self-disclosure by SBM Offshore and the FPS and CGU initiated parallel investigations in 2014 after notice of ongoing investigations in the Netherlands related to its business conduct with Petrobras.[126]

Parties cooperated formally, through mutual legal assistance requests, and informally, through e-mails, phone calls and on-site meetings, even the scope of the investigations was not the same. For instance, Brazilian authorities focused on bribery related to Petrobras, and U.S. authorities focused on bribery allegations regardless of country or region.

In 2014 SBM Offshore resolved with Dutch authorities and following that the U.S. authorities announced a declination. During 2016 new information regarding part of the scheme being conducted in the U.S. led to the DOJ to reopening case, reaching a DPA with SBM Offshore and a plea agreement with its U.S. subsidiary, both in 2017.[127]

In Brazil the FPS requested formal legal assistance from several countries such as the Netherlands, Switzerland, the U.S., the United Kingdom, and Jersey. Even established in the Anti-Bribery Convention,[128] the CGU failed to obtain legal assistance for its non-criminal investigations and opened an administrative liability proceeding that could end in a debarment sanction against SBM Offshore, precluding the company to celebrate new contracts with Petrobras. In 2016, after attempts to reach a joint resolution with CGU, AGU, and the FPS, the terms were rejected by the FPS Anti-Corruption Chamber, and in

[126] Press Release, Brazilian Communication Enterprise (EBC) announcing the opening of investigations (accessed on May 4, 2020 at 8:01 P.M.), https://www.ebc.com.br/noticias/brasil/2014/04/cgu-abre-sindicancia-para-apurar-denuncias-de-suborno-envolvendo-petrobras.
[127] *Supra note* 35, at 202.
[128] Article 9 of the UNCAC.

2018 SBM Offshore resolved the matter in two separate resolutions with the CGU and AGU and another with the FPS.

4.1.3. Resolutions Terms in the Netherlands

The resolution considered SBM Offshore's self-disclosure and cooperation with authorities during the whole investigation period, including updates on its internal investigation. Also, a new management board was in place, a compliance officer position linked to the board was created, and the company reinforced its internal controls related to the payment of sales agents. The company agreed to resolve the case paying a fine of USD 40 million and a disgorgement of USD 200 million. Lastly, prosecutors required a sort of monitorship to oversee the implementation of compliance measures.[129]

4.1.4. Resolutions Terms in the U.S.

In 2017 SBM Offshore reached a three-year DPA with the DOJ and its American subsidiary reached a plea agreement with the DOJ as well. SBM Offshore agreed to pay a penalty of USD 238 million, including a criminal fine of USD 500,000 and USD 13.2 million in criminal forfeiture related to its U.S. subsidiary. Besides, SBM Offshore was required to cooperate with foreign authorities and Multilateral Development Banks.[130]

It is important to note that due to the seriousness of the offenses, which lasted for more than a decade and involvement of the C-level executives, the DOJ estimated the fine range between USD 4.5 billion and USD 9 billion. Nevertheless, even conceding a 25% reduction for cooperation the fine would result in a corporate death penalty.[131] Thus,

[129] *Supra note* 35, at 203-204.
[130] *Id.* at 204.
[131] *Id.*

U.S. authorities considered the resolution reached in the Netherlands and the negotiations in with the Brazilian authorities.

4.1.5. Resolutions Terms in Brazil

In July 2018 SBM Offshore signed a joint leniency agreement with the CGU and the AGU to resolve CCA matters and agreed to pay USD 327 million, USD 256 million for damages, and USD 71 million as a civil fine. Besides, the CGU will monitor the implementation of recommendations related to its compliance program for three years. Later in September 2018, SBM Offshore reached a resolution with the FPS agreeing to pay USD 375[132] million and requiring the company to provide regular compliance reports to prosecutors, which was finally approved by the Anti-Corruption Chamber in December 2018.[133]

4.2. Odebrecht

4.2.1. Facts

Odebrecht is a Brazilian company that operates in several countries providing services related to civil engineering, oil and gas, energy, and infrastructure. During more than a decade the company paid around USD 788 million to bribe public officials, politicians, and political parties to gain or retain dozens of projects around the world. Odebrecht created an area called "Division of Structured Operations" to facilitate the scheme which used off-book payments and shell companies. [134]

[132] The FPS settlement considers the amount agreed on the leniency agreement with the CGU and the AGU.
[133] *Supra note* 35, at 205-206.
[134] *Supra note* 35, at 189.

4.2.2. Investigations

In 2014, during investigations related to the Car Wash case [135] in Brazil prosecutors and investigators discovered payment of bribes to Petrobras officials, which later led to enforcement authorities around the world discovering a large and complex scheme of illegal payments to foreign officials. Due to that U.S. and Swiss authorities decided to open their investigations and enforcement authorities increased cooperation to share information and evidence.[136]

In 2016, after several meetings, in-person and virtually, authorities from all three countries reached a coordinated resolution, which was considered at the time the largest global agreement[137] totaling USD 2.6 billion.[138]The coordination also enabled authorities to calculate which jurisdiction was mostly affected and the total fine was credited 80% to Brazil and 10% each for Switzerland and the U.S.

4.2.3. Resolution Terms in the U.S.

Within the U.S. Odebrecht reached a plea agreement in December 2016 and a criminal penalty based on Odebrecht profits earned, bribes paid, and its ability to pay, reached USD 2.6 billion, from which 10% was to be received by the U.S. Later, the DOJ did its analysis on Odebrecht's ability to pay and agreed to adjust the US portion from

[135] *Id.* at 85.
[136] *Id.* at 118.
[137] In January 2020 Airbus reached a global settlement of USD 4 billion related to foreign bribe and trade charges, with French, UK, and U.S. authorities (accessed on April 30, 2020, at 03:16 A.M.), https://fcpablog.com/2020/01/31/airbus-pays-4-billion-to-settle-global-bribery-and-trade-offenses/.
[138] The original total was USD 4.5 billion, based on the application of the United States Sentencing Guidelines, plus a 25% reduction for cooperation. Nevertheless, Odebrecht represented its ability to pay no more than USD 2.6 billion. U.S. v. Odebrecht S.A., plea agreement, available at https://www.justice.gov/opa/press-release/file/919916/download.

USD 260 million to USD 93 million.[139] Regardless of self-disclosure credit was given for Odebrecht's cooperation during the investigation and remediation efforts taken, such as terminating contracts, creating a Chief Compliance Officer position, and implementing a compliance program. Finally, a three-year monitorship was required.[140]

4.2.4. Resolution Terms in Switzerland

A summary penalty order was reached with the OAG in December 2016 and the company and its subsidiary Construtora Norberto Odebrecht pleaded guilty for not preventing foreign bribery and money laundering.[141] The Swiss authorities used the same methodology as their counterparts in Brazil and the U.S. to calculate profits and the ability to pay. Thus, it seems that the final monetary sanction, as within the U.S., was reduced from USD 260 million to approximately USD 119.2 million.[142] Regarding compliance evaluation and required actions it was not possible to identify any recommendation since, as previously mentioned, resolutions in Switzerland are not publicly available.

4.2.5. Resolution Terms in Brazil

In December 2016 Odebrecht signed a leniency agreement with the FPS which was a hybrid instrument that included individuals and legal entities. The former received

[139] Sentencing memorandum, Re: United States v. Odebrecht S.A., Criminal Docket Number: 16-643 (RJD), available at https://www.mediafire.com/?77coy9xiiv8ljn7.
[140] *Supra note* 30, at 190-191.
[141] OAG, Press Release, December 21, 2016, Petrobras – Odebrecht Affair: The Office of the Attorney General of Switzerland convicts Brazilian companies and demands payment of over CHF 200 million
Swiss Office of the Attorney General, available at https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-65077.html.
[142] Supra note 35, at 193.

criminal immunity and the latter resolved civil actions. The agreement was approved by the FPS Anti-Corruption Chamber and was ratified in May 2017 by a federal court.[143]

The settlement with the FPS did not affect CGU's jurisdiction established in the CCA and Odebrecht also reached a resolution in July 2018 totaling approximately USD 700 million and will consider the total amount from the global settlement.[144] The CGU does not require retention of independent monitors but instead oversees entities directly and Odebrecht agreed to repay the amount in twenty-two years leading to an oversight during this period and a projected value of USD 2.2 billion.[145]

4.3. Technip

4.3.1. Facts

TechnipFMC is a public traded headquartered in London and its shares are listed on the New York Stock Exchange and the Euronext Paris that operates in the oil and gas sector in more than forty countries and is a result of a 2017 merger between Technip S.A. (Paris-based) and FMC (Houston-based) with total revenues of USD 12.6 billion for the year 2018.[146] The scheme perpetrated allowed the payment of more than USD 70 million in bribes to foreign officials and a political party to obtain and retain contracts with oil and gas SOE's such as Petrobras in Brazil and the South Oil Company in Iraq, from 2003 to 2013.[147]

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[143] The Anti-Corruption Chamber approves provisions related to civil matters and legal entities and the federal court ratifies provisions related to criminal matters and individuals.
[144] Odebrecht leniency agreement with CGU and AGU, available at https://www.gov.br/cgu/pt-br/assuntos/responsabilizacao-de-empresas/lei-anticorrupcao/acordo-leniencia/acordos-firmados/odebrecht.pdf.
[145] Supra note 35, at 193.
[146] TechnipFMC website (accessed on April 29, 2020 at 3:40 P.M.), https://www.technipfmc.com/en/about-us.
[147] DOJ, Press Release, June 25, 2019 (accessed on April 29, 2020 at 3:51 P.M.), https://www.justice.gov/opa/pr/technipfmc-plc-and-us-based-subsidiary-agree-pay-over-296-million-global-penalties-resolve.

4.3.2. Investigations

Initially, it is important to mention that TechnipFMC did not exist during the investigation period. However, as liability remains on successors and in this case, wrongdoing was committed by both Technip S.A. and FMC. For example, companies operating in Brazil must be aware that Article 4 of the CCA establishes that "The liability of legal entities remains in the event of amendments to their articles of incorporation, corporate changes, mergers, acquisitions or spin-offs." In the same direction, the Justice Manual adopts an enforcement policy to pursue investigations against successor companies awarding benefits such as declination if there if has been cooperation with the DOJ.[148]

The investigation began under the Car Wash case once evidence gathered revealed involvement of the Technip subsidiary in Brazil and its sales representative in payment of bribes to public officials.[149]

For the first time a global settlement involving Brazilian and U.S. authorities was negotiated from its very beginning between the DOJ, the CGU, the AGU, and the FPS. The experience from previous negotiations certainly did not provide predictability and transparency for companies under investigation and willing to cooperate. In this case, enforcement authorities to fully cooperate, and the resolution was announced by all parties on the same day, June 25, 2019.[150] The company agreed to pay a total of USD 296

[148] Id. at 79, at § 9-47.120.
[149] FCPA Update: A Global Anti-Corruption Newsletter, Debevoise & Plimpton, July 2019. Vol. 10, No. 12 (accessed on April 30, 2020 at 5:32 P.M.), https://www.debevoise.com/insights/publications/2019/07/fcpa-update-july-2019.
[150] Id. at 101. *See also*, CGU, AGU, and FPS, Press Release, June 25, 2019 (accessed on April 29, 2020, at 5:30 P.M.), https://www.gov.br/cgu/pt-br/assuntos/noticias/2019/06/cgu-agu-mpf-e-doj-firmam-primeiro-acordo-de-leniencia-global-no-ambito-da-lava-jato.

million, from which the DOJ received USD 81.9 million and the Brazilian government received USD 214 million.

4.3.3. Resolution Terms in the U.S.

With the U.S. two different resolutions were reached. First TechnipFMC entered in a three-year DPA[151] admitting conspiracy to violate anti-bribery provisions for the FCPA related to Brazil and Iraq. The DOJ considered that Technip cooperated with the investigations by adopting remedial measures and improvement of the compliance program and required cooperation with related investigations. Due to that prosecutors granted a 25% discount on the applicable penalty and the company agreed to pay USD 240 million. Finally, it required a one-year monitorship to oversee TechnipFMC compliance with the terms of the agreement was required.

A second resolution reached was a plea agreement[152] with a subsidiary Technip USA resulting in a criminal fine of USD 500,000. The company cooperated with authorities and received full credited. Besides, Technip USA was required to follow standards of the parent's company compliance program, including the implementation of measures provided on the DPA, and monitorship was not required.

A positive fact is that in both resolutions have provisions mentioning that TechnipFMC was entering a resolution in Brazil related to the same facts, which once again reinforces the level of cooperation achieved.

4.3.4. Resolution Terms in Brazil

[151] *United States v. Technip S.A.*, Deferred Prosecution Agreement, Case No. 4:10-cr-00439, Doc. 1 (S.D.Tex June 28, 2010), at https://www.justice.gov/criminal-fraud/case/united-states-v-technip-sa-court-docket-number-10-cr-439.

[152] *United States v. Technip USA*, Plea Agreement, Case 19-cr-279 (KAM), (E.D.N.Y. June 25, 2019), https://www.justice.gov/opa/press-release/file/1177306/download.

Resolutions in Brazil involved two subsidiaries Technip Brasil (Technip) and Flexibras Tubos Flexiveis Ltda. (Flexibras) that signed separated leniency agreements, one with the FPS and another with the CGU and the AGU. Both documents self-referred and have provisions mentioning that a global settlement involving the U.S. DOJ was reached.[153]

Technip and Flexibras agreed to pay $214 million, $164.8 for damages and disgorgement and a civil penalty of USD 49.4 within two years for bribing Petrobras public officials using a consultant and making illegal payments to the Worker's Party and its officials.[154]

Concerning the enhancement of the compliance program, the companies have been required to present a compliance plan within ninety days of signing the agreements and to provide specific reports every six months. Also, the CGU will oversee the companies, monitoring if recommendations are being implemented, and providing information to the AGU and the FPS.

[153] FPS leniency agreement clause 6(j) §3, at http://www.mpf.mp.br/atuacao-tematica/ccr5/coordenacao/colaboracoes-premiadas-e-acordos-de-leniencia/doc_acordos_votos/Acordo_TECNHIP_1.25.000.001452-2018-11.pdf. See also, CGU and AGU leniency agreement, clause 8.2., at https://www.gov.br/cgu/pt-br/assuntos/responsabilizacao-de-empresas/lei-anticorrupcao/acordo-leniencia/acordos-firmados/TechnipBrasil.pdf.

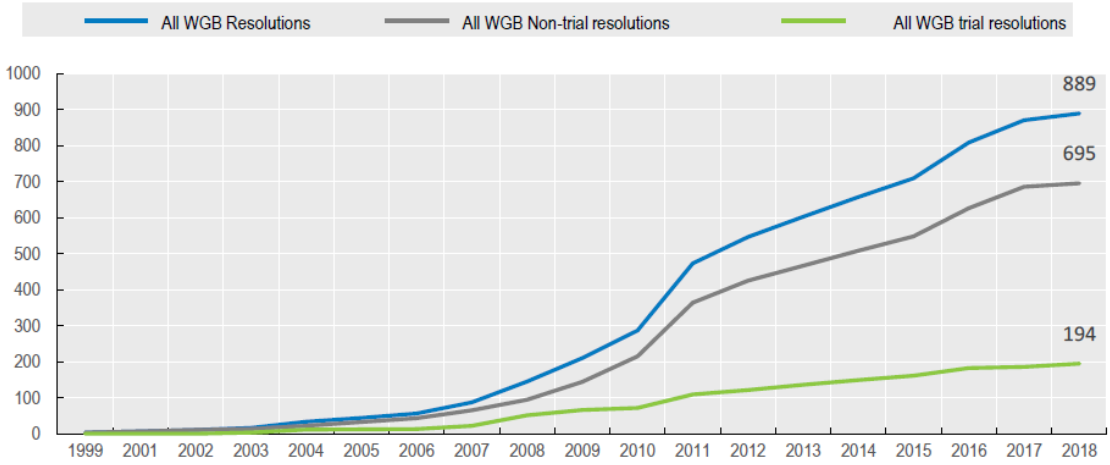
[154] *Id.*

Chapter Five: A new regime for Settlements and Non-Trial Agreements?

5.1. Current Scenario

As the IBA study[155] revealed in more than fifty countries a sort of settlement agreement exists to resolve cases related to foreign bribery. In the U.S., Switzerland, and France settlements are used to resolve at the criminal level and in others, such as Argentina, Brazil, Germany, and the United Kingdom, a non-criminal resolution, at a civil or administrative level, is also available. Moreover, since the enactment of the Anti-Bribery Convention in 1999 the number of enforcement actions related to foreign bribery has increased significantly and in 78% of cases ends in a non-trial resolution. The reason is not difficult to explain since collecting evidence, obtaining mutual legal assistance (MLA), and court trials result in high cost and several years to obtain a conviction.

Figure 11: Number of resolutions from 1999 to 2018.



Source: OECD.[156]

[155] *Supra note* 6.
[156] *Supra note* 30, at 22.

Also, since the Siemens case[157] in 2008 coordinated non-trial resolutions have been used, sometimes involving three countries such as the Odebrecht case, which requires a great level of cooperation. shortening distances and increasing trust it is usual nowadays to have personal meetings, exchange documents, and evidence through formal and informal channels[158] providing predictability regarding monetary sanctions to be imposed and timely resolution in different jurisdictions.

5.2. Constraints

The Anti-Corruption Convention and the UNCAC have provisions incentivizing countries to hold corporations accountable for foreign bribery and related offenses. In several countries the goal was achieved but each jurisdiction freely decided which instrument and procedure should be adopted.

With the increasing number of anti-corruption investigations in place some concerns must be addressed, and solutions shall be encountered to increase effectiveness, promote fairness, and avoid overdeterrence. Considering this, and taking the cases presented as a basis, there are two main constraints to be addressed, lack of uniformity and guidance during investigations and enforcement proceedings,[159] including non-trial resolutions, and jurisdiction deference.

Regarding lack of uniformity and guidance, there are no minimum standards that countries should consider such as transparency, legal privilege, predictability, and

[157], Siemens is a German engineering corporation that was charged for violating internal controls, books and records and payment of bribes totaling $1.4 billion. The corporation resolved with the DOJ and the SEC in 2008 and agreed to pay an $800 million fine, which was at the time the highest penalty since the enactment of the FCPA, available at https://www.justice.gov/criminal-fraud/case/united-states-v-siemens-aktiengesellschaft-court-docket-number-08-cr-367-rjl.

[158] *Supra note* 35, at 202.

[159] For these work investigations are preliminary or preparatory proceedings adopted by enforcement authorities such as gathering of evidence, mutual legal assistance requests, testimonies, interviews, analysis of documents, etc. Enforcement proceedings are those in which a sanction, at administrative, civil, or criminal may be imposed, including non-trial resolutions.

minimum due process standards to be adopted during investigations, leaving enforcement authorities with great latitude and discretion. For example, if a resolution is reached any person interested should have access to its terms to learn the basis for a monetary sanction, the reason monitorship is required, and why a compliance program was considered effective. Using the Odebrecht case as an example, the U.S. DOJ has released all documents related to its resolution, including exhibits with statements of facts. In Brazil authorities have released the terms of leniency agreements but the statement of facts, information regarding monetary sanctions, and compliance requirements are not publicly available. Finally, in Switzerland the resolution is not available to the public at large but just too interested parties.

In addition, transnational investigations involve countries with different law systems, civil or common law, utilizing criminal and non-criminal instruments such as a DPA, an NPA, a leniency agreement, or a summary punishment order, which increases difficulties for both sides. From a government perspective, without minimum standards and guidance it may be hard to exchange evidence in non-criminal investigations. Also, monetary sanctions may differ from each jurisdiction if using different parameters. For corporations, costs such as for legal counsel and hiring other professionals for its defense before agencies tend to increase since each jurisdiction adopts a different model and specific procedures.

Concerning jurisdiction deference, the Anti-Bribery Convention establishes in Article 4:

> When more than one Party has jurisdiction over an alleged offense described in this Convention, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

Thus, a literal interpretation may lead to a conclusion that in cases such as SBM Offshore, which involved more than one jurisdiction, parties affected will jointly decide

in which country the issue shall be resolved. This interpretation brings various problems and seems to be unattainable. First, in some countries, enforcement authorities have limitations or no discretion at all to drop charges or file a case. This is the case in Germany where, prosecutors must follow the principle of mandatory prosecution, and discretion is possible in just some cases related to minor offenses.[160] So, if there is a wrongdoing an investigation shall be initiated and if there is evidence charges or a lawsuit must be brought. Second, there is no guidance on how parties shall interpret the term "most appropriate" which can be based on agency expertise, jurisdiction in which most of the wrongdoing occurred, a country in which most of the bribe was paid, and several other interpretations.[161] However, in practice, cases are complex, involving sophisticated operations and discussions between parties may last for a long time. For instance, in the Odebrecht case, a designated area within the company directed funds to shell companies in several countries and, then shell companies disbursed funds to corrupt officials abroad and Brazil. Third, in practice countries are privileging global settlements through meaningful cooperation, reducing costs, sharing evidence, splitting monetary sanctions, with positive results and a change in the interpretation might be harmful.

5.3. A new framework under the Working Group on Bribery?

[160] *Supra note* 6, 156.

[161] In October 2011 the OECD promoted a consultation to the private sector on "The Challenge of Multijurisdictional Anti-Bribery Enforcement" and a concept of a single jurisdiction was considered as following "Possible criteria for the development of this concept include holding prosecutions in a single jurisdiction, according to the home country where the official was bribed, the home country where the company is domiciled, the first country to take up prosecutions, location of evidence, and availability of prosecutorial resources." And "Concern was expressed as to the feasibility of developing such a single-jurisdiction concept, given the differences in jurisdictions and the time that it would take to develop such a concept.", available at http://www.oecd.org/daf/anti-bribery/49040760.pdf.

The Working Group on Bribery is responsible for monitoring the implementation of the Anti-Bribery Convention[162] and since its creation in 1994 more than 60 country evaluations have been handled within all 44 parties.[163]Additionally, the WGB serves as an advisory body conducting studies, technical meetings, and issuing guidance, to promote transparency, enhance enforcement, and provide clarification to members, corporations, and civil society.

In 2019, a comparative study[164] analyzing models of non-trial resolution used by Parties was produced, exposing the complexity and variety of instruments and procedures used by each country that might be a trigger for creating a new regime to foster convergence and harmonization.

Also, during the same year the International Competition Network (ICN)[165] issued a Framework on Competition Agency Procedures (CAP) [166] aiming to "strengthen procedural fairness in competition law enforcement" on investigative and enforcement proceedings. The rationale behind the CAP, which was initially proposed by the U.S. DOJ Antitrust Division, was to create a minimum due process in competition enforcements as enforcement proceedings around the world heavily increased.[167]The ICN is a virtual network created in 2001 to promote convergence and cooperation on antitrust enforcement and encompasses 130 antitrust agencies as members nowadays. The CAP is a non-binding instrument, based on good faith and reputation and establishes three main pillars: principles, review mechanisms, and cooperation.

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[162] Article 12 of the Anti-Bribery Convention.
[163] Convention monitoring is conducted by designated OECD and member country experts.
[164] *Supra note* 35.
[165] International Competition Network (ICN) (accessed on April 30, 2020, at 7:44 P.M.), https://www.internationalcompetitionnetwork.org/.
[166] The ICN issued other two frameworks before the CAP. One related to merger review and another related to cartel enforcement.
[167] Makan Delrahim and Roger P. Alford, *Promoting Fundamental Due Process in Competition Law Enforcement*, Vol. XX: N.

In sum, there are principles that competition agencies shall follow if consistent with its laws. Regarding review mechanisms, participants shall fill out a self-report, known as Template, which provides relevant information regarding regulations, guidance, and features and limitations for the CAP implementation and is publicly available. Besides, parties may have meetings to discuss issues, review CAP implementation, and propose changes. Finally, parties shall cooperate, formally and informally, to fully implement the CAP and address specific matters, such concerns related to a specific investigation.

Considering that anti-corruption enforcement and settlement agreements reached a significant number and there is a signal that will continue to increase,[168] there is a need to promote convergence on the due process used on investigations and enforcement proceedings to enhance cooperation and promote efficiency.

Using the CAP as a reference, the WGB shall invite parties with expertise on both international cooperation and non-trial resolutions, which come from civil and common law and use criminal and non-criminal models, like the U.S, Germany, Switzerland, United Kingdom, France, and Brazil to produce a study based on the CAP pillars, principles, review mechanism, and cooperation.

In brief, while conducting investigations and enforcement proceedings shall adopt the following principles: (a) Non-Discrimination: treat persons[169] equally, regardless of its origin or nationality; (b) Transparency and Predictability: resolutions, regulations, guidance, and cases shall be public available, with few exception; (c) Investigative Process: persons shall be informed on the legal basis and conduct under investigation; (d) Timing of Investigations and Enforcement Proceedings: investigations and enforcement proceedings shall be resolved within a reasonable time; (e) Confidentiality: public

[168] *Supra note* 30, at 14.
[169] Under the principles persons means individuals and legal entities.

available rules and guidance concerning confidential information; (f) Conflict of Interest: publicly available rules and guidance to prevent personal or financial conflict of interest; (g) Notice and Opportunity to Defend: persons shall receive timely notice of alleged violations and be provided opportunity to defend; (h) Representation by Legal Counsel and Privilege: persons will not be prohibited to be represented by legal counsel and legal privileges shall apply; (i) Decision in Writing: all decisions and orders shall present facts which led to certain conclusion and be publicly available; and (j) Independent Review: any sanction or prohibition imposed shall provide the opportunity for judicial review.

Regarding review mechanisms, countries will fill out the templates providing information related to the mentioned principles, including regulations, guidance, and case law, and if so, explaining limitations to follow it, such as national concern or a regulation prohibition. Besides, the WGB will review all templates and request clarification if necessary. Further, templates will be publicly available on the OECD website.

Relating to cooperation, parties may discuss specific issues or concerns with each other independently, informal and formal cooperation shall be incentivized, and the exchange of documents and evidence shall not be prevented even for non-criminal proceedings.[170]

Once a consensual proposal is reached the WGB will present it to all members and provide opportunity for considerations. The idea is not to amend the convention since it will be more difficult to approve a binding document, discussions will take longer, and approval is uncertain, but instead to issue a recommendation.

Finally, as a first step to increase efficiency, the Recommendation on Anti-Corruption Procedures (RAP) will provide guidance and promote convergence within

[170] Article 9 of the Anti-Bribery Convention.

investigations and enforcement proceedings, which will serve as a benchmark to parties on the fight against corruption.

Conclusion

This work has shown how pervasive corruption is undermining people's well-being and increasing the distance between developed and emerging countries. There is a pattern, not a rule, demonstrating that multinational companies, usually based on wealthier countries tend to commit wrongdoing while doing business in less developed countries which requires a new regime.

Aware of that, international organizations such as the United Nations and the OECD enacted conventions specifically designed to reduce corruption by requiring member parties to establish minimum standards that are periodically evaluated by peer members.

However, transnational corruption is a sophisticated and complex offense, difficult to investigate and prosecute, requiring international cooperation to exchange documents and gather evidence and spend several years to bring charges before a court. Also, corporations under investigation spend huge sums of money to hire legal counsel, conduct internal investigations, and designing compliance programs.

During the last two decades several countries have adopted non-trial resolutions to resolve cases related to foreign bribe. In recent years coordinated resolutions have increased and become essential to deter transnational corruption as demonstrated in chapter 3 within SBM Offshore, Odebrecht, and Technip cases.

While explaining the models of non-trial resolutions adopted in the U.S., Brazil, and Switzerland it was possible to verify common features and discrepancies from each system and reach a conclusion that regardless of good faith and coordination between countries, there is a need for adopting minimum standards on enforcement proceedings and investigations.

Thus, based on the successful strategy developed by ICN members to enact the CAP, establishing principles to promote convergence between competition agencies, periodic review, and cooperation, this thesis proposes the enactment of a similar recommendation within the OECD Working Group on Bribery.

The proposal aims to increase efficiency in enforcement proceedings and including investigations to promote convergence, uniformity, and provide transparency which certainly will benefit not only developed but also emerging countries.

All in all, much was done within the last 20 years but now it is time to take one step forward and the Recommendation on Anti-Corruption Procedures shall be the new frontier to reach optimal efficiency in combating transnational corruption.

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