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Multijurisdictional Prosecution of Multinational Corporations: Double Jeopardy *vis-à-vis* Sovereign Rights in the Globalized Anti-bribery Regime

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(Submitted 14 July 2022; revised 15 August 2022; accepted 20 August 2022; first published online 04 October 2022)

Abstract

The emergence of multijurisdictional anti-bribery actions presents a substantial challenge to multinational corporations (MNCs). Multiple sovereigns have the jurisdiction to pursue criminal enforcement action against the same entity for the same underlying bribery. The existing legal framework is not sufficient for addressing this global challenge. The difference between theories of double jeopardy and judicial practices across sovereigns complicates multinationals' strategic designs of their compliance programmes. A global settlement regime would help in efficiently using precious judicial resources and incentivize MNCs to self-disclose in furtherance of their cooperation.

Keywords double jeopardy, multijurisdictional prosecution, bribery, global settlement, sovereign rights, corporate crime

INTRODUCTION

Transnational bribery constitutes an impediment to sustainable global development. The criminal offence may occur across borders, whereby each country can assert its jurisdiction for investigations of the crime. The nature of anti-bribery law's extraterritoriality renders it possible for the involved states to initiate “carbon copy” proceedings. The protection in one jurisdiction's laws may not necessarily afford similar protection in another country. With the growing global trend of criminalizing bribery, various scenarios can lead to parallel or even multiple prosecutions against multinational corporations (MNCs). Given the absence of a legally binding treaty to prohibit overlapping prosecutions of the same conduct, each state exercises its discretion regardless of whether a foreign sovereign has prosecuted a firm. An MNC may risk having to defend duplicative proceedings. The difference between

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theories of double jeopardy and cross-border judicial practices inevitably complicates MNCs' strategies when they seek to reach a global settlement. This paper only considers a circumstance in which an MNC has committed a "Bribery Act-2010-Style" offence where the same entity is subject to prosecution in multiple jurisdictions. The question arises as to how the firm gets as much protection as is consistent with the current state of double jeopardy law. The prospect of authorities applying more transnational bribery enforcement actions introduces greater uncertainty into the regulatory environment for MNCs (Brewster and Dryden 2018). It is significant to address these global challenges by attenuating the potential adverse counteractive effects of such multijurisdictional prosecution to reduce global bribery in all its forms substantially.¹

Structure of the Article

This study proceeds with five sections structured as follows. The first section starts with a conceptual approach to the doctrine of international double jeopardy. Duplicative actions can be counterproductive as they may discourage parties from self-reporting and cooperating with enforcement authorities. It is also notable that recognizing the doctrine could lead to jurisdictional forum shopping. The second part considers whether or to what extent a company can be protected from multiple prosecutions for the same bribery. The focus is put on how the US and UK enforcement authorities address the issue of overlapping jurisdictions. Their divergent approaches are differentiated, exemplified by the leading case of *BAE Systems* (U.S. Department of Justice 2010), which serves as a touchstone test of the doctrine.

Given that one state may seek credit for sums paid to other states, the third part discusses approaches to mitigating potential adverse effects present in the multinational enforcement regimes between the USA and France. Unprecedented coordination and divided penalties between the two sovereign states have shielded *Société Générale* from double jeopardy. This represents a milestone in reshaping the landscape. Behind the above scenarios, the greatest challenge is to address the political, cultural and ideological divergences across borders. The fourth part refers to the landmark case of *GlaxoSmithKline (GSK)* to illustrate how to deal with the doctrine between different legal systems, say the USA, China and the UK. The extent to which different enforcers cooperate varies considerably. With the rising of the emerging demand-side state enforcement, MNCs are facing increased uncertainties. Based on a cost-benefit analysis, the fifth part explores the feasibility of entering into a single coordinated global settlement. Doing so would substantially reshape the enforcement landscape across multiple jurisdictions. A concluding remark is given in the final part of this paper.

THE DOCTRINE OF INTERNATIONAL DOUBLE JEOPARDY

A bribe paid in one country could give rise to liability in another jurisdiction that criminalizes the same conduct (Weiss 2009). A carbon copy prosecution occurs where multiple sovereigns initiate duplicative prosecutions against the same conduct, which transgresses the laws of involved states (Boutros and Funk 2012). In

¹United Nations Sustainable Development Goals, Goal 16.5.

such “carbon copy” proceedings, it is nearly impossible for an MNC to rebut criminal charges arising from the same bribery if it has admitted to its wrongdoing as part of the settlement agreement. Notably, a settlement in one jurisdiction cannot guarantee affirmative protection in other jurisdictions. Parallel proceedings can have a negative impact, disincentivizing MNCs to voluntarily self-report bribery. Interchangeably, the principle of *ne bis in idem* is commonly referred to in common law as double jeopardy, which protects a defendant from being penalized twice for the same offence.² The resultant multijurisdictional enforcement actions seem to violate the principle of double jeopardy (Boutros and Funk 2012).

The Theory of Cost–Benefit Analysis

Incentivizing self-disclosures of potential corporate crime allows enforcement authorities to focus more on unreported bribery (Bhojwani 2012). The principle of double jeopardy is conducive to achieving such a goal. From a firm’s perspective, proactive cooperation in multijurisdictional enforcement can strategically shield a firm from collateral consequences. One of the decisive factors is based on a rationale that self-disclosure will lead to a definitive resolution, with its publicity damage reduced to the minimum (OECD 2019). Adequate analysis of benefits and costs is required to avoid incurring collateral consequences and some resultant cumulative penalties disproportionate to the underlying conduct (Glickman 1990). MNCs need to calculate cost-effectiveness and determine whether to self-disclose after economic analysis.

Unintended Consequences of Disclosures

Disclosures may have unintended repercussions (Funk and Boutros 2019). The lack of cross-border coordination and the risk of carbon copy proceedings do not incentivize but deter MNCs from self-reporting instances of bribery. One occurrence of bribery will probably trigger parallel or multiple enforcement actions and duplicative penalties (Holtmeier 2015:498). Entering into a settlement with one jurisdiction, an MNC is likely to be subject to another investigation based on the agreement’s admissions (Colangelo 2009). This would probably give rise to sequential liability to foreign sovereigns. After all, a prior conviction would not bar subsequent civil proceedings.³ Furthermore, duplicative prosecutions will have a chilling effect that causes over-deterrence, compromising the company’s self-disclosure and cooperation. The approach will chill firms’ entrepreneurship and adversely affect companies’ risk-taking and global competitiveness (Anonymous 1979). Too severe penalties will even inhibit companies from cross-listing in foreign stock exchanges. In this vein, successive prosecutions do not lead to expected deterrence but less self-disclosure.

Cost–benefit analysis

Given the ramifications, MNCs need to attenuate all the above risks meticulously (Boutros and Funk 2012). It is imperative to perform a rigorous cost–benefit analysis and examine whether international double jeopardy is a viable tool to solve the

²*Ne bis in idem* is the equivalent of double jeopardy, which is interchangeably used in this paper.

³*R. v. Beedie* [1998] QB 356 (CA).

problem (Richman 1996). Careful consideration must be given to the possible enforcement by potential foreign authorities with extraterritorial jurisdictional reach (Funk and Boutros 2019). They should evaluate whether to simultaneously disclose other potential violations apart from the Foreign Corrupt Practices Act (FCPA) (Fisher 1961). Various costs are to be considered, such as reputational damage, possible settlement amount and compliance cost. Assume that an exclusive penalty by one jurisdiction is a basis of marginal cost; above it is the negative cost, and below it is the marginal benefit (Hessick and Hessick 2011). Weighing the risks and benefits, a company would not voluntarily report the bribery if the negative cost considerably outweighs the benefit. As such, an affirmative policy is key to promoting equity and fairness for MNCs, where they face overlapping investigations by those authorities that do not recognize the doctrine of double jeopardy. Enforcement agencies need to assess collateral consequences and avoid defendants' collapses due to prosecutions (Paulsen 2007). Otherwise, the interests of some innocent stakeholders that rely upon the companies would be compromised.

The Side-Effect of International Double Jeopardy: Forum Shopping

A MNC could be subject to more severe penalties from a foreign authority. In theory, the second state would receive a reduced settlement award when more than one state has jurisdiction, which could incentivize enforcement agencies to race to prosecution (Bulovsky 2019). The firm would “race to the courthouse” in jurisdictions where it could be offered the most lenient sanction.⁴ This would enable the firm to strategically forum shop through self-reporting in a more lenient jurisdiction, which could help reduce compliance costs. Ideally, forum shopping could create a *de facto* race to the top regarding global anti-bribery standards. In reality, the current status suggests that non-US companies with few contacts with the country may be tempted to negotiate first with US enforcement agencies and later deal with their home prosecutors (Levmore and Porat 2011). An efficient system should be in place to ensure that an MNC will not secure lenient penalties with foreign governments unless they have made adequate disclosures to the US Department of Justice (DoJ). Otherwise, competitive neutrality will not be achieved if companies use forum-shopping strategies (OECD 2012). They could benefit from undue advantages since more countries enforce their foreign bribery laws more aggressively.

Uncertainties in Applying the Principle of Double Jeopardy

Double jeopardy could constitute a legal bar to prosecution but is subject to some prerequisites. For instance, the relevant domestic law should recognize the principle. In addition, the firm in question has either been prosecuted or reached a deferred prosecution agreement (DPA), which usually entails a firm's admission of wrongdoing in exchange for prosecutors dropping the charges. In theory, authorities implicated in one country would consider the potential impact of resolutions in another sovereign. However, it remains uncertain whether a state will recognize the decisions of foreign courts. In some circumstances, what counts as a punishment

⁴*Gamble v. United States*, 139 S. Ct. 1960 (2019).

in terms of double jeopardy depends on the nature of the penalty imposed. When a defendant enters into a DPA that results in penalties without an official conviction, the settlement may trigger another jurisdiction to seek further investigations or prosecutions (Arlen 2016). An optimal solution is mutual recognition of the double jeopardy principle. It is essential to strike a balance between firms' right not to be penalized twice for the same offence, and each sovereign's right to prosecute crimes committed onshore to avoid forum shopping practices (Holzhaus 1986).

DIFFERENT OFFENCES VIS-À-VIS UNDERLYING FACTS: DIVERGENT INTERPRETATIONS BETWEEN THE USA AND THE UK

MNCs are increasingly subject to successive prosecutions for the same conduct resulting in US liability (Boutros and Funk 2012). Unlike the USA, the UK recognizes international double jeopardy, which applies equally if the prior conviction has occurred in a foreign sovereign. The Serious Fraud Office (SFO) has run into double jeopardy challenges, which require the agency to tailor the settlement because the USA has initiated its concurrent investigation (Garrett 2011). Furthermore, the alleged offence must be identical to the one previously convicted or acquitted. Double jeopardy will rarely be a bar to prosecution if enforcement authorities can show the proceedings are not identical but distinctly separate. Critical analyses are essential, focusing on the same offence instead of a separate one within an MNC.

Double Jeopardy in US Law

Under the dual sovereignty doctrine, the double jeopardy principle does not apply to US prosecutors; that is, a foreign prosecution does not necessarily preclude the USA from initiating prosecutions against the same conduct. The principle is consistently interpreted to bar only duplicative prosecutions by the same jurisdiction. MNCs may face multiple investigations by the Securities and Exchange Commission (SEC) and the DoJ for the same conduct (Kane 1977).

Fifth Amendment to the US Constitution

Enshrined in the Double Jeopardy Clause of the US Constitution, the principle states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb".⁵ The US Supreme Court Justice Black once explained in *Green v. United States* the rationale that:

The underlying idea, which is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence ...⁶

⁵US Constitution, Amendment V.

⁶*Green v. United States*, 355 US 184 (1957).

The Court held that this clause does not preclude the USA from prosecuting a defendant previously penalized by a foreign sovereign, but only proscribes multiple prosecutions by the same sovereign.⁷ The US position seems to contradict the Organisation for Economic Cooperation and Development (OECD) Anti-Bribery Convention (OECD Convention), which provides that member states must consult to determine the most appropriate jurisdiction for prosecution in a case where more than one country is competent to prosecute.⁸

Piling-On in Duplicative/Multiple Cross-Border Actions

The FCPA is so far the most effective law to combat cross-border corporate bribery (Brewster 2017). The USA does not normally coordinate with foreign sovereigns in assessing prosecutions involving the same act (Michigan Law Review 1982). Protection against double jeopardy applies to corporations and individuals, although the rationales for its application are weaker in the former context (Khanna 1996:1517). As the most robust agencies pursuing transnational anti-bribery, the US authorities have been aggressively enforcing the FCPA against foreign MNCs for bribes that may have been committed overseas.

In 2018, the Department of Justice issued a Policy on Coordination of Corporate Resolution Penalties, the No-Piling-On Policy. The Policy aims to eliminate “unfair duplicative penalties” on foreign bribery by deterring multiple authorities from “piling on” penalties (Levmore and Porat 2011). It seeks to facilitate coordination of enforcements between foreign sovereigns and the USA to mitigate carbon copy penalties for the same corporate crime. However, the Policy leaves the DoJ with discretion; whether imposing duplicative penalties serves “the interests of justice” remains a decisive element when the agency evaluates a number of factors (Garrett 2020). The US federal prosecutors would consider the potential impact of foreign prosecutions when exercising their discretion. The Policy allows the DoJ to credit the firm for any penalties previously imposed by a foreign sovereign (Tokar 2019). Notably, the agency retains wide latitude to determine whether a foreign penalty is too lenient. However, it remains unclear how the DoJ will assess the above factors due largely to the lack of guidance and objective criteria. A decision will be made on a case-by-case basis. It is noteworthy that the DoJ’s No-Piling-on Policy is consistent with the OECD Convention. Signatories with competent jurisdiction are required to decide the most suitable country to initiate the prosecution through consulting with each other.⁹ Furthermore, it has been incorporated into the FCPA Resource Guide of 2020 (U.S. Department of Justice and the Securities and Exchange Commission 2020:71).

Gamble v. United States, 139 S. Ct. 1960 (2019)

The doctrine of dual sovereignty allows two sovereigns to prosecute a company for the same act if it breaches the anti-bribery laws of both countries (Adler 2015).

⁷Heath v. Alabama, 474 US 82 (1985).

⁸OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Art. 4(3).

⁹OECD Convention, Art. 4(3).

There will be no constitutional violation, provided the sovereigns are different. The US Supreme Court held in *Gamble* that:

the Double Jeopardy Clause of the Fifth Amendment to the US Constitution does not prohibit a successive federal prosecution of an individual for the same conduct that was at issue in the defendant's prior state conviction.¹⁰

The *Gamble* decision reaffirmed the long-standing doctrine. A crime under one sovereign's law is not "the same offence" as a crime under another sovereign's laws (Principato 2014). According to the Supreme Court's reasoning, the text of the Double Jeopardy Clause does not bar prosecuting the same conduct but prohibits a defendant from being put in jeopardy twice for the same offence.¹¹ As the Court stated: "a crime against two sovereigns constitutes two offenses because each sovereign has an interest to vindicate".¹² As such, the double jeopardy law does not prohibit multiple sovereigns from initiating duplicative prosecutions of the same conduct. It applies only when two offences are "the same", but the standard for determining the sameness of offences is vague (Anonymous 1979:1344).

The Supreme Court's conceptual reaffirmation paves the way for the USA to prosecute conduct that has been tried in a foreign court (King 1995). Foreign judgments are not treated as barring trials in US law. When formulating its global defence strategies, an MNC facing multijurisdictional criminal enforcement should consider the implications of *Gamble*. Despite the DoJ's Policy against "piling on", its application is at the authority's discretion, which neither creates a new private right of action nor becomes enforceable in Court (U.S. Department of Justice 2018b). The Court in *Gamble* has foreclosed potential legal challenges when US enforcement agencies seek to start duplicative prosecutions (New, Campbell, and Pollawit 2019). In this vein, the Supreme Court has given the green light to authorities "piling on" in enforcement against transnational corporate bribery. This substantially shrinks the latter's room to exercise their No-Piling-on Policy discretion.

The UK Cases: A Touchstone of the Doctrine of International Double Jeopardy

The principle prevents a defendant from double or even multiple prosecutions regarding the underlying bribery. The UK Home Affairs Committee stated, "it has been a long-standing principle of common law that no one should be tried a second time after being acquitted" (Home Affairs Committee 2000). In consistence, the Law Commission report stated that:

For a plea of *autrefois* to succeed, there must previously have been a valid acquittal or conviction. This means, first, that the defendant must have been acquitted or convicted by a court of competent jurisdiction, and the proceedings must not have been *ultra vires*. (Law Commission 2015)

¹⁰*Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019).

¹¹*Gamble v. United States*, 139 S. Ct. 1960 (2019), at 1965.

¹²*Ibid.*, at 1967.

In the case of *Treacy v. Director of Public Prosecutions*, Lord Diplock said that double jeopardy “has always applied whether the previous conviction of acquittal based on the same facts was by an English court or by a foreign court”.¹³ This decision has been well exemplified in the case of *BAE Systems*. The firm pled guilty and settled because of its FCPA violations in Central and Eastern Europe, while an SFO settlement related to bribes in Tanzania. BAE agreed to settle an issue with the UK that was not covered in the US settlement. The finding properly interprets that a separate entity within an MNC is considered a separate subject of criminal law.

Similarly, the double jeopardy principle barred the SFO from proceeding criminally against DePuy. As a UK subsidiary of Johnson & Johnson (J&J), a US company, DePuy settled simultaneously parallel investigations in the USA and the UK for alleged bribes in 2011. J&J reached a DPA with the DoJ, according to which it paid the USA \$70 million in criminal and civil penalties. The DPA invokes the principle, which qualifies as criminal prosecution in the UK. For double jeopardy, the SFO held that a DPA is tantamount to a conviction (OECD 2017). The agency further explained that the DPA met the objective criteria of an officially concluded prosecution that penalized the same conduct, which had satisfied the basis of the SFO investigation (UK Serious Fraud Office 2011). Thus, the SFO forewent criminal sanctions against DePuy and only pursued a civil recovery order in respect of the same conduct. Instead of pushing the firm towards financial collapse, the agency considered the settlement in the USA. In this regard, the UK analysis of double jeopardy depends on the underlying facts used to support the offence rather than on the offence *per se* charged by the prior prosecuting sovereign (Koehler 2011). The case of *DePuy* reflects comity between the UK and the USA, given that the former’s recognition of double jeopardy prevents the SFO from proceeding if the firm was previously prosecuted in the USA. With extraterritorial effect, the two authorities have been collaborating on global settlements with companies in respect of their transnational bribery. Of particular relevance here is the extent to which the SFO recognizes a US DPA as giving rise to double jeopardy (Holtmeier 2015).

SOCIÉTÉ GÉNÉRALE: DOUBLE JEOPARDY BETWEEN THE USA AND FRANCE

Loi Sapin II marks a watershed in France’s evolution of the global anti-bribery law regime. The enactment shows that French authorities will prosecute domestic firms and pursue foreign companies. Unprecedentedly, the French Court applied the double jeopardy rule to a DPA, which coordinated with divided penalties between France and the USA, shielding Société Générale from double jeopardy. This considerably readdresses imbalance in French sovereign interests since fines are payable in France, and the state can also secure credit for sums paid to the USA.

The Evolution of Double Jeopardy Law in France

Prior to the case of *Société Générale*, there have been inconsistencies in applying the double jeopardy law in France. This holds particularly true when its Court has referred to provisions under the International Covenant on Civil and Political

¹³*Treacy v. Director of Public Prosecutions* [1971] AC 537.

Rights (ICCPR). Two leading cases of *Total, S.A.* and *Vitol* epitomize the development of French double jeopardy law, which reflects that the risk of duplicative prosecutions has been reasonably reduced.

Total, S.A.

The French oil company Total, S.A. was prosecuted for alleged bribery in Iran (U.S. Department of Justice 2013). Its FCPA settlements preceded the French enforcement action. In May 2013, Total, S.A. reached a DPA with the USA and agreed to pay \$398 million.¹⁴ The company has thus referred to the doctrine of double jeopardy as a defence in the French proceedings. In 2015, the Paris Criminal Court ruled that the double jeopardy principle applied to a US agreement, resulting in a US court conviction.¹⁵ The Court reasoned that the DPA had the essential qualities of a judgment, thus qualifying the firm for *ne bis in idem* protection. However, a French Court of Appeals found Total, S.A. guilty of paying bribes to foreign public officials in February 2016 after new criminal offences were charged in 2014. Total, S.A. challenged the decision of the Court of Appeals of Paris before the French Cour de Cassation (France's Supreme Court). The Supreme Court held that the ICCPR only addresses the acts taking place in a single sovereign (Davis 2016). This amounts to *res judicata*, recognized by French Courts and the DPA bars further prosecution. The judgment represents a milestone since it not only applies the double jeopardy or *ne bis in idem* principle to a DPA but also recognizes a *res judicata* effect regarding the decision of a foreign authority. Notably, the Court held that it was bound by the ICCPR about the protection issue against multiple prosecutions.¹⁶ It is the first time a European court has relied on the ICCPR to reject an otherwise procedurally appropriate prosecution based on a prior US prosecution (van Kempen and Bemelmans 2018). Furthermore, the OECD has urged member states to bolster cross-border enforcement of corporate bribery, which may have contributed to the French courts' judgment in *Total, S.A.* (Van Alstine 2012).

Vitol: Same Act vis-à-vis Same Offence

In another case similar to *Total, S.A.*, Swiss oil trader Vitol argued that it could not be tried again for the same offence in France, invoking the double jeopardy principle enshrined in the ICCPR.¹⁷ The first-instance Court had agreed with this premise, determining that the plea agreement would block French courts from hearing the case. It held that the *ne bis in idem* provision protected against a French prosecution, given that both France and the USA are signatories to the ICCPR (Colangelo 2009). The Paris Criminal Court explicitly applied the *ne bis in idem* principle and dismissed all charges against the firm on 8 July 2013 (Neagu 2012). The Paris Court of Appeals overturned this dismissal and charged Vitol under French law (Davis 2016). Plausibly, the French Code of Criminal Procedure provides that:

¹⁴Deferred Prosecution Agreement, *United States v. Total, S.A.*, No. 1:13-CR-239 (E.D. Va. 29 May 2013).

¹⁵Paris First Instance Tribunal – Criminal Division (8 July 2013).

¹⁶ICCPR, Art. 14(7).

¹⁷*Ibid.*

no prosecution can occur concerning a person who has been definitively convicted in another country for the same facts, and, in case of conviction, where the penalty has been performed or suspended.¹⁸

It was further reasoned that the ICCPR shields a firm from being multiply prosecuted for the same “offence”, but Vitol’s guilty plea in New York was not for the same “act” (Davis 2018). It is inferred that the appellate Court would be barred from prosecuting Vitol for the same offence (Davis 2018). This is consistent with the core “same-elements” protection afforded under the UK law against successive prosecution (Griffin 2002). In practice, an enforcement authority can get away with the “same act” test by distinguishing separate proceedings and showing non-identical offences (Rastan 2017). The Cour de Cassation ruled that Article 14(7) under the ICCPR was inapplicable to convictions of foreign sovereigns. It found that despite a 2007 plea agreement and subsequent \$17 million fine by a New York court, Vitol could still be pursued in France on charges of foreign bribery stemming from its attempt to secure oil from Iraq under the United Nations’ Oil-for-Food programme which operated from 1996 to 2003. It explained that double jeopardy protection is an unviable defence to deter the authority from prosecuting the firm that had reached a plea agreement for convictions in a foreign sovereign (Davis 2016).

This judgment paves the way for companies’ foreign bribery convictions in France. The cases highlight the risks that multinational jurisdictional enforcements generate for MNCs. The judgments will make an impact on MNCs’ defensive strategies that may involve French jurisdiction (Bulovsky 2019). The protection offered by one country’s law may afford no protection in another sovereign (Colangelo 2009), because French criminal procedure does not recognize DPAs as a tool to deal with criminal investigations (Davis and Kirry 2015). Asymmetrically, the USA does not recognize that the ICCPR will preclude its prosecution because of a French criminal judgment, which has been systematically interpreted as a “non-self-executing treaty” (Mulligan 2018). The two judgments demonstrate the French Supreme Court’s unwillingness to surrender its jurisdiction based on convictions rendered abroad with parts of the facts occurring in France (Bonifassi 2018). The French courts’ interpretations of double jeopardy protection were conducive to eliminating the asymmetry, which may encourage MNCs to forum shop foreign enforcement authorities to preclude French prosecutions (Davis 2018). Some inquiries arise as to how the involved prosecutors can fill a gap to facilitate predictability and efficiency in multijurisdictional enforcement (Bulovsky 2019).

An optimum resolution would be for the US and French prosecutors to conduct joint investigations and share the fines.

Société Générale: Unprecedented Cooperation between the USA and France

Both the French and US authorities asserted jurisdiction over Société Générale for its cross-border bribery, with the former as the home state and the latter as its subsidiary’s location (Van Alstine 2012). The defendant moved to dismiss the charge on the ground of double jeopardy protection. Société Générale reached an agreement

¹⁸Article 113-9 of the French Criminal Code; Article 692 of the Code of Criminal Procedure.

with the two authorities to resolve indictments (U.S. Department of Justice 2018c). The total \$585 million fine for the FCPA violations was equally split between the French Parquet National Financier (PNF) and the DoJ (OECD 2019). The unprecedented approach demonstrates respect for the supply-side nation's sovereignty and its national interest.

Recognition of Foreign Courts' Judgments

The case marks a landmark FCPA enforcement, whose sanction has been split with a foreign sovereign state (U.S. Department of the Treasury 2018). The DoJ acknowledged a resolution between the PNF and Société Générale. The agency has credited the firm \$292.8 million, given the parallel resolution (U.S. Department of Justice 2018c). Furthermore, the PNF was responsible for assessing the quality and the effectiveness of Société Générale's anticorruption measures for two years (Terret and Père 2018). The DoJ has taken proactive steps and given credit to the assessment by waiving the appointment of independent monitors (Knapp 2016). It is also noteworthy that the coordination makes more sense between the two unique legal systems of common law and civil law (Stuckenberg 2019:§21). The exemption saved considerably on Société Générale's compliance costs due to the waiving of the DoJ's regular appointment of monitors. FCPA enforcement actions represent the first case in which the USA has credited the fines paid to a foreign sovereign for the same conduct. The case also marks the USA's first coordinated resolution with another country in a transnational corporate crime (OECD 2019:17–42).

The innovative decision clarifies that cross-border corporate bribery can be efficiently addressed through coordinated law enforcement actions (U.S. Department of Justice 2018c). The DoJ's recognition can be justified under comity, which is conceptualized as a doctrine of deference showing respect for the judicial decisions of a foreign sovereign.¹⁹ The coordinated approach is also in line with the OECD Convention on Combating Bribery.²⁰ For the sake of cost-effective responses to bribery, this flexible approach saves precious judiciary resources during cross-border investigations and in overseeing the implementation of DPAs (Boutros and Funk 2012).

Will the Milestone Decision Reshape the Double Jeopardy Landscape?

In December 2017, France promulgated the Loi Sapin II, which permits French prosecutors to negotiate the equivalent of a DPA for the first time.²¹ It was designed to make France a major player in prosecuting foreign bribery (Arlen and Buell 2020). Sapin II requires that a court review DPAs during a public hearing, which mirrors the UK's approach.²² In addition, the expanded jurisdictional reach enhances France's position in global combat against bribery and enables French

¹⁹*United States v. Kashamu*, 656 F.3d 679 (7th Cir. 2011), at 683.

²⁰OECD Convention, Art. 4(3).

²¹Loi Sapin II Art. 22; France's National Assembly adopted the final version of the "Loi Sapin II pour la transparence de la vie économique" on 8 November 2016, which came into force on 10 November 2016.

²²DPAs were introduced on 24 February 2014, under the provisions of Schedule 17 of the Crime and Courts Act 2013.

authorities to prosecute its domestic firms for their overseas offences.²³ The current US principle on double jeopardy, in general, inhibits effective collaboration with other foreign enforcement authorities. In *Société Générale*, the USA has adjusted its settlement requirements to credit sanctions imposed by French enforcers (Johnson, Freifeld, and Landauro 2018). It shows the potential for coordinated settlements and the advantages for both states and companies (OECD 2019). The case marks a significant FCPA resolution since the changes to the FCPA Corporate Enforcement Policy incentivize companies' self-disclosures and investigative cooperation.²⁴ In particular, the coordinated settlement is beneficial for MNCs facing multijurisdictional investigations (Davis 2016). Nevertheless, joint settlements have not yet become a uniform approach to resolving transnational corporate bribery cases (Garrett 2011). As part of a global settlement, MNCs may petition US enforcement agencies for case-by-case credit for any penalties paid to local authorities (Boutros and Funk 2012). They should not take it for granted that all involved authorities agree to the settlement because priorities and objectives vary from jurisdiction to jurisdiction (Stahn 2018). These *ad hoc* decisions should not be overinterpreted since the DoJ and SEC still aggressively claim jurisdiction even if principal violations have occurred abroad. Whether foreign proceedings can have a preclusive effect on a US court depends upon whether they are compatible with US conceptions of due process of law (Funk 2018). Otherwise, they would be unviable and unlikely to result in a joint settlement across jurisdictions. In this vein, it is similarly significant that the US enforcement agencies should articulate circumstances where they will defer to foreign sovereign prosecution (Brewster and Dryden 2018).

GSK: AN EMERGING NEW GAME BETWEEN THE USA, CHINA AND THE UK

The extent to which an MNC could be subject to duplicative prosecutions relies on those involved jurisdictions. A lack of demand-side enforcement has been normal during the past decades (Roberts 2002). The case of GSK demonstrates how a bribery case in China sparked multiple enforcement actions. China's prosecution triggered subsequent enforcement actions under the UK Bribery Act 2010 (BA 2010) and the FCPA (Plumridge and Burkitt 2014). An inquiry arises as to whether the USA and the UK should give proper deference to the fact that China has previously penalized the firm for the same bribery (Boutros and Funk 2012). A growing trend sees an increase in joint investigations. It is worth examining whether the USA, UK and China could coordinate co-investigating cross-border bribery offences.

The Emerging Demand-Side Enforcement

The UK pharmaceutical giant GSK offered bribes to Chinese officials to boost its sales. In 2014, a Chinese court fined a record RMB¥ 3 billion (\$490 million) for the bribery after finding the firm guilty of having paid \$482 million in bribes

²³OECD Convention, Art. 4(2).

²⁴US DoJ Deputy Attorney General Rod Rosenstein announced on 29 November 2017 that the DoJ would add a "revised FCPA Corporate Enforcement Policy" to the US Attorneys' Manual. It was then updated on 29 March 2019 (U.S. Department of Justice 2019).

(Jourdan and Hirschler 2014). The UK and the USA subsequently initiated investigations into the alleged bribery. The BA 2010 has a wide extraterritorial scope, under which an offence of “failure to prevent bribery” applies to any organization incorporated in the UK.²⁵ The SFO, however, closed the investigation of GSK with its director’s remark: “Following a detailed review of the available evidence and an assessment of the public interest, there will be no prosecution in this case.” (UK Serious Fraud Office 2019) China’s GSK penalties might forbid the UK from prosecuting the British company. Notably, the closure of the GSK investigation was not on the ground of double jeopardy protection but on that of evidential circumstances and public interest. Paradoxically, the SFO has referred to its double jeopardy law to justify dropping the *Rolls-Royce* and GSK investigations, which raises concern about protectionism in favour of its own national companies. There is a legitimate concern over how multijurisdictional cases are resolved in the UK, where there is strong public interest.

The US DoJ has investigated whether GSK had violated the FCPA, although the bribery took place in China. As discussed earlier, the application of international double jeopardy generally remains unrecognized in the USA, notwithstanding a prior prosecution for the same conduct in China. The USA has jurisdiction to prosecute foreign companies traded on its securities markets (U.S. Department of Justice Criminal Division and the Enforcement Division of the U.S. Securities and Exchange Commission 2020:43–4). GSK avails itself of the New York Stock Exchange, and the USA asserted FCPA jurisdiction based on its status as an issuer on the US securities markets (Diamant, Sullivan, and Smith 2019). On 30 September 2016, GSK reached a DPA with the SEC for violating the FCPA accounting provisions (Funk and Boutros 2019). Neither admitting nor denying the SEC’s findings, the firm paid a civil penalty of \$20 million for the same underlying conduct (U.S. Securities and Exchange Commission 2016). The DoJ did not prosecute GSK for its bribery in China, although the latter’s enforcement does not pose a legal obstacle to an FCPA prosecution. The non-legally binding United Nations Convention against Corruption (UNCAC)²⁶ and the OECD Anti-Bribery Convention do not provide a viable solution in this vein.²⁷ Only the USA must consult with China regarding potential overlapping investigations as appropriate. The case of GSK presents a milestone marking the emergence of demand-side enforcement in the global fight against corruption (Moran 2015). China’s prosecution of GSK has placed the US DoJ and SEC second in line (Flitter and Hirschler 2013). Companies may initially cooperate with demand-side prosecutors since they know that any associated penalty would be considered in subsequent supply-side settlement negotiations (Brewster and Dryden 2018).

Furthermore, to some extent, a policy of accommodating foreign penalties reflects respect for the sovereignty of a demand-side state and its national interest. This is particularly sensible for China, which considers sovereignty an unassailable cornerstone policy in its long-standing foreign relations (Soros 2009). Unlike consolidated global settlements, such as in *Société Générale*, enforcement coordination

²⁵BA 2010, Section 7.

²⁶United Nations Convention against Corruption (UNCAC, 2003), Art. 42(5).

²⁷OECD Anti-Bribery Convention, Art. 4.3.

between the US and Chinese authorities has been unlikely. To address its perceived overreach, the USA may issue guidelines for when deference is made to foreign judgments. While challenges are most often encountered in US cross-border investigations, similar tensions could also arise concerning other jurisdictions. More significantly, the USA and the UK need to adjust their systems to the prospect of being second in line as prosecutors. It is worth exploring whether the lack of interaction was largely due to their enormous divergences in the political, cultural and ideological settings.

Paramount Challenges in Dealing with Political, Cultural and Ideological Divergences

There are marked differences between the supply-side and demand-side authorities while collaboratively dealing with international double jeopardy (Boutros and Funk 2012). Many variables contribute to the failure of efficient coordination between supply- and demand-side enforcement actions, like the lack of mutual trust (Holtmeier 2015). Accordingly, the lack of coordination blocks the efficient sharing of information (Colangelo 2009). Proper deference to foreign resolutions will help build goodwill between demand- and supply-side enforcement agencies, which is likely to lead to efficacies in joint investigations (Garrett 2011).

The Implementation of Anti-Piling-On Policy Based on Diplomatic Relations

The efficacy in prosecuting corporate crime for FCPA violations depends on US diplomatic relations and the ability to get access to foreign firms (Colangelo 2019). The No-Piling-On Policy advocates for the DoJ to defer to foreign authorities in some like-minded countries and can coordinate parallel proceedings. In contrast, poor diplomatic relations will limit information sharing and further compromise the DoJ's ability for efficient coordination, which could lead to "pile-on" prosecutions (Bulovsky 2019). The Anti-Piling-On Policy could apply only to countries with which the USA has favourable relationships (Karp 2018). The company's fate in question will depend upon whether diplomatic relations could enable foreign prosecutors to make it to the US enforcement agencies. This diplomatic relations-based approach may result in counterproductive reactions. It makes it difficult for a firm to predict whether the USA applies the Policy, particularly in uncertain relations between the USA and a relevant foreign sovereign. Despite the positive signal, the USA must address the challenges for more efficient cooperation with foreign regulators and law enforcement (Colangelo 2009).

Asymmetry of Divergences in the International Double Jeopardy Doctrine

As discussed above, the USA is not bound by resolutions in a foreign country but can initiate FCPA prosecutions against a foreign firm convicted for the same underlying conduct (Colangelo 2019). This inevitably creates an asymmetry concerning jurisdictions constrained by a double jeopardy bar, which forbids them from prosecuting a firm whose bribery has been resolved in the USA (Levmore and Porat 2011). From an equitable perspective, it is imperative to address which country should take the lead and how the involved states should coordinate in cases where

they all can claim jurisdictions (Brewster 2017). Given their current dominant position in global anti-bribery, the US enforcement authorities may evaluate whether prosecutions in a foreign sovereign were adequate. Suppose a prior proceeding follows laws compatible with US laws and sentences. In that case, the prosecution may vindicate US interests and justify not applying the dual sovereignty doctrine. A challenge is how the US enforcement agencies evaluate the adequacy of non-US prosecutions and penalties and the circumstances where they should make a deference. In particular, China is short of the capacity to proceed with complex transnational anti-bribery. Although recognizing the principle of double jeopardy could considerably make an impact on a country's capacity to combat bribery, the institutional void and deficiencies manifest the challenges facing China's law enforcement agencies.

Is There Any Possibility of Addressing the Issue Between Two Different Legal Systems?

Advance authorities are supposed to recognize the capacity, credibility and independence established by their counterpart enforcement agencies. The landscape has become more complicated as China has emerged as one of the global anti-bribery forces (Holtmeier 2015:498). If an MNC has already been convicted in a foreign country, it may receive a mitigated penalty or even be exempted from prosecutions. However, there are substantial uncertainties around the circumstances in which Chinese enforcement authorities will prosecute a bribery offence. Little evidence shows cooperation to afford the firm relief in the face of multijurisdictional enforcement (Colangelo 2009).

As an established common-law rule, the principle of double jeopardy provides that no one should be prosecuted twice for the same offence (Amar 1997; Broadbridge 2009).²⁸ It may not be invoked if the alleged offences are separate from those under investigation in China. A pressing issue is that China does not recognize that the doctrine bars it from taking enforcement action for a bribe that occurred in China (Bulovsky 2019). Chinese law does not expressly recognize the concept of double jeopardy even within its criminal law system. The Chinese Criminal Procedure Law does not have a double jeopardy clause that stops anyone from being charged twice for the same underlying crime. There have been no precedents in China suggesting that its administrative or judicial authorities consider the penalties imposed in other jurisdictions. Under the Chinese Criminal Procedure Law, even if a case has been resolved, it can be restarted if new evidence supports that those facts relied on in the original judgment were incorrect.²⁹ There is still a risk of prosecution under Articles 7 and 10 of the Chinese Criminal Law. China is unlikely to recognize the double jeopardy concept in international criminal enforcement actions (Cheng 1988). In certain limited circumstances, it may depend on whether the foreign jurisdiction dealt properly, without undue leniency, with the offence (Chalmers and Leverick 2011).

²⁸"The provisions were introduced by Part 10 of the Criminal Justice Act 2003, which came into force in April 2005." (Broadbridge 2009)

²⁹People's Republic of China Criminal Procedural Law, Art. 242.

THE VIABILITY OF A GLOBAL SETTLEMENT BASED ON INTERNATIONAL DOUBLE JEOPARDY

Recent prosecutions reflect international cooperation to resolve multijurisdictional corruption allegations. There are substantial benefits to coordination on enforcement, such as the possibility of reaching a global settlement (Holtmeier 2015). The expedient solution enables the firm to avoid further tangible and intangible losses and helps to mitigate reputational damages. Enforcement authorities may use the global settlement to balance accomplishing appropriate deterrence and avoiding over-punishment. It, however, remains a major challenge to structure global settlements given the conflicting legal jurisprudence of involved states (Funk and Boutros 2019).

Soft Law in the Doctrine of International Double Jeopardy

The law on double jeopardy differs between states. In the absence of a treaty, conflicting substantive laws and procedural rules can expose MNCs to sequential prosecutions by multiple sovereigns (Boutros and Funk 2012). International regimes try to provide a remedy against these prosecutions for the same bribery. Two international mechanisms, the UNCAC and the OECD Convention seek to address how different enforcing states should work together and how a global settlement should be structured.

Coordination of Jurisdiction Under UNCAC and the OECD Convention

Not only does coordination help avoid duplicative enforcement, but it also leads to more consistent resolutions (Boutros and Funk 2012). UNCAC provides that:

The return of assets according to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.³⁰

This applies to proceeds of corruption from offences covered in Article 16 on foreign bribery (Ivory 2014). In principle, UNCAC could allow a country like France to seek split compensation in a US court from an American company that has committed bribery in France (Funk and Boutros 2019). Alternatively, UNCAC could require the US enforcement agencies to recognize France as the legitimate owner of fines paid to the USA resulting from an FCPA violation.³¹ The OECD Convention requires signatory nations to criminalize bribery of foreign public officials in their domestic law.³² Each signatory country must “take measures necessary to establish its jurisdiction over the bribery when the offense is committed”.³³ Little progress has been made to enhance cooperation between signatories in order to settle issues relating to concurrent proceedings (Boutros and Funk 2012). The nature of transnational bribery renders it common for multiple authorities to claim jurisdiction over the same underlying bribery (Ashe 2005).

³⁰UNCAC, Art. 51.

³¹*Ibid.*, Art. 53.

³²OECD Convention, Art. 1.

³³*Ibid.*, Art. 4(1).

Competing jurisdictional claims can arise as to which country has primacy to prosecute (Brown 1998). The OECD Convention explicitly advocates that only one country prosecute a firm for the same underlying bribery.³⁴ To attenuate the likelihood of parallel or multiple enforcement (Davis 2016), the OECD requires signatories to consult to identify the most appropriate state for prosecution, which provides that:

When more than one Party [i.e., signatory country] has jurisdiction over an alleged offence described in this Convention, the Parties involved shall consult at the request of one of them to determine the most appropriate jurisdiction for prosecution.³⁵

Respect for the spirit of the above provision suggests in favour of deference (Colangelo 2009). Signatories need to reach a consensus that alleviates adverse consequences due to duplicative proceedings (OECD 2019). It, however, does not require member states to surrender their sovereign power while determining whether to prosecute particular instances of corporate crime (Rastan 2017). The Convention advocates that states consult in identifying the primary jurisdictional claim.³⁶ However, there is no international rule governing how to determine primacy (OECD 2017).

The Policy underlying the OECD and UNCAC articles is that multiple actions should be avoided. In practice, a sensible remedy only arises if either state recognizes the principle of double jeopardy or if credit can be given for leniency in other states. The European Union takes a similar stance. A European version of the *ne bis in idem* principle has come into being via conventions, treaties and court decisions. The Convention Implementing the Schengen Agreement provides that: “[a] person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another . . . for the same acts”.³⁷ Similarly, the Charter of Fundamental Rights of the European Union also provides: “No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union.”³⁸

Companies are reasonably assured to be shielded from further prosecution in other member states if they are prosecuted in one European jurisdiction (Van Den Wyngaert and Stessens 1999).

Toothless Soft Law

The non-legally binding, soft law would ideally result in only one signatory country actually prosecuting (Brewster 2017). This was well explained in *United States v. Jeong*, where the Court held that:

³⁴*Ibid.*, Art. 4(3).

³⁵*Ibid.*, Art. 4(3).

³⁶*Ibid.*, Art. 5.

³⁷Article 54 of the Convention Implementing the Schengen Agreement (CISA). This provision has several exceptions, which are outlined in Article 55.

³⁸Charter of Fundamental Rights of the European Union (2010 OJ C 83/02), Art. 50.

[W]e conclude that the plain language of Article 4.3 does not prohibit two signatory countries from prosecuting the same offense. Rather, the provision merely establishes when two signatories must consult on jurisdiction.³⁹

It further reasoned: “Double jeopardy thus does not attach when separate sovereigns prosecute the same offense, as here.”⁴⁰ The judgment creates tension with the OECD Convention, in which Article 4.3 constraint has turned out to be virtually unenforceable. Notably, the Court has conceptually differentiated “act” from “offence”, discussed above in the landmark case of *Gamble v. United States*.⁴¹ The soft law only goes as far as to advocate coordination between sovereign states (Brewster and Dryden 2018). Without a legally binding treaty, recognizing the principle of double jeopardy is only at national discretion. This demonstrates the urgent need for an internationally recognized framework that applies the principle of avoiding multiple proceedings (Colangelo 2009). A new Article 4-style instrument needs to be in place, which would more efficiently confer involved states’ obligations for pursuits of cross-border bribery. It is more sensible to explore a uniform recognition that the principle applies to foreign resolutions. Establishing a working group to determine a state that should be given a prioritized position for prosecution is also institutionally important.

International Coordination: Is the Société Générale Coordination a Model on the Way?

There is a trend pointing to jurisdictional coordination to address duplicative prosecutions. How relevant enforcement authorities and courts interpret their anti-bribery laws will determine the efficacies of their pursuits of transnational corporate bribery. Whether the *Société Générale* coordination could be considered a model to address future cross-border bribery remains uncertain.

A Challenge to the USA’s Hegemony of an “Ultimate Arbiter”?

The US resolutions have either become an integral part of a global settlement, like *Société Générale* or preceded a foreign prosecution, like *Total, S.A.* Given its prosecutors’ considerable leverage, the US authorities are plausibly considered the ultimate arbiter of the sufficiency of global anti-bribery enforcement (Davis 2017). Based on such prosecutions, billions of dollars of fines are paid to the US treasuries (Garrett 2011). Given the pecuniary scale, those FCPA counterparts would be inclined to contemplate alternative schemes if they lost out on potential recoveries (Mathews 1997). On 2 June 2020, the French Minister of Justice issued a Guide on Criminal Policy Related to International Bribery (from now on, referred to as Sapin II Guide 2020) (French Ministry of Justice 2020), which reflects the proactive French attitude toward robust anti-bribery enforcement. It also represents another milestone after the enactment of Sapin II in 2016. The Guide 2020 encourages France to conduct more aggressive extraterritorial enforcement against

³⁹*United States v. Jeong*, 624 F.3d 706 (5th Cir. 2010).

⁴⁰*United States v. Jeong*, 624 F.3d 706, 712 (5th Cir. 2010).

⁴¹*Gamble v. United States*, 139 S. Ct. 1960 (2019).

transnational bribery committed by non-French companies. This would inevitably challenge the US position. As Davis (2017:344) pointed out:

unless the DOJ does more to recognize the sovereign concerns of its trading partners—whether by deferring to their prosecutions, or at a minimum sharing the proceeds, and making clear the principles it follows in doing so—it risks inhibiting those partners’ efforts and creating tensions with them.

There have been, so far, no uniform guidelines for the distribution of recoveries among jurisdictions (Doyle 2013). In practice, the lack of proof of concrete and measurable harm compromises the efficiencies of certain mechanisms established by supply-side jurisdictions (Stephenson 2014b).

Redistribution of Recoveries

The US DoJ can channel some of the criminal penalty monies in FCPA cases into funding anticorruption initiatives in developing countries (Stephenson 2014a). In May 2018, the No-Piling-On Policy set out principles to help enforcement agencies avoid punishing a company for the same underlying misconduct (U.S. Department of Justice 2018a). The 2020 FCPA Guide explicitly provides that US prosecutors should endeavour to coordinate with international counterparts. This approach helps avoid imposing duplicative penalties for the same conduct (U.S. Department of Justice and the Securities and Exchange Commission 2020:71). It is noteworthy that the authorities do not ensure that they will necessarily give credit for resolutions in other jurisdictions. The 2020 FCPA Guide also references some factors that enforcement agencies should consider in deciding whether and how much to consider penalties imposed by other authorities. They exercise discretion by weighing the factors during their decision-making. Some variables encompass the egregiousness of the crime and the adequacy of an MNC’s compliance (U.S. Department of Justice and the Securities and Exchange Commission 2020:71). The approach sometimes raises other issues related to the level of judicial review of settlements (Makinwa and Søreide 2018). Repatriation may depend upon whether the demand-side government has proactively prosecuted the bribe receiver (Sung 2005).

It would be equitable to create mechanisms that make it viable for both demand- and supply-side states to address the redistributive recoveries. The former state may secure separate recoveries based on a firm’s settlement with the supply-side country. Whether the recoveries secured in a supply-side state should be transferred to the demand-side country remains a highly contentious issue (Holtmeier 2015). A more complex issue arises regarding how sovereigns will allocate those proceeds when more than one jurisdiction has the legitimacy to claim the assets. Complex as it is, the case of *Airbus* epitomizes such a general trend, culminating in the firm entering into a global settlement of €3.6 billion due to a joint investigation between France’s PNF, the UK’s SFO and the US DoJ (Moiseienko 2020). It represents a second significant step for France to become a major anticorruption enforcer. *Airbus* reflects a new variation in the burgeoning trend of coordinated global

settlements. A mutual understanding at a strategic level manifests the developed relationships between the SFO, DoJ and PNF.

MNCs' Global Strategies in Mitigating Potential Consequences: Prevention is Better than Cure

The growing engagement of foreign enforcement agencies reflects the heightened risk of multijurisdictional prosecutions. An MNC has little redress if more than one state decides that each will prosecute for the same act of bribery (Brewster 2017). The doctrine of double jeopardy could apply to an MNC at a later stage. Prevention is better than cure, and MNCs must ensure from the outset that they have in place robust compliance programmes designed to address the risks. In particular, companies in countries characterized by endemic corruption are more likely to be exposed to situations where they face strong pressure to bribe officials (Birnbaum 2014). In response, MNCs should strategically design their compliance programmes since their global operations may shape the investigative inquiry.

The extent to which an MNC seeks to address multijurisdictional bribery issues depends largely upon how it can transform the latest global enforcement development into effective compliance. For instance, a presumption has been incorporated into the 2020 FCPA Guide that the DoJ will not prosecute a company that “voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates” (U.S. Department of Justice 2019; U.S. Department of Justice Criminal Division and the Enforcement Division of the U.S. Securities and Exchange Commission 2020:51). Of the utmost significance is that a firm’s programme should be considered effective in terms of anticorruption compliance (U.S. Department of Justice and the Securities and Exchange Commission 2020:58). Proactive and adequate measures will influence the development of compliance standards, which MNCs might make their operation benchmarks. In light of changing enforcement environments, ensuring that their compliance programmes meet all relevant standards under the FCPA, BA 2010 and Sapin II is essential. The increased challenges impose pressure on MNCs, incentivize them to proactively cooperate with multijurisdictional authorities and develop a compliance strategy characterized by built-in flexibility (Colangelo 2009). Since multiple sovereigns may seek to assert jurisdiction on the same grounds, a firm must conduct an accurate assessment based on the pros and cons of disclosures before approaching the UK, French or US authorities for cooperation. Furthermore, they need to evaluate any possible follow-on consequences of foreign litigation and any potential “collateral estoppel rules” (Schaefer 1970).

CONCLUSION

Concurrent multijurisdictional prosecutions are common in the global anti-bribery enforcement landscape. More than one sovereign may have jurisdiction to charge a transnational corporate crime against the same entity for the same underlying conduct. Given the lack of coordination between the authorities, the issue of double jeopardy has become a growing concern amongst MNCs that are facing duplicative investigations for essentially the same acts. With the landscape of global anti-bribery

enforcement reshaped, the emerging demand-side enforcement is further manifested in the 2020 French Circular on Criminal Policy Related to International Bribery and the 2020 FCPA Resource Guide. The latest development in anti-bribery catalyses greater cooperation between jurisdictions in corporate bribery investigations. MNCs should be aware of the full scope of their potential liability, as cross-border joint investigations become an ever-present part of enforcing a corporate crime. Overlapping prosecutions disincentivize MNCs to disclose their bribery voluntarily. The international community has taken steps to mitigate the negative impact. More recognitions of the double jeopardy principle and growth of DPAs represent a manifestation of greater anti-bribery policy convergence across jurisdictions, making the global settlement an ever-increasing reality. This would help MNCs achieve equity in cases where they are facing multijurisdictional investigations based on the same set of facts. Conventional wisdom applies in that prevention is better than cure. MNCs should ensure that adequate compliance programmes are put in place as their built-in global anti-bribery strategies.

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TRANSLATED ABSTRACTS

Abstracto

El surgimiento de acciones multijurisdiccionales contra el soborno presenta un desafío sustancial para las corporaciones multinacionales (CMN). Múltiples soberanos tienen jurisdicción para emprender acciones penales contra la misma entidad por el mismo soborno subyacente. El marco legal existente no es suficiente para abordar este desafío global. La diferencia entre las teorías de doble enjuiciamiento y las prácticas judiciales entre los soberanos complica los diseños estratégicos de los programas de cumplimiento de las multinacionales. Un régimen de liquidación global ayudaría a utilizar de manera eficiente los preciosos recursos judiciales e incentivaría a las multinacionales a revelar información para promover su cooperación.

Palabras clave riesgo doble, fiscalía multijurisdiccional, soborno, liquidación global, derechos soberanos, crime corporativo

Abstrait

L'émergence d'actions anti-corruption multijuridictionnelles présente un défi considérable pour les entreprises multinationales (EMN). Plusieurs souverains ont compétence pour engager des poursuites pénales contre la même entité pour la même corruption sous-jacente. Le cadre juridique existant n'est pas suffisant pour relever ce défi mondial. La différence entre les théories de la double incrimination et les pratiques judiciaires des souverains complique les conceptions stratégiques des multinationales de leurs programmes de conformité. Un régime de règlement mondial aiderait à utiliser efficacement les précieuses ressources judiciaires et inciterait les multinationales à se divulguer dans le cadre de leur coopération.

Mots-clés double péril, poursuite multijuridictionnelle, corruption, règlement global, droits souverains, crime d'entreprise

抽象

跨司法管辖区反贿赂行动的出现对跨国公司（MNC）提出了重大挑战。多个主权国家有权就同一潜在贿赂对同一实体采取刑事执法行动。现有的法律框架不足以应对这一全球挑战。双重危险理论与主权国家司法实践之间的差异使跨国公司对其合规计划的战略设计复杂化。全球和解机制将有助于有效利用宝贵的司法资源，并激励跨国公司自我披露以促进合作。

关键词. 双重危险, 多司法管辖区起诉, 受贿; 全球结算, 主权; 企业犯罪

العمل الخاص

يهدف ظمور إجراءات متعددة الاختصاصات لمكافحة الرشوة تحديا كبيرا للشركات متعددة الجنسيات (MNCs). تتمتع العديد من الدول السيادية بالولاية القضائية لمتابعة إجراءات الإنفاذ الجنائي ضد نفس الكيان لنفس الرشوة الأساسية. إن الإطار القانوني الحالي ليس كافيا لمواجهة هذا التحدي العالمي. يؤدي الاختلاف بين نظريات الخطر المزدوج والممارسات القضائية عبر الحكومات السيادية إلى تعقيد التصاميم الاستراتيجية للشركات متعددة الجنسيات لبرامج الامتثال الخاصة بها. من شأن نظام تسوية عالمي أن يساعد بكفاءة في استخدام الموارد القضائية الثمينة ويحفز الشركات متعددة الجنسيات على الكشف عن نفسها لتعزيز تعاونها.

الكلمات الدالة: خطر مزدوج، محالمة متعددة التخصصات، تسوية الرشوة، حقوق سيادية عالمية؛ جرائم الشريك

List of Abbreviations

BA 2010	: Bribery Act 2010, UK
DoJ	: Department of Justice, USA
DPA	: Deferred Prosecution Agreement
FCPA	: Foreign Corrupt Practices Act
GSK	: GlaxoSmithKline
ICCPR	: International Covenant on Civil and Political Rights
J&J	: Johnson & Johnson
MNC	: multinational corporation
OECD	: Organisation for Economic Cooperation and Development
OECD Convention	: OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
PNF	: Parquet National Financier, France
SEC	: Securities and Exchange Commission, USA
SFO	: Serious Fraud Office, UK
UNCAC	: United Nations Convention Against Corruption

Qingxiu Bu is Fellow of the Stellenbosch Institute for Advanced Study. He has published widely in a variety of areas of law, many of which are themed around law and global challenges, with a particular focus on the development of legal infrastructures in transnational law and global governance. In recognition of his contribution in global law, Qingxiu was appointed as Li Kashing Professor at McGill University. He has also held posts in Queen's, Harvard, Cardiff and Georgetown Universities. Apart from his academic life, he serves as senate at the University of Sussex.

Cite this article: Bu, Q. 2022. Multijurisdictional Prosecution of Multinational Corporations: Double Jeopardy *vis-à-vis* Sovereign Rights in the Globalized Anti-bribery Regime. *International Annals of Criminology* 60, 269–295. <https://doi.org/10.1017/cri.2022.18>