

**REASSESSING INTERNATIONAL COOPERATION BETWEEN  
SECURITIES REGULATORS IN VIEW OF THE  
INTERNATIONAL DOUBLE JEOPARDY PRINCIPLE**

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## ABSTRACT

An increase in cross-border securities transactions results in a heightened need for international cooperation between securities regulators. Securities regulators have tried to exchange information with each other under the Multilateral Memorandum of Understanding. Depending on the nature of the case, there might be a regulatory overlap in which multiple regulators exercise jurisdiction based on nexuses such as the place and effects of the conduct. When there is a regulatory overlap, enforcement by one regulator might disturb the other regulator's investigation. The importance of this issue can be seen in shortcomings in the current cooperation framework, actual cases where regulators with strong interests were restrained due to international double jeopardy concerns, and adoption in some countries' domestic law of a "broader" version of the international double jeopardy principle. This paper will propose provisions that should be incorporated into the Multilateral Memorandum of Understanding for coordinated enforcement. This new framework will best balance the interest of securities regulators to vindicate their own laws and the interest of market participants to avoid double jeopardy.

## I. INTRODUCTION

An increase in cross-border securities transactions results in a heightened need for international cooperation. For example, assume that an investor residing in the United States, where the Securities and Exchange Commission (SEC) oversees the market, conducts market manipulation in the United Kingdom, where the Financial Conduct Authority (FCA) oversees the market. Under the current primary cooperation framework among securities regulators, the Multilateral Memorandum of Understanding (MMoU) (drafted by the International Organization of Securities Commissions (IOSCO)), the FCA will likely ask the SEC to cooperate in obtaining material information from the investor. Today this type of cooperation occurs frequently. What happens, however, if the SEC also wants to enforce its securities regulations against the investor?

Depending on the nature of the case, there might be a regulatory overlap. The FCA might exercise jurisdiction based on the place of conduct, while the SEC might exercise jurisdiction based on the effects of the investor's conduct overseas. When the SEC and the FCA conduct parallel investigations, material issues could occur. For example, enforcement by one regulator might disturb the other regulator's investigation because of an inadvertent disclosure of the investigation or because of double jeopardy concerns. If so, should there be an international rule regarding priority between the SEC and the FCA?

The importance of the issues raised above can be seen in the following three aspects: (1) shortcomings in the current cooperation framework; (2) actual cases where regulators with strong interests were restrained due to international double jeopardy concerns; and (3) adoption in some countries' domestic laws of a "broader" version of the international double jeopardy principle that would treat some foreign administrative penalties as the equivalent of criminal penalties.

Many scholars have analyzed relevant issues, including: regulatory overlaps in a broader context,<sup>1</sup> the constitutionality of parallel administrative and criminal proceedings and of information exchange between U.S. regulators,<sup>2</sup> and whether the double jeopardy principle should be recognized internationally.<sup>3</sup> They have, however, mostly focused on domestic issues and largely ignored issues concerning international cooperation in securities regulation.

This Article, therefore, seeks to fill the gap by expanding the scope of analysis to the international setting and proposing specific revisions to the MMoU that would contribute to more efficient and effective securities enforcement on a global level. Part II will describe the current regulatory framework to combat cross-border market misconduct and explain why regulatory overlaps occur. Part III will explain the double jeopardy principle as applied internationally, including two distinct approaches. Part IV will explore the problems that exist in international securities enforcement and introduce cross-border cases and one recent development in Europe. Part V will analyze international cooperation in other fields where international cooperation might be more developed as instructive examples from which securities regulators can learn. Finally,

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1. See, e.g., Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209 (2002).

2. See, e.g., Shiv Narayan Persaud, *Parallel Investigations Between Administrative and Law Enforcement Agencies: A Question of Civil Liberties*, 39 U. DAYTON L. REV. 77 (2013).

3. See, e.g., Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769 (2009).

Part VI will propose detailed provisions to be incorporated into the MMoU.

## II. THE FRAMEWORK OF INTERNATIONAL SECURITIES ENFORCEMENT

This Part will describe market misconduct and the role of securities enforcement, representative enforcement tools, the international framework in securities regulation to combat market misconduct, and why regulatory overlaps might occur in securities enforcement.

### A. Market Misconduct

In this Article, “market misconduct” refers to insider trading and market manipulation. Insider trading can be defined as “buying or selling a security, in breach of a fiduciary duty or other relationship of trust and confidence, on the basis of material, nonpublic information about the security.”<sup>4</sup> Market manipulation can be defined as “intentional conduct designed to deceive investors by controlling or artificially affecting the market for a security . . . [through, for example,] trades to create a false or deceptive picture of the demand for a security.”<sup>5</sup>

As there is no single antifraud provision to regulate market misconduct globally, each regulator has used its own regulatory regime.<sup>6</sup> In the United States, the SEC uses one of the anti-fraud provisions, Rule 10b-5 of the Securities Exchange Act of 1934,<sup>7</sup> most extensively to regulate securities fraud, including market misconduct.<sup>8</sup>

4. *Fast Answers: Insider Trading*, SEC (May 16, 2018), [sec.gov/fast-answers/answersinsiderhtm.html](http://www.sec.gov/fast-answers/answersinsiderhtm.html) [<http://web.archive.org/web/20190927150258/https://www.sec.gov/fast-answers/answersinsiderhtm.html>].

5. *Fast Answers: Manipulation*, SEC (Mar. 28, 2008), [sec.gov/fast-answers/answerstmanipulhtm.html](http://www.sec.gov/fast-answers/answerstmanipulhtm.html) [<http://web.archive.org/web/20190927195434/https://www.sec.gov/enforce/how-investigations-work.html>].

6. Junsun Park, *Global Expansion of National Securities Laws: Extraterritoriality and Jurisdictional Conflicts*, 12 U.N.H. L. REV. 69, 69 (2014).

7. SEC Securities & Exchange Act of 1934 Rule, 17 C.F.R. § 240.10b-5 (2016).

8. Genevieve Beyea, *Transnational Securities Fraud and the Extraterritorial Application of U.S. Securities Laws: Challenges and Opportunities*, 1 GLOB. BUS. L. REV. 139, 142 (2011) (characterizing Rule 10b-5 as “the most far-reaching” catch-all provision).

### B. Enforcement Tools

Some securities regulators can utilize multiple enforcement tools to regulate market misconduct, while other regulators may rely solely on criminal enforcement.<sup>9</sup> For example, the SEC can pursue three types of enforcement actions: administrative, civil, and criminal.<sup>10</sup> First, the SEC may seek a variety of sanctions through administrative proceedings, presided over by an administrative law judge who is independent of the SEC.<sup>11</sup> The administrative law judge conducts a hearing, considers the evidence, and issues an initial decision including recommended sanctions such as: cease and desist orders, suspension or revocation of registrations, civil monetary penalties, and disgorgement.<sup>12</sup>

Second, the SEC can file a civil complaint with a federal district court, seeking various sanctions including an injunction to prohibit any further violations, civil monetary penalties, disgorgement, and suspension of the defendant's ability to act as a corporate officer or director.<sup>13</sup>

Third, the SEC may refer criminal cases to the Department of Justice (DOJ). Under the formal process, SEC staff members prepare a criminal reference report for the SEC, which decides whether to refer the case to the DOJ.<sup>14</sup> The decision to accept or reject cases the SEC has referred is left to the discretion of the United States Attorneys.<sup>15</sup>

Similarly, in the United Kingdom, the FCA can pursue administrative, civil, and criminal enforcement actions.<sup>16</sup> In Japan, although there is no option to pursue a civil action, the Securities and

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9. See *infra* note 20 and accompanying text (observing that many regulators rely solely on criminal enforcement).

10. *How Investigations Work*, SEC (Jan. 27, 2017), [sec.gov/enforce/how-investigations-work.html](http://sec.gov/enforce/how-investigations-work.html) [<http://web.archive.org/web/20190927195434/https://www.sec.gov/enforce/how-investigations-work.html>].

11. *Id.*

12. *Id.*

13. *Id.*

14. NICOLE A. BAKER ET AL., *THE SECURITIES ENFORCEMENT MANUAL: TACTICS AND STRATEGIES* 394 (Michael J. Missal & Richard M. Phillips eds., 2d ed. 2007).

15. Paul Radvany, *The SEC Adds a New Weapon: How Does the New Admission Requirement Change the Landscape?*, 15 *CARDOZO J. CONFLICT RESOL.* 665, 675 (2014).

16. FCA, *ENFORCEMENT INFORMATION GUIDE 1* (2017), <https://www.fca.org.uk/publication/corporate/enforcement-information-guide.pdf> [<http://web.archive.org/web/20190927203942/https://fca.org.uk/publication/corporate/enforcement-information-guide.pdf>]. The Financial Conduct Authority took over enforcement responsibility from the Financial Services Authority in 2013. *About the FCA*, FIN. CONDUCT AUTH. (July 30, 2019), <https://www.fca.org.uk/about/the-fca> [<http://web.archive.org/web/20191110025919/https://www.fca.org.uk/about/the-fca>].

Exchange Surveillance Commission (JSESC) can pursue either administrative or criminal actions.<sup>17</sup> If the JSESC identifies possible market misconduct, it may either (1) recommend that the Prime Minister and the Commissioner of the Financial Services Agency issue an administrative monetary penalty payment order<sup>18</sup> or (2) file a criminal charge with the public prosecutor's office.<sup>19</sup> On the other hand, many regulators in the world can take only criminal actions against insider trading.<sup>20</sup>

### C. Current Cooperative Framework: IOSCO and MMoU

In today's securities markets, cross-border transactions have become very common, and activities in one jurisdiction frequently impact securities markets and regulation in other jurisdictions.<sup>21</sup> Those who engage in cross-border market misconduct engage in this behavior through various means, including transferring funds to widespread geographic areas, investing in securities of foreign countries, and utilizing international transactions.<sup>22</sup>

In order to enhance their abilities to investigate and prosecute cross-border market misconduct, regulators have made efforts to cooperate with each other.<sup>23</sup> Because there is no single regulatory authority to govern all securities markets globally, each regulator has tried to apply

17. SEC. AND EXCH. SURVEILLANCE COMM'N, SECURITIES AND EXCHANGE SURVEILLANCE COMMISSION'S INITIATIVES: BUILDING ON A QUARTER-CENTURY OF ACHIEVEMENT 4 (2017) (Japan), <https://www.fsa.go.jp/sesc/english/aboutsesc/all.pdf> [<http://web.archive.org/web/20190927204135/https://www.fsa.go.jp/sesc/english/aboutsesc/all.pdf>].

18. *Id.* at 7.

19. *Id.* at 15–16.

20. *See, e.g.*, EMERGING MARKETS COMMITTEE, INT'L ORG. OF SEC. COMM'NS, INSIDER TRADING: HOW JURISDICTIONS REGULATE IT (2003) (Spain). Out of forty-one jurisdictions surveyed in 2003, at least the following seventeen jurisdictions had only criminal penalties against insider trading: Austria, China, Cyprus, Croatia, Finland, Italy, Luxembourg, Malta, Poland, Portugal, Slovenia, Spain, Sri Lanka, Taiwan, Thailand, Turkey, and Vietnam. *Id.* at 27–102.

21. Michael D. Mann & William P. Barry, *Developments in the Internationalization of Securities Enforcement*, 39 INT'L LAW. 667, 667 (2005); *see also* John Armour et al., *Investor Choice in Global Securities Markets* 4 (Eur. Corp. Governance Inst., Working Paper No. 371, 2017) (“Global securities markets have experienced unprecedented levels of cross-border activity over the past 30 years.”).

22. Junsun Park, *Enforcement of Securities Law in the Global Marketplace: Cross-Border Cooperation in the Prosecution of Transnational Hedge Fund Fraud*, 39 BROOK. J. INT'L L. 231, 241, 243 (2014) (explaining how hedge funds structure cross-border deals to avoid enforcement).

23. *See* Mann & Barry, *supra* note 21, at 667 (observing that regulators have responded to cross-border cases by formalizing cooperation with each other).

its domestic securities regulation extraterritorially to regulate cross-border market misconduct.<sup>24</sup> Regulators, however, need assistance from foreign regulators to enforce their domestic laws extraterritorially because investigatory authority is generally limited within a territory.<sup>25</sup> For example, the DOJ and the SEC can currently exercise extraterritorial jurisdiction based on the effects or conduct test under the Dodd-Frank Act,<sup>26</sup> but the Act does not guarantee that they can gather evidence and discover the violation.<sup>27</sup>

In 1983, the IOSCO was founded as “the international body that brings together the world’s securities regulators” and “the global standard setter for the securities sector.”<sup>28</sup> In response to the increase of cross-border securities transactions, securities regulators around the world started cooperating first by entering into bilateral treaties and memoranda of understanding.<sup>29</sup> Then, in 2002, the IOSCO created the MMoU to form a global cooperation framework among its over one hundred members to consult, cooperate, and exchange information with each other.<sup>30</sup> The MMoU has now become the primary cooperation framework among securities regulators.<sup>31</sup>

24. Park, *supra* note 22, at 234.

25. *Id.*; see also J. WILLIAM HICKS, INTERNATIONAL DIMENSIONS OF U.S. SECURITIES LAW § 11:53 (2019) (describing obstacles to cross-border securities enforcement by the SEC).

26. See *infra* notes 56–57 and accompanying text (describing the relevant provision of the Dodd-Frank Act).

27. Park, *supra* note 22, at 243.

28. *About IOSCO*, OICV-IOSCO (2019), [http://www.iosco.org/about/?subsection=about\\_iosco](http://www.iosco.org/about/?subsection=about_iosco) [[http://web.archive.org/web/20190927232726/https://www.iosco.org/about/?subsection=about\\_iosco](http://web.archive.org/web/20190927232726/https://www.iosco.org/about/?subsection=about_iosco)].

29. See MARC I. STEINBERG, INTERNATIONAL SECURITIES LAW: A CONTEMPORARY AND COMPARATIVE ANALYSIS 203 (1999) (describing memoranda of understanding generally).

30. *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU)*, OICV-IOSCO (2019), <http://www.iosco.org/about/?subsection=mmou> [<http://web.archive.org/save/https://www.iosco.org/about/?subsection=mmou>]; see Int’l Org. of Sec. Comm’ns, *Multilateral Memorandum of Understanding Concerning Consultation and Coordination and the Exchange of Information*, OICV-IOSCO (May 2012), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf> [<http://web.archive.org/web/20190927233900/https://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf>] [hereinafter MMoU].

31. See generally STEINBERG, *supra* note 29, at 203–37 (describing international cooperation efforts before the establishment of the MMoU framework, the IOSCO, and the MMoU more generally).

### D. Regulatory Overlap

A securities regulator may exercise jurisdiction either domestically or extraterritorially based on various connections with conduct, such as the effects and the place.<sup>32</sup> A regulatory overlap may occur in two settings: first, when multiple regulators try to enforce their regulations concurrently; and second, when one regulator tries to enforce its regulation after another regulator has already enforced its own regulation.<sup>33</sup>

#### 1. Concurrent Jurisdiction

If regulators all over the world exercise jurisdiction only within their respective territories, there should be no regulatory overlaps. Then, why do regulators try to exercise jurisdiction extraterritorially?

Multiple jurisdictions may have a legitimate interest in regulating the same conduct.<sup>34</sup> Jurisdictional overlap may not be avoidable in enforcement against market misconduct because almost all countries have securities regulators tasked to prevent market misconduct, and market misconduct in one jurisdiction could have adverse effects in other jurisdictions.<sup>35</sup> At the same time, all jurisdictions should also have an interest in reducing regulatory overlaps that increase compliance costs for market participants and disturb foreign investigation and enforcement.<sup>36</sup> Historically, the principle of territoriality restricted regulators to enforcement of their own domestic laws.<sup>37</sup> Currently,

32. Note that a sovereign exercises three types of jurisdiction: prescriptive jurisdiction, adjudicative jurisdiction, and enforcement jurisdiction. See Colangelo, *supra* note 3, at 781 (explaining the three types of jurisdiction). As this paper discusses how securities regulators apply their domestic laws extraterritorially, the term “jurisdiction” refers to prescriptive jurisdiction unless otherwise noted therein.

33. See *id.* at 782.

34. See Beyea, *supra* note 8, at 155 (observing that one regulator may exercise jurisdiction because of the effect of the conduct on their citizens, while another regulator may exercise jurisdiction because of the place of the conduct).

35. See *id.* at 160; see also INST. OF INTERNAL AUDITORS ET AL., MANAGING THE BUSINESS RISK OF FRAUD: A PRACTICAL GUIDE 11 (2008), [https://competency.aicpa.org/media\\_resources/209048-managing-the-business-risk-of-fraud-a-practical-gu/detail](https://competency.aicpa.org/media_resources/209048-managing-the-business-risk-of-fraud-a-practical-gu/detail)

[[http://web.archive.org/save/https://competency.aicpa.org/media\\_resources/209048-managing-the-business-risk-of-fraud-a-practical-gu/detail](http://web.archive.org/save/https://competency.aicpa.org/media_resources/209048-managing-the-business-risk-of-fraud-a-practical-gu/detail)] (observing that the laws of most countries prohibit financial statement fraud).

36. See Bayea, *supra* note 8, at 161 (“[A]ll countries . . . have an interest in reducing the inefficiencies created by overregulation and jurisdictional conflict.”).

37. See *id.* at 145 (citing *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909)).

however, a certain degree of extraterritorial application is generally accepted, though the proper bases and scope of such applications are still debated.<sup>38</sup>

The Restatement (Third) of Foreign Relation Law, which compiled accepted principles of customary international law, defines the jurisdiction to prescribe laws as the power to “make its law applicable to the activities, relations, or status of persons, or the interests of persons in things . . . .”<sup>39</sup> Section 402 of the Restatement provides, among other things, the following bases of jurisdiction: “conduct that, wholly or in substantial part, takes place within its territory” and “conduct outside its territory that has or is intended to have substantial effect within its territory . . . .”<sup>40</sup> These bases were reflected in approaches developed by the federal courts—viz. the “conduct test” and the “effects test.”<sup>41</sup>

The Second Circuit developed the conduct and the effects tests to decide whether U.S. securities laws should be applied extraterritorially.<sup>42</sup> Under the conduct test, the U.S. courts have subject matter jurisdiction when “substantial acts in furtherance of the fraud” occurred on U.S. soil.<sup>43</sup> Under the effects test, the U.S. courts have subject matter jurisdiction when “the wrongful conduct had a substantial effect in the United States or upon United States citizens.”<sup>44</sup> The effects must be strong enough to generate “foreseeable and substantial harm to interests in the United States”<sup>45</sup>; mere adverse effects are insufficient.<sup>46</sup>

One problem with the conduct test is that when significant conduct occurs in multiple jurisdictions, all jurisdictions may have enough activity within their borders to justify asserting jurisdiction.<sup>47</sup> This is particularly true for securities transactions.<sup>48</sup> Similarly, cross-border securities transactions likely affect multiple jurisdictions, so the effects test also allows extraterritorial application by multiple jurisdictions.<sup>49</sup>

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38. See *id.* (citing a leading article, Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002)).

39. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401 (AM. LAW INST. 1987).

40. *Id.* at § 402.

41. *Beyea*, *supra* note 8, at 146.

42. *Id.* at 147.

43. *Psimenos v. E.F. Hutlon & Co., Inc.*, 722 F.2d 1041, 1045 (2d Cir. 1983).

44. *S.E.C. v. Berger*, 322 F.3d 187, 192 (2d Cir. 2003).

45. *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103, 1108 (7th Cir. 1984).

46. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 989 (2d Cir. 1975).

47. Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT'L L. & BUS. 207, 218 (1996).

48. *Id.*

49. *Id.*

In *Morrison v. National Australia Bank*, the Supreme Court overruled the two tests and introduced a new test: the transactional test.<sup>50</sup> The Court held that Section 10(b) applies to fraudulent action involving “transactions in securities listed on domestic exchanges, and domestic transactions in other securities.”<sup>51</sup> The Court reasoned that the effects test and the conduct test were problematic because they made it impossible to anticipate when antifraud provisions would apply to a transaction.<sup>52</sup>

The *Morrison* decision, however, created a loophole for fraudsters.<sup>53</sup> For example, a person who violates U.S. securities regulation may avoid the application of antifraud provisions by executing trades outside the United States.<sup>54</sup> The U.S. Congress, therefore, added a new provision in the Dodd-Frank Act to close the loophole.<sup>55</sup> Under Section 929P(b) of the Dodd-Frank Act, the SEC and the DOJ may exercise extraterritorial jurisdiction against “conduct within the United States that constitutes significant steps in furtherance of the violation” or “conduct occurring outside the United States that has a foreseeable substantial effect within the United States.”<sup>56</sup> Therefore, even if conduct does not meet the transaction test, the SEC can exercise extraterritorial application of anti-fraud provisions by using the effects or conduct test under the Dodd-Frank Act.<sup>57</sup>

Potential issues remain in overlapping jurisdictions in cross-border cases. Because Section 929P(b) mirrored words used in cases before *Morrison*, the meaning of phrases such as “significant steps in furtherance of the violation” and “a foreseeable substantial effect” are still unclear.<sup>58</sup> Because the test left much ambiguity for courts to decide, depending on specific facts in a particular case, the SEC and the DOJ could exercise extraterritorial jurisdiction arbitrarily even when the U.S.

50. *Morrison v. Nat’l Austl. Bank*, 561 U.S. 247, 269–70 (2010).

51. *Id.* at 267.

52. *Id.* at 257–62.

53. See Park, *supra* note 6, at 76–77.

54. See *id.* at 77 (providing an example where a chemist obtained confidential information from the U.S. FDA and traded securities on a Chinese exchange).

55. *Id.* at 77–78.

56. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864 (2010).

57. Note that the transaction test still applies to litigation by private parties. As required by Section 929Y of the Dodd-Frank Act, the SEC conducted a study to consider the extension of the cross-border scope of private actions. See generally Staff of the SEC, *Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934* (Apr. 2012) <https://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf> [<http://web.archive.org/web/20190928020107/https://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf>].

58. Park, *supra* note 6, at 80.

interest was only nominal.<sup>59</sup> This in turn could lead to regulatory overlaps where the claims by the SEC or the DOJ based on the effects test or the conduct test could overlap with claims by foreign regulators.<sup>60</sup>

## 2. Carbon Copy Prosecution

Regulatory overlaps exist not only when two securities regulators exercise jurisdiction concurrently, but also when there is a follow-on or “carbon copy” prosecution.<sup>61</sup> A carbon copy prosecution is defined as “successive, duplicative prosecutions by multiple sovereigns for conduct transgressing the laws of several nations, but arising out of the same common nucleus of operative facts.”<sup>62</sup>

In a recent Foreign Corrupt Practices Act (FCPA) case, while the U.S. was the global anticorruption leader, a corporation reaching a negotiated resolution with U.S. authorities faced a risk that other countries would initiate prosecutions based on the same facts.<sup>63</sup> More jurisdictions have been actively enacting and enforcing their own local anticorruption laws.<sup>64</sup> If a company enters into a negotiated resolution with the DOJ, the company may then have difficulty with local authorities, due to the collateral estoppel doctrine or information shared by the DOJ.<sup>65</sup> As globalization makes the world smaller, carbon copy prosecutions increase in frequency, size, scope, and force.<sup>66</sup>

An empirical analysis found a strong statistical correlation between extraterritoriality and national policy implementation: the odds of a country enforcing its own anti-corruption case were twenty times greater if it had experienced extraterritorial application of the FCPA.<sup>67</sup> This correlation suggests that powerful regulators in larger markets could

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59. *Id.* at 80–81.

60. *See id.* at 81 (“The effects and conduct tests restored by the Dodd-Frank Act result in claims that overlap with those of other countries’ transactional tests. . .”).

61. Andrew S. Boutros & T. Markus Funk, “Carbon Copy” Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World, 2012 U. CHI. LEGAL F. 259, 269 (2012).

62. *Id.*

63. *See id.* at 259–60 (discussing a case in which Nigerian authorities sought criminal penalties on a U.S. company that had settled with the DOJ).

64. *Id.* at 270.

65. *Id.* at 275.

66. *Id.* at 298; *see also* Sarah C. Kaczmarek & Abraham L. Newman, *The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation*, 65 INT’L ORG. 745, 745 (2011) (observing that even though legal systems and sovereignty were traditionally territorial, courts and regulators have applied and enforced national law to conduct transpiring outside of their physical territory).

67. Kaczmarek & Newman, *supra* note 66, at 747.

induce political activism in other jurisdictions where enforcement is weak because the “stronger” regulator may provide legitimacy and attention to advocates, as well as opponents, of ruling parties.<sup>68</sup> Also, decisions by strong regulators such as the DOJ and the SEC may have multiplying but unintentional spillover effects, altering national decision making in other jurisdictions.<sup>69</sup> “Weaker” regulators may follow “stronger” regulators simply in order to collect substantial penalties from wealthy corporations.

While carbon copy prosecution of market misconduct may have a positive effect in helping “weaker” jurisdictions step up, and while it does not disturb other regulators, there may be other problems such as increased compliance costs for market participants and duplicative recovery, as described in Section III.E.1 below.

### III. THE INTERNATIONAL DOUBLE JEOPARDY PRINCIPLE

Regulatory overlaps could be costly not only for market participants but also for regulators themselves because they could prevent other regulators from continuing enforcement due to international double jeopardy concerns. The double jeopardy principle generally applies to courts within the same sovereign,<sup>70</sup> but does it automatically apply across states as well? On this issue, there seems to be no general principle that is settled or recognized in international law.<sup>71</sup> Rather, each country has its own view on whether the double jeopardy principle applies internationally.<sup>72</sup> There are two distinctive approaches: countries, such as the United States and Japan, that do not recognize the international

68. *Id.* at 748–50.

69. *Id.* at 765.

70. Colangelo, *supra* note 3, at 779.

71. See INT’L CRIM. L. SERV., MODULE 3: GENERAL PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 9, <https://iici.global/0.5.1/wp-content/uploads/2018/03/icls-training-materials-sec-3-general-principles-of-icl.pdf> [<http://web.archive.org/web/20191110213542/https://iici.global/0.5.1/wp-content/uploads/2018/03/icls-training-materials-sec-3-general-principles-of-icl.pdf>]; see also Colangelo, *supra* note 3, at 774 (observing that some states provide near absolute double jeopardy protection and others provide none at all); Gerard Conway, *Ne Bis in Idem in International Law*, 3 INT’L CRIM. L. REV. 217, 217–18 (2003) (observing that the majority of writers deny “the principle of *ne bis in idem* . . . as a rule of custom or a general principle of international law”).

72. Nicolas Bourtin et al., *Double Jeopardy: Coordinating Cross-Border Corruption Investigations*, N.Y. L.J. (Aug. 10, 2012), <https://www.sullcrom.com/siteFiles/Publications/Delahunty-Bourtin-Double-Jeopardy.pdf> [<http://web.archive.org/web/20190928123307/https://www.sullcrom.com/siteFiles/Publications/Delahunty-Bourtin-Double-Jeopardy.pdf>].

double jeopardy principle; and countries, such as the United Kingdom and Canada, that do.<sup>73</sup>

In this Part, this Article will first look at the double jeopardy principle as it applies domestically and provide its history, justification, and scope—including whether it applies to civil or administrative penalties. Second, the Article will explore current international law and practice regarding double jeopardy to show that the international double jeopardy principle is not uniformly accepted. Third, it will illustrate an approach in the United States where courts have denied the international double jeopardy principle under the dual sovereignty doctrine, but where regulators have shown some deference to other regulators in practice. Fourth, the Article will describe the opposite approach in the European Union, where the international double jeopardy principle is strictly recognized. Finally, it will compare arguments for and against recognizing the international double jeopardy principle.

#### *A. Double Jeopardy Principle as Domestic Law*

Double jeopardy is generally known as the principle that a person may not be put in peril of conviction twice for the same offense.<sup>74</sup> The term is used globally in domestic and international law.<sup>75</sup> At least fifty jurisdictions recognize the double jeopardy principle under constitutional, statutory, or common law.<sup>76</sup> For example, Article 39 of the Japanese Constitution provides that “[n]o person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy.”<sup>77</sup>

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73. *Id.*; see Frederick T. Davis, *International Double Jeopardy: U.S. Prosecutions and the Developing Law in Europe*, 31 AM. U. INT’L L. REV. 57, 63 (2016) (“[T]he United States and Europe have followed quite different courses.”).

74. Colangelo, *supra* note 3, at 778.

75. See *id.* at 772 (“The language of double jeopardy permeates U.S. and international law.”).

76. Bourtin et al., *supra* note 72, at 4; see M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT’L L. 235, 292 (1993) (finding that the constitutions of 51 out of 139 countries have a double jeopardy clause); Colangelo, *supra* note 3, at 817 (observing that most countries have some type of double jeopardy protection).

77. NIHONKOKU KENPŌ [KENPŌ] [Constitution], art. 39 (Japan), [http://japan.kantei.go.jp/constitution\\_and\\_government\\_of\\_japan/constitution\\_e.html](http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html) [[http://web.archive.org/save/http://japan.kantei.go.jp/constitution\\_and\\_government\\_of\\_japan/constitution\\_e.html](http://web.archive.org/save/http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html)].

### 1. History

The root of the idea that a person cannot be prosecuted twice for the same offense dates back to ancient Greece and Rome.<sup>78</sup> It was established as a “universal maxim of the common law” in England by the thirteenth century.<sup>79</sup> Because there were two separate court systems then (the church-run ecclesiastical court and the secular king’s court), “there was concern about whether a person convicted in the ecclesiastical court could be tried in the king’s court.”<sup>80</sup>

The earliest settlers of the United States brought the principle “as part of their heritage of freedom.”<sup>81</sup> As Justice Black observed in his dissent in *Bartkus v. Illinois*, “it is found . . . not only in the Federal Constitution, but in the jurisprudence or constitutions of every [s]tate, as well as most foreign nations.”<sup>82</sup> The term double jeopardy comes from the wording of the Fifth Amendment: “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.”<sup>83</sup>

A similar principle is also commonly accepted in civil law countries and international legal systems, referred to as *non bis in idem*, or “not twice for the same thing.”<sup>84</sup> *Non bis in idem*, however, is not exactly the same as the double jeopardy principle because the former applies to the same *facts* while the latter applies to the same *offense*.<sup>85</sup> For example, when a person takes an action that constitutes grand larceny in country A and bribery in country B, the double jeopardy principle will not apply, regardless of whether it is applied internationally, because the two

78. *Bartkus v. Illinois*, 359 U.S. 121, 151–52, 152 n.3 (1958) (Black, J., dissenting) (citing ROBERT JOHNSON BONNER, *LAWYERS AND LITIGANTS IN ANCIENT ATHENS: THE GENESIS OF THE LEGAL PROFESSION* 195 (1927)) (describing legal tactics in ancient Greece); MAX RADIN, *HANDBOOK OF ROMAN LAW* 475 n.28 (1927) (observing that a form of double jeopardy was forbidden under Roman law).

79. *Bartkus*, 359 U.S. at 152–53, 152 n.5, 153 n.6.

80. Anthony J. Bellanto QC, Presentation at the Lexis Nexis Criminal Law Conference: Developments in Double Jeopardy & The Application of the Statutory Non-Parole Period 4 (Nov. 30, 2011), [https://criminalcpd.net.au/wp-content/uploads/2016/09/Bellanto\\_QC\\_Double\\_Jeopardy\\_and\\_Standard\\_NonParole\\_Periods.pdf](https://criminalcpd.net.au/wp-content/uploads/2016/09/Bellanto_QC_Double_Jeopardy_and_Standard_NonParole_Periods.pdf) [http://web.archive.org/web/20190928141423/https://criminalcpd.net.au/wp-content/uploads/2016/09/Bellanto\_QC\_Double\_Jeopardy\_and\_Standard\_NonParole\_Periods.pdf].

81. *Bartkus*, 359 U.S. at 153.

82. *Id.* at 154.

83. U.S. CONST. amend. V; see also *Ex parte Lange*, 85 U.S. 163, 173 (1873) (“[W]e do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.”).

84. Colangelo, *supra* note 3, at 778–79.

85. *Id.* at 779.

offenses are different, but *non bis in idem* may apply because the facts are the same.<sup>86</sup>

## 2. Application to Administrative and Civil Penalties

As described above, most countries generally agree with the double jeopardy principle as applying domestically in a criminal context.<sup>87</sup> One material issue that may arise in law enforcement in countries where both criminal and civil or administrative penalties are available is whether the double jeopardy principle would bar civil or administrative proceedings after a conviction is finalized in a criminal proceeding, or vice versa.<sup>88</sup> Before looking into the international double jeopardy principle, this Section will examine whether the double jeopardy principle in domestic laws in the United States and other countries covers civil and administrative penalties.

### a. United States

As Frederick T. Davis observes, "it is very common for a company to face simultaneous, or successive, investigations by the DOJ and the SEC for the same conduct, and to make large payments to both."<sup>89</sup> Does that mean that both the DOJ and the SEC can impose monetary penalties for the same conduct without violating the double jeopardy principle? In the landmark case, *Hudson v. United States*, the Supreme Court established a guideline for whether double jeopardy protection applies to parallel criminal and civil or administrative proceedings.<sup>90</sup>

In 1989, the Office of the Comptroller of Currency (OCC), a federal administrative agency, imposed civil monetary penalties and occupational debarment on three bank officials in Oklahoma for violating several federal banking statutes and regulations.<sup>91</sup> The three officials were later indicted on criminal charges arising from the same conduct, and they moved to dismiss the criminal charges, claiming

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86. The analysis in this Article, however, refers only to the double jeopardy principle unless otherwise noted. This is for the sake of simplicity and to conform with the use of the term in most of the articles discussing the international double jeopardy principle, including those cited in this Article. The difference comes into play later when this Article discusses a recent development in Europe. See *infra* Section IV.B.

87. See *id.*

88. See *id.*

89. Davis, *supra* note 73, at 64.

90. See generally *Hudson v. United States*, 522 U.S. 93 (1997).

91. *Id.* at 95-97.

double jeopardy protection.<sup>92</sup> The Tenth Circuit had previously found that the civil monetary penalties imposed by the OCC were not so grossly disproportionate to the government's damages as to constitute punishment for the purpose of the double jeopardy clause.<sup>93</sup>

The Supreme Court affirmed the decision of the Tenth Circuit, holding that the civil monetary penalties were not criminal punishment required to trigger double jeopardy protection under the Constitution.<sup>94</sup> The Court formed two inquiries for the purposes of double jeopardy analysis that lower courts should consider: (1) whether the legislature had indicated either expressly or impliedly, that the sanction was a civil sanction and (2) whether the petitioner could show "by the clearest proof" that the purportedly civil sanction was so punitive on its face as to be transformed to a criminal penalty.<sup>95</sup>

As the SEC has noted, "[*Hudson*] is why we may today bring action for serious monetary penalties without much concern about compromising a parallel criminal prosecution for the same conduct."<sup>96</sup>

In cross-border cases, however, imposition of a criminal penalty in one country may prevent imposition of an administrative or civil penalty in another country if double jeopardy protection applies to a civil or administrative proceeding. Even if a country has a rule similar to that of the United States, in the international setting, it would be more difficult to define what "punitive on its face" would mean. Such ambiguity may cause a regulator to race to impose administrative sanctions for fear that the international double jeopardy principle would otherwise preclude it.

92. *Id.* at 97–98.

93. *United States v. Hudson*, 92 F.3d 1026, 1029 (10th Cir. 1996).

94. *Hudson*, 522 U.S. at 104–05; *see also* *United States v. Ursery*, 518 U.S. 267, 292 (1996) (holding that "*in rem* civil forfeitures are neither 'punishment' nor criminal for purposes of the Double Jeopardy clause").

95. *Hudson*, 522 U.S. at 99. *But see* Stanley E. Cox, *Halper's Continuing Double Jeopardy Implications: A Thorn by Any Other Name Would Prick as Deep*, 39 ST. LOUIS U. L.J. 1235, 1239 (1995) (arguing that a defendant should not "twice be put in jeopardy of punishment for the same actions, regardless of whether the punisher wears a civil or criminal hat").

96. Thomas C. Newkirk, Associate Director, Division of Enforcement, SEC, Remarks at the 16th International Symposium on Economic Crime at Jesus College, Cambridge, England (Sept. 19, 1998), <https://www.sec.gov/news/speech/speecharchive/1998/spch222.htm> [<http://web.archive.org/save/https://www.sec.gov/news/speech/speecharchive/1998/spch222.htm>].

*b. Japan*

Japan has a rule similar to that of the United States for application of the double jeopardy principle to administrative penalties.<sup>97</sup> The administrative monetary penalty proceeding under the Financial Instruments and Exchange Act (FIEA) was introduced in 2004 as an administrative action to impose financial obligations on a violator for the purpose of deterring market misconduct.<sup>98</sup> Under the FIEA, financial obligations are considered equivalent to economic benefits gained by market misconduct.<sup>99</sup> Subjecting the same conduct to both an administrative monetary penalty and a criminal penalty under the FIEA is not considered a violation of the double jeopardy principle, pursuant to decisions of the Supreme Court of Japan (SCJ).<sup>100</sup>

The SCJ has held that an administrative tax penalty for tax evasion in addition to a criminal penalty for the same act would not violate the double jeopardy principle.<sup>101</sup> The Court reasoned that while a criminal penalty is imposed as a penalty for the antisocial or immoral nature of tax evasion, an administrative tax penalty proceeding is an administrative action for the purpose of preventing violation of tax laws, thereby promoting effective payment of taxes.<sup>102</sup> Similarly, the Court has held that the imposition of an administrative monetary penalty under the Antitrust Act and the filing of a civil suit by the government for disgorgement, coupled with a criminal penalty for the same act, would not violate the double jeopardy principle.<sup>103</sup>

Even though the administrative monetary penalty under the FIEA does not implicate double jeopardy in the domestic setting, it may cause

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97. Memorandum of the Financial System Council, Working Group on Insider Trading Regulations, Nov. 7, 2012, [http://www.fsa.go.jp/singi/singi\\_kinyu/insider\\_h24/gijiroku/20121107.html](http://www.fsa.go.jp/singi/singi_kinyu/insider_h24/gijiroku/20121107.html) [[http://web.archive.org/web/20191119001722/https://www.fsa.go.jp/singi/singi\\_kinyu/insider\\_h24/gijiroku/20121107.html](http://web.archive.org/web/20191119001722/https://www.fsa.go.jp/singi/singi_kinyu/insider_h24/gijiroku/20121107.html)] (The editors of the *Wayne Law Review* rely on the author's expertise regarding citations to untranslated Japanese-language publications.).

98. *Id.*

99. *Id.*

100. *Id.*

101. Kotobukisha, [Sup. Ct.] Apr. 30, 1958, no. 12 [MINSHU] 938 n.6 (Japan) (decision available in the Wayne State University Law School Library). (The editors of the *Wayne Law Review* rely on the author's expertise regarding citations to untranslated Japanese-language publications.).

102. *Id.*

103. Kotobukisha, [Sup. Ct.] Oct. 13, 1998, [MINSHU] n. 190, 1 (Japan) (citing Kotobukisha, [Sup. Ct.] Apr. 30, 1958, no. 12 [MINSHU] 938 n.6 (Japan)) (decision available in the Wayne State University Law School Library). (The editors of the *Wayne Law Review* rely on the author's expertise regarding citations to untranslated Japanese-language publications.).

some issues in the international setting. For example, the FIEA may potentially prevent criminal enforcement in countries, such as the United Kingdom and Canada, where international double jeopardy is recognized.<sup>104</sup> The term “administrative monetary penalty” may be more likely to be construed as quasi-criminal outside of Japan. “Administrative monetary penalty” is an English translation of *Kachōkin* in the original Japanese, which is generally accepted as a correct translation.<sup>105</sup> *Kachōkin*, however, does not contain any meaning of “penalty,” and the literal translation of *Kachōkin* should have been either “administrative monetary obligation” or “administrative monetary imposition.”<sup>106</sup>

### c. Other Countries

On the other hand, in some countries, administrative monetary penalties are considered “penal” or “quasi-criminal”. For example, in Singapore, a “civil penalty” sought by the SEC was construed as “penal” in nature.<sup>107</sup> Under Section 3(b) of the Evidence Act of Singapore, assistance to foreign authorities may be allowed only if the High Court of Singapore is satisfied that the evidence is to be “obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated.”<sup>108</sup>

Singaporean residents challenged the SEC’s request, arguing that U.S. civil proceedings instituted by the SEC would be characterized as criminal in nature.<sup>109</sup> The court held that assistance could be provided for injunctive relief that is civil in nature both under Singaporean and U.S. laws, but found that the civil penalties were penal in nature as the money

104. See *infra* Section III.D.2 (discussing the international double jeopardy principle in the United Kingdom and Hong Kong).

105. For example, the Securities and Exchange Surveillance Commission translates *Kachōkin* as an administrative monetary penalty. See *Recommendation for Administrative Monetary Penalty Payment Order for Market Manipulation of 10-year Japanese Government Bond Futures by Citigroup Global Markets Limited*, SESC (Mar. 26, 2019), <https://www.fsa.go.jp/sesc/english/news/reco/20190326-1.htm> [<http://web.archive.org/web/20191119003306/https://www.fsa.go.jp/sesc/english/news/reco/20190326-1.htm>].

106. “Ka” means imposition, “chō” means collection, and “kin” means money. There are at least two Chinese characters used in Japan to express “ka,” and one contains a meaning of “criminal penalty[.]” but the other does not. The latter Chinese character is intentionally used for *Kachōkin*.

107. Evidence (Civil Proceedings in Other Jurisdictions) Act, Ch. 98 (2013) (Sing.), <https://sso.agc.gov.sg/Act/ECPOJA1979> [<http://web.archive.org/save/https://sso.agc.gov.sg/Act/ECPOJA1979>].

108. *Id.*

109. *S.E.C. v. Ong Congqin Bobby & Anor.* [1998] 3 SLR(R) 19, 19 (Sing.).

collected would go to the Treasury, not the injured persons.<sup>110</sup> Such construction of administrative monetary penalties as “penal” or “quasi-criminal” may also implicate double jeopardy concerns. For example, in 2014, the European Court of Human Rights ruled that administrative penalties the Italian securities regulator imposed precluded a criminal prosecution.<sup>111</sup> This decision was echoed in France, where the Constitutional Court of France barred a criminal trial of individuals and companies accused of insider trading on the ground that the same defendants had already been found not liable in an administrative proceeding by a French securities regulator.<sup>112</sup>

### *B. International Law and Practice*

A certain level of double jeopardy protection can be seen in international law and practice, including in international human rights law, international cooperation on extradition, and international criminal tribunal statutes.<sup>113</sup> None of the double jeopardy protections seen in the above three areas of international relations can be characterized as general international principles.<sup>114</sup>

Further, as Anthony J. Colangelo observes, “domestic practice on the point is so mixed that no principle responsibly can be deduced.”<sup>115</sup> Rather, as discussed below, domestic laws and practices are sharply divided into two distinct approaches. After surveying the domestic laws and practices of European countries, Advocate General Mayras in the European Court of Justice concluded that “the *non bis in idem* rule, which is stated and applied in domestic law, is far from being accepted as a general principle of law in international relations.”<sup>116</sup>

110. *Id.*

111. *Grande Stevens v. Italy*, App. No. 18640/10, Eur. Ct. H.R. ¶ 229 (2014), <http://hudoc.echr.coe.int/eng?i=001-141794>

[<http://web.archive.org/web/20191119003813/https://hudoc.echr.coe.int/eng>].

See *infra* Section IV.B.2 for more discussion.

112. Conseil constitutionnel [CC] [Constitutional Court] decision Nos. 2014-453/454 QPC and 2015-462 QPC, Mar. 18, 2015, ¶ 36 (Fr.), [https://www.conseil-constitutionnel.fr/en/decision/2015/2014453\\_454QPCet2015462QPC.htm](https://www.conseil-constitutionnel.fr/en/decision/2015/2014453_454QPCet2015462QPC.htm)

[[http://web.archive.org/web/20191112000703/https://www.conseil-constitutionnel.fr/en/decision/2015/2014453\\_454QPCet2015462QPC.htm](http://web.archive.org/web/20191112000703/https://www.conseil-constitutionnel.fr/en/decision/2015/2014453_454QPCet2015462QPC.htm)].

See *infra* Section IV.B.2 for more discussion.

113. See Colangelo, *supra* note 3, at 805–15 (observing various international laws and practices concerning the double jeopardy principle).

114. See *id.*

115. *Id.* at 817.

116. Case T-7/72, *Boehringer Mannheim GmbH v. Comm'n*, 1972 E.C.R. 1291, 1296.

*C. No International Double Jeopardy—The U.S. Approach*

In the United States, double jeopardy protection under the Constitution does not extend internationally under the dual sovereignty doctrine, but in practice regulators such as the DOJ and the SEC may defer to foreign judgments or authorities under enforcement comity.<sup>117</sup> Some civil law countries—such as Japan, Germany, and Italy—follow suit by not recognizing international double jeopardy.<sup>118</sup>

*1. Dual Sovereignty Doctrine in the United States*

As the Fifth Circuit said, “[t]he Constitution of the United States has not adopted the doctrine of international double jeopardy.”<sup>119</sup> This is because the Fifth Amendment to the Constitution is interpreted to proscribe multiple prosecutions only by a single sovereign under the “dual sovereignty doctrine.”<sup>120</sup> Under the dual sovereignty doctrine, even if a defendant has already been convicted or acquitted by one sovereign, the defendant may be tried again for the same offense by another sovereign.<sup>121</sup> For example, the federal government is not prevented from punishing an offender for the same offense even though the offender was previously prosecuted by a U.S. state or foreign country.<sup>122</sup> On the other hand, the Supreme Court has held that successive prosecutions for the same offense by the same sovereign are prohibited by the protection against double jeopardy,<sup>123</sup> even if a judge ruled incorrectly in the first case.<sup>124</sup>

117. See *infra* Section III.C.1–2.

118. See *infra* Section III.C.3.

119. *United States v. Martin*, 574 F.2d 1359, 1360 (5th Cir. 1978); see also *Davis*, *supra* note 73, at 63 (“In the United States, the Double Jeopardy clause provides no protection against multiple prosecutions across borders.”).

120. See *Heath v. Alabama*, 474 U.S. 82, 87–93 (1985) (holding that under the dual sovereignty doctrine, “successive prosecutions by two [s]tates for the same conduct are not barred by the Double Jeopardy Clause” of the Fifth Amendment, hence, Alabama is not barred from prosecuting the petitioner after he was already sentenced with a life imprisonment in Georgia).

121. See *Bartkus v. Illinois*, 359 U.S. 121, 136 (1958) (observing precedent interpreting the Fifth Amendment as not preventing a second prosecution where the first one was by a different government).

122. See *United States v. Richardson*, 580 F.2d 946, 947 (9th Cir. 1978) (holding that Guatemalan convictions did not bar prosecution by the United States).

123. *E.g.*, *Ball v. United States*, 163 U.S. 662, 669 (1896).

124. *Sanabria v. United States*, 437 U.S. 54, 68–69 (1978).

## 2. Practice in the United States—Enforcement Comity

United States prosecutors have wide discretion concerning whether to prosecute.<sup>125</sup> Although the United States does not recognize the international double jeopardy principle, both DOJ and SEC officials have said that they would defer to foreign investigations in certain cases.<sup>126</sup> For example, an SEC official said that the Commission would not “turn a blind eye” to any foreign action: “We certainly will take that into account in terms of what we are going to do.”<sup>127</sup>

Enforcement comity that modifies the dual sovereignty doctrine was formalized in the Petite Policy, the U.S.-E.C. Positive Comity Agreement, the Guidance for Handling Criminal Cases, and the DOJ’s policy regarding foreign authorities, as described below.

### a. Petite Policy

The DOJ has adopted internal policies that modify the dual sovereignty doctrine vis-à-vis U.S. states.<sup>128</sup> Under the Petite Policy, federal prosecutors must decline to prosecute a defendant who was previously convicted or acquitted in a state court.<sup>129</sup> The policy requires deference to a prior state prosecution “even where a prior state prosecution would not legally bar a subsequent federal prosecution under the Double Jeopardy Clause because of the doctrine of dual sovereignty.”<sup>130</sup> The Petite Policy, however, does not confer substantive rights on criminal defendants and contains many exceptions.<sup>131</sup>

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125. Davis, *supra* note 73, at 65; see also Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 4–5 (2009) (“Under federal law, a public prosecutor has exclusive discretion to decide whether or not to prosecute any crime that is supported by probable cause.”).

126. F. Joseph Warin et al., *2008 Year-End FCPA Update*, GIBSON DUNN (Jan. 5, 2009), <https://www.gibsondunn.com/2008-year-end-fcpa-update/> [<http://web.archive.org/web/20190928200257/https://www.gibsondunn.com/2008-year-end-fcpa-update/>].

127. *Id.*

128. Although the Petite Policy applies only domestically, this Article will later discuss an argument that it be adjusted and applied to multijurisdictional enforcement. See *infra* Section VI.B.

129. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL, § 9-2.031 (2019) [hereinafter U.S. ATTORNEYS’ MANUAL]. The DOJ adopted the policy after the Supreme Court’s decision in *Bartkus* and named it after the decision in *Petite v. United States*, 361 U.S. 529 (1960); see also *United States v. Barrett*, 496 F. 3d 1079, 1120 (10th Cir. 2007) (describing the policy).

130. U.S. ATTORNEYS’ MANUAL, *supra* note 129, at § 9-2.031(B).

131. In *Barrett*, the Tenth Circuit Court observed that “the Petite policy ‘is merely a housekeeping provision of the Department’ that, ‘at most,’ serves as ‘a guide for the use

According to Colangelo, the Petite Policy is “an advanced and formalized version of enforcement comity . . . between the U.S. federal and state governments.”<sup>132</sup> The Petite Policy, however, does not apply internationally.<sup>133</sup> As discussed in Section III.C.2.d below, U.S. prosecutors may view a non-U.S. prosecution, at most, as one of the factors they can consider in determining whether to prosecute.<sup>134</sup> Therefore, how U.S. prosecutors might react in response to a non-U.S. prosecution, therefore, is unpredictable.<sup>135</sup>

*b. U.S.-E.C. Positive Comity Agreement*

In some areas of international regulation, more formal avenues of enforcement comity have been established, such as those in the Positive Comity Agreement between the European Communities and the United States.<sup>136</sup> Under the Agreement, competition authorities of one party may request the competition authorities of the other party to take enforcement action against anticompetitive activities taking place in the requested party’s jurisdiction that affect the interests of the requesting party.<sup>137</sup>

The Agreement additionally contains:

communication and cooperation provisions requiring that the competition authorities of the Requested Party agree that in conducting their enforcement activities they will: devote adequate resources to the enforcement activities;<sup>138</sup> use best efforts to pursue all sources of information . . . ;<sup>139</sup> inform, and provide information to, the authorities of the Requesting Party on the status of the enforcement activities;<sup>140</sup> “notify the . . .

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of the Attorney General and the United States Attorneys in the field,’ and thus does not confer any enforceable rights upon criminal defendants.” *Barrett*, 496 F.3d at 1120 (internal citation omitted); *see also* *Davis*, *supra* note 73, at 64–65 (observing that the policy does not define any rights enforceable in court).

132. Colangelo, *supra* note 3, at 851.

133. *Davis*, *supra* note 73, at 65.

134. *Id.*

135. *Id.* (explaining there is no explicit principles, references, or guidelines).

136. Colangelo, *supra* note 3, at 853; *see* Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, U.S.-E.C., June 4, 1998, T.I.A.S. No. 12,958 [hereinafter Positive Comity Agreement].

137. Positive Comity Agreement, *supra* note 136, at art. III.

138. Colangelo, *supra* note 3, at 854 (quoting Positive Comity Agreement, *supra* note 136, at art. IV(2)(c)(i)).

139. *Id.* (quoting Positive Comity Agreement, *supra* note 136, at art. IV(2)(c)(ii)).

140. *Id.* (quoting Positive Comity Agreement, *supra* note 136, at art. IV(2)(c)(iii)).

authorities of the Requesting Party of any change in their intentions . . .”;<sup>141</sup> and use best efforts to quickly pursue completion of an investigation and to obtain remedies.”<sup>142</sup> . . . The requested party’s authorities also must “fully inform” the requesting party’s authorities “of the results of their investigation and take into account the views” of the requesting party’s authorities “prior to . . . settlement, initiation of proceedings, adoption of remedies, or termination of the investigation”<sup>143</sup> as well as “comply with any reasonable request that may be made” by the Requesting Party’s authorities.”<sup>144</sup> [These provisions] intend to ensure that the Requesting Party’s interests are satisfied by the Requested Party’s enforcement action, thus disposing of the need for multiple enforcement actions.<sup>145</sup>

The Agreement further provides that “[t]he competition authorities of the Requesting Party may defer or suspend their own enforcement activities . . . [but nothing] in this Agreement precludes the competition authorities of a Requesting Party that choose to defer or suspend independent enforcement activities from later initiating or reinstating such activities.”<sup>146</sup> The Requesting Party therefore retains the sovereign power to pursue its own action should it feel that its interests remain unsatisfied.<sup>147</sup> Jay Holtmeier observes that this agreement shows how the United States and the EU have been able to coordinate and establish cooperation to reduce the costs of double jeopardy and streamline international enforcement.<sup>148</sup>

*c. A-G Guidance and Joint Guidance for Handling Criminal Cases*

In 2007, the Attorney-General of the United Kingdom issued domestic guidance for handling criminal cases affecting both the United

141. *Id.* (quoting Positive Comity Agreement, *supra* note 136, at art. IV(2)(c)(iv)).

142. *Id.* at 854–55 (quoting Positive Comity Agreement, *supra* note 136, at art. IV(2)(c)(v)).

143. *Id.* at 855 (quoting Positive Comity Agreement, *supra* note 136, at art. IV(2)(c)(vi)).

144. *Id.* (quoting Positive Comity Agreement, *supra* note 136, at art. IV(2)(c)(vii)).

145. *Id.*

146. Positive Comity Agreement, *supra* note 136, at art. IV(3)(4).

147. Colangelo, *supra* note 3, at 855.

148. Jay Holtmeier, *Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities*, 84 *FORDHAM L. REV.* 493, 519 (2015).

Kingdom and the United States (A-G Guidance).<sup>149</sup> In addition to the requirement that the “liaison lawyer” should promptly inform the Office of International Affairs of the DOJ of any case raising concurrent jurisdictional issues with the United States,<sup>150</sup> U.K. and U.S. prosecutors should confer “with the aim of developing a case strategy on issues arising from concurrent jurisdiction.”<sup>151</sup> U.K. and U.S. prosecutors also should consult each other to decide, among other things, (1) “where and how investigations may be most effectively pursued[;]” (2) “where and how prosecutions should be initiated, continued or discontinued[;]” and (3) “whether and how aspects of the case should be pursued in the different jurisdictions.”<sup>152</sup>

In response to the A-G Guidance, in 2007 the Attorneys General of the United Kingdom and the United States jointly issued guidance for handling criminal cases with concurrent jurisdiction (Joint Guidance), generally following the provisions of the A-G Guidance.<sup>153</sup> Paragraph Four of the Joint Guidance provides a step-by-step approach in concurrent jurisdiction: (1) prosecutors should share information early; (2) prosecutors should confer on cases and the issues; and (3) where prosecutors cannot reach agreement, the offices of Attorney General or Lord Advocate should take the lead.<sup>154</sup> Paragraph 14 provides which

149. ATTORNEY GENERAL’S DOMESTIC GUIDANCE FOR HANDLING CRIMINAL CASES AFFECTING BOTH ENGLAND WALES OR NORTHERN IRELAND AND THE UNITED STATES OF AMERICA (2007) [hereinafter A-G GUIDANCE], <https://publications.parliament.uk/pa/ld200607/ldlwa/70125ws1.pdf> [<http://web.archive.org/web/20190928210757/https://publications.parliament.uk/pa/ld200607/ldlwa/70125ws1.pdf>].

150. *Id.* at ¶ 9.

151. *Id.* at ¶ 13.

152. *Id.* at ¶ 15. The U.K. Ministry of Justice noted that without timely assistance, authorities in England and Wales may be hindered from prosecution by international double jeopardy. See U.K. MINISTRY OF JUSTICE, CONSULTATION ON A NEW ENFORCEMENT TOOL TO DEAL WITH ECONOMIC CRIME COMMITTED BY COMMERCIAL ORGANISATIONS: DEFERRED PROSECUTION AGREEMENTS (May 2012), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/236065/8348.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/236065/8348.pdf) [[http://web.archive.org/web/20190928232840/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/236065/8348.pdf](http://web.archive.org/web/20190928232840/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/236065/8348.pdf)].

153. GUIDANCE FOR HANDLING CRIMINAL CASES WITH CONCURRENT JURISDICTION BETWEEN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA (2007) [hereinafter JOINT GUIDANCE], [https://www.cps.gov.uk/sites/default/files/documents/legal\\_guidance/Agreement-handling-criminal-cases-concurrent-jurisdiction-UK-USA.pdf](https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Agreement-handling-criminal-cases-concurrent-jurisdiction-UK-USA.pdf) [[http://web.archive.org/web/20191112023326/https://www.cps.gov.uk/sites/default/files/documents/legal\\_guidance/Agreement-handling-criminal-cases-concurrent-jurisdiction-UK-USA.pdf](http://web.archive.org/web/20191112023326/https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Agreement-handling-criminal-cases-concurrent-jurisdiction-UK-USA.pdf)].

154. *Id.* at ¶ 4.

issues prosecutors should consult over, and the issues are identical to those provided in paragraph 15 of the A-G Guidance.<sup>155</sup>

Practitioners criticize the A-G Guidance and the Joint Guidance as mere procedural tools that give no guidance on how to resolve problems substantively.<sup>156</sup> They also argue that the absence of clear principles to resolve jurisdictional issues may leave the United Kingdom in a position where it cannot “either secure a conviction or impose an appropriate sentence against U.K. companies as public interest demands.”<sup>157</sup> The step-by-step approach and the consultation provision described above, however, should be a good starting point for securities regulators that currently do not have a procedural tool for resolving double jeopardy issues.

#### *d. DOJ's Policy Regarding Foreign Authority*

There is only one provision where the DOJ's policy potentially requires it to defer to a foreign authority if the foreign authority is better situated to investigate and prosecute the conduct.<sup>158</sup> Section 9-27.240 provides that, in determining whether to defer to the other authorities, the DOJ considers: (1) “[t]he strength of the other jurisdiction's interest in prosecution;” (2) “[t]he other jurisdiction's ability and willingness to prosecute effectively;” and (3) “[t]he probable sentence or other consequences if the person is convicted in the other jurisdiction.”<sup>159</sup> Although the comments to section 9.27-240 imply that the policy is directed to jurisdictional conflicts with U.S. state or local authorities, nothing in the manual or its comments expressly precludes its application to foreign prosecutions.<sup>160</sup> This would inform how securities regulators

155. *Id.* at ¶ 14; see also A-G GUIDANCE, *supra* note 149 and accompanying text (discussing paragraph 15 of the A-G GUIDANCE).

156. Transparency Int'l, *Deterring and Punishing Corporate Bribery: An Evaluation of UK Corporate Plea Agreements and Civil Recovery in Overseas Bribery Cases*, 1, 77 (May 2012) [hereinafter *Deterring Bribery*], <https://www.transparency.org.uk/publications/policy-paper-series-1-deterring-punishing-corporate-bribery-2/> [<http://web.archive.org/web/20191112025926/https://www.transparency.org.uk/publications/policy-paper-series-1-deterring-punishing-corporate-bribery-2/>].

157. *Id.*

158. U.S. ATTORNEYS' MANUAL, *supra* note 129, at § 9-27.240.

159. *Id.*

160. See Daniel Pulecio Boek, *The United States Foreign Corrupt Practices Act and Latin America: The Influence of Local Prosecutorial Efforts in Transnational White-Collar Litigation*, 24 INT'L L.: REV. COLOMB. DERECHO INT. 21, 33–34 (2014); see also U.S. ATTORNEYS' MANUAL, *supra* note 129, at § 9-27.240 cmt. (“Although there may be instances in which a federal prosecutor may wish to consider deferring to prosecution in

should cooperate regardless of whether their jurisdictions recognize the international double jeopardy principle.

With respect to anti-bribery prosecution, the DOJ and the SEC jointly issued a “resource guide” that sets out the principles they follow when making the decision of whether to prosecute.<sup>161</sup> It in turn refers to “enforcement principles” that have been separately issued by the DOJ<sup>162</sup> and the SEC.<sup>163</sup> As Davis points out, however, these guidelines make no explicit references to foreign prosecutions, despite providing significant detail about the many factors to be considered when making decisions concerning whether to prosecute or settle.<sup>164</sup> Davis reasons that it is probably because of “an inherent difficulty in prescribing specific standards and principles, and perhaps from a concern that an attempt to do so might lead to misunderstandings both with targeted parties and with foreign prosecutors.”<sup>165</sup>

#### e. Cases

Cases involving U.S. regulators, however, show that is it unpredictable whether and how U.S. regulators will exercise enforcement comity vis-à-vis non-U.S. regulators.<sup>166</sup> Recent U.S. prosecution of the FCPA cases can be divided into three categories.<sup>167</sup> First, there have been many “me too” prosecutions where a completed outcome in a foreign country was followed by a new and uncoordinated prosecution in the

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another federal district, or to another government, in most instances the choice will probably be between federal prosecution and prosecution by state or local authorities.”).

161. U.S. DEP’T OF JUSTICE & U.S. SEC. AND EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012) [hereinafter FCPA RESOURCE GUIDE], <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> [http://web.archive.org/web/20191112034058/https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf].

162. See U.S. ATTORNEYS’ MANUAL, *supra* note 129, at § 9-28.000.

163. See U.S. SEC. AND EXCH. COMM’N, REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS (2001), <https://www.sec.gov/litigation/investreport/34-44969.htm> [http://web.archive.org/web/20191112153057/https://www.sec.gov/litigation/investreport/34-44969.htm]; see, e.g., *Spotlight on Enforcement Cooperation Program*, SEC. AND EXCH. COMM’N (Sept. 20, 2016), <http://www.sec.gov/spotlight/enfcoopinitiative.shtml> [http://web.archive.org/web/20191112153807/https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml].

164. Davis, *supra* note 73, at 66.

165. *Id.*

166. See *id.*

167. *Id.*

United States.<sup>168</sup> For example, although a Norwegian company, Statoil, paid a \$3 million penalty to the government of Norway,<sup>169</sup> the DOJ imposed an additional \$10.5 million penalty and a three-year deferred prosecution.<sup>170</sup> Second, there have been “very few cases where the DOJ expressed an interest in investigation, but ended up not prosecuting based upon a completed prosecution overseas.”<sup>171</sup> For example, in the case of Dutch company SBM Offshore, after the company reached a negotiated outcome with the Dutch prosecutors and paid a very significant fine, the DOJ informed the company that it would no longer be investigating the matter.<sup>172</sup> Third, falling between the two extremes above, there have been many cases where the DOJ cooperated or coordinated with foreign authorities, though the allocation of responsibilities and penalties were not made publicly available.<sup>173</sup>

There are no clear principles for predicting the degree to which U.S. prosecutors will give credit to non-U.S. prosecutions.<sup>174</sup> Davis observes that in cases where there is a real connection with the United States, such as U.S. participants or victims, U.S. prosecutors will likely take the lead.<sup>175</sup> In other cases, where a connection with the United States is weak, U.S. prosecutors will likely decide not to prosecute if the non-U.S. outcome is perceived to be adequate, as seen in the case of SBM Offshore above.<sup>176</sup>

### 3. Other Countries

In Japan, Article 39 of the Constitution provides: “No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in

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168. *Id.* at 67 (pointing out that the public expressions of “cooperation” may have been used as window dressing to disguise an absence of any real coordination).

169. Stephanie Kirchgassner & Justine Lau, *Statoil Admits Bribe for Iran Oil Rights*, FIN. TIMES, Oct. 14, 2006, at 7.

170. Press Release, Dep’t of Justice, U.S. Resolves Probe Against Oil Company That Bribed Iranian Official (Oct. 13, 2006), [https://www.justice.gov/archive/opa/pr/2006/October/06\\_crm\\_700.html](https://www.justice.gov/archive/opa/pr/2006/October/06_crm_700.html) [[http://web.archive.org/web/20190929001947/https://www.justice.gov/archive/opa/pr/2006/October/06\\_crm\\_700.html](http://web.archive.org/web/20190929001947/https://www.justice.gov/archive/opa/pr/2006/October/06_crm_700.html)].

171. Davis, *supra* note 73, at 67.

172. Sean Hecker et al., *Small Country, Big Punch: The Netherlands’ Anti-Bribery Prosecution of SBM Offshore*, FCPA Update (Debevoise & Plimpton), Dec. 2014, at 13.

173. Davis, *supra* note 73, at 68.

174. *Id.* at 69.

175. *Id.*

176. *Id.*

double jeopardy.”<sup>177</sup> This double jeopardy protection applies only domestically and not internationally because Article 5 of the Penal Code (Effect of Foreign Judgments) provides: “Even when a final and binding decision has been rendered by a foreign judiciary against the criminal act of a person, it shall not preclude further punishment in Japan with regard to the same act.”<sup>178</sup> However, credit will be given for non-Japanese prosecutions because “when the person has already served either the whole or part of the punishment abroad, execution of the punishment shall be mitigated or remitted.”<sup>179</sup>

In addition, many civil law countries in Europe do not recognize the international double jeopardy principle.<sup>180</sup> For example, in Germany, the doctrine is not recognized in the absence of a binding international treaty, provided that an offense is also punishable under German law.<sup>181</sup> Italy also does not recognize the international double jeopardy doctrine.<sup>182</sup>

#### *D. Recognizing International Double Jeopardy—The EU Approach*

While the U.S. the double jeopardy internationally, the EU and many countries apply the double jeopardy principle internationally.<sup>183</sup> Recognition of the international double jeopardy principle does not seem to depend on whether a country has a common law or civil law system because both common law and civil law countries take the EU approach.<sup>184</sup>

##### *1. European Union*

In the EU, different EU member states cannot prosecute an individual or entity for the same offense.<sup>185</sup> Article 50 of the Charter of Fundamental Rights of the European Union provides: “No one shall be

177. Nihonkoku Kenpō [KENPŌ] [Constitution], art. 39, *translated in Japanese Law Translation* [JLT DS], <http://www.japaneselawtranslation.go.jp/law/detail/?id=174> [<http://web.archive.org/web/20190929004349/http://www.japaneselawtranslation.go.jp/law/detail/?id=174>].

178. Keihō [Penal Code] Law No. 45 of 1907, art. 5, *translated in Japanese Law Translation* [JLT DS], <http://www.japaneselawtranslation.go.jp/law/detail/?id=1960> [<http://web.archive.org/save/www.japaneselawtranslation.go.jp/law/detail/?id=1960>].

179. *Id.*

180. See Colangelo, *supra* note 3, at 818 (observing that Germany and Italy “fall into the U.S. camp”).

181. Case T-7/72, *Boehringer Mannheim GmbH v. Comm’n*, 1972 E.C.R. 1291, 1296.

182. Colangelo, *supra* note 3, at 818.

183. See *infra* Section III.D.1.

184. See *infra* Section III.D.2–3.

185. Davis, *supra* note 73, at 63.

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.”<sup>186</sup> Similarly, Article 54 of the Convention Implementing the Schengen Agreement (Convention) provides that an individual or entity cannot be prosecuted by different EU member states twice for the same criminal offense: “A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts.”<sup>187</sup>

The European Court of Justice has construed Article 54 of the Convention broadly.<sup>188</sup> For example, in *Gözütok and Brügge*, the Court held that negotiated agreements without court intervention would bar re-prosecution.<sup>189</sup> Noting that there remained differences in national criminal legal systems, the Court observed that there is a necessary implication that “the Member States have mutual trust in their criminal justice systems and that each of them recogni[z]es the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.”<sup>190</sup>

## 2. Common Law Countries

In the United Kingdom, the international double jeopardy principle applies in most cases.<sup>191</sup> The Court of King’s Bench held that an acquittal in Wales on a charge of murder barred a subsequent prosecution for the same offense in England.<sup>192</sup> In contrast, however, a British court of appeals refused to apply the international double jeopardy principle to a person who had been convicted in a default judgment in Italy but could not be extradited to Italy because he was not truly twice in “jeopardy.”<sup>193</sup>

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186. Charter of Fundamental Rights of the European Union, art. 50, Dec. 14, 2007, 2007 O.J. (C 303) 13.

187. Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, art. 54, Sept. 22, 2000, 2000 O.J. (L 239) 35.

188. Davis, *supra* note 73, at 72.

189. Joined Cases C-187/01 & C-385/01, Criminal Proceedings Against Hüseyin Gözütok and Klaus Brügge, 2003 E.C.R. I-1345.

190. *Id.*

191. David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL RTS. J. 193 (2005).

192. *Id.* at 220 n.240 (describing King v. Thomas (1664) 83 Eng. Rep. 326, 327 (K.B.)).

193. See Colangelo, *supra* note 3, at 817 n.262.

Similarly, Canada has a comprehensive international double jeopardy safeguard for most cases.<sup>194</sup> Canada also amended its anti-bribery law in 2017; Section 5(4) of the Corruption of Foreign Public Officials Act provides:

If a person is alleged to have committed an act or omission that is deemed to have been committed in Canada under subsection (1) and they have been tried and dealt with outside Canada for an offen[s]e in respect of the act or omission so that, if they had been tried and dealt with in Canada, they would be able to plead *autrefois acquit*, *autrefois convict* or pardon, they are deemed to have been so tried and dealt with in Canada.<sup>195</sup>

This amendment “preserve[s] the Canadian and British concept of international double jeopardy.”<sup>196</sup> Hong Kong also recognizes the international double jeopardy principle.<sup>197</sup> Section 31(1) of Chapter 221 provides: “In criminal proceedings in any court on a plea of *autrefois convict* or *autrefois acquit* the accused person may state that he has been previously convicted or acquitted, as the case may be, of the offen[s]e charged.”<sup>198</sup>

### 3. Civil Law Countries

While some civil law countries, such as Japan, Germany, and Italy follow the U.S. approach,<sup>199</sup> others follow the EU approach. For example, in the Netherlands, a valid foreign judgment broadly protects individuals from a successive prosecution for the same offense.<sup>200</sup> Similarly, in Belgium, an individual is protected from prosecution in

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194. See *id.* at 817–18 (citing Canadian cases).

195. Corruption of Foreign Public Officials Act, S.C. 1998, c 34 (Can.).

196. Nicolas Businger, *Significant Amendments to Canada’s Corruption of Foreign Public Officials Act*, BORDEN LADNER GERVAIS (June 25, 2013), [https://blg.com/en/News-And-Publications/publication\\_3416](https://blg.com/en/News-And-Publications/publication_3416) [[https://web.archive.org/web/20190929020655/https://blg.com/en/News-And-Publications/publication\\_3416](https://web.archive.org/web/20190929020655/https://blg.com/en/News-And-Publications/publication_3416)].

197. Criminal Procedure Ordinance, (2018) Cap. 221, § 31(1) (H.K.).

198. *Id.*

199. See *supra* Section III.C.3.

200. Christine van den Wyngaert & Guy Stessens, *The International Non bis in Idem Principle: Resolving Some of the Unanswered Questions*, 48 INT’L & COMP. L.Q. 779, 798 (1999); see also Case T-7/72, *Boehringer Mannheim GmbH v. Comm’n*, 1972 E.C.R. 1291, 1296 (“[In the Netherlands,] the *non bis in idem* rule applied without reservation, whether the acts were only committed abroad, or also in the Netherlands.”).

Belgium if the offense occurs entirely outside of Belgium and there was a final judgment.<sup>201</sup>

In France, if an offense was committed entirely outside of France, Article 113-9 of the Penal Code<sup>202</sup> and Article 692 of the Code of Criminal Procedure<sup>203</sup> provide double jeopardy protection.<sup>204</sup> However, in “territorial prosecutions,” where at least a part of the act was committed in France, French law does not provide any double jeopardy protection for persons that have been the subject of non-French prosecutions arising from the same act.<sup>205</sup>

### *E. Arguments For and Against International Double Jeopardy*

There are persuasive arguments both for and against international double jeopardy. This Section will describe each argument and conclude that the arguments against the international double jeopardy principle are stronger.

#### *1. Arguments for International Double Jeopardy*

Justifications for the international double jeopardy principle can be summarized into four categories: prevention of excessive penalty or over-deterrence, promotion of stability and finality, encouragement of disclosure, and conformity with current international and U.S. practice, as discussed below.

##### *a. Prevention of Excessive Penalty or Over-Deterrence*

It is not unusual for a regulator to pursue a “carbon copy” prosecution in a cross-border case where another regulator has already prosecuted the relevant parties, resulting cumulatively in excessive penalties.<sup>206</sup> The burdens imposed on parties targeted by multiple regulators are often duplicative.<sup>207</sup>

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201. See Wyngaert & Stessens, *supra* note 200, at 784.

202. CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 113-9 (Fr.).

203. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 692 (Fr.).

204. Davis, *supra* note 73, at 70.

205. *Id.*

206. See *supra* Section II.D.2 (discussing carbon copy prosecution).

207. Bourtin et al., *supra* note 72, at 1.

It is possible that a targeted party may know that its payments to one authority would be credited against payments to another authority.<sup>208</sup> If, however, the targeted party does not have a means to know which authority it is subject to and to what degree it should cooperate with the relevant authorities, there can be no predictability.<sup>209</sup> There is no general rule requiring only one regulator to obtain disgorgement even though disgorgement should be theoretically based on a specific amount that the violator gained through illegal conduct.<sup>210</sup> Multiple regulators, therefore, may order duplicative disgorgement.

When large sums of money are at stake, there are no guarantees that international comity and cooperation will govern the behavior of multiple States' regulatory authorities.<sup>211</sup> Prior notice and consultation between regulators, if any, does not guarantee that regulators will refrain from seeking duplicative fines because of comity.<sup>212</sup>

### *b. Promotion of Stability and Finality*

Companies faced with charges may want to pay the penalties and move on, but "the threat of enforcement in multiple jurisdictions . . . leads to uncertainty for management and shareholders."<sup>213</sup> For example, an article written by the chief legal officers of three major oil and energy conglomerates—France's Total, Italy's Eni, and the Netherlands' Royal Dutch Shell—expressed concerns about double jeopardy.<sup>214</sup> The authors

208. David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 501–02 (2009).

209. *Id.*

210. *Id.* at 504 ("[T]his is further complicated by the fact that it is not clear what 'disgorgement' in the FCPA context really means since it is often impossible to know the distinct benefit that a firm derived from any given bribe.").

211. *Id.* at 504.

212. *See id.* (arguing that it would be one thing for a regulator to inform an interested State, but it would be quite another for that regulator to refrain from seeking fines).

213. Catherine Dunn, *Double Jeopardy and the New World of Antibribery Laws*, CORP. COUNS. (Mar. 12, 2012, 12:00 AM), [https://www.law.com/corpcounsel/almID/1331104027217&Double\\_Jeopardy\\_and\\_the\\_New\\_World\\_of\\_Antibribery\\_Laws/?slreturn=20191014130211](https://www.law.com/corpcounsel/almID/1331104027217&Double_Jeopardy_and_the_New_World_of_Antibribery_Laws/?slreturn=20191014130211) [[http://web.archive.org/web/20191114180339/https://www.law.com/corpcounsel/almID/1331104027217&Double\\_Jeopardy\\_and\\_the\\_New\\_World\\_of\\_Antibribery\\_Laws/?slreturn=20191014130211](http://web.archive.org/web/20191114180339/https://www.law.com/corpcounsel/almID/1331104027217&Double_Jeopardy_and_the_New_World_of_Antibribery_Laws/?slreturn=20191014130211)].

214. Peter Herbel et al., *Double Jeopardy - Finding a Balance in Enforcement Actions for Companies*, LEGAL WEEK (Nov. 23, 2011, 7:03 PM), <https://www.law.com/legal-week/2011/11/23/double-jeopardy-finding-a-balance-in-enforcement-actions-for-companies/> [<http://web.archive.org/web/20191114180647/https://www.law.com/legal-week/2011/11/23/double-jeopardy-finding-a-balance-in-enforcement-actions-for-companies/?slreturn=20191014130646>].

argue that corporations are “often subject to duplicative sanctions from different foreign authorities . . . [and] may face different final consequences depending on their own jurisdiction.”<sup>215</sup> They further argue that receiving multiple penalties for the same conduct is not only overly burdensome on corporations, but also violates “fundamental principles of fairness.”<sup>216</sup> They seek a “uniform, fair, and non-discriminatory international regulatory framework, [which] will enhance the cooperation between business and authorities and will be a key tool in the common fight against corruption.”<sup>217</sup>

The dual sovereignty doctrine provides prosecutors a second chance to prosecute acquitted defendants, thus virtually guaranteeing a conviction on the second try.<sup>218</sup> Therefore, one scholar, Dax Eric Lopez, argues that the United States should abandon the dual sovereignty doctrine in the international setting.<sup>219</sup>

### *c. Encouragement of Disclosure*

Application of the international double jeopardy principle will create incentives for companies to cooperate fully with investigations and voluntarily self-report misconduct, particularly if they receive credit for self-reporting.<sup>220</sup> If there is no international double jeopardy protection, however, companies may not seek to take advantage of such incentives out of fear that doing so may trigger a parallel proceeding in another jurisdiction.<sup>221</sup> Companies may prefer to gamble that misconduct will remain undetected and instead spend resources on internal investigations to remedy misconduct.<sup>222</sup>

### *d. Conformity with Current International and U.S. Practice*

Gerard Conway argues that the international double jeopardy principle should be a general international rule for two main reasons. First, notwithstanding differences in approach, the double jeopardy

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215. *Id.*

216. *Id.*

217. *Id.*

218. Dax Eric Lopez, Note, *Not Twice for the Same: How the Dual Sovereignty Doctrine is Used to Circumvent Non Bis In Idem*, 33 VAND. J. TRANSNAT'L L. 1263, 1294 (2000).

219. *See id.* at 1295–1303.

220. Bourtin et al., *supra* note 72, at 4–5.

221. *See id.* (discussing the B20 Working Group on Improving Transparency & Anti-Corruption, *Task Force Recommendations on Improving Transparency and Anti-Corruption* 72 (2012)).

222. Holtmeier, *supra* note 148, at 516.

principle has been almost universally recognized in national laws; and second, high levels of international cooperation show that an effective operation of the principle could be well achieved.<sup>223</sup>

In addition, the dual sovereignty doctrine lacks a basis in U.S. historical practice.<sup>224</sup> Scholars criticize Justice Taft's opinion in *United States v. Lanza*,<sup>225</sup> which has frequently served as precedent for later cases.<sup>226</sup> Lopez argues that it provided "little reasoning or support for the holding" and did not make "any reference to the interests protected by the Double Jeopardy Clause or the framer's [sic] intent."<sup>227</sup> Instead, he argues that the Framers intended the Clause to conform to the practice of the English common law, which recognized the international double jeopardy principle.<sup>228</sup> He also argues that the United States' international practice with respect to successive international prosecutions appears to be consistent with the English common law view.<sup>229</sup>

## 2. Arguments Against International Double Jeopardy

There seem to be very few proponents of the dual sovereignty doctrine in the international setting and few opponents of the international double jeopardy principle. However, representative arguments against the international double jeopardy principle include: (1) it increases competition among securities regulators; (2) it encourages forum shopping; and (3) it harms the interests of countries and regulators, as discussed below.

### a. Increase of Competition Among Securities Regulators

One argument against the international double jeopardy principle is that it leads to a race to prosecute or settle.<sup>230</sup> Jordan Moran provides an

223. Conway, *supra* note 71, at 237–38.

224. See Lopez, *supra* note 218, at 1295–97.

225. *Id.* at 1275 (citing *U.S. v. Lanza*, 260 U.S. 377 (1922), describing the Court's holding that a federal conviction following a conviction in the state of Washington did not violate the double jeopardy principle).

226. Lopez, *supra* note 218, at 1295.

227. *Id.*

228. *Id.* at 1296 (noting that the framers would have specified or provided an exception similar to the dual sovereignty doctrine if they had intended to allow multiple prosecutions).

229. *Id.* at 1296–97.

230. Jordan Moran, *Why International Double Jeopardy is a Bad Idea*, GAB (Mar. 9, 2015), <https://globalanticorruptionblog.com/2015/03/09/why-international-double-jeopardy-is-a-bad-idea/>

example where Country A more aggressively enforces its laws and assesses higher penalties compared to Country B.<sup>231</sup> If just one of the countries, Country A, recognizes the international double jeopardy principle, offenders would have a strong incentive to settle with Country B so that they can block criminal prosecution in Country A.<sup>232</sup> If both countries recognize the international double jeopardy principle, both have an incentive to prosecute or settle first so that they do not miss out on criminal penalties.<sup>233</sup> Healthy competition among securities regulators may incentivize them to conduct investigations more efficiently. A “race to settle,” however, would likely result in shorter investigations and lower penalties.<sup>234</sup>

As discussed in Section IV.A.4 below, in the *Tiger* case, a Hong Kong regulator gave up a criminal investigation on alleged market manipulation in Hong Kong because the DOJ secured a criminal conviction first.<sup>235</sup> Also, as seen in a recent trend described in Section IV.B.2 below, some countries apply the double jeopardy principle to administrative monetary penalties, so imposition of an administrative monetary penalty by one regulator may force another regulator to give up or reduce penalties.<sup>236</sup>

#### *b. Encouragement of Forum Shopping*

Another argument against application of the international double jeopardy principle is that it may encourage forum shopping if a party subject to multiple investigations knows which country’s laws and regulations work better for it.<sup>237</sup> For example, Davis (though he does not necessarily argue against the international double jeopardy principle) observes that some commentators warn that if the international double

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[<https://web.archive.org/save/https://globalanticorruptionblog.com/2015/03/09/why-international-double-jeopardy-is-a-bad-idea/>].

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* A longer investigation may lead to discovery of a broader fraud scheme. *Id.*

235. *See infra* Section IV.A.4.

236. *See infra* Section IV.B.2.

237. *See* Jordan Moran, Comment to *Why International Double Jeopardy Is a Bad Idea*, GAB (Mar. 14, 2015, 2:09 PM), <https://globalanticorruptionblog.com/2015/03/09/why-international-double-jeopardy-is-a-bad-idea/>

[<http://web.archive.org/web/20191119005444/https://globalanticorruptionblog.com/2015/03/09/why-international-double-jeopardy-is-a-bad-idea/>] (reasoning that companies may forum shop if they know that the country to whom they self-disclose might not freely share information with other authorities).

jeopardy principle is applied universally, it may encourage companies to race to the jurisdiction that offers more attractive outcomes.<sup>238</sup>

Typically, a defendant facing possible prosecutions in the United States and other countries, such as the United Kingdom and Canada, may settle in the United States first because doing so will likely prevent prosecutions in other countries.<sup>239</sup> Davis reasons that the asymmetry between the United States and Europe may encourage a “race to the courthouse” or may discourage companies from cooperating with non-U.S. prosecutors where it could only lead to an outcome with no preclusive effect in the U.S.<sup>240</sup>

Andrew S. Boutros and T. Markus Funk also observe the increase of carbon copy prosecution and recommend that when a company makes disclosures to regulators in multiple jurisdictions, it should carefully consider whether those jurisdictions recognize the international double jeopardy principle.<sup>241</sup> In addition, Tyler W. Hodgson argues that excluding U.S. authorities in a global settlement creates a risk of double jeopardy, giving no finality in the settlement.<sup>242</sup>

### *c. Harm to Interests of Countries and Regulators*

Another argument against the application of the international double jeopardy principle is that it may lead to the absurd result that the most interested jurisdiction is not able to prosecute a wrongdoer. For example, in the *Tiger* case, even though this matter involved substantial conduct in the United States, the conduct harmed the market in Hong Kong, where criminal prosecution was prevented due to the international double jeopardy principle.<sup>243</sup> Practitioners observe that if “the facts suggest an interest of prosecuting authorities in the United States, the track record . . . is that U.S. authorities are likely to take a dominant role in multi-national investigation” —even if other countries may have greater interests.<sup>244</sup>

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238. Davis, *supra* note 73, at 99.

239. *Id.*

240. *Id.*

241. Boutros & Funk, *supra* note 61, at 292; see also *supra* Section II.D.2 (discussing carbon copy prosecutions).

242. Tyler W. Hodgson, *The Gift that Keeps on Giving: Does the Protection Against Double Jeopardy Have any Application to International Crime?*, 19 J. FIN. CRIME 326, 329 (2012).

243. See *infra* Section IV.A.4 (describing the *Tiger* case).

244. Frederick T. Davis et al., *Multi-Jurisdictional Criminal Investigations Pose Challenges*, N.Y. L.J. (Nov. 18, 2013, 12:00 AM), <https://www.law.com/newyorklawjournal/almID/1202627815370/Multi-/> [<http://web.archive.org/web/20191114185301/https://www.law.com/newyorklawjournal/>]

In particular, although the U.K. Serious Fraud Office has worked with U.S. authorities, such as the DOJ and the SEC, in global settlements, there is no agreed-upon protocol or clear principles as to the basis for the division of penalties or the resolution of issues regarding jurisdiction in concurrent cases.<sup>245</sup> The process would not only be confusing to participants, but also the failure to address this issue might prevent the United Kingdom from securing a conviction or imposing an appropriate sentence against U.K. companies as public interest demands (as is shown in the *BAE* and *DePuy* cases below).<sup>246</sup>

In addition, regulators may be criticized and their reputations might be harmed if the general public determines that regulators used the international double jeopardy principle to avoid prosecuting or investigating a case (as seen in the *BAE* case below).<sup>247</sup>

### 3. Analysis

All three justifications *against* the international double jeopardy principle are sound. And while there is some merit to the second justification *for* the international double jeopardy principle—i.e., promotion of stability and finality in cross-border enforcement<sup>248</sup>—the remaining justifications are not as strong.

First, the international double jeopardy principle may indeed allow penalties to be too harsh—resulting in over-deterrence—which is arguably unfair to defendants.<sup>249</sup> However, duplicate punishments may be justified in some egregious cases that harm multiple countries' interests, so they should not be uniformly prohibited.

Rather, as proposed in Section VI.A below, regulators should consult each other on a case-by-case basis to seek the best solution.<sup>250</sup> Also, given that securities market misconduct can be so egregious that it can affect the integrity of multiple markets, regulators may want to “err on the side of more robust enforcement” and mitigate over-deterrence by reducing the amount of penalties and considering penalties imposed by other regulators.<sup>251</sup>

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almID/1202627815370/Multi-/?slreturn=20191014135300]. Practitioners also argue that U.S. and non-U.S. authorities should strategically foster cooperative relationships. *Id.*

245. *Deterring Bribery*, *supra* note 156, at 77.

246. *Id.*; see also *infra* Section IV.A.2-3 (describing the *BAE* and *DePuy* cases).

247. See *infra* Section IV.A.3 (describing the *BAE* case).

248. See *supra* Section III.E.1.b.

249. See *supra* Section III.E.1.a.

250. See *infra* Section VI.A.

251. See Moran, *supra* note 230 (arguing that overdeterrence is an empirical question and regulators should err on the side of more robust enforcement).

Second, the international double jeopardy principle creates an incentive for self-disclosure only where the law allows leniency or some similar system that incentivizes disclosure. This justification does not apply in international securities enforcement, where such leniency is not an option.<sup>252</sup>

Third, the international double jeopardy principle may conform with international or U.S. practices to some extent, but it is merely one of the options that international organizations or sovereigns may decide to take. International cooperation is not evidence of a uniform acceptance of the double jeopardy principle. Rather, it is a tool for implementing international rules. Also, even if the double jeopardy principle is almost universally accepted as domestic law, this does not necessarily prove its acceptance as a general international principle. Further, as those who argue against the international double jeopardy principle point out, recognition of the principle may prevent international cooperation.<sup>253</sup>

Even though the arguments *against* the international double jeopardy principle are stronger, the ultimate goal of this Article is not to decide which is the better theory. Different positions such as those between the United States and the United Kingdom exist, and this has caused problems in actual cases, as seen in Part IV.<sup>254</sup> Given the valid concerns that motivate both those who argue for and those who argue against the international double jeopardy principle, this Article's proposal is not to provide a universal rule or to leave it to the discretion of each country. Instead, this Article proposes a guideline to be incorporated into the MMoU to detail the kinds of cooperation that would be useful when at least one of the affected countries recognizes the international double jeopardy principle.

#### IV. PROBLEMS IN INTERNATIONAL SECURITIES ENFORCEMENT

This Part discusses cases involving U.S. regulators, in which the international double jeopardy principle caused one regulator to defer to the decisions of another regulator, thereby highlighting problems that

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252. Securities regulators may benefit from implementing such a system, but this topic is beyond the scope of this Article.

253. See *supra* Section III.E.2 (arguing that the international double jeopardy principle will increase competition among regulators, encourage forum shopping, and harm interests of countries and regulators).

254. See Daniel A. Principato, Note, *Defining the "Sovereign" in Dual Sovereignty: Does the Protection Against Double Jeopardy Bar Successive Prosecutions in National and International Courts?*, 47 CORNELL INT'L L.J. 767, 783 (2014) (observing that, given the different positions in recognition of international double jeopardy, it would be difficult to formulate a universal rule).

occur in cross-border cases. It then analyzes recent developments in Europe where the courts applied the international double jeopardy principle to a settlement and to non-criminal monetary penalties, thereby showing broader implications of the principle.

### *A. Cases in Which One Regulator Deferred to Another Regulator*

The differences in approach concerning whether to recognize the international double jeopardy principle culminated in several cross-border law enforcement issues involving U.S. regulators.<sup>255</sup> The cases that follow highlight this culmination.

Two anti-bribery cases, *DePuy International* and *BAE*, are included here among securities enforcement cases because the Securities and Exchange Act of 1934 comprises a significant portion of the later FCPA.<sup>256</sup> There appear to be very few securities enforcement cases in which double jeopardy issues were explicitly mentioned. This is probably because regulators are more likely to discontinue investigations if there are any double jeopardy issues, and they tend to publicize cases in which they successfully charged or prosecuted misconduct, not cases where the investigation was discontinued.<sup>257</sup>

The following cases, however, show that securities regulators with strong prosecutorial interests may not necessarily be able or willing to prosecute securities violations.

#### *1. Royal Ahold*

In 2004, the SEC agreed to the Dutch prosecutor's request to discontinue investigations of individuals who allegedly violated reporting and record-keeping provisions of U.S. securities regulations "because of potential double jeopardy issues under Dutch law."<sup>258</sup> In this

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255. See Davis, *supra* note 73, at 58 ("[A] vexing problem occurs when a person or a company may be subject to criminal prosecutions for the same facts in two different countries.").

256. See Securities Exchange Act § 30A(a), 15 U.S.C. § 78dd-1(a) (1998) (anti-bribery provision); Securities Exchange Act § 13(b)(2)(A)–(B), 15 U.S.C. § 78m(b)(2)(A)–(B) (2002) (accounting provisions); Securities Exchange Act § 21(d), 15 U.S.C. § 78u(d) (2015) (enforcement provision).

257. See Holtmeier, *supra* note 148, at 512 (observing that regulators rarely disclose why they give up prosecution).

258. Press Release, SEC, SEC Charges Royal Ahold and Three Former Top Executives with Fraud; Former Audit Committee Member Charged with Causing Violations of the Securities Law (Oct. 13, 2004) [hereinafter Royal Ahold Press Release], <https://www.sec.gov/news/press/2004-144.html>

case, the SEC filed charges in a federal court against Royal Ahold (a Dutch company), its three former top executives, and a former member of the audit committee for filing materially false and misleading financial statements with the SEC.<sup>259</sup>

The chief allegation of fraud had to do with the inflation of promotional allowances at its wholly-owned subsidiary in the United States.<sup>260</sup> Royal Ahold and its executives consented to the entry of injunctive orders without admitting or denying the allegations,<sup>261</sup> but the SEC did not seek civil penalties against the executives because:

[T]he Dutch Public Prosecutor's Office, which [was] conducting a parallel criminal investigation in The Netherlands, [] requested that the Commission not seek penalties against the individuals because of potential double jeopardy issues under Dutch law. Because of the importance of this case in The Netherlands and the need for continued cooperation between the SEC and regulatory authorities in other countries, the Commission [] agreed to the Dutch prosecutor's request.<sup>262</sup>

Later that year, Royal Ahold agreed to pay €8 million (approximately \$10 million) to settle with the Dutch prosecutor, acknowledging that it had improperly consolidated joint ventures.<sup>263</sup> While the three executives were found guilty of fraud and ordered to pay fines ranging from €120,000 to €225,000 in the Dutch court, the former

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[<http://web.archive.org/web/20191114190845/https://www.sec.gov/news/press/2004-144.html>].

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* The quoted language shows that the SEC realizes that imposition of a civil penalty may implicate double jeopardy concerns in the Netherlands.

263. Bloomberg News, *Royal Ahold to pay \$10 million to settle probe*, THE BALTIMORE SUN (Oct. 1, 2004), <https://www.baltimoresun.com/news/bs-xpm-2004-10-01-0410010183-story.html>

[<http://web.archive.org/web/20191114191159/https://www.baltimoresun.com/news/bs-xpm-2004-10-01-0410010183-story.html>].

member of the supervisory board was acquitted.<sup>264</sup> Royal Ahold also entered into a non-prosecution agreement with the DOJ.<sup>265</sup>

This seems to be the only case where the SEC publicly stated that it deferred to a foreign authority due to the international double jeopardy concern.<sup>266</sup> It is notable that the SEC referred to international double jeopardy because, as described in Section III.C.1 above, the United States does not recognize the international double jeopardy principle, and both the DOJ and the SEC have great discretion concerning whether to proceed with prosecution.<sup>267</sup> The SEC may have deferred to the Dutch authority because of the importance of Royal Ahold in the Netherlands, one of the largest and longest standing food retail groups in the world.<sup>268</sup> Alternatively, the SEC may have thought that the Dutch authority would sufficiently punish Royal Ahold, or it may have anticipated a non-prosecution agreement between Royal Ahold and the DOJ, and thus avoided interfering with the DOJ.

## 2. *DePuy International*

The U.S. company, Johnson & Johnson, discovered through an internal investigation that one of its U.K. subsidiaries, DePuy International Ltd. (DePuy), paid commissions of about \$16.4 million to agents, with the knowledge that a large majority of these funds would be used as cash incentives for health care officials in European countries.<sup>269</sup> Johnson & Johnson self-reported the findings to the DOJ and the SEC and entered into a deferred prosecution agreement with the DOJ, agreeing to pay \$28.5 million to cover DePuy's conduct and other

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264. Catherine Fredenburgh, *Royal Ahold CEO & CFO Found Guilty of Fraud*, LAW360 (May 22, 2006, 12:00 AM), <https://www.law360.com/securities/articles/6673/royal-ahold-ceo-cfo-found-guilty-of-fraud>

[<http://web.archive.org/web/20200101205827/https://www.law360.com/articles/6673/royal-ahold-ceo-cfo-found-guilty-of-fraud>].

265. Ben James, *Royal Ahold Avoids Criminal Prosecution*, LAW360 (Sept. 29, 2006), <https://www.law360.com/articles/11000/royal-ahold-avoids-criminal-prosecution> [<http://web.archive.org/web/20200101210445/https://www.law360.com/articles/11000>].

266. See Royal Ahold Press Release, *supra* note 258.

267. See *supra* Section III.C.1.

268. *About Us*, AHOLD DEHAIZE, <https://www.aholddelhaize.com/en/about-us/> [<http://web.archive.org/web/20191114192129/https://www.aholddelhaize.com/en/about-us/>] (last visited Jan. 21, 2020).

269. *Deterring Bribery*, *supra* note 156, at 59.

offenses. It also entered in a settlement agreement with the SEC, agreeing to pay \$24.3 million as a civil penalty.<sup>270</sup>

The U.K. authority obtained a civil recovery order of payment of £4.829 million against DePuy in recognition of unlawful conduct in Greece.<sup>271</sup> The U.K. authority explained why it did not seek criminal sanction:

On the facts of this case, criminal sanction of the Greek conduct has been achieved by the conclusion of a Deferred Prosecution Agreement with DePuy International Limited's parent company and the DOJ. The Director of the Serious Fraud Office has concluded that a prosecution was therefore prevented in this jurisdiction by the principles of double jeopardy. . . . The DOJ Deferred Prosecution Agreement has the legal character of a formally concluded prosecution and punishes the same conduct in Greece that had formed the basis of the Serious Fraud Office investigation. . . . Consequently the Serious Fraud office is satisfied that the most appropriate sanction is a Civil Recovery Order, under the Proceeds of Crime Act 2002.<sup>272</sup>

There are three noteworthy issues in this case. First, the deferred prosecution agreement, though technically not an acquittal or conviction in the United States, was treated as covered by the double jeopardy protection in the United Kingdom.<sup>273</sup> Second, how the financial penalty of £4.8 million was calculated is still not clear, except that the U.K. authority seems to have considered the fines imposed in the United

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270. *Id.* For details of the U.S. settlements, see Press Release, U.S. Dep't of Justice, Johnson & Johnson Agrees to Pay \$21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations (Apr. 8, 2011) and Press Release, SEC, SEC Charges Johnson & Johnson With Foreign Bribery (Apr. 7, 2011).

271. *Deterring Bribery*, *supra* note 156, at 60.

272. Press Release, UK Serious Fraud Office, DePuy International Limited Ordered to Pay 4.829 million pounds in Civil Recovery Order (Apr. 8, 2011), <https://webarchive.nationalarchives.gov.uk/20120314170611/http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/deputy-international-limited-ordered-to-pay-4829-million-in-civil-recovery-order.aspx> [<http://web.archive.org/web/20200101211524/https://webarchive.nationalarchives.gov.uk/20120314170611/http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/deputy-international-limited-ordered-to-pay-4829-million-in-civil-recovery-order.aspx>].

273. *Deterring Bribery*, *supra* note 156, at 60.

States.<sup>274</sup> Third, the U.K. authorities did not impose criminal charges, even though there seemed to be ample evidence of corruption.<sup>275</sup>

### 3. *British Aerospace (BAE)*

This case has been described as “without question, the most controversial overseas bribery case that has come before the UK courts.”<sup>276</sup> BAE Systems (BAE), a defense company in the United Kingdom, won contracts in various countries—including Saudi Arabia, South Africa, Tanzania, Austria, the Czech Republic, and Hungary—allegedly through bribes to government officials in those countries.<sup>277</sup> Various prosecuting agencies, including the U.K. and the DOJ, subjected BAE to investigation.<sup>278</sup>

The U.K. authority, however, decided not to proceed with the allegation concerning the contracts with Saudi Arabia.<sup>279</sup> According to the U.K. authority, when BAE pleaded guilty during the proceedings in the United States, “[u]nder the UK law of double jeopardy, it was no longer possible [for the] investigation relating to Central and Eastern Europe to continue.”<sup>280</sup>

The U.K. authority continued to investigate the remaining allegations, and in 2010, BAE entered into a global settlement with the DOJ and the U.K. authorities.<sup>281</sup> BAE conceded to defrauding the United States government by selling fighting planes to countries in Eastern Europe and Saudi Arabia, and BAE agreed to a \$400 million fine for these charges; additionally, BAE settled for £30 million with the United

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274. *Id.*

275. *Id.*

276. *Id.* at 36.

277. *Id.* For a detailed timeline of investigations, see *BAE Systems: Timeline of Bribery Allegations*, THE TELEGRAPH (Dec. 21, 2010, 1:16 PM), <https://www.telegraph.co.uk/finance/newsbysector/industry/defence/8216172/BAE-Systems-timeline-of-bribery-allegations.html> [<http://web.archive.org/web/20191114193359/https://www.telegraph.co.uk/finance/newsbysector/industry/defence/8216172/BAE-Systems-timeline-of-bribery-allegations.html>].

278. *Deterring Bribery*, *supra* note 156, at 36.

279. *Id.*

280. Mike Koehler, *A Conversation with Richard Alderman Regarding BAE*, SCRIBD (Feb. 23, 2011), <https://www.scribd.com/document/50759481/A-Conversation-With-Richard-Alderman-Regarding-BAE> [<http://web.archive.org/web/20191114194014/https://www.scribd.com/document/50759481/A-Conversation-With-Richard-Alderman-Regarding-BAE>].

281. *Deterring Bribery*, *supra* note 156, at 36.

Kingdom for its failure to maintain accurate records of deals in Tanzania.<sup>282</sup>

In July 2008, the House of Lords ruled that the U.K. authority had acted lawfully when it terminated the European investigation; however, the U.K. authority took a serious reputational hit for not confronting cross-border cases of fraud.<sup>283</sup> This case shows that claiming the international double jeopardy doctrine as a reason for not prosecuting a nationally important case may be taken as an excuse and cause a backlash against regulators.

#### 4. Tiger

In 2010, the Hong Kong Securities and Futures Commission (HKSFC) gave up a criminal investigation on alleged market misconduct by U.S. firms on the Hong Kong Stock Exchange because of the international double jeopardy principle.<sup>284</sup> In this case, Sung Kook Hwang, a U.S. resident and the founder and portfolio manager of U.S.-based Tiger Asia Management and Tiger Asia Partners (Tiger Asia), was alleged to have ordered the trading of shares of a Chinese bank listed on the Hong Kong Stock Exchange, knowing insider information regarding private placements.<sup>285</sup>

Tiger Asia also allegedly manipulated the price of the Chinese bank shares by placing false orders, thereby raising the price at month's end and inflating Tiger Asia's management fees.<sup>286</sup> As a result of the parallel criminal and civil proceedings in the United States, Tiger Asia agreed to pay a total of \$44 million in disgorgement and penalties.<sup>287</sup>

The HKSFC, however, had to give up a criminal investigation on alleged market manipulation because the DOJ had secured a criminal conviction against the firms first, even though the HKSFC had started

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282. *BAE Systems: Timeline of Bribery Allegations*, *supra* note 277. For details of the settlement with the DOJ, see Press Release, U.S. Dep't of Justice, *BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine* (Mar. 1, 2010), <https://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine> [<http://web.archive.org/web/20200101212117/https://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine>].

283. *Deterring Bribery*, *supra* note 156, at 36.

284. Complaint at 1–2, 5, SEC v. Tiger Asia Mgmt. LLC, No. 12-cv-7601, 2012 WL 6178426 (D.N.J. Dec. 12, 2012).

285. *Id.*

286. *Id.*

287. Tiger Asia Mgmt., LLC, SEC Litigation Release No. 22569, 2012 WL 6178426 (Dec. 13, 2012) (DMC).

investigation of Tiger Asia earlier than the DOJ and the SEC.<sup>288</sup> The Securities and Futures Ordinance (SFO) has a “dual and *mutually exclusive* civil/criminal regime to deal with market misconduct”: (1) the Market Misconduct Tribunal (MMT) imposes civil sanctions, including disgorgement and dealing bans; and (2) the criminal courts impose criminal sanctions.<sup>289</sup>

However, the HKSFC tried a third route of securities enforcement when it sought to freeze Tiger Asia’s assets through the Court of First Instance (CFI) as a test case.<sup>290</sup> Ultimately, the HKSFC lost the option to seek criminal sanctions because the proceedings in the CFI took longer than the HKSFC expected and the DOJ settled with Tiger Asia in the meantime.<sup>291</sup>

The HKSFC commenced proceedings in the CFI against Tiger Asia and its senior officers in August 2009, seeking to freeze Tiger Asia’s assets and place affected parties in the position they were in prior to the Tiger Asia transactions.<sup>292</sup> The HKSFC invoked Section 213 of the SFO, which authorizes the CFI to issue an injunction and give restoration orders, but it was not clear if a prior contravention determination was required before the CFI could do so.<sup>293</sup>

The CFI, however, ruled in favor of Tiger Asia, holding that “a prior determination of contravention by a criminal court or MMT” would be

288. Press Release, Sec. & Futures Comm’n, Tiger Asia Admits Insider Dealing and Ordered to Pay Investors \$45 Million (Dec. 20, 2013) (H.K.), <https://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=13PR127> [<https://web.archive.org/web/20200101212757/https://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=13PR127>].

289. Gong Yiyi, *Cross Border Securities Enforcement: Tiger Asia Management*, SEVEN PILLARS INST. (July 28, 2014) (emphasis added), <https://sevenpillarsinstitute.org/cross-border-securities-enforcement-case-tiger-asia-management-llc/> [<http://web.archive.org/web/20191114200410/https://sevenpillarsinstitute.org/cross-border-securities-enforcement-case-tiger-asia-management-llc/>]; see also Thomas Gorman et al., *Hong Kong Securities Laws Violations: How To Trap a Tiger - Regulators’ Nets Tighten Around Tiger Asia on Both Sides of the Pacific*, DORSEY & WHITNEY LLP (Aug. 21, 2013), [https://www.dorsey.com/newsresources/publications/2013/08/how-to-trap-a-tiger--regulators-nets-tighten-aro\\_\\_](https://www.dorsey.com/newsresources/publications/2013/08/how-to-trap-a-tiger--regulators-nets-tighten-aro__) [[http://web.archive.org/web/20191114200546/https://www.dorsey.com/newsresources/publications/2013/08/how-to-trap-a-tiger--regulators-nets-tighten-aro\\_\\_](http://web.archive.org/web/20191114200546/https://www.dorsey.com/newsresources/publications/2013/08/how-to-trap-a-tiger--regulators-nets-tighten-aro__)] (explaining a dual civil/criminal regime under the SFO).

290. Yiyi, *supra* note 289.

291. *Id.*

292. *Id.*

293. *Id.*; see also Securities and Futures Ordinance, (2012) Cap. 571, § 213 (H.K.).

necessary.<sup>294</sup> Although the Court of Appeals overturned the CFI's ruling in February 2012, and the Court of Final Appeal dismissed Tiger Asia's appeal in April 2013, Tiger Asia had already settled with the DOJ in the previous year—thereby preventing the HKSFC from seeking any criminal sanctions.<sup>295</sup> The HKSFC stated that it would not pursue criminal charges because of the significant risk that it would be barred by the double jeopardy principle.<sup>296</sup>

This case shows that securities regulators with a strong interest might not be able to prosecute wrongdoers. Even though this matter involved substantial conduct in the United States (e.g., obtaining insider information and placing orders in the United States),<sup>297</sup> the market harmed by the conduct is in Hong Kong. It also suggests the possibility of a “race to prosecute,” thereby causing a competitive—instead of cooperative—environment for securities regulators in the future.

### *B. Recent Court Decisions in Europe*

An administrative or a civil monetary penalty imposed, or even a negotiated settlement, by one regulator may prevent other regulators from pursuing enforcement. In the United States, the issue was largely resolved in favor of permitting multiple penalties by criminal and administrative authorities under the *Hudson* decision, as discussed above.<sup>298</sup> Developing law in Europe, however, seems to be going in the opposite direction.

#### *1. Negotiated Agreements*

A district court in Paris recently held that French authorities could not prosecute French companies whose parent companies had signed either a deferred prosecution agreement or a non-prosecution agreement

294. Yiyi, *supra* note 289.

295. *Id.*

296. See Paul J. Davies, *HK Opens Civil Case Against Tiger Asia*, FT.COM (July 15, 2013),

<https://www.ft.com/content/d649fc14-ed3e-11e2-ad6e-00144feabdc0>

[<https://web.archive.org/web/20200101230134/https://www.ft.com/content/d649fc14-ed3e-11e2-ad6e-00144feabdc0>] (“The SFC is not pursuing criminal charges against the Tiger Asia parties, given the significant risk that criminal charges in Hong Kong are barred on the grounds of double jeopardy.”).

297. Yiyi, *supra* note 289.

298. See *supra* Section III.A.2.a (discussing *Hudson v. United States*, 118 S. Ct. 488 (1997), which held that civil sanctions are not “criminal punishments” that trigger the protection of the Double Jeopardy Clause).

with the DOJ, even though these agreements are the result of out-of-court negotiations and not an “acquittal or conviction.”<sup>299</sup>

There are two French cases, both of which involved *non bis in idem* questions.<sup>300</sup> Under the “Oil for Food” program administered by the United Nations, companies were permitted to do business in Iraq if any payments paid to the Iraqi government were placed in accounts supervised by the UN to ensure that funds were distributed only to Iraqi citizens—not to members of Saddam Hussein’s government.<sup>301</sup> Many program participants allegedly made prohibited payments to the Iraqi regime, so they became subject to criminal investigations in countries including the United States and France.<sup>302</sup> In France, the criminal trial was split into two groups of target companies, so called “*Oil-for-Food I*”<sup>303</sup> and “*Oil-for-Food II*.”<sup>304</sup>

#### a. *Oil-for-Food I*

One of the *Oil-for-Food* defendants, the oil company Vitol, plead guilty to grand larceny in New York state court for making payments to the Iraqi regime.<sup>305</sup> In the French trial court, Vitol claimed that “the New York guilty plea protected it against further prosecution in France under the principle of [*non*] *bis in idem*.”<sup>306</sup>

The trial court rejected Vitol’s argument because *non bis in idem* protections under the Penal Code and the Code of Criminal Procedure do not apply to a “territorial prosecution” where a part of the actions took place in France, as occurred in this case.<sup>307</sup> The court, however, held that Vitol was protected against French prosecution under article 14(7) of the United Nations International Covenant on Civil and Political Rights (ICCPR), which provides that “[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of

299. See Davis, *supra* note 73, at 77–78 (describing the cases).

300. Note that *non bis in idem* applies to the same facts and double jeopardy applies to the same offense. See *supra* Section III.A.1 (explaining the difference).

301. See Davis, *supra* note 73, at 74 (describing the Oil-for-Food program).

302. See *id.*

303. *Id.* at 75–77.

304. *Id.* at 77–79.

305. *Id.* at 75.

306. *Id.* at 76.

307. *Id.* French law provides *non bis in idem* protection only if the act was committed entirely outside of France. See *supra* Section III.D.3 (discussing international double jeopardy protection in France).

[another] country.”<sup>308</sup> The court found that Article 14(7) applies to multiple prosecutions, not only within Europe, but also outside of Europe.<sup>309</sup>

However, the appellate court reversed the trial court decision and held that Vitol was not protected against French prosecution.<sup>310</sup> The court reasoned that, while Vitol had been prosecuted in New York for grand larceny, it was prosecuted for offenses related to integrity and transparency under France’s anti-bribery statute.<sup>311</sup> The court found that Article 14(7) of the ICCPR would apply to “the same offen[s]e,” but that the offenses subject to New York prosecutions and the offenses subject to French prosecutions were different because the former was characterized as an “economic crime,” while the latter involved a completely different purpose, viz. guaranteeing the integrity of the competitive global marketplace.<sup>312</sup>

### *b. Oil-for-Food II*

This case involves four French companies, whose parent companies entered into a Deferred Prosecution Agreement (DPA) or a Non-Prosecution Agreement (NPA) with the DOJ and paid “significant fines.”<sup>313</sup> First, the trial court followed the reasoning of the trial court in *Oil-for-Food I* and found that Article 14(7) of the ICCPR applied to a “territorial prosecution” where a part of the actions took place in France.<sup>314</sup>

The court also stated that the DPA/NPA were essentially a judgment, thereby activating the protections of double jeopardy.<sup>315</sup> Although the court’s rationale for the second issue is unclear, the reasoning seems to be that the combination of a significant payment and a protection against further prosecution by the DOJ have the “hallmarks of a prior judgment.”<sup>316</sup>

308. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 14 § 7 (Dec. 16, 1966); Davis, *supra* note 73, at 76.

309. Davis, *supra* note 73, at 76–77.

310. *Id.* at 80. In France, an appellate court will review both the facts and the law and can convict a previously acquitted defendant. *Id.* at 75 n.59.

311. *Id.* at 79.

312. *Id.* at 79–81. As discussed in Section III.A.1, *non bis in idem* is not exactly the same as the double jeopardy principle because the former applies to the same *facts* while the latter applies to the same *offense*.

313. *Id.* at 77.

314. *Id.* at 77–78.

315. *Id.* at 78.

316. *Id.* Even if the court had allowed the prosecution to proceed, the court would probably have allowed the defendants the benefit of penalties paid under the DPA/NPA.

The Public Prosecutor appealed and the judgment of the Appellate Court has not yet been rendered, but Davis argues that the Appellate Court will likely uphold the trial court decision.<sup>317</sup> In the *Oil-for-Food I* appellate decision, the offenses in New York and the offenses in France were found to be different.<sup>318</sup> In contrast, in *Oil-for-Food II*, the four defendants were charged with violations of the FCPA, which is entirely consistent with French law criminalizing overseas bribery.<sup>319</sup> Davis concluded, therefore, that the real innovation of the *Oil-for-Food* cases is the extension of double jeopardy protection to a negotiated non-criminal outcome such as a DPA or NPA.<sup>320</sup>

### *c. Analysis of Negotiated Agreements*

It is not clear whether any other courts will follow the *Oil-for-Food II* decision, thereby extending double jeopardy protection to DPAs or NPAs. For example, according to the European Court of Justice, the highest court in matters of European Union law, the attributes of the final judgment are as follows:

In order to determine whether a judicial decision constitutes a decision finally disposing of the case against a person . . . it is necessary to be satisfied that that decision was given after a determination had been made as to the merits of the case. . . . In that respect, it is apparent from the settled case-law of the Court that, for a person to be regarded as someone whose trial has been “finally disposed of” in relation to the acts for which he is alleged to have committed . . . further prosecution must have been definitively barred. . . .<sup>321</sup>

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because Article 56 of the Convention Implementing the Schengen Agreement obligates signatory countries to deduct from any penalty in the second prosecution the amount paid in the first one. *Id.* at 78–79.

317. *Id.* at 82.

318. *See supra* Section IV.B.1.a.

319. Davis, *supra* note 73, at 81–82.

320. *Id.* at 82.

321. Case C-398/12, Judgment, M., at ¶¶ 28, 31 (June 5, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=153311&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1954495> [<http://web.archive.org/web/20191114230029/http://curia.europa.eu/juris/document/document.jsf?text=&docid=153311&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1954495>].

DPA and NPA have some, but not all the above attributes.<sup>322</sup> Once a DPA or NPA is entered, “‘further prosecution’ in the United States is, as a practical matter, definitively barred.”<sup>323</sup> There is, however, “no ‘determination’ as to ‘the merits of the case’” in DPAs and NPAs because there is no judicial involvement in NPAs and there is only limited judicial review of DPAs, such as determining whether a DPA is procedurally correct.<sup>324</sup> Further, a company signing a DPA or NPA “must acknowledge the facts underlying its transgression,” but admission of guilt is not required.<sup>325</sup>

Because a U.S. negotiated outcome could prevent European prosecution, Davis predicts that, in the long term, the predominance of U.S. investigations relative to other countries’ efforts will increase.<sup>326</sup> It may also provide an incentive to regulators to not only enhance coordination with their foreign counterparts but also to accelerate domestic prosecutions to avoid disruption by a settlement with foreign regulators.<sup>327</sup>

## 2. Administrative Sanctions

In *Grande Stevens v. Italy*, the European Court of Human Rights ruled that “administrative” penalties imposed by an Italian securities regulator precluded a criminal prosecution.<sup>328</sup> In this case, two Italian companies, their two chairmen of the companies, and the companies’ lawyer allegedly manipulated FIAT stock by issuing press releases omitting material facts regarding ongoing negotiations with banks.<sup>329</sup>

The Italian Companies and Stock Exchange Commission (Consob) imposed administrative sanctions on participants, ranging from €3 to €5 million and banned individuals from servicing listed companies for

322. Davis, *supra* note 73, at 84–86. For a more detailed analysis regarding DPAs and NPAs, see *id.* at 82–98 (analyzing (1) the terms of the DPAs and the NPA in *Oil-for-Food II*; (2) the preclusive effects of DPAs and NPAs in the United States; and (3) the degree of judicial participation in DPAs and NPAs).

323. *Id.* at 95.

324. *Id.*; see also *id.* at 89–92 (discussing the degree of judicial participation in DPAs and NPAs).

325. *Id.* at 95.

326. *Id.* at 98.

327. See *supra* Section III.E.2.a (arguing that the international double jeopardy principle may promote the “race-to-prosecute”).

328. *Grande Stevens v. Italy*, App. No. 18640/10, Eur. Ct. H.R. ¶ 229 (2014), <http://hudoc.echr.coe.int/eng?i=001-141794> [<http://web.archive.org/web/20191119010605/https://hudoc.echr.coe.int/eng?i=001-141794>].

329. See *id.* at ¶¶ 13, 27.

periods ranging from two to six months.<sup>330</sup> Shortly thereafter, a criminal proceeding was initiated against the same participants and, while a trial court acquitted all of them, appellate proceedings for two individuals were pending.<sup>331</sup> Those two applied for review by the European Court of Human Rights, claiming, among other things, a violation of Article 4 of Protocol 7 to the European Convention for the Protection of Human Rights and Freedoms.<sup>332</sup>

The Court unanimously held that there had been a violation of Article 4 of Protocol No. 7 and ordered the immediate dismissal of pending criminal proceedings against the two individuals.<sup>333</sup> The Court first found that the reservation to the Protocol relied upon by Italy was invalid because, although Italy made a declaration that Article 4 applied only to offenses classified as criminal by Italian law, it did not contain “a brief statement of the law concerned” as Article 57 of the Convention required.<sup>334</sup> The Court then found that the two individuals were considered already convicted by a final judgment because the sentences imposed by the Consob had become final, and the two proceedings concerned the same conduct.<sup>335</sup>

The *Grande Stevens* decision was echoed in France. The Constitutional Court of France<sup>336</sup> barred a criminal trial of individuals and companies accused of insider trading on the ground that French securities regulator, the French Autorité des Marchés Financiers (AMF), had already found the same defendants not liable in an administrative proceeding<sup>337</sup>

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330. *Id.* at ¶¶ 25–26.

331. *Id.* at ¶¶ 39–52.

332. *Id.* at ¶ 42; see generally Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 7, Council of Eur., art. 4, Nov. 22, 1984, E.T.S. 117.

333. *Grande Stevens*, Eur. Ct. H.R. at ¶¶ 227–28.

334. *Id.* at ¶¶ 204–11.

335. *Id.* at ¶¶ 222, 227.

336. The Constitutional Court of France is “responsible for assessing the constitutionality of legislation.” *General Overview*, CONSEIL CONSTITUTIONNEL, <http://www.conseil-constitutionnel.fr/en/general-overview> [<http://web.archive.org/web/20191115182217/https://www.conseil-constitutionnel.fr/en/general-overview>] (last visited Nov. 15, 2019).

337. Conseil constitutionnel [CC] [Constitutional Court] decision Nos. 2014-453/454 QPC and 2015-462 QPC, Mar. 18, 2015, ¶ 36 (Fr.), [https://www.conseil-constitutionnel.fr/en/decision/2015/2014453\\_454QPCet2015462QPC.htm](https://www.conseil-constitutionnel.fr/en/decision/2015/2014453_454QPCet2015462QPC.htm) [[http://web.archive.org/web/20191112000703/https://www.conseil-constitutionnel.fr/en/decision/2015/2014453\\_454QPCet2015462QPC.htm](http://web.archive.org/web/20191112000703/https://www.conseil-constitutionnel.fr/en/decision/2015/2014453_454QPCet2015462QPC.htm)]; see also Antoine Kirry & Frederick T. Davis, *France*, in THE INTERNATIONAL INVESTIGATION REVIEW, 1, 1–5 (2015) (ebook) (describing the administrative and criminal investigations in France).

In France, the Monetary and Financial Code allows both criminal and administrative prosecution of insider trading.<sup>338</sup> Before this decision, the *non bis in idem* principle had been strictly limited to criminal law, and wrongdoers already prosecuted before the AMF for insider trading were frequently prosecuted before criminal courts for the same offense.<sup>339</sup>

The defendants allegedly engaged in insider trading, but the AMF dropped the charges for all defendants in 2009, finding that none of the alleged inside information qualified as “material inside information” under the law.<sup>340</sup> In 2014, however, a criminal judge bound nine of the defendants over to trial at the Paris first instance trial court.<sup>341</sup> The *Grande Stevens* decision was handed down after the defendants were acquitted in the administrative proceeding but before the criminal proceeding commenced.<sup>342</sup> The defendants, therefore, challenged the constitutionality of the laws allowing for dual criminal and administrative prosecutions in the Constitutional Court.<sup>343</sup>

The Constitutional Court did not rely on the *Grande Stevens* decision, but held instead that the administrative and criminal penalties could not be of a different nature.<sup>344</sup> Practitioners observe that the Constitutional Court “may be resistant as a matter of pride or principle to allowing an analysis by judges [of the *Grande Stevens* case] in Strasbourg to be seen to overtly influence its enunciation of the French constitution.”<sup>345</sup>

Though the Constitutional Court avoided the double jeopardy analysis, the Paris first instance trial court later applied both the

338. Antoine F. Kirry & Amanda Lee Wetzel, *Evolution of French Constitutional Law and European Human Rights Law Related to the non bis in idem Principle*, 4 EUR. HUM. RTS. L. REV. 382, 384 (2015); see also Kirry & Davis, *supra* note 337.

339. *Insider Trading Cases: The Paris Criminal Court Acknowledges the Extinction of Public Prosecution Following Repeal of “Double Jeopardy” System*, BRYAN CAVE LEIGHTON PAISNER (May 22, 2015), <https://www.bclplaw.com/en-US/thought-leadership/insider-trading-cases-the-paris-criminal-court-acknowledges-the.html> [<http://web.archive.org/web/20191115183817/https://www.bclplaw.com/en-US/thought-leadership/insider-trading-cases-the-paris-criminal-court-acknowledges-the.html>].

340. Kirry & Wetzel, *supra* note 338, at 385.

341. *Id.*

342. *Id.* at 388.

343. *Id.*

344. Conseil constitutionnel [CC] [Constitutional Court] decision Nos. 2014-453/454 QPC and 2015-462 QPC, Mar. 18, 2015, ¶ 28 (Fr.), [https://www.conseil-constitutionnel.fr/en/decision/2015/2014453\\_454QPCet2015462QPC.htm](https://www.conseil-constitutionnel.fr/en/decision/2015/2014453_454QPCet2015462QPC.htm) [[http://web.archive.org/web/20191112000703/https://www.conseil-constitutionnel.fr/en/decision/2015/2014453\\_454QPCet2015462QPC.htm](http://web.archive.org/web/20191112000703/https://www.conseil-constitutionnel.fr/en/decision/2015/2014453_454QPCet2015462QPC.htm)]; see also Kirry & Wetzel, *supra* note 338, at 391 (describing the holding of the case).

345. Kirry & Wetzel, *supra* note 338, at 391.

Constitutional Court's decision and the *Grande Stevens* decision and held that the "*non bis in idem* principle as codified in article 4 of Protocol No. 7 and the French principle of *res judicata*" made the criminal prosecution extinct.<sup>346</sup> Given the Constitutional Court's decision, Law No. 2016-819 introduced new provisions governing the dialogue between the Public Prosecutor and the AMF in order to avoid having both administrative and criminal enforcement for the same offense. However, there is no clear indication which cases will be handled by which authorities.<sup>347</sup>

Given these trends, Davis predicts that an increased predominance of U.S. investigations will encourage a "race to the courthouse" and "discourage companies from entering into discussions with non-U.S. prosecutors."<sup>348</sup> The DOJ should issue clear principles that encourages it to decline domestic prosecution when a party has already been charged in another country.<sup>349</sup> Additionally, because international agreements to address this issue are unlikely, the DOJ should be encouraged to share prosecutorial responsibilities with regulators in other countries.<sup>350</sup> However, he does not justify why such an international agreement would be unlikely. Therefore, the goal of this Article is to propose such an agreement or a guideline under the MMoU, which would be more feasible than requiring clear principles from the DOJ.

In summary, the cases and recent developments discussed above suggest that, in addition to the three concerns raised by application of the international double jeopardy principle provided in Section III.E.2 (i.e., competition among regulators, forum shopping, and harm to the interests of countries/regulators),<sup>351</sup> each regulator needs to take into account the double jeopardy implication for other interested regulators before entering into a negotiated settlement or imposing an administrative sanction.

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346. *See id.* (describing the decision of the Paris first instance trial court).

347. Dimitri Lecat & Stephanie Benouville, *Market Abuse News - Winter 2016*, FRESHFIELDS BRUCKHAUS DERINGER (Dec. 15, 2016), [http://knowledge.freshfields.com/en/Global/r/1754/market\\_abuse\\_news\\_-\\_winter\\_2016](http://knowledge.freshfields.com/en/Global/r/1754/market_abuse_news_-_winter_2016) [[http://web.archive.org/web/20191119010843/http://knowledge.freshfields.com/en/Global/r/1754/market\\_abuse\\_news\\_-\\_winter\\_2016](http://web.archive.org/web/20191119010843/http://knowledge.freshfields.com/en/Global/r/1754/market_abuse_news_-_winter_2016)].

348. Davis, *supra* note 73, at 99.

349. *Id.* at 100-01.

350. *Id.*

351. *See supra* Section III.E.2.

## V. PRECEDENT AND PRESCRIPTION

Legal scholars observe, “securities enforcement trends since the 2008 financial crisis show that regulatory authorities worldwide have almost universally agreed to coordinate and cooperate with each other.”<sup>352</sup> However, while international cooperation has been seen in FCPA investigations, such a level of cooperation has rarely been seen in securities enforcement.<sup>353</sup> Regulators arguably may have overcome similar challenges of coordination in other contexts, such as antitrust law and antibribery law, and these may provide instructive examples from which securities regulators can learn how to solve double jeopardy issues.<sup>354</sup>

This Part revisits and analyzes enforcement comity implemented in relation to the DOJ’s prosecution. It then turns to an analysis of existing enforcement cooperation frameworks in antitrust law and antibribery law.

## A. Enforcement Comity

## 1. Enforcement Comity Revisited

Even if successive prosecutions by different jurisdictions is permissible, some jurisdictions may refrain from prosecuting due to enforcement comity.<sup>355</sup> As discussed in Section III.C.2 above, the DOJ modifies the dual sovereignty doctrine and defers to other regulators through enforcement comity frameworks such as the Petite Policy, the U.S.-E.C. Positive Comity Agreement, the Guidance for Handling Criminal Cases, and the DOJ’s policy regarding foreign authorities.<sup>356</sup>

For example, the DOJ’s domestic policies could be adjusted to provide a reasonable starting point for creating prosecutorial guidelines in multijurisdictional antibribery enforcement.<sup>357</sup> Holtmeier proposes that regulators outline a more explicit “prudential policy,” similar to the

352. Henry Klehm III et al., *Securities Enforcement Has Crossed the Border: Regulatory Authorities Respond to the Financial Crisis with a Call for Greater International Cooperation, but Where Will That Lead?*, 13 U. PA. J. BUS. L. 927, 928 (2011). For example, about a third of SEC’s investigations of market misconduct requires the SEC to collect evidence abroad. *Id.* at 942.

353. *Id.* at 954.

354. *Id.* at 946.

355. See Colangelo, *supra* note 3, at 848 (arguing that just because successive prosecutions were permitted does not mean that they are required).

356. See *supra* Section III.C.2.

357. Holtmeier, *supra* note 148, at 521.

Petite Policy, to impose a higher bar on successive prosecution, considering factors like:

- (1) the strength of the investigating/prosecuting state's interest in the case, such as whether the offender is incorporated in the state or listed on one of its exchanges;
- (2) whether a prior or related investigation/prosecution addresses all offending conduct; and
- (3) whether the other prosecution(s) satisfies the demands of deterrence, in view of the defendant's culpability and compliance.<sup>358</sup>

Ultimately, only the most relevant jurisdiction should investigate the matter.<sup>359</sup>

Holtmeier reasons that his approach will achieve the goals of establishing final liability in all related jurisdictions and avoiding inefficient and unfair resolutions, while also encouraging companies to self-report and cooperate.<sup>360</sup> He argues that this approach will also allow authorities to address issues at the earliest stage, including "comity and good foreign diplomatic relations; collateral consequences to the alleged offender, victims, and innocent third parties; and practical issues, such as which authority is best positioned to enforce sanctions."<sup>361</sup>

Holtmeier's proposal can also be implemented as a good starting point for cooperation among securities regulators, but differences between antibribery enforcement and securities enforcement should be noted in structuring a cooperative framework. For example, in international market misconduct enforcement, there is no incentive for the defendants to self-report.<sup>362</sup> Also, in antibribery cases, there is generally both a supply-side country and a demand-side country, and

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358. *Id.* at 522.

359. *Id.*

360. *Id.*

361. *Id.*

362. Leniency in the context of antitrust law is the "policy by which cartel participants are offered some kind of reward—usually immunity or a partial reduction in the penalty or penalties they would normally face for partaking in collusion—in exchange for the voluntary disclosure of information that serves as evidence of the existence of the cartel." Sandra Marco Colino, *The Perks of Being a Whistleblower: Designing Efficient Leniency Programs in New Antitrust Jurisdictions*, 50 VAND. J. TRANSNAT'L L. 535, 541 (2017). A similar policy is implemented in FCPA enforcement. See FCPA RESOURCE GUIDE, *supra* note 161, at 54 ("[B]oth DOJ and SEC place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters.").

such relationships are usually fixed (that is, their positions do not reverse).<sup>363</sup>

In securities cases, although there are a few "central" securities markets that attract many foreign investors (and are thus more likely to be involved in market misconduct), such as the New York Stock Exchange and the Tokyo Stock Exchange, the supply of market misconduct can come from any country. Interests of securities regulators, therefore, are more likely to converge, rather than diverge, because market misconduct can harm any country's securities market.

## 2. *Prior Notice and Consultation Provisions*

Prior notice and consultation provisions contained in the major anti-terrorism treaties uniformly mandate prior notice to other jurisdictionally interested states.<sup>364</sup> Even though these provisions are less mature than enforcement comity regimes seen in the Petite Policy and the U.S.-E.C. Positive Comity Agreement, these provisions contemplate the same sort of communication and cooperation opportunities among interested states.<sup>365</sup>

The treaties all contain similar provisions directing that any state making a "preliminary inquiry" or "investigation" into the facts of an offense set forth by the treaty "shall promptly report its findings to [other directly jurisdictionally interested states as designated by the treaty, i.e., national jurisdiction states] and shall indicate whether it intends to exercise jurisdiction."<sup>366</sup> Coordination provisions also promote cooperation and ex ante resolution of jurisdictional disputes. For example, the Convention for the Suppression of Financing Terrorism provides that "[w]hen more than one State Party claims jurisdiction over the offences set forth [herein], the relevant States Parties shall strive to coordinate their actions appropriately, in particular concerning the conditions for prosecution and the modalities for mutual legal assistance."<sup>367</sup>

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363. See Holtmeier, *supra* note 148, at 496 (explaining that foreign bribery cases always involve at least two countries, "the bribe-giver's home country (the supply-side jurisdiction) and the bribe-receiver's home country (the demand-side jurisdiction)").

364. *E.g.*, Convention for the Suppression of Unlawful Seizure of Aircraft art. 6(4), Dec. 16, 1970, 22 U.S.T. 1641; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 7(5), Mar. 10, 1988, 1678 U.N.T.S. 221; International Convention for the Suppression of the Financing of Terrorism art. 9(6), Dec. 9, 1999, 39 I.L.M. 270, 274-75 [hereinafter Financing Convention].

365. Colangelo, *supra* note 3, at 855.

366. See Financing Convention, *supra* note 364.

367. *Id.* at art. 7(5).

In summary, from enforcement comity, securities regulators can learn the following: first, the Petite Policy provides both substantial and procedural guidelines that may be adjusted as a “prudential policy” and used in considering the interests of other authorities;<sup>368</sup> second, the U.S.-E.C. Positive Comity Agreement suggests a mechanism where one party may request another party to take enforcement action;<sup>369</sup> third, the A-G Guidance and the Joint Guidance show how and what interested parties should consult and decide;<sup>370</sup> fourth, DOJ’s policy regarding “Prosecution in Another Jurisdiction” may be applied internationally;<sup>371</sup> and fifth, prior notice and consultation provisions contained in the major antiterrorism treaties can also be incorporated into the MMOU.<sup>372</sup>

## *B. Antitrust Cooperation*

### *1. Existing Framework*

It seems that antitrust enforcement authorities are more advanced in terms of international cooperation.<sup>373</sup> For example, the United States and the European Union have entered into a formal cooperation agreement that requires each country to consider the other’s interests in determining whether to investigate an offense and what penalties to seek.<sup>374</sup>

On the 20th anniversary of this agreement, antitrust agencies (the DOJ, the U.S. Federal Trade Commission, and the Competition Directorate-General of the European Commission) compiled a collection of best practices in facilitating cooperation in merger investigations.<sup>375</sup> Paragraph 13 provides:

[T]he reviewing agencies should seek to coordinate with one another throughout the course of their investigations and to keep one another informed of their progress; such coordination may well start in DG Competition’s pre-notification phase. This coordination may include sharing publicly available information

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368. See *supra* Section V.A.1.

369. See *supra* Section III.C.2.b.

370. See *supra* Section III.C.2.

371. See *supra* Section III.C.2.

372. See *supra* Section III.E.3.

373. See Bourtin et al., *supra* note 72, at 1 (noting that antitrust enforcement authorities were more advanced in mitigating the risk of double jeopardy).

374. See *supra* Section III.C.2.b (detailing the U.S.-E.C. Positive Comity Agreement).

375. U.S.-E.U. Merger Working Group, *Best Practices on Cooperation in Merger Investigations* (Oct. 2011), <https://www.ftc.gov/system/files/111014eumerger.pdf> [<http://web.archive.org/web/20191116162445/https://www.ftc.gov/system/files/111014eumerger.pdf>].

and, consistent with the agencies' confidentiality obligations, discussing their respective analyses at various stages of an investigation, including market definitions, assessments of competitive effects and efficiencies, theories of competitive harm, economic theories, and empirical evidence needed to test those theories. Views on necessary remedial measures and relevant past investigations and cases also may be discussed.<sup>376</sup>

Paragraph 16 provides: "Cooperation will be especially valuable for both the reviewing agencies and the merging parties in mergers for which remedies need to be considered in both jurisdictions, or for which remedies offered to one agency may have effects in the other jurisdiction."<sup>377</sup>

In addition, the European Competition Network (ECN) facilitates finding an investigative authority best suited to avoid parallel proceedings.<sup>378</sup> It is a forum for discussion and cooperation of European competition authorities to "ensure an efficient division of work and an effective and consistent application of ECN competition rules."<sup>379</sup> Through the ECN, "[t]he EU Commission and competition authorities from EU member states cooperate with each other . . . by: informing each other of new cases and envisaged enforcement decisions; coordinating investigations, where necessary; helping each other with investigations; exchanging evidence and other information; and discussing various issues of common interest."<sup>380</sup>

As to the imposition of penalties, for example, the Office of Fair Trading (OFT) of the United Kingdom published a guideline that requires it to consider fines imposed by the European Commission or any other EU Member State's antitrust enforcement authority.<sup>381</sup> Among many factors to be considered in calculating a penalty, paragraph 2.24 of the guideline provides:

376. *Id.* at ¶ 13.

377. *Id.* at ¶ 16.

378. *European Competition Network Overview*, EUR. COMM'N (Apr. 16, 2012), [http://ec.europa.eu/competition/ecn/more\\_details.html](http://ec.europa.eu/competition/ecn/more_details.html) [[http://web.archive.org/web/20191116163151/https://ec.europa.eu/competition/ecn/more\\_details.html](http://web.archive.org/web/20191116163151/https://ec.europa.eu/competition/ecn/more_details.html)].

379. *Id.*

380. *Id.*

381. *See generally Guidance as to the Appropriate Amount of a Penalty*, OFFICE OF FAIR TRADING (Sept. 2012) (U.K.), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284393/oft423.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf) [[http://web.archive.org/web/20191116163915/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284393/oft423.pdf](http://web.archive.org/web/20191116163915/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf)].

If a penalty or fine has been imposed by the European Commission, or by a court or other body in another Member State in respect of an agreement or conduct, the [OFT] must take that penalty or fine into account when setting the amount of a penalty in relation to that agreement or conduct.<sup>382</sup>

This provision ensures that where an anti-competitive agreement or conduct is subject to proceedings resulting in a penalty or fine in another Member State, that conduct will not be penalized again in the United Kingdom.

## 2. *Air Cargo Cases*

In the *Air Cargo* cases, various competition authorities implemented measures to address the double jeopardy issue.<sup>383</sup> There, “a number of air cargo carriers were involved in a price-fixing cartel in respect of freight rates and surcharges for shipping goods across various countries worldwide.”<sup>384</sup> Because the cartel impacted competition at both the starting and end points of shipping routes, if the competition authorities of each jurisdiction accounted for both inbound and outbound shipments to set the fine, the defendants would be paying twice for one offense.<sup>385</sup> Some regulators, therefore, tried various approaches to avoid over-punishment.<sup>386</sup>

For example, in a 2007 plea agreement with British Airways (BA), the DOJ *excluded* commerce related to BA’s cargo shipments into the United States when assessing the volume of affected commerce, but *included* it when making an upward adjustment from what would have been the bottom end of the sentencing range—because of the serious harm U.S. victims suffered.<sup>387</sup> Moreover, the next year, Qantas was fined

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382. *Id.* at 16. The title of the applicable section explicitly says, “adjustment to prevent maximum penalty being exceeded and to *avoid double jeopardy*.” *Id.* at 15 (emphasis added).

383. Susan Ning et. al., *The Principle of “Double Jeopardy” in International Cartel Investigations*, CHINA L. INSIGHT (Nov. 13, 2014), <https://www.chinalawinsight.com/2014/11/articles/compliance/the-principle-of-double-jeopardy-in-international-cartel-investigations/> [<http://web.archive.org/web/20191116164640/https://www.chinalawinsight.com/2014/11/articles/compliance/the-principle-of-double-jeopardy-in-international-cartel-investigations/>].

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

by the Australian Competition and Consumer Commission (ACCC) because of its involvement in the cartel; however, the ACCC recognized the fines previously imposed on Qantas in the United States and the future fines that would be imposed by the European Commission—noting that without acknowledging the fines levied in other jurisdictions, the base fine amount it imposed would have been significantly higher.<sup>388</sup> In comparison, in 2010, eleven air cargo carriers were fined by the European Commission because of their involvement in the cartels; however, here, the Commission only took into account “50% of the turnover achieved on routes between the European Economic Area [] and third countries. . . .”<sup>389</sup>

### 3. Analysis

Many scholars and practitioners have analyzed the existing framework and proposed revisions for more efficient enforcement. For example, John Terzaken and Pieter Huizing observe that, in practice, each jurisdiction takes an “ad hoc approach” in which it decides for itself what it considers to be an appropriate punishment, “often without taking into account the actual or potential enforcement actions of other jurisdictions.”<sup>390</sup> They criticize the approaches taken in the *Air Cargo* case as “noble efforts to bring fairness and proportionality to the process” but “inconsistent and incapable of solving the underlying over-punishment issue.”<sup>391</sup> They propose a four-step analysis that each jurisdiction should consider in exercising prosecutorial discretion in parallel enforcement actions:

- (1) Is there a single, overarching international conspiracy?
- (2) If so, is the harm to national businesses and consumers similar to the harm caused abroad?
- (3) If so, will the foreign sanction against the particular defendant be greater than or equal to the penalty that would

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388. *Id.*

389. *Id.*

390. John Terzaken & Pieter Huizing, *How Much Is Too Much? A Call For Global Principles to Guide the Punishment of International Cartels*, ALLEN & OVERY 1, 4 (Spring 2013),

[http://awa2014.concurrences.com/IMG/pdf/how\\_much.pdf](http://awa2014.concurrences.com/IMG/pdf/how_much.pdf)

[[http://web.archive.org/web/20191116165447/http://awa2014.concurrences.com/IMG/pdf/how\\_much.pdf](http://web.archive.org/web/20191116165447/http://awa2014.concurrences.com/IMG/pdf/how_much.pdf)].

391. *Id.*

otherwise be imposed under national law for purposes of general and specific deterrence?

(4) If not, what level of additional sanction is necessary to impose on the particular defendant to achieve a proportionate and deterrent punishment under national law?<sup>392</sup>

Scholars argue that this test should not require definitive “yes or no” answers, but should work as a guide for prosecutorial discretion, thereby achieving retribution and deterrence of wrongdoing while avoiding the risk of over-punishment.<sup>393</sup> Although this test does not take into consideration the priority among interested parties, it seems to be a good starting point for further discussion.<sup>394</sup> Moreover, this additional framework will encourage facilitation and coordination, which is less ad hoc than a case-by-case basis for cooperation in antibribery enforcement.<sup>395</sup>

In summary, from the existing antitrust cooperation and proposed solutions, securities regulators can learn the following: first, the US-EU Merger Working Group’s Best Practices provide useful model provisions for contents of coordination;<sup>396</sup> second, the *Air Cargo* case shows—though perhaps inconsistently—how authorities have decided penalties when considering penalties imposed by other authorities;<sup>397</sup> and third, Terzaken’s and Huizing’s proposal of the four-step analysis in deciding antitrust prosecutorial discretion is also useful for securities regulators.<sup>398</sup>

### C. Antibribery Cooperation

Holtmeier observes that in antitrust enforcement, regulators are more active than in antibribery enforcement in addressing double jeopardy concerns.<sup>399</sup> He argues that international antibribery enforcement came later to the game than antitrust enforcement, so antibribery regulators can look to antitrust experience in seeking ways to create an international

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392. *Id.* at 7.

393. *Id.*

394. *See id.* at 8 (claiming that it would serve as a “catalyst for the further development of guiding principles for ensuring fair and proportional punishment in international cartel cases”).

395. Holtmeier, *supra* note 148, at 519.

396. *See supra* Section V.B.1.

397. *See supra* Section V.B.2.

398. *See supra* Section V.B.3.

399. Holtmeier, *supra* note 148, at 518 (describing, as an example, the 1998 Positive Comity Agreement between the United States and the European Union).

cooperation regime.<sup>400</sup> Furthermore, international securities enforcement came later to the game than both antitrust enforcement and antibribery enforcement, so securities regulators can learn from both.<sup>401</sup>

### 1. The OECD Antibribery Framework

International organizations such as the United Nations and the Organization for Economic Cooperation and Development (OECD) issued guidelines for multiple concurrent proceedings.<sup>402</sup> For example, Article 15(5) of the UN Convention Against Corruption provides that if a State learns that another State is conducting an “investigation, prosecution, or judicial proceeding” regarding the same conduct, the authorities “shall, as appropriate, consult one another with a view to coordinating their actions.”<sup>403</sup>

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organization of Economic Co-operation and Development (OECD Convention)<sup>404</sup> also contemplates multiple prosecutions and double jeopardy concerns.<sup>405</sup> Multiple prosecutions have been seen in international efforts to combat cross-border corruption under the OECD Convention signed in 1997.<sup>406</sup> The OECD Convention led to the transformation of the signatory countries’ antibribery laws into laws similar to those in the Foreign Corrupt Practices Act (FCPA).<sup>407</sup>

Prior to the implementation of the OECD Convention, most companies faced the realistic risk of prosecution only in the United States and in the country where the bribery occurred, and “prosecutions in other countries of incorporation were rare.”<sup>408</sup> After the implementation of the OECD Convention, however, an individual entity

400. *Id.* at 519 n.160.

401. *Id.*

402. Bourtin et al., *supra* note 72, at 1.

403. G.A. Res. 55/25, Annex II, United Nations Convention Against Transnational Organized Crime, art. 15(5) (Jan. 8, 2001).

404. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Org. for Econ. Co-Operation & Dev. [OECD], Dec. 17, 1997, 37 I.L.M. 1 [hereinafter OECD Convention].

405. See Davis, *supra* note 73, at 62 (“The OECD Convention clearly considered the possibility of multiple investigations.”).

406. *Id.* at 61.

407. *Id.*

408. *Id.*

engaging in bribery may risk prosecution “in any signatory country where it is incorporated or has significant contacts.”<sup>409</sup>

Instead of prohibiting multiple prosecutions, Article 4.3 of the OECD Convention provides: “When more than one Party [i.e., signatory country] has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.”<sup>410</sup> The drafters intended that only one country should prosecute a defendant in multiple investigations.<sup>411</sup>

## 2. Cases and Practices

There are cases where authorities deciding penalties gave consideration to penalties imposed by other authorities.<sup>412</sup> For example, the DOJ agreed in 2006 to reduce Statoil’s fine by \$3 million, in consideration of the \$3 million fine Norwegian authorities levied against the company.<sup>413</sup> Also, the DOJ agreed to impose an \$800,000 fine on Akzo Nobel, but under a non-prosecution agreement it agreed to waive the fine if Akzo Nobel paid an equivalent fine to Dutch authorities.<sup>414</sup> In the prosecution of Innospec Limited, U.S. and U.K. authorities consulted Innospec to determine how much the company could pay and negotiated with each other to split the total amount of the penalty.<sup>415</sup>

One of the notable examples is a global settlement of Siemens for the violation of anti-bribery provisions, which imposed over \$1.6 billion in

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409. *Id.*; see also Holtmeier, *supra* note 148, at 495 (observing that, as more jurisdictions become active in anticorruption enforcement, “parallel or successive enforcement . . . and, in some cases, duplicative penalties by different authorities,” will become common).

410. OECD Convention, *supra* note 404, at art. 4.3.

411. See Davis, *supra* note 73, at 62 (“The drafters clearly hoped that in the event of multiple investigations, only one country would actually prosecute a given defendant.”).

412. Press Release, U.S. Dep’t of Justice, U.S. Resolves Probe Against Oil Company that Bribed Iranian Official (Oct. 13, 2006), [https://www.justice.gov/archive/opa/pr/2006/October/06\\_crm\\_700.html](https://www.justice.gov/archive/opa/pr/2006/October/06_crm_700.html), [[http://web.archive.org/web/20191116171218/https://www.justice.gov/archive/opa/pr/2006/October/06\\_crm\\_700.html](http://web.archive.org/web/20191116171218/https://www.justice.gov/archive/opa/pr/2006/October/06_crm_700.html)].

413. *Id.*

414. Press Release, U.S. Dep’t of Justice, Akzo Nobel Acknowledges Improper Payments Made by its Subsidiaries to Iraqi Government Under the U.N. Oil for Food Program, Enters Agreement with Department of Justice (Dec. 20, 2007), [https://www.justice.gov/archive/opa/pr/2007/December/07\\_crm\\_1024.html](https://www.justice.gov/archive/opa/pr/2007/December/07_crm_1024.html), [[http://web.archive.org/web/20191116171326/https://www.justice.gov/archive/opa/pr/2007/December/07\\_crm\\_1024.html](http://web.archive.org/web/20191116171326/https://www.justice.gov/archive/opa/pr/2007/December/07_crm_1024.html)].

415. *R. v. Innospec Ltd.* [2010] 3 WLUK 784, [2010] Crim. L.R. 665 (In the Crown Court at Southwark).

disgorgement and fines.<sup>416</sup> Siemens was charged for paying bribes totaling over \$1 billion to foreign officials between 2001 and 2007 in order to obtain business around the world, including in China, Argentina, Vietnam, and Russia.<sup>417</sup> The investigation also revealed that Siemens' management did not ensure that the company complied with U.S. and German laws adopting the OECD Convention.<sup>418</sup>

Siemens paid \$350 million in disgorgement penalties to the SEC, a \$450 million criminal fine to the DOJ, and a total of \$854 million in criminal fines to the Office of the Prosecutor General in Munich.<sup>419</sup> The SEC leveraged the prior investigation by German prosecutors and conducted a further joint investigation with the U.K. Financial Services Agency and the HKSFC.<sup>420</sup>

Holtmeier observes that different authorities did not punish the same conduct because the U.S. settlement related to "illegal payments made in Latin America, the Middle East, and Bangladesh[.]" while the German charges "involved a different set of corrupt acts . . . in Spain, Venezuela, and China."<sup>421</sup> Because several different authorities can conduct multiple related prosecutions with little apparent overlap, it would be "impossible to know in which instances, if any, various authorities took into consideration" prosecutions by other authorities; regulators should collaborate to provide more predictability and efficiency.<sup>422</sup>

### 3. Analysis

Although Article 4(3) of the OECD Convention has never been invoked, this does not mean prosecutors do not consult each other.<sup>423</sup> Some argue that Article 4(3) should be used to override the double sovereignty doctrine or should be revised to provide a binding mechanism to determine the single prosecuting jurisdiction.

For example, Michael P. Van Alstine argues that the Convention's requirement that each Member State criminalize the same conduct creates an exception to the double sovereignty doctrine, or in the alternative, that the consultation requirement in Article 4(3) overrides the

416. Klehm et al., *supra* note 352, at 944–45.

417. Siemens Aktiengesellschaft, SEC Litigation Release No. 20829, 2008 WL 5221040 (Dec. 15, 2008).

418. *Id.*

419. *Id.*

420. *Id.*

421. Holtmeier, *supra* note 148, at 504.

422. *Id.* at 505–06.

423. See Dunn, *supra* note 213 (citing comments of the OECD legal director).

double sovereignty doctrine.<sup>424</sup> He admits that Article 4(3) alone would not create a self-executing protection against double jeopardy because the obligation to consult is only triggered “at the request” of another Member State.<sup>425</sup> Alstine argues, however, that where “another [M]ember [S]tate makes a corresponding formal request, a strong argument may exist that the involved [M]ember [S]tates must identify ‘the most appropriate jurisdiction’ among them for prosecution for the specific offense defined in the Convention, and that double jeopardy should attach to” successive prosecutions.<sup>426</sup>

Arguments that Article 4(3) requires a single prosecution, however, have been rejected in U.S. courts. For example, in *United States v. Jeong*, a person already convicted of corruption in Korea claimed that Article 4.3 precluded prosecution in the United States.<sup>427</sup> The Court rejected this argument, noting: “We 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.”<sup>428</sup>

The idea that Article 4(3) of the OECD Convention should be altered to create a binding mechanism for determining a single jurisdiction has been also criticized. For example, observes a political implausibility where not only would this amendment require the assent of several countries that do not recognize the international double jeopardy principle, but would also “radically transform the Convention by requiring countries to surrender their sovereign power.”<sup>429</sup> This Article, therefore, does not propose a binding mechanism to decide a single jurisdiction for prosecution or mandate countries to surrender their sovereign power, but instead tries to provide a practical guideline for cooperation.

In the context of antibribery enforcement, Bourtin proposes that “[a]ll interested authorities should confer to determine which authority is best suited to conduct the investigation,” so that a “single national

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424. Michael P. Van Alstine, *Treaty Double Jeopardy: The OECD Anti-Bribery Convention and the FCPA*, 73 OHIO ST. L.J. 1321, 1323 (2012); see also Davis, *supra* note 73, at 99–101 (arguing for “a more procedurally comprehensive, and binding, version of article 4.3 that would require coordinated prosecutions and only one opportunity to prosecute a given defendant for the same acts”). *But see* Moran, *supra* note 230 (criticizing such an argument on the ground that it would be “difficult to reconcile with the soft ‘consultation’ language of art 4.3”).

425. Alstine, *supra* note 424, at 1344.

426. *Id.* at 1350.

427. *United States v. Jeong*, 624 F.3d 706, 709 (5th Cir. 2010).

428. *Id.* at 711.

429. Moran, *supra* note 230.

authority [can] then investigate and prosecute.”<sup>430</sup> He lists the following factors to be considered:

- The site of the conduct;
- The nationality of the defendant and victims;
- The location of witnesses and evidence;
- Available resources;
- The ability to obtain evidence;
- Whether one investigation has advanced substantially ahead of others;
- Whether the defendant has pledged to cooperate with any authority;
- The likely penalty; and
- The commitment of the authority to anti-bribery enforcement.<sup>431</sup>

Bourtin also proposes that “[i]f the authorities cannot reach agreement, the matter should be referred to a tribunal. If no resolution is reached after such referral, the authorities should agree closely to coordinate their investigations,” and “[i]f a single authority is designated, the other authorities should terminate or suspend their investigations.”<sup>432</sup> As to the imposition of penalties in multiple proceedings, he proposes that “they should ensure that any penalty takes account of penalties imposed by other authorities, so that the combined penalty does not exceed the highest penalty set in any of the . . . jurisdictions” and that they should “try to distribute equitably any disgorged profits.”<sup>433</sup>

While his proposal is very specific and practicable, it should be tailored to enforcement against market misconduct, considering the similarities and differences between the nature of those cases and anti-bribery cases. For example, the interest harmed may not be the same (i.e., fair business opportunity versus market integrity), and there is a strong incentive to self-report in anti-bribery cases.

In summary, from antibribery cooperation and proposed solutions, securities regulators can learn the following: first, the OECD antibribery framework provides a good starting point for a consultation clause to be provided in the MMoU;<sup>434</sup> second, although it is not clear how regulators should allocate responsibilities and money remedies in a global

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430. Bourtin et al., *supra* note 72, at 2.

431. *Id.*

432. *Id.*

433. *Id.*

434. *See supra* Section V.C.1.

settlement, collaboration among regulators can provide more predictability and efficiency in enforcement;<sup>435</sup> third, various proposals to amend Article 4(3) of the OECD Convention can provide a useful guideline for the MMoU;<sup>436</sup> and fourth, although it might not be necessary or desirable to have a single prosecuting authority in securities enforcement, Bourtin's proposal to determine a single prosecuting authority provides helpful factors consider in cooperation under the MMoU.<sup>437</sup>

## VI. SOLUTION—PROPOSALS FOR AMENDING THE MMoU

Given the existing framework, cases, proposals, and concerns discussed above, provisions ought to be added to the MMoU dealing with prior notice and consultation, joint investigation and enforcement, and requests for enforcement.

### *A. Prior Notice and Consultation*

The following provisions should be added to obligate securities regulators to notify other securities regulators who may be affected by the former's investigation and enforcement and to provide an opportunity to consult with each other to solve potential jurisdictional issues:

1) If an Authority<sup>438</sup> commences a preliminary inquiry or investigation to secure compliance with the respective Laws and Regulations<sup>439</sup> of the Authority—which may affect important interests of any other Authority—the investigating Authority shall, as promptly as possible, notify all other Authorities that may be affected; confirm the existence of parallel criminal, civil, or administrative proceedings by the latter Authority; and indicate whether the first Authority intends to exercise jurisdiction. At this stage, the relevant Authorities may share with each other—and others—publicly available information,

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435. *See supra* Section V.C.1.

436. *See supra* Section V.C.1.

437. *See supra* Section V.C.3.

438. "Authority" means those regulators listed in Appendix A, who, in accordance with the procedures set forth in Appendix B, have signed this Memorandum of Understanding." MMoU, *supra* note 30, at ¶ 1.

439. "Laws and Regulations" mean the provisions of the laws of the jurisdictions of the Authorities, the regulations promulgated thereunder, and other regulatory requirements that fall within the competence of the Authorities," regarding securities regulation. *Id.* at ¶ 4.

their respective analyses, views on necessary remedial measures, and relevant past investigations and cases.

2) When more than one Authority claims jurisdiction over the same facts and against the same Persons,<sup>440</sup> the Relevant Authorities shall, as appropriate and at the request of any of the relevant Authorities: consult with or among one another with a view to coordinating their actions appropriately and to decide the best course of action, to provide mutual legal assistance, and to mitigate the adverse consequences that may occur due to the parallel proceedings. For the avoidance of doubt, nothing contained in this Agreement requires that a single Authority enforce its Laws and Regulations against any Persons. The best courses of action include, among others: a joint investigation, a global settlement, and parallel but separate prosecutions.

3) If the relevant Authorities cannot reach agreement over the best course of action, the relevant Authorities may jointly refer the matter to the Chairperson of the IOSCO. The Chairperson shall then recommend a course of action that the relevant Authorities may take, however, this recommendation shall not bind the relevant Authorities.

These provisions incorporate the step-by-step approach in potential multijurisdictional cases taken under the Joint Guidance issued by the United Kingdom and the United States.<sup>441</sup> These provisions are generally based on the prior notice and consultation provisions contained in the major antiterrorism treaties that uniformly mandate prior notice to, and consultation with, interested states.<sup>442</sup> Information to be shared at this stage is based on paragraph 13 of the Best Practices on Cooperation in Merger Investigations.<sup>443</sup> These provisions ensure that the relevant Authorities can be consulted at an earlier stage, as the A-G Guidance allows.<sup>444</sup>

The provisions above clarify that the MMoU does not require a single Authority to take an enforcement action. A single enforcement action in a single forum would always be the goal for multiple States' securities regulators for two reasons. First, a securities regulator in one jurisdiction may take a civil or administrative enforcement action to

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440. "'Person' means a natural or legal person, or unincorporated entity or association, including corporations and partnerships." *Id.* at ¶ 5.

441. See *supra* Section III.C.2.c (describing the Joint Guidance).

442. See *supra* Section V.A.2 (describing prior notice and consultation provisions).

443. See U.S.-E.U. Merger Working Group, *supra* note 375.

444. See *supra* Section III.C.2.c (describing the A-G Guideline).

supplement criminal enforcement of another jurisdiction's securities regulator. Second, choosing only one jurisdiction to prosecute market misconduct might mandate other jurisdictions with strong interests in prosecution to surrender their sovereign powers.<sup>445</sup>

Finally, these provisions delegate to the IOSCO Chairperson the authority to coordinate among regulators, though that authority is not mandatory, but merely recommended. It resembles a mechanism in which the Office of Attorney General or Lord Advocate takes the lead under the A-G Guidance when the parties cannot reach an agreement.<sup>446</sup>

### *B. Joint Investigation and Enforcement*

The following provisions should be added to clarify what factors the relevant Authorities should consider when deciding whether and how to conduct a joint investigation:

Whether to conduct a joint investigation, and if so, which Authority should take the lead in the investigation, and whether to conduct parallel but separate investigations, may depend on various factors, including:

- Whether regulatory interests are diverging, complementing, or conflicting;
- Which Authority's interest is stronger;
- Whether there is any limitation on sharing information;
- Where and how investigations may be most effectively pursued, including the location and availability of witnesses and evidence;
- Whether an Authority's investigation has advanced substantially ahead of others;
- Where and how prosecutions should be initiated, continued, or discontinued;
- Whether an Authority has the ability, resources, and willingness to prosecute effectively;
- Whether waivers of confidentiality may be obtained by the Persons under investigation;
- Whether the Persons have pledged to cooperate with any Authority; and

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445. See Moran, *supra* note 230 (arguing against choosing a single prosecuting jurisdiction).

446. See JOINT GUIDANCE, *supra* note 153, at 6-7 (describing the authority of the Office of Attorney General and Lord Advocate).

- Which Authority's enforcement has the most multiplying effect.

These factors are informed by various treaties and guidelines, including: (1) the three items on which the U.K. and U.S. prosecutors should consult with each other under the A-G Guidance;<sup>447</sup> (2) the three factors that the DOJ considers in determining whether to defer to a state or local authority;<sup>448</sup> (3) the four-step analysis proposed by Terzaken and Huizing in deciding whether to exercise prosecutorial discretion;<sup>449</sup> and (4) Bourtin's proposed factors to be considered when regulators discuss which authority would be best suited to investigate a matter.<sup>450</sup>

These provisions contemplate cases in which an administrative proceeding in one country resulting in a civil or administrative penalty or a settlement may prevent another regulator's criminal proceeding, or vice versa.<sup>451</sup> These provisions also allow an Authority to take a civil or administrative enforcement action to supplement criminal enforcement of another Authority.

The following provision should also be added to the MMoU:

Whether an Authority has interest in a Person is decided based on factors including:

- Where the substantive offense occurred or was facilitated;
- Where the losses either occurred or were received; and
- The nationality or connections of the Person, such as where the Person resides or is incorporated or listed.

These factors were informed by (1) the four-step analysis proposed by Terzaken and Huizing<sup>452</sup> and (2) Bourtin's proposed factors.<sup>453</sup>

Finally, the following provision should be added to clarify the factors to be considered when the relevant Authorities decide whether to enter into a global settlement or a coordinated resolution:

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447. See *id.* at 6 (listing the three items).

448. See U.S. ATTORNEYS' MANUAL, *supra* note 129, at § 9-27.240 (listing three factors).

449. See Terzaken & Huizing, *supra* note 390, at 7 (describing the four-step analysis).

450. See Bourtin et al., *supra* note 72, at 1 (listing the factors).

451. See *supra* Section IV.B (describing the trend).

452. See Terzaken & Huizing, *supra* note 390, at 7 (describing the four-step analysis).

453. See Bourtin et al., *supra* note 72, at 1 (listing the factors).

Whether the relevant Authorities shall enter into a global settlement or, at a minimum, a coordinated resolution may depend on factors including:

- Whether contemplated remedies could nullify the other Authority's investigation due to international double jeopardy or similar concerns, and if so, whether an Authority should take enforcement action first;
- Whether contemplated sanctions are duplicate, complementary, or contradictory;
- Whether Authorities could take actions on different persons involved or different offending conduct;
- Whether the other Authority's action is adequate and satisfies the demands of deterrence, in view of the defendant's culpability and compliance;
- Whether an Authority must take a penalty or fine imposed by other Authorities into account when setting the amount of a penalty; and
- Whether the relevant Authorities can share penalties and recoveries equitably.

These provisions follow a case-by-case determination under the Petite Policy.<sup>454</sup> The factors are informed by: (1) various securities and antitrust cases in which relevant regulators entered into a global settlement or coordinated resolutions, including *Statoil*,<sup>455</sup> *SBM Offshore*,<sup>456</sup> *Air Cargo*,<sup>457</sup> and *Siemens*;<sup>458</sup> and (2) cases in which securities regulators with strong interests were unable or unwilling to prosecute, including *Royal Ahold*,<sup>459</sup> *DePuy International*,<sup>460</sup> *BAE*,<sup>461</sup> and *Tiger*.<sup>462</sup> The factors are also informed by Holtmeier's proposal of "prudential policy," which modifies the Petite Policy and applies it to multijurisdictional antibribery enforcement.<sup>463</sup>

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454. See *supra* Section III.C.2.a (describing the Petite Policy).

455. See Kirchgaessner & Lau, *supra* note 169, at 7 (describing the case).

456. See Hecker et al., *supra* note 172, at 13 (describing the case).

457. See Ning et. al., *supra* note 383 (describing the case).

458. See Klehm, *supra* note 352, at 944-45 (describing the case).

459. See Royal Ahold Press Release, *supra* note 258 (describing the case).

460. See DePuy Press Release, *supra* note 272 (describing the case).

461. See *BAE Systems: Timeline of Bribery Allegations*, *supra* note 277 (describing the case).

462. See Complaint, *supra* note 284 (describing the case).

463. See Holtmeier, *supra* note 148, at 520 (internal citation omitted) (describing the proposal).

### *C. Request for Enforcement*

The following provisions should be added so that one Authority can ask another relevant Authority to take an enforcement action if the first Authority believes that the enforcement action by the second Authority would complement or substitute for the requesting Authority's action:

- When joint enforcement is impossible or impracticable, one Authority may request that the other Authority take enforcement action against the Persons residing in the requested Authority's jurisdiction but affecting the interests of the requesting Authority to the extent it is allowed under the Laws and Regulations of the requested Authority;
- Upon request, the requested Authority shall devote adequate resources to the enforcement activities, use its best efforts to pursue all sources of information, inform the requesting Authority of the status of the enforcement activities, use its best efforts to quickly pursue completion of an investigation and obtain remedies, and fully inform the requesting Authorities prior to any settlement, initiation of proceedings, adoption of remedies, or termination of the investigation;
- For the avoidance of doubt, nothing in this Agreement precludes the requesting Authority that chose to defer or suspend independent enforcement activities from later initiating or reinstating such activities.

These provisions are based on the U.S.-E.C. Positive Agreement, in which a competition authority of one party may request a competition authority of another party to take an enforcement action against anticompetitive activities taking place in the requested party's jurisdiction.<sup>464</sup> Although the requested Authority may not have "clearly stronger links to the activity," these provisions presume that the requested Authority will likely have jurisdiction over the Person because of the Person's residency.

These provisions try to avoid infringement of the requested Authority's sovereign power by limiting the assistance to that allowed under the laws and regulations of the requested Authority. These provisions also require the requested Authority to use its best efforts, including devoting adequate resources and informing the requesting Authority before any significant decision is made. Finally, these

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464. See Positive Comity Agreement *supra* note 136; see also *supra* Section III.C.2.b (describing the agreement).

provisions allow the requesting Authority to later initiate its own action, thereby preserving the sovereign power of the requesting Authority.

## VII. CONCLUSION

Implementation of the foregoing proposal will benefit not only securities regulators but also parties subject to investigation or enforcement. Securities regulators will benefit from coordinated enforcement, regardless of whether their jurisdictions recognize the international double jeopardy principle. All relevant interested authorities can consult each other at an early stage before any final decisions are made; can take advantage of their respective powers to obtain information, evidence, and access to witnesses; can achieve better results by resolving a matter through complementary remedies taken by other authorities; can minimize adverse effects of one authority's decision to seek settlement or impose penalties on other relevant authorities; and can give a coherent message so as to achieve credible deterrence.

Each of the four cases discussed in Section IV.A, where the international double jeopardy principle caused problems, involved either U.S. regulators, the SEC, or the DOJ.<sup>465</sup> Because the United States does not recognize the international double jeopardy principle, the other parties that recognize the principle—such as the Netherlands, the United Kingdom, and Hong Kong—have been or could have been prevented from prosecuting.<sup>466</sup> The United States, therefore, is not a party that will directly benefit from having provisions like those proposed in Part VI.<sup>467</sup> Many of the market misconduct cases in the United States, however, should have increasingly required cooperation by foreign regulators. Taking the lead in enhancing an international cooperative framework will greatly help the United States with forging cooperative relationships with foreign regulators.

There may be a criticism that this case-by-case determination by regulators would impose a burden on market participants. However, deterring market misconduct and maintaining the integrity of markets would ultimately benefit market participants. Coordinated prosecution will motivate targeted parties to stay on “the right side of the fight” by discouraging forum shopping and encouraging cooperation with the relevant authorities while affording optimal protection for targeted parties. This framework will best balance the interests of authorities to

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465. See *supra* Section IV.A.

466. See *supra* Section III.C–D.

467. See *supra* Section VI.

vindicate their own laws and regulations with the market participants' interests not be put twice in jeopardy.