GENEVA GRADUATE INSTITUTE

INSTITUT DE HAUTES ÉTUDES INTERNATIONALES ET DU DÉVELOPPEMENT

GRADUATE INSTITUTE OF INTERNATIONAL AND DEVELOPMENT STUDIES

The Rise of Corporate Non-Prosecution Agreements: Transnational Criminal Law in the Making

THESIS
submitted at the Graduate Institute
of International and Development Studies
in fulfilment of the requirements of the
PhD degree in International Law

by

Felix LÜTH

Thesis N° 1431

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Sur le préavis de M. Zachary DOUGLAS, professeur à l'Institut et directeur de thèse, de M. Nico KRISCH, professeur à l'Institut et membre interne du jury, et de Ms Radha IVORY, Senior Lecturer, School of Law, The University of Queensland, Australia et experte extérieure, la directrice de l'Institut de hautes études internationales et du développement autorise l'impression de la présente thèse sans exprimer par là d'opinion sur son contenu.

Le dépôt officiel du manuscrit, en 6 exemplaires, doit avoir lieu au plus tard le 22 juillet 2022.

Genève, le 22 juin 2022

Marie-Laure Salles
Directrice

Thèse N° 1431

RESUME / ABSTRACT

Résumé en français: Les systèmes de justice pénale poursuivent traditionnellement des mesures d'exécution par le biais de poursuites et de procès aboutissant à une détermination finale de la responsabilité. Pourtant, aujourd'hui, la plupart des enquêtes sur les grandes entreprises sont résolues par des règlements, dont les *accords de non-poursuite des entreprises* constituent un exemple frappant. Ils permettent aux procureurs de convenir avec les entreprises de ne pas les poursuivre en échange de conditions telles que la coopération, des amendes et des mesures préventives. Alors que ces accords ont initialement été introduits pour les mineurs aux États-Unis, la thèse étudie pourquoi les États ont récemment introduit de telles procédures de mesures d'exécution alternatives en réponse aux crimes économiques complexes impliquant des entreprises. Elle montre en particulier que l'évolution des accords de non-poursuite des entreprises aux États-Unis a été provoquée par des développements nationaux entraînant une réponse juridique qui souhaitait privilégier l'efficacité, la sécurité nationale et, surtout, des considérations économiques. L'essor ultérieur de ces accords dans d'autres systèmes juridiques nationaux pourrait être largement attribué aux intérêts américains en matière d'exportation, qui étaient soutenus par le droit international et des organisations internationales, en particulier l'OCDE, et répondaient à des demandes locales reflétant la stratégie de rationalisation et d'exportation des États-Unis. La thèse remet ensuite en question l'opinion majoritaire derrière cette réforme, selon laquelle la diffusion des accords de non-poursuite des entreprises serait due à leur importance pour lutter contre la criminalité des entreprises et protéger le bien-être public, et présente deux propositions supplémentaires qui mettent l'accent sur des logiques de concurrence et d'autonomie des entreprises. Plus généralement, en intégrant un droit pénal transnational et une approche narrative, la thèse contribue aux outils d'analyse servant à l'étude des réformes nationales de la justice pénale dans un monde globalisé.

English Summary: Criminal justice systems traditionally pursue enforcement through prosecution and trial with a final determination of responsibility. Yet, most of today's investigations of large corporations are resolved through settlements, of which co*rporate non-prosecution agreements* form a prominent example. They enable prosecutors to agree with corporations not to prosecute in exchange for conditions such as cooperation, fines and preventive measures. Having initially emerged for juveniles in the US, the thesis investigates why states have recently introduced such procedures as an alternative enforcement response to complex economic crimes involving corporations. It shows in particular that the evolution of corporate non-prosecution agreements in the US was prompted by domestic developments causing a legal response that prioritised efficiency, national security and especially economic considerations. The subsequent rise across other domestic legal systems could largely be attributed to US export interests, which were supported by international law and organisations, especially the OECD, and met with local demands that mirrored the US rationalisation and export strategy. The thesis then challenges the dominant reform narrative, justifying the diffusion of corporate non-prosecution agreements based on their importance for combatting corporate crime and protecting public welfare, and offers two additional narratives that emphasise competition and corporate self-governance rationales. More generally, by integrating a transnational criminal law and narrative approach, the thesis contributes to the analytical tools for the study of domestic criminal justice reforms in a globalised world.

ACKNOWLEDGEMENTS

A great number of people have contributed in one way or another to the process of writing this thesis, and while it would be impossible to thank them individually, I am grateful to all of them.

There are, however, several contributions that must be acknowledged. In particular, I would like to thank my thesis supervisor Professor Zachary Douglas QC for his unwavering patience and support as well as the freedom to make my own mistakes. I am grateful also to Professor Nico Krisch and Dr Radha Ivory for acting as the internal and external readers of the thesis.

I owe a debt of gratitude to the Geneva Graduate Institute and the Swiss National Science Foundation for their financial support, which enabled not only my studies in Geneva but also several research visits to the Max-Planck-Institute for Foreign and International Criminal Law in Freiburg (now Max-Planck Institute for the Study of Crime, Security and Law) and the Transnational Law Institute of King's College London. While I have benefitted from many people during these visits, I would especially like to thank Professor Peer Zumbansen for giving me the opportunity to co-edit a special issue in *Transnational Legal Theory* on 'Bringing the human problem back into transnational law: The example of corporate (ir)responsibility'. In a similar vein, I am grateful to Professors Gregory Shaffer and Ely Aaronson for allowing me to participate in their conference on 'Transnational Legal Ordering of Criminal Justice' in September 2018 at the UCI School of Law as well as to Professors Neil Boister, Sabine Gless and Florian Jessberger for letting me contribute to their conference and subsequent book project on 'Histories of Transnational Criminal Law'. Finally, I would like to express my gratitude to Michael Elliot for the many inspiring exchanges on matters relating to and going far beyond this study. All these experiences have shaped the thesis and continue shaping my thinking about international and transnational law.

Much of this thesis was written during the COVID-19 pandemic and I am enormously grateful to my friends and family, especially my parents Monika and Donald, whose unconditional understanding and support during this time was essential. While her birth has significantly delayed the study's completion, I am deeply grateful to my daughter Milja for ensuring regular breaks and generally providing me with the happiest moments of my life thus far.

Finally, it is Laura, my partner in life, who deserves my gratitude above all. She has suffered on account of this thesis more than anyone and yet she has made by far the biggest contribution to its completion. The gratitude I have for her is beyond words, but here are words just the same said from the bottom of my heart: Thank you.

Felix Lüth
Berlin, 2022

Contents

List of Abbreviations

AFA	Agence Française Anticorruption
CIA	Central Intelligence Agency
CJIP	*Convention Judiciaire d'Intérêt Public*
CoE	Council of Europe
DOJ	US Department of Justice
EU	European Union
EUR	Euro
FATF	Financial Action Task Force
FCPA	US Foreign Corrupt Practices Act
GAO	US Government Accountability Office
GBP	British pound sterling
IAP	International Association of Prosecutors
ICIJ	International Consortium of Investigative Journalists
NGO	Non-governmental Organisation
OECD	Organisation for Economic Co-operation and Development
OECD-ABC	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
2009 OECD Recommendation	OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions 2009
OECD-WGB	OECD Working Group on Bribery
SEC	US Securities and Exchange Commission
SFO	UK Serious Fraud Office
TCL	Transnational Criminal Law

TLO	Transnational Legal Ordering
TLO-CJ	Transnational Legal Ordering of Criminal Justice
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCAC	UN Convention against Corruption
UNCAC-IRM	UNCAC Implementation Review Mechanism
UNCTAD	UN Conference on Trade and Development
UNCTOC	UN Convention against Transnational Organized Crime
UN FACTI	UN High-Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda
UN Financing of Terrorism Convention	International Convention for the Suppression of the Financing of Terrorism
UNGA	UN General Assembly
UNODC	UN Office on Drugs and Crime
US	United States of America
USD	US Dollar

1 Introduction

> Just like you or me, [a company] is bound by the laws of the countries in which it operates. It can open a bank account and own property. It pays taxes, and it can be sued and even prosecuted separately from any of the people who own or work for it. … The idea behind [limited liability] companies is among humanity's most ingenious inventions. … Over the last few centuries such companies have become the main players in the economic arena, and we have grown so used to them that we forget that they exist only in our imagination.[1]

The use of these legal fictions we call 'companies' or 'corporations' has revolutionised the way in which humans are able to cooperate and concentrate resources in pursuit of important activities such as the production and distribution of food, shelter, or energy as well as communication, information, or entertainment.[2] At the same time, these economic concentrations of power have regularly enabled harmful and even criminal activities with far-reaching repercussions around the world.[3] While corporations can technically be prosecuted in many countries, enforcement against corporate crimes and other misconduct through judicial processes remains a difficult endeavour, seemingly rooted in the complexity of corporate activities and structures as well as the important and historically privileged role of corporations in the global economy.[4]

This is not news as such. What is new, however, is our approach to public enforcement: while judicial systems have traditionally pursued enforcement through prosecution and trial aimed at a final determination of responsibility, today's enforcement response against corporate crimes increasingly takes the form of negotiated settlements.[5]

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[1] Yuval N Hariri, *Sapiens: A Brief History of Humankind* (Vintage 2015) 32-33.

[2] Laura Knöpfel and Felix Lüth, 'Bringing the *human problem* back into transnational law: the example of corporate (ir)responsibility' (2021) Transnational Legal Theory 1, 4. See also, John Micklethwait and Adrian Wooldridge, *The Company: A Short History of a Revolutionary Idea* (Weidenfeld & Nicolson 2003); Sol Picciotto, *Regulating Global Corporate Capitalism* (Cambridge University Press 2012) 108 et seq.

[3] Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 255; Samuel W Buell and Brandon L Garrett, 'Introduction: Two Decades of Corporate Criminal Enforcement' (2020) 83(4) Law and Contemporary Problems i, i-ii; Edwin H Sutherland, *White-collar Crime: The Uncut Version* (Yale University Press 1983). See also, Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge 2012); Judith van Erp, Wim Huisman and Gudrun Vande Walle (eds), *The Routledge Handbook of White-Collar and Corporate Crime in Europe* (Routledge 2015).

[4] Karin van Wingerde and Nicholas Lord, 'The Elusiveness of White-Collar and Corporate Crime in a Globalized Economy' in Melissa L Rorie (ed), *The Handbook of White-Collar Crime* (Wiley 2019) 469. See generally, Grietje Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Economy* (Brill 2019); Doreen Lustig, *Veiled Power: International Law and the Private Corporation, 1886-1981* (Oxford University Press 2020).

[5] Abiola Makinwa and Tina Søreide, 'Introduction' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 2-3; Nicholas Lord and Michael J

For example, the Organisation for Economic Co-operation and Development (OECD) reports a significant increase in the enforcement of anti-foreign bribery laws between February 1999 and June 2018 having taken place primarily outside of traditional trial processes: an average of 91 per cent of all cases involving legal persons were resolved through different forms of settlements and non-trial agreements.[6] This trend has been echoed by the United Nations (UN) High-Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda (FACTI), among others.[7]

1.1 The Emergence and Cross-Border Rise of Corporate Non-Prosecution Agreements

A particularly prominent and controversial development in this context involves the recent rise of procedures that enable prosecutors to agree with corporations not to prosecute serious suspicions of economic crimes provided the corporation meets certain conditions. These conditions typically include a combination of self-reporting, cooperation with law enforcement authorities, acceptance of relevant facts, imposition of fines and disgorgement as well as various measures aimed at preventing future misconduct and reforming corporate culture (usually through compliance and self-monitoring programs). The prosecution can then be dismissed immediately or after a certain period of monitoring without prosecuting authorities having to prove their case in trial and with corporations avoiding many of the adverse consequences associated with a trial and conviction such as potentially long periods of uncertainty, reputational damage, debarment from public contracts and funding, delicensing, or banning of certain business activities.[8]

Levi, 'Determining the adequate enforcement of white collar and corporate crimes in Europe' in Judith van Erp, Wim Huisman and Gudrun Vande Walle (eds), *The Routledge Handbook of White-Collar and Corporate Crime in Europe* (Routledge 2015) 41. While not the focus of this study, civil cases between private plaintiffs and corporations are also frequently settled without admission of liability (see for example, Sol Picciotto, *Regulating Global Corporate Capitalism* (Cambridge University Press 2012) 177-78, among others, referring to the 2005 Union Oil Company of California (UNOCAL) and 2009 Royal Dutch Shell settlements in the context of the United States Alien Tort Claims Act).

[6] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (OECD 2019) 19, 22-23. The report defines a non-trial resolution as 'any agreement between a legal or natural person and an enforcement authority to resolve foreign bribery cases without a full trial on the merits of the allegations either before or after indictment with sanctions and/or confiscation, irrespective of whether it is a conviction (e.g., plea deals) or a non-conviction mechanism (e.g., non-prosecution or deferred prosecution agreements)' (11).

[7] UN FACTI, *Report on Financial Integrity for Sustainable Development* (UN 2021) 15.

[8] See generally, Julie R O'Sullivan, 'How Prosecutors Apply the "Federal Prosecutions of Corporations" Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction' (2014) 51 American Criminal Law Review 29; OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (OECD 2019) 50. On the avoidance of a conviction as an important incentive for legal persons to enter into a settlement and a

These agreements provide an alternative enforcement response to the traditional options of either dismissing a prosecution unconditionally or pursuing conviction (or equivalent judgement in case of non-criminal procedures) through full or accelerated proceedings. While unconditional dismissals of prosecution are generally used to close cases with little evidence of significant criminality and public interest in enforcement, accelerated proceedings, including different forms of plea agreements, do not obviate final pronouncements on responsibility.[9] Rather, they are aimed at speeding up proceedings in relatively clear or advanced cases and usually do not encompass continuing obligations as regards corporate reform and monitoring. In other words, this study is interested in the 'middle ground' where evidence of significant criminality likely exists, but the decision is still taken not to pursue prosecution and divert the proceedings onto an alternative path with far-reaching consequences not only for the immediately involved prosecuting authority and corporation but also for related private parties (such as employees, shareholders, or business partners), victims, competitors, and the public more generally.[10] The study collectively refers to these kinds of procedural mechanisms as 'corporate non-prosecution agreements'.[11]

They had initially emerged in the United States (US) in the early 1900s as non-prosecution and deferred prosecution agreements not in the corporate context but to enable leniency for individuals, especially juveniles, in non-serious misdemeanour cases.[12] After some scattered extensions to corporations in the 1990s, two domestic events can be seen as having in particular catalysed a more widespread shift towards corporate non-prosecution or deferred

main difference to trial resolutions, see also OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: OECD Data Collection Questionnaire Results* (OECD 2019) 94-96 and 133-34.

[9] Marianne Wade, 'The Power to Decide – Prosecutorial Control, Diversion and Punishment in European Criminal Justice Systems Today' in Jörg-Martin Jehle and Marianne Wade (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power in Europe* (Springer 2006) 65-68 and 74-80; Julia Peters, Bruno Aubusson de Cavarlay, Christopher Lewis and Piotr Sobota, 'Negotiated Case-Ending Settlements: Ways of Speeding up the (Court) Process' (2008) 14 European Journal on Criminal Policy and Research 145; Maximo Langer, 'Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions' (2021) 4 Annual Review of Criminology 377. On the distinction between conviction- and non-conviction-based resolutions, see also note 6.

[10] According to the United States Department of Justice, non-prosecution and deferred prosecution agreements 'occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation' (DOJ, Justice Manual, § 9-28.200 (2020)). See also, United Kingdom Deferred Prosecution Agreements Code of Practice issued by the Director of Public Prosecutions and Director of the Serious Fraud Office pursuant to paragraph 6(1) of Schedule 17 to the Crime and Courts Act 2013, para 1.1 (referring to 'a DPA [deferred prosecution agreement] as an alternative to prosecution').

[11] This is intended as an umbrella term which encompasses but is not limited to the settlement procedure known as 'non-prosecution agreements' in the US.

[12] The Chicago Boys' Court is said to have 'conceived deferred prosecution in 1914 in an attempt to process juvenile offenders without "branding them as criminals"' (Benjamin M Greenblum, 'What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements' (2005) 105 Columbia Law Review 1863, 1866).

prosecution agreements. One was the terrorist attacks of 11 September 2001 which led to significant changes in US law enforcement priorities, including the reassignment of resources from corporate crime to counter-terrorism investigations. As a result, the Department of Justice (DOJ) and other agencies tasked with corporate prosecutions developed less resource-consuming ways to deal with corporate crimes.[13] The second event was the prosecution and subsequent failure of the US accounting firm Arthur Andersen LLP in 2002, then one of the 'Big Five' global accounting firms.[14] In the wake of the collapse of the Enron Corporation, which resulted in the largest bankruptcy reorganisation in US history at the time,[15] obstruction of justice charges were brought against Andersen for destroying audit documents related to its client Enron.[16] After its indictment in 2002, Andersen went quickly out of business. While the trial produced a guilty verdict against the firm, the US Supreme Court later reversed the conviction due to flawed jury instructions.[17] The DOJ did not retry Andersen as 'the firm was no longer operating'.[18] In the aftermath, the DOJ was heavily criticised for prosecuting Andersen with claims that it had 'amounted to a corporate "death penalty" for the firm',[19] which unnecessarily resulted in the loss of tens of thousands of jobs and a significant reduction of competition in the accounting industry.[20] In response to the criticism, the DOJ revised its guidance on the prosecution of corporations and, among others, included the possibility of non-prosecution and deferred prosecution agreements by stating that cooperation and voluntary disclosure could merit 'granting a corporation immunity or amnesty *or pretrial diversion*'.[21]

[13] See for example, Michel A Perez, 'The rise and globalization of negotiated settlements: How an American procedure, the Deferred Prosecution Agreement (DPA), became a transnational key tool to fight transnational corporate crimes' (2020) 1 Rule of Law and Anti-Corruption Center Journal 4.
[14] See for example, David M Uhlmann, 'Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability' (2013) 72 Maryland Law Review 1295, 1310.
[15] Richard A Oppel Jr and Andrew R Sorkin, 'Enron's Collapse: The Overview; Enron Corp. Files Largest U.S. Claim for Bankruptcy' *The New York Times* (3 December 2001).
[16] David M Uhlmann, 'Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability' (2013) 72 Maryland Law Review 1295, 1310 with reference to Kurt Eichenwald, 'Enron's Many Strands: The Investigation; Andersen Charged with Obstruction in Enron Inquiry' *The New York Times* (15 March 2002).
[17] Ibid with reference to *Arthur Andersen, LLP v US*, 544 U.S. 696 (2005), 708.
[18] Ibid with reference to Carrie Johnson, 'U.S. Ends Prosecution of Arthur Andersen: Former Partner Moves to Withdraw 2002 Guilty Plea' *The Washington Post* (23 November 2005).
[19] Ibid with reference to Carrie Johnson, 'Ruling Won't Deter Prosecution of Fraud' *The Washington Post* (1 June 2005).
[20] Ibid 1310-11.
[21] DOJ, Memorandum from Larry D Thompson, Deputy Attorney General on Principles of Federal Prosecution of Business Organizations to Heads of Department Components and United States Attorneys (20 January 2003) § VI.A-B (emphasis added).

Since then, non-prosecution and deferred prosecution agreements have become 'a mainstay of white collar criminal law enforcement' in the US, having been employed in 'virtually all areas of corporate criminal wrongdoing', including anti-money laundering, antitrust, corruption, environmental violations, fraud or tax evasion'.[22] However, this development was not limited to acts committed on US territory by US corporations, but also increasingly extended to acts committed abroad and by foreign corporations.[23] Prominent examples have involved such important foreign corporations as Britain's HSBC in 2012, France's Total and Alstom in 2013 and 2014, Germany's Deutsche Bank in 2015, Argentina's Torneos in 2016, Singapore's Keppel in 2017, Brazil's Petroleo Brasileiro (Petrobras) in 2018, Sweden's Ericsson in 2019 as well as European multinational and French-based Airbus in 2020.[24] Notably, only one out of the current ten biggest settlements by US law enforcement authorities based on the Foreign Corrupt Practices Act (FCPA) has been reported as involving a US corporation with Goldman Sachs in 2020.[25]

Over the last decade, many domestic legal systems in the Americas, Asia-Pacific, and Europe have introduced similar forms of corporate non-prosecution agreements for settling investigations into 'core' economic crimes, primarily encompassing different forms of corruption, fraud, money laundering, and related offences. They include, for example, the introduction of deferred prosecution agreements in the United Kingdom (UK) in 2014, administrative leniency agreements (*acordo de leniencia*) in Brazil in 2014, and judicial public interest agreements (*convention judiciaire d'intérêt public*) in France in 2016. 2018 saw the establishment of effective collaboration agreements (*acuerdo de colaboracion eficaz*) in Argentina, remediation agreements in Canada, and deferred prosecution agreements in Singapore.[26] In 2020, the Netherlands revised its 'transaction' (*transactie*) procedure to make

[22] Lanny A Breuer, Assistant Attorney, Speech at the New York Bar Association (13 September 2012) <www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association>;Cindy R Alexander and Mark A Cohen, 'The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements' (2015) 52 American Criminal Law Review 537, 537.

[23] See for example, Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 218-49.

[24] For these and more examples, see Brandon L Garrett and Jon Ashley, Duke and UVA Corporate Prosecution Registry <https://corporate-prosecution-registry.com/browse/>.

[25] Harry Cassin, 'Wall Street bank earns top spot on FCPA Blog top ten list' (*FCPA Blog*, 26 October 2020) <https://fcpablog.com/2020/10/26/wall-street-bank-earns-top-spot-on-fcpa-blog-top-ten-list/> (reporting the involved penalties and disgorgement based on US enforcement documents only, that is excluding related settlements with foreign law enforcement authorities, as amounting to over USD 13 billion).

[26] Abiola Makinwa and Tina Søreide, *Structured Criminal Settlements: Towards Global Standards in Structured Criminal Settlements for Corruption Offences* (International Bar Association 2018) 17-18 and the individual country reports; OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (OECD 2019) 34-35.

it more broadly available for serious economic crimes involving corporations.[27] While so far not based on an express, formal legal framework, the use of deferred prosecution agreements has also been reported in prosecutorial practice in countries such as Kenya.[28] Similar legislative changes are on the verge of being introduced in Australia and under serious consideration in, among others, Germany, Ireland, and Switzerland.[29] Discussions appear to have started as well in countries such as Ghana, Israel, Malaysia, Poland, and New Zealand.[30] Other countries have established procedures that exhibit partially similar features but, so far, are only available for individuals,[31] in the context of less serious crimes and certain specialist laws,[32] or for cooperation in relation to crimes committed by third parties.[33]

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[27] OECD Working Group on Bribery, *Phase 4 Report on Implementing the OECD Anti-Bribery Convention in the Netherlands* (16 October 2020) 45.

[28] Kenya Office of the Director of Public Prosecutions, Newsletter, Issue 3 (September 2020) <www.odpp.go.ke/wp-content/uploads/2020/10/ODPP-Newsletter-2020-OCTOBER-10-ISSUE-III_compressed.pdf>.

[29] Australian Parliament, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019, schedule 2 <www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1920a/20bd099#_Toc41551903>; German Federal Ministry of Justice and Consumer Protection, Draft Law on the Sanctioning of Association-Related Crimes (*Gesetz zur Sanktionierung von verbandsbezogenen Straftaten*) § 36 <www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Staerkung_Integritaet_Wirtschaft.pdf?__blob=publicationFile&v=2>; Ireland, Law Reform Commission, *Regulatory Powers and Corporate Offences* (LRC, 119-2018) 266. After a proposal for the inclusion of deferred prosecution agreements (*Aufschub der Anklageerhebung bei Verfahren gegen Unternehmen*) by the Swiss Office of the Attorney General (Consultation Overview on the Revision of the Criminal Procedure Code (March 2018) 25, 38-42 <www.admin.ch/ch/d/gg/pc/documents/2914/Organisationen_Teil_1.pdf>) was not adopted in the Federal Council's draft bill for a revision of the Criminal Procedure Code (Swiss Federal Council Message on the Revision of the Criminal Procedure of 28 August 2019, Federal Gazette 2019 6697 <https://www.fedlex.admin.ch/eli/fga/2019/2368/de>), it is currently unclear whether Parliament will follow this position or if it will be reintroduced in a modified form.

[30] Kofi Owusu, 'Ghana must adopt Deferred Prosecution Agreements - Godfred Odame' (*GhanaWeb*, 5 March 2020) <www.ghanaweb.com/GhanaHomePage/NewsArchive/Ghana-must-adopt-Deferred-Prosecution-Agreements-Godfred-Odame-886255> (indicating that the Deputy Attorney-General has called for the introduction of deferred prosecution agreements); OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: OECD Data Collection Questionnaire Results* (OECD 2019) 24 (indicating that the Israeli Ministry of Justice is considering the proposal of non-prosecution agreements); Ben Lucas, 'Deferred prosecution agreements required in Malaysia before corporate failure-to-prevent-bribery offense is enforced, MACC chief says' (*MLex*, 28 October 2019) <https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/anti-bribery-and-corruption/deferred-prosecution-agreements-required-in-malaysia-before-corporate-failure-to-prevent-bribery-offense-is-enforced-macc-chief-says> (indicating that the head of the Malaysian Anti-Corruption Commission has called for the introduction of deferred prosecution agreements); Poland, Government Legislative Process, *Draft Act on the Liability of Collective Entities for Offenses* <https://legislacja.rcl.gov.pl/projekt/12312062>; Michael Griffiths, 'New Zealand mulls deferred prosecution agreements' Global Investigations Review (12 February 2019).

[31] See for example, deferred prosecution agreements (*huan qi su*) in Taiwan (Abiola Makinwa and Tina Søreide, *Structured Criminal Settlements: Towards Global Standards in Structured Criminal Settlements for Corruption Offences* (International Bar Association 2018) 574).

[32] See for example, conditional suspensions of proceedings (*suspension del proceso a prueba*) in Costa Rica or the procedure of closing a case through settlement under Israeli Securities Law (OECD Working Group on Bribery, *Phase 2 Report on Implementing the OECD Anti-Bribery Convention in Costa Rica* (2020) 39; Abiola Makinwa and Tina Søreide, *Structured Criminal Settlements: Towards Global Standards in Structured Criminal Settlements for Corruption Offences* (International Bar Association 2018) 599).

[33] See for example, agreements procedures (*shiho-torihiki)* in Japan (OECD Working Group on Bribery, *Phase 4 Report on Implementing the OECD Anti-Bribery Convention in Japan* (27 June 2019) 64).

Curiously, this cross-border rise of corporate settlement procedures akin to US non-prosecution or deferred prosecution agreements seems to be occurring not only in the absence of express coordination through international law, the traditional vehicle of cross-border regulation,[34] but also regardless of traditionally emphasised differences between domestic legal systems in terms of underlying criminal justice principles, including jurisdictions where principles of legality or mandatory prosecution should ostensibly prohibit such agreements.[35] Moreover, it appears to take place despite considerable controversy over their general effectiveness and appropriateness, in particular in the US.

Proponents praise corporate non-prosecution agreements for their efficiency and effectiveness in detecting, preventing and sanctioning corporate crimes.[36] Accordingly, these procedures are rationalised based on their ability to incentivise corporate cooperation and reform.[37] They provide prosecuting authorities with important and frequently inaccessible information about corporate crimes in a more predictable and resource-saving manner,[38] while allowing for significant financial penalties and other payments.[39] Moreover, non-prosecution agreements permit corporations to address allegations of criminal behaviour, make reparations, and prevent future wrongdoing without the risk of a criminal trial and adverse collateral consequences of a conviction or equivalent judgement in non-criminal procedures for innocent employees, business collaborators, and shareholders as well as the public more generally (for example as regards tax payments and consumer demands).[40]

However, critics from different quarters have expressed various concerns. For example, some warn that the desired effects of corporate non-prosecution agreements, in particular as regards prevention, will largely depend on the concrete terms of the agreement and specific features

[34] Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 951. See chapter 4.
[35] Abiola Makinwa, 'Public/private co-operation in anti-bribery enforcement: non-trial resolutions as a solution?' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 43.
[36] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (OECD 2019) 21-22.
[37] See Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 949.
[38] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (OECD 2019) 21. See also, Colin King and Nicholas Lord, *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements* (Palgrave Macmillan 2018) 12.
[39] Nicholas Lord and Colin King, 'Negotiating Non-Contention: Civil Recovery and Deferred Prosecution in Response to Transnational Corporate Bribery' in Liz Campbell and Nicholas Lord (eds), *Corruption in Commercial Enterprise: Law, Theory and Practice* (Routledge 2018) 245-49.
[40] Council of Europe, *Liability of Legal Persons for Corruption Offences* (CoE 2020) 78-79.

of the domestic legal system in question.[41] Criminal lawyers, especially in the US, point to high levels of recidivism accompanied by largely absent prosecutions of senior-level individuals.[42] Criticism has also focused on 'prosecutorial overreach and inconsistencies compounded by a lack of judicial oversight'.[43] For example, when asked why no high-level executives had been prosecuted after the 2008 financial crisis, Jed Rakoff, a well-known US District Judge on senior status and former Chief of the Business and Securities Fraud Prosecutions Unit, identified as the most important reason 'the shift that has occurred, over the past thirty years or more, from focusing on prosecuting high-level individuals to focusing on prosecuting companies and other institutions… and as a result, government policy has taken the form of "deferred prosecution agreements" or even "nonprosecution agreements"'.[44] This shift, he argues, has not only 'led to some lax and dubious behaviour on the part of prosecutors, with deleterious results' but also ignores the fact that 'the future deterrent value of successfully prosecuting individuals outweighs the potential prophylactic benefits of imposing internal compliance measures that are often little more than window-dressing'.[45]

As to financial benefit, it has been pointed out that many non-prosecution or deferred prosecution agreements in the US have involved no or relatively small payments of criminal fines.[46] Others have queried whether these agreements – by avoiding criminal trials – in fact

[41] Jennifer Arlen, 'The potential promise and perils of introducing deferred prosecution agreements outside the U.S.' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 156 with further references.

[42] Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 81-116, 165-68; Samuel Buell, *Capital Offenses: Business Crime and Punishment in America's Corporate Age* (WW Norton & Co 2016) 241-46. See also, International Consortium of Investigative Journalists (ICIJ), 'Global banks defy U.S. crackdowns by serving oligarchs, criminals and terrorists: The FinCEN Files show trillions in tainted dollars flow freely through major banks, swamping a broken enforcement system' (20 September 2020) <www.icij.org/investigations/fincen-files/global-banks-defy-u-s-crackdowns-by-serving-oligarchs-criminals-and-terrorists/>.

[43] Liz Campbell, 'Trying corporations: why not prosecute?' (2019) 31(2) Current Issues in Criminal Justice 269, 269 with reference to Richard A Epstein, 'Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions' in Anthony S Barkow and Rachel E Barkow (eds), *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* (New York University Press 2011) 38; Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014); Jed S Rakoff, 'Justice deferred is justice denied' *The New York Review of Books* (19 February 2015).

[44] Jed S Rakoff, 'The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?' *The New York Review of Books* (9 January 2014).

[45] Ibid. See also, Rob Evans and David Pegg, 'Campaigners condemn closure of Rolls-Royce bribery inquiry: SFO shuts down investigation into which executives were responsible for payments' *The Guardian* (22 February 2019); Kirstin Ridley, 'UK prosecutor ends investigation into Airbus individuals' *Reuters* (4 May 2021).

[46] Based on a large dataset of non-prosecution and deferred prosecution agreement entered into between 2001 and 2012, Garrett shows that the total payments by corporations were dominated by regulatory payments, restitution or forfeiture, and private civil suits, while in almost half of the agreements there was no criminal fine at all. In addition, even the biggest 'blockbuster' fines often only amounted to a fraction of the corporations' market

hamper the 'development of case law that helps establish and affirm the boundaries of permissible corporate behaviour'.[47] From a fairness perspective, corporate non-prosecution agreements have also been regarded as privileging corporate offenders, worsening disparities between 'blue and white collar' offenders and permitting senior corporate officials to use company assets as shield from prosecution.[48]

At the same time, there are concerns that corporate non-prosecution agreements enable prosecutors to pressure corporations into unmerited settlements without ever having to prove that a crime has occurred, take over the role of 'corporate managers, co-opt corporations into police work, and/or encourage the company to sacrifice the individual or waive its own privileges'.[49]

1.2 Larger Debates over Procedural Efficiency in Criminal Justice, the 'Right' Approach to Corporate Liability, and the Role of Corporations in the Global Economy

The rise of corporate non-prosecution agreements and its surrounding controversy are embedded in three larger and interrelated debates over procedural efficiency in criminal

capitalization (Brandon L Garrett, *Too big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 69-70).

[47] Liz Campbell, 'Trying corporations: why not prosecute?' (2019) 31(2) Current Issues in Criminal Justice 269, 269-270. See also, Emmanouil Billis, 'On the Limits of Informal Enforcement' in Ulrich Sieber (ed), *Prevention, Investigation, and Sanctioning of Economic Crime: Alternative Control Regimes and Human Rights Limitations* (International Review of Penal Law, 2018) 369; Nicholas Lord and Colin King, 'Negotiating Non-Contention: Civil Recovery and Deferred Prosecution in Response to Transnational Corporate Bribery' in Liz Campbell and Nicholas Lord (eds), *Corruption in Commercial Enterprise: Law, Theory and Practice* (Routledge 2018) 246.

[48] Colin King and Nicholas Lord, *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements* (Palgrave Macmillan 2018) 2-3, 30; Kevin E Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (Oxford University Press 2019) 145; Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 950.

[49] Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 950. See also, Barry A Bohrer and Barbara L Trencher, 'Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation' (2007) 44 American Criminal Law Review 1481; Robert J Ridge and Mackenzie A Baird, 'The Pendulum Swings Back: Revisiting Corporate Criminality and the Rise of Deferred Prosecution Agreements' (2008) 33(2) University of Dayton Law Review 187, 195-7; Editorial, 'Corporate settlements in the United States: The criminalisation of American business' *The Economist* (30 August 2014). See also Roger Shiner and Henry Ho, 'Deferred Prosecution Agreements and the Presumption of Innocence' (2018) 12(4) Criminal Law and Philosophy 707; Jennifer L Achilles, Francisca M Mok, Eric H Sussman and Bradley J Bolerjack, 'United States' in Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes, Luke Tolaini, Ama A Adams and Tara McGrath (eds), *The Practitioner's Guide to Global Investigations - Volume II: Global Investigations around the World* (4th edn, Global Investigations Review 2020) 582; Joel M Cohen, Sacha Harber-Kelly and Steve Melrose, 'Recent Prosecutorial Failures in the US and UK: Why Corporations Should Rethink How They Evaluate Deferred Prosecution Agreements' *New York Law Journal* (5 May 2021).

justice, the 'right' approach to corporate liability, and the role of corporations in the global economy.

The first debate concerns a turn away from traditional criminal trials towards procedures and systems that increasingly emphasise procedural efficiency. Albeit with a focus on relatively minor mass crimes committed by individuals, in 2006, Jehle and Wade provided one of the first systematic studies in Europe that revealed a clear trend towards simplification through diversion away from trial procedures and a leading role for the public prosecutor in reaction to overloaded and under-resourced criminal justice systems.[50] It was echoed, for example, by Hodgson and Roberts who found that

> [a]cross all jurisdictions, there is a clear trend toward expanding the role of the prosecutor as a primary measure to improve the efficient processing of cases and so reduce delays and caseloads. This may be through mediation and other methods of diversion away from prosecution and trial; prosecution powers to issue penalties; powers to expedite trial procedures; different forms of plea, charge, and sentence bargaining.[51]

This development had been called for and was welcomed by international organisations of prosecutors. For example, the Consultative Council of European Prosecutors to the Council of Europe (CoE) emphasised in its 2008 Opinion on *Alternatives to prosecution* that '[a]lternative measures to prosecution, whose range of possibilities can be progressively enriched, illustrate an evolutionary phase in the development of society and the modernisation of justice (which is most welcome) vis-à-vis the traditional system consisting solely of suspended or non-suspended prison sentences or fines, particularly in respect of juvenile

[50] Jörg-Martin Jehle and Marianne Wade (eds), *Coping with overloaded criminal justice systems: The rise of prosecutorial power across Europe* (Springer 2006) and their extended follow-up study 'Prosecution and diversion within criminal justice systems in Europe' (2008) 14(2-3) European Journal on Criminal Policy and Research 91. In an earlier study, Jehle had already diagnosed: 'In all European countries the capacity of the criminal courts is limited. … Every criminal justice system has to make some selection at precourt level following the principle of expediency …. How and at what level the possibilities of disposing of cases are to be used, cannot be decided empirically but are matters of criminal policy. … Despite the huge variety, there are convergent trends across Europe. On the one hand, countries which traditionally followed the principle of legality very strictly are introducing the principle of expediency with ever increasing vigour into their criminal justice systems, and on the other hand, countries in which a prosecuting authority was not of great significance previously are systematically increasing its role and powers within the criminal justice system.' (Jörg-Martin Jehle, 'Prosecution in Europe: Varying Structures, Convergent Trends' (2000) 8 European Journal on Criminal Policy and Research 27, 37-38).

[51] Jacqueline Hodgson and Andrew Roberts, 'Criminal Process and Prosecution' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 80. See also, Gwladys Gilliéron, *Public Prosecutors in the United States and Europe: A Comparative Analysis with Special Focus on Switzerland, France and Germany* (Springer 2014) 5; Jago Russell and Nancy Hollander, 'The Disappearing Trial: The global spread of incentives to encourage suspects to waive their right to a trial and plead guilty' (2017) 8(3) New Journal of European Criminal Law 309.

offenders or juveniles who have not previously been convicted'.[52] However, it has also raised concerns among criminal lawyers and criminologists who, for example, worry about the role of diversion procedures and the rise of prosecutorial power as part of 'a contemporary turn away from liberal principles of criminal justice and toward regulatory, preventive, and authoritarian state forms'.[53] Criticism has also focused on the dilemma of balancing efficiency with fundamental safeguards of procedural fairness and considerations of social legitimacy.[54]

A second area of much debate involves the 'right' approach to imposing liability and sanctions on corporations. As Aiolfi and Pieth explain, disagreements go back to 'philosophical notions of the aims of criminal law, the nature of criminal punishment generally, the specific sanctions available for companies, and whether blurring the distinctions between offences in torts (civil law) and criminal law somehow diminishes either field of law'.[55] While these issues have provoked vast amounts of commentary over the past decades, for the present purpose, three partially overlapping lines of traditional disagreement can be briefly identified.[56]

The first relates to the merits and demerits of imposing criminal as opposed to administrative or civil forms of liability on corporations.[57] In many ways, this discussion continued earlier arguments over the difficulties arising from the legal nature of corporate personality which

[52] CoE Consultative Council of European Prosecutors, Opinion No 2 on 'Alternatives to prosecution' (CoE 2008) para 18. See also, UN Congress on the Prevention of Crime and the Treatment of Offenders, Guidelines on the Role of the Prosecutor (adopted 27 August to 7 September 1990) Recommendation 18; International Association of Prosecutors, Standards of Professional Responsibility and Statement of Essential Duties and Rights of Prosecutors (adopted 23 April 1999) Article 4.3(h).

[53] Radha Ivory, 'Beyond Transnational Criminal Law: Anti-Corruption as Global New Governance' (2018) 6(3) London Review of International Law 413, 431 with reference to Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 Criminal Law and Philosophy 21, 23, 44. See also, Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press 2014).

[54] Sabine Gless and Nadine Zurkinden, 'Negotiated Justice – Balancing Efficiency and Procedural Safeguards' in Katalin Ligeti and Vanessa Franssen (eds), *Challenges in the Field of Economic and Financial Crime in Europe and the US* (Hart 2017) 117; Emmanouil Billis and Nandor Knust, 'Alternative Types of Procedure and the Formal Limits of National Criminal Justice: Aspects of Social Legitimacy' in Ulrich Sieber, Valsamis Mitsilegas, Christos Mylonopoulos, Emmanouil Billis and Nandor Knust (eds) *Alternative Systems of Crime Control: National, Transnational, and International Dimensions* (Duncker & Humblot 2018) 39.

[55] Gemma Aiolfi and Mark Pieth, 'International Aspects of Corporate Liability and Corruption' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar 2005) 405. See also, Celia Wells, 'Corporate crime: opening the eyes of the sentry' (2010) 30(3) Legal Studies 370.

[56] For a more detailed discussion along these lines, see Simeon Obidairo, *Transnational Corruption and Corporations: Regulating Bribery through Corporate Liability* (Ashgate 2013) 12-13, 123-27. See generally, Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, Oxford University Press 2001); Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer 2011).

[57] See for example, Vikramaditya S Khanna, 'Corporate Criminal Liability: What Purpose Does It Serve?' (1996) 109(7) Harvard Law Review 1477; Thomas Weigend, '*Societas delinquere non potest*? A German Perspective' (2008) 6(5) Journal of International Criminal Justice 927; Albert W Alschuler, 'Two Ways to Think About the Punishment of Corporations' (2009) 46 American Criminal Law Review 1359; Sara Sun Beale, 'A Response to the Critics of Corporate Criminal Liability' (2009) 46 American Criminal Law Review 1481.

the 18th century Lord Chancellor of Great Britain, Edward Thurlow, famously ascribed to the fact that '[c]orporations have neither bodies to be punished, nor souls to be condemned'.[58] The US was early in overcoming this limitation and accepting the possibility of holding corporations criminally liable, in particular after the seminal 1909 case of *New York Central & Hudson River Railroad v US* had established the legal fiction that an agent's culpable mental state could be attributed directly to the corporation.[59] While many common law countries were quick to follow,[60] the spread of corporate criminal liability to other national criminal justice systems was much slower, and some jurisdictions such as Brazil and Germany have hitherto resisted such a reform.[61] Secondly, where legal systems allow for the imposition of criminal liability (as most do nowadays),[62] the discussion often centres on the relative benefits of holding corporations liable over individuals and vice versa, reflecting in particular different views on the expressive, retributive or dessert-based, and preventive or deterrent function of criminal law.[63] A third and perhaps most relevant line of contestation today relates to the exact means and circumstances for imposing liability on corporations.[64] In this context,

[58] John Poynder, *Literary Extracts from English and other Works – Vol I* (John Hatchard & Sons 1844) 268. For a discussion of corporate personality at the beginning of the 20th century, see George F Deiser, 'The Juristic Person I' (1908) 57(3) University of Pennsylvania Law Review 131; Harold J Laski, 'The Personality of Associations' (1916) 29 Harvard Law Review 404.

[59] *New York Central & Hudson River Railroad v US*, 212 U.S. 481, 493 (1909). For a detailed discussion of the political context at the time, see Anthony Grasso, 'No Bodies to Kick or Souls to Damn: The Political Origins of Corporate Criminal Liability' (2021) 35(1) Studies in American Political Development 57.

[60] See for example, *Mousell Brothers v London and Northwestern Railway* [1917] 2 K.B. 836. See generally, Thomas J Bernard, 'The Historical Development of Corporate Criminal Liability' (1984) 22 Criminology 3 (describing the emergence of corporate criminal liability as a development driven by the Anglo-American tradition of common law).

[61] Thomas Weigend, '*Societas delinquere non potest*? A German Perspective' (2008) 6(5) Journal of International Criminal Justice 927; OECD, *The Liability of Legal Persons for Foreign Bribery: A Stocktaking* Report (OECD 2016) 21. See also, Sara S Beale and Adam G Safwat, 'What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability' (2004) 8 Buffalo Criminal Law Review 89, 105.

[62] OECD, *The Liability of Legal Persons for Foreign Bribery: A Stocktaking* Report (OECD 2016) 21; United Nations Office on Drugs and Crime (UNODC), *State of the Implementation of the United Convention against Corruption: Criminalization, Law Enforcement and International Cooperation* (2nd edn, UN 2017) 87.

[63] On expressive functions, see for example Lawrence Friedman, 'In Defense of Corporate Criminal Liability' (2000) 23(3) Harvard Journal of Law & Public Policy 833; Vikramaditya S Khanna, 'Should the Behavior of Top Management Matter?' (2003) 91(6) Georgetown Law Journal 1215. On retributive or dessert-based functions, see for example Eliezer Lederman, 'Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle' (1985) 76(2) Journal of Criminal Law and Criminology 285; Vikramaditya S Khanna, 'Is the Notion of Corporate Fault a Faulty Notion? The Case of Corporate Mens Rea' (1999) 79(2) Boston University Law Review 355. On preventive or deterrent functions, see for example Brent Fisse, 'The Social Policy of Corporate Criminal Responsibility' (1978) 6 Adelaide Law Review 361; Assaf Hamdani and Alon Klement, 'Corporate Crime and Deterrence' (2010) 61(2) Stanford Law Review 271. See generally, Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press 1994).

[64] See for example, Vikramaditya S Khanna, 'Corporate Liability Standards: When Should Corporations be Held Criminally Liable?' (2000) 37 American Criminal Law Review 1239; Eliezer Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity' (2000) 4 Buffalo Criminal Law Review 641. See also, OECD Working Group on Bribery, *Corporate Liability Rules in Common Law Jurisdictions of Australia, Canada, England and Wales, New Zealand and the*

increasing attention has focused on the delegation of responsibility to corporations whereby liability is found in failures in corporate compliance or culture that are largely 'policed' through the corporation itself.[65]

Finally, these debates are not limited to domestic law and legal systems but also extend to the inter-state level where they form part of broader international regulatory contests over corporations as transnational actors and efforts to shape the global economic order. As generally observed by Backer, the 'last half-century has seen a vigorous debate about the status, character, obligations and sources of regulation of multinational enterprises (and principally those organizations operating in corporate form) that continues unabated'.[66] Conventional explanations of international standards on corporate liability for economic crimes, reflected in international instruments and scholarly literature, often relate their development and added value to crime combatting functions. On this understanding, international corporate liability standards are important to the 'fight against foreign bribery and other complex economic crimes',[67] because economic crimes frequently are 'committed by, through or under the cover of legal entities', corporate structures complicate the identification of particular individuals as responsible, and corporations are well placed to engage in preventive measures.[68] Rationales of justice and fairness have also been invoked.[69] However, this rationalisation has recently come under criticism from scholars who, emphasising historical perspectives and international contests, have pointed to other accounts with significant explanatory power such as the legitimisation of transnational corporate power

United States (OECD 2000); OECD Working Group on Bribery, *Corporate Liability Rules in Civil Law Countries* (OECD 2000).

[65] See for example, Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12(2) Law and Financial Markets Review 57; Gustavo A Jimenez, 'Corporate Criminal Liability: Toward a Compliance-Orientated Approach' (2019) 26(1) Indiana Journal of Global Legal Studies 353; Jennifer Arlen and Samuel Buell, 'The Global Expansion of Corporate Criminal Liability: Effective Enforcement Policy Across Legal Systems' (2020) 93 Southern California Law Review 697.

[66] Larry C Backer, 'Multinational Corporations as Objects and Sources of Transnational Regulation' (2007-2008) 14(2) ILSA Journal of International and Comparative Law 499, 506. See also, Peter T Muchlinski, *Multinational Enterprises and the Law* (3rd edn, Oxford University Press 2021).

[67] OECD, *The Liability of Legal Persons for Foreign Bribery: A Stocktaking* Report (OECD 2016) 11.

[68] Kevin E Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (Oxford University Press 2019) 127-28; Gemma Aiolfi and Mark Pieth, 'International Aspects of Corporate Liability and Corruption' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar 2005) 395; UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime* (UN 2004) 116; Financial Action Task Force 40 Recommendations, October 2003 (incorporating all subsequent amendments until October 2004), 2 <www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf>.

[69] CoE, *Liability of Legal Persons for Corruption Offences* (CoE 2020) 5.

and the delegitimisation of global South states' governance (and more generally the prioritisation of an agenda of economic liberalisation).[70]

1.3 The Scope and Structure of the Study

Against this background, the study investigates the question why states have introduced or are considering introducing corporate non-prosecution agreements as an alternative enforcement response to economic crimes involving corporations. More specifically, it examines what actors, factors, and rationales have influenced their emergence in the US and rise across domestic legal systems.

It approaches this question with a focus on the diffusion of the underlying norms and through the methodological lens of transnational criminal law and narratives.

This approach provides an appropriate framework for answering the research question under examination. As Twining explains, '[w]hen normative and legal orders co-exist in the same context of time and space there is always the prospect of more or less sustained interaction between them'.[71] In this context, diffusion is then 'generally considered to take place when one legal order, system or tradition *influences* another in some significant way'.[72] While the study's focus is on legal change that manifests itself at the domestic level,[73] this change may have been influenced by different actors, factors, and rationales within and outside of a particular domestic legal system. Indeed, as pointedly observed by Shaffer,

> norms do not travel by themselves. They are constructed, conveyed, and carried by actors, including by government officials, members of international secretariats, professionals, business representatives, and civil society activists. Actors with agendas often drive these

[70] For a more detailed discussion, see Michael Elliot and Felix Lüth, 'Corporate Liability for Economic Crimes: A Contested Transnational History' in Neil Boister, Sabine Gless and Florian Jessberger (eds), *Histories of Transnational Criminal Law* (Oxford University Press 2021) 202; section 4.2. See also, Elitza Katzarova, *The Social Construction of Global Corruption: From Utopia to Neoliberalism* (Palgrave Macmillan 2019); Doreen Lustig, *Veiled Power: International Law and the Private Corporation, 1886-1981* (Oxford University Press 2020).
[71] William Twining, 'Diffusion of law: A global perspective' (2004) 49 The Journal of Legal Pluralism and Unofficial Law 1, 14.
[72] Ibid (emphasis in original).
[73] Reflecting the reality that the prosecution of corporate crimes is done almost exclusively by domestic prosecuting authorities applying domestic law as opposed to international authorities applying international law. At least formally, this dominance of domestic legal systems is also likely to remain in the foreseeable future considering that 'prosecuting offenders is viewed by many as an essential element of national sovereignty' (Antoinette Perrodet, 'The Public Prosecutor' in Mireille Delmas-Marty and J R Spencer (eds), *European Criminal Procedures* (Cambridge University Press 2002) 455). See chapter 2.

> processes. At other times, the legal norms may be carried less consciously as a reflection of intensified cross-border interaction characterizing economic and cultural globalization.[74]

As will be elaborated in chapter 2, viewing the diffusion of norms underlying corporate non-prosecution agreements from a transnational criminal law and narrative perspective, provides a flexible and yet focused lens to capture a broad picture of potentially relevant foreign, international, and local influences.

Investigating influences on diffusion from a norm-oriented perspective as objective qualities rather than a sociological empirical perspective based on the subjective views of key actors not only provides a broad and flexible lens but also avoids some of the challenges and limitations associated with research into individual and institutional decision-making processes, especially for legal researchers. It will regularly require detailed empirical research based on specialist frameworks and methods developed, among others, in sociology and anthropology which take a relatively narrow focus on, for example, the motivations of a small number of individual decision-makers within governments and legislatures, the dynamics of domestic politics at the time, or the capacity of international and private actors to gain access to and influence legislative processes across a multitude of countries.[75] While it is largely outside the scope of this project (and perhaps any single project that tries to capture such broad and varied influences), the hope is to provide useful starting points also for this kind of research.

Finally, the study's focus is on the diffusion of *norms* rather than *laws* because norms may refer to both binding and non-binding legal standards and reflect better the reality of corporate non-prosecution agreements being introduced as part of often larger domestic legislative initiatives. There is also rich scholarship on the concept of legal norm diffusion as well as the closely related concepts of convergence, transfer, transplant, transposition, or similar,[76] on which the study can draw.[77]

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[74] Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) Law & Social Inquiry 229, 236.
[75] See William Twining, 'Social Science and Diffusion of Law' (2005) 32(2) Journal of Law and Society 203, 237; Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) Law & Social Inquiry 229, 254-55. On some of the challenges involved in this kind of research, see also Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) especially chapters 37 and 38; Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2019) especially chapters 3 and 4.
[76] On the various metaphors used in connection with diffusion, see David Nelken, 'Towards a Sociology of Legal Adaptation' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart 2001) 15-20.
[77] In addition to the already referenced works, see generally Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' in Otto Kahn-Freund, *Selected Writings* (Stevens 1978) 294-319; Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993); Ugo Mattei,

Following this introduction, chapter 2 elaborates the study's methodological approach. It first presents the analytical benefits of viewing domestic criminal justice reforms through a transnational law lens, before explaining the additional insights that might be gained from focusing on narratives. In a final section, the chapter introduces the two main theories of transnational law in criminal justice – *Transnational Criminal Law* and *Transnational Legal Ordering of Criminal Justice* – and outlines their relative capacities to identify influences by international, foreign, and local actors and factors as well as to engage with narratives in the context of domestic criminal justice reforms.

The following chapters then apply this framework, tracing the actors, factors, and rationales that have influenced the rise of corporate non-prosecution agreements from their initial introduction for juvenile offenders in the US to becoming a major enforcement response to complex economic crimes involving corporations in many parts of the world. These chapters do not provide in-depth analysis of the technical legislative processes or legal frameworks and their subsequent developments in the individual domestic legal systems – which alone could form the subject of several PhDs – but rather aim at showing some of the broader influences on domestic legal change by foreign law and enforcement authorities, international law and organisations, and local demands as well as the cross-cutting influence of private actors.

Chapter 3 investigates the emergence of non-prosecution and deferred prosecution agreements in the US. The chapter starts with a short history from their initial introduction as leniency procedures for minor and especially juvenile offenders in the early 1900s to the first, still timid extensions to corporations in the 1990s. It then examines developments that catalysed a more widespread use of non-prosecution and deferred prosecution agreements in the context of economic crimes committed in the US and by US corporations since the early 2000s, focusing especially on changes to US law enforcement priorities following the terrorist attacks of 9/11 and the large-scale corporate fraud scandals of the early 2000s. Finally, the

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'Efficiency in legal transplants: an essay in comparative law and economics' (1994) 14(1) International Review of Law and Economics 3; Esin Örücü, 'Law as transposition' (2002) 51(2) International & Comparative Law Quarterly 205; Sue Farran, James Gallen, Jennifer Hendry and Christa Rautenbach (eds), *The Diffusion of Law: The Movement of Laws and Norms Around the World* (Ashgate 2015). In the context of corporate crimes, see for example Maximo Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure' (2004) 45(1) Harvard International Law Journal 1; Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer 2011); Jason C Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (Cornell University Press 2011).

chapter analyses the methods and rationales behind the mission creep of their application to acts committed abroad and foreign corporations, which intensified towards the late 2000s.

Chapter 4 then discusses whether and, if so, how international law regulates corporate non-prosecution agreements. It starts by briefly presenting some early calls for alternatives to prosecution which, with some resemblance to initial developments in the US, focused on providing leniency to juvenile offenders and increasing procedural efficiency in mass crimes cases. The chapter then turns to the multilateral treaty regime on economic crimes that introduced international standards on corporate liability and its enforcement. This part first considers the pre-treaty phase, focusing especially on international contests over corporations as transnational actors and efforts to shape the global economic order that brought corporate liability to the fore internationally. It then examines the multilateral treaty regime established in the late 1990s and early 2000s for signs of support or opposition to the domestic introduction of corporate non-prosecution agreements. In particular, it explores the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and UN Convention against Corruption, the OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions adopted in 2009 as well as the treaty monitoring body practice of the OECD Working Group on Bribery and UN Convention against Corruption Implementation Review Mechanism. In the final part, the chapter briefly describes the current reform efforts to establish international standards on non-trial resolutions, including corporate non-prosecution agreements, under the umbrella of the OECD.

Chapter 5 turns the study's focus to the introduction of corporate non-prosecution agreements in other domestic legal systems. It is divided into two parts. The first part describes domestic introductions of corporate non-prosecution agreements outside the US. It starts by providing a general overview of the domestic legal systems that have introduced or are considering the introduction of these procedures, before examining the underlying introduction processes and norms in England and Wales, France, and Canada in more detail. These domestic legal systems are chosen for reasons of feasibility but also because they represent examples from different 'periods' of domestic introductions.[78] Building on this analysis, the second part then

[78] The introduction of deferred prosecution agreements in England and Wales in 2014 can be considered part of the first period of domestic introductions, whereas the adoption of the 'convention judiciaire d'intérêt public' in France in 2016 and remediations agreements in Canada in 2018 may be seen as examples of the second and third periods, respectively.

categorises and zooms in on some of the discernible influences by US and other foreign law and enforcement authorities, international law and organisations as well as additional local demands. In view of the research question and applied design of this study, the chapter focuses on a textual analysis of the scope of the introduced norms, the main legislative reform documents (especially public consultation documents and parliamentary debates), and official (governmental) commentary at the time. It also considers relevant academic, professional, and civil society commentary, although only to a limited extent.

Chapter 6 focuses specifically on the rationales behind the rise of corporate non-prosecution agreements using a narrative lens. It starts by describing the official governmental reform narrative emerging from the analysis in the previous chapters as well as more recent governmental statements and commentary that have largely rationalised the introduction of corporate non-prosecution agreements based on their importance for combatting corporate crime and protecting public welfare. The chapter then presents several challenges to this official narrative from empirical, conceptual, and functional perspectives. In a final part, the chapter explores whether some of the official reform narrative's apparent success in promoting the cross-border rise of corporate non-prosecution agreements may lie not in its (empirically verifiable) effectiveness to achieve the stated aims but in its ability to reflect a 'plausible folk theory'. It then offers two additional narratives with arguably significant explanatory power, emphasising competition and corporate (self-)governance rationales.

Finally, chapter 7 recaps the main conclusions in relation to the investigated research question. It also offers some additional, more general observations, situating the rise of corporate non-prosecution agreements within broader transnational law and corporate governance themes. Lastly, returning to the study's methodological approach, it suggests the added value of a combined transnational criminal law and narrative lens not only to better understand transnationally induced domestic criminal justice reforms but also to imagine or re-imagine change.

The main aim of the study is to contribute to a better understanding of one of today's major criminal justice reforms and policy shifts towards not prosecuting corporations for serious allegations of economic crimes in exchange for settlement conditions. In particular, it seeks to shed light on the actors, factors, and rationales behind the emergence and cross-border rise of corporate non-prosecution agreements. While this study does not focus on prescribing concrete 'counter reforms', it aims to support critical reflections about the reasons for and

consequences of these developments and to lay some of the groundwork for the reconsideration of deeper changes to the way we deal with corporate crimes. Incidentally, it also seeks to contribute to improving the analytical tools available for the study of domestic criminal justice reforms from a transnational law perspective.

In addition to the people concerned with these themes, the study may also be of interest to anyone involved in broader discussions over the regulation of corporate responsibility and the diffusion of legal norms in our globalised world.

2 The Rise of Corporate Non-Prosecution Agreements Viewed through the Lens of Transnational Criminal Law and Narratives

This chapter elaborates the study's methodological approach. It first presents the analytical benefits of viewing domestic criminal justice reforms through a transnational law lens, before explaining the additional insights that might be gained from focusing on narratives. In the final section, the chapter introduces the two main theories of transnational law in criminal justice – *Transnational Criminal Law* and *Transnational Legal Ordering of Criminal Justice* and outlines their relative potential for the study of domestic criminal justice reforms.[79]

2.1 Viewing Domestic Criminal Justice Reforms through a Transnational Law Lens

Criminal justice is traditionally understood as a 'system of legal norms and institutions that govern the exercise of the state's monopoly over the legitimate use of violence'.[80] This claim is linked to a perception of the state as the ultimate authority to ensure the delivery of the public goods associated with criminal law.[81] It also echoes the Westphalian principle of non-intervention in matters essentially connected to the domestic jurisdiction of another state.[82] In other words, criminal justice 'continues to be a powerful icon of sovereign statehood'.[83]

Against this background, it is unsurprising that the prosecution of corporations for economic crimes is almost exclusively done by domestic prosecuting authorities applying domestic law.[84] As a consequence, reforms – such as the introduction of corporate non-prosecution

[79] An earlier version of parts of this chapter has appeared in Felix Lüth, 'Corporate non-prosecution agreements as *transnational human problems*: transnational law and the study of domestic criminal justice reforms in a globalised world' (2021) Transnational Legal Theory 1.
[80] Ely Aaronson and Gregory Shaffer, 'The Transnational Legal Ordering of Criminal Justice' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 3 with reference to Max Weber, 'Politics as a Vocation' in Hans H Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Routledge 2009) 78 [first published in 1948].
[81] See generally, Antje du Bois-Pedain, Magnus Ulväng and Petter Asp (eds), *Criminal Law and the Authority of the State* (Hart 2017).
[82] Ely Aaronson and Gregory Shaffer, 'The Transnational Legal Ordering of Criminal Justice' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 3.
[83] John Muncie, 'On Globalisation and Exceptionalism' in David Nelken (ed), *Comparative Criminal Justice and Globalization* (Ashgate 2011) 87.
[84] Antoinette Perrodet, 'The Public Prosecutor' in Mireille Delmas-Marty and J R Spencer (eds), *European Criminal Procedures* (Cambridge University Press 2002) 455; Antje du Bois-Pedain, Magnus Ulväng and Petter Asp (eds), *Criminal Law and the Authority of the State* (Hart 2017). While exceedingly rare in practice, corporations may, for example, also be prosecuted for the commission of or contribution to international crimes under international criminal law (see for example, Wolfgang Kaleck and Miriam Saage-Maaß, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes' (2010) 8 Journal of International

agreements – also happen at the domestic level. Yet, while manifesting themselves as changes in domestic law and practice, in today's globalised world[85] these reforms may be influenced by various actors, factors, and rationales within and outside of a particular domestic legal system.[86]

In an effort to respond to the analytical difficulty created by this dichotomy between formal domestic legislative procedures and a potentially broader mix of influences, the study adopts a transnational law lens. The remainder of this part first revisits the 'birth' of transnational law, before presenting the strand of its subsequent development that is of most relevance for this study. The second section briefly points to some of the advantages of a transnational as compared to a (purely) domestic or international perspective.

2.1.1 Transnational law as a framework to analyse the construction and conveyance of legal norms across borders

Philip C Jessup, an American diplomat, judge, and scholar, is generally credited with coining the term 'transnational law' in his Storrs Lectures on Jurisprudence delivered at Yale Law School in 1956.[87]

Convinced that '[p]art of the difficulty in analysing the problems of the world community and the law regulating them is the lack of an appropriate word or term for the rules we are discussing',[88] he suggested transnational law to refer to

> all law which is concerned with actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.[89]

Criminal Justice 699; James G Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (Open Society Institute 2011)).

[85] Following Twining, globalisation is understood here in a broad sense, including 'any processes that tend to make human relations – economic, political, cultural, communicative etc – more interdependent. Sometimes this refers to the world as a whole, ie, those relations and issues that are genuinely worldwide; but sometimes it refers to relations that transcend national boundaries to a greater or lesser degree.' (William Twining, 'Implications of "Globalisation" for Law as a Discipline' in Andrew Halpin and Volker Roeben (eds), *Theorising the Global Legal Order* (Hart 2009) 40.

[86] For examples of some of these potential influences as regards corporate non-prosecution agreements, see chapter 1. See also, Felix Lüth, 'Corporate non-prosecution agreements as *transnational human problems*: transnational law and the study of domestic criminal justice reforms in a globalised world' (2021) Transnational Legal Theory 1, 6-9.

[87] Reprinted as Philip C Jessup, *Transnational Law* (Yale University Press 1956).

[88] Ibid 1.

[89] Ibid 2.

Albeit less noticed than this famous definition,[90] an important motivation for Jessup appears to have been the idea of a pragmatic analytical framework which better reflects the complexity of 'human problems' in the modern society.[91] For example, he argues that

> "Lawyers … have adhered to rigidly compartmentalized national legal systems, which are unable to cope with an economic order of international dimensions." The use of transnational law would supply a larger storehouse of rules on which to draw, and it would be unnecessary to worry whether public or private law applies in certain cases. We may find that some of the problems that we have considered essentially international, inevitably productive of stress and conflict between governments and peoples of two different countries, are after all merely *human problems* which might arise at any level of human society – individual, corporate, interregional, or international.[92]

In other words, Jessup's intervention may be seen as an attempt to provide more analytical flexibility and, ultimately, visibility beyond rigid categorisations of law as well as traditional concepts such as public and private that defined much of legal scholarship.[93]

Since this initial surfacing, the idea of transnational law has been picked up time and again by legal scholars in various contexts.[94] In particular, the last decade has seen a surge in interest

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[90] See generally, Laura Knöpfel and Felix Lüth, 'Bringing the *human problem* back into transnational law: the example of corporate (ir)responsibility' (2021) Transnational Legal Theory 1.

[91] While the study uses transnational law as an analytical framework, it does not intend to diminish critical perspectives on Jessup's *Transnational Law* or transnational law more generally, especially as regards its normative and political orientation or consequences (see for example, Prabhakar Singh, 'The Private Life of Transnational law: Reading Jessup from the Post-Colony' in Peer Zumbansen (ed), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (Cambridge University Press 2020) 419, 440; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) 223-26; Michael Elliot, 'Problematising the 'governance gap': corporations, human rights, and the emergence of transnational law' (2021) 12(2) Transnational Legal Theory 196.

[92] Philip C Jessup, *Transnational Law* (Yale University Press 1956) 15-16 (emphasis added) with reference to Sigmund Timberg, 'International Combines and National Sovereigns' (1947) 95 University of Pennsylvania Law Review 573, 577.

[93] See also, Philip C Jessup, *Transnational Law* (Yale University Press 1956) 102-03, 106. More generally, Zumbansen has observed that Jessup's invocation of transnational law 'appears to concern a "field" *of* law as much as a perspective *on* law per se' (Peer Zumbansen, 'The Continuing Search for Law in a Globally Interconnected World: Engaging and Contextualising Jessup's "Transnational Law"' in Peer Zumbansen (ed), *Jessup's Bold Proposal: Critical Engagements with Transnational Law* (Cambridge University Press 2019) 6 (emphasis in original).

[94] See for example, Henry J Steiner and Detlev F Vagts, *Transnational Legal Problems: Materials and Text* (1st edn, Foundation Press 1968); Wolfgang Friedmann, Louis Henkin and Oliver Lissitzyn (eds), *Transnational Law in a Changing Society: Essays in Honor of Philip Jessup* (Columbia University Press 1972); Detlev F Vagts, T*ransnational Business Problems* (1st edn, Foundation Press 1986); Harold H Koh, 'Transnational Legal Process' (1996) 75 Nebraska Law Review 181; Michael Likosky (ed), *Transnational Legal Processes* (Butterworths 2002); Harold H Koh, 'Transnational Legal Process After September 11th' (2004) 22 Berkeley Journal of International Law 337; Emmanuelle Gaillard, 'Transnational law: a legal system or a method of decision making?' (2001) 17(1) Arbitration International 59; Harold H Koh, 'Why Transnational Law Matters' (2006) 24 Penn State International Law Review 745; David Szablowski, *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Hart 2007).

and proliferation of scholarship, grappling especially with increasingly complex relations between law and society under the conditions of globalisation.[95]

Of particular relevance for this study is the strand of development which has focused on transnational law as an analytical perspective to engage with the legal processes behind state change.

According to Koh, one of the pioneers of legal process studies from a transnational perspective, this process refers to 'the theory and practice of how public and private actors – nation states, international organizations, multinational enterprises, non-governmental organizations, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law'.[96] On this understanding, transnational legal process exhibits four typical characteristics:

> First, it is nontraditional: it breaks down two traditional dichotomies that have historically dominated the study of international law: between domestic and international, public and private. Second, it is non-statist: the actors in this process are not just, or even primarily, nation-states, but include non-state actors as well. Third, transnational legal process is dynamic, not static. Transnational law transforms, mutates, and percolates up and down, from the public to the private, from the domestic to the international level and back down again. Fourth and finally, it is normative. From this process of interaction, new rules of law emerge, which are interpreted, internalized, and enforced, thus beginning the process all over again.

[95] See for example, Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart 2010); Pieter H F Bekker, Rudolf Dolzer and Michael Waibel (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge University Press 2010); Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism' (2012) 21 Transnational Law & Contemporary Problems 305; Roger Cotterrell, 'What Is Transnational Law?' (2012) *37* Law & Social Inquiry 500; Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) Law & Social Inquiry 229; Gregory Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge University Press 2013); Gralf-Peter Calliess (ed), *Transnationales Recht: Stand und Perspektiven* (Mohr Siebeck 2014); Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press 2014); Terence Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015); Gregory Shaffer, Tom Ginsburg and Terence C Halliday (eds), *Constitution-Making and Transnational Legal Order* (Cambridge University Press 2019); Detlev F Vagts, William S Dodge, Hannah L Buxbaum and Harold H Koh, T*ransnational Business Problems* (6th edn, Foundation Press 2019); Roger Cotterrell and Maksymilian Del Mar (eds), *Authority in Transnational Legal Theory: Theorising Across Disciplines* (Edward Elgar 2019); Peer Zumbansen (ed), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (Cambridge University Press 2020); Peer Zumbansen (ed), *The Oxford Handbook of Transnational Law* (Oxford University Press 2021).
[96] Harold H Koh, 'Transnational Legal Process' (1996) 75 Nebraska Law Review 181, 183-84.

> Thus, the concept embraces not just the descriptive workings of a process, but the normativity of that process.[97]

Using computer-age imagery, Koh, later defined transnational law as

> (1) law that is "downloaded" from international to domestic law: for example, an international law concept that is domesticated or internalized into municipal law, such as the international human rights norm against disappearance, now recognized as domestic law in most municipal systems; (2) law that is "uploaded, then downloaded": for example, a rule that originates in a domestic legal system, such as the guarantee of a free trial under the concept of due process of law in Western legal systems, which then becomes part of international law, as in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and from there becomes internalized into nearly every legal system in the world; and (3) law that is borrowed or "horizontally transplanted" from one national system to another: for example, the "unclean hands" doctrine, which migrated from the British law of equity to many other legal systems.[98]

On this understanding, transnational law 'matters' in a range of different legal areas, which are neither thought of as purely international or domestic nor public or private. They include, for example, international commerce and trade, immigration and asylum, national security, cyberspace, environment, or transnational crimes.[99] And to comprehend how transnational law operates, one must study the transnational legal processes within each of these areas.[100]

Building on Koh's work but approaching transnational legal process studies less from a traditional public international law and more from a law and society perspective,[101] an important initiative has started operating under the label of 'transnational legal ordering' (TLO). While we have seen increasing diversification and sophistication over the last years,[102]

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[97] Ibid 184.
[98] Harold H Koh, 'Why Transnational Law Matters' (2006) 24 Penn State International Law Review 745, 745-46.
[99] Ibid 746.
[100] Ibid.
[101] See for example, ibid (identifying transnational legal process as 'the transubstantive process … whereby states and other transnational private actors use the blend of domestic and international legal process *to internalize international legal norms into domestic law'* (emphasis added)). See generally, Harold H Koh, 'Transnational Legal Process' (1996) 75 Nebraska Law Review 181; Harold H Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale Law Journal 2599.
[102] See, for example, Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015); Gregory Shaffer, 'Theorizing Transnational Legal Orders' (2016) 12 Annual Review of Law and Social Science 231; Gregory Shaffer, Tom Ginsburg and Terence C Halliday (eds), *Constitution-Making and Transnational Legal Order* (Cambridge University Press 2019); Gregory Shaffer and Terence Halliday, 'With, within, and beyond the State: The Promise and Limits of Transnational Legal Ordering' in Peer Zumbansen (ed), *The Oxford Handbook of Transnational Law* (Oxford University Press 2021) 987.

TLO theory was initially brought to the fore by Shaffer as a socio-legal methodology to assess the kinds of effects transnational legal processes have on state change.[103]

Importantly for this study, it starts from the assumption that

> norms do not travel by themselves. They are constructed, conveyed, and carried by actors, including by government officials, members of international secretariats, professionals, business representatives, and civil society activists. Actors with agendas often drive these processes. At other times, the legal norms may be carried less consciously as a reflection of intensified cross-border interaction characterizing economic and cultural globalization.[104]

Transnational legal process then describes the various processes through which these different actors and factors interact to construct and convey legal norms across borders.[105] Thus, in contrast to the majority of legal studies that use the term transnational law to refer to law that addresses events and activities that involve more than one jurisdiction (TLO scholars refer to this conception as *transnational law applying to transnational situations*),[106] TLO theory conceives of transnational law in terms of the sources of legal change within a domestic legal system (TLO scholars refer to this conception as *transnational law as transnational construction and flow of legal norms* or, more recently, *transnational law as transnational legal ordering*).[107] Accordingly, transnational law 'consists of legal norms that are exported and imported across borders and that involve transnational networks and international and regional institutions that help to construct and convey them'.[108]

TLO theory is not focused on delineating a particular legal doctrine or field of law. Rather, cutting across fields of law, it provides 'an analytical means for assessing transnationally

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[103] Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) Law & Social Inquiry 229, 234. For a similar view on transnational law 'primarily as a methodological approach', see also Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism' (2012) 21 Transnational Law & Social Problems 305, 308.

[104] See note 74. See also, Gregory Shaffer, 'Transnational Legal Ordering of State Change' in Gregory Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge University Press 2013) 1.

[105] See Gregory Shaffer, 'Transnational Legal Ordering of State Change' in Gregory Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge University Press 2013) 1-2.

[106] Ibid 5 with reference, among others, to Harold H Koh, 'International Law as Part of Our Law' (2004) 98 American Journal of International Law 43, 53; Anne-Marie Slaughter, 'A Liberal Theory of International Law' (2000) 94 American Society of International Law Proceedings 240, 245; Oona A Hathaway, 'Between Power and Principle: An Integrated Theory of International Law' (2005) 72 University of Chicago Law Review 469, 473.

[107] Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) Law & Social Inquiry 229, 233; Gregory Shaffer, 'Transnational Legal Ordering of State Change' in Gregory Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge University Press 2013) 5.

[108] Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) Law & Social Inquiry 229, 233.

induced change in a globalized world'.[109] In other words, this approach allows for the flexible tracing of how different actors and factors operating at the international, foreign, or local level interact recursively to establish the influence or ordering power of legal norms on domestic legal change,[110] irrespective of whether they refer to cross-border events or only national ones.[111] It allows, for example, for the consideration of 'historic events', the exposure to different intermediaries at the international, domestic, public, or private level, and the 'relative power of the receiving state as well as its domestic circumstances'.[112]

2.1.2 Advantages compared to a (purely) national or international perspective

The main advantage of viewing the construction and conveyance of legal norms underlying domestic criminal justice reforms through a transnational as opposed to a (purely) national or international lens is its relatively higher flexibility. It allows the study to shed light on a broader variety of sources that may have influenced the norm diffusion process.[113] By doing so, it helps to bridge the dichotomy between the formal introduction of legal norms at the domestic state level and a potentially broader mix of relevant influences by international, foreign, local, or non-state actors and factors. A clearer view of these different actors and factors can also contribute to a more complete picture of their relative successes in influencing domestic criminal justice reforms such as the introduction of corporate non-prosecution agreements.[114]

Traditionally, in keeping with the focus on prosecuting corporate crimes through domestic authorities and law mentioned at the beginning of this part, much criminal justice scholarship

[109] Gregory Shaffer, 'Transnational Legal Ordering of State Change' in Gregory Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge University Press 2013) 7.
[110] Terence C Halliday and Gregory Shaffer, 'Transnational Legal Orders' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015) 65; Gregory Shaffer, 'Conclusion: The Study of Transnational Legal Ordering' in Gregory Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge University Press 2013) 212.
[111] Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) Law & Social Inquiry 229, 234.
[112] Radha Ivory, 'Transnational Criminal Law or the Transnational Legal Ordering of Criminal Justice: Theorizing Australian Corporate Foreign Bribery Reforms' in in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 88-89. See Gregory Shaffer, 'Transnational Legal Ordering of State Change' in Gregory Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge University Press 2013) 33-46. In the context of presenting TLO's recent extension to criminal justice studies, section 2.3 will also discuss some of the general aspects of TLO theory in more detail.
[113] See also, Maíra R Machado, 'Similar in their Differences: Transnational Legal Process Addressing Money Laundering in Brazil and Argentina' in Gregory Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge University Press 2013) 55. See also, section 1.3.
[114] See also, Felix Lüth, 'Corporate non-prosecution agreements as *transnational human problems*: transnational law and the study of domestic criminal justice reforms in a globalised world' (2021) Transnational Legal Theory 1, 9.

has assumed a perspective that is methodologically nationalist.[115] In other words, it applies analytical frameworks that are constructed as if 'the web of social life was spun within the container of the national society, and everything extending over its borders was cut off analytically'.[116] In particular, it approaches the study of domestic criminal justice reforms as if they were essentially divorced from foreign or international influences.[117] This state- and inward-focused perception of criminal justice has long shaped its theoretical and empirical analysis,[118] despite developments towards an increasingly interconnected 'criminal justice world' in which 'international and regional organizations, supranational courts, and transnational nongovernmental organizations (NGOs) addressing criminal justice issues proliferated, and domestic processes of criminal lawmaking and enforcement became increasingly enmeshed within transnational frameworks that elaborate norms and practices'.[119] While some progress has been made under the label of comparative criminal justice,[120] even sophisticated comparative approaches to norm diffusion are still often limited to a relatively narrow concept of norm diffusion.[121] In particular, they focus 'mainly on the municipal law of nation states', while not 'deal[ing] systematically with cross-level interaction between legal orders or with non-state law'.[122]

Similarly, a purely international law lens seems ill-equipped to capture such a broad picture of various influences, especially as regards foreign and local dimensions as well as the potentially cross-cutting influence of non-state actors. Traditional (positivist) international law studies tend to limit their focus to conventional sources of international law and their

[115] Katja Franko, *Globalization & Crime* (3rd edn, Sage 2020) 218-21; Ely Aaronson and Gregory Shaffer, 'Defining Crimes in a Global Age: Criminalization as a Transnational Legal Process' (2021) 46(2) Law & Social Inquiry 455, 455-56.
[116] Andreas Wimmer and Nina Glick Schiller, 'Methodological Nationalism, the Social Sciences, and the Study of Migration: An Essay in Historical Epistemology' (2003) 3(3) International Migration Review 576, 579. For a general critique of methodological nationalism in the social sciences, see Ulrich Beck, *Power in the Global Age: A New Global Political Economy* (Polity Press 2005) 43-50 and 'The Cosmopolitan Condition: Why Methodological Nationalism Fails' (2007) 24 Theory, Culture & Society 286.
[117] Ely Aaronson and Gregory Shaffer, 'Defining Crimes in a Global Age: Criminalization as a Transnational Legal Process' (2021) 46(2) Law & Social Inquiry 455, 456 with reference to David Nelken, 'Introduction: Comparative Criminal Justice and the Challenge of Globalisation' in David Nelken (ed) *Comparative Criminal Justice and Globalization* (Ashgate 2011) 1. See generally, Peer Zumbansen, 'Neither "Public" nor "Private", "National" nor "International": Transnational Corporate Governance from a Legal Pluralist Perspective' (2011) 38 Journal of Law and Society 50.
[118] Lucia Zedner, *Criminal Justice* (Oxford University Press 2004) 3.
[119] Ely Aaronson and Gregory Shaffer, 'The Transnational Legal Ordering of Criminal Justice' in Gregory Shaffer and Ely Aaronson (eds), Transnational Legal Ordering of Criminal Justice (Cambridge University Press 2020) 4.
[120] See for example, David Nelken (ed) *Comparative Criminal Justice and Globalization* (Ashgate 2011).
[121] William Twining, 'Social Science and Diffusion of Law' (2005) 32(2) Journal of Law and Society 203, 215.
[122] Ibid.

relatively isolated analysis.[123] A more flexible approach also seems particularly relevant in the context of domestic criminal justice reforms such as the introduction of corporate non-prosecution agreements considering that they are not required by or even expressly referenced to in the main international legal instruments.[124]

However, a transnational law lens can also integrate international law perspectives and studies relevant to corporate non-prosecution agreements, as will be seen in chapter 4. Furthermore, it can benefit from international law and relations scholarship more generally such as on the role of powerful states in international regulatory contests. For example, Krisch presents a framework for analysis which emphasises that 'international law's relationship with dominant states is complex and multifaceted: sometimes it is instrumentalized, sometimes withdrawn from, most of the time reshaped, and often replaced with (or at least complemented by) domestic law'.[125] Among others, Krisch identifies the 'exercise of extraterritorial jurisdiction' by the US as a means of 'international government [which] has particular importance for corporate actors that need to compete on the US market and whose assets are therefore highly vulnerable to US court action'.[126]

Viewing domestic criminal justice reforms through a transnational law lens that focuses on the 'construction and migration of legal norms through transnational legal processes' not only allows for the inclusion of international and national or comparative perspectives on norm diffusion processes in a broader, sociolegal frame but it is also 'where the action is'.[127] For this study, it is primarily a pragmatic and problem-oriented choice.

However, regardless of whether one is an advocate of transnational, international, or comparative law perspectives in promoting domestic legal change in a particular domain, or a resister of such influences, a better understanding of the various actors and factors as well as their relative success in shaping domestic criminal justice reforms is critical.[128]

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[123] Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) Law & Social Inquiry 259.
[124] See chapter 1 note 33. For more details, see chapter 4.
[125] Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16(3) European Journal of International Law 369, 407.
[126] Ibid 403-04.
[127] Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) Law & Social Inquiry 229, 259; Gregory Shaffer, 'Transnational Legal Ordering of State Change' in Gregory Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge University Press 2013) 2
[128] See Gregory Shaffer, 'Conclusion: The Study of Transnational Legal Ordering' in Gregory Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge University Press 2013) 214-15.

2.2 Insights to Be Gained from Focusing on Narratives

Originating from literature studies, narratives refer to 'the way that a story is told or a discourse is constructed'.[129] As Saab explains in her study on *Narratives of Hunger in International Law*, a narrative is

> both the process and product of storytelling; it can be an account or sequencing of events, an indication of the relationships between actors and events, a representation of history or the present, or a projection of the future. Narratives can demonstrate alignment with specific ideologies, serve as justification, interpret issues in society, and shape our ways of understanding and perceiving the world.[130]

In a similar vein, cognitive psychologists have argued that narratives are intricately linked to the social construction of reality.[131] For example, Bruner observes that

> [n]arrative "truth" is judged by its verisimilitude rather than its verifiability. There seems indeed to be some sense in which narrative, rather than referring to "reality," may in fact create or constitute it, as when "fiction" creates a "world" of its own ….[132]

From a world history perspective, Hariri describes the importance of stories and the creation of fictions such as corporations in the following words:

> Over the years, people have woven an incredibly complex network of stories. Within this network, fictions such as [corporations] not only exist, but also accumulate immense power. The kinds of things that people create through this network of stories are known in academic circles as 'fictions', 'social constructs' or 'imagined realities'. An imagined reality is not a lie. … Unlike lying, an imagined reality is something that everyone believes in, and as long as this communal believe persists, the imagined reality exerts force in the world.[133]

On this understanding, narratives are important not only for the creation of reality as such but rather for the creation of the dominant reality. In the words of Bruner, '[g]reat storytellers have the artifices of narrative reality construction so well mastered that their telling pre-empts momentarily the possibility of any but a single interpretation'.[134]

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[129] Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press 2016) 292.
[130] Anne Saab, *Narratives of Hunger in International Law: Feeding the World in Times of Climate Change* (Cambridge University Press 2019) 32.
[131] See for example, Jerome Bruner, 'The Narrative Structure of Reality' (1991) 18(1) Critical Inquiry 1.
[132] Ibid 13.
[133] Yuval N Hariri, *Sapiens: A Brief History of Humankind* (Vintage 2015) 35.
[134] Jerome Bruner, 'The Narrative Structure of Reality' (1991) 18(1) Critical Inquiry 1, 9.

While narratives thus tend to support dominant actors and power structures, they can also be utilised for purposes of opposition by emphasising realities that are alternative to dominant legal realities.[135] In other words, considering narratives in law means considering narratives 'within a culture of argument'.[136] In this culture, narratives can then play 'two contrasting roles: they can seek to tell the truth and find the winning argument, on the one hand, and they can oppose dominant arguments and tell a different story, on the other hand'.[137]

Correspondingly, scholarship on narratives and law during the last three decades has focused on legal practitioners and the contest of stories that transpires in trials before domestic courts, especially in the US.[138] However, narrative approaches to law can also go beyond the courtroom and examine the histories and developments of legal norms and systems in particular domains.[139] In the context of international and transnational legal studies, narratives

[135] For an early and broad discussion of this function, see Richard Delgado, 'Storytelling for oppositionists and others: A plea for narrative' (1989) 87(8) Michigan Law Review 2411. In the context of criminology and criminal justice studies, see for example Martina Althoff, Bernd Dollinger and Holger Schmidt, 'Fighting for the "Right" Narrative: Introduction to *Conflicting Narratives of Crime and Punishment*' in Martina Althoff, Bernd Dollinger and Holger Schmidt (eds), *Conflicting Narratives of Crime and Punishment* (Palgrave 2020) 6-9. More generally, Hariri 'encourage[s] all of us, whatever our beliefs, to question the basic narratives of our world, to connect past developments with present concerns' (Yuval N Hariri, *Sapiens: A Brief History of Humankind* (Vintage 2015) author page).

[136] Paul Gewirtz, 'Narrative and Rhetoric in the Law' in Peter Brooks and Paul Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press 1996) 5.

[137] Anne Saab, *Narratives of Hunger in International Law: Feeding the World in Times of Climate Change* (Cambridge University Press 2019) 33. See also, Greta Olsen, 'Narration and Narrative in Legal Discourse' in Peter Hühn et al (eds), *The Living Handbook of Narratology* (Hamburg University 2014) 3.0.2 <www.lhn.uni-hamburg.de/article/narration-and-narrative-legal-discourse>.

[138] Michael Hanne and Robert Weisberg, 'Introduction' in Michael Hanne and Robert Weisberg (eds), *Narrative and Metaphor in the Law* (Oxford University Press 2018) 2. See also, Peter Brooks, 'The Law as Narrative and Rhetoric' in Peter Brooks and Paul Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press 1996) 14; Anthony G Amsterdam and Jerome Bruner, *Mind the Law: How courts rely on storytelling, and how their stories change the ways we understand the law – and ourselves* (Harvard University Press 2000); Flora Di Donato, *The Analysis of Legal Cases: A Narrative Approach* (Routledge 2019).

[139] See Greta Olsen, 'Narration and Narrative in Legal Discourse' in Peter Hühn et al (eds), *The Living Handbook of Narratology* (Hamburg University 2014) 3.1 <www.lhn.uni-hamburg.de/article/narration-and-narrative-legal-discourse>.

have only recently started to receive heightened attention.[140] Similarly, scholars have diagnosed a 'narrative turn' in criminology and criminal justice studies.[141]

Against this background, focusing on narratives as an additional lens enables the study to zoom in on the stories dominant actors and factors tell to create a dominant reality in relation to the domestic introductions of corporate non-prosecution agreements. In particular, it allows the research to focus on the way governments have officially narrated these reforms, any challenges this official narration may face as well as the identification of alternative narratives with potentially significant explanatory power.

The integration of a narrative focus into a broader transnational law frame improves our capacity to reflect critically on interpretative power in the context of domestic criminal justice reforms. The relevance of this heuristic is primarily rooted in the assumption that seemingly technical domestic criminal justice reforms such as the introduction of corporate non-prosecution agreements are neither inevitable nor inherently or exclusively positive.[142] Rather, they reflect complex conflicts of competing interests at different levels of society with winners and losers.[143] More successful actors and factors then have a relatively larger capacity

[140] See for example, Matthew Windsor, 'Narrative Kill or Capture: Unreliable Narration in International Law' (2015) 28(4) Leiden Journal of International Law 743; Barrie Sander, 'The Method is the Message: Law, Narrative Authority and Historical Contestation in International Criminal Courts' (2018) 19(1) Melbourne Journal of International Law 299; Anne Saab, 'International law and feeding the world in times of climate change' (2018) 9(3-4) Transnational Legal Theory 288; Giulia Claudia Leonelli, 'GMO risks, food security, climate change and the entrenchment of neo-liberal legal narratives' (2018) 9(3-4) Transnational Legal Theory 302; Anne Saab, *Narratives of Hunger in International Law: Feeding the World in Times of Climate Change* (Cambridge University Press 2019); Phillip Paiment, 'Urgent agenda: how climate litigation builds transnational narratives' (2020) 11(1-2) Transnational Legal Theory 121; Giulia Claudia Leonelli, *Transnational Narratives and Regulation of GMO Risks* (Hart forthcoming 2021); Makane Mbengue and Jean d'Aspremont (eds), *Crisis Narratives in International Law* (Brill forthcoming 2021); Luca Pasquet, Klara Polackova Van der Ploeg and León Castellanos-Jankiewicz (eds), *International Law and Time: Narratives and Techniques* (Springer forthcoming 2021).

[141] Lois Presser, 'Criminology and the narrative turn' (2016) 12(2) Crime, Media, Culture: An International Journal 137. See also, Lois Presser, *Inside Stories: How Narratives Drive Mass Harm* (University of California Press 2018); Jennifer Fleetwood, Lois Presser, Sveinung Sandberg and Thomas Ugelvik (eds), *The Emerald Handbook of Narrative Criminology* (Emerald 2019); Martina Althoff, Bernd Dollinger and Holger Schmidt (eds), *Conflicting Narratives of Crime and Punishment* (Palgrave 2020).

[142] In contrast, 'much of the literature on the relationship between globalization, crime, and crime control measures is *functionalist*, depicting the emergence of new instruments for harmonizing criminalization policies as a natural response to changes taking place in the organization of illicit markets' (Ely Aaronson and Gregory Shaffer, 'Defining Crimes in a Global Age: Criminalization as a Transnational Legal Process' (2021) 46(2) Law & Social Inquiry 455, 458 (emphasis in original)). For a critical analysis of this explanatory approach, see for example Peter Andreas, 'Illicit Globalization' in Valsamis Mitsilegas, Peter Alldridge and Leonidas Cheliotis (eds), *Globalisation, Criminal Law and Criminal Justice* (Hart 2015) 45.

[143] For a more detailed discussion of the various and potentially conflicting interests involved in the introduction of corporate non-prosecution agreements, see Felix Lüth, 'Corporate non-prosecution agreements as *transnational human problems*: transnational law and the study of domestic criminal justice reforms in a globalised world' (2021) Transnational Legal Theory 1, 6-9. See generally, A Claire Cutler, 'Locating Private Transnational

to shape the way we understand the problem of corporate crime enforcement and perceive what appropriate reforms are.[144]

While a transnational law lens, even with a focus on narratives, does not as such provide a framework for the normative evaluation of what actors, factors, and rationales should prevail over others in the context of domestic criminal justice reforms,[145] it can inform evaluative efforts by shedding light on these interpretive struggles and the realities, dominant or alternative, they try to constitute.[146] It allows us to go beyond treating law simply as responses or solutions to problems but scrutinise the role law may play in constructing or manifesting the very problems it seeks to address. The point in doing so is not immediately to come up with better law or policy but 'to keep open to us ways of thinking and speaking that policy discourses appear to preclude or to disfavour'.[147]

Finally, it may be argued that focusing on narratives is particularly relevant in contexts where transnationally induced criminal justice reforms occur despite empirical uncertainties or even contrary evidence regarding their effectiveness in achieving the ends conventionally claimed.[148]

Authority in the Global Political Economy' in Peer Zumbansen (ed), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (Cambridge University Press 2020) 333.

[144] See Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) Law & Social Inquiry 229, 238.

[145] See generally, Peer Zumbansen, 'Transnational Law as Socio-Legal Theory and Critique: Prospects for "Law and Society" in a Divided World' (2019) 67(3) Buffalo Law Review 909, 936.

[146] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press 2002) 3 (noting that 'if critical theory is to be taken seriously, it will have to first engage with things as they actually are').

[147] Marianne Constable, 'Law as Language' (2014) 1(1) Critical Analysis of Law 63, 74. See also, Anne Saab, *Narratives of Hunger in International Law: Feeding the World in Times of Climate Change* (Cambridge University Press 2019) 35.

[148] See Terence C Halliday, Michael Levi and Peter Reuter, 'Why do Transnational Legal Orders Persist? The Curious Case of Money-Laundering Controls' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 71 with reference to Sally E Merry and David Nelken.For studies referring to empirical uncertainties or even contrary evidence, see for example Jason Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (Cornell University Press 2011); Simeon Obidairo, *Transnational Corruption and Corporations: Regulating Bribery through Corporate Liability* (Ashgate 2013); Terence C Halliday, Michael Levi and Peter Reuter, *Global Surveillance of Dirty Money: Assessing Assessments of Regimes to Control Money Laundering and Combat the Financing of Terrorism* (Center on Law and Globalization, American Bar Foundation and University of Illinois College of Law 2014) <www.americanbarfoundation.org/uploads/cms/documents/report_global_surveillance_of_dirty_money_1.30.2014.pdf>.

2.3 Two Theories of Transnational Law in Criminal Justice and the Study of Domestic Reforms

After a brief introduction of the two main theories of transnational law in criminal justice, *Transnational Criminal Law* and *Transnational Legal Ordering of Criminal Justice*, this part outlines their relative potential to identify influences by international, foreign, and local actors and factors as well as to critically engage with narratives in the context of domestic reforms.

2.3.1 Transnational Criminal Law and Transnational Legal Ordering of Criminal Justice

In an effort to find a doctrinal match for the criminological term 'transnational crime' which could be distinguished from international criminal law in a strict sense,[149] Boister first popularised *Transnational Criminal Law* (TCL) in the early 2000s.[150] Since then it has developed into the principal framework for the analysis of criminal law and practice from a transnational perspective.[151]

TCL can be defined as 'the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects'.[152] In other words, it 'consists of (a) horizontal international obligations between states to criminalize and cooperate, and (b) the vertical application of criminal law and procedures by those states to individuals in order to meet these international obligations'.[153] Together these international

[149] Meaning the body of law creating criminal responsibility which could be directly applied under international law and enforced before international criminal tribunals. See Neil Boister, 'Transnational Criminal Law?' (2003) 14 European Journal of International Law 953, 953-54, 955; Neil Boister, 'Further Reflections on the Concept of Transnational Criminal Law' (2015) 6(1) Transnational Legal Theory 9, 10.

[150] Neil Boister, 'Transnational Criminal Law?' (2003) 14 European Journal of International Law 953. See also, Jessica Roher, Nicola Dalla Guarda and Maryam Khalid, 'Introduction: Symposium on Transnational Criminal Law' (2015) 6(1) Transnational Legal Theory 1, 2.

[151] See Radha Ivory, 'Beyond Transnational Criminal Law: Anti-Corruption as Global New Governance' (2018) 6(3) London Review of International Law 413, 416. See generally, Jessica Roher, Nicola Dalla Guarda and Maryam Khalid, 'Introduction: Symposium on Transnational Criminal Law' (2015) 6(1) Transnational Legal Theory 1.

[152] Neil Boister, 'Transnational Criminal Law?' (2003) 14 European Journal of International Law 953, 955. This definition has been repeated throughout TCL scholarship with the subsequent addition of 'transboundary moral impacts' (see for example, Neil Boister, 'Further Reflections on the Concept of Transnational Criminal Law' (2015) 6(1) Transnational Legal Theory 9, 13; Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, Oxford University Press 2018) 17).

[153] Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, Oxford University Press 2018) 18. See also, Neil Boister, 'Transnational Criminal Law?' (2003) 14 European Journal of International Law 953, 972; Neil Boister, 'The Concept and Nature of Transnational Criminal Law' in Neil Boister and Robert Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015) 14, 18.

and domestic laws are said to create a system,[154] a field within transnational legal pluralism,[155] or a non-hierarchical order.[156] As Ivory notes, the 'system, field, or order is constituted by suppression conventions or similar international coordinating "arrangements", and the cross-border social construction of "transnational crimes"'.[157]

Conjoining '"transnational crime" with Jessup's term "transnational law"', TCL focuses on the 'governance of transnational criminal actions' or, in other words, 'the actions and ideas of those who clarify, normativise and apply the norms [that] transcend territorial boundaries'.[158] As regards law reform at the domestic level, Boister notes in his more recent writings that

> [t]ransnational criminal law can be understood as an area or field within transnational legal pluralism that only becomes fully visible if domestic legal systems are examined with a view to identifying their transnational features. … Only a thorough investigation of the history of law reform of particular norms in particular contexts, and the dialectical way in which they have been constituted and reconstituted under the influence of other norms whether by radical reform or incremental adjustment or reinterpretation, will expose these extraterritorial influences and will make it possible to judge the weight of their impact.[159]

Similarly, TCL may function

> as a lens to reveal the relationships between seemingly unrelated national criminal laws. It is suggested that the use of this lens makes it possible to see the normative cross-pollination between the different regimes within transnational criminal law that put, for example, a law on human trafficking in one country in relationship with such a law in another. It makes it possible to examine the transnational criminal procedures and law enforcement structures that have grown up in the "transnational legal space" to service these regimes.[160]

In contrast, TLO theory was only very recently extended to criminal justice studies with the aim of improving their capacity to grapple with the changing nature of criminal justice policy

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[154] Neil Boister, 'Transnational Criminal Law?' (2003) 14 European Journal of International Law 953, 955; Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, Oxford University Press 2018) 18-23.
[155] Neil Boister, 'Further Reflections on the Concept of Transnational Criminal Law' (2015) 6(1) Transnational Legal Theory 9, 25.
[156] Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, Oxford University Press 2018) 33.
[157] Radha Ivory, 'Beyond Transnational Criminal Law: Anti-Corruption as Global New Governance' (2018) 6(3) London Review of International Law 413, 419.
[158] Neil Boister, 'Further Reflections on the Concept of Transnational Criminal Law' (2015) 6(1) Transnational Legal Theory 9, 13.
[159] Neil Boister, 'The concept and nature of transnational criminal law' in Neil Boister and Robert Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015) 22.
[160] Neil Boister, 'Further Reflections on the Concept of Transnational Criminal Law' (2015) 6(1) Transnational Legal Theory 9, 30.

and law making in an increasingly complex, interconnected world.[161] *Transnational Legal Ordering of Criminal Justice* (TLO-CJ) in particular seeks to counter approaches of methodological nationalism which from an analytical perspective 'dichotomi[se] the study of international and national processes of criminal lawmaking' by 'applying the conceptual tools of the theory of transnational legal orders (TLOs) to analyse the dynamic and recursive interactions between the international, regional, national, and local levels in shaping criminal justice law and policy'.[162] As explained above, TLO theory provides a flexible socio-legal methodology for the analysis of 'how transnational and domestic actors promote the global diffusion of particular norms and institutional forms, and how domestic actors generate, translate, adapt, appropriate, and resist transnational norms.'[163]

2.3.2 Capacity to identify international, foreign, and local influences

This section examines the relative potential of the conceptions of 'transnational law' proposed by TCL and TLO theory to identify different international, foreign, and local influences on domestic criminal justice reforms.[164]

Beginning with TCL theory, we can first note TCL's long-standing view that 'a horizontal treaty element is a necessary element of transnational criminal law because it is indicative of a formal inter-sovereign relationship … which distinguishes transnational criminal law from mere international relations'.[165] While continuing to emphasise that TCL requires a horizontal international element, Boister has more recently and seemingly reluctantly acknowledged that

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[161] See in particular, the conference on *Transnational Legal Ordering in Criminal Justice* convened by Gregory Shaffer and Ely Aaronson at the University of California, Irvine School of Law on 21-22 September 2018 <www.law.uci.edu/centers/glas/activities/transnational-ordering-criminal-justice/> and the resultant publications: 'Symposium on Transnational Legal Ordering and Criminal Justice' (2019) 4 UC Irvine Journal of International, Transnational, and Comparative Law; Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020).

[162] Ely Aaronson and Gregory Shaffer, 'The Transnational Legal Ordering of Criminal Justice' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 5-6; Ely Aaronson and Gregory Shaffer, 'Defining Crimes in a Global Age: Criminalization as a Transnational Legal Process' (2021) 46(2) Law & Social Inquiry 455, 4556.

[163] Ely Aaronson and Gregory Shaffer, 'Defining Crimes in a Global Age: Criminalization as a Transnational Legal Process' (2021) 46(2) Law & Social Inquiry 455, 457.

[164] For a more detailed discussion, see Felix Lüth, 'Corporate non-prosecution agreements as *transnational human problems*: transnational law and the study of domestic criminal justice reforms in a globalised world' (2021) Transnational Legal Theory 1, 12-15. See also, Radha Ivory, 'Transnational Criminal Law or the Transnational Legal Ordering of Criminal Justice: Theorizing Australian Corporate Foreign Bribery Reforms' in in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 84.

[165] Neil Boister, 'Further Reflections on the Concept of Transnational Criminal Law' (2015) 6(1) Transnational Legal Theory 9, 15. See also, Neil Boister, *An Introduction to Transnational Criminal Law* (1st edn, Oxford University Press 2012) 13; Neil Boister, 'The Concept and Nature of Transnational Criminal Law' in Neil Boister and Robert Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015) 15.

'it appears that this can be constituted by a treaty, a custom, a resolution, soft law, any form of international arrangement making for coordination of approach among states and for legal acts at a domestic level'.[166] The involvement of traditional international law, even if understood broadly as any form of internationally agreed coordination arrangement, is therefore central to the ambit of TCL. This relatively narrow conception of transnational law makes it difficult to include, for example, domestic criminal justice reforms (or parts thereof) which have occurred largely without the agency of an express, internationally agreed coordinating arrangement, while still addressing criminal activities that have actual or potential trans-boundary effects and being subject to various influences within and outside of the domestic legal system.[167]

This analytical focus also affects TCL's capacity to consider another, frequently important source of influence on domestic criminal justice reforms, namely that of powerful states and foreign law.[168] While TCL has been concerned with the disproportionate influence of powerful Western states such as the UK and US from the outset, it appears to be focused primarily on their ability to shape the horizontal international element of TCL (and only as a consequence of that shaping impact law reforms in other states).[169] This conception again struggles to capture influences of powerful states and foreign law and law enforcement in the absence or outside the scope of international coordinating arrangements.

Finally, the degree to which TCL's conception of transnational law focuses on states as the main actors may limit its ability to consider the influence of other less public international law actors and factors.[170] While Boister acknowledges that the 'transnational normative space is expanding', he maintains that this expansion is 'directed at states … and it is only the

[166] Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, Oxford University Press 2018) 22-23. However, he maintains 'the suppression conventions provide a penal anchor for much of this transnational governance, even when it takes on a more administrative or regulatory form' (23).
[167] For a detailed discussion of the role of international law in the diffusion of corporate non-prosecution agreements, see chapter 4.
[168] See Prabha Kotiswaran and Nicola Palmer, 'Rethinking the 'international law of crime': provocations from transnational legal studies' (2015) 6(1) Transnational Legal Theory 55, 82 ('call[ing] for a redefinition of TCL to include comparative criminal law'). For a renewal of their call, see also Prabha Kotiswaran and Nicola Palmer, 'Transnational Criminal Law: A Field in the Making' in Peer Zumbansen (ed), *The Oxford Handbook of Transnational Law* (Oxford University Press 2021) 195-98.
[169] Neil Boister, 'Transnational Criminal Law?' (2003) 14 European Journal of International Law 953, 956; Neil Boister, *An Introduction to Transnational Criminal Law* (1st edn, Oxford University Press 2012) 18; Neil Boister, 'Further Reflections on the Concept of Transnational Criminal Law' (2015) 6(1) Transnational Legal Theory 9, 26-28; Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, Oxford University Press 2018) 20-21.
[170] See Radha Ivory, 'Transnational Criminal Law or the Transnational Legal Ordering of Criminal Justice: Theorizing Australian Corporate Foreign Bribery Reforms' in in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 98.

participants in the horizontal level that include non-state entities'.[171] It is of course true that states ultimately hold the power to enact domestic criminal justice reforms such as the introduction of corporate non-prosecution agreements. However, the decisions to do so and how may be influenced by various individual, corporate, public, state, and governmental interests and pressures arising within and across jurisdictions which are important to consider in context. Limiting the analysis of non-state influences to the horizontal international level, as seems to be suggested, is again problematic in the absence or outside the scope of an international coordinating arrangement.

In contrast, TLO's socio-legal and process-oriented conception of transnational law provides a flexible analytical framework for studying international influences on domestic criminal justice reforms. In particular, it does not restrain its focus to norms that relate to (perceived) cross-border events and activities or the existence and scope of international coordinating arrangements.[172] Rather, 'taking off from a new legal realist conception of law',[173] TLO scholars view 'transnational law as embodying norms that are transported across national frontiers via cross-border social structures, and which are possibly changed in the process'.[174] Unlike more traditional approaches in international law and relations studies, including TCL, TLO theory aims to emphasise transnational processes of norm construction and diffusion which integrate horizontal, top-down, and bottom-up forms of law-making and enforcement. In doing so, it is also awake to recursive interactions between actors asserting influence at different levels of society.[175]

As regards the influence of foreign law and law enforcement authorities of powerful states, like the US, on criminal justice reforms in other countries, this conception of transnational

[171] Neil Boister, 'Further Reflections on the Concept of Transnational Criminal Law' (2015) 6(1) Transnational Legal Theory 9, 23. See also, Neil Boister, 'The Concept and Nature of Transnational Criminal Law' in Neil Boister and Robert Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015) 21.
[172] See Radha Ivory, 'Transnational Criminal Law or the Transnational Legal Ordering of Criminal Justice: Theorizing Australian Corporate Foreign Bribery Reforms' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 88, 100.
[173] Radha Ivory, 'Transnational Criminal Law or the Transnational Legal Ordering of Criminal Justice: Theorizing Australian Corporate Foreign Bribery Reforms' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 88 with reference to, among others, Victoria Nourse and Gregory Shaffer, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?' (2009) 95 Cornell Law Review 61; Terence C Halliday and Gregory Shaffer, 'Transnational Legal Orders' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015) 17.
[174] Radha Ivory, 'Transnational Criminal Law or the Transnational Legal Ordering of Criminal Justice: Theorizing Australian Corporate Foreign Bribery Reforms' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 88.
[175] Ely Aaronson and Gregory Shaffer, 'Defining Crimes in a Global Age: Criminalization as a Transnational Legal Process' (2021) 46(2) Law & Social Inquiry 455, 456-57.

law may similarly illuminate a more complex picture. It may in particular contribute to a better understanding of their role and strategies in the absence or outside the scope of international coordinating arrangements as well as in the context of 'recursive interactions between bottom-up and top-down norm making processes and institutional interactions'.[176] This conception also pays attention to modifications during transnational norm diffusion processes such as through new legislative models.[177]

Finally, TLO theory's analytical openness supports a nuanced understanding of local demands as well as the interactions between state and non-state actors in constructing criminal justice reforms transnationally. These interactions are not necessarily limited to international networks or organisations in the horizontal international level, as may be TCL's focus, but can occur at any and multiple levels of governance and as such impact on domestic legal change.[178] TLO theory not only accommodates these dynamics but also reflects a reality in which states may not always behave as a unified actor, potentially leading officials operating within the state's constituent branches and agencies to develop their positions through interactions with different non-state actors.[179]

The conception of transnational law proposed by TLO theory therefore seems to have a higher capacity for capturing the processes by which international organisations, foreign states, and local circumstances may influence domestic criminal justice reforms. In contrast, the study of these reforms holds a number of challenges for TCL which seem to be primarily rooted in its doctrinal ambition and relatively strict focus on traditional public international law instruments and actors.

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[176] Ely Aaronson and Gregory Shaffer, 'The Transnational Legal Ordering of Criminal Justice' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 10, 11. See also, Terence C Halliday and Gregory Shaffer, 'Transnational Legal Orders' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015) 37-42.

[177] See generally, Ely Aaronson and Gregory Shaffer, 'Defining Crimes in a Global Age: Criminalization as a Transnational Legal Process' (2021) 46(2) Law & Social Inquiry 455, 473; Brandon L Garrett and David Zaring, 'For a Better Way to Prosecute Corporations, Look Overseas' *The New York Times* (23 September 2013). While Boister signals awareness in his more recent writings that 'traffic is not all one way', he suggests, in line with the assumed central role of international coordinating arrangements, that 'the relationship between the vertical and horizontal elements is recursive in the sense that adaptations in national law can feed back into *alterations of the international template* and [from there] on to other national laws' (Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, Oxford University Press 2018) 20 (emphasis added).

[178] See Radha Ivory, 'Transnational Criminal Law or the Transnational Legal Ordering of Criminal Justice: Theorizing Australian Corporate Foreign Bribery Reforms' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 109.

[179] See Ely Aaronson and Gregory Shaffer, 'The Transnational Legal Ordering of Criminal Justice' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 9-10.

2.3.3 Capacity to accommodate a narrative focus

This final section briefly discusses TCL and TLO's capacity to accommodate critical engagement with reform narratives established by dominant actors and factors as well as the identification of alternative accounts.

TCL is presented as a system with its own goals and values, ranging from the effective suppression of transnational crime to the preservation of sovereignty as well as considerations of security, legitimacy, legality, or human rights.[180] While TCL theory has been concerned about the influence of powerful states, especially as regards negative effects on the sovereignty of other states and the rights of individuals, from the outset,[181] its concerns remain largely focused on TCL's function to facilitate inter-state coordination in supressing or controlling crime.[182] So far, no particular attention appears to have been paid to the study of narratives within this framework.

In contrast, studies under the umbrella of TLO theory, especially involving legal sociologists, have been more open to and interested in the role of narratives in criminal justice reforms.[183] This interest corresponds with TLO theory's general approach towards normative assessments. While TLO theory 'takes no categorical normative position on TLOs, whether positive or negative',[184] it follows a predominantly constructivist approach which 'posit[s] that the emergence of new transnational criminal justice norms is primarily driven by political and professional actors' success in shaping the dominant frames through which a social problem is defined and acted upon'.[185] Employing, among others, the sociological concepts

[180] Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, Oxford University Press 2018) 33-41.
[181] See Neil Boister, 'Transnational Criminal Law?' (2003) 14 European Journal of International Law 953, 956-60; Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, Oxford University Press 2018) 33-42, 422-27. See also Sabine Gless, 'Bird's-eye view and worm's-eye view: towards a defendant-based approach in transnational criminal law' (2015) 6(1) Transnational Legal Theory 117.
[182] See Boister Neil Boister, 'Further Reflections on the Concept of Transnational Criminal Law' (2015) 6(1) Transnational Legal Theory 9, 24; Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, Oxford University Press 2018) 21, 42, 422.
[183] See for example, Terence C Halliday, Michael Levi and Peter Reuter, 'Why do Transnational Legal Orders Persist? The Curious Case of Money-Laundering Controls' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 51; Joachim J Savelsberg, 'The Anti-Impunity Transnational Legal Order for Human Rights: Formation, Institutionalization, Consequences, and the Case of Darfur' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 205; Manuel Iturralde, 'Columbian Transitional Justice and the Political Economy of the Anti-Impunity Transnational Legal Order' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 234.
[184] Terence C Halliday and Gregory Shaffer, 'Transnational Legal Orders' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015) 27.
[185] Ely Aaronson and Gregory Shaffer, 'The Transnational Legal Ordering of Criminal Justice' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020)

of framing and diagnostic struggles, TLO theory thus 'highlights the role of conflicts regarding the nature and causes of a perceived social problem in shaping the form and content of legal norms and implementation mechanisms to govern the problem'.[186] Against this background, some TLO scholars have also focused on justificatory rhetoric designated as 'plausible folk theories'.[187] For example, Halliday, Levi, and Reuter observe that

> the promoters of the AML [anti-money laundering] TLO have had considerable success in building a plausible folk theory to underwrite their enterprise. A plausible folk theory is built not on robust empirical foundations but on parsimony, face validity, a compactness of rhetorical expression, sufficient ambiguity to accommodate potentially conflicting understandings of what it purports to explain, an affinity with extant beliefs about such things as crime and dirty money, and a failure or resistance to examining too closely the premises and logic of the theory itself.[188]

Accordingly, TLO theory also has a larger capacity than TCL theory to accommodate critical engagements with reform narratives.

2.4 Conclusion

This chapter has presented an analytical framework which views the study of domestic criminal justice reforms such as the rise of corporate non-prosecution agreements through a combined transnational law and narrative lens. Borrowing from transnational legal process studies and especially TLO theory, it adopted a methodological conception of transnational law as a framework to analyse the construction and conveyance of legal norms across borders. It was argued that the main advantage of this conception compared to others, such as transnational law applying to transnational situations as well as purely national/comparative or international perspectives, is the capacity to provide a more flexible and yet focused

8. See already, Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) Law & Social Inquiry 229, 238.

[186] Ely Aaronson and Gregory Shaffer, 'Defining Crimes in a Global Age: Criminalization as a Transnational Legal Process' (2021) 46(2) Law & Social Inquiry 455, 461 with reference to Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Cambridge University Press 1974); Robert Benford and David Snow, 'Framing Processes and Social Movements: An Overview and Assessment' (2000) 26 Annual Review of Sociology 611. Specifically on diagnostic disagreements over whether a social problem should be addressed through criminal law measures or alternative policies, see also Ely Aaronson and Gregory Shaffer, 'Defining Crimes in a Global Age: Criminalization as a Transnational Legal Process' (2021) 46(2) Law & Social Inquiry 455, 463.

[187] See initially, Terence C Halliday, 'Plausible Folk Theories: Throwing Veils of Plausibility over Zones of Ignorance in Global Governance' (2018) 69(4) British Journal of Sociology 936.

[188] Terence C Halliday, Michael Levi and Peter Reuter, 'Why do Transnational Legal Orders Persist? The Curious Case of Money-Laundering Controls' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 70-71.

analytical lens to trace the influence of various foreign, international, and local actors and factors or events on domestic legal change. Integrating a focus on narratives into this transnational law framework was found to allow not only critical engagements with the way governments and dominant actors rationalise reforms but also explorations of the existence of other accounts with potentially significant explanatory power.

Against this background, the chapter turned to an assessment of the relative analytical power of the two main theories of transnational law in criminal justice. The proposed combination of a transnational law and narrative lens allowed the chapter not only to contribute to existing comparative studies in relation to some specific elements of the descriptive power of TCL and TLO-CJ theory but also to add that the theories should be compared for their critical capacity as well. In that way, it may be argued that the presented analytical framework helps to build bridges between normative (descriptive), sociological, and critical approaches to studies of transnational law in criminal justice. While the traditional framework proposed by TCL theory will undoubtedly continue to enable important studies into supra-state rules on crime control, the chapter finds that TLO-CJ offers a more suitable analytical framework for the study of domestic reforms in this context, despite its only recent extension to criminal justice issues and relative lack of application so far.

The following four chapters apply the presented transnational law and narrative lens to the case study of corporate non-prosecution agreements, tracing the actors, factors, and rationales that may have influenced their curious emergence in the US and subsequent rise across other domestic legal systems. In chapter 7, as part of the conclusion, the study will briefly return to the issue of methodology and added value of a combined transnational criminal law and narrative lens. This chapter and study thus also seek to contribute to improving the tools available for the analysis of criminal justice reforms in an increasingly interconnected and contested world. In that sense, it may also go some way towards answering Twining's call

> in an era of globalisation, we need a broader and much more complex picture and flexible methodology as a basis for studying processes of diffusion and their outcomes.[189]

[189] William Twining, 'Diffusion of law: A global perspective' (2004) 49 The Journal of Legal Pluralism and Unofficial Law 1, 5.

3 Emergence and Mission Creep of Non-Prosecution and Deferred Prosecution Agreements in the US

The idea that corporations could be held criminally liable was accepted early in the US,[190] especially after the Supreme Court had established the legal fiction that an agent's culpable mental state could be attributed directly to the principal corporation in the seminal case of *New York Central & Hudson River Railroad v US* in 1909.[191] The concept of corporate criminal liability was subsequently applied and developed in several cases.[192] Until the 1990s, this meant that if corporations were prosecuted in the US, they were typically convicted or acquitted by a court.[193]

However, over the last couple of decades, the DOJ and other US law enforcement agencies have started using extensively pre-trial diversion procedures to resolve investigations into corporate criminal liability.[194] The US Justice Manual defines pre-trial diversion generally as

> an alternative to prosecution which seeks to divert certain offenders from traditional criminal justice processing into a program of supervision and services administered by the U.S. Probation Service. In the majority of cases, offenders are diverted at the pre-charge stage. Participants who successfully complete the program will not be charged or, if charged, will have the charges against them dismissed; unsuccessful participants are returned for prosecution.[195]

[190] See Vikramaditya S Khanna, 'Corporate Criminal Liability: What Purpose Does It Serve?' (1996) 109(7) Harvard Law Review 1477, 1479-83.
[191] *New York Central & Hudson River Railroad v US*, 212 U.S. 481, 493 (1909). For a detailed discussion of the political context at the time, see Anthony Grasso, 'No Bodies to Kick or Souls to Damn: The Political Origins of Corporate Criminal Liability' (2021) 35(1) Studies in American Political Development 57.
[192] See for example, *US v Dotterweich*, 320 U.S. 277, 281 (1943); *US v George F Fish, Inc*, 154 F.2d 798, 801 (2d Cir.), cert. denied, 328 U.S. 869 (1946); *Standard Oil Co v US*, 307 F.2d 120, 127 (5th Cir. 1962); *US v Harry L Young & Sons*, 464 F.2d 1295 (10th Cir. 1972); *US v Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982); *US v Automated Medical Laboratories*, 770 F.2d 399 (4th Cir. 1985); *US v Bank of New England, NA*, 821 F.2d 844 (1st Cir.), cert denied, 484 U.S. 943 (1987). See generally, Kathleen F Brickey, 'Corporate Criminal Liability: A Primer for Corporate Counsel' (1984) 40(1) The Business Lawyer 129; Ved P Nanda, 'Corporate Criminal Liability in the United States: Is a New Approach Warranted?' (2010) 58 The American Journal of Comparative Law 605, 608-13.
[193] Brandon L Garrett, 'International Corporate Prosecutions' in Darryl K Brown, Jenia Iontcheva Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019) 426.
[194] See Jennifer Arlen and Marcel Kahan, 'Corporate Governance Regulation through Nonprosecution' (2017) 84 The University of Chicago Law Review 323, 324-25; Brandon L Garrett, 'Declining Corporate Prosecutions' (2020) 57 American Criminal Law Review 109.
[195] DOJ, Justice Manual, § 9-22.010 (2020).

In relation to large corporations, non-prosecution and deferred prosecution agreements are among the most frequently used forms of pre-trial diversion.[196] According to § 9-28.200 (General Considerations of Corporate Liability) of the Principles of Federal Prosecution of Business Organizations,

> [i]n certain instances, it may be appropriate to resolve a corporate criminal case by means other than indictment. Non-prosecution and deferred prosecution agreements, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation. These agreements are discussed further in JM 9-28.1100 (Collateral Consequences).[197]

§ 9-28.1100 (Collateral Consequences) then explains further that

> where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other. Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement. ….[198]

Importantly, the US Sentencing Guidelines clarify that non-prosecution and deferred prosecution agreements are not counted towards a criminal history of the defendant. According to § 4A1.2.(f) of the US Sentencing Guidelines,

> [d]iversion from the judicial process without a finding of guilt (*e.g.*, deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a judicial proceeding is counted as a sentence under §4A1.1(c)

[196] See Jennifer Arlen and Marcel Kahan, 'Corporate Governance Regulation through Nonprosecution' (2017) 84 The University of Chicago Law Review 323, 332; Cindy R Alexander and Mark A Cohen, 'The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements' (2015) 52 American Criminal Law Review 537, 537; Brandon L Garrett, 'Structural Reform Prosecution' (2007) 93 Virginia Law Review 853, 880, 887-89.
[197] DOJ, Justice Manual, § 9-28.200 (2020).
[198] Ibid § 9-28.1100 (2020).

> even if a conviction is not formally entered, except that diversion from juvenile court is not counted.[199]

Non-prosecution and deferred prosecution agreements thus are two types of voluntary, pre-trial diversion mechanisms that enable prosecutors to agree with corporations not to prosecute suspicions of criminal activity in certain 'instances' and in exchange for 'conditions'. Once an agreement has been reached, prosecution can be dismissed immediately or after a certain period of monitoring without prosecuting authorities having to prove their case in trial and with corporations avoiding the collateral consequences associated with a trial and conviction such as potentially long periods of uncertainty, reputational damage, debarment from public contracts and funding, delicensing, or banning of certain business activities.[200]

The referenced instances and conditions that may lead to these agreements are largely governed by policy and practice, providing prosecuting authorities with wide discretion and varying to some degree from one agreement to another.[201] They typically include a combination of self-reporting, cooperation with the government's continuing investigations, waiver of the defendant's right to a speedy trial and certain defences, acceptance of relevant facts, imposition of fines, disgorgement, and other remedial relief as well as various measures aimed at preventing future misconduct and reforming corporate culture.[202] In addition to the establishment or development of extensive compliance and self-monitoring programs, these reformative measures can include, for example, the ousting or reassigning of executives or board members, changes to long-standing business and compensation practices, or the

[199] US Sentencing Commission, Guidelines Manual, § 4A1.2.(f) (2018) (emphasis in original).
[200] See Lisa K Griffin, 'Compelled Cooperation and the New Corporate Criminal Procedure' (2007) 82 New York University Law Review 311, 321-22. On the implications of debarment from public procurement in the US, see also Sope Williams-Elegbe, 'The implications of negotiated settlements for debarment in public procurement: a preliminary enquiry' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 72-74.
[201] Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 198. For example, the Principles of Federal Prosecution of Business Organizations require generally that '[t]he appropriateness of a criminal charge against a corporation, or some lesser alternative, must be evaluated in a pragmatic and reasoned way that produces a fair outcome, taking into consideration, among other things, the Department's need to promote and ensure respect for the law' (DOJ, Justice Manual, § 9-28.1100 (2020)).
[202] See generally, Brandon L Garrett, 'Structural Reform Prosecution' (2007) 93(4) Virginia Law Review 853; Ralph F Hall, 'Deferred Prosecution and Non-Prosecution Agreements' in James T O'Reilly, James Patrick Hanlon, Ralph F Hall, Steven L Jackson and Erin Lewis (eds), *Punishing Corporate Crime: Legal Penalties for Criminal and Regulatory* (Oxford University Press 2009) 149-54; Julie R O'Sullivan, 'How Prosecutors Apply the "Federal Prosecutions of Corporations" Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction' (2014) 51 American Criminal Law Review 29.

appointment of an independent monitor who assesses and reports to the prosecuting authority on the implementation of the terms of the agreement.[203]

While the negotiations and conditions can be similar for non-prosecution and deferred prosecution agreements, the key difference is that in case of the latter criminal charges are filed in court, but the prosecution is deferred and the charges are subsequently dismissed if the company adheres to the agreed terms over a specified period of time. In contrast, non-prosecution agreements do not entail the filing of criminal charges, with the investigation remaining unresolved until the corporation fulfils the agreed terms.[204] Consequently, deferred prosecution agreements require judicial approval, albeit limited,[205] whereas non-prosecution agreements can simply be letter agreements between the prosecutor and the corporation.

Non-prosecution and deferred prosecution agreements are available to federal and state prosecutors as well as some specialised enforcement agencies 'in virtually all areas of corporate criminal wrongdoing', among others, 'including antitrust, fraud, domestic bribery, tax evasion, environmental violations as well as foreign corruption cases'.[206] Since the early 2010s, these procedures have also occasionally been used in civil matters, especially by the Securities and Exchange Commission (SEC) and DOJ's Antitrust Division.[207] However, for reasons of focus and feasibility, this chapter concentrates on the use of non-prosecution and deferred prosecution agreements by federal prosecutors at the DOJ to resolve allegations of corporate criminal conduct, focusing in particular on corruption, money laundering, fraud,

[203] Wulf A Kaal and Timothy A Lacine, 'The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013' (2014) 70(1) The Business Lawyer 61, 92-111; Jennifer Arlen and Marcel Kahan, 'Corporate Governance Regulation through Nonprosecution' (2017) 84 The University of Chicago Law Review 323, 324-25.

[204] Ved P Nanda, 'Corporate Criminal Liability in the United States: Is a New Approach Warranted?' (2010) 58 The American Journal of Comparative Law 605, 624.

[205] On the controversial issue of judicial oversight in the context of non-prosecution and deferred prosecution agreements, see for example Benjamin M Greenblum, 'What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements' (2005) 105 Columbia Law Review 1863; Mary Miller, 'More Than Just a Potted Plant: A Court's Authority to Review Deferred Prosecution Agreements Under the Speedy Trial Act and Under Its Inherent Supervisory Power' (2016) 115 Michigan Law Review 135; Benjamin Barr, 'Get your hands off my DPA! The proper scope of the judicial supervisory power in deferred prosecution agreements' (2017) 54(2) American Criminal Law Review 571.

[206] See Cindy R Alexander and Mark A Cohen, 'The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements' (2015) 52 American Criminal Law Review 537, 537.

[207] See Gibson Dunn, '2013 Mid-Year Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)' (9 July 2013) <www.gibsondunn.com/2013-mid-year-update-on-corporate-deferred-prosecution-agreements-dpas-and-non-prosecution-agreements-npas/>; Gibson Dunn '2020 Mid-Year Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements' (15 July 2020 <www.gibsondunn.com/2020-mid-year-npa-dpa-update/>.

and related economic crimes for which corporate non-prosecution agreements have also been introduced or are discussed in other countries.[208]

Against this background, the chapter discusses the emergence and mission creep of non-prosecution and deferred prosecution agreements in the US. It starts with a short history from their initial introduction as leniency procedures for minor and especially juvenile offenders in the early 1900s to the first extensions to corporations in the 1990s and the becoming of a prevalent tool from the mid-2000s. The chapter then examines domestic developments that catalysed the rise of corporate non-prosecution and deferred prosecution agreements, focusing on changes to US enforcement policies and practices following the terrorist attacks of 11 September 2001 (9/11) and the large-scale corporate fraud scandals of the early 2000s. Finally, the chapter investigates the methods and rationales behind the extension to foreign corporations and, indirectly, foreign countries.

3.1 From Leniency for Juveniles to Large Corporations: A Short History of Non-Prosecution and Deferred Prosecution Agreements in the 20th and 21st Century

After a brief description of the historical emergence of non-prosecution and deferred prosecution agreements as leniency procedures for minor and especially juvenile offenders, this part describes the policy changes and cases that led to the first extensions to corporations in the 1990s. The final section provides some empirical information on the rise and consistent use in the corporate context from 2000 to 2020.

3.1.1 Emergence as leniency procedures for minor and especially juvenile offenders

In the early 1900s, US prosecutors started using non-prosecution and deferred prosecution agreements to enable leniency for individuals, especially juveniles and first-time offenders, in non-serious misdemeanour cases such as retail theft.[209] For example, the Chicago Boys' Court is said to have 'conceived deferred prosecution in 1914 in an attempt to process juvenile offenders without "branding them as criminals"'.[210] After the Second World War, especially deferred prosecution agreements were increasingly used in combination with community-

[208] See section 1.1.

[209] Peter R Reilly, 'Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions' (2015) 2 Brigham Young University Law Review 307, 314.

[210] Benjamin M Greenblum, 'What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements' (2005) 105 Columbia Law Review 1863, 1866. See also, Joel Cohen and Jonathan Liebman, 'Pretrial Diversion: Federal Prosecution?' *New York Law Journal* (6 April 1994); David A Inniss, 'Developments in the Law: Alternatives to Incarceration' (1998) 111(7) Harvard Law Review 1863, 1902-03.

counselling, training, and job-placement programs to further support offenders in avoiding a criminal future.[211] From 1947, the Judicial Conference, the national policy-making body for the federal courts, endorsed the use of deferred prosecution agreements.[212]

Subsequently, references to these procedures also started to appear in legislation such as the Speedy Trial Act of 1974 which required that a defendant is brought to trial within 70 days.[213] The Act provides an exception to this rule in § 3161(h)(2) for '[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct'.[214] When drafting the Act, the Senate Committee expressly stated that '[s]ubparagraph 3161(h)(2) is designed to encourage the current trend among United States attorneys to allow for deferral of prosecution on the condition of good behavior'.[215] Commentators have argued that this provision in the Speedy Trial Act reflects the original purpose for which deferred prosecution agreements were developed.[216]

In 1977, the Justice Manual (then Attorneys' Manual) included the above-cited pre-trial diversion standards in § 9-22.010,[217] referring to three principal aims:

> (1) to prevent future criminal activity among certain offenders by diverting them from traditional processing into community supervision and services; (2) to save prosecutive and judicial resources for concentration on major cases; and (3) to provide, where appropriate, a vehicle for restitution to communities and victims of crime.[218]

The main rationale behind non-prosecution and deferred prosecution agreements was thus utilitarian and rehabilitative. The idea was that by avoiding a criminal conviction and giving

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[211] Peter R Reilly, 'Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions' (2015) 2 Brigham Young University Law Review 307, 315 with reference to Editor, 'Pretrial Diversion from the Criminal Process' (1974) 83 Yale Law Journal 827, 827.
[212] TASC Center for Health and Justice, *No Entry: A National Survey of Criminal Justice Diversion Programs and Initiatives* (TASC Center for Health and Justice 2013) 16.
[213] US Speedy Trial Act of 1974, 18 USC § 3161(c)(1) (2012).
[214] Ibid § 3161(h)(2) (2012).
[215] US Senate Committee Report (1974) 36-37 available in Anthony Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974* (Federal Judicial Center 1980) 117.
[216] See for example, Gordon Bourjaily, 'DPA DOA: How and Why Congress Should Bar the Use of Deferred and Non-Prosecution Agreements in Corporate Criminal Prosecutions' (2015) 52 Harvard Journal on Legislation 543, 544; Andrea Amulic, 'Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States' (2017) 116 Michigan Law Review 123, 128.
[217] See note 195 and accompanying text.
[218] DOJ, US Attorneys' Manual, § 9-22.010 (2014).

defendants a second chance, they will be more likely to find employment and, in turn, less likely to reoffend.[219]

Non-prosecution and deferred prosecution agreements therefore emerged primarily from prosecutorial practice, as opposed to strategic legislative reform, and a desire to shield vulnerable individuals from the consequences and stigma of a criminal conviction in cases with limited perceived culpability.[220]

3.1.2 Extensions to corporations in the 1990s: US Sentencing Commission Guidelines, Salomon Brothers/Prudential Securities, and the Holder memo

With their use limited to individuals for most of the 20th century, non-prosecution and deferred prosecution agreements only started to be extended to corporations in the 1990s.

This extension was in significant ways initiated by the US Sentencing Commission, a federal agency created by Congress in 1984 and charged with producing guidelines to reduce disparities and promote transparency and proportionality in sentencing federal crimes.[221] The Commission issued its first guidelines in 1987,[222] supplementing them with a new chapter on the 'Sentencing of Organizations' in 1991.[223]

The guidelines in this chapter were designed so that the sanctions imposed upon organisations would provide not only 'just punishment [and] adequate deterrence' but also 'incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct'.[224] Decisions on how to achieve these aims through sentencing should reflect the need for remediation, the seriousness of the offence, and the culpability of the organisation.[225] When determining culpability, the guidelines identified four factors that should be considered as increasing the organisation's culpability score: 1) involvement in or

[219] David M Uhlmann, 'Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability' (2013) 72 Maryland Law Review 1295, 1305-06.
[220] See Andrea Amulic, 'Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States' (2017) 116 Michigan Law Review 123, 125.
[221] See US Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984). See also, US Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987); Kate Stith and Steve Y Koh, 'The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines' (1993) 28 Wake Forest Law Review 223.
[222] US Sentencing Commission, Guidelines Manual (1987).
[223] US Sentencing Commission, Guidelines Manual, § 8 (1991). See generally, Ilene H Nagel and Winthrop M Swenson, 'The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future' (1993) 71 Washington University Law Quarterly 205.
[224] US Sentencing Commission, Guidelines Manual, § 8, Introductory Commentary (1991). See also, US Sentencing Commission, Guidelines Manual, § 8C2.4, commentary designated as background (1991).
[225] Ibid § 8, Introductory Commentary (1991).

tolerance of criminal activity; 2) prior history; 3) violation of an order; and 4) obstruction of justice.[226] However, they also introduced the novel idea that the following two factors should be counted towards decreasing culpability: 1) an effective program to prevent and detect violations, self-reporting, and cooperation; and 2) acceptance of responsibility.[227] Members of the corporate defence bar have referred to this change as having 'revolutionize[d] the control of corporate crime by shifting the primary responsibility for such control from the government to the corporation'.[228]

Another important innovation was the idea that probation may be an appropriate part of an organisation's sentence to ensure the implementation of the imposed sanctions as well as measures of corporate reform.[229] For example, § 8D1.1(a)(3) and (6) of the 1991 Sentencing Guidelines required the ordering of a term of probation if 'at the time of sentencing, an organization having 50 or more employees does not have an effective program to prevent and detect violations of law' or 'such sentence is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct'.[230]

Thus, the 1991 US Sentencing Guidelines not only transferred some of the rehabilitative and preventive considerations that had been important rationales in the emergence of non-prosecution and deferred prosecution agreements for individuals to the corporate context but also already foreshadowed many of the conditions that would become prevalent in their use with corporations.[231]

Only one year later, on 20 May 1992, the DOJ and SEC announced they had reached an agreement with Salomon Brothers, a US investment firm, to resolve an investigation into alleged misconduct in treasury auctions and government securities trading.[232] This settlement is generally considered as the first corporate non-prosecution agreement.[233] Under the

[226] Ibid § 8C2.5.(b)-(e) (1991).
[227] Ibid § 8C2.5.(f), (g) (1991).
[228] Neil V Getnick and Lesley A Skillen, 'Structural Reform: The Front Line Fight Against Business Crime' (1995) 1(2) The New York Litigator <https://getnicklaw.com/1995/11/structural-reform-the-front-line-fight-against-business-crime/>.
[229] US Sentencing Commission, Guidelines Manual, § 8, Introductory Commentary (1991).
[230] Ibid § 8D1.1(a)(3), (6) (1991).
[231] On the rehabilitative focus of Chapter Eight of the of the US Sentencing Guidelines Manual, see also Diana E Murphy, 'The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics' (2002) 87 Iowa Law Review 697, 703.
[232] DOJ Press Release, 'Department of Justice and SEC enter $290 million Settlement with Salomon Brothers in Treasury Securities Case' (20 May 1992).
[233] Rachel Delaney, 'Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements' (2009) 93 Marquette Law Review 875, 878; Peter Spivack and Sujit Raman, 'Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements' (2008) 45(2) American Criminal Law Review 159, 163-64.

agreement, Salomon Brothers was required to pay USD 290 million in sanctions, forfeitures, and restitution, cooperate in ongoing investigations, and take reformative measures.[234] In justifying the decision not to pursue criminal charges, Otto Obermaier, US Attorney for the Southern District of New York, explained that Salomon Brothers had 'cooperated extensively in the investigation and had taken decisive and extraordinary actions to restructure its management to avoid future misconduct'.[235] He further emphasised that

> [w]hile the alleged violations were serious, we believe that the combination of punishments is adequate, and there is no need for invoking the criminal process. Salomon's cooperation has been exemplary. Such actions were virtually unprecedented in my experience.[236]

Commentators have subsequently added that the prosecutors' decision to offer the non-prosecution agreement was likely motivated by concerns over the collateral consequences of a conviction on the firm's shareholders and employees. For example, Rakoff pointed out that a conviction could have excluded Salomon Brothers from working as a broker-dealer or investment advisor.[237] A few days after the Salomon Brothers agreement, in a newspaper article titled 'Drafting Companies to Fight Crime', Obermaier explained that the US Sentencing Guidelines embody the principle of partnership between prosecutors and corporations in the fight against corporate crimes.[238] Good corporate citizens, he said, not only prevent involvement in illegal activities but also report and cooperate with the government in case they occur.[239]

The first corporate deferred prosecution agreement followed on 27 October 1994, when the DOJ entered into a settlement with Prudential Securities, the then fourth-largest US brokerage firm, which deferred the prosecution of fraud allegations in the sale of gas and oil interests.[240]

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[234] DOJ Press Release, 'Department of Justice and SEC enter $290 million Settlement with Salomon Brothers in Treasury Securities Case' (20 May 1992). See also, Benjamin M Greenblum, 'What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements' (2005) 105 Columbia Law Review 1863, 1872.

[235] DOJ Press Release, 'Department of Justice and SEC enter $290 million Settlement with Salomon Brothers in Treasury Securities Case' (20 May 1992).

[236] Ibid.

[237] See for example, Jed S Rakoff, 'Corporate Indictment and the Guidelines' *New York Law Journal* (13 January 1994) 1, 3, referring to 15 US Code § 78o(b)(4)(B) and 15 US Code § 80b-3(e).

[238] Otto Obermaier, 'Drafting Companies to Fight Crime' *The New York Times* (24 May 1992).

[239] Ibid.

[240] *Re: Prudential Securities Inc*, Letter from Mary Jo White, US Attorney for the Southern District of New York, to Scott W Muller and Carey R Dunne (27 October 1994). See also, Leonard Orland, 'The Transformation of Corporate Criminal Law' (2006) 1 Brooklyn Journal of Corporate, Financial & Commercial Law 45, 59; Benjamin M Greenblum, 'What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements' (2005) 105 Columbia Law Review 1863, 1873; Rachel Delaney, 'Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements' (2009) 93 Marquette Law Review 875, 879.

According to the agreement, Prudential Securities was required to pay USD 330 million in restitution, cooperate in ongoing investigations, take reformative measures, including the hiring of a new outside director for its board and compliance committee, and install an independent monitor that would report directly to the prosecutor.[241] According to Mary Jo White, the responsible US Attorney for the Southern District of New York, the reasons for entering into the deferred prosecution agreement were the company's cooperation in the investigation, its recognition of misconduct, and concerns over the collateral consequences of an indictment and possible conviction.[242] Similar to the Salomon Brothers case, a conviction, she explained, could have excluded the firm from acting as an investment advisor and led to 'crippling' results for innocent employees and investors.[243] In addition, it has been noted that the government may also have been motivated by a lack of resources to investigate all of the allegations of criminal conduct by Prudential Securities.[244]

The DOJ reacted to this developing practice by providing, for the first time, guidance for the federal prosecution of corporations.[245] On 16 June 1999, the then Deputy Attorney General Eric Holder circulated a memorandum to all Component Heads and US Attorneys on 'Bringing Criminal Charges against Corporations', which became popularly known as the 'Holder memo'.[246] While the memo was not formally binding, it recommended that prosecutors should take into account the following factors when taking a charging decision against a corporation:

> 1) the nature and seriousness of the crime; 2) pervasiveness of wrongdoing within the corporation; 3) the corporation's history of similar misconduct; 4) timely and voluntary disclosure and cooperation; 5) the existence and adequacy of the corporation's compliance program; 6) the corporation's remedial actions, including the implementation or improvement of compliance programs, replacement of responsible management and disciplining of

[241] *Re: Prudential Securities Inc*, Letter from Mary Jo White, US Attorney for the Southern District of New York, to Scott W Muller and Carey R Dunne (27 October 1994).
[242] Sharon Walsh and Jay Mathews, 'Prudential Accused of Fraud, But Gets Chance to Avoid Trial' *The Washington Post* (28 October 1994).
[243] Ibid. See also, Jed S Rakoff, 'Corporate Indictment and the Guidelines' *New York Law Journal* (13 January 1994); F Joseph Warin and Jason C Schwartz, 'Deferred Prosecution: The Need for Specialized Guidelines for Corporate Defendants' (1997) 23 Journal of Corporate Law 121, 126.
[244] See for example, Justin O'Brien, *Redesigning Financial Regulation: The Politics of Enforcement* (Wiley 2015) 159 (referring, among others, to the selling of questionable investment products to approximately 120 000 retirees).
[245] See Dane C Ball and Daniel E Bolia, 'Ending a Decade of Federal Prosecutorial Abuse in the Corporate Criminal Charging Decision' (2009) 9 Wyoming Law Review 229.
[246] DOJ, Memorandum from Eric H Holder, Jr, Deputy Attorney General, to All Component Heads and US Attorneys on Bringing Criminal Charges Against Corporations (16 June 1999).

> wrongdoers, payment of restitution as well as cooperation with relevant government agencies; 7) collateral consequences, including disproportionate harm to shareholders and employees; and 8) the adequacy of non-criminal remedies, such as civil or regulatory enforcement actions.[247]

In its commentary on timely and voluntary disclosure and cooperation, the Holder memo explained that

> [i]n some circumstances, … granting a corporation immunity or amnesty may be considered in the course of the government's investigation. In such circumstances, prosecutors should refer to the principles governing non-prosecution agreements generally. See USAM § 9-27.600-650. Specifically, these principles permit a non-prosecution agreement in exchange for cooperation when a corporation's "timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective".[248]

As regards the consideration of collateral consequences, the Holder memo comments that

> prosecutors may take into account the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (e.g., publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it. Further, prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge[s], such as potential suspension or debarment from eligibility for government contracts or federal funded programs such as health care.[249]

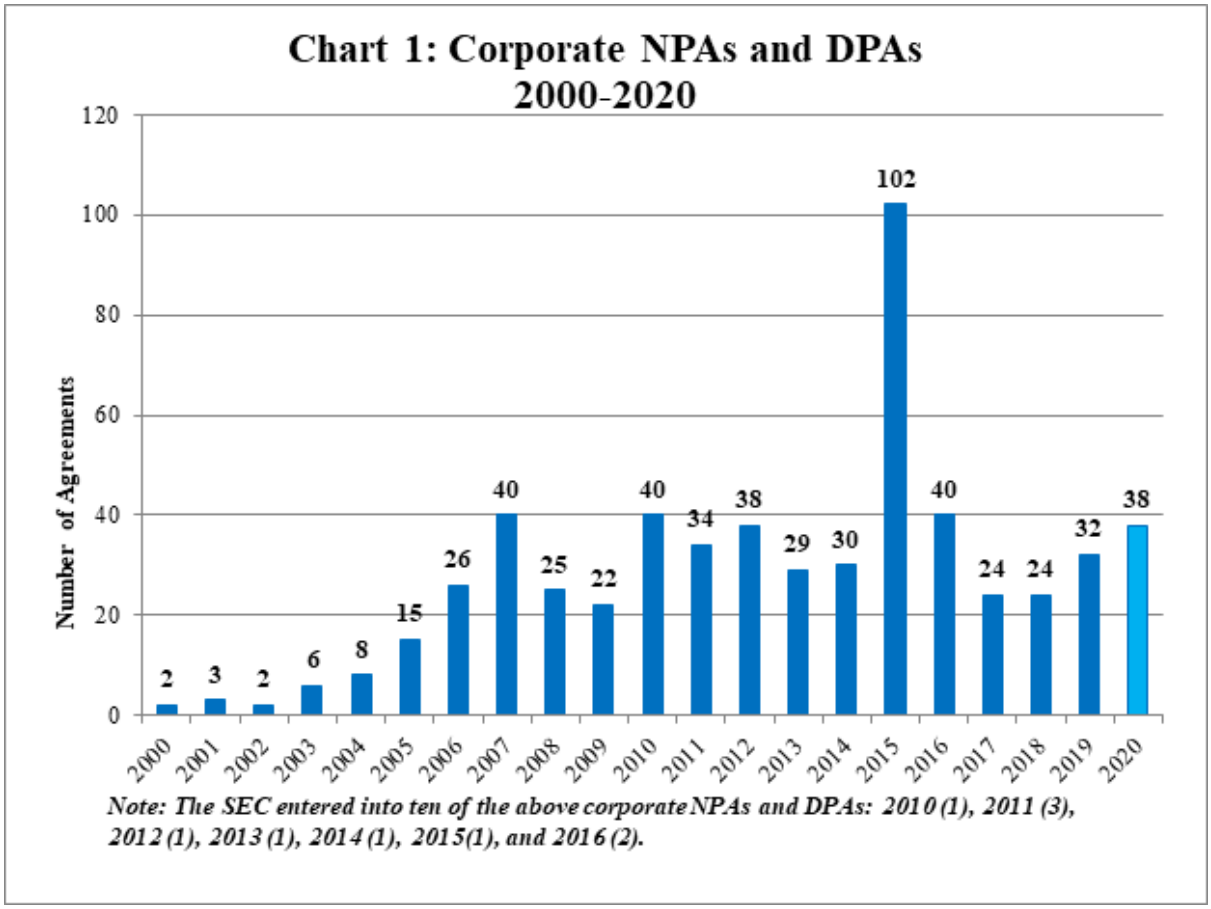
The Holder memo therefore reflects, in many ways, the conditions and rationales already developed in the 1991 US Sentencing Guidelines and emerging corporate non-prosecution and deferred prosecution practice as illustrated by the Salomon Brothers and Prudential Securities resolutions.

3.1.3 Corporate non-prosecution and deferred prosecution agreements, 2000-2020

The developing practice and policy guidance, however, did not immediately result in a significant use of corporate non-prosecution and deferred prosecution agreements. For example, the Corporate Prosecution Registry, a legal data lab jointly maintained by the

[247] Ibid § II.A.
[248] Ibid § VI.B (citing DOJ, US Attorneys' Manual, § 9-27.600-650).
[249] Ibid § IX.B.

University of Virginia School of Law and Duke University School of Law, reports merely twenty non-prosecution and deferred prosecution agreements for the first decade since the Salomon Brothers non-prosecution agreement in 1992.[250] In contrast, the registry lists 569 agreements from 2003 to 2020.[251] The increase and subsequent development of the use of non-prosecution and deferred prosecution agreements is well-illustrated by the following chart which the law firm Gibson Dunn published as part of its bi-annual update on corporate non-prosecution and deferred prosecution agreements.[252]



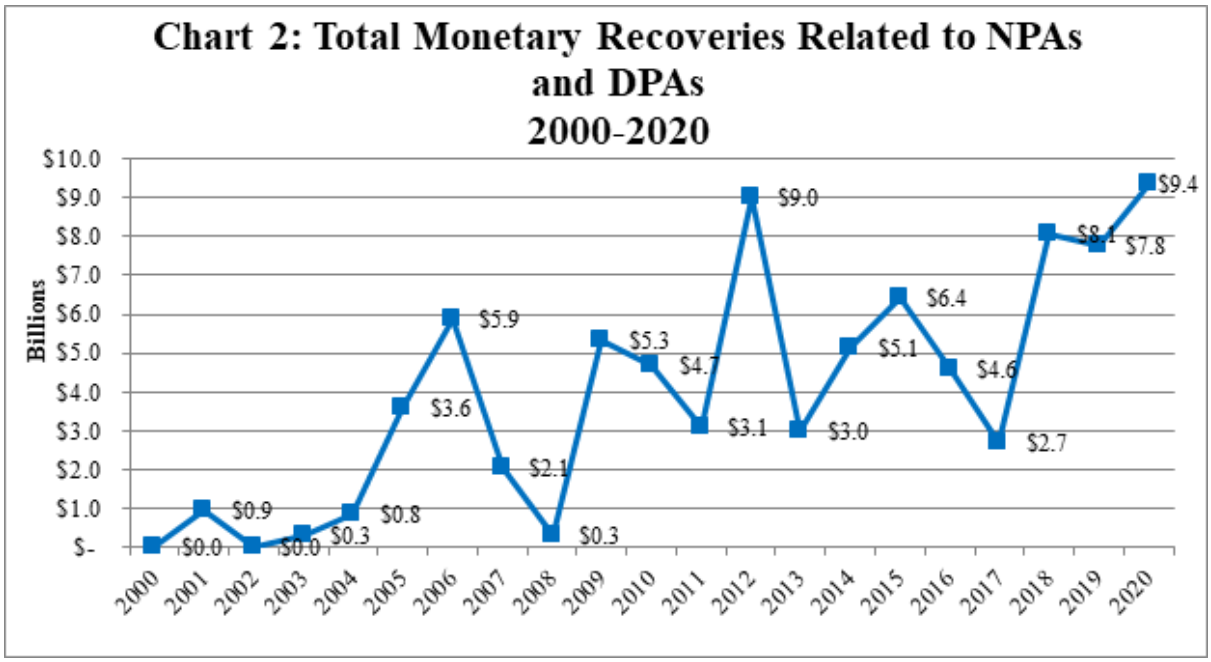
[250] Brandon L Garrett and Jon Ashley, Duke and UVA Corporate Prosecution Registry <https://corporate-prosecution-registry.com/browse/> accessed 30 September 2021 (reporting for the period between 1992 and 2002 12 non-prosecution agreements and eight deferred prosecution agreements). See also, US Government Accountability Office, *Corporate Crime: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness*, GAO-10-110 (2009). It should be noted that some agreements, especially non-prosecution agreements, remain confidential and thus cannot be counted.

[251] Brandon L Garrett and Jon Ashley, Duke and UVA Corporate Prosecution Registry <https://corporate-prosecution-registry.com/browse/> accessed 30 September 2021 (reporting for the period between 2003 and 2020 303 non-prosecution agreements and 266 deferred prosecution agreements).

[252] Gibson Dunn, '2020 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements' (19 January 2021) Chart 1: Corporate NPAs and DPAs 2000-2020 <www.gibsondunn.com/2020-year-end-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements/>.

While remaining low in the first couple of years of the new millennium, the numbers of reported non-prosecution and deferred prosecution agreements with corporations started rising in 2003. Since 2006, the number of agreements has been overall relatively consistent, subject to normal fluctuation in prosecution cycles.[253] The unusual spike in 2015 can be attributed to a DOJ initiative referred to as the 'Swiss Bank Program', which was based on an *ad hoc* agreement with Switzerland and invited Swiss banks to self-report involvement in illegal tax evasion by US citizens in exchange for non-prosecution agreements;[254] it will be discussed in more detail in section 3.3.4 below.

Gibson Dunn has reported the total monetary recoveries related to non-prosecution and deferred prosecution agreements during that period as follows:[255]



In line with the rising number of agreements, the monetary recoveries related to non-prosecution and deferred prosecution agreements have also increased since 2003. Subject to some variation between the years, which can again be attributed to fluctuation in prosecution

[253] See Michel A Perez, 'The rise and globalization of negotiated settlements: How an American procedure, the Deferred Prosecution Agreement (DPA), became a transnational key tool to fight transnational corporate crimes' (2020) 1 Rule of Law and Anti-Corruption Center Journal 1, 5.
[254] DOJ, Swiss Bank Program (2020) <https://www.justice.gov/tax/swiss-bank-program>. See also, DOJ Press Release, 'United States and Switzerland Issue Joint Statement Regarding Tax Evasion Investigations - Switzerland Encourages Its Banks to Cooperate with New Program Which Will Require Significant Financial Penalties and Information Sharing from Banks That Aided Secret Account Holders' (29 August 2013).
[255] Gibson Dunn, '2020 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements' (19 January 2021) 2 <www.gibsondunn.com/wp-content/uploads/2021/01/2020-year-end-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements-1.pdf>.

cycles, the amounts recovered have been substantial.[256] The notably larger amounts recovered in years such as 2012 or 2020 were driven by a small number of agreements with very high recovery amounts. For example, in 2020, the two largest resolutions accounted for approximately 53 per cent and the largest thirteen agreements for 94 per cent of the total monetary recoveries.[257] Furthermore, there seems to be an overall trend towards higher recovery amounts.[258] These developments, it may be noted, seem difficult to reconcile with the Justice Manual's initial justification for including deferred prosecution agreements for individuals, namely to save prosecutorial and judicial resources for major cases.[259]

Finally, it can generally be observed that political changes in the leadership of the US government or DOJ do not seem to affect the overall use of non-prosecution and deferred prosecution agreements.[260]

3.2 Domestic Developments that Catalysed the Rise of Corporate Non-Prosecution and Deferred Prosecution Agreements

This part now zooms in on the domestic developments that led to the rise since 2003 and relatively consistent use since 2006 of corporate non-prosecution and deferred prosecution agreements. It starts by briefly introducing two major events or series of events which shook US society at the beginning of the new millennium, namely the terrorist attacks of 9/11 and the large-scale corporate fraud scandals involving Enron and other major US corporations. It then describes the immediate impact of these events on subsequent corporate crime enforcement policy. Finally, this part examines the dominance of the so-called 'Andersen effect' and 'too big to jail' rationales in the discourse accompanying the establishment of a consistent use of non-prosecution and deferred prosecution agreements since 2006.

[256] The indicated amounts reflect monetary recovery directly related to non-prosecution and deferred prosecution agreements with the DOJ. It does not include potential additional payments towards civil and regulatory agencies or foreign law enforcement authorities.
[257] Gibson Dunn, '2020 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements' (19 January 2021) 2 <www.gibsondunn.com/wp-content/uploads/2021/01/2020-year-end-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements-1.pdf>.
[258] See also, Harry Cassin, 'With J&F, 2020 becomes the biggest year in FCPA history' (*FCPA Blog*, 19 October 2020) <https://fcpablog.com/2020/10/19/with-jf-2020-becomes-the-biggest-year-in-fcpa-history/>.
[259] See note 218.
[260] See Gibson Dunn, '2019 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements' (8 January 2020) 1 <www.gibsondunn.com/wp-content/uploads/2020/01/2019-year-end-npa-dpa-update.pdf>.

3.2.1 9/11 and the corporate fraud scandals of the early 2000s

> On September 11, 2001, 19 militants associated with the Islamic extremist group al-Qaeda hijacked four airplanes and carried out coordinated suicide attacks against targets in the United States. Two of the planes were flown into the Twin Towers of the World Trade Center in New York City, a third plane hit the Pentagon just outside Washington DC, and the fourth plane crashed in a field in Shanksville, Pennsylvania.[261]

These attacks reportedly resulted in over 3,000 fatalities, tens of thousands of injuries, extensive long-term health consequences, and hundreds of billions in economic damage.[262]

The *National Commission on Terrorist Attacks Upon the United States*, charged with preparing a full account of the circumstances surrounding the attacks and making recommendations to prevent future attacks, have characterised 11 September 2001 as a 'day of unprecedented shock and suffering in the history of the United States' as well as a 'landmark in the history of our nation'.[263] Subsequently, it has had a major influence on US as well as international policies, triggering several US-led initiatives to combat terrorism which are often referred to as 'war on terror'.[264]

In addition to this hugely transformative national security event, the early 2000s also saw several cases of corporate scandal and collapse that shook the US economy. These cases, which have been referred to as 'Enron et al. cases', involved a broad range of leading corporate and financial institutions, in particular the Enron Corporation, its accounting firm, Arthur Andersen LLP, and a series of other firms such as Adelphia Communications Corporation, Tyco International, WorldCom and Xerox.[265]

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[261] History.com, 'September 11 Attacks' (22 September 2021) <https://www.history.com/topics/21st-century/9-11-attacks>.
[262] See CNN, 'September 11 Terror Attacks Fast Facts' CNN Editorial Research (18 September 2020). See also, National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (2004).
[263] National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (2004) xv and xvii.
[264] See for example, David Holloway, *9/11 and the War on Terror* (Edinburgh University Press 2008); Jason G Ralph, *America's War on Terror: The State of the 9/11 Exception from Bush to Obama* (Oxford University Press 2013); Adam Hodges, *The "War on Terror" Narrative: Discourse and Intertextuality in the Construction and Contestation of Sociopolitical Reality* (Oxford University Press 2011); Tom Lansford, Robert P Watson and Jack Covarrubias (eds), *America's War on Terror* (2nd edn, Routledge 2016); Matthew Morgan (ed), *The Impact of 9/11 and the New Legal Landscape: The Day that Changed Everything?* (Palgrave Macmillan 2019); Edwin D Jacob, *American Security and the Global War on Terror* (Routledge 2020).
[265] David Friedrichs, 'Enron et al.: Paradigmatic White Collar Crime Cases for the Century' in Nikos Passas (ed), *Transnational Financial Crime* (Ashgate 2013) 59; Gilbert Geis, *White-Collar and Corporate Crime: A Documentary and Reference Guide* (Greenwood 2011) 233 (Chapter 10: The Enron Decade of Corporate Debacles).

Common themes in these cases were very serious misrepresentation of financial statements or even outright accounting fraud to manipulate stock prices, very high levels of compensation for senior executives, vast networks of cooperative actors (including accounting, law, and investment banking firms as well as stock analysts), and huge losses for investors following the revelations of the misconduct.[266] The economic harm caused by these cases has been reported as 'extraordinary', including, among others, 'for tens of thousands of people, lost jobs; lost pensions; lost opportunities for higher education; higher prices; higher rates of interest; less money for investment in legitimate business; less money for charities; and so on'.[267] The collapse of the Enron Corporation in 2001 alone resulted in the largest bankruptcy reorganisation in US history at the time.[268] In addition to their economic impact, these cases also raised public awareness of business-related crimes and, as result, political and legal pressure to act.[269]

A particularly important aspect of these developments for the purposes of this study was the prosecution of Enron's auditor, the US accounting firm Arthur Andersen LLP in 2002, then one of the 'Big Five' global accounting firms with 340 offices in thirty-four countries and 85,000 employees.[270] On 14 March 2002, in the aftermath of Enron's collapse, it was announced that charges were brought against Arthur Andersen in the US District Court for the Southern District of Texas for obstruction of justice in an SEC investigation into Enron by instructing employees to destroy documents relating to its auditing of Enron's financial statements.[271] For example, Michael Odom, a partner of the firm, responsible for the risk

[266] David Friedrichs, 'Enron et al.: Paradigmatic White Collar Crime Cases for the Century' in Nikos Passas (ed), *Transnational Financial Crime* (Ashgate 2013) 60. See also, Kurt Eichenwald, 'Enron's Many Strands: Executive Compensation; Enron Paid Huge Bonuses in '01; Experts See a Motive for Cheating' *The New York Times* (1 March 2002); John C Coffee, 'Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms' (2004) 84(2) Boston University Law Review 301.
[267] David Friedrichs, 'Enron et al.: Paradigmatic White Collar Crime Cases for the Century' in Nikos Passas (ed), *Transnational Financial Crime* (Ashgate 2013) 61.
[268] Richard A Oppel Jr and Andrew R Sorkin, 'Enron's Collapse: The Overview; Enron Corp. Files Largest U.S. Claim for Bankruptcy' *The New York Times* (3 December 2001).
[269] See David Friedrichs, 'Enron et al.: Paradigmatic White Collar Crime Cases for the Century' in Nikos Passas (ed), *Transnational Financial Crime* (Ashgate 2013) 59. See also, David Callahan, 'Private Sector, Public Doubts' *The New York Times* (15 January 2002); Alex Berenson, 'The Nation: Oversight; The Biggest Casualty of Enron's Collapse: Confidence' *The New York Times* (10 February 2002); John Armour and Joseph A McCahery (eds), *After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe and the US* (Hart 2006).
[270] See Gilbert Geis, *White-Collar and Corporate Crime: A Documentary and Reference Guide* (Greenwood 2011) 245.
[271] Kurt Eichenwald, 'Enron's Many Strands: The Investigation; Andersen Charged with Obstruction in Enron Inquiry' *The New York Times* (15 March 2002) (a federal grand jury had already filed the indictment on 7 March 2002, but it was only unsealed on 14 March 2002). See also, Kathleen F Brickey, 'Andersen's Fall from Grace' (2003) 81(4) Washington University Law Quarterly 917.

management at its Houston office, had explained to Andersen employees in the context of complying with the firm's retention policy:

> If it's destroyed in the course of [the] normal policy and litigation is filed the next day, that's great .... We've followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable.[272]

Arthur Andersen was found guilty by a federal jury on 15 June 2002,[273] which was confirmed by the Court of Appeals in 2004.[274] In 2005, the US Supreme Court reversed the Court of Appeals' judgment due to erroneous jury instructions.[275] However, in August 2002, before a re-trial could take place, Arthur Andersen had already stopped auditing public companies. Subsequently, the firm rapidly lost clients and employees, and ultimately dissolved.[276] In light of these developments, the DOJ decided not to retry Arthur Andersen.[277]

3.2.2 Immediate impact on corporate crime enforcement policy

The 9/11 attacks had two important consequences for the enforcement against corporate crimes and especially the use of non-prosecution and deferred prosecution agreements. They first led to significant changes in US law enforcement priorities, including the reassignment of resources to counter-terrorism investigations.[278] This development, it has been argued, incentivised the DOJ and other agencies tasked with corporate prosecutions to develop less

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[272] *Arthur Andersen, LLP v US*, 544 U.S. 696, 700 (2005) quoting 374 F.3d 286. See also, Jonathan Weil and Alexei Barrionuevo, 'Andersen Takes Different View on Shredding' *The Wall Street Journal* (10 May 2002).

[273] *US v Arthur Andersen, LLP*, 374 F.3d 281 (5th Cir. 2004). The conviction was for 'corrupt persuasion' under § 18 U.S.C. 1512(b)(2)(A) and (B), which provides:

> Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another, with intent to …cause or induce any person to (A) … withhold a record, document, or other object, from an official proceeding; [or] (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . . shall be fined under this title or imprisoned not more than ten years, or both.

[274] *US v Arthur Andersen, LLP*, 374 F.3d 284 (5th Cir. 2004).

[275] *Arthur Andersen LLP v US*, 544 U.S. 696, 708 (2005).

[276] Ved P Nanda, 'Corporate Criminal Liability in the United States: Is a New Approach Warranted?' (2010) 58 The American Journal of Comparative Law 605, 615 with reference to Elizabeth K Ainslie, 'Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution' (2006) 43 American Criminal Law Review 107.

[277] Carrie Johnson, 'U.S. Ends Prosecution of Arthur Andersen: Former Partner Moves to Withdraw 2002 Guilty Plea' *The Washington Post* (23 November 2005).

[278] See for example, DOJ, 'Structural Changes to Enhance Counter-Terrorism Efforts' <https://www.justice.gov/archive/911/counterterrorism.html>; Bryan Mabee, 'Re-imagining the Borders of US Security after 9/11: Securitisation, Risk, and the Creation of the Department of Homeland Security' (2007) 4(3) Globalizations 385. See also, note 265.

resource-consuming ways to deal with corporate crimes, providing fertile ground for the increased use of non-prosecution and deferred prosecution agreements.[279]

However, in addition to these efficiency-related incentives, it may also be argued that the 9/11 attacks and subsequent changes in law enforcement priorities provided a functional reason for the increased use of non-prosecution and deferred prosecution agreements. Beyond the efforts of holding the immediately involved individuals and organisations responsible, the attacks also created pressure for US prosecuting authorities to ensure that corporations are not knowingly or unknowingly supporting international terrorism, especially its supply or financing side. This included not only a focus on the enforcement against facilitative financial crimes such as money laundering, bribery, or accounting offences but also of sanctions against the dealings with individuals, companies, and countries associated with supporting international terrorism. Over the last two decades, US prosecutors have used non-prosecution and deferred prosecution agreements prominently in this context.[280] Especially banks and financial institutions have been identified as one of the main targets of US corporate prosecution agreements.[281] In trying to reduce the financial means of international terrorist organisations and prevent future attacks, non-prosecution and deferred prosecution agreements allow US law enforcement authorities not only to impose fines and thus incentivise better controls but to actually demand and influence corporate compliance reforms.[282]

The corporate scandals of Enron and others led to immediate structural, legislative, and policy changes that contributed towards the increased use of non-prosecution and deferred prosecution agreements. The most important changes involved the founding of the DOJ

[279] See Michel A Perez, 'The rise and globalization of negotiated settlements: How an American procedure, the Deferred Prosecution Agreement (DPA), became a transnational key tool to fight transnational corporate crimes' (2020) 1 Rule of Law and Anti-Corruption Center Journal 1, 4.
[280] See Gibson Dunn, '2012 Year-End Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)' (3 January 2013) <www.gibsondunn.com/2012-year-end-update-on-corporate-deferred-prosecution-agreements-dpas-and-non-prosecution-agreements-npas/>; Gibson Dunn, '2015 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)' (8 July 2015) <www.gibsondunn.com/2015-mid-year-update-on-corporate-non-prosecution-agreements-npas-and-deferred-prosecution-agreements-dpas/#_ftnref33>; Brandon L Garrett and Jon Ashley, Duke and UVA Corporate Prosecution Registry <https://corporate-prosecution-registry.com/browse/>. For a more detailed discussion, see also sections 3.3.2 and 3.3.5.
[281] Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 254.
[282] See notes 202-03. For a more detailed discussion of 'reformative' conditions in non-prosecution and deferred prosecution agreements, see also sections 3.3.2-3.3.4.

Corporate Fraud Task Force, the adoption of the Sarbanes-Oxley Act, and a renewal of the DOJ Guidance on the Federal Prosecution of Corporations.[283]

The scale of corporate misconduct in these cases and their vast impact on the US society created significant public pressure to improve the enforcement against corporate crimes.[284] In response, President George W Bush set up the Corporate Fraud Task Force on 9 July 2002.[285] The aim was to 'strengthen the efforts of the Department of Justice and Federal, State and local agencies to investigate and prosecute significant financial crimes, recover the proceeds of such crimes, and ensure just and effective punishment of those who perpetrate financial crimes'.[286]

Shortly after, the US Congress also joined the effort by enacting the Sarbanes-Oxley Act on 30 July 2002, officially known as the Public Company Accounting Reform and Investor Protection Act (in the Senate) and Corporate and Auditing Accountability, Responsibility, and Transparency Act (in the House of Representatives).[287] It mandates stricter oversight and compliance of the boards, management, and accounting firms of public companies, with some provisions such as the wilful destruction of evidence in the context of federal investigations also applying to privately held companies.[288] President George W Bush lauded the Act as 'an important step toward improving corporate responsibility … guided by the core principles of providing better information to investors, making corporate officers more accountable, and developing a stronger, more independent audit system'.[289]

Another important development was specifically linked to the prosecution and subsequent failure of Arthur Andersen LLP.[290] After the firm had been indicted in March 2002 and largely

[283] See Ved P Nanda, 'Corporate Criminal Liability in the United States: Is a New Approach Warranted?' (2010) 58 The American Journal of Comparative Law 605, 624; Gibson Dunn, '2008 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements' (6 January 2009) <www.gibsondunn.com/2008-year-end-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/>.
[284] See previous section.
[285] George W Bush, Executive Order No 13271 of 9 July 2002, Establishment of the Corporate Fraud Task Force, 67 Federal Register 46091, amended by Executive Order No 13286 of 28 February 2003, 68 Federal Register 10619.
[286] Ibid.
[287] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (30 July 2002).
[288] Ibid. See generally, Byron F Egan, 'The Sarbanes Oxley Act and Its Extending Reach' (2005) 40 Texas Journal of Business Law 305.
[289] George W Bush, Statement of Administration Policy: H.R. 3763 - Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002 (23 April 2002).
[290] The Senate Report on 'The Corporate and Criminal Fraud Accountability Act of 2002', which was enacted in part as Title VIII and XI of the Sarbanes-Oxley Act, also already referred to Arthur Andersen's document retention and destruction policy when discussing why new obstruction of justice laws were needed (US Senate, 'The Corporate and Criminal Fraud Accountability Act of 2002', Report No 107-146 (6 May 2002) 15-16).

stopped operating by August 2002,[291] the DOJ was heavily criticised with claims that the indictment had 'amounted to a corporate "death penalty"',[292] which unnecessarily resulted in the loss of tens of thousands of jobs and the reduction in number of the 'Big Five' accounting firms to the 'Big Four'.[293] In response to this criticism, the DOJ revised its guidance on the prosecution of corporations.[294]

Deputy Attorney General Larry Thompson then circulated the new 'Principles of Federal Prosecution of Business Entities' in January 2003,[295] which were made binding on all federal prosecutors.[296] This so-called Thompson memo was almost matching the previous Holder memo, reflecting largely the conditions and rationales developed in the 1991 US Sentencing Guidelines and emerging corporate non-prosecution and deferred prosecution practice,[297] except for its guidance on cooperation.[298] For the first time, it included the possibility of non-prosecution and deferred prosecution agreements by stating that cooperation and voluntary disclosure could merit 'granting a corporation immunity or amnesty *or pretrial diversion*'.[299] In line with the original use of these procedures for individuals, the Thompson memo then refers generally to the principles governing non-prosecution agreements in § 9-27.600-650 of the US Attorneys' Manual. It reiterates that prosecutors may enter into 'a non prosecution agreement in exchange for cooperation when a corporation's "timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective"'.[300] In addition, the memo 'encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose their

[291] See previous section.
[292] David M Uhlmann, 'Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability' (2013) 72 Maryland Law Review 1295, 1310 with reference to Carrie Johnson, 'Ruling Won't Deter Prosecution of Fraud' *The Washington Post* (1 June 2005).
[293] See for example, Jessica Sommar, 'Arthur Andersen Gets "Death Penalty" – Criminal Charges by the Feds may be End for Firm' *New York Post* (15 March 2002); Jonathan D Glater, 'Last Task at Andersen: Turning Out the Lights' *The New York Times* (30 August 2002); Carrie Johnson, 'Ruling Won't Deter Prosecution of Fraud' *The Washington Post* (1 June 2005); Elizabeth K Ainslie, 'Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution' (2006) 43 American Criminal Law Review 107, 108.
[294] See Brandon L Garrett, 'Structural Reform Prosecution' (2007) 93 Virginia Law Review 853, 880, 887-89; David M Uhlmann, 'Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability' (2013) 72 Maryland Law Review 1295, 1311.
[295] DOJ, Memorandum from Larry D Thompson, Deputy Attorney General to All Component Heads and US Attorneys on Principles of Federal Prosecution of Business Organizations (20 January 2003).
[296] DOJ, Criminal Resource Manual, § 163 (2005) providing that '[t]he Thompson Memorandum sets forth nine factors that federal prosecutors *must* consider in determining whether to charge a corporation or other business organization' (emphasis added).
[297] See section 3.1.2.
[298] DOJ, Memorandum from Larry D Thompson, Deputy Attorney General to All Component Heads and US Attorneys on Principles of Federal Prosecution of Business Organizations (20 January 2003), § VI.
[299] Ibid § VI.A-B (emphasis added)).
[300] Ibid § VI.B (citing DOJ, US Attorneys' Manual, § 9-27.600-650).

findings to the appropriate authorities'.[301] As we have seen in section 3.1.2, this inclusion primarily codified a change that had started to occur already at the DOJ over the last decade.[302] While the DOJ has revised its Principles of Federal Prosecution of Business Organizations several times since the Thompson memo, these revisions maintained fundamentally the same approach as regards the availability of non-prosecution and deferred prosecution agreements.[303]

Finally, in 2004, for the first time since its initial addition in 1991, the US Sentencing Commission also made significant changes to chapter eight on the 'Sentencing of Organizations' of the US Sentencing Guidelines Manual.[304] The changes primarily strengthened the guidelines' focus on corporate compliance and self-investigation. For example, when announcing the revision, the Commission indicated that it would create a 'new era of corporate compliance' where organisations would concentrate 'on ethical corporate behavior' and being a 'good corporate citizen'.[305] In the introductory commentary to chapter eight, the Commission added as a general principle that '[t]hese guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program'.[306] Part B of chapter eight, which had previously contained only guidance on remedying harm from criminal conduct, was extended by another subsection, adding relatively detailed guidance on what an effective compliance and ethics program should entail.[307] In particular, it required 'boards of directors and executives to assume responsibility for the oversight and management of compliance and ethics programs' and, at a minimum, to 'train high-level officials as well as employees in relevant legal standards and obligations, and give their compliance and ethics officers sufficient authority

[301] Ibid.
[302] See also, David M Uhlmann, 'Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability' (2013) 72 Maryland Law Review 1295, 1311.
[303] See Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 56.
[304] US Sentencing Commission, Guidelines Manual, § 8 (2004). See for example, David Hess, Robert S McWhorter and Timothy L Fort, 'The 2004 Amendments to the Federal Sentencing Guidelines and Their Implicit Call for a Symbiotic Integration of business Ethics' (2006) XI Fordham Journal of Corporate & Financial Law 725.
[305] US Sentencing Commission Press Release, 'Commission Tightens Requirements for Corporate Compliance and Ethics Programs' (3 May 2004).
[306] US Sentencing Commission, Guidelines Manual, § 8, Introductory Commentary (2004).
[307] Ibid § 8 (2004) 476-81.

and resources to carry out their responsibilities'.[308] In its background commentary to § 8B2.1, the 2004 Sentencing Guidelines expressly clarified that § 8B2.1 was added in response to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, which instructed the Sentencing Commission to review the guidelines to warrant that they are 'sufficient to deter and punish organizational criminal misconduct'.[309]

3.2.3 The 'Andersen effect', 'too big to jail', and the rationalisation of a consistent use of non-prosecution and deferred prosecution agreements

While the 9/11 attacks and corporate scandals involving Enron et al. created significant pressure for increased law enforcement activity against certain economic crimes involving corporations,[310] much of the subsequent discourse over the increased use of corporate non-prosecution and deferred prosecution agreements has focused on the rationale of avoiding potential collateral consequences of corporate prosecutions.

This framing primarily originated with the already mentioned prosecution and failure of Arthur Andersen. Commentators have used and continue to use this example to argue against the prosecution of corporations and for the use of non-prosecution and deferred prosecution agreements, linking the firm's demise to its prosecution.[311] For example, Ainslie observed that there was a 'clear causal connection between the firm's felony conviction and its consequent inability to audit public companies, an inability that, for a public accounting firm, amounted to death'.[312] Similar interpretations and rhetoric have regularly been used by commentators from academia, media, and legal practice to illustrate how damaging an indictment against a corporation can be and to justify the increased use of corporate non-prosecution and deferred prosecution agreements.[313] For example, in the well-known bi-

[308] US Sentencing Commission Press Release, 'Commission Tightens Requirements for Corporate Compliance and Ethics Programs' (3 May 2004). See also, US Sentencing Commission, Guidelines Manual (2004) § 8B2.1(b)(2)(A)-(C).
[309] US Sentencing Commission, Guidelines Manual, § 8B2.1, commentary designated as background (2004).
[310] See previous section.
[311] See Rena Steinzor, *Why Not Jail? Industrial Catastrophes, Corporate Malfeasance, and Government Inaction* (Cambridge University Press 2014) 4; Court E Golumbic and Albert D Lichy, 'The "Too Big to Jail" Effect and the Impact on the Justice Department's Corporate Charging Policy' (2014) 65 Hastings Law Journal 1293, 1296.
[312] Elizabeth K Ainslie, 'Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution' (2006) 43 American Criminal Law Review 107, 108. See also, Ralph F Hall, 'Deferred Prosecution and Non-Prosecution Agreements' in James T O'Reilly, James Patrick Hanlon, Ralph F Hall, Steven L Jackson and Erin Lewis (eds), *Punishing Corporate Crime: Legal Penalties for Criminal and Regulatory* (Oxford University Press 2009) 120.
[313] See for example, Jessica Sommar, 'Arthur Andersen Gets "Death Penalty" – Criminal Charges by the Feds may be End for Firm' *New York Post* (15 March 2002); Joseph A Grundfest, 'Over Before it Started' *The New York Times* (14 June 2005) (noting that 'Andersen's demise did serve as a stern reminder to corporate America that prosecutors can bring down or cripple many of America's leading corporations simply by indicting them on sufficiently serious charges'); Andrew Weissmann and David Newman, 'Rethinking Corporate Criminal

annual publication on corporate non-prosecution and deferred prosecution agreements,[314] the law firm Gibson Dunn noted that

> [a]lthough a conviction establishes legal culpability, the simple indictment of a corporation—particularly a public, regulated corporation—can have massive collateral consequences for the company and third parties. The fallout from the Arthur Andersen prosecution is a textbook example. Prior to its indictment in 2002, Arthur Andersen was a worldwide institution with over $9.3 billion in annual revenues and over 85,000 worldwide employees. By the time the Supreme Court unanimously reversed Arthur Andersen's conviction in 2005, the employees were virtually all gone, partnership value had vanished, and the few remaining assets were being divvied up by litigants.[315]

In relation to non-prosecution and deferred prosecution agreements, the firm emphasised that

> [i]t should come as no surprise, then, that the use of DPAs and NPAs increased dramatically following the demise of Arthur Andersen, the accounting firm that imploded after being indicted and convicted of obstruction of justice in 2003. By the time the Supreme Court overturned Arthur Andersen's conviction, the firm was already out of business.[316]

Notably, this narrative of prioritising the avoidance of similar collateral consequences of corporate prosecutions, referred to by some as the 'Andersen effect',[317] was established

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Liability' (2007) 82 Indiana Law Journal 411, 426 (noting that '[a] criminal indictment can have devastating consequences for a corporation and risks the market imposing what is in effect a corporate death penalty'); Erik Paulsen, 'Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements' (2007) 82(5) New York University Law Review 1434, 1436 (noting that '[w]hen Andersen collapsed after its indictment, federal prosecutors realized that prosecution alone could destroy even the most established of companies'). See also, James Kelly, 'The Power of an Indictment and the Demise of Arthur Andersen' (2006) 48 South Texas Law Review 509; Ved P Nanda, 'Corporate Criminal Liability in the United States: Is a New Approach Warranted?' (2010) 58 The American Journal of Comparative Law 605, 615; James R Copland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements* (Manhattan Institute 2012) 11.

[314] See section 3.1.3.

[315] Gibson Dunn, '2008 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements' (6 January 2009) <https://www.gibsondunn.com/2008-year-end-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/>.

[316] Gibson Dunn, '2009 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements' (7 January 2010) <https://www.gibsondunn.com/2009-year-end-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/>. For similar statements, see for example Gibson Dunn, '2009 Mid-Year Update on Corporate Deferred Prosecution and Non-Prosecution Agreements' (8 July 2009) <https://www.gibsondunn.com/2009-mid-year-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/>; Gibson Dunn, '2010 Mid-Year Update on Corporate Deferred Prosecution and Non-Prosecution Agreements' (5 August 2010) <https://www.gibsondunn.com/2010-mid-year-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/>. See also, Wilson Ang, Paul Sumilas and Jeremy Lua, 'Deferred Prosecution Agreements – Justice delayed or Justice denied?' (2018) 14 Norton Rose Fulbright Asia Pacific Insights: Business Ethics and Anti-Corruption 3.

[317] For the use of the term 'Andersen effect', see for example Andrea Amulic, 'Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States' (2017) 116 Michigan Law Review 123, 132.

despite serious factual challenges. To start with, it overlooks that Arthur Andersen was reportedly offered a deferred prosecution agreement but decided not to agree to its conditions.[318] In particular, Andersen's objection to any admission of wrongdoing as a firm – on which the government insisted – and a deferral period of three years have been indicated as the main reasons.[319] These were important for the firm because it feared severe reputational damage and sanctions, including potential disbarment from auditing public companies, considering its involvement in several past, pending, and potential investigations.[320] For example, Arthur Andersen had already agreed to a deferred prosecution agreement with federal prosecutors to resolve a criminal investigation into accounting irregularities in connection with real estate fraud in Connecticut in 1996.[321] With some parallels to its later involvement in the Enron scandal, the investigation related to the provision of accounting services by Arthur Andersen to the real estate company Colonial Realty Company of West Hartford, which underwent involuntary bankruptcy proceedings in September 1990.[322] Similarly, only a short while before the problems with Enron became public, Andersen resolved a civil injunctive action by the SEC, which had charged the firm with fraud committed in the context of auditing the financial statements of Waste Management Inc.[323] Among others, the settlement 'permanently enjoined Andersen from violating federal

[318] Richard B Schmitt, Gary Fields and Devon Spurgeon, 'U.S. May Be Open to Andersen Settlement: Admission of Wrongdoing Short of Guilty Plea Might Satisfy Prosecutors' *The Wall Street Journal* (4 April 2002); Jonathan Weil, Devon Spurgeon and Cassell Bryan-Low, 'Arthur Andersen Breaks Off Talks to Settle Criminal Case' *The Wall Street Journal* (19 April 2002); Kurt Eichenwald, 'Andersen Refused a Probation Deal' *The New York Times* (2 April 2002). See also, Peter Spivack and Sujit Raman, 'Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements' (2008) 45 American Criminal Law Review 159, 165; Ved P Nanda, 'Corporate Criminal Liability in the United States: Is a New Approach Warranted?' (2010) 58 American Journal of Comparative Law 605, 624.

[319] Kurt Eichenwald, 'Andersen Refused a Probation Deal' *The New York Times* (2 April 2002); Kathleen F Brickey, 'Andersen's Fall from Grace' (2003) 81(4) Washington University Law Quarterly 917, 925-926 with further references.

[320] See Gabriel Markoff, 'Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century' (2013) 15(3) University of Pennsylvania Journal of Business Law 797, 805; Kathleen F Brickey, 'Andersen's Fall from Grace' (2003) 81(4) Washington University Law Quarterly 917, 947-950, 952-954.

[321] Corporate Crime Reporter, *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements* (*Corporate Crime Reporter* 2005) <www.corporatecrimereporter.com/deferredreport.htm>; *Re: Arthur Andersen LLP, f/k/a Arthur Andersen & Co,* Letter from Edwin J Gale, Acting US Attorney for the District of Connecticut, Peter A Clarke, Assistant US Attorney for the District of Connecticut, and Thomas J Murphy, Assistant US Attorney for the District of Connecticut, to Elliot Lauer and Shaun S Sullivan (15 April 1996).

[322] Ibid.

[323] SEC Press Release, 'Arthur Andersen LLP and Three Partners Settle Civil Injunctive Action Charging Violations of Antifraud Provisions, and Settle Related Administrative Proceedings, Arising out of Andersen's Audits of Waste Management, Inc.'s Financial Statements' (19 June 2001). Notably, it was reported as the first time the SEC had ever accused a major accounting firm of securities fraud in connection with a failed audit (Kathleen F Brickey, 'Andersen's Fall from Grace' (2003) 81(4) Washington University Law Quarterly 917, 922).

securities laws'.[324] One month before the Waste Management resolution, the SEC had already brought charges for securities fraud against the Sunbeam Corporation, again implicating Arthur Andersen employees.[325] Before the SEC's filing of the civil complaint, Arthur Andersen entered into a settlement to resolve a 'class action fraud suit', which was reported as one of the largest of its kind.[326] As part of its defence strategy, Arthur Andersen also engaged in a sustained public relations campaign to compel the government to abandon prosecution.[327] Among others, using employee protests, newspaper articles and advertisements, systematic lobbying of Congress, the DOJ, and media representatives by employees as well as a website hosting 'supportive' materials and analysis, Arthur Andersen tried not only to portray the government's actions as legally wrong and abusive but also to create the perception that the indictment would bring the firm down with severe consequences for many innocent employees and shareholders.[328]

In addition, there were strong indications that it was not or at least not primarily the prosecution of Arthur Andersen but rather its association with Enron's collapse, involvement in other recent or pending government investigations,[329] and the reputational damage that came with it that resulted in the firm's failure. After Arthur Andersen publicly confirmed the

[324] Kathleen F Brickey, 'Andersen's Fall from Grace' (2003) 81(4) Washington University Law Quarterly 917, 923 with reference to *Re: Arthur Andersen LLP*, SEC Order Instituting Public Administrative Proceedings, Making Findings and Imposing Remedial Sanctions Pursuant to Rule 102(e) of the Commission's Rules of Practice, Exchange Act Release No 44444 (19 June 2001). See also, SEC Press Release, 'Arthur Andersen LLP and Three Partners Settle Civil Injunctive Action Charging Violations of Antifraud Provisions, and Settle Related Administrative Proceedings, Arising out of Andersen's Audits of Waste Management, Inc.'s Financial Statements' (19 June 2001).

[325] Kathleen F Brickey, 'Andersen's Fall from Grace' (2003) 81(4) Washington University Law Quarterly 917, 923 with reference to *Re: Sunbeam Corporation*, SEC Order Instituting Public Administrative Proceedings, Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Exchange Act Release No 7976 (15 May 2001); SEC Press Release, 'SEC Sues Former Top Officers of Sunbeam Corporation and Arthur Andersen Auditor in Connection With Massive Financial Fraud' (15 May 2001).

[326] Kathleen F Brickey, 'Andersen's Fall from Grace' (2003) 81(4) Washington University Law Quarterly 917, 923-24 with reference to Nicole Harris, 'Andersen to Pay $110 Million to Settle Sunbeam Accounting-Fraud Lawsuit' *The Wall Street Journal* (2 May 2001). See also, Kathleen F Brickey, 'Andersen's Fall from Grace' (2003) 81(4) Washington University Law Quarterly 917, 947-950 (listing twenty-three recent and pending audit-related lawsuits against Arthur Andersen).

[327] Kathleen F Brickey, 'Andersen's Fall from Grace' (2003) 81(4) Washington University Law Quarterly 917, 942 (reporting that Arthur Andersen spent USD 1.5 million on its public relations campaign).

[328] Ibid 942-46. See also, John Schwartz, 'Arthur Andersen Employees Circle the Wagons' *The New York Times* (22 March 2002); 'Why We're Fighting Back' (Arthur Andersen advertisement) *The Wall Street Journal* (20 March 2002); 'Injustice for All' (Arthur Andersen advertisement) *The Wall Street Journal* (27 March 2002); Ken Brown and John R Wilke, 'Andersen Partners Grasp at the Volcker Plan: 'If You Want to Kill Us, Go Kill Us,' Berardino Says He Told Prosecutor' *The Wall Street Journal* (28 March 2002).

[329] See notes 319-25.

document destruction in January 2002,[330] the firm lost many of its major clients.[331] For example, Coffee reportedly explained that it was not the indictment that led to the firm's demise but that

> [the] company was already dead at that point …. Remember, an auditor is in an exposed position. You are being brought in so that shareholders will trust the company's financial statements. If you bring in a company that has become notorious for Enron, that doesn't enhance the shareholder trust. It probably diminishes it. There was negative value to Arthur Andersen's name at that point. And that destroyed it. The brand was simply killed.[332]

Similarly, Steinzor observed that

> Arthur Andersen's clients began to desert the firm when news of Enron's collapse hit Wall Street. The DOJ indictment was issued months later. … No major publicly traded corporation wanted to be tainted by continued association with Arthur Andersen in the wake of the scandal. At best, the indictment played a minor role in the rapid demise of the firm.[333]

Finally, while the DOJ did not retry Arthur Andersen after the Supreme Court ruling since the firm largely had stopped operating, commentators have noted that the reversal had 'not damaged the government's factual case and a retrial would likely have been successful'.[334]

Regardless, the narrative persevered that links the failure of Arthur Andersen to the DOJ's prosecution and uses the resulting collateral consequences to argue that corporate

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[330] Arthur Andersen Press Release, 'Andersen Notifies SEC, Justice Department, Congress that a Significant but Undetermined Number of Enron-Related Documents Were Disposed of; Firm Issues New Interim Document Management Policy; Asks Former U.S. Sen. Danforth to Review Records Management Policies' (10 January 2002). See also, Jonathan Weil, John Emshwiller and Scot J Paltrow, 'Arthur Andersen Admits It Destroyed Documents Related to Enron Account' *The Wall Street Journal* (11 January 2002).

[331] By the time of the indictment two months later, Arthur Andersen had already lost seven of its t largest clients – 'Delta Air Lines, Dynegy, Enron, FedEx, Freddie Mac, Merck, and WorldCom' (Kathleen F Brickey, 'Andersen's Fall from Grace' (2003) 81(4) Washington University Law Quarterly 917, 951 with reference to Jonathan D Glater, 'Audit Firms Await Fallout and Windfall: Andersen Rivals Foresee Scramble to Calm Fears' *The New York Times* (14 March 2002)). See also, Gabriel Markoff, 'Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century' (2013) 15(3) University of Pennsylvania Journal of Business Law 797, 805; Kathleen F Brickey, 'Andersen's Fall from Grace' (2003) 81(4) Washington University Law Quarterly 917, 951.

[332] Corporate Crime Reporter, *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements* (*Corporate Crime Reporter* 2005) <www.corporatecrimereporter.com/deferredreport.htm> (referring to an interview with Columbia University Law Professor John Coffee in 2005).

[333] Rena Steinzor, *Why Not Jail? Industrial Catastrophes, Corporate Malfeasance, and Government Inaction* (Cambridge University Press 2014) 4. See also, Kathleen F Brickey, 'Andersen's Fall from Grace' (2003) 81(4) Washington University Law Quarterly 917, 951.

[334] Gabriel Markoff, 'Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century' (2013) 15(3) University of Pennsylvania Journal of Business Law 797, 805; Carrie Johnson, 'U.S. Ends Prosecution of Arthur Andersen: Former Partner Moves to Withdraw 2002 Guilty Plea' *The Washington Post* (23 November 2005).

prosecutions are 'unjustifiably dangerous' and should rather be resolved through non-prosecution and deferred prosecution agreements.[335] It not only lived on in media and academic discourse but was also prominently reflected in subsequent DOJ enforcement practice as well as policy statements.[336]

As shown in section 3.1.1, the use of corporate non-prosecution and deferred prosecution agreements by the DOJ started rising in 2003, immediately after the indictment and decline in Arthur Andersen's business operations in 2002 as well as the issuing of the Thompson memo at the beginning of 2003. The subsequent revision of the Principles of Federal Prosecution of Business Organizations through the Memorandum from Deputy Attorney General Paul J McNulty in 2006 reflected the guidance already provided in the Holder and Thompson memos as regards the use of pre-trial diversions procedures and the consideration of collateral consequences in corporate charging decisions.[337] The following revision through the Memorandum from Deputy Attorney General Mark R Filip in 2008 (Filip memo) not only included the Principles of Federal Prosecution of Business Organizations in the US Attorneys' Manual but also expressly linked the use of non-prosecution and deferred prosecution agreements with considerations relating to collateral consequences.[338] Whereas previous versions of the Principles of Federal Prosecution of Business Organizations had provided that '[p]rosecutors may consider the collateral consequences of a corporate criminal conviction in determining whether to charge the corporation with a criminal offense',[339] the Filip memo and § 9-28.1000 of the US Attorneys' Manual added that they may also do so in determining 'how to resolve corporate criminal cases'.[340] The commentary on § 9-28.1000 then elaborated that

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[335] Gabriel Markoff, 'Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century' (2013) 15(3) University of Pennsylvania Journal of Business Law 797, 806.

[336] See notes 313-14. See more recently, James R Copland and Rafael A Mangual, *Justice out of the Shadows: Federal Deferred Prosecution Agreements and the Political Order* (Manhattan Institute 2016) 6; Jesse Eisinger, *The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives* (Simon Schuster 2017) 32-58.

[337] DOJ, Memorandum from Paul J McNulty, Deputy Attorney General, to All Component Heads and US Attorneys on 'Principles of Federal Prosecution of Business Organizations' (12 December 2006) § VII(1) and X. See sections 3.1.2 and 3.2.2.

[338] DOJ, Memorandum from Mark R Filip, Deputy Attorney General, to All Component Heads and US Attorneys on 'Principles of Federal Prosecution of Business Organizations' (28 August 2008); DOJ, US Attorneys' Manual, § 9-28.000 (2008).

[339] DOJ, Memorandum from Eric H Holder, Jr, Deputy Attorney General, to All Component Heads and US Attorneys on Bringing Criminal Charges Against Corporations (16 June 1999) § IX(A); DOJ, Memorandum from Larry D Thompson, Deputy Attorney General to All Component Heads and US Attorneys on Principles of Federal Prosecution of Business Organizations (20 January 2003) § IX(A); DOJ, Memorandum from Paul J McNulty, Deputy Attorney General, to All Component Heads and US Attorneys on 'Principles of Federal Prosecution of Business Organizations' (12 December 2006) § X(A).

[340] DOJ, US Attorneys' Manual, § 9-28.1000(A) (2008).

> where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other. Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or nonprosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement. …[341]

This approach and even wording were maintained in subsequent revisions and can still be found in the current version of the Principles of Federal Prosecution of Business Organizations.[342] Thus, the rationale of avoiding a repeat of the 'Andersen effect' through the possible use of non-prosecution and deferred prosecution agreements was embedded in the DOJ's Principles of Federal Prosecution of Business Organizations. Considering that the yearly numbers of non-prosecution and deferred prosecution agreements entered into by the DOJ had already reached a relatively consistent level by the time the Filip memo was issued, the memo, like the Holder and Thompson memos before, largely 'codified' a change that had already occurred in prosecutorial practice.[343]

Subsequently, DOJ officials have regularly emphasised the benefits of non-prosecution and deferred prosecution agreements to improve corporate crime enforcement and avoid 'Andersen-like' collateral consequences. For example, in a speech to the New York Bar Association on 13 September 2012, the head of the DOJ's Criminal Division, Assistant Attorney General Lanny Breuer, explained that '[o]ver the last decade, DPAs [deferred prosecution agreements] have become a mainstay of white collar criminal law

[341] Ibid § 9-28.1000(B) (2008).
[342] See notes 197-98.
[343] See section 3.1.3. According to the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, a comparison of DOJ prosecutions in the five years before and after the issuance of the Filip memo 'indicate its genuine significance in changing how federal prosecutors dealt with corporate crime'. Based on data from the Executive Office for US Attorneys (EOUSA) and the US Sentencing Commission, TRAC reports 21.9 per cent fewer corporate prosecution totals for the five years after the Filip memo as well as a decline in corporate convictions of 14.9 per cent (TRAC, Justice Department Data Reveal 29 Percent Drop in Criminal Prosecutions of Corporations (TRAC 2015) <http://trac.syr.edu/tracreports/crim/406/>).

enforcement'.[344] He declared that this growing use of non-prosecution and deferred prosecution agreements has had 'a truly transformative effect on particular companies, and, more generally, on corporate culture across the globe', resulting in 'unequivocally, far greater accountability for corporate wrongdoing – and a sea change in corporate compliance efforts'.[345]

As regards the importance of considering collateral consequences, he emphasised that

> [i]n reaching every charging decision, we must take into account the effect of an indictment on innocent employees and shareholders, just as we must take into account the nature of the crimes committed and the pervasiveness of the misconduct. I personally feel that it's my duty to consider whether individual employees with no responsibility for, or knowledge of, misconduct committed by others in the same company are going to lose their livelihood if we indict the corporation. In large multi-national companies, the jobs of tens of thousands of employees can be at stake. And, in some cases, the health of an industry or the markets are a real factor.[346]

On 11 December 2012, at the press conference announcing a deferred prosecution agreement with HSBC Bank USA NA and HSBC Holdings Plc, Breuer confirmed this rationalisation when reportedly asserting that had prosecutors pressed criminal charges against HSBC, the bank would likely have lost its banking license.[347] He is then quoted explaining that

> [o]ur goal here is not to bring HSBC down, it's not to cause a systemic effect on the economy, it's not for people to lose thousands of jobs …. The innocent people who would suffer don't deserve that.[348]

These remarks fuelled concerns that potential collateral consequences in combination with the company's large size had been the decisive factor in the DOJ's resolve not to charge HSBC.[349] On the same day, considering that there was 'no doubt that the wrongdoing at

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[344] Lanny A Breuer, Assistant Attorney, Speech at the New York Bar Association (13 September 2012) <www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association>.
[345] Ibid.
[346] Ibid. For criticism, see for example Mike Koehler, 'Assistant Attorney General Breuer's Unconvincing Defense of DPAs/NPAs' (*FCPA Professor,* 17 September 2012) <https://fcpaprofessor.com/assistant-attorney-general-breuers-unconvincing-defense-of-dpas-npas/>.
[347] Dominic Rushe and Jill Treanor, 'HSBC's record $1.9bn fine preferable to prosecution, US authorities insist' *The Guardian* (11 December 2012).
[348] James O'Toole, 'HSBC: Too big to jail' *CNN Business* (12 December 2012).
[349] See for example, Glenn Greenwald, 'HSBC, too big to jail, is the new poster child for US two-tiered justice system' *The Guardian* (12 December 2012); James O'Toole, 'HSBC: Too big to jail' *CNN Business* (12 December 2012); Matt Taibbi, 'Gangster Bankers: Too Big to Jail: How HSBC hooked up with drug traffickers and terrorists. And got away with it' *Rolling Stone* (14 February 2013).

HSBC was serious and pervasive', the editors of *The New York Times* announced that it was a 'dark day for the rule of law' and that 'the government has bought into the notion that too big to fail is too big to jail'.[350]

A few months later, these concerns were seemingly confirmed by Breuer's superior, US Attorney General Eric Holder, in his famous statement before the Senate Judiciary Committee on 6 March 2013:

> I am concerned that the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that if you do prosecute, if you do bring a criminal charge, it will have a negative impact on the national economy, perhaps even the world economy. And I think that is a function of the fact that some of these institutions have become too large.[351]

This rationalisation of the DOJ's hesitation to charge big corporations and preference for using non-prosecution and deferred prosecution agreements, which started to be referred to as 'too big to jail',[352] can be seen as a continuation of the 'Andersen effect' and a general narrative that prioritises the avoidance of collateral consequences from corporate prosecutions. Even though Holder subsequently tried to retract his statement,[353] the rationale it had articulated continued to be reflected in the DOJ's enforcement practice.

This can be seen not only in the consistently high numbers of non-prosecution and deferred prosecution agreements in the following years, as shown in section 3.1.3, but also in the recipients of the agreements. Corporate recipients of non-prosecution and deferred prosecution agreements frequently share certain attributes. They are often 'large, publicly held corporations' operating in business sectors that are perceived as especially important and

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[350] Editorial, 'Too Big to Indict' *The New York Times* (11 December 2012).
[351] US Senate Judiciary Committee, Statement of Eric Holder, Attorney General of the United States from 2009-2015 (6 March 2013). See also, Danielle Douglas, 'Holder Concerned Megabanks Too Big to Jail' *The Washington Post* (6 March 2013); Andrew R Sorkin, 'Realities behind prosecuting big banks' *The New York Times* (11 March 2013).
[352] The term 'too big to jail' appears to be an adaptation of *Too Big to Fail*, Andrew Sorkin's account of the 2008 financial crisis (Andrew R Sorkin, *Too Big to Fail: The Inside Story of How Wall Street and Washington Fought to Save the Financial System—and Themselves* (Viking Press 2009)). See notes 349-51. See also, Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014); Court E Golumbic and Albert D Lichy, 'The "Too Big to Jail" Effect and the Impact on the Justice Department's Corporate Charging Policy' (2014) 65 Hastings Law Journal 1293; Nick Werle, 'Prosecuting Corporate Crime when Firms Are Too Big to Jail-Investigation, Deterrence, and Judicial Review' (2019) 128 Yale Law Journal 1366.
[353] Mark Gongloff, 'Eric Holder: Actually, I Meant to Say No Banks Are Too Big to Jail' *The Huffington Post* (15 May 2013).

sensitive to collateral consequences of prosecutions and convictions.[354] For example, corporations working in highly regulated industries such as banks, accounting firms, military contractors, and health care or pharmaceutical companies have been identified as regularly reaching agreements by arguing that the collateral consequences of a conviction would be too severe.[355] In contrast, the vast majority of corporations actually prosecuted have been reported as 'small, closely-held, non-public corporations with less than 200 employees'.[356] The fact that non-prosecution and deferred prosecution agreements are made available mostly for large corporations as opposed to small companies is also reflected in the high monetary recoveries reported in these agreements.[357]

3.3 Mission Creep to Foreign Corporations and Countries

The establishment of non-prosecution and deferred prosecution agreements as a prevalent response to allegations of corporate criminal conduct, however, was not limited to acts committed on US territory by US corporations but also extended to foreign corporations and, indirectly, an increasing number of foreign countries.[358] Indeed, as Garrett notes, the 'favored new tool of the corporate prosecutor, the deferred prosecution agreement, is being actively exported to other countries'.[359] This export or influence on foreign countries' criminal laws

[354] See for example, Gibson Dunn, '2008 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements' (6 January 2009) <www.gibsondunn.com/2008-year-end-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/> (noting that this is 'not surprising given the DPAs' [deferred prosecution agreements'] implicit purpose of limiting the collateral consequences of corporate convictions'). See also, Gibson Dunn, '2010 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements' (4 January 2011) <www.gibsondunn.com/publications/ Pages/2010Year-EndUpdate-CorporateDeferredProsecutionAndNon-ProsecutionAgreements.aspx>; James R Copland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements* (Manhattan Institute 2012) 3.

[355] Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 254-55. See for example, DOJ Press Release, 'Manhattan U.S. Attorney And FBI Assistant Director-In-Charge Announce Filing Of Criminal Charges Against And Deferred Prosecution Agreement With JPMorgan Chase Bank, N.A., In Connection With Bernard L. Madoff's Multi-Billion Dollar Ponzi Scheme' (7 January 2014). See generally, Brandon L Garrett and Jon Ashley, Duke and UVA Corporate Prosecution Registry <https://corporate-prosecution-registry.com/browse/>.

[356] Gibson Dunn, '2008 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements' (6 January 2009) <www.gibsondunn.com/2008-year-end-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/>; Brandon L Garrett, 'Globalized Corporate Prosecutions' (2011) 97(8) Virginia Law Review 1775, 1804.

[357] See section 3.1.3.

[358] See section 1.1. See generally, Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 218-49; Jennifer Arlen, 'The potential promise and perils of introducing deferred prosecution agreements outside the U.S.' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 157-58.

[359] Brandon L Garrett and David Zaring, 'For a Better Way to Prose-cute Corporations, Look Overseas' *The New York Times* (23 September 2013). See generally on the US's success in exporting some of its national approaches and ideas such as the FCPA, James A Barta and Julia Chapman, 'Foreign Corrupt Practices Act' (2012) 49(2) American Criminal Law Review 825, 851.

primarily takes the form of setting enforcement examples, incentivising cooperation, and asserting diplomatic pressure.[360]

After a brief introduction to the exceptionally broad rules on corporate criminal liability and enforcement jurisdiction in the US, this part explores the mission creep of non-prosecution and deferred prosecution agreements to foreign corporations and countries along these lines. The final section then draws together important rationales for this development from a US perspective.

3.3.1 US exceptionalism: broad rules on corporate criminal liability and the long jurisdictional arm of law enforcement authorities

US law enforcement authorities are responsible for many more corporate criminal enforcement actions and sanctions than authorities in any other country.[361] This dominance has largely been attributed to the threat of exceptionally broad rules on corporate criminal liability and enforcement jurisdiction.[362]

In contrast to most other jurisdictions, in the US, companies can be held criminally liable for almost any crime that was committed by an employee as part of the employment with the intent of benefitting the company based on the doctrine of *respondeat superior*.[363] This federal standard has been referred to as the 'broadest in use in the world'.[364] Upon conviction, corporations may then be subject to large monetary sanctions, including fines, restitution, and

[360] Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 246.
[361] For example, the OECD reports that the US imposed criminal sanctions on seventy-six organisations in the context of foreign bribery in 2011, which constituted 84 per cent of the global number of sanctions. No other country was reported to have sanctioned more than four companies (OECD Working Group on Bribery, *2011 Data on Enforcement of the Anti-Bribery Convention* (OECD 2012) 3). For 2018, the OECD reports 136 criminal sanctions imposed by the US, which accounted for 67 per cent of all sanctions imposed on legal persons globally. The two next most active jurisdictions (Germany and the UK) only sanctioned elven and ten, respectively (OECD Working Group on Bribery, *2018 Enforcement of the Anti-Bribery Convention: Investigations, Proceedings, and Sanctions* (OECD 2019) 2-4).
[362] Jennifer Arlen and Samuel Buell, 'The Global Expansion of Corporate Criminal Liability: Effective Enforcement Policy Across Legal Systems' (2020) 93 Southern California Law Review 697, 699-700; Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 223-24, 242-44.
[363] *New York Central & Hudson River Railroad v US*, 212 U.S. 481, 494-95 (1909); Thomas J Bernard, 'The Historical Development of Corporate Criminal Liability' (1984) 22 Criminology 3, 8-11; Jennifer Arlen and Samuel Buell, 'The Global Expansion of Corporate Criminal Liability: Effective Enforcement Policy Across Legal Systems' (2020) 93 Southern California Law Review 697, 707.
[364] Brandon L Garrett, 'International Corporate Prosecutions' in Darryl K Brown, Jenia Iontcheva Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019) 422.

remediation, as well as various non-monetary sanctions.[365] They may also be subject to severe 'civil penalties and administrative sanctions', including delicensing and debarment from public contracting with potentially ruinous consequences.[366] However, as shown in the previous parts of this chapter, the DOJ, through policy memoranda and practice, have largely replaced this far-reaching *de jure* rule of strict or *respondeat superior* liability with an even further reaching *de facto* corporate liability regime that focuses on self-reporting, cooperation, and compliance in exchange for non-conviction-based resolutions and sanctions.[367]

In addition, US law enforcement authorities are equipped with a long 'jurisdictional arm' when it comes to corporate crime enforcement.[368] This far-reaching enforcement capacity can primarily be attributed to the importance of trade with the US, the US dollar in the international financial system, and US-based stock exchanges, which creates various domestic constitutional bases for jurisdiction by US law enforcement authorities.[369] Another reason is the many criminal statutes that contain broad rules on extraterritorial jurisdiction. For example, the FCPA expressly applies to acts committed abroad and by foreign corporations.[370] The legal frameworks contained in these statutes are also regularly well-developed compared to their foreign counterparts. For example, the FCPA was already enacted in 1977, whereas Germany and the UK only adopted legal frameworks for responding to foreign bribery in 1998 and 2001, respectively.[371] Foreign corporations that have securities listings in the US will also likely be considered 'present' in the US for purposes of establishing jurisdiction.[372] In relation to securities, the US Supreme Court has also found that harm to US

[365] Jennifer Arlen, 'The Failure of the Organizational Sentencing Guidelines' (2012) 66 University of Miami Law Review 321, 344-51.
[366] Jennifer Arlen and Marcel Kahan, 'Corporate Governance Regulation through Nonprosecution' (2017) 84 The University of Chicago Law Review 323, 331; David M Uhlmann, 'The Pendulum Swings: Reconsidering Corporate Criminal Prosecution' (2016) 49 UC Davis Law Review 1235, 1257-58.
[367] See Jennifer Arlen and Samuel Buell, 'The Global Expansion of Corporate Criminal Liability: Effective Enforcement Policy Across Legal Systems' (2020) 93 Southern California Law Review 697, 707-08.
[368] See Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 242.
[369] See Tonya L Putnam, *Courts without Borders: Law, Politics and U.S. extraterritoriality* (Cambridge University Press 2016) 8-9, 11; Brandon L Garrett, 'International Corporate Prosecutions' in Darryl K Brown, Jenia Iontcheva Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019) 434. See generally, Daniel Drezner, *All Politics Is Global: Explaining International Regulatory Regimes* (Princeton University Press 2006).
[370] US Foreign Corrupt Practices Act of 1977, 15 USC §§ 78dd-1 et seq.
[371] Nicholas Lord and Michael J Levi, 'Determining the adequate enforcement of white collar and corporate crimes in Europe' in Judith van Erp, Wim Huisman and Gudrun Vande Walle (eds), *The Routledge Handbook of White-Collar and Corporate Crime in Europe* (Routledge 2015) 46 (referring to the inclusion of a foreign element to domestic corruption laws in the UK Anti-terrorism, Crime and Security Act of 2001 and the enactment of the Act on Combating Bribery of Foreign Public Officials in International Business Transactions of 1998 in Germany).
[372] Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 243.

stockholders may provide a sufficient basis for US jurisdiction over domestic and foreign corporations.[373] In the absence of 'direct harm felt in the US', jurisdiction can also be based on a '"protective principle" if there is potential harm to U.S. interests or national security'.[374] The DOJ has also asserted jurisdiction, for example, on the basis of business meetings on US territory as well as the use of US financial institutions and USD currency.[375]

As a result, US federal prosecutors have frequently pursued foreign corporations and acts committed abroad.[376] For example, nine out of the ten currently largest FCPA enforcement actions have been against foreign corporations.[377] The widespread use of non-prosecution and deferred prosecution agreements is supportive of broad assertions of corporate criminal liability and jurisdiction as these agreements largely avoid judicial scrutiny in relation to the scope and interpretation of the applied legislation.[378] In a speech before the Lawyers for Civil Justice in 2012, Alberto Gonzalez, the US Attorney General from 2005 to 2007, reportedly made the following remark:

> Because of the increased American business activity overseas, we made a conscious decision during the Bush Administration to allocate more time and resources to FCPA enforcement. And we quickly discovered two important truths. One, the FCPA gives prosecutors tremendous discretion in defining its scope, and, thus, tremendous leverage in charging decisions. Two, corporations do not like to be investigated by the Justice Department or the SEC for violations of the FCPA. It's bad for business. So, these cases often settled, charges were dropped in exchange for either nonprosecution or deferred prosecution agreements. In an ironic twist, the more that American companies elect to settle and not force the DOJ to

[373] *Morrison v National Australia Bank*, 130 U. S. 2869, 2884-85 (2010).
[374] Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 243.
[375] Lorna Emson, Francis Bond and James Reid, 'Is the United States more effective than the United Kingdom at prosecuting economic crime?' (*Lexology*, 7 May 2021) <www.lexology.com/library/detail.aspx?g=4c84f43b-bf3d-49f1-8f10-3fe789c067cf&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2021-05-12&utm_term=>.
[376] See note 359. See also, *US v Conti*, 864 F3d 63, 89 (2d Cir 2017); Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 219; Virginia Chavez Romano, 'Extraterritoriality and US Corporate Enforcement' *Global Investigations Review* (19 August 2019).
[377] Harry Cassin, 'Wall Street bank earns top spot on FCPA Blog top ten list' (*FCPA Blog*, 26 October 2020) <https://fcpablog.com/2020/10/26/wall-street-bank-earns-top-spot-on-fcpa-blog-top-ten-list/>.
[378] Lorna Emson, Francis Bond, and James Reid, 'Is the United States more effective than the United Kingdom at prosecuting economic crime?' (*Lexology*, 7 May 2021) <www.lexology.com/library/detail.aspx?g=4c84f43b-bf3d-49f1-8f10-3fe789c067cf&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2021-05-12&utm_term=>.

defend its aggressive interpretation of the Act, the more aggressive DOJ has become in its interpretation of the law and its prosecution decisions.[379]

3.3.2 Influence through example: non-prosecution and deferred prosecution agreements with foreign corporations

As part of the general rise in numbers of non-prosecution and deferred prosecution agreements,[380] US federal prosecutors also started using these procedures in the context of criminal acts committed abroad.[381] For example, in late 2004 and early 2005, the US companies InVision Technologies Inc and Monsanto Company entered into the first non-prosecution and deferred prosecution agreements with the DOJ for violations of the FCPA.[382] Since then, FCPA-related agreements have reflected a significant part of the yearly non-prosecution and deferred prosecutions agreements entered into by the DOJ with both US and foreign corporations.[383] Among others, the rise of FCPA enforcement in the early 2000s has been expressly linked to the parallel rise of non-prosecution and deferred prosecution agreements.[384] FCPA-related non-prosecution and deferred prosecution agreements have also featured prominently in the DOJ's response to corporate scandals abroad. For example, the relatively large number of agreements in 2007 can partially be attributed to FCPA resolutions arising from the DOJ's systematic investigations in the context of the UN's Oil-for-Food program.[385]

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[379] Mike Koehler, 'Add Alberto Gonzalez To The List Of Former High-Ranking DOJ Officials Who Support An FCPA Compliance Defense' (*Lexis Nexis*, 12 September 2012) <www.lexisnexis.com/legalnewsroom/corporate/b/fcpa-compliance/posts/add-alberto-gonzalez-to-the-list-of-former-high-ranking-doj-officials-who-support-an-fcpa-compliance-defense>.

[380] See section 3.1.3.

[381] See generally, Brandon L Garrett and Jon Ashley, Duke and UVA Corporate Prosecution Registry <https://corporate-prosecution-registry.com/browse/>.

[382] *Re: InVision Technologies Inc*, Non-Prosecution Agreement between the US DOJ and InVision Technologies Inc (3 December 2004); *US v Monsanto Company*, Deferred Prosecution Agreement, US District Court for the District of Columbia, Case No 1:05-CR-00008-ESH (6 January 2005).

[383] For example, Gibson Dunn reports 45 per cent of all non-prosecution and deferred prosecution agreements in 2010 as resolving FCPA investigations (Gibson Dunn, '2010 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements' (4 January 2011) <www.gibsondunn.com/2010-year-end-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/>. The Corporate Prosecution Registry reports to date 118 non-prosecution and deferred prosecution agreements in the FCPA context (Brandon L Garrett and Jon Ashley, Duke and UVA Corporate Prosecution Registry <https://corporate-prosecution-registry.com/browse/> accessed 30 September 2021. See also, Mike Koehler, 'FCPA Declinations with Aggravating Circumstances' (*Corporate Crime Reporter*, 28 May 2019) <www.corporatecrimereporter.com/news/200/mike-koehler-on-fcpa-declinations-with-aggravating-circumstances/>.

[384] See Nick Gersh, 'The Curious Absence of FCPA Trials' (*The Global Anticorruption Blog*, 8 September 2017) <https://globalanticorruptionblog.com/2017/09/08/the-curious-absence-of-fcpa-trials/>.

[385] See for example, DOJ Press Release, 'Chevron Corporation Agrees to Pay $30 Million in Oil-for-Food Settlement' (14 November 2007). See generally, Gibson Dunn, '2009 Year-End Update on Corporate Deferred

Especially since the late 2000s, US federal prosecutors have entered into non-prosecution and deferred prosecution agreements with often large and prominent foreign corporations on a regular basis.[386] For example, from 2007 until the UK's introduction of deferred prosecution agreements in 2014, the DOJ has reportedly entered into eleven deferred prosecution agreements with UK companies.[387] Among others, the resolutions involved such prominent corporations as Lloyds Bank, Barclays Bank, Standard Chartered Bank, HSBC and Royal Bank of Scotland.[388] French companies have reportedly entered into seven deferred prosecution agreements with the DOJ from 2008 until France's introduction of judicial public interest agreements (*convention judiciaire d'intérêt public*) in 2016, especially for FCPA violations.[389] They included, among others, Technip, Alcatel-Lucent, Total, Alstom, and Credit Agricole Corporate & Investment Bank.[390] Swiss companies have also been an important focus of US law enforcement actions, having entered into fifteen deferred and eighty-eight non-prosecution agreements since 2007.[391] Finally, German companies such as

Prosecution and Non-Prosecution Agreements' (7 January 2010) <www.gibsondunn.com/2009-year-end-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/>.

[386] See generally, Brandon L Garrett and Jon Ashley, Duke and UVA Corporate Prosecution Registry <https://corporate-prosecution-registry.com/browse/>.

[387] See Brandon L Garrett and Jon Ashley, Duke and UVA Corporate Prosecution Registry <https://corporate-prosecution-registry.com/browse/>. UK companies also entered into five non-prosecution agreements with the DOJ during the same period.

[388] *US v Barclays Bank Plc*, Deferred Prosecution Agreement, US District Court for the District of Columbia, Case No 1:10-CR-00218-EGS (1 August 2010); *US v Standard Chartered Bank*, Deferred Prosecution Agreement, US District Court for the District of Columbia, Case No 1:12-CR-00262 (10 December 2012); *US v HSBC Bank USA NA and HSBC Holdings Plc*, Deferred Prosecution Agreement, US District Court for the Eastern District of New York, Case No 12-763 (11 December 2012); *US v The Royal Bank of Scotland Plc*, Deferred Prosecution Agreement, US District Court for the District of Connecticut, Case No 3:13-CR-74-MPS (5 February 2013); *US v Lloyds Banking Group Plc*, Deferred Prosecution Agreement, US District Court for the District of Connecticut, Case No 3:14-CR-00165-AWT (28 July 2014).

[389] See Brandon L Garrett and Jon Ashley, Duke and UVA Corporate Prosecution Registry <https://corporate-prosecution-registry.com/browse/>. French companies also entered into two non-prosecution agreements with the DOJ in 1999 and 2008, respectively.

[390] *US v Technip SA*, Deferred Prosecution Agreement, US District Court for the Southern District of Texas, Criminal Case No H-10-439 (28 June 2010); *US v Alcatel-Lucent SA f/k/a "Alcatel SA"*, Deferred Prosecution Agreement, US District for the Southern District of Florida, Case No 10-20907-CR-Moore (27 December 2010); *US v Total SA*, Deferred Prosecution Agreement, US District for the Eastern District of Virginia, Criminal Case No 1:13-CR-239 (29 May 2013); *US v Alstom Grid Inc*, Deferred Prosecution Agreement, US District for District of Connecticut, Case No 3:14-CR-00247-JBA (22 December 2014); *US v Alstom Power Inc*, Deferred Prosecution Agreement, US District for District of Connecticut, Case No 3:14-CR-00248-JBA (22 December 2014); *US v Credit Agricole Corporate and Investment Bank*, Deferred Prosecution Agreement, US District Court for the District of Columbia, Case No 1: 15-CR-00137 (20 October 2015).

[391] See Brandon L Garrett and Jon Ashley, Duke and UVA Corporate Prosecution Registry <https://corporate-prosecution-registry.com/browse/>. As mentioned in section 3.1.3 and discussed in more detail in section 3.3.4, the high number of non-prosecution agreements is largely attributable to the DOJ's Swiss Bank Program, inviting Swiss banks or banks based in Switzerland to enter into non-prosecution agreements for assisting tax evasion by US citizens.

Daimler Chrysler, Lufthansa, Deutsche Telekom, Commerzbank, or Deutsche Bank have reportedly entered into six deferred and six non-prosecution agreements since 2006.[392]

Many of these agreements have involved severe monetary and non-monetary sanctions, including far-reaching changes to business practices and corporate governance. Their focus has largely been on violations of tax, trade sanctions, and foreign bribery laws.

For example, in 2009, UBS AG, the largest Swiss bank, entered into a deferred prosecution agreement with the DOJ to resolve charges of conspiring to defraud the US by assisting illegal tax evasion of US citizens and impeding the Internal Revenue Service.[393] As part of the agreement and in an 'unprecedented move', UBS 'agreed to immediately provide the United States government with the identities of, and account information for, certain US customers', 'expeditiously exit the business of providing banking services to US clients with undeclared accounts' and pay USD '780 million in fines, penalties, interest, and restitution'.[394] In addition, UBS was required to admit responsibility, cooperate with ongoing investigations, and make significant governance changes, including the establishment of new compliance and management positions as well as reporting responsibilities.[395]

In 2012, HSBC, the largest British and European bank, entered into a deferred prosecution agreement with the DOJ to resolve investigations into violations of the Bank Secrecy Act, the International Emergency Economic Powers Act, and the Trading with the Enemy Act.[396] The investigated violations related to allegations of wilfully failing to maintain an effective anti-money laundering program and to conduct appropriate due diligence on foreign correspondent account holders as well as illegally conducting transactions on behalf of clients in Cuba, Iran, Libya, Sudan, and Burma (Myanmar), countries that were subject to sanctions enforced by the Office of Foreign Assets Control.[397] At the press conference announcing the agreement as 'a historic criminal resolution involving one of the world's largest banks', Lanny

[392] See Brandon L Garrett and Jon Ashley, Duke and UVA Corporate Prosecution Registry <https://corporate-prosecution-registry.com/browse/>.
[393] *US v UBS AG*, Deferred Prosecution Agreement, US District Court for the Southern District of Florida, Case No 09-60033-CR-COHN (18 February 2009).
[394] DOJ Press Release, 'UBS Enters into Deferred Prosecution Agreement Bank Admits to Helping U.S. Taxpayers Hide Accounts from IRS; Agrees to Identify Customers & Pay $780 Million' (18 February 2009).
[395] *US v UBS AG*, Deferred Prosecution Agreement, US District Court for the Southern District of Florida, Case No 09-60033-CR-COHN (18 February 2009).
[396] *US v HSBC Bank USA NA and HSBC Holdings Plc*, Deferred Prosecution Agreement, US District Court for the Eastern District of New York, Case No 12-763 (11 December 2012).
[397] DOJ Press Release, 'HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement - Bank Agrees to Enhanced Compliance Obligations, Oversight by Monitor in Connection with Five-year Agreement' (11 December 2012).

Breuer, Assistant Attorney General of the DOJ's Criminal Division, explained that 'HSBC is being held accountable for stunning failures of oversight – and worse – that led the bank to permit narcotics traffickers and others to launder hundreds of millions of dollars through HSBC subsidiaries, and to facilitate hundreds of millions more in transactions with sanctioned countries'.[398]

In addition to accepting responsibility for its conduct, cooperating with ongoing investigations, accepting a five-year corporate monitor, and paying forfeiture in the amount of USD 1.256 billion,[399] UBS agreed to make far-reaching changes to its business practices, management, and governance structures. For example, as also emphasised by Breuer, 'HSBC has replaced virtually all of its senior management, "clawed back" deferred compensation bonuses given to some of its most senior U.S. anti-money laundering and compliance officers, and agreed to partially defer bonus compensation for its most senior officials during the five-year period of the deferred prosecution agreement'.[400] HSBC was required to make significant changes to its anti-money laundering compliance functions and structures within its entire global operations. These included, for example, the reorganisation of the anti-money laundering department by separating the legal and compliance departments and ensuring that the anti-money laundering director reports directly to the chief compliance officer as well as regularly to the board and senior management. It also involved significant increases to financial spending and staffing on anti-money laundering. As a result, the company spent in 2011, even before the agreement was reached, roughly nine times more than its anti-money laundering spending in 2009 and increased the number of staff from ninety-two employees and twenty-five consultants to 880 full time employees and 267 consultants. Finally, in the context of the deferred prosecution agreement, HSBC agreed to simplify its global control

[398] DOJ, 'Assistant Attorney General Lanny A. Breuer Speaks at the HSBC Press Conference' (11 December 2012).
[399] DOJ Press Release, 'HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement - Bank Agrees to Enhanced Compliance Obligations, Oversight by Monitor in Connection with Five-year Agreement' (11 December 2012). The Press Release also indicated that in addition to the forfeiture of USD 1.256 billion as part of its deferred prosecution agreement with the DOJ, HSBC also agreed to pay USD 665 million in civil penalties, USD 500 million to the Office of the Comptroller of the Currency, and USD 165 million to the Federal Reserve for its anti-money laundering program violations.
[400] DOJ, 'Assistant Attorney General Lanny A. Breuer Speaks at the HSBC Press Conference' (11 December 2012). See also, *US v HSBC Bank USA NA and HSBC Holdings Plc*, Deferred Prosecution Agreement, US District Court for the Eastern District of New York, Case No 12-763 (11 December 2012).

structure so that the entire organisation is aligned around four global businesses, five regional geographies, and ten global functions.[401]

Between 2010 and 2014, the DOJ entered into several deferred prosecution agreements involving large French companies as well as sanctions in the context of FCPA investigations.[402] For example, in 2010, Technip SA, a global engineering, construction, and services company based in Paris, entered into a deferred prosecution agreement with the DOJ to resolve investigations into long-standing bribery allegations of Nigerian government officials to obtain lucrative contracts. The DOJ asserted jurisdiction because Technip's American depository shares were traded on the New York Stock Exchange.[403] In addition to a USD 240 million criminal penalty, Technip agreed, among others, to retain an independent compliance monitor for two years and to cooperate with ongoing investigations.[404] Similarly, Total SA, one of world's largest oil and gas companies, agreed to deferred prosecution in 2013 to resolve FCPA charges in relation to payments made through third parties to government officials in Iran. Like Technip, the basis for the DOJ asserting jurisdiction was the fact that Total's shares were traded on the New York Stock Exchange.[405] Under the agreement, Total agreed to pay USD 245 million in criminal penalties, cooperate with ongoing investigations, implement an improved compliance program and internal controls designed to prevent and detect FCPA violations as well as to retain a corporate monitor for three years to oversee the implementation of these terms.[406]

Notably, only one out of the current ten biggest settlements by US law enforcement authorities based on the FCPA has been reported as involving a US corporation with Goldman Sachs in 2020.[407]

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[401] See *US v HSBC Bank USA NA and HSBC Holdings Plc*, Deferred Prosecution Agreement, US District Court for the Eastern District of New York, Case No 12-763 (11 December 2012).
[402] See note 391.
[403] *US v Technip SA*, Deferred Prosecution Agreement, US District Court for the Southern District of Texas, Criminal No H-10-439 (28 June 2010).
[404] DOJ Press Release, 'Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty' (28 June 2010). The press release indicates that Technip also agreed to pay USD 98 million in disgorgement of profits as part of a settlement with the SEC in a related civil complaint based on FCPA violations.
[405] *US v Total SA*, Deferred Prosecution Agreement, US District for the Eastern District of Virginia, Criminal No 1:13-CR-239 (29 May 2013)
[406] DOJ Press Release, 'French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme' (29 May 2013). The press release indicates that the SEC also entered into a cease-and-desist order against Total in which it agreed to pay an additional USD 153 million in disgorgement and prejudgment interest.
[407] Harry Cassin, 'Wall Street bank earns top spot on FCPA Blog top ten list' (*FCPA Blog*, 26 October 2020) <https://fcpablog.com/2020/10/26/wall-street-bank-earns-top-spot-on-fcpa-blog-top-ten-list/>.

3.3.3 Influence through cooperation: cross-border coordinated resolutions

Since other jurisdictions have also introduced settlement procedures akin to US non-prosecution and especially deferred prosecution agreements beginning with the UK and Brazil in 2014,[408] joint investigations and coordinated resolutions together with other foreign law enforcement authorities have increased in number and complexity, especially in the context of large bribery cases.[409]

For example, in 2016, Brazilian aircraft manufacturer Embraer SA entered into a global settlement with the DOJ, SEC, and Brazilian Ministério Público Federal to resolve investigations into bribery payments to public officials in the Dominican Republic, Saudi Arabia, Mozambique, and India.[410] Under the settlement, Embraer agreed to pay a USD 107 million penalty to the DOJ as part of a deferred prosecution agreement,[411] and more than USD 98 million in disgorgement and interest to the SEC. In this context, the US authorities agreed to credit up to a USD 20 million towards payments made to the Brazilian Ministério Público Federal in a parallel leniency agreement in Brazil.[412] In addition to the monetary sanctions, the deferred prosecution agreement with the DOJ required Embraer to admit responsibility, cooperate with ongoing investigations, improve its compliance program, implement a more adequate system of internal accounting controls, and retain an independent compliance monitor for a three-year term.[413]

In 2017, Rolls-Royce plc, a UK manufacturer and distributor of power systems for the aerospace, defence, marine and energy sectors, entered into a global resolution with US, UK, and Brazilian authorities involving overall payments of USD 800 million to resolve bribery investigations in relation to payments in Angola, Azerbaijan, Brazil, China, India, Indonesia,

[408] See section 1.1. See also, chapter 5 below.
[409] See DOJ, 'Acting Assistant Attorney General Kenneth A. Blanco Speaks at the American Bar Association National Institute on White Collar Crime' (10 March 2017); Michael Griffiths, 'Cooperate with everyone simultaneously to avoid piling on, says FCPA chief' *Global Investigations Review* (14 June 2018); Evan Norris, 'How Enforcement Authorities Interact' *Global Investigations Review* (19 August 2019).
[410] DOJ Press Release, 'Embraer Agrees to Pay More than $107 Million to Resolve Foreign Corrupt Practices Act Charges -Parallel Resolutions with the Securities and Exchange Commission and Brazilian Authorities Equaling $97 Million in Disgorgement Also Announced Today' (24 October 2016).
[411] *US v Embraer SA*, Deferred Prosecution Agreement, United States District Court for the Southern District of Florida, Case No 16-60294-CR-COHN (24 October 2016).
[412] SEC Press Release, 'Embraer Paying $205 Million to Settle FCPA Charges' (24 October 2016).
[413] DOJ Press Release, 'Embraer Agrees to Pay More than $107 Million to Resolve Foreign Corrupt Practices Act Charges -Parallel Resolutions with the Securities and Exchange Commission and Brazilian Authorities Equaling $97 Million in Disgorgement Also Announced Today' (24 October 2016).

Iraq, Kazakhstan, Malaysia, Nigeria, Russia, and Thailand.[414] As part of the resolution, Rolls-Royce entered into a deferred prosecution agreement with the DOJ involving criminal penalties of USD 195 million,[415] a deferred prosecution agreement with the UK Serious Fraud Office (SFO) involving a total fine of USD 605 million,[416] and a leniency agreement with the Brazilian Ministério Público Federal including a penalty of USD 25 million. Because the acts underlying the resolution with the Ministério Público Federal overlapped with the acts underlying part of the DOJ's resolution, the DOJ agreed to credit the USD 25 million that Rolls-Royce agreed to pay in Brazil against the total fine in the US.[417] It was the first time that the DOJ and SFO entered into two separate but coordinated deferred prosecution agreements in the US and UK.[418]

While Rolls-Royce had not initially self-reported suspicions of criminal conduct to the authorities, the DOJ credited the company for cooperating in the subsequent investigations, taking substantial corrective measures, including 'terminating business relationships with multiple employees and third-party intermediaries, enhancing compliance procedures to review and approve intermediaries; and implementing new and enhanced internal controls to address and mitigate corruption and compliance risks'.[419] In addition to continued cooperation with ongoing investigations, the agreement requires Rolls-Royce to enhance the implementation of these measures.[420]

When announcing the DOJ deferred prosecution agreement, Chief Andrew Weissmann of the Fraud Section of the DOJ's Criminal Division remarked that '[t]he global nature of this crime [foreign bribery] requires a global response, and this case is yet another example of the strong relationship between the United States and U.K. Serious Fraud Office and Brazilian

[414] DOJ Press Release, 'Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case - Company Agrees to $800 Million Global Resolution with authorities in the United States, the United Kingdom and Brazil' (17 January 2017).
[415] *US v Rolls Royce Plc*, Deferred Prosecution Agreement. United States District Court for the Southern District of Ohio, Case No 2:16-CR-247 (17 January 2017).
[416] *SFO v Rolls Royce PLC, Rolls Royce Energy Systems Inc.*, Deferred Prosecution Agreement, Crown Court at Southwark, Case No U20170036 (17 January 2017).
[417] DOJ Press Release, 'Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case - Company Agrees to $800 Million Global Resolution with authorities in the United States, the United Kingdom and Brazil' (17 January 2017).
[418] More precisely, in England, Wales, and Northern Ireland in line with the SFO's jurisdiction.
[419] DOJ Press Release, 'Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case - Company Agrees to $800 Million Global Resolution with authorities in the United States, the United Kingdom and Brazil' (17 January 2017).
[420] DOJ Press Release, 'Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case - Company Agrees to $800 Million Global Resolution with authorities in the United States, the United Kingdom and Brazil' (17 January 2017).

Ministério Público Federal, and the collective efforts to ensure that ethical companies can compete on an even playing field anywhere in the world'.[421] Assistant Director in Charge Paul M Abbate of the FBI's Washington Field Office added that this parallel investigation is a 'tremendous example of the central importance of working cooperatively alongside our international partners to achieve a fair and meaningful resolution' as well as a 'reflection of the immense reach and capabilities of the FBI's Washington Field Office international corruption squad and the global impact of the anti-corruption program'.[422]

Another prominent example is the coordinated resolution of investigations by US and French authorities into Société Générale SA, the French global financial services institution, in 2018. To settle charges relating to a multi-year bribery scheme of government officials in Libya and the manipulation of the London InterBank Offered Rate (LIBOR), Société Générale entered into a deferred prosecution agreement with the DOJ.[423] In related proceedings, the company entered into a judicial public interest agreement (*convention judiciaire d'intérêt public*) with the French Parquet National Financier to resolve charges relating to the Libya bribery scheme (but not the LIBOR manipulation also covered by the DOJ deferred prosecution agreement).[424] This was the first coordinated resolution together with French authorities in a foreign bribery case. As part of the resolution, the DOJ agreed to credit approximately USD 292 million that Société Générale was to pay to the French authorities under its own deferred prosecution agreement which equals approximately 50 per cent of the total criminal penalty otherwise payable in the US.[425]

In response to the increasing number of coordinated resolutions together with foreign enforcement authorities, the DOJ Justice Manual expressly added a section on the coordination of parallel proceedings in 2018.[426] It provides that DOJ attorneys should 'coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with

[421] Ibid.
[422] Ibid.
[423] *US v Société Générale SA*, Deferred Prosecution Agreement, US District Court for the District of New York, Case No 18-CR-253 (5 June 2018).
[424] *Le Procureur de la Republique Financier près le tribunal de grande instance de Paris et Société Générale SA*, Convention judiciaire d'intérêt public, Réf PNF-15 254 000 424 (24 May 2018).
[425] DOJ Press Release, 'Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate' (4 June 2018).
[426] DOJ, Justice Manual, § 1-12.100 (Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct) (2018). See also, DOJ, Office of the Deputy Attorney General, Policy on Coordination of Corporate Resolution Penalties (9 May 2018).

a company for the same misconduct'.[427] This policy, also known as the 'anti-piling-on' policy, has been utilised immediately in practice.[428] For example, in 2018, when the DOJ entered into a non-prosecution agreement with Brazil-based Petróleo Brasileiro SA (Petrobras) to settle allegations of FCPA violations, the DOJ credited the payments Petrobras made to the SEC (10 per cent) and Brazil's Ministério Público Federal (80 per cent), decreasing the amount payable to the DOJ by 90 per cent.[429] The DOJ emphasised the fact that Petrobras was to enter into a parallel resolution with the Brazilian authorities and be under their supervision as a consideration for this reduction or shifting of payments as well as for not insisting on a US-appointed corporate monitor.[430]

A final example that brings together US, UK, and French authorities, is the coordinated resolution in 2020 with Airbus SE, the worldwide second largest aerospace company based in France. As part of this global resolution, the DOJ agreed a deferred prosecution agreement with Airbus to resolve foreign bribery charges under the FCPA and export control charges under the Arms Export Control Act in exchange for continued cooperation, enhancing its compliance program, taking remedial measures, and payments of USD 2.3 billion.[431] In related proceedings, Airbus entered into a judicial public interest agreement (*convention judiciaire d'intérêt public*) with the French Parquet National Financier to resolve investigations 'over bribes paid to government officials and non-governmental airline executives in China and multiple other countries and agreed to pay more than 2 billion Euros'.[432] Finally, Airbus also entered into a deferred prosecution agreement with the UK's

[427] DOJ, Justice Manual, § 1-12.100 (Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct) (2018). See also, Sharon Oded, 'The DOJ's Anti-Piling On Policy: time to reflect?' in in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 240-44.

[428] See Gibson Dunn, '2020 Mid-Year Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements' (15 July 2020) <www.gibsondunn.com/2020-mid-year-npa-dpa-update/#_ftn2>.

[429] *Re: Petroleo Brasileiro S.A. – Petrobras*, Non-Prosecution Agreement between the US DOJ and *Petroleo Brasileiro S.A. – Petrobras* (26 September 2018) 3.

[430] DOJ Press Release, 'U.S. Dep't of Justice, Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than $850 Million for FCPA Violations' (27 September 2018); *Re: Petroleo Brasileiro S.A. – Petrobras*, Non-Prosecution Agreement between the US DOJ and *Petroleo Brasileiro S.A. – Petrobras* (26 September 2018) 3. See also, *US v TechnipFMC plc*, Deferred Prosecution Agreement, US District Court for the Eastern District of New York, Case No 19-CR-278 (25 June 2019) 9 (the DOJ crediting approximately USD 214 million that Technip agreed to pay to Brazilian authorities under a leniency agreement towards the payments of approximately USD 296 million indicated in its deferred prosecution agreement).

[431] *US v Airbus SE*, Deferred Prosecution Agreement, US District Court for the District of Columbia, Case No 1:20-CR-00021-TFH (31 January 2020).

[432] DOJ Press Release, 'Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case' (31 January 2020); *Le Procureur de la Republique Financier près le tribunal de grande instance de Paris et Airbus SE*, Convention judiciaire d'intérêt public, Réf PNF-16 159 000 839 (29 January 2020).

SFO over bribery payments in Malaysia, Sri Lanka, Taiwan, Indonesia and Ghana, in which it agreed to pay approximately EUR 990 million.[433]

Notably, the DOJ only claimed a relatively small amount of the overall payments in this global resolution, crediting approximately USD 1.8 billion of the USD 2.3 billion required under its deferred prosecution agreement in payments made to the Parquet National Financier.[434] In addition, the DOJ accepted that the monitorship will be solely under the supervision of the French authorities.[435] The agreement also highlighted some interesting points regarding the DOJ's approach to enforcement jurisdiction in the context of coordinated resolutions with foreign law enforcement authorities. On the one hand, the DOJ acted on a very broad understanding of territorial jurisdiction, premising its authority on allegations that Airbus employees and agents sent emails while in the US and hosted foreign officials at US holiday sites.[436] On the other, the deferred prosecution agreement contains an explicit recognition of the limits of US jurisdiction when acknowledging that

> the Company is neither a U.S. issuer nor a domestic concern, and the territorial jurisdiction over the corrupt conduct is limited; in addition, although the United States' interests are significant enough to warrant a resolution, France's and the United Kingdom's interests over the Company's corruption-related conduct, and jurisdictional bases for a resolution, are significantly stronger, and thus the Fraud Section and the Office [US DOJ, Criminal Division, Fraud Section and the US Attorney's Office for the District of Columbia, Criminal Division] deferred to France and the United Kingdom to vindicate their respective interests as those countries deem appropriate, and … have taken into account these countries' determination of the appropriate resolution into all aspects of the U.S. resolution.[437]

[433] *SFO v Airbus SE*, Deferred Prosecution Agreement, Crown Court at Southwark, Case No U20200108 (31 January 2020).
[434] *US v Airbus SE*, Deferred Prosecution Agreement, US District Court for the District of Columbia, Case No 1:20-CR-00021-TFH (31 January 2020) (31 January 2020) 13.
[435] See Airbus Press Release, 'Airbus reaches agreements with French, U.K. and U.S. authorities' (31 January 2021) <www.airbus.com/newsroom/press-releases/en/2020/01/airbus-reaches-agreements-with-french-uk-and-us-authorities.html>.
[436] *US v Airbus SE*, Deferred Prosecution Agreement, US District Court for the District of Columbia, Case No 1:20-CR-00021-TFH (31 January 2020) A-9–A-10.
[437] Ibid 5. See also, DOJ Press Release, 'Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case' (31 January 2020); John J Carney and Michelle N Tanney, 'Record Airbus FCPA Settlement Reinforces DOJ's Position on Cooperation and the Value of a Strong Ethics and Compliance Program' (*Lexology*, 6 February 2020) <www.lexology.com/library/detail.aspx?g=a1d24c84-5b27-4c27-8495-22d4cf461a93>.

3.3.4 Influence through diplomacy: Swiss banks and American tax evaders

Members of the DOJ and other US officials regularly meet and discuss with foreign counterparts in 'diplomatic settings' such as professional associations or international meetings.[438] While it is difficult to measure the exact degree of influence in these contexts, US officials are likely to share their views on corporate crime enforcement policies, including their use of non-prosecution and deferred prosecution agreements.[439]

Besides these more general avenues, one example in particular illustrates the capacity of US diplomatic influence in the context of extending non-prosecution and deferred prosecution agreements to foreign corporations and countries: Swiss banks and American tax evaders.

As discussed in section 3.3.2, the DOJ entered into a deferred prosecution agreement with UBS in 2009 in which UBS, among others, agreed to provide the US government with the identities and account information of US clients suspected of tax evasion.[440] While the exact number is not publicly known since that part of the agreement was sealed,[441] it has been reported as approximately 250 account holders.[442] UBS was able to share the names of these account holders, which were already subject to a mutual assistance request by the US,[443] without violating Swiss bank secrecy laws because it had received a rare permission from the Swiss Financial Market Supervisory Authority.[444] Following UBS' transfer of the account information, the US withdrew its mutual assistance request,[445] which reportedly prompted the President of the Swiss Confederation, Hans Rudolf Merz, to declare that 'Switzerland's

[438] See for example, meetings in the context of the International Association of Prosecutors or international organisations such as the OECD (for a more detailed discussion, see chapter 4).
[439] For example, in 2016, the US Attorney General Loretta E Lynch and the Chief of the DOJ Fraud Section, Andrew Weissmann, attended a high-level meeting of government officials organised by the OECD to discuss issues relating to the OECD-ABC, including whether corporate settlements (such as deferred prosecution agreements) can be used as an incentive for companies to self-report wrongdoing (OECD, Anti-Bribery Ministerial Meeting Programme, *The OECD Anti-Bribery Convention and its role in the global fight against corruption: Towards A New Era of Enforcement* (16 March 2016) 8).
[440] See notes 395-96. See also, David Voreacos and Carlyn Kolker, 'U.S. Sues UBS Seeking Swiss Account Customer Names' *Bloomberg* (19 February 2009).
[441] *US v UBS AG*, Deferred Prosecution Agreement, US District Court for the Southern District of Florida, Case No 09-60033-CR-COHN (18 February 2009) para 9 and Exhibit E (filed under seal).
[442] See for example, Lynnley Browning, 'A 2nd inquiry hits UBS, now pressed for 52,000 names' *The New York Times* (20 February 2009).
[443] See Judgement of the Swiss Federal Administrative Tribunal, Case Nos A7342/2008 and A-7426/2008 (5 March 2009). See also, Swiss Federal Law on International Judicial Assistance in Criminal Matters 1981, RS 351.1 (20 March 1981); Bilateral Agreement between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, 27 UST 2019, TIAS No 8302 (25 May 1973).
[444] Swiss Financial Market Supervisory Authority Press Release, 'FINMA Makes Possible Settlement Between UBS and the US Authorities and Announces the Results of Its Own Investigation' (18 February 2009).
[445] Sam Cage, 'US Withdraws Request for Swiss Help on UBS Case' *Reuters* (19 March 2009).

banking secrecy remained "intact"' and that it will continue protecting confidential bank accounts.[446] However, only one day later, the US initiated proceedings to carry out an Internal Revenue Service summons from 1 July 2008, which would have forced the bank to reveal the names of approximately 52,000 US clients.[447] While UBS was permitted to challenge the Internal Revenue Service summons under the deferred prosecution agreement,[448] which it immediately indicated it would do,[449] the agreement would have required UBS to comply with the summons in case the challenge was unsuccessful and once all appellate remedies were exhausted.[450] After several rounds of negotiations, including, among others, appeals by the Swiss President to the US Secretary of the Treasury and Swiss Government threats to block compliance with any US court order in the matter,[451] this dilemma was eventually resolved through a treaty between the US and Switzerland on 19 August 2009, which allowed UBS to provide more information on potential American tax evaders without violating Swiss bank secrecy laws.[452]

This diplomatic initiative not only helped to resolve the DOJ investigation into UBS but laid the groundwork for a very large number of Swiss banks or banks with branches in Switzerland to enter into similar settlements as part of a dedicated 'Swiss Bank Program'. Under the program, which was jointly announced by the DOJ and the Swiss Federal Department of Finance on 29 August 2013, Swiss banks could resolve potential criminal liabilities in the US by entering into a non-prosecution agreement.[453] In exchange, the banks were required to

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[446] Imogen Foulkes, 'Clock Ticking for Swiss Bank Secrecy' *BBC News* (20 February 2009).
[447] Lynnley Browning, 'A 2nd inquiry hits UBS, now pressed for 52,000 names' *The New York Times* (20 February 2009); Devlin Barrett, 'U.S. Steps Up Pressure on UBS in Bank Secrets Case' *Associated Press* (19 February 2009).
[448] *US v UBS AG*, Deferred Prosecution Agreement, US District Court for the Southern District of Florida, Case No 09-60033-CR-COHN (18 February 2009) para 13.
[449] David Voreacos and Carlyn Kolker, 'U.S. Sues UBS Seeking Swiss Account Customer Names' *Bloomberg* (19 February 2009).
[450] *US v UBS AG*, Deferred Prosecution Agreement, US District Court for the Southern District of Florida, Case No 09-60033-CR-COHN (18 February 2009) para 13. See also, Bradley J Bondi, 'Don't Tread on Me: Has the United States Government's Quest for Customer Records from UBS Sounded the Death Knell for Swiss Bank Secrecy Laws?' (2010) 30 Northwestern Journal of International Law & Business 1, 11.
[451] Contemporary Practice of the United States Relating to International Law, 'United States and Switzerland Agree on Access to Swiss Bank Information' (2009) 103(4) American Journal of International Law 748, 748. See also, Emma Thomasson, 'Swiss Party Wants to Punish US for UBS Probe' *Reuters* (21 February 2009).
[452] Bilateral Agreement between the United States of America and the Swiss Confederation on the request for information from the Internal Revenue Service of the United States of America regarding UBS AG, a corporation established under the laws of the Swiss Confederation (19 August 2009) <www.justice.gov/archive/tax/txdv09_US_Swiss_Agreement%20_Decl_Signed.pdf>. See also, Lynnley Browning, 'Swiss Approve Deal for UBS to Reveal U.S. Clients Suspected of Tax Evasion' *The New York Times* (17 June 2010).
[453] DOJ and Swiss Federal Department of Finance, Joint Statement (29 August 2013) <www.justice.gov/tax/file/631356/download>. See also, DOJ Press Release, 'United States and Switzerland Issue Joint Statement Regarding Tax Evasion Investigations - Switzerland Encourages Its Banks to Cooperate with New

'make a complete disclosure of their cross-border activities; [p]rovide detailed information on an account-by-account basis for accounts in which U.S. taxpayers have a direct or indirect interest; [c]ooperate in treaty requests for account information; p[r]ovide detailed information as to other banks hat transferred funds into secret accounts or that accepted funds when secret accounts were closed; [a]gree to close accounts of accountholders who fail to come into compliance with U.S. reporting obligations; and [p]ay appropriate penalties'.[454] The program led to eighty-four non-prosecution agreements,[455] levied more than USD 1.36 billion in penalties,[456] and resulted in fundamental institutional changes not only within the involved banks but also more generally in the Swiss banking sector.[457]

3.3.5 Rationales from a US perspective

After discussing how the US has extended its non-prosecution and deferred prosecution agreements regime to foreign corporations and, indirectly, to foreign countries, this section focuses on the underlying rationales from a US perspective. Based on the settlement practice analysed in the previous sections as well as statements made by US officials, a combination of partially overlapping factors can be identified, reflecting enforcement efficiency, economic, and political rationales.

To begin with, one obvious reason for seeking to extend the application of non-prosecution and deferred prosecution agreements to foreign corporations may simply be perceived enforcement efficiency. As demonstrated throughout this chapter, US governmental law enforcement practitioners and policy makers have perceived and promoted non-prosecution and deferred prosecution agreements as an efficient and flexible way to enforce against complex economic crimes involving corporations. In particular, prosecutors do not have to prove factual allegations or at least not to the same degree required in a trial. This rationale not only applies equally to foreign corporations but is likely accentuated. Building cases against foreign corporations for violating US criminal laws that hold up in trial are often

Program Which Will Require Significant Financial Penalties and Information Sharing from Banks That Aided Secret Account Holders' (29 August 2013).

[454] DOJ, Swiss Bank Program (2020) <https://www.justice.gov/tax/swiss-bank-program>.

[455] Ibid.

[456] DOJ Press Release, 'Justice Department Announces Final Swiss Bank Program Category 2 Resolution with HSZH Verwaltungs AG - Department's Swiss Bank Program Imposed More Than $1.3 Billion in Penalties on 80 Banks, Which Continue to Cooperate with the Department' (27 January 2016).

[457] See for example, Florian Überbacher and Andreas Georg Scherer, 'Indirect Compellence and Institutional Change: U.S. Extraterritorial Law Enforcement and the Erosion of Swiss Banking Secrecy' (2020) 65(3) Administrative Science Quarterly 565.

complicated. For example, prosecutors often do not have jurisdiction over employees or documents abroad, with sending US law enforcement personnel to investigate or acquiring assistance from foreign counterparts regularly impossible or impractical.[458]

A related factor incentivising the use of non-prosecution or deferred prosecution agreements in cases involving foreign corporations may be that potentially far-reaching assertions on points of law are also not fully tested in trial and decided by a court.[459] This provides prosecutors with some 'flexibility' in suggesting interpretations of, for example, extraterritorial reach or substantive conditions of corporate liability in US criminal laws. In this context, it has been argued that the parallel rise of non-prosecution and deferred prosecution agreements and FCPA enforcement since the early 2000s has led to a lack of 'workable case law, leaving the ambiguities surrounding the FCPA statute unmolded'.[460] Commentators have referred to this flexibility as one of the reasons why prosecutors operate in the 'shadow' of the law when using non-prosecution and deferred prosecution agreements.[461] Finally, the attractiveness of procedures that incentivise foreign corporations to cooperate while not requiring the authorities to substantiate their case in trial may be further increased when considering the investigative burden, or rather its distribution. As explained at the beginning of section 3.1.1, US authorities have been shouldering a much larger number of corporate enforcement actions with an international dimension than authorities in any other country.[462]

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[458] See Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 221-22.

[459] Since non-prosecution agreements do not entail the filing of charges, they are not subject to court approval. Even though there has been considerable controversy over this issue, judicial oversight of deferred prosecution agreements, which involve charges filed in court, remains very limited (see notes 205, 379-80).

[460] Nick Gersh, 'The Curious Absence of FCPA Trials' (*The Global Anticorruption Blog*, 8 September 2017) <https://globalanticorruptionblog.com/2017/09/08/the-curious-absence-of-fcpa-trials/>. See also, Wilson Ang, Paul Sumilas and Jeremy Lua, 'Deferred Prosecution Agreements – Justice delayed or Justice denied?' (2018) 14 Norton Rose Fulbright Asia Pacific Insights: Business ethics and anti-corruption 4 <www.nortonrosefulbright.com/en-id/knowledge/publications/48cf9cbe/deferred-prosecution-agreements--justice-delayed-or-justice-denied>.

[461] Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 198; Nick Werle, 'Prosecuting Corporate Crime when Firms Are Too Big to Jail: Investigation, Deterrence, and Judicial Review' (2019) 128 The Yale Law Journal 1366, 1380. See generally, James R Copland and Rafael A Mangual, *Justice out of the Shadows: Federal Deferred Prosecution Agreements and the Political Order* (Manhattan Institute 2016).

[462] See note 362. See also, Gibson Dunn, '2016 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)' (6 July 2016) <www.gibsondunn.com/2016-mid-year-update-on-corporate-non-prosecution-agreements-npas-and-deferred-prosecution-agreements-dpas/>; Jennifer Arlen and Samuel Buell, 'The Global Expansion of Corporate Criminal Liability: Effective Enforcement Policy Across Legal Systems' (2020) 93 Southern California Law Review 697, 699-700.

Furthermore, several financial and economic rationales can be identified. As shown,[463] the monetary recoveries directly related to non-prosecution and deferred prosecution agreements can be substantial. The application of these agreements to foreign corporations may also facilitate indirect forms of financial recovery, as can be seen in the context of the Swiss Bank Program.[464]

Beyond immediate financial recovery, the use of non-prosecution and deferred prosecution agreements with foreign corporations also contributes towards promoting US economic interests more generally. In particular, it allows the US to (i) 'level the playing field' between American and foreign corporations and (ii) promote corporate practices that orientate at US regulatory and economic preferences.

First, the prevention of competitive disadvantages for US corporations due to more rigid US laws on corporate criminal liability for economic crimes has been identified as an important motivation for efforts to extend US approaches to foreign corporations, especially in the FCPA context.[465] The application of broad corporate criminal liability and jurisdiction rules, facilitated through the rise of corporate non-prosecution and deferred prosecution agreements, has been associated with significantly higher business costs for US corporations and economy.[466] US officials have expressly referred to a level playing field for American and foreign corporations when explaining their reasons for entering into non-prosecution and deferred prosecution agreements with foreign corporations. For example, when announcing the deferred prosecution agreement with Technip in 2010,[467] FBI Assistant Director Kevin L Perkins emphasised that '[t]he FBI is committed to pursuing those who disrupt the level playing field to which companies in the U.S. and around the world are entitled'.[468] Similarly, when announcing the deferred prosecution agreement with Rolls-Royce in 2017,[469] Andrew Weissmann, Chief of the Fraud Section of the DOJ's Criminal Division, declared that '[t]he

[463] See section 3.1.3 for an overview and sections 3.3.2-3.3.4 for examples.
[464] See section 3.3.4.
[465] See Rachel Brewster, 'Enforcing the FCPA: International Resonance and Domestic Strategy' (2017) 103 Virginia Law Review 1611, 1630, 1659, and 1663; Michael Elliot and Felix Lüth, 'Corporate Liability for Economic Crimes: A Contested Transnational History' in Neil Boister, Sabine Gless and Florian Jessberger (eds), *Histories of Transnational Criminal Law* (Oxford University Press 2021) 202. See generally, Tonya L Putnam, *Courts without Borders* (Cambridge University Press 2016) 25.
[466] See for example, James R Copland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements* (Manhattan Institute 2012) 11.
[467] See discussion in section 3.3.2.
[468] DOJ Press Release, 'Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty' (28 June 2010).
[469] See discussion in section 3.3.3.

global nature of this crime [foreign bribery] requires a global response … to ensure that ethical companies can compete on an even playing field anywhere in the world'.[470] Assistant Director Stephen Richardson of the FBI's Criminal Investigative Division added that '[t]his resolution will stand as a warning to big and small companies all across the world that the FBI will not tolerate the foreign corruption that threatens our fair and competitive markets'.[471]

Secondly, non-prosecution and deferred prosecution agreements provide US authorities with a flexible tool to promote practices within corporations and even entire industries that reflect US regulatory and economic preferences.[472] As shown in the previous sections, in reaching and implementing these agreements, DOJ and other federal agencies have been able to require far-reaching insights into and changes to business practices as well as governance structures of foreign corporations.[473] They can include, among others, changing long-standing sales and compensation practices, implementing expensive compliance and reporting programs, modifying consulting, contracting, and merger decisions as well as replacing senior personnel and making fundamental changes to corporate structures.[474]

Federal prosecutors have confirmed the potential of non-prosecution and deferred prosecution agreements as a governance instrument to steer corporate behaviour on several occasions. For example, in his 2012 speech to the New York Bar Association, the Assistant Attorney General, Lanny Breuer, noted that while 'I've heard people criticize them and I've heard people praise them …, DPAs [deferred prosecution agreements] have had a truly transformative effect on particular companies and, more generally, on corporate culture across the globe'.[475] The following year, Denis McInerney, Deputy Assistant Attorney General in the DOJ's Criminal Division and former Chief of the Fraud Section, reportedly defended non-prosecution and

[470] DOJ Press Release, 'Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case - Company Agrees to $800 Million Global Resolution with authorities in the United States, the United Kingdom and Brazil' (17 January 2017).
[471] Ibid. US authorities have made similar statements in the context of many other agreements, including the prominent deferred prosecution agreement with Société Générale and non-prosecution agreement with Petrobras in 2018 (DOJ Press Release, 'Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate' (4 June 2018); DOJ Press Release, 'U.S. Dep't of Justice, Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than $850 Million for FCPA Violations' (27 September 2018)).
[472] See generally, Yurika Ishii, 'On law enforcement through agreements between the US regulatory authorities and foreign corporations', in Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann and Joachim Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 243.
[473] See sections 3.3.2-3.3.4. See generally, note 203.
[474] See sections 3.3.2-3.3.4. See generally, James R Copland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements* (Manhattan Institute 2012) 5.
[475] Lanny A Breuer, Assistant Attorney, Speech at the New York Bar Association (13 September 2012) <www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association>.

deferred prosecution agreements as 'a product of the reasoned judgment developed over time by prosecutors—to incentivize companies to do all the things that we want them to do'.[476] In December 2014, US Assistant Attorney General for the DOJ's Criminal Division, Leslie Caldwell, highlighted the importance of negotiated resolutions that allowed the DOJ to 'impose reforms, impose compliance controls, and impose all sorts of behavioral change', which led her to conclude that they are a 'more powerful tool than actually going to trial'.[477] Finally, when announcing the resolution with Alstom, the French power and transportation company, in 2014, First Assistant US Attorney Michael Gustafson, alongside Assistant Attorney General Leslie Caldwell, expressed that he is 'hopeful that this resolution, and in particular the deferred prosecution agreement with Alstom Power, will provide the company an opportunity to reshape its culture and restore its place as a respected corporate citizen'.[478] The government's strategy has also been noticed by corporate counsel with, for example, the law firm Gibson Dunn commenting that '[s]uch agreements enable prosecutors … to craft detailed, if not sometimes draconian, compliance measures for one company in a given industry, which can then serve as a benchmarking signal to other companies'.[479]

Finally, there are discernible rationales for extending non-prosecution and deferred prosecution agreements to foreign corporations and countries that can broadly be referred to as political.[480] They involve especially perceived threats to national security and the protection of the functioning of US law inside the US.

In the context of rationalising the extraterritorial application of US law more generally, the latter has been referred to as the 'domestic rule integrity logic'.[481] According to this logic, '[t]hreats of this type [to the functioning of US law inside the US] exist where limiting the reach of U.S. law to conduct inside the United States would push the regulated behaviour

[476] Corporate Crime Reporter, 'McInerney Defends Deferred and Non Prosecution Agreements' (C*orporate Crime Reporter,* 7 May 2013) <www.corporatecrimereporter.com/news/200/mcinerneydefendsdpas05072013/>.
[477] Rahul Rose, 'Caldwell: Settlement a "More Powerful Tool Than Convictions"' *Global Investigations Review* (3 December 2014).
[478] DOJ Press Release, 'Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges' (22 December 2014).
[479] Gibson Dunn, '2012 Mid-Year Update on Corporate Deferred Prosecution and Non-Prosecution Agreements' (10 July 2012) <www.gibsondunn.com/2012-mid-year-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/#_edn12> with reference to the non-prosecution agreement between the DOJ and Barclays Bank in 2012 (see note 389).
[480] See Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 243 (noting that '[p]rosecutions are quintessential exercise of U.S. sovereign power').
[481] Tonya L Putnam, *Courts without Borders: Law, Politics and U.S. extraterritoriality* (Cambridge University Press 2016) 4.

outside U.S. borders but would not simultaneously exclude its unwanted effects'.[482] A prime example in the context of this study is the DOJ's extension of non-prosecution and deferred prosecution agreements to foreign banks in the context of assisting tax evasion by US citizens, as illustrated by the UBS deferred prosecution agreement in 2009 as well as the many non-prosecution agreements subsequently entered into as part of the Swiss Bank Program.[483] The motive of protecting the domestic functioning of US law was, for example, emphasised at the press conference announcing the deferred prosecution agreement with UBS, where John DiCicco, Acting Assistant Attorney General of the DOJ's Tax Division, stated that '[t]oday's agreement is but one milestone in an ongoing law enforcement effort to reassure hard-working and law-abiding taxpayers who pay their fair share of taxes that those who don't will pay a heavy price'.[484] Alexander Acosta, US Attorney for the Southern District of Florida, added that '[t]he veil of secrecy has been pulled aside and we will continue to aggressively pursue those who shirk their federal tax obligations or assist others in doing so'.[485]

The political dimension of extending non-prosecution and deferred prosecution agreements is also illustrated by their frequent use in resolving investigations into violations of trade export controls, sanctions and related regulations.[486] In this context, federal prosecutors have expressly referred to national security interests when rationalising non-prosecution and deferred prosecution agreements with foreign corporations on several occasions. For example, when announcing the deferred prosecution agreement with HSBC to resolve investigations into violations of the Bank Secrecy Act, the International Emergency Economic Powers Act, and the Trading with the Enemy Act in 2012, Manhattan District Attorney Cyrus Vance explained that

> New York is a center of international finance, and those who use our banks as a vehicle for international crime will not be tolerated. My office has entered into Deferred Prosecution Agreements with two different banks in just the past two days, and with six banks over the

[482] Ibid.
[483] For a discussion of the UBS agreement and Swiss Bank Program, see sections 3.3.2 and 3.3.4.
[484] DOJ Press Release, 'UBS Enters into Deferred Prosecution Agreement Bank Admits to Helping U.S. Taxpayers Hide Accounts from IRS; Agrees to Identify Customers & Pay $780 Million' (18 February 2009).
[485] Ibid.
[486] See section 3.3.2. See also, Gibson Dunn, '2012 Year-End Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)' (3 January 2013) <www.gibsondunn.com/2012-year-end-update-on-corporate-deferred-prosecution-agreements-dpas-and-non-prosecution-agreements-npas/>; Gibson Dunn, '2015 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)' (8 July 2015) <www.gibsondunn.com/2015-mid-year-update-on-corporate-non-prosecution-agreements-npas-and-deferred-prosecution-agreements-dpas/#_ftnref33>; Brandon L Garrett and Jon Ashley, Duke and UVA Corporate Prosecution Registry <https://corporate-prosecution-registry.com/browse/>.

past four years. Sanctions enforcement is of vital importance to our national security and the integrity of our financial system.[487]

At the same press conference Richard Weber, Chief of the Internal Revenue Service Criminal Investigation Unit, noted that '[b]anks are the first layer of defense against money launderers and other criminal enterprises who choose to utilize our nation's financial institutions to further their criminal activity'.[488]

Another agreement that highlighted the government's focus on national security was the deferred prosecution agreement with Commerzbank AG in 2015 to resolve charges based on the Bank Secrecy Act and the International Emergency Economic Powers Act.[489] In announcing the settlement, US Attorney Ronald Machen stressed the importance of 'protect[ing] the national security of the United States and promot[ing] our foreign policy interests'.[490]

However, national security considerations were not limited to the sanctions and anti-money laundering context but also became visible in foreign bribery resolutions. For example, when announcing the deferred prosecution agreement with Société Générale in 2018, Assistant Director in Charge William Sweeney of the FBI New York Field Office remarked that '[w]hen financial institutions convince foreign officials to accept bribes in return for lucrative business deals, their actions directly threaten the international free market system, not to mention our national security'.[491] A few months later, at the press conference for the Petrobras non-prosecution agreement, US Attorney Zachary Terwilliger remarked that '[p]rotecting the integrity of U.S. financial markets is one of the highest priorities of this Administration [and] [t]hose who choose to access our capital markets while failing to disclose the corrupt activities

[487] DOJ Press Release, 'HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement - Bank Agrees to Enhanced Compliance Obligations, Oversight by Monitor in Connection with Five-year Agreement' (11 December 2012). See also, section 3.3.2.
[488] DOJ Press Release, 'HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement - Bank Agrees to Enhanced Compliance Obligations, Oversight by Monitor in Connection with Five-year Agreement' (11 December 2012).
[489] *US v Commerzbank AG and Commerzbank AG New York Branch*, Deferred Prosecution Agreement, US District Court for the District of Columbia, Case No 1:15-CR-00031-BAH (12 March 2015).
[490] DOJ Press Release, 'U.S. Dep't of Justice, Commerzbank AG Admits to Sanctions and Bank Secrecy Violations, Agrees to Forfeit $563 Million and Pay $79 Million Fine Combined with Payments to Regulators' (12 March 2015).
[491] DOJ Press Release, 'Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate' (4 June 2018).

of company executives will be held accountable'.[492] Lastly, in announcing the Airbus deferred prosecution agreement in 2020, Special Agent in Charge Peter Fitzhugh of US Immigration and Customs Enforcement's Homeland Security Investigations explained that 'the bribery of government officials, specifically those involved in the procurement of U.S. military technology, posed a national security threat to both the U.S. and its allies'.[493]

In the context of such prominent pronouncements of national security considerations, it is notable that non-prosecution and deferred prosecution agreements do not seem to be regularly offered to resolve investigations into the violation of terrorism financing laws,[494] an area of economic crime that is usually closely associated with US national security.[495] In contrast to, for example, money laundering violations that may have indirectly facilitated the financing of organised criminal and terrorist groups, it appears that the DOJ does not perceive corporate non-prosecution and deferred prosecution agreements as appropriate responses to suspected violations of terrorism financing laws.[496]

Furthermore, a closer look at the kind of foreign corporations that enter into non-prosecution or deferred prosecution agreements also attests to the political dimensions (and limits) of the US's extension of these procedures. In addition to being regularly large and publicly traded, these corporations (or rather the parent companies) come from allied countries that have close economic and political ties to the US. For example, an analysis of the entries listed in the Corporate Prosecution Registry reports non-prosecution and deferred prosecution agreements with corporations from the following countries: Argentina, Bahamas, Brazil, Canada, Chile, Costa Rica, Denmark, France, Germany, Greece, Hungary, India, Israel, Italy, Japan, Luxembourg, Mexico, the Netherlands, Norway, Panama, Saudi Arabia, Singapore, South Korea, Spain, Sweden, Switzerland, United Arab Emirates, and the UK.[497] Notably, the Corporate Prosecution Registry also lists one deferred prosecution agreement and one non-

[492] DOJ Press Release, 'U.S. Dep't of Justice, Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than $850 Million for FCPA Violations' (27 September 2018).
[493] DOJ Press Release, 'Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case' (31 January 2020).
[494] See Brandon L Garrett and Jon Ashley, Duke and UVA Corporate Prosecution Registry <https://corporate-prosecution-registry.com/browse/> accessed 30 September 2021.
[495] See generally, Colin King, Clive Walker and Jimmy Gurulé, (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave Macmillan 2018).
[496] Michael Taxay, 'Trends in the Prosecution of Terrorist Financing and Facilitation' (September 2014) 62(5) US Attorneys' Bulletin 2-8 (noting that whereas suspected financiers of terrorism get prosecuted, corporations accused of sanctions violations in relation to state sponsors of terrorism may receive deferred prosecution agreements instead).
[497] Brandon L Garrett and Jon Ashley, Duke and UVA Corporate Prosecution Registry <https://corporate-prosecution-registry.com/browse/> accessed 30 September 2021.

prosecution agreement involving Chinese companies. However, the former was entered into with the German company Daimler AG and three of its Chinese subsidiaries,[498] whereas the latter involved two Chinese subsidiaries of Massachusetts software company PTC Inc.[499] Thus, the agreements were really offered to and accepted by a German and US parent company, resonating with the identified group of home states. The exception to this rule may be the DOJ's recent deferred prosecution agreement with Mobile TeleSystems PJSC, the largest mobile telecommunications company in Russia, and its wholly owned Uzbek subsidiary, Kolorit Dizayn Ink LLC.[500] The circumstances of this resolution may, however, themselves be exceptional not only because Mobile TeleSystems PJSC was an issuer of publicly traded securities in the US (which provided a ground for jurisdiction) but also because the DOJ had already entered into two deferred prosecution agreements with major Dutch and Swedish telecommunications companies relating essential to the same bribery scheme in Uzbekistan.[501] While this is speculation, the DOJ may have perceived it as too inconsistent not to offer a deferred prosecution agreement to Mobile TeleSystems PJSC in light of these circumstances.

The rationales identified in this section explain not only the strategic interest of the US in extending the use of non-prosecution and deferred prosecution agreements to foreign corporations but also to foreign countries. An increased availability of similar procedures in other jurisdictions, in particular, aligns with US interest in reducing competitive disadvantages for American corporations, while promoting US regulatory and economic preferences in the context of corporate governance. Similarly, it closely reflects the identified considerations relating to the protection of national security as well as the functioning of US law and internal markets.

As regards the US's capacity to obtain monetary recovery and influence business activities of foreign corporations directly arising from non-prosecution and deferred prosecution

[498] DOJ Press Release, 'Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay $93.6 Million in Criminal Penalties' (1 April 2010); *US v Daimler AG*, Deferred Prosecution Agreement, US District Court for the District of Columbia, Case No 1:10-CR-00063-RJL (24 March 2010).
[499] DOJ Press Release, 'PTC Inc. Subsidiaries Agree to Pay More Than $14 Million to Resolve Foreign Bribery Charges' (16 February 2016).
[500] *US v Mobile TeleSystems PJSC*, Deferred Prosecution Agreement, US District Court for the Southern District of New York, Case No 1:19-CR-00167-JPO (22 February 2019).
[501] *US v VimpelCom Ltd*, Deferred Prosecution Agreement, US District Court for the Southern District of New York, Case No 1:16-CR-00137-ER (10 February 2016); *US v Telia Company AB*, Deferred Prosecution Agreement, US District Court for the Southern District of New York, Case No 1:17-CR-00581-GBD (21 September 2017).

agreements, it may be argued that increased 'enforcement competition' from foreign authorities relying on newly introduced corporate non-prosecution agreements is against US interests. However, if at all, not much importance seems to be attached to this consideration. Instead, subsequent practice and statements by the DOJ rather appear to have 'rewarded' the introduction and use of similar settlement procedures in foreign jurisdictions. This can be seen not only from the growing number of coordinated resolutions involving foreign authorities but also the increasingly large amounts the DOJ agreed to credit towards payments made by corporations to these foreign authorities.[502] On several occasions, DOJ officials have also emphasised the importance of cooperation in the context of coordinated resolutions, including to meet US interests.[503] For example, when announcing the Airbus resolution involving French and UK authorities, both countries that have recently adopted similar procedures, US Assistant Attorney General Brian Benczkowski stressed that 'the Department will continue to work aggressively with our partners across the globe to root out corruption, particularly corruption that harms American interests'.[504]

In addition, the increased availability of corporate non-prosecution agreements in other countries may be seen not only as potentially reducing the disproportionate enforcement burden on the US (and US tax payer) but also as improving US law enforcement efficiency through coordinated investigations and resolutions with foreign authorities,[505] including the possibility of extracting ever higher monetary recoveries.[506] This 'sharing' of the corporate enforcement space may also decrease the political costs associated with aggressive unilateral enforcement by US authorities.[507]

At the same time, the US seems to maintain its leadership role in corporate crime enforcement regardless of the availability of similar settlement procedures in other countries. So far, the vast majority of large-scale corporate prosecution agreements around the world have involved

[502] See section 3.3.3.
[503] Ibid.
[504] DOJ Press Release, 'Airbus Agrees to Pay Over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case' (31 January 2020).
[505] See note 362 and section 3.3.3. See also, Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 248.
[506] See especially the recent coordinated resolutions with Rolls-Royce, Société Générale, and Airbus discussed in section 3.3.3. See generally for the increasing monetary recoveries related to US non-prosecution and deferred prosecution agreements, section 3.1.3.
[507] See Tonya L Putnam, *Courts without Borders: Law, Politics and U.S. extraterritoriality* (Cambridge University Press 2016) 76. See also, Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16(3) European Journal of International Law 369, 404; William Magnuson, 'International Corporate Bribery and Unilateral Enforcement' (2013) 51 Columbia Journal of Transnational Law 360, 411-13.

US authorities, either acting on their own or in coordination with other states' authorities.[508] Indeed, the importance of the US market and economic infrastructure combined with the threat of exceptionally broad rules on corporate criminal liability and far-reaching powers of US prosecutors seem to continue to play a central role in the decision of large foreign corporations with close ties to the US to seek corporate non-prosecution agreements.[509] Many of the conditions and terms applied in the settlements with foreign law enforcement authorities are also modelled after the US approach and closely reflect US preferences.[510] It can thus be argued that the adoption and use of procedures akin to non-prosecution and deferred prosecution agreements in other countries helps to legitimise and establish the US approach with a continued leadership role of US law and enforcement authorities but with overall reduced financial and political costs for the US.

3.4 Conclusion

This chapter has traced the strange evolution of non-prosecution and deferred prosecution agreements from initially being introduced as leniency procedures for individual juvenile offenders to becoming one of the major enforcement responses to complex economic crimes involving large US and increasingly also foreign corporations.

Non-prosecution and deferred prosecution agreements emerged in prosecutorial practice at the beginning of the 20th century to protect individuals that had committed offences with limited perceived culpability from the potentially severe consequences of a criminal conviction and to encourage 'good behaviour' in the future. These utilitarian and rehabilitative considerations suddenly started to be extended to large corporations towards the end of the century, with the 1992 Salomon Brothers and 1994 Prudential Securities resolutions generally considered as the first corporate non-prosecution and deferred prosecution agreements. The impetus for this extension and the conditions applied in these

[508] See for example, the coordinated resolutions with Embraer, Rolls-Royce, Société Générale, Petrobras, or Airbus discussed in section 3.3.3. See generally, Brandon L Garrett and Jon Ashley, Duke and UVA Corporate Prosecution Registry <https://corporate-prosecution-registry.com/browse/> accessed 30 September 2021.
[509] See section 3.3.1. See also, Jennifer Arlen, 'The potential promise and perils of introducing deferred prosecution agreements outside the U.S.' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 156.
[510] See Jennifer Arlen, 'The potential promise and perils of introducing deferred prosecution agreements outside the U.S.' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 157-58.; Rachel Brewster and Samuel Buell, 'The Market for Global Anticorruption Enforcement' (2017) 80(1) Law and Contemporary Problems 193, 212-13; Jennifer Arlen and Samuel Buell, 'The Global Expansion of Corporate Criminal Liability: Effective Enforcement Policy Across Legal Systems' (2020) 93 Southern California Law Review 697, 700-03. See also, chapters 1 and 5.

early agreements can largely be attributed to prosecutorial initiative and prior practice (albeit in relation to individuals) as well as the US Sentencing Commission's expansion of its Sentencing Guidelines Manual to organisations in 1991. Together they established the idea that, like for individuals before,[511] it may be desirable to avoid the negative (especially collateral) consequences of a criminal conviction and to incentivise 'good behaviour' now (cooperation) and in the future (compliance and self-investigation) by offering non-prosecution and deferred prosecution agreements also to corporations. This paradigm shift was primarily motivated by a desire to increase enforcement efficiency against corporate crimes and to mitigate the adverse consequences of the traditional prosecutorial process aimed at conviction. Even though still stopping short of expressly addressing non-prosecution and deferred prosecution agreements, the DOJ included many of the motives and conditions already applied in practice in its guidance to federal prosecutors on bringing criminal charges against corporations in 1999 (Holder memo).

While the number of corporate non-prosecution and deferred prosecution agreements remained low for the first decade after the Salomon Brothers non-prosecution agreement, their use started to increase rapidly in 2003 and reached a relatively consistent level by 2006. This rise can be largely attributed to two domestic events or series of events that shook the US in the early 2000s: the 9/11 terrorist attacks and the large corporate fraud scandals involving Enron and other major US corporations. They resulted in immediate changes to corporate crime enforcement policies which catalysed the increased use of non-prosecution and deferred prosecution agreements. In particular, the prioritisation of anti-terrorism enforcement after 9/11 increased the demand for corporate crime enforcement procedures that were not only efficient in terms of required resources but also enabled prosecutors to change the business practices of certain corporations, especially banks, and effectively 'recruit' them for law enforcement purposes. While the scale of corporate greed and economic consequences involved in the fraud scandals of the early 2000s initially created significant pressure for the US government to take (or be seen to take) 'tough' actions against corporate crimes, the subsequent policies, enforcement actions, and accompanying discourse quickly focused on

[511] Notably, it has been argued that while the DOJ's use of non-prosecution and deferred prosecution agreements has increased with corporations, it has significantly decreased with 'low-level offenders' or noncorporate individuals (Andrea Amulic, 'Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States' (2017) 116 Michigan Law Review 123, 125 with reference to Mark Gongloff, 'Elizabeth Warren: Banks Get Wrist Slaps While Drug Dealers Get Jail' *The Huffington Post* (7 March 2013); see also, Brandon L Garrett, 'The Metamorphosis of Corporate Criminal Prosecutions' (2016) 101 Virginia Law Review Online 60, 62-63).

the need to avoid collateral consequences associated with corporate prosecutions and incentivise corporate cooperation and self-policing. The dominance of these rationales is well-illustrated by the diagnostic struggles over the prosecution and subsequent failure of Enron's auditor, Arthur Andersen LLP, in 2002. While there were several factual challenges to the narrative that linked Arthur Andersen going out of business to the DOJ's prosecution, it still persevered and shaped much of the subsequent discourse. Since then, prosecutors and commentators have regularly used arguments and rhetoric that directly or indirectly refer to the avoidance of an 'Andersen effect' to justify the increased use of corporate non-prosecution and deferred prosecution agreements. Fittingly, in response to severe criticism after the Arthur Andersen prosecution, the DOJ included the possibility of entering into non-prosecution and deferred prosecution agreements in its guidance on the federal prosecution of corporations in 2003 (Thompson memo).

The mission creep of non-prosecution and deferred prosecution agreements was not limited to acts committed in the US and by US corporations. In particular since the late 2010s, these procedures were also increasingly extended to foreign corporations and, indirectly, foreign countries. As the chapter has shown, this extension was quite strategic. Against the background of exceptionally broad corporate criminal liability rules and enforcement powers of American prosecutors, the US pursued this extension by way of setting examples through the unilateral application to foreign corporations, cooperation with foreign enforcement authorities once similar procedures were available to them, and diplomatic pressure. Several rationales for this strategic extension could be identified, generally relating to enforcement efficiency, economic, and political considerations. They include, for example, direct and indirect financial recovery, levelling the playing field for US corporations, shaping corporate activities and governance structures to comply with US preferences, protecting US national security interests and the functioning of US law and markets as well as reducing the financial and political costs associated with the unilateral application of US law outside of the US.

4 Corporate Non-Prosecution Agreements and International Law

This chapter discusses whether and, if so, how international law regulates corporate non-prosecution agreements. It starts by briefly presenting some early calls for alternatives to prosecution which, with some resemblance to initial developments in the US, focused on providing leniency to juvenile offenders and increasing procedural efficiency in mass crimes cases. The chapter then turns to the multilateral treaty regime on economic crimes that introduced international standards on corporate liability and its enforcement. This part first considers the pre-treaty phase, focusing especially on international contests over corporations as transnational actors and efforts to shape the global economic order that brought corporate liability to the fore internationally. It then examines the multilateral treaty regime established in the late 1990s and early 2000s for signs of support or opposition to the domestic introduction of corporate non-prosecution agreements. In particular, it explores the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD-ABC) and UN Convention against Corruption (UNCAC),[512] the OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions adopted in 2009 (2009 OECD Recommendation)[513] as well as the treaty monitoring body practice of the OECD Working Group on Bribery (OECD-WGB) and UNCAC Implementation Review Mechanism (UNCAC-IRM).[514] This focus is chosen because the OECD-ABC and UNCAC treaty regimes not only address most of the 'core' economic crimes for which countries have recently introduced or are considering introducing corporate non-prosecution agreements,[515] but also because they represent the most influential, widely subscribed, and developed treaty regimes on economic crimes.[516] In

[512] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (opened for signature 17 December 1997, entered into force 15 February 1999) 37 ILM 1; UN Convention against Corruption (opened for signature 9 December 2003, entered into force 14 December 2005) 2349 UNTS 41.
[513] OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (adopted on 26 November 2009, amended on 18 February 2010) C(2009)159/Rev1/FINAL, C(2010)19.
[514] The OECD-WGB is responsible for monitoring the implementation and enforcement of the OECD-ABC, 2009 OECD Recommendation, and related instruments based on a peer-review monitoring system which is conducted in successive phases (see Article 12 OECD-ABC; see generally, <www.oecd.org/corruption/anti-bribery/anti-briberyconvention/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm>). Similarly, the UNCAC-IRM monitors the implementation of the UNCAC through a peer-review process (see Article 63(7) UNCAC in combination with Resolution 3/1 of the Conference of the States Parties to the UNCAC (adopted 9-13 November 2009); see generally, <www.unodc.org/unodc/en/corruption/implementation-review-mechanism.html>).
[515] See section 1.1.
[516] See Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 948-49; Michael Elliot and Felix

addition, they provide examples of treaties that were developed at the beginning and end of what Mearsheimer refers to as the 'golden years' of the liberal international order from the early 1990s to mid-2000s[517] as well as before and after many of the legal changes in the US in response to the 9/11 attacks and corporate scandals of the early 2000s.[518] In the final part, the chapter briefly describes the current reform efforts to establish international standards on non-trial resolutions, including corporate non-prosecution agreements, under the umbrella of the OECD.

4.1 Early Calls for Alternatives to Prosecution for Individuals and Mass Crimes

Initially, references to and calls for alternatives to prosecution surfaced at the international level in the context of providing leniency to individuals, especially juveniles, and increasing procedural efficiency in minor mass crimes. They were to a large extent driven by prosecutors or justice ministry officials and took the form of non-binding recommendations, guidelines, or standards.

For example, already in 1987, the Council of Europe (CoE) Committee of Ministers recommended to member states 'making use of the following measures when dealing with minor and mass offences: so-called summary procedures, out-of-court settlements by authorities competent in criminal matters and other intervening authorities, as a possible alternative to prosecution, [and] so-called simplified procedures'.[519] Considering that 'over recent years criminal justice systems throughout Europe have faced an increase in the number and often in the complexity of cases', in 1995, the CoE Committee of Ministers recalled that 'crime policies such as decriminalisation, depenalisation or diversion, mediation and the simplification of criminal procedure can contribute to addressing these difficulties'.[520]

Lüth, 'Corporate Liability for Economic Crimes: A Contested Transnational History' in Neil Boister, Sabine Gless and Florian Jessberger (eds), *Histories of Transnational Criminal Law* (Oxford University Press 2021) 210-15.

[517] John J Mearsheimer, 'Bound to Fail: The Rise and Fall of the Liberal International Order' (2019) 43(4) International Security 7, 26-27. See also, Kenneth W Abbott and Duncan Snidal, 'Values and Interests: International Legalization in the Fight Against Corruption' (2002) 31(S1) The Journal of Legal Studies S141, S157-176; Christine Schwöbel-Patel, 'Multilateralism' in Jean d'Aspremont and Joh Haskell (eds), *Tipping Points in International Law: Commitment and Critique* (Cambridge University Press forthcoming 2021) 230.

[518] See section 3.2.1. The text of the UNCAC was negotiated during seven sessions of the Ad Hoc Committee for the Negotiation of the Convention against Corruption between 21 January 2002 and 1 October 2003 (UNODC, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption* (UN 2010) vii), whereas the Corporate Fraud Task Force, Sarbanes-Oxley Act, and Thompson memo had all been established between 8 July 2002 and 20 January 2003 (section 3.2.2).

[519] CoE, Recommendation No R 87 (18) of the Committee of Ministers to Member States concerning the Simplification of Justice (CoE 1987) Preamble.

[520] CoE, Recommendation No R (95) 12 of the Committee of Ministers to Member States on the Management of Criminal Justice (CoE 1995) Preamble.

The UN Guidelines on the Role of the Prosecutor, adopted in 1990 to 'assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings', advised that

> [i]n accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatization of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.[521]

This has been echoed by international organisations of prosecutors. For example, the Standards of Professional Responsibility and Statement of Essential Duties and Rights of Prosecutors established by the International Association of Prosecutors (IAP) in 1999 recommended that prosecutors 'in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system'.[522] Similarly, the Conference of Prosecutors General of Europe, in 2004, called for 'the possibility of choice between the criminal justice response and other types of response to criminal acts, whatever system of mandatory or discretionary prosecution operates, while bearing in mind … the need for an alternative to prosecution to be serious, credible and capable of preventing reoffending'.[523] Finally, in 2008, the Consultative Council of European Prosecutors to the CoE issued an Opinion on 'Alternatives to prosecution' which emphasised, among others, that '[a]lternative measures to prosecution, whose range of possibilities can be progressively enriched, illustrate an evolutionary phase in the development of society and the modernisation of justice (which is most welcome) vis-à-vis the traditional system consisting solely of suspended or non-

[521] UN Congress on the Prevention of Crime and the Treatment of Offenders, Guidelines on the Role of the Prosecutor (adopted 27 August to 7 September 1990) Recommendation 18.
[522] IAP, Standards of Professional Responsibility and Statement of Essential Duties and Rights of Prosecutors (adopted 23 April 1999) Article 4.3(h). The Standards of Professional Responsibility and Statement of Essential Duties and Rights of Prosecutors are intended as 'a working document for use by prosecution services to develop and reinforce their own standards' (Foreword). While being a private and non-binding initiative, they are referred to as 'standards and principles which are generally recognised internationally as necessary for the proper and independent prosecution of offences' (Article 2.3 of the Constitution of the IAP).
[523] Conference of Prosecutors General of Europe held in Celle (Germany) on 23 to 25 June 2004 on the theme 'Discretionary powers of public prosecution: opportunity or legality principle - advantages and disadvantages', conclusions (reproduced in CoE Consultative Council of European Prosecutors, Opinion No 2 on 'Alternatives to prosecution' (CoE 2008) para 4).

suspended prison sentences or fines, particularly in respect of juvenile offenders or juveniles who have not previously been convicted'.[524]

Thus, like in the US, these early calls for alternatives to prosecution at the international level were also limited to individuals and mass crimes, albeit at a later point in time.[525] However, unlike in the US, they have so far not led to an extension to corporations and corporate non-prosecution agreements.

4.2 The Multilateral Treaty Regime on Economic Crimes

The chapter now turns to an examination of corporate liability and enforcement standards in the multilateral treaty regime on economic crimes. It starts by discussing pre-treaty developments, with a focus on international contests over transnational corporations and the US's adoption of the FCPA during the 1970s as well as key developments beginning in 1988 that eventually resulted in the emergence of international standards on corporate liability and enforcement in 1997. It then investigates the OECD-ABC and UNCAC treaty regimes for signs of support or opposition to the domestic introduction of corporate non-prosecution agreements. For this purpose, it examines general standards on corporate liability and enforcement in the OECD-ABC and UNCAC, subsequent developments towards incentivising corporate cooperation and self-regulation in the 2009 OECD Recommendation as well as evidence of acceptance and endorsement of corporate non-prosecution agreements in the treaty body practice of the OECD-WGB and UNCAC-IRM. The focus on the OECD-ABC and UNCAC treaty regimes is chosen for reasons of relevance and feasibility,[526] thus excluding other multilateral as well as bilateral treaties on economic crimes and more general agreements on, for example, mutual legal assistance in criminal matters or debarment from public procurement in case of a criminal conviction.[527]

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[524] CoE Consultative Council of European Prosecutors, Opinion No 2 on 'Alternatives to prosecution' (CoE 2008) para 18. For later examples, see CoE Consultative Council of European Prosecutors, Opinion No. 9 on 'European norms and principles concerning prosecutors' (CoE 2014) paras 28-32; UNODC, *The Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide* (UN 2014) 47.

[525] See section 3.1.1.

[526] See notes 516-17.

[527] See generally, David McClean, *International Co-Operation in Civil and Criminal Matters* (Oxford University Press 2012); Sabine Gless, Thomas Hackner and Sebastian Trautmann (eds), *Internationale Rechtshilfe in Strafsachen = International Cooperation in Criminal Matters* (6th edn, Beck 2020); Sope Williams-Elegbe, 'The implications of negotiated settlements for debarment in public procurement: a preliminary enquiry' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 68.

4.2.1 Pre-treaty contests over corporate liability[528]

Standards on corporate liability and its enforcement have become key features in today's multilateral treaty regime on economic crimes.[529] Their growing prominence has mainly been rationalised by their importance to the 'fight against foreign bribery and other complex economic crimes',[530] with conventional explanations, reflected in international instruments and academic literature, frequently referring to the fact that economic crimes are 'committed by, through or under the cover of legal entities', corporate structures make it difficult to identify particular individuals as responsible, and corporations are well placed to take preventive measures.[531] Notions of justice and fairness may also be invoked.[532]

Yet despite their persuasive valence, these explanations struggle to account for the fact that the spread of international standards on corporate liability has occurred without being demonstrably effective in achieving the ends conventionally claimed.[533] They also do little to explain why corporate liability standards were being supported by many of the same powerful states that were simultaneously pursuing an international agenda of economic liberalisation, of which reducing regulatory constraints on corporations formed an important part.[534] Finally, they largely disregard international law's role in not simply devising solutions to 'global'

[528] An earlier and more extensive version of this section has appeared in Michael Elliot and Felix Lüth, 'Corporate Liability for Economic Crimes: A Contested Transnational History' in Neil Boister, Sabine Gless and Florian Jessberger (eds), *Histories of Transnational Criminal Law* (Oxford University Press 2021) 203-210.
[529] OECD, *The Liability of Legal Persons for Foreign Bribery: A Stocktaking* Report (OECD 2016) 11; Leonardo Borlini, 'Art. 26: Liability of Legal Persons' in Cecily Rose, Michael Kubiciel and Oliver Landwehr (eds), *The United Nations Convention Against Corruption: A Commentary* (Oxford University Press 2019) 274.
[530] OECD, *The Liability of Legal Persons for Foreign Bribery: A Stocktaking* Report (OECD 2016) 11.
[531] Kevin E Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (Oxford University Press 2019) 127-128; Gemma Aiolfi and Mark Pieth, 'International Aspects of Corporate Liability and Corruption' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar 2005); UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime* (UN 2004) 116; Financial Action Task Force 40 Recommendations (October 2003) (incorporating all subsequent amendments until October 2004) 2 <www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf>.
[532] CoE, *Liability of Legal Persons for Corruption Offences* (CoE 2020) 5.
[533] See for example, Jason C Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (Cornell UP 2011); Simeon Obidairo, *Transnational Corruption and Corporations: Regulating Bribery through Corporate Liability* (Ashgate 2013); Terence C Halliday, Michael Levi and Peter Reuter, *Global Surveillance of Dirty Money: Assessing Assessments of Regimes to Control Money Laundering and Combat the Financing of Terrorism* (Center on Law and Globalization, American Bar Foundation and University of Illinois College of Law 2014) <www.americanbarfoundation.org/uploads/cms/documents/report_global_surveillance_of_dirty_money_1.30.2014.pdf>.
[534] Muthucumaraswamy Sornarajah, 'Power and Justice: Third World Resistance in International Law' (2006) 10 Singapore Yearbook of International Law 19, 22. See also, Christine Schwöbel-Patel, 'Multilateralism' in Jean d'Aspremont and John Haskell (eds), *Tipping Points in International Law: Commitment and Critique* (Cambridge University Press forthcoming 2021) 230.

problems, but in constructing the narratives that inform the problems themselves.[535] Attending more closely to both this narrative role and the positioning of corporations as 'responsible' transnational actors, this section provides a summary account of the international regulatory contests that preceded the establishment of corporate liability standards in the modern multilateral treaty regime on economic crimes.

While most of these developments took place significantly before even the extension of non-prosecution and deferred prosecution to corporations in the US, they are still instructive for a better understanding of the actors, factors, and rationales that have shaped and, in many ways, continue to shape the multilateral treaty regime, especially as regards the strategic pursuit and establishment of a framework that, in many ways, reflects US law and interests. Furthermore, without the existence of some form of corporate liability, there would seem to be only a limited basis for the international regulation of corporate non-prosecution agreements which aim at avoiding a determination of corporate liability through prosecution.

At the beginning of the 1970s, rising concerns over interference by Western companies in global South states' domestic politics, exacerbated by revelations in 1972 that the American International Telephone and Telegraph Company had conspired with the Central Intelligence Agency (CIA) to prevent Salvador Allende's election in Chile,[536] brought to the fore struggles between global South and global North states over the capacity to constrain or legitimise the activities of transnational corporations.[537] Whereas global South states endeavoured to protect and affirm their regulatory capacity as the host states of transnational corporations, powerful home states such as the US worked to limit host states' policy space and 'arrive at a code of conduct *for the governments of host countries* (especially developing countries) in the international investment area' that would facilitate corporate access to global South resources.[538]

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[535] See generally, Anne Saab, *Narratives of Hunger in International Law: Feeding the World in Times of Climate Change* (Cambridge University Press 2019).
[536] Doreen Lustig, *Veiled Power: International Law and the Private Corporation, 1886-1981* (Oxford University Press 2020) 205.
[537] Sundhya Pahuja and Anna Saunders, 'Rival Worlds and the Place of the Corporation in International Law' in Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford University Press 2019) 141; Karl P Sauvant, 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned' (2015) 16 The Journal of World Investment and Trade 11, 16-18.
[538] Karl P Sauvant, 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned' (2015) 16 The Journal of World Investment and Trade 11, 25 (emphasis in original).

Competing conceptualisations of corruption as a 'global' problem emerged in this context. One was rooted, in Allende's words, in corporations' 'powerful corruptive influence on public institutions in rich and poor countries alike'.[539] It embedded the anti-corruption project within broader efforts to constrain corporate power and rearrange the international economic order along more equal lines.[540] The US in particular sought to counter this conceptualisation of corruption with a narrower one that effectively equated it with illicit payments or bribery, suggesting the problem resided in governmental, not corporate, power and its abuse.[541] This not only changed the relationship between corruption and corporate regulation, making the latter a consequence of efforts to combat corruption, but also shifted the regulatory and enforcement approach from cooperating with host states to home states becoming the prime actors, defining the lawfulness of their corporations' interactions with host state governments.[542]

In 1977, the implications of this latter conceptualisation became more tangible with the enactment of the FCPA in the US, which criminalised corporate bribes to foreign officials following the unearthing of such bribes on a large-scale in the aftermath of the Watergate scandal.[543] Various factors likely influenced the FCPA's adoption, including conceptions of morality and concerns over the private sector's capacity to interfere with US foreign policy and national security interests.[544] However, important Congressional reports indicate particular significance, especially in relation to corporate (criminal) liability, of concerns for American corporations and the US-led economic order. According to these reports, a strong anti-bribery law was necessary 'to restore public confidence in the integrity of the American

[539] UN Conference on Trade and Development (UNCTAD), 'Address Delivered by Mr. Salvador Allende Gossens, President of Chile at the Inaugural Ceremony on April 13, 1972' (Proceedings of UNCTAD Third Session, Vol 1, Annex VIII, 353, para 58).
[540] See for example, UN General Assembly (UNGA), *Measures against corrupt practices of transnational and other corporations, their intermediaries and others*, A/RES/3514, 15 December 1975.
[541] See for example, the US draft resolution drawn up within the framework of the UN Commission on Transnational Corporations and presented to the UNGA during its 30th session in 1975 (reprinted in summarised form in UN, 'Chapter XIII: Questions Concerning Transnational Corporations' (1975) 29 Yearbook of the United Nations 486, 487). See generally, Elitza Katzarova, *The Social Construction of Global Corruption: From Utopia to Neoliberalism* (Palgrave Macmillan 2019) 2, 77, 84-88.
[542] Michael Elliot and Felix Lüth, 'Corporate Liability for Economic Crimes: A Contested Transnational History' in Neil Boister, Sabine Gless and Florian Jessberger (eds), *Histories of Transnational Criminal Law* (Oxford University Press 2021) 205.
[543] US Foreign Corrupt Practices Act of 1977, 15 USC § 78dd-1. See also, Cecily Rose, 'The Origins of International Anti-Corruption Law: The Failed Negotiation of an International Agreement on Illicit Payments' in Neil Boister, Sabine Gless and Florian Jessberger (eds), *Histories of Transnational Criminal Law* (Oxford University Press 2021) 187, 191.
[544] Kenneth W Abbott and Duncan Snidal, 'Values and Interests: International Legalization in the Fight against Corruption' (2002) 31(S1) The Journal of Legal Studies S141, S161 and S167; Kevin E Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (Oxford University Press 2019) 40.

business system',[545] not only because corporate bribery of foreign officials was considered unethical but because '[i]t erodes public confidence in the integrity of the free market system'.[546] Furthermore, considering that the US was headquarter to roughly 90 per cent of all multinational companies at the time,[547] 'in many cases the resulting adverse competitive effects are entirely domestic'.[548]

In addition, three further functions served by corporate liability provisions in the FCPA can be briefly observed. First, it framed corruption as a public sector phenomenon, largely ignoring the corruptive influence of private sector power.[549] Second, it established the 'individual actor paradigm', with corruption being not a systemic problem but 'a problem of individuals making corrupt decisions', who are 'exceptions to the anti-corruption norm within their own community'.[550] Third, corporate liability provisions in the FCPA provided the US with expansive regulatory power over corporations' interactions with foreign officials. This ensured not only a significant definitional role regarding what constitutes lawful conduct but also a long jurisdictional reach regarding matters important to the sovereignty of other states.[551]

International contests continued along these lines throughout the 1980s, notably as part of the 1985 UN Congress on Prevention of Crime and the Treatment of Offenders' Guiding Principles which tied corporate liability not only to economic crime but to the 'restructuring of the international economic system' and host state capacity.[552] Its detachment from these broader aims was largely the product of two American 'internationalising' initiatives.

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[545] US Senate, 'Foreign Corrupt Practices and Domestic and Foreign Investment Improved Disclosure Acts of 1977', Report No 95-114 (2 May 1977) 3.
[546] US House of Representatives, 'Unlawful Corporate Payments Act of 1977', Report No 95-640 (28 September 1977) 4.
[547] Elitza Katzarova, *The Social Construction of Global Corruption: From Utopia to Neoliberalism* (Palgrave Macmillan 2019) 83.
[548] US House of Representatives, 'Unlawful Corporate Payments Act of 1977', Report No 95-640 (28 September 1977) 5.
[549] See Elitza Katzarova, *The Social Construction of Global Corruption: From Utopia to Neoliberalism* (Palgrave Macmillan 2019) 65 (referring, among others, to the World Bank's definition of corruption as 'the abuse of public office for private gain').
[550] Blake Puckett, 'Clans and the Foreign Corrupt Practices Act: Individualized Corruption Prosecution in Situations of Systemic Corruption' (2010) 41 Georgetown Journal of International Law 815, 818.
[551] See for example, Kevin E Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (Oxford University Press 2019) 38. See also, section 3.3.1.
[552] UN Department of International Economic and Social Affairs, *Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26 August-6 September 1985, Report prepared by the Secretariat* (UN 1986), ch I, sec A, paras 9, 2.

The first took the form of a 1988 amendment to the FCPA which obliged the President to pursue negotiations towards an international agreement, following pressure from the US business sector that saw the FCPA as a competitive disadvantage absent corresponding legislation elsewhere.[553] The US's proposal to the OECD the following year for a feasibility study on illicit payments led eventually to the adoption of the OECD-ABC.[554] Similarly, the second initiative sought to extend the reach of the US's 'war on drugs' and ensure that other states followed its lead in enacting laws like the 1986 Money Laundering Control Act.[555] In 1989, it resulted in the Group of Seven establishing the Financial Action Task Force (FATF), an *ad hoc* intergovernmental body which was initially focused on money laundering from the illicit narcotics trade and has been described as 'a group of the world's most developed countries [seeking] to impose standards that they developed upon all other countries and jurisdictions'.[556] In 1990, the FATF issued a set of recommendations which included that '[w]here possible, corporations themselves – not only their employees – should be subject to criminal liability'.[557]

These anti-corruption and anti-money laundering initiatives aligned with more general observations of a shift at the UN from conceptualising issues of transnational crime within the context of corporations' abuse of power towards 'more narrowly defined crime control'.[558] In this, the initiatives benefitted from a transformed international order and changed perceptions of the role of corporations within it. The Cold War had come to an end and resistance amongst global South states to the dominance of economic liberalisation was severely reduced.[559] As a result, international focus continued shifting from efforts to constrain corporate power, let alone systematically alter the economic structures that enabled

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[553] Mark Pieth, 'Introduction' in Mark Pieth, Lucinda A Low and Nicola Bonucci (eds), *The OECD Convention on Bribery: A Commentary* (2nd edn, Cambridge University Press 2014) 11; Rachel Brewster, 'Enforcing the FCPA: International Resonance and Domestic Strategy' (2017) 103 Virginia Law Review 1611, 1630.

[554] Elitza Katzarova, *The Social Construction of Global Corruption: From Utopia to Neoliberalism* (Palgrave Macmillan 2019) 133-34.

[555] Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press 2015) 1-2; Jason C Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (Cornell University Press 2011) 21.

[556] Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press 2015) 214-15. See generally, Mark T Nance, 'The Regime that FATF built: An Introduction to the Financial Action Task Force' (2018) 69 Crime, Law and Social Change 109.

[557] FATF 40 Recommendations (1990), Recommendation 7 <www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf>.

[558] Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, Oxford University Press 2018) 9.

[559] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011); Mark Pieth, 'Introduction' in Mark Pieth, Lucinda A Low and Nicola Bonucci (eds), *The OECD Convention on Bribery: A Commentary* (2nd edn, Cambridge University Press 2014) 8-9.

it,[560] to means that legitimised its exercise, partly through self-regulation.[561] Although corporate liability provisions ostensibly provided binding constraints, they nevertheless fit comfortably within and contributed to this self-regulatory paradigm.[562] Even the FCPA, which imposed criminal liability, was largely to be 'a self-enforcing, preventative mechanism'.[563]

4.2.2 The OECD-ABC and UNCAC: establishing a general framework on corporate liability and enforcement

Against this background, international standards on corporate liability and its enforcement emerged at the multilateral treaty level in 1997. After the Council of the European Union (EU) had introduced the liability of legal persons in the Second Protocol of the Convention on the protection of the European Communities' Financial Interests on 19 June 1997,[564] the OECD followed suit in the OECD-ABC only a few months later.[565] Corporate liability provisions, therefore, surfaced for the first time in economic crime treaties which reflected the EU's financial interests or, in the case of the OECD-ABC, the US's interest in the globalisation of the FCPA, of which it is '[t]he true international child'.[566] Considering that most large multinational corporations were domiciled in states parties to the OECD-ABC and the treaty's exclusive focus on 'supply-side corruption', that is on the payor as opposed to recipient, 'compliance in the states that "host" the corruption is irrelevant'.[567] Such corruption would supposedly be addressed through corporate self-regulation and the exercise of home state jurisdiction.[568]

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[560] See notes 540-41.
[561] Doreen Lustig, *Veiled Power: International Law and the Private Corporation, 1886-1981* (Oxford University Press 2020) 216-18. See also, Grietje Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy* (Brill 2019) 355-57.
[562] Michael Elliot and Felix Lüth, 'Corporate Liability for Economic Crimes: A Contested Transnational History' in Neil Boister, Sabine Gless and Florian Jessberger (eds), *Histories of Transnational Criminal Law* (Oxford University Press 2021) 208.
[563] US Senate, 'Foreign Corrupt Practices and Domestic and Foreign Investment Improved Disclosure Acts of 1977', Report No 95-114 (2 May 1977) 10.
[564] Articles 3 and 4 Second Protocol of the Convention on the protection of the European Communities' financial interests [1997] OJ C221/12.
[565] Articles 2 and 3 OECD-ABC.
[566] Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, Oxford University Press 2018) 151. See also, Mark Pieth, 'Introduction' in Mark Pieth, Lucinda A Low and Nicola Bonucci (eds), *The OECD Convention on Bribery: A Commentary* (2nd edn, Cambridge University Press 2014) 31-32.
[567] Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, Oxford University Press 2018) 151 with reference to Article 1 of the OECD Convention and Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press 2015) 60.
[568] Michael Elliot and Felix Lüth, 'Corporate Liability for Economic Crimes: A Contested Transnational History' in Neil Boister, Sabine Gless and Florian Jessberger (eds), *Histories of Transnational Criminal Law* (Oxford University Press 2021) 212.

Once introduced, corporate liability standards were quickly diffused via the three major UN conventions on economic crime.[569] With 189, 190, and 188 states parties,[570] the International Convention for the Suppression of the Financing of Terrorism adopted on 9 December 1999 (UN Financing of Terrorism Convention),[571] the Convention against Transnational Organized Crime adopted on 15 November 2000 (UNCTOC),[572] and the UNCAC adopted on 31 October 2003 have a truly global reach.[573] However, the US and European states remained the key drivers behind the diffusion of corporate liability provisions, illustrated by the fact that treaties from regions outside North America and Europe either did not include corporate liability provisions[574] or simply replicated the established OECD/UN approach.[575]

Focusing on the OECD-ABC and the UNCAC, the section examines this approach in more detail for signs of supporting or constraining the domestic introduction of corporate non-prosecution agreements.

As already mentioned, the OECD-ABC and UNCAC do not expressly regulate corporate non-prosecution agreements or settlements more generally.[576] In fact, as observed by Ivory and Søreide, 'the drafters do not seem to have envisaged that settlements would become the

[569] Mark Pieth, 'Article 2' in Mark Pieth, Lucinda A Low and Nicola Bonucci (eds), *The OECD Convention on Bribery: A Commentary* (2nd edn, Cambridge University Press 2014) 225.
[570] At the time of writing, the UN Secretary-General lists 189, 190, and 188 states parties, <https://treaties.un.org/Pages/Treaties.aspx?id=18&subid=A&clang=_en>.
[571] Article 5 International Convention for the Suppression of the Financing of Terrorism (opened for signature 10 January 2000, entered into force 10 April 2002) 2178 UNTS 197.
[572] Article 10 UN Convention against Transnational Organized Crime (opened for signature 12 December 2000, entered into force 29 September 2003) 2225 UNTS 209.
[573] Article 26 UNCAC.
[574] On terrorism, see for example: League of Arab States Convention on the Suppression of Terrorism of April 1998; Organisation of the Islamic Conference Convention on Combating International Terrorism of 1 July 1999; Organisation of African Unity Convention on the Prevention and Combating of Terrorism of 1 July 1999 and its Protocol of 8 July 2004; Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism of 4 June 1999; Shanghai Convention on Combating Terrorism, Separatism and Extremism of 15 June 2001; Cooperation Council for the Arab States of the Gulf Convention on Combating Terrorism of 4 May 2004; Association of Southeast Asian Nations Convention on Counter Terrorism 13 January 2007. On corruption, see for example: Agreement among the Governments of the Black Sea Economic Cooperation Participating States on Cooperation in Combating Crime, in Particular its Organized Forms of 2 October 1998 (and its two protocols of 15 March 2002 and 3 December 2004); Southern African Development Community Protocol against Corruption of 14 August 2001; African Union Convention on Preventing and Combating Corruption of 11 July 2003.
[575] For example, Article 6 Additional Protocol to the South Asian Association for Regional Cooperation Regional Convention on Suppression of Terrorism of 6 January 2004; Article 5 League of Arab States Anti-Corruption Convention of 21 December 2010; Article 11 Economic Community of West African States Protocol on the Fight against Corruption of 21 December 2001. For a more detailed discussion, see Michael Elliot and Felix Lüth, 'Corporate Liability for Economic Crimes: A Contested Transnational History' in Neil Boister, Sabine Gless and Florian Jessberger (eds), *Histories of Transnational Criminal Law* (Oxford University Press 2021) 212-14.
[576] See section 1.1.

predominant means for sanctioning corporate offenders'.[577] This is also not surprising when considering the timing of the adoption of these treaties in light of the developments in the US. They were either adopted significantly before the developments that catalysed the rise of corporate non-prosecution and deferred prosecution agreements in the US (in case of the OECD-ABC) or before these developments could lead to a consistently high use of corporate non-prosecution agreements, including in relation to acts committed abroad and by foreign corporations (in case of the UNCAC).[578]

However, the OECD-ABC and UNCAC contain several general standards on liability, sanctions, and procedure that may be seen as relevant to the domestic introduction of corporate non-prosecution agreements.

Starting with the OECD-ABC, Article 2 establishes corporate liability, albeit in a relatively 'minimalist' fashion, requiring that '[e]ach Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official'. The provision not only omits reference to any particular rule of attribution[579] but also introduces a 'safeguard clause' ('in accordance with its legal principles') which would become a cornerstone of future corporate liability standards.[580] The consequences of liability are regulated in Article 3 which requires that in all instances sanctions must be 'effective, proportionate and dissuasive'.[581] Both corporate liability and sanctions may be criminal or non-criminal.[582] This flexibility was important considering that the extension of criminal, as opposed to civil or administrative, liability to corporations was resisted by many states,[583] engaging as it does philosophical

[577] Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 957 with reference to OECD, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 21 November 1997), Articles 2 and 3; UNODC, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption* (UN 2010), Articles 26, 30, and 37.
[578] See note 519. See also, section 3.3.
[579] Julio Bacio Terracino, *The International Legal Framework against Corruption: States' Obligations to Prevent and Repress Corruption* (Intersentia 2012) 262. See also, Gemma Aiolfi and Mark Pieth, 'International Aspects of Corporate Liability and Corruption' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar 2005) 398-99.
[580] Michael Elliot and Felix Lüth, 'Corporate Liability for Economic Crimes: A Contested Transnational History' in Neil Boister, Sabine Gless and Florian Jessberger (eds), *Histories of Transnational Criminal Law* (Oxford University Press 2021) 211.
[581] Article 3(1) and (2) OECD-ABC.
[582] Article 3(2) OECD-ABC. As regards Article 2, see OECD, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 21 November 1997) para 20.
[583] Elitza Katzarova, *The Social Construction of Global Corruption: From Utopia to Neoliberalism* (Palgrave Macmillan 2019) 178. Considering that criminal law 'traditionally focuses on personal blame, guilt and the infliction of loss', the principle that corporations cannot commit crimes (*societas delinquere non potest*) used to

conceptualisations of criminal laws' aims, the nature of criminal punishment and especially the available sanctions for legal persons, and concerns over blurring of legal fields.[584] Recalling the rationales for corporate non-prosecution agreements, it should be noted that the commentaries clarify that the 'additional civil or administrative sanctions' that might be imposed on legal persons under Article 3(4) OECD-ABC may include 'exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order'.[585] However, neither the treaty text nor the commentaries suggest corporate non-prosecution agreements as a non-criminal procedure for imposing such liability and sanctions under Articles 2 and 3 OECD-ABC.[586]

In terms of procedure, Article 5 generally provides that [i]nvestigation and prosecution … shall be subject to the applicable rules and principles of each Party'. However, the Article also constraints the exercise of states' enforcement discretion when requiring that investigation and prosecution 'shall not be influenced by *considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved*'.[587] Rather, as the commentaries add, 'discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature'.[588]

Turning now to the UNCAC, Article 26 provides that '[e]ach State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons' which may again be 'criminal, civil or administrative'.[589] Notably, efforts to extend such liability from bribery in the public sector to also include bribery in the private sector during the negotiations of the UNCAC, supported by the EU and Latin American and

be widely accepted (Mark Pieth, 'Article 2' in Mark Pieth, Lucinda A Low and Nicola Bonucci (eds), *The OECD Convention on Bribery: A Commentary* (2nd edn, Cambridge University Press 2014) 215).

[584] Gemma Aiolfi and Mark Pieth, 'International Aspects of Corporate Liability and Corruption' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar 2005) 405. For a flavour of the debate over the merits and demerits of imposing criminal liability on corporations, see also section 1.2.

[585] OECD, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 21 November 1997) para 24.

[586] See also in relation to settlements more generally, Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 954.

[587] Article 5 OECD-ABC (emphasis added).

[588] OECD, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 21 November 1997) para 27.

[589] Article 26(1) and (2) UNCAC.

Caribbean States, were successfully opposed by the US.[590] It ensured that the problem to be solved remained framed as governmental, not corporate, (abuse of) power.[591] Like in the OECD-ABC, the UNCAC requires states parties to 'ensure that legal persons … are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions'.[592]

Article 30 UNCAC then addresses '[p]rosecution, adjudication and sanctions'. While the article largely concerns individual offenders, especially public officials, a few paragraphs 'have broader relevance'.[593] In particular, Article 30(1) UNCAC obliges states parties to 'make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence'. Similarly to Article 5 OECD-ABC, although in a 'softer' manner, Article 30(3) UNCAC restricts states' enforcement discretion.[594] It requires states parties to 'endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures ... and with due regard to the need to deter the commission of such offences'.[595] Finally, Article 30(9) UNCAC contains a general safeguard clause of the states' prescriptive authority, including in relation to prosecution and punishment,[596] while Article 30(10) UNCAC encourages states parties to promote reintegration after conviction.

While these immediate provisions on liability, sanctions, and prosecution were largely reflective of the OECD-ABC approach and effectively adopted the corporate liability provisions of the earlier UNCTOC,[597] the UNCAC also provided some new standards on

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[590] UNGA, A/AC.261/9, 26 November 2002; Philippa Webb, 'The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?' (2005) 8(1) Journal of International Economic Law 191, 213-14.
[591] Michael Elliot and Felix Lüth, 'Corporate Liability for Economic Crimes: A Contested Transnational History' in Neil Boister, Sabine Gless and Florian Jessberger (eds), *Histories of Transnational Criminal Law* (Oxford University Press 2021) 214.
[592] Article 26(4) UNCAC.
[593] Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 956.
[594] See Radha Ivory, *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys* (Cambridge University Press 2014) 97; Thea Coventry, 'Art: 30 Prosecution, Adjudication, and Sanctions' in Cecily Rose, Michael Kubiciel and Oliver Landwehr (eds), *The United Nations Convention Against Corruption: A Commentary* (Oxford University Press 2019) 309-11.
[595] Article 30(3) UNCAC.
[596] See Thea Coventry, 'Art: 30 Prosecution, Adjudication, and Sanctions' in Cecily Rose, Michael Kubiciel and Oliver Landwehr (eds), *The United Nations Convention Against Corruption: A Commentary* (Oxford University Press 2019) 303.
[597] UNGA, A/RES/55/61, 22 January 2001; UNODC, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption* (UN 2010) 235.

corporate cooperation and prevention. These themes resonate with the described outcomes of the international contests over corporate liability as well as the developments in the US after the 9/11 attacks and the corporate fraud scandals of the early 2000s, especially the establishment of the Corporate Fraud Task Force, Sarbanes-Oxley Act, and the Thompson memo.[598]

As regards the idea of corporate cooperation, Article 37(1) UNCAC requires states parties to 'take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes'. For persons who provide 'substantial cooperation in the investigation or prosecution', Article 37(2) and (3) UNCAC obliges states parties to consider the provision of 'mitigating punishment' or even 'granting immunity from prosecution'. The importance of this theme in the UNCAC is further emphasised by Article 39 UNCAC which appears to make the same logic of encouraging cooperation between law enforcement authorities and the private sector applicable even in relation to innocent corporations.[599] While again not mentioned in the text or background materials of the UNCAC, from here it does not seem to be such a big step anymore to the application of this logic in the context of corporate non-prosecution agreements.

Outside of the specific chapter on criminalisation and law enforcement,[600] the UNCAC also emphasises the importance of prevention by dedicating the first chapter after the '[g]eneral provisions' chapter to '[p]reventive measures'.[601] For example, Article 5(2) UNCAC provides, in very general terms, that states parties 'shall endeavour to establish and promote effective practices aimed at the prevention of corruption', while Article 5(4) UNCAC encourages international collaboration in this respect. Article 12 UNCAC then specifically requires states parties to take measures 'to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures'.[602] Among the measures to achieve these ends, it refers

[598] See section 3.2.2.
[599] See Philip M Nichols, 'Article 39' in Cecily Rose, Michael Kubiciel and Oliver Landwehr (eds), *The United Nations Convention Against Corruption: A Commentary* (Oxford University Press 2019) 390.
[600] UNCAC, Chapter III Criminalization and law enforcement, Articles 15-42.
[601] See Chapter I General provisions (Articles 1-4) and Chapter II Preventive measures (Articles 5-14) UNCAC.
[602] Article 12(1) UNCAC.

again to '[p]romoting cooperation between law enforcement agencies and relevant private entities' as well as '[e]nsuring that private enterprises … have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures'.[603] Finally, as regards improving cooperation between law enforcement authorities, Article 48 UNCAC provides generally that states parties shall take effective measures to 'facilitate effective coordination between their competent authorities, agencies and services'.[604]

Thus, while not expressly addressing corporate non-prosecution agreements, several provisions can be found in the OECD-ABC and UNCAC which establish a general framework on corporate liability and enforcement and appear potentially indirectly relevant to the domestic introduction of corporate non-prosecution agreements.[605] As a fundamental pre-condition to corporate non-prosecution agreements, Articles 2 and 3 OECD-ABC and Article 26 UNCAC require states to establish corporate liability and sanctions, which can be criminal or non-criminal in nature as long as they are 'effective, proportionate and dissuasive'. After the historical contests over corporate liability in the previous decades, the primary objective in ensuring corporate liability provisions within these key economic crime treaties lay in establishing the norm in principle, while leaving much discretion to states' domestic approaches and the development of further details for a later stage. Albeit in a loose manner, Article 5 OECD-ABC and Article 30(1) and (3) UNCAC may be seen as containing some constraints on states' enforcement discretion, with the OECD-ABC prohibiting economic and political considerations and the UNCAC tying the exercise of discretion to effectiveness and deterrence. While still not mentioning corporate non-prosecution agreements, the later UNCAC, especially in Articles 37 and 12, also encompasses standards on corporate cooperation and prevention that may be seen as potentially supporting the domestic introduction of corporate non-prosecution agreements. These developments from the strategic establishment of corporate liability to the first signs of a turn towards emphasising corporate cooperation and a preventive, self-regulatory enforcement paradigm resonate with the dominant US approach and preferences, reflected in both the described

[603] Article 12(2)(a) and (f) UNCAC. In particular, Article 12(2)(f) was a new addition compared to the prior UN conventions on the financing of terrorism and transnational organised crime (see notes 572-73).
[604] Article 48(1)(e) UNCAC.
[605] See similarly, Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 957.

historical international contests as well as the domestic emergence and extension abroad of corporate non-prosecution and deferred prosecution agreements.[606]

4.2.3 The 2009 OECD Recommendation: subsequent development towards incentivising corporate cooperation and self-regulation

At the OECD, developments resumed in the form of a non-binding international instrument, with the OECD Council adopting a new version of its 1994 and 1997 Recommendations, forerunners to the OECD-ABC, together with two annexed 'Good Practice Guidances', in 2009.[607]

While continuing to emphasise respect for national legal principles and state discretion, the 2009 OECD Recommendation contains important developments and details on corporate liability and its enforcement. As explained by Pieth, the 2009 OECD Recommendation finally defines the minimum standard of corporate liability. Whereas the Convention

> had merely asked for "effective, proportionate and dissuasive" sanctions, the "Good Practice Guidance'" draws the bottom line. It defines the failure of supervision and failure to implement adequate ethics and compliance programmes as an alternative to strict liability. Annex II defines what an adequate ethics and compliance programme requires.[608]

In addition, the 2009 OECD Recommendation recommends that states parties to the OECD-ABC ensure that 'easily accessible channels are in place for reporting of suspected acts of bribery of foreign public officials in international business transactions to law enforcement authorities'.[609] As regards internal controls, ethics, and compliance, parties should encourage 'companies to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery' and 'the creation of monitoring bodies, independent of management'.[610] Finally, the 2009 OECD Recommendation also recommends a revision of the 'laws and regulations on banks and other financial institutions to ensure that adequate records would be kept and made available for inspection and investigation'.[611]

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[606] As examined in chapter 3.
[607] See note 514.
[608] Mark Pieth, 'Introduction' in Mark Pieth, Lucinda A Low and Nicola Bonucci (eds), *The OECD Convention on Bribery: A Commentary* (2nd edn, Cambridge University Press 2014) 27.
[609] 2009 OECD Recommendation, IX(i).
[610] Ibid X(C)(i).
[611] Ibid III(vi).

While still not referring to corporate non-prosecution agreements expressly, these standards are not only 'very close to the US Sentencing Guidelines', as some commentators have observed,[612] but more broadly reflect the US approach to corporate crime enforcement and the strategic efforts to export US preferences to other countries. In particular, the 2009 OECD Recommendation can be seen as continuing previous US efforts to establish a corporate liability regime that emphasises a preventive, self-regulatory paradigm in combination with home state regulatory power at the international level.[613] It also traces closely prior developments and rationales that played an important role in the emergence and mission creep of corporate non-prosecution and deferred prosecution agreements in the US, reflecting especially the shift towards an even further reaching *de facto* liability regime that relies heavily on corporate compliance, cooperation, and 'self-policing'.[614]

Commentators have also argued that in 'developing its Good Practice Guidances, the OECD appears to have deliberately mirrored many of the provisions previously set forth in FCPA-related [deferred prosecution agreements]'.[615] In this context, a particular source of inspiration may have been the DOJ's practice of appending 'an evolving list of FCPA corporate compliance obligations … to its FCPA [non-prosecution and deferred prosecution agreements]' since 2005.[616]

However, 'traffic' was not only one way, with US prosecutors subsequently starting to include references to the requirements of the 2009 OECD Recommendation, especially the Good

[612] Mark Pieth, 'Introduction' in Mark Pieth, Lucinda A Low and Nicola Bonucci (eds), *The OECD Convention on Bribery: A Commentary* (2nd edn, Cambridge University Press 2014) 27 with reference to US Sentencing Commission, Guidelines Manual, § 8B2.1 (2012).
[613] See in particular, section 4.2.1.
[614] See chapter 3, in particular sections 3.1.2, 3.2, and 3.3.1. See generally, Leonardo Borlini, 'Article 26: Liability of Legal Persons' in Cecily Rose, Michael Kubiciel and Oliver Landwehr (eds), *The United Nations Convention Against Corruption: A Commentary* (Oxford University Press 2019) 279-80; Jennifer Arlen and Samuel Buell, 'The Global Expansion of Corporate Criminal Liability: Effective Enforcement Policy Across Legal Systems' (2020) 93 Southern California Law Review 697, 706-09.
[615] See for example, Gibson Dunn, '2010 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements' (4 January 2011) <www.gibsondunn.com/2010-year-end-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/> comparing, among others, the corporate compliance program in the non-prosecution agreement between the DOJ and Helmerich Payne Inc of 29 July 2009 (requiring 'a system of internal accounting controls designed to ensure that H&P makes and keeps fair and accurate books, records, and accounts' and 'a compliance code with a clearly articulated corporate policy against violations of the anti-corruption laws') with the OECD Good Practice Guidance on Internal Controls, Ethics, and Compliance (requiring, among others, 'a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery' and 'a clearly articulated and visible corporate policy prohibiting foreign bribery').
[616] Gibson Dunn, '2012 Mid-Year Update on Corporate Deferred Prosecution and Non-Prosecution Agreements' (10 July 2012) <www.gibsondunn.com/2012-mid-year-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/#_edn13>.

Practice Guidance in Annex II, as part of the compliance procedures required in their non-prosecution and deferred prosecution agreements.[617] The DOJ formally acknowledged its reliance on the OECD Good Practice Guidance when adopting, jointly with the SEC, a 'Resource Guide to the US Foreign Corrupt Practices Act' in 2012.[618] In terms of compliance programs, the Guide refers to the OECD's Good Practice Guidance as reflecting an 'emerging international consensus on compliance best practices'.[619]

The US's support for the 2009 OECD Recommendation's international standardisation effort on compliance procedures again appears to have been driven, in important ways, by concerns over competitive disadvantages for US corporations as a consequence of FCPA enforcement and compliance costs.[620] By incorporating parts of the 2009 OECD Recommendation into its non-prosecution and deferred prosecution agreements, the DOJ not only increased the normative value of this non-binding international instrument but also addressed domestic and international criticism of the US, among others by the OECD-WGB, for not providing sufficient guidance on how companies may avoid running afoul of the FCPA.[621] It can thus be argued that the 2009 OECD Recommendation has helped legitimising and promoting the dominant US approach to corporate crime enforcement. Finally, it also provides an interesting example of the strategic use of international law, with US domestic norms and practices first being 'uploaded' to the international level and then 'downloaded' again for further, more legitimate use.[622]

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[617] Gibson Dunn, '2012 Mid-Year Update on Corporate Deferred Prosecution and Non-Prosecution Agreements' (10 July 2012) <www.gibsondunn.com/2012-mid-year-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/#_edn13>; Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press 2015) 76-77 with reference to, among others, *US v Panalpina World Transport (Holding) Ltd*, Deferred Prosecution Agreement, US District Court for the Southern District of Texas, Case No 10-CR-769 (4 November 2010) Attachment C; *US v Shell Nigeria Exploration and Production Company Ltd*, Deferred Prosecution Agreement, US District Court for the Southern District of Texas, Case No 10-CR-767 (4 November 2010) Attachment C; *US v* Transocean, Deferred Prosecution Agreement, US District Court for the Southern District of Texas Case No 10-CR-768 (4 November 2010) Attachment C.

[618] DOJ and SEC, A Resource Guide to the US Foreign Corrupt Practices Act (14 November 2012) 8.

[619] Ibid 63.

[620] Gibson Dunn, '2010 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements' (4 January 2011) <www.gibsondunn.com/2010-year-end-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/>. See also, sections 4.2.1 and 3.3.5.

[621] OECD-WGB, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States* (15 October 2010) 26, 29-30. See also, Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press 2015) 76; Amy D Westbrook, 'Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act' (2011) 45 Georgia Law Review 489.

[622] See generally on the 'upload and download' of transnational norms, note 97.

4.2.4 The treaty monitoring body practice of the OECD-WGB and UNCAC-IRM: acceptance and endorsement of corporate non-prosecution agreements

While not yet expressly addressed in international instruments, the emerging practice of corporate non-prosecution agreements in domestic legal systems has been scrutinised by the treaty bodies charged with monitoring the implementation of the OECD-ABC and UNCAC, the OECD-WGB and UNCAC-IRM.[623]

From an international law perspective, the monitoring reports issued by the OECD-WGB and UNCAC-IRM may be relevant for two reasons: First, they may be seen as 'subsequent practice in the application of the treat[ies] which establishes the agreement of the parties regarding [their] interpretation' in accordance with Article 31(3) of the Vienna Convention on the Law of Treaties.[624] Second, considering their political importance, it may be argued that the reports 'generat[e] changes in State opinion or practice [which] could also be contributing to the formation of new international customs on corporate settlements'.[625] However, for the purposes of this study, the main interest is in assessing the OECD-WGB's and UNCAC-IRM's treaty body practice for signs of support or opposition which may have influenced the domestic introductions of corporate non-prosecution agreements.

In their comprehensive study of corporate settlements more generally,[626] Ivory and Søreide have recently shown that these treaty body reports indicate an acceptance and endorsement of corporate non-prosecution agreements, albeit with some qualifications.[627]

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[623] See note 515.

[624] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 31(3)(b). See generally, Georg Nolte, *Treaties and Subsequent Practice* (Oxford University Press 2013).

[625] Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 958 with reference to, among others, Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2015) 212-15, 225.

[626] Following the OECD's broader definition of non-trial resolutions as 'any agreement between a legal or natural person and an enforcement authority to resolve foreign bribery cases without a full trial on the merits of the allegations either before or after indictment with sanctions and/or confiscation, irrespective of whether it is a conviction (e.g., plea deals) or a non-conviction mechanism (e.g., non-prosecution or deferred prosecution agreements)' (Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 947 with reference to OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (OECD 2019) 11).

[627] Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 959, 969. The following analysis is much indebted to this study. See also, Peter J Cullen and Mark Pieth, 'Article 5' in Mark Pieth, Lucinda A Low and Nicola Bonucci (eds), *The OECD Convention on Bribery: A Commentary* (2nd edn, Cambridge University Press 2014) 354, 369-70.

For example, in its Phase 3 report on the US in 2010, the OECD-WGB first explains in relation to non-prosecution and deferred prosecution agreements that

> [t]he dramatic increase occurred shortly after the prosecution and collapse of the accounting firm Arthur Andersen which led to thousands of jobs lost. Avoiding such collateral consequences of prosecution is generally cited as why DPAs and NPAs are used.[628]

In its overall commentary on the use of non-prosecution and deferred prosecution agreements in the US, the OECD-WGB then notes that non-prosecution and deferred prosecution agreements are an 'innovative method for resolving cases, … which has helped to enable a high level of enforcement activity'.[629]

In the context of reviewing the UK's ability to provide criminal sanctions, the OECD-WGB explained in 2012 that '[e]xperience in other jurisdictions shows that plea negotiations, deferred prosecution agreements and plea agreements, when allowed under a country's legal system, can be useful for resolving foreign bribery enforcement actions'.[630] The lead examiners then went on to 'recommend the UK to pursue legislative and other efforts that could lead to greater use of these measures in appropriate cases'.[631] In the Phase 3 report on Brazil in 2014, the OECD-WGB indicates that it views Brazil's adoption of administrative leniency agreements (*acordo de leniencia*) as a 'positive development [which] broaden[s] the arsenal available to the prosecution to encourage self-reporting and uncover foreign bribery'.[632] The lead examiners more generally 'welcome the value and flexibility provided by the availability of cooperation agreements and leniency agreements'.[633] Similarly encouraging statements can be found, for example, in the Phase 4 reports on Germany and Switzerland in 2018.[634] 'Not[ing] that conditional non-prosecution agreements are not

[628] OECD-WGB, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States* (15 October 2010) para 112 with reference to US Government Accountability Office, *Corporate Crime: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness*, GAO-10-110 (2009) 1.
[629] Ibid 38.
[630] OECD-WGB, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom* (16 March 2012) 21.
[631] Ibid 21. See also for similar calls in relation to Scotland, OECD-WGB, *Phase 4 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom* (16 March 2017) 59.
[632] OECD-WGB, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Brazil* (14 October 2014) para 60.
[633] Ibid 42.
[634] Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 962. See also, OECD-WGB, *Phase 4 Report on Implementing the OECD Anti-Bribery Convention in Japan* (27 June 2019) 66; OECD-WGB, Phase 4 Report on Implementing the OECD Anti-Bribery Convention in the Netherlands (16 October 2020) 65.

available to legal persons', the report on Germany 'recommend[s] that Germany consider introducing a system of resolution for legal persons as part of its efforts to increase enforcement against legal persons'.[635] Similarly, the report on Switzerland 'recommend[s] that Switzerland consider …the introduction of an alternative procedure to prosecution'.[636]

In addition to these supportive statements, the OECD-WGB has also expressed concerns over domestic laws and practices on corporate non-prosecution agreements not complying with certain terms of the OECD-ABC as well as principles of transparency, accountability, and consistency.[637] In particular, it has stated that unclear and ill-defined settlement procedures may allow for 'considerations of … national economic interest … or the identity of the natural or legal persons involved' in violation of Article 5 OECD-ABC.[638] However, it did not criticise the consideration of Rolls-Royce importance to the British economy as a relevant public interest criterion for entering into the deferred prosecution agreement in 2017,[639] but merely mentioned concerns by non-governmental organisations (NGOs) over setting 'a precedent of "big government contractors" "escap[ing] trial and consequently avoiding being debarred"'.[640] Furthermore, the OECD-WGB has indicated that some domestic laws and practices may not satisfy the standard of 'efficient, proportionate, and dissuasive' sanctioning in Article 3 OECD-ABC.[641]

[635] OECD-WGB, *Phase 4 Report on Implementing the OECD Anti-Bribery Convention in Germany* (14 June 2018) 58.
[636] OECD-WGB, *Phase 4 Report on Implementing the OECD Anti-Bribery Convention in Switzerland* (15 March 2018) 42
[637] For a detailed analysis, see Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 962-67.
[638] See for example, OECD-WGB, *Phase 3 Report Implementing the OECD Anti-Bribery Convention in France* (12 October 2012) 41 (still on the use of the procedure for appearance on prior admission of guilt); OECD-WGB, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Brazil* (14 October 2014) 27; OECD-WGB, *Phase 1bis Report on Implementing the OECD Anti-Bribery Convention in Argentina* (29 June 2019) para 83. See further, Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 962-63.
[639] *SFO v Rolls Royce PLC, Rolls Royce Energy Systems Inc.*, Deferred Prosecution Agreement, Crown Court at Southwark, Case No U20170036 (17 January 2017). See also, section 3.3.3.
[640] Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 962 with reference to OECD-WGB, *Phase 4 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom* (16 March 2017) para 128.
[641] See for example, OECD-WGB, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Brazil* (14 October 2014) para 61; OECD-WGB, *Phase 1bis Report on Implementing the OECD Anti-Bribery Convention in Argentina* (29 June 2019) para 81. See Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 963-64 with further references.

Ivory and Søreide also report a 'more tentative but nonetheless marked acceptance of settlements' in the UNCAC-IRM country reports.[642] While more rarely in comparison to the OECD-WGB, the UNCAC-IRM reports also provide evidence of direct calls for the adoption or expansion of corporate non-prosecution agreements.[643] In addition, when discussing Articles 26, 30, and 37 of the UNCAC, the UNCAC-IRM implicitly describes corporate non-prosecution agreements as, in principle, compliant with the UNCAC.[644]

4.3 The Revision of the 2009 OECD Recommendation: Towards International Standards on Corporate Non-Prosecution Agreements?

In this final part, the chapter briefly turns to current efforts on the establishment of international standards for corporate non-prosecution agreements. While there have also been general calls for the development of such standards in other forums such as the UN or G20,[645] the most sustained and advanced efforts have taken place under the umbrella of the OECD, culminating in the current revision of the 2009 OECD Recommendation.

After several initiatives by civil society actors recommending the OECD to develop international standards on corporate settlements since 2016,[646] the OECD-WGB invited comments on the development of a recommendation on non-trial resolutions in the

[642] Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 967.
[643] See for example, UNCAC-IRM, *Country Review Report of the United Kingdom* (2011-2012) 111; UNCAC-IRM, *Country Review Report of Israel* (2010-2015) paras 336, 452-53.
[644] See for example, UNCAC-IRM, *Country Review Report of Israel* (2010-2015) para 332; UNCAC-IRM, *Country Review Report of the United Kingdom* (2011-2012) para 223; UNCAC-IRM, *Country Review Report of the United States of America* (2010-2015) 47. See also, Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 967.
[645] UN FACTI, *Report on Financial Integrity for Sustainable Development* (UN 2021) Recommendation 1B; G20, *Annex to G20 Leaders Declaration: G20 High Level Principles on the Liability of Legal Persons for Corruption* (8 July 2017) Principle 8. The G20 (or Group of Twenty) comprises nineteen of the world's largest economies and the EU.
[646] See for example, Corruption Watch, Transparency International, UNCAC Coalition, and Global Witness, *Letter to Secretary General Angel Gurria on 'Global Standards for Corporate Settlements in Foreign Bribery Cases'* (10 March 2016) <https://uncaccoalition.org/letter-to-oecd-secretary-general-angel-gurria-global-standards-for-corporate-settlements-in-foreign-bribery-cases/>; OECD Secretary-General's High-Level Advisory Group (HLAG) on Anti-Corruption and Integrity, *Report to the OECD Secretary-General on Combating Corruption and Fostering Integrity* (16 March 2017) Recommendation 6 <www.oecd.org/corruption/HLAG-Corruption-Integrity-SG-Report-March-2017.pdf>; Recommendation 6 Network, *Recommendation regarding Non-trial Resolutions or Negotiated Settlements of Cases involving Foreign Bribery* and *Appendix III: Principles for the Implementation and Use of Non-trial Resolutions of Foreign Bribery Cases* (31 October 2018) <www.ibanet.org/Non-trial-Resolutions-of-Bribery-Cases>; Corruption Watch, Transparency International, UNCAC Coalition, and Global Witness, *Letter to Secretary General Angel Gurria on 'Principles for the use of non-trial resolutions in foreign bribery cases'* (6 December 2018) <www.oecd.org/daf/anti-bribery/CSO-Letter-to-OECD-SG-Gurria-December-2018.pdf>.

enforcement of the foreign bribery offence as part of its public consultation on the review of the 2009 OECD Recommendation in 2019.[647]

In terms of non-trial resolutions, the public consultation document states:

> Non-trial resolutions (resolutions) are not specifically addressed by the Convention or 2009 Recommendation. In 2019, the WGB finalised a thematic study on the various forms of resolutions in WGB countries to resolve foreign bribery matters. With close to 80% of all successfully concluded cases since the Convention's entry into force resolved with a resolution, these instruments have also been key to the resolution of various high-profile multijurisdictional cases. In several countries, resolutions are designed to leverage voluntary disclosure, co-operation and remedial actions by offenders. When properly designed, resolutions can thus be a driver of enforcement and a leverage for corporate compliance. Yet, as the Working Group has repeatedly noted in the context of its country monitoring, such mechanisms must be accompanied by adequate measures to ensure their transparency and accountability. This topic has also been the subject of much recent attention by civil society.[648]

At present, it is unclear whether the revision of the 2009 OECD Recommendation, once it is approved, will introduce international standards on non-trial resolutions, including corporate non-prosecution agreements.[649]

4.4 Conclusion

This chapter set out to examine to what extent international law regulates the domestic introduction of corporate non-prosecution agreements. Resembling early developments in the

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[647] OECD-WGB, *Public Consultation Document: Review of the 2009 OECD Anti-Bribery Recommendation* (2019) Question 8.

[648] OECD-WGB, *Public Consultation Document: Review of the 2009 OECD Anti-Bribery Recommendation* (2019) 10 with reference to OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (OECD 2019); Corruption Watch, Transparency International, UNCAC Coalition, and Global Witness, *Letter to Secretary General Angel Gurria on 'Global Standards for Corporate Settlements in Foreign Bribery Cases'* (10 March 2016) <https://uncaccoalition.org/letter-to-oecd-secretary-general-angel-gurria-global-standards-for-corporate-settlements-in-foreign-bribery-cases/>; Corruption Watch, Transparency International, UNCAC Coalition, and Global Witness, *Letter to Secretary General Angel Gurria on 'Principles for the use of non-trial resolutions in foreign bribery cases'* (6 December 2018) <www.oecd.org/daf/anti-bribery/CSO-Letter-to-OECD-SG-Gurria-December-2018.pdf>; Recommendation 6 <www.oecd.org/corruption/HLAG-Corruption-Integrity-SG-Report-March-2017.pdf>; Recommendation 6 Network, *Recommendation regarding Non-trial Resolutions or Negotiated Settlements of Cases involving Foreign Bribery* and *Appendix III: Principles for the Implementation and Use of Non-trial Resolutions of Foreign Bribery Cases* (31 October 2018) <www.ibanet.org/Non-trial-Resolutions-of-Bribery-Cases>.

[649] Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 972 with reference to Drago Kos, 'Foreword' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) xiii.

US, it has shown that calls for alternatives to prosecution first surfaced at the international level in relation to individuals and minor, mass crimes. The discussion then turned to the multilateral treaty regime on economic crimes, starting with an analysis of the pre-treaty international contests over corporate liability and the regulation of transnational corporations more generally. This analysis has emphasised the important influence of domestic events in the US and subsequent American 'internationalising' initiatives, especially as regards the establishment of the FCPA in the aftermath of the Watergate scandal and legal changes in reaction to the US 'war on drugs'. The emergence of corporate liability and enforcement standards in the multilateral treaty regime was thus, in important ways, shaped by US preferences for a preventive, self-regulatory paradigm in combination with far-reaching home state jurisdiction. While neither the OECD-ABC nor the UNCAC addressed corporate non-prosecution expressly, they established a general framework on corporate liability and enforcement and provided states parties with large regulatory space regarding the domestic introduction of corporate non-prosecution agreements. After the treaty phase, which established important norms on corporate liability and enforcement in principle, subsequent developments returned to non-binding international instruments, especially the 2009 OECD Recommendation. While still not mentioning corporate non-prosecution agreements, the 2009 OECD Recommendation provided further details on corporate cooperation and self-regulation, which not only continue the dominant historical paradigm on corporate liability but also reflect important developments and legal changes relating to the emergence and expansion of corporate non-prosecution and deferred prosecution agreements in the US. Importantly, the study ascertained that, despite the absence of an express basis in the treaty framework, the treaty monitoring body practice of the OECD-WGB and UNCAC-IRM started accepting and endorsing corporate non-prosecution agreements as compliant with the terms and contributing towards the objectives of the OECD-ABC and UNCAC regimes, albeit with some qualifications. Finally, the chapter briefly presented the current status of efforts to introduce international standards on corporate non-prosecution agreements under the umbrella of the OECD, especially as part of its ongoing revision of the 2009 OECD Recommendation.

Thus, even in the absence of express standards in the main international instruments on economic crimes, it may be argued that corporate non-prosecution agreements already form part of broader international developments and contests on corporate liability and more generally the regulation of corporations in the global economic order (or at least the part that

is subject to significant US influence).[650] In addition to the 'substantive' influence of the US corporate crime enforcement model described in this chapter, there are also some parallels or similarities in terms of the method of development in US and international law. In particular, corporate liability for economic crimes was first established in principle in the US (through case law) and international law (through multilateral treaties), while leaving the development of details, especially on corporate cooperation and self-regulation, to non-binding instruments and guidelines (for example, the US Sentencing Guidelines and Principles of Federal Prosecution of Business Organizations, and the 2009 OECD Recommendation as well as its ongoing revision). The diffusion of this general framework is then pursued through DOJ and treaty body practice.

[650] This is also reflected in the fact that corporate non-prosecution agreements are usually introduced at the domestic level as part of bigger legislative changes to corporate liability and enforcement against economic crimes (see section 1.1 and chapter 5 below).

5 Introduction of Corporate Non-Prosecution Agreements in other Domestic Legal Systems

This chapter turns the study's focus to the introduction of corporate non-prosecution agreements in other domestic legal systems. It is divided into two parts. The first part describes domestic introductions of corporate non-prosecution agreements outside the US. It starts by providing a general overview of the domestic legal systems that have introduced or are considering the introduction of these procedures, before examining the underlying introduction processes and norms in England and Wales, France, and Canada in more detail. These domestic legal systems are chosen for reasons of feasibility (including linguistic capacity) but also because they represent examples from different 'periods' of domestic introductions.[651] Partially with the exception of Australia (where it has been reported that deferred prosecution agreements are likely to be introduced soon),[652] the chapter does not address introduction processes that are currently ongoing due to the uncertainty in terms of outcomes.[653] Building on this analysis, the second part then categorises and zooms in on some of the discernible foreign, international, and local influences.

Commentators have generally noted considerable pressure for 'functional equivalence' in domestic legal frameworks on the enforcement against economic crimes.[654] To explore what actors, factors, and rationales may have influenced this development in the context of corporate non-prosecution agreements, the chapter focuses on a textual analysis of the scope of the introduced norms, the main legislative reform documents (especially public

[651] The introduction of deferred prosecution agreements in England and Wales in 2014 can be considered part of the first period of domestic introductions, whereas the adoption of the 'convention judiciaire d'intérêt public' in France in 2016 and remediations agreements in Canada in 2018 may be seen as examples of the second and third period, respectively.

[652] See for example, Christopher Kerrigan, James Campbell, Dora Banyasz and Lewis Winter, 'Trends in corporate crime and what you can expect in 2021' (*Allens INSIGHT*, 22 February 2021) <www.allens.com.au/insights-news/insights/2021/02/trends-in-corporate-crime-and-ahead-for-2021/>; Liz Campbell, 'Revisiting and Re-Situating Deferred Prosecution Agreements in Australia: Lessons from England and Wales' (2021) 43(2) Sydney Law Review 187.

[653] For example, it has recently and somewhat surprisingly been reported that the draft bill which would have introduced corporate non-prosecution agreements in Germany will not be discussed during this parliamentary term. Considering this year's federal elections in Germany, it is thus currently unclear if, when, and in what way the introduction of corporate non-prosecution agreements will be pursed (see for example, Corinna Budras, 'Gesetzesentwurf gekippt: Skandale ohne Folgen' *Frankfurter Allgemeine Zeitung* (9 June 2021)).

[654] See for example, Michael Levi, 'Financial Crimes' in Michael Tonry (ed), The *Oxford Handbook of Crime and Public Policy* (Oxford University Press 2009) 242. See also, OECD, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 21 November 1997) para 2; Mark Pieth, 'Introduction' in Mark Pieth, Lucinda A Low and Nicola Bonucci (eds), *The OECD Convention on Bribery: A Commentary* (2nd edn, Cambridge University Press 2014) 37-41.

consultation documents and parliamentary debates), and official (governmental) commentary at the time. It also considers relevant academic, professional, and civil society commentary, although only to a limited extent. In view of the research question and applied design of this study as well as for reasons of feasibility, the chapter does not provide in-depth analysis of the various legal and practical requirements or their subsequent (that is post-introduction) development in the different jurisdictions – which alone could form the subject of several independent studies[655] – but rather aims at showing some of the broader foreign, especially US, international, and local influences on the decision of states to introduce corporate non-prosecution agreements as reflected in the domestic introduction processes. Similarly, it does not provide a general introduction to or comparison of fundamental differences between prosecution systems.[656]

5.1 Domestic Introductions of Corporate Non-Prosecution Agreements

This part starts by providing a brief overview of the domestic legal systems that have introduced or are considering the introduction of corporate non-prosecution agreements. By way of example, it then presents a more detailed account of the introduction processes in England and Wales, France, and Canada.

5.1.1 An overview

Over the last decade, many domestic legal systems in the Americas, Asia-Pacific, and Europe have introduced forms of corporate non-prosecution agreements akin to US non-prosecution and deferred prosecution agreements for resolving corporate investigations for economic crimes.[657] These mechanisms have been made available especially for corruption, fraud,

[655] See for example on deferred prosecution agreements in England and Wales, Polly Sprenger, *Deferred Prosecution Agreements: The law and practice of negotiated corporate criminal penalties* (Sweet & Maxwell 2015).

[656] See for example, Julia Fionda, *Public Prosecutors and Discretion: A Comparative Study* (Oxford University Press 1995); Jörg-Martin Jehle and Marianne Wade (eds), *Coping with overloaded criminal justice systems: The rise of prosecutorial power across Europe* (Springer 2006); Erik Luna and Marianne Wade (eds), *The Prosecutor in Transnational Perspective* (Oxford University Press 2012); Michael Tonry (ed), *Prosecutors and Politics in Comparative Perspective* (Chicago University Press 2012); Gwladys Gilliéron, *Public Prosecutors in the United States and Europe: A Comparative Analysis with Special Focus on Switzerland, France and Germany* (Springer 2014).

[657] Jennifer Arlen, 'The potential promise and perils of introducing deferred prosecution agreements outside the U.S.' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 157-58. See generally, Abiola Makinwa and Tina Søreide, *Structured Criminal Settlements: Towards Global Standards in Structured Criminal Settlements for Corruption Offences* (International Bar Association 2018); Abiola Makinwa and Tina Søreide, 'Introduction' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020); OECD, *Resolving Foreign*

money laundering, and related economic offences. Notably, this norm diffusion process appears to have occurred regardless of traditionally emphasised differences between domestic legal systems in terms of underlying criminal justice principles, including jurisdictions where principles of legality or mandatory prosecution should ostensibly prohibit such agreements.[658]

For example, England and Wales introduced deferred prosecution agreements and, in the absence of corporate criminal liability, Brazil adopted administrative leniency agreements (*acordo de leniencia*) in 2014.[659] France followed two years later with the introduction of judicial public interest agreements (*convention judiciaire d'intérêt public*) in 2016.[660] 2018 saw the establishment of effective collaboration agreements (*acuerdo de colaboracion eficaz*) in Argentina,[661] remediation agreements in Canada,[662] and deferred prosecution agreements in Singapore.[663] In 2020, the Netherlands revised its 'transaction' (*transactie*) procedure to make it more broadly available for serious economic crimes involving corporations.[664] While so far not based on an express, formal legal framework, the use of deferred prosecution agreements has also been reported in prosecutorial practice in countries such as Kenya.[665] Similar legislative changes are on the verge of being introduced in Australia[666] and under

Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention (OECD 2019).

[658] Abiola Makinwa, 'Public/private co-operation in anti-bribery enforcement: non-trial resolutions as a solution?' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 43.

[659] UK Crimes and Courts Act 2013, c. 22, § 45, schedule 17; Brazil Clean Companies Act 2014, No 12,846, chapter V.

[660] Law relating to Transparency, the Fight against Corruption and the Modernisation of Economic Life, No 2016-1691 (9 December 2016) Article 22.

[661] Argentina Law on Corporate Criminal Liability 2018, No 27.401 (1 March 2018) section 21. See also, Guillermo Jorge and Fernando Basch, 'Jorge and Basch: Argentina introduces deferred prosecution agreements, standards for compliance programs' (*FCPA Blog*, 16 January 2018) <https://fcpablog.com/2018/01/16/jorge-and-basch-argentina-introduces-deferred-prosecution-ag/>.

[662] Canadian Criminal Code, part XXXII.1, section 715.3.

[663] Singapore Criminal Justice Reform Act 2018, section 35.

[664] OECD-WGB, *Phase 4 Report on Implementing the OECD Anti-Bribery Convention in the Netherlands* (16 October 2020) 45.

[665] Kenya Office of the Director of Public Prosecutions, Newsletter, Issue 3 (September 2020) <www.odpp.go.ke/wp-content/uploads/2020/10/ODPP-Newsletter-2020-OCTOBER-10-ISSUE-III_compressed.pdf>.

[666] Australian Parliament, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019, schedule 2 <www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1920a/20bd099#_Toc41551903>. See also, note 649.

consideration at least in Germany,[667] Ireland,[668] and Switzerland.[669] Discussions appear to have started as well in countries such as Ghana, Israel, Malaysia, Poland, and New Zealand.[670] Other countries have established procedures that exhibit partially similar features but, so far, are only available for individuals,[671] in the context of less serious crimes and certain specialist laws,[672] or for cooperation in relation to crimes committed by third parties.[673] While the latter group of procedures may become a stepping stone towards the development of (more general) corporate non-prosecution agreements, it falls outside the scope of this study.

5.1.2 England and Wales: deferred prosecution agreements, 2014

The beginning of the domestic process that eventually led to the introduction of a deferred prosecution regime in England and Wales can be traced to the sentencing of Innospec Ltd,

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[667] German Federal Ministry of Justice and Consumer Protection, Draft Law on the Sanctioning of Association-Related Crimes (*Gesetz zur Sanktionierung von verbandsbezogenen Straftaten*) section 36 <www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Staerkung_Integritaet_Wirtschaft.pdf?__blob=publicationFile&v=2>. See also, note 654.

[668] Law Reform Commission of Ireland, *Regulatory Powers and Corporate Offences* (LRC, 119-2018) 266.

[669] After a proposal for the inclusion of deferred prosecution agreements (*Aufschub der Anklageerhebung bei Verfahren gegen Unternehmen*) by the Swiss Office of the Attorney General (Consultation Overview on the Revision of the Criminal Procedure Code (March 2018) 25, 38-42 <www.admin.ch/ch/d/gg/pc/documents/2914/Organisationen_Teil_1.pdf>) was not adopted in the Federal Council's draft bill for a revision of the Criminal Procedure Code (Federal Council Message on the Revision of the Criminal Procedure of 28 August 2019, Federal Gazette 2019 6697 <https://www.fedlex.admin.ch/eli/fga/2019/2368/de>), it is currently unclear whether Parliament will follow this position or if it will be reintroduced in a modified form (see for example, Jürg Wernli and Déborah Carlson-Burkart, 'Kein Deferred Prosecution Agreement im Unternehmensstrafrecht?' Jusletter (5 October 2020)).

[670] Kofi Owusu, 'Ghana must adopt Deferred Prosecution Agreements - Godfred Odame' (*GhanaWeb*, 5 March 2020) <www.ghanaweb.com/GhanaHomePage/NewsArchive/Ghana-must-adopt-Deferred-Prosecution-Agreements-Godfred-Odame-886255> (indicating that the Deputy Attorney-General has called for the introduction of deferred prosecution agreements); OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: OECD Data Collection Questionnaire Results* (OECD 2019) 24 (indicating that the Israeli Ministry of Justice is considering the proposal of non-prosecution agreements); Ben Lucas, 'Deferred prosecution agreements required in Malaysia before corporate failure-to-prevent-bribery offense is enforced, MACC chief says' (*MLex*, 28 October 2019) <https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/anti-bribery-and-corruption/deferred-prosecution-agreements-required-in-malaysia-before-corporate-failure-to-prevent-bribery-offense-is-enforced-macc-chief-says> (indicating that the head of the Malaysian Anti-Corruption Commission has called for the introduction of deferred prosecution agreements); Poland, Government Legislative Process, Draft Act on the Liability of Collective Entities for Offenses <https://legislacja.rcl.gov.pl/projekt/12312062>; Michael Griffiths, 'New Zealand mulls deferred prosecution agreements' *Global Investigations Review* (12 February 2019).

[671] See for example, deferred prosecution agreements (*huan qi su*) in Taiwan (Abiola Makinwa and Tina Søreide, *Structured Criminal Settlements: Towards Global Standards in Structured Criminal Settlements for Corruption Offences* (International Bar Association 2018) 574).

[672] See for example, conditional suspensions of proceedings (*suspension del proceso a prueba*) in Costa Rica or the procedure of closing a case through settlement under Israeli Securities Law (OECD-WGB, *Phase 2 Report on Implementing the OECD Anti-Bribery Convention in Costa Rica* (11 March 2020) 39; Abiola Makinwa and Tina Søreide, *Structured Criminal Settlements: Towards Global Standards in Structured Criminal Settlements for Corruption Offences* (International Bar Association 2018) 599).

[673] See for example, agreements procedures (*shiho-torihiki)* in Japan (OECD-WGB, *Phase 4 Report on Implementing the OECD Anti-Bribery Convention in Japan* (27 June 2019) 64).

which brought the status of corporate criminal prosecutions into focus. In 2010, Innospec Inc, a specialty chemical company headquartered in the US, agreed to settle charges of wire fraud and FCPA violations in the context of the UN's Oil for Food Program in Iraq as well violations of the US embargo against Cuba through a plea agreement.[674] In a related matter, brought by the UK's SFO, Innospec's British subsidiary, Innospec Ltd, agreed to plead guilty to settle a case of corrupt payments to Indonesian officials which had been developed after a referral by the DOJ.[675] It was one of the first coordinated global settlements involving these two authorities.

However, the 'prospect of future trans-Atlantic coordination dimmed' when Lord Justice Thomas almost refused to accept the settlement agreement due to concerns over incompatibility with English law.[676] Lord Justice Thomas, Britain's second highest criminal judge at the time and later Chief Justice (the head of the criminal judiciary), concluded that 'under English law, "[t]he Director of the SFO had no power to enter into the [settlement] arrangements" that prescribe a particular penalty and that the settlement, as far as it related to a specific fine amount, had "no effect" in English courts'.[677] He added that the penalty of USD 12.7 million issued by the SFO was 'wholly inadequate' and should have amounted to 'tens of millions'.[678] Despite 'considerable reluctance', the judge approved the settlement, among others, not wanting to undermine the global settlement, which had already been announced to the markets, at this late stage.[679] However, he emphasised that going forward 'no such arrangements should be made again … unless any change is made to the rules of procedure or to the practice direction'.[680]

[674] DOJ Press Release, 'Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba: Coordinated Global Enforcement Action by DOJ, SEC, OFAC and United Kingdom's Serious Fraud Office' (18 March 2010); *US v Innospec Inc*, Plea Agreement, US District Court for the District of Columbia, Case No 1:10-CR-00061-ESH (18 March 2010).
[675] DOJ Press Release, 'Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba: Coordinated Global Enforcement Action by DOJ, SEC, OFAC and United Kingdom's Serious Fraud Office' (18 March 2010); *Regina v Innospec Ltd* [2010] EW Misc 7 (EWCC).
[676] See Gibson Dunn, '2011 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements' (4 January 2012) <www.gibsondunn.com/2011-year-end-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/#_ftn22>.
[677] Gibson Dunn, '2011 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements' (4 January 2012) <www.gibsondunn.com/2011-year-end-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/#_ftn22> with reference to *Regina v Innospec Ltd*, Sentencing remarks of Lord Justice Thomas, Crown Court at Southwark (26 March 2010) paras 22-28 and 45.
[678] Ibid paras 40-41.
[679] Ibid para 42.
[680] Ibid paras 45-46.

Responding to such pressure, government officials, including the Director of the SFO, Richard Alderman, and the Solicitor-General, Edward Garnier, started making public comments on the need to explore alternative ways of resolving corporate criminal investigations, including deferred prosecution agreements.[681] For example, on 6 October 2011, Solicitor-General Garnier argued in the Law Society Gazette that the 'introduction of deferred prosecution agreements (DPAs), similar to those in the US, would provide a more effective approach to dealing with corporate crime'.[682] After explaining that prosecutions in the UK are 'long, expensive and resource-intensive' with '[t]oo few companies … ever held to account for their crimes', he noted that '[b]y the time we are ready to prosecute in this jurisdiction, those businesses which have an international presence, particularly in the US, have often reached settlements with overseas authorities which shut us out from taking action here'.[683] In the context of arguing that UK prosecuting authorities 'need new tools that are more effective in the modern world', he also emphasised that prosecution can be a 'blunt response' which 'often also causes collateral damage: companies are not people, but the effect of a prosecution can be felt by employees, pensioners and shareholders who have played no part in the crime'.[684] He added that 'Arthur Andersen's collapse in 2002 demonstrated that all too vividly'.[685] Director Alderman made similar statements, for example, when reportedly explaining at an event hosted by Pinsent Masons' London office on 17 October 2011 that '[t]ools such as deferred prosecution and early judicial involvement will allow us to work more efficiently and cost-effectively'.[686] He also declared that 'the SFO is "in the process of convincing the government that these changes are needed, particularly with regards to the Bribery Act implementation"'.[687]

In addition to these domestic developments, on 16 March 2012, the OECD-WGB released a monitoring report in which it criticised the UK for its insufficient enforcement of the OECD-

[681] See Gibson Dunn, '2011 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements' (4 January 2012) <www.gibsondunn.com/2011-year-end-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/#_ftn22>.
[682] Edward Garnier, 'DPAs will provide effective tool for combating corporate crime' *The Law Society Gazette* (6 October 2011).
[683] Ibid.
[684] Ibid.
[685] Ibid.
[686] Gibson Dunn, '2011 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements' (4 January 2012) <www.gibsondunn.com/2011-year-end-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/#_ftn22>.
[687] Ibid.

ABC.[688] The criticism focused in particular on so-called 'consent civil recovery orders', which the SFO had been using as its primary enforcement tool in foreign bribery cases since 2008.[689] According to the OECD-WGB's lead examiners this civil settlement was 'opaque, lacks accountability and thus fails to instil public and judicial confidence'.[690] Explaining that '[e]xperience in other jurisdictions shows that … deferred prosecution agreements and plea agreements … can be useful for resolving foreign bribery enforcement actions', they encouraged the UK to 'pursue legislative and other efforts that could lead to greater use of these measures'.[691]

These developments resulted in the UK Ministry of Justice, on 17 May 2012, releasing a consultation paper and opening a period of public consultation on deferred prosecution as a 'new enforcement tool to deal with economic crime committed by commercial organisations'.[692] In announcing the consultation process, Parliamentary Under-Secretary of State Crispin Blunt and the Solicitor-General Edward Garnier echoed earlier arguments in favour of deferred prosecution agreements, emphasising that '[i]nvestigations and trials are forbiddingly long, expensive and complicated – particularly where offences occur across multiple jurisdictions', resulting in 'too few organisations held to account for their crimes'.[693] They explained that 'we need to look again at the range of tools open to prosecutors' and expressed a 'believe that deferred prosecution agreements … can make a valuable contribution to efforts to identify and address corporate economic crime'.[694] In relation to collateral consequences of prosecutions, they emphasised that deferred prosecution agreements 'enable commercial organisations to be held to account – but without unfairly affecting employees, customers, pensioners, suppliers and investors who were not involved

[688] OECD-WGB, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom* (16 March 2012). See also, section 4.2.4.
[689] OECD-WGB, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom* (16 March 2012) 6, 24. For a detailed discussion of the SFO's use of 'consent civil recovery orders' in this context, see Colin King and Nicholas Lord, *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements* (Palgrave Macmillan 2018) 33-66.
[690] OECD-WGB, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom* (16 March 2012) 24.
[691] Ibid 21.
[692] UK Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements* (17 May 2012). See also, Susan Hawley, Colin King and Nicholas Lord, 'Justice for whom? The need for a principled approach to Deferred Prosecution Agreements in England and Wales' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 315-17.
[693] UK Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements* (17 May 2012) para 3.
[694] Ibid para 5.

in the behaviour that is being penalised'.[695] On this point, the consultation paper elaborated that

> '[w]hile criminal prosecution can effectively punish a commercial organisation using existing criminal penalties, it can also end up having unintended detrimental consequences, such as adverse share price movements and failure of organisations, which in turn can impact on blameless employees, customers, pensioners, suppliers and investors. A criminal conviction can also mean the organisation is unable to bid for EU and US public procurement tenders, which may be disproportionate and particularly damaging. Occasionally, a criminal investigation and prosecution can lead to the commercial organisation going out of business, leading to job losses and wider damage to the economy. The global collapse of Arthur Andersen in 2002 within weeks of indictment (which was subsequently overturned in 2005 by the US Supreme Court) is a graphic illustration of the problem'.[696]

In the context of presenting the 'case for change and need for new enforcement approaches', the consultation paper referred on several occasions to rationales that emphasise enforcement efficiency, including costs, prevention and self-policing, and greater cooperation with foreign law enforcement authorities.[697] Notably, the consultation paper also included an analysis of the US approach to deferred prosecution agreements and how it may be effectively used in England and Wales.[698]

The UK Government's response to the consultation was published on 23 October 2012 and indicated widespread support for its plan to introduce deferred prosecution agreements.[699] Subsequently, draft legislation on deferred prosecution agreements was included in the larger Crime and Courts Bill which was already before Parliament.[700] Having received royal assent on 25 April 2013, schedule 17 of the Crime and Courts Act introduced deferred prosecution agreements in England and Wales on 24 February 2014.[701] As required

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[695] Ibid para 7.
[696] Ibid paras 27-28.
[697] See for example, ibid para 30 and subsequent sections on 'Commercial organisations' behaviour', 'Multiple jurisdictions', and 'Length and cost of proceedings'.
[698] Ibid paras 44, 56-70. See also, section 5.2.1.1.
[699] UK Ministry of Justice, *Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations* (23 October 2012) 35 (indicating that 86 per cent of respondents agreed that 'DPAs will assist prosecutors in tackling economic crime and dealing with cases appropriately').
[700] UK Crimes and Courts Act 2013, c. 22, § 45, schedule 17, section 6; UK Ministry of Justice, *Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations* (23 October 2012) para 225.
[701] UK Crimes and Courts Act 2013, c. 22, § 45, schedule 17. On the limitation to England and Wales, the consultation paper explained that while '[i]n Northern Ireland and Scotland, much of the criminal justice system is devolved, … matters relating to corporate law are broadly reserved'. In addition, it noted that the remits of the

by the Act, schedule 17 was supplemented by the Deferred Prosecution Agreements Code of Practice, an advisory document issued by the SFO and the Crown Prosecution Service.[702] According to schedule 17 of the Crime and Courts Act, a deferred prosecution agreement is a voluntary agreement between a designated prosecutor and legal person whereby, in exchange for fulfilling a variety of conditions imposed by the agreement, the prosecutor will first defer and eventually discontinue a criminal prosecution.[703]

The introduced deferred prosecution regime is clearly modelled after the US example, as evidenced by the use of the same terminology, express references in the legislative history, and several similarities in the basic characteristics, effects, and conditions.[704] Many of the factors to be considered and conditions to be imposed by English and Welsh prosecutors when offering a deferred prosecution agreement are similar to the dominant factors and conditions in US practice, going back to the factors already described in the 1991 US Sentencing Commission Guidelines.[705] In particular, similar emphasis is put on self-investigation and -reporting, cooperation with law enforcement authorities, prevention-oriented compliance programs, and the consideration of the negative consequences of a prosecution for the corporation and the collateral effects for its employees, shareholders, and the public more generally.[706]

However, it is also different from the US approach in several respects. In general, the statutory regime in combination with the Deferred Prosecutions Agreements Code of Practice provides a more formalised process that grants less discretion to prosecutors to enter into deferred

Crown Prosecution Service and SFO, the prosecuting authorities responsible for the application of deferred prosecutions agreements, are limited to England and Wales (and Northern Ireland in case of the SFO) (UK Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements* (17 May 2012) para 24 and note 6).

[702] UK SFO and Crown Prosecution Service, Deferred Prosecution Agreements Code of Practice (14 February 2014).

[703] See in particular, UK Crimes and Courts Act 2013, c. 22, § 45, schedule 17, sections 1-4, 11.

[704] See UK Ministry of Justice, *Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations* (23 October 2012) paras 56-70; UK Crimes and Courts Act 2013, c. 22, schedule 17. See also, Polly Sprenger, *Deferred Prosecution Agreements: The law and practice of negotiated corporate criminal penalties* (Sweet & Maxwell 2015) 19; Joanna Dimmock, Jonathan Pickworth and Tom Hickey, 'Deferred Prosecution Agreements 5 years on – the Americanization of UK corporate crime enforcement' (*White and Case Client Alert*, 10 May 2019) <www.whitecase.com/publications/alert/deferred-prosecution-agreements-5-years-americanisation-uk-corporate-crime>.

[705] See section 3.1.2.

[706] UK SFO and Crown Prosecution Service, Deferred Prosecution Agreements Code of Practice (14 February 2014) sections 2.8.1(iii), (v), (vi), 2.8.2(i), (iii), (v), (vi), (vii), 2.9. See also, UK Crimes and Courts Act 2013, c. 22, schedule 17, section 5(3).

prosecution agreements.[707] In particular, while US prosecutors negotiate and file deferred prosecution agreements with little judicial oversight,[708] the deferred prosecution regime in England and Wales provides a more prominent role to the courts, requiring court confirmation before and after agreeing on the terms of the deferred prosecution agreement that the agreement is in the interests of justice and that the terms proposed are fair, reasonable, and proportionate to the offense.[709] Similarly, court approval is also needed to establish a breach or modify an agreement once it is in force.[710] The US approach applies deferred prosecution agreements to a broad variety of crimes,[711] whereas schedule 17 of the Crimes and Courts Act limits the application in England and Wales to certain enumerated crimes, which are mainly of economic nature, involving especially bribery, fraud, money laundering, and other designated financial crimes.[712] Finally, in England and Wales, deferred prosecution agreements are only available for 'a body corporate, a partnership or an unincorporated association', but not individuals, like in the US.[713] One the one hand, this development may appear paradoxical considering that deferred prosecution agreements initially emerged to provide leniency to individuals in the US.[714] On the other, it may be argued that it further attests to the higher prioritisation of other rationales that emphasise incentivising corporate cooperation and protecting corporations and innocent third-party stakeholders from adverse collateral consequences of prosecutions.[715]

5.1.3 France: convention judiciaire d'intérêt public, 2016

France started considering the introduction of its version of a corporate non-prosecution agreement, referred to as judicial public interest agreement (*convention judiciaire d'intérêt public*), as part of a draft law relating to transparency, the fight against corruption, and the modernisation of economic life (*projet de loi relatif à la transparence, à la lutte contre la*

[707] See Lorna Emson, Francis Bond and James Reid, 'Is the United States more effective than the United Kingdom at prosecuting economic crime?' (*Lexology*, 7 May 2021) <www.lexology.com/library/detail.aspx?g=4c84f43b-bf3d-49f1-8f10-3fe789c067cf&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2021-05-12&utm_term=>.
[708] See chapter 3, in particular note 204.
[709] See for example, UK Crimes and Courts Act 2013, c. 22, § 45, schedule 17, sections 7-8.
[710] See for example, ibid sections 9-10.
[711] See chapter 3, in particular note 205.
[712] Crimes and Courts Act 2013, c. 22, § 45, schedule 17, sections 15-30.
[713] Ibid section 4.
[714] See section 3.1.1.
[715] For a discussion of this change in the US, see section 3.1.2 and 3.2. Notably, commentators have even argued that while the DOJ's use of corporate non-prosecution and deferred prosecution agreements has increased, it has significantly decreased with 'low-level offenders' or noncorporate individuals (see note 512).

corruption et à la modernisation de la vie économique) in 2016.[716] The bill commonly referred to as the 'Sapin II' bill, after Michel Sapin, the Finance Minister who introduced the legislation, was developed against the background of a series of prominent French companies, including among others Technip, Alcatel-Lucent, Total, and Alstom, having previously entered into deferred prosecution agreements with the US DOJ, especially for alleged violations of the FCPA.[717] In addition, France had been criticised internationally for its low levels of anti-bribery enforcement. For example, in 2014 the OECD-WGB expressed 'serious concerns' about France's 'limited efforts' in enforcing its anti-corruption laws.[718] In fact, prior to the introduction of France's version of a corporate non-prosecution agreement, prosecutions against corporations had hardly ever been successful, except for the conviction of Total on 26 February 2016 which was widely perceived as 'symbolic' due to the modest maximum financial sanction of EUR 750,000 available under French law at the time.[719]

The Sapin II bill, and especially its provisions on judicial public interest agreements, were subject to some controversy in and between the different institutions involved in the French legislative process.[720] For example, on 24 March 2016, the Council of State (*Conseil d'État*), which acts both as the supreme court of administrative justice and legal advisor to the French Government on the preparation of draft legislation, issued an advisory opinion on the draft Sapin II bill.[721] The advisory opinion criticised the proposed settlement regime, especially for

[716] See National Assembly, Draft Law relating to Transparency, the Fight against Corruption and the Modernisation of Economic Life, Adopted Text No 755 (14 June 2016) <www.assemblee-nationale.fr/14/ta/ta0755.asp> Article 12 *bis*.

[717] *US v Technip SA*, Deferred Prosecution Agreement, US District Court for the Southern District of Texas, Criminal Case No H-10-439 (28 June 2010); *US v Alcatel-Lucent SA f/k/a "Alcatel SA"*, Deferred Prosecution Agreement, US District for the Southern District of Florida, Case No 10-20907-CR-Moore (27 December 2010); *US v Total SA*, Deferred Prosecution Agreement, US District for the Eastern District of Virginia, Criminal Case No 1:13-CR-239 (29 May 2013); *US v Alstom Grid Inc*, Deferred Prosecution Agreement, US District for District of Connecticut, Case No 3:14-CR-00247-JBA (22 December 2014); *US v Alstom Power Inc*, Deferred Prosecution Agreement, US District for District of Connecticut, Case No 3:14-CR-00248-JBA (22 December 2014); *US v Credit Agricole Corporate and Investment Bank*, Deferred Prosecution Agreement, US District Court for the District of Columbia, Case No 1: 15-CR-00137 (20 October 2015). See also, section 3.3.2.

[718] OECD-WGB, *Statement of the OECD Working Group on Bribery on France's implementation of the Anti-Bribery Convention* (23 October 2014).

[719] Etienne Vergès, 'La procédure pénale hybride: À propos de la convention judiciaire d'intérêt public issue de la loi n o 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique' (2017) 3(3) Revue de science criminelle et de droit pénal compare 579, 580. See also, Juliette Lelieur 'Première condamnation française de personnes morales pour corruption transnationale' (2016) Recueil Dalloz 1240

[720] See generally, Etienne Vergès, 'La procédure pénale hybride: À propos de la convention judiciaire d'intérêt public issue de la loi n o 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique' (2017) 3(3) Revue de science criminelle et de droit pénal compare 579, 581.

[721] Council of State, Opinion on Draft Law relating to Transparency, the Fight against Corruption and the Modernisation of Economic Life, Advisory Opinion No 391.262 (24 March 2016) <www.conseil-

not requiring judicial approval through a public court hearing, which would be contrary to the inquisitorial approach of the French criminal justice system.[722] The Council of State also expressed concerns over the fact that the proposed settlement mechanism would only be available for legal persons but not individuals, indicating that the establishment of divergent procedural pathways would be against the good administration of justice.[723] However, despite these criticisms and subject to appropriate safeguards, the Council of State supported the introduction of the settlement procedure in the specific case of transnational corruption, referring in particular to the existence of similar procedures in other countries.[724] Similar to the UK context, the fact that the corporate non-prosecution agreements regime was introduced in the face of initial resistance based on concerns over inconsistencies with existing principles of the criminal justice system appears to attest to the strength of the actors and proposed rationales in its favour.

On 30 March 2016, French lawmakers decided to submit to the National Assembly a version of the Sapin II bill that did not include the provision containing the settlement procedure.[725] However, the provision was introduced again into the bill during the parliamentary process after a number of amendments, including the requirement of closer judicial supervision and strong guarantees of publicity.[726] The National Assembly then approved the bill on 15 June 2016.[727]

In the Senate, the second legislative chamber, Article 12 *bis* of the Sapin II bill, the provision containing the settlement procedure, was also the subject of heated discussion. During the Senate's debate of Article 12 *bis*, several amendments were presented, requesting its deletion. Supporters of this amendment referred, among others, to the importation of an American procedure which creates a two-tier justice system for large corporations able to pay for their

etat.fr/ressources/avis-aux-pouvoirs-publics/derniers-avis-publies/projet-de-loi-relatif-a-la-transparence-a-la-lutte-contre-la-corruption-et-a-la-modernisation-de-la-vie-economique>.

[722] Ibid para 13.

[723] Ibid.

[724] Ibid.

[725] National Assembly, Draft Law relating to Transparency, the Fight against Corruption and the Modernisation of Economic Life, No 3623 (30 March 2016) <www.assemblee-nationale.fr/14/projets/pl3623.asp>.

[726] National Assembly, Report of the Commission of Constitutional Law, Legislation and General Administration on Draft Law No 3623, Nos 3785 and 3786 (26 May 2016) <www.assemblee-nationale.fr/14/rapports/r3785-tI.asp> II(B)(2)(a).

[727] National Assembly, Draft Law relating to Transparency, the Fight against Corruption and the Modernisation of Economic Life, Adopted Text No 755 (14 June 2016) <www.assemblee-nationale.fr/14/ta/ta0755.asp>.

impunity and all others.[728] In addition, reference was also made to a lack of political will to fight corporate corruption.[729] In response, the rapporteur, François Pillet, explained that

> [t]he judicial settlement, it is true, is a new mechanism for the amicable settlement of disputes …. The idea is to allow our exporting companies or companies established abroad to regularise their situation, and thus to continue their international activities and to be able to operate in certain markets, which would be prohibited by a criminal conviction. We must be pragmatic and take into account the law in other countries, especially in the United States. And better that the proceeds of the fines go to the French Treasury than to the American Treasury![730]

Similarly, Minister Sapin rejected the criticism and echoed the call for pragmatism and enforcement efficiency. In particular, he referred to similar mechanisms being used, among others, in the US and UK, and pointed to a general absence of successful prosecutions of corporations for foreign bribery despite the existence of both the offense in French law since 2000 and obvious facts.[731] In response to criticism of 'sliding towards Anglo-Saxon law' under the guise of pragmatism and efficiency,[732] Minister Sapin argued that Anglo-Saxon law already applied in light of the difficulties of prosecuting corporate crimes in France.[733] He further remarked that

> French companies have been condemned in the United States, Great Britain, the Netherlands, but not in France. Can we thus let slip a part of our sovereignty, while letting others judge our nationals, according to their procedures? … I have met French business leaders sentenced abroad. Technip, for example, was convicted in the United States for acts committed in Nigeria. Very quickly, the board of directors replaced the responsible team and introduced new prevention procedures - staff training, appointment of a [compliance] officer. Why would

[728] Senate, Official Summary Record, Draft Law relating to Transparency, the Fight against Corruption and the Modernisation of Economic Life (5 July 2016) <www.senat.fr/cra/s20160705/s20160705_3.html#par_468> Article 12 *bis*, Amendments No 447 and 558 and, in particular, the statement by Jean-Pierre Bosino. See also similar statements later in the debate by Patrick Abate, Jacques Mézard, and Évelyne Didier.
[729] Ibid statements by Jean-Pierre Bosino and Pierre-Yves Collombat.
[730] Ibid author translation of statement by François Pillet (in the original: 'La transaction judiciaire, c'est vrai, est un mécanisme nouveau de règlement amiable des différends …. L'idée est de permettre à nos entreprises exportatrices ou implantées à l'étranger de régulariser leur situation, et ainsi de poursuivre leurs activités internationales et de pouvoir postuler à certains marchés, ce qu'interdirait une condamnation pénale. Nous devons être pragmatiques et tenir compte du droit dans les autres pays, notamment aux États-Unis. Et mieux vaut que le produit des amendes aille au Trésor français qu'au Trésor américain!').
[731] Ibid statement by Michel Sapin.
[732] Ibid author translation of statement by Évelyne Didier (in the original: '[l]entement mais sûrement, sous couleur de pragmatisme et d'efficacité, nous glissons vers le droit anglo-saxon'). See also, note 729.
[733] Senate, Official Summary Record, Draft Law relating to Transparency, the Fight against Corruption and the Modernisation of Economic Life (5 July 2016) <www.senat.fr/cra/s20160705/s20160705_3.html#par_468> Article 12 *bis*, statement by Michel Sapin.

> we want to wait ten years for a company to be condemned, when a new team is in place and fighting to conquer markets in accordance with the rules, with jobs in France? Ten years during which suspicion weighs on the company, which harms its reputation, employment, and the image of France. I invite you to adopt this balanced device, the fruit of the joint work of the National Assembly and the Senate.[734]

The Senate then adopted Article 12 *bis* of the Sapin II bill with 296 votes in favour and 37 against.[735] After a ruling on its constitutionality by the Constitutional Council (*Conseil Constitutionnel*) on 8 December 2016,[736] the Law relating to Transparency, the Fight against Corruption and the Modernisation of Economic Life came into force on 9 December 2016.[737]

Now included in Article 41-1-2 of the French Code of Criminal Procedure, the introduced *convention judiciaire d'intérêt public* (CJIP) is in many ways inspired and modelled after the US regime on deferred prosecution agreements.[738] Prosecutors, either of their own accord or after referral by an investigating judge, can negotiate agreements with corporations that suspend and eventually dismiss prosecution with conviction or criminal record in exchange for certain conditions.[739] These conditions may include, in particular, the payment of a monetary penalty in an amount oriented at the benefits derived from the offence, up to a maximum of 30 per cent of the company's average annual revenue for the previous three years.[740] The other conditions expressly listed refer to the implementation of a compliance

[734] Ibid author translation of statement by Michel Sapin (in the original: 'Des entreprises françaises ont été condamnées aux États-Unis, en Grande-Bretagne, aux Pays-Bas, mais pas en France. Pouvons-nous ainsi laisser échapper une part de notre souveraineté, en laissant d'autres juger nos ressortissants, selon leurs procédures ? … J'ai rencontré des chefs d'entreprise françaises condamnées à l'étranger. Technip, par exemple, a été condamnée aux États-Unis pour des faits commis au Nigéria. Très rapidement, le conseil d'administration a remplacé l'équipe responsable et instauré de nouvelles procédures de prévention - formation du personnel, nomination d'un référent. Pourquoi voudrait-on attendre dix ans qu'une entreprise soit condamnée, alors qu'une nouvelle équipe est en place et se bat pour conquérir des marchés dans le respect des règles, avec à la clé des emplois en France ? Dix années pendant lesquelles le soupçon pèse sur elle, ce qui nuit à sa réputation, à l'emploi, à l'image de la France. Je vous invite à adopter ce dispositif équilibré, fruit du travail conjoint de l'Assemblée nationale et du Sénat.').
[735] Ibid.
[736] Decision of the French Constitutional Council, Law relating to Transparency, the Fight against Corruption and the Modernisation of Economic Life, Decision No 2016-741 DC (8 December 2016).
[737] Law relating to Transparency, the Fight against Corruption and the Modernisation of Economic Life, No 2016-1691 (9 December 2016).
[738] French Code of Criminal Procedure, Article 41-1-2. See generally, Reuters, 'France adopts U.S.-style anti-corruption settlement system' *Reuters* (8 November 2016) <www.reuters.com/article/us-france-corruption-idUSKBN1332G1>; Jennifer Arlen, 'The potential promise and perils of introducing deferred prosecution agreements outside the U.S.' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 177-78, 190; Gibson Dunn, '2016 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)' (4 January 2017) <www.gibsondunn.com/2016-year-end-update-on-corporate-non-prosecution-agreements-npas-and-deferred-prosecution-agreements-dpas/>.
[739] French Code of Criminal Procedure, Article 41-1-2(I) and (IV), Article 180(2).
[740] Ibid Article 41-1-2(I)(1).

program under the supervision of the newly established French Anticorruption Agency (*Agence Française Anticorruption*; AFA) for a period of up to three years.[741]

However, there are also some discernible differences.[742] For example, like in England and Wales, the French approach limits the application of CJIPs to legal persons and specific offences, including corruption, trading in influence, and money laundering.[743] Similarly, the CJIP procedure provides for more judicial oversight than in the US, requiring especially review and approval by the Court of First Instance (*tribunal de grande instance*) following a public hearing, which may be attended by any alleged victims.[744] The court's review needs to verify the appropriateness of resorting to a CJIP, the regularity of the process, and the conformity of the fines and measures to the indicated limits and advantages derived from the breach.[745]

5.1.4 Canada: remediation agreements, 2018

In contrast to England and Wales and France, the beginning of discussion over the introduction of remediation agreements, Canada's version of a corporate non-prosecution agreement, seemed less driven by external but rather internal influence. In particular, there appear not to have been widely influential US or other foreign law enforcement actions against Canadian companies in the years prior to the introduction of remediation agreements in 2018.[746] Instead, the discussion seems to have surfaced in connection with endeavours led by SNC-Lavalin Group Inc, Canada's largest engineering firm and frequent contractor with the federal government, to convince the Canadian Government to adopt a form of deferred prosecution agreement after it had been charged in 2015 with paying bribes to Libyan

[741] Ibid Article 41-1-2(I)(2).
[742] See Martina Galli, 'Une justice pénale propre aux personnes morales: Réflexions sur la convention judiciaire d'intérêt public' (2018) 2(2) Revue de science criminelle et de droit pénal compare 359, 366 (explaining that to the extent the procedure departs from the US model, it comes close to the British model). See also, Brandon L Garrett, 'International Corporate Prosecutions' in Darryl K Brown, Jenia Iontcheva Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019) 430.
[743] French Code of Criminal Procedure, Article 41-1-2(I).
[744] Ibid Article 41-1-2(II).
[745] Ibid Article 41-1-2(II).
[746] See Brandon L Garrett and Jon Ashley, Duke and UVA Corporate Prosecution Registry <https://corporate-prosecution-registry.com/browse/>.

government officials and defrauded Libyan organisations.[747] The charges related to contracts SNC-Lavalin had entered into in Libya between 2001 and 2011.[748]

On 12 July 2017, Transparency International Canada also published a report discussing deferred prosecution agreements and on balance encouraging their adoption in Canada.[749] Referring to 'chronically low' corporate crime enforcement in Canada, the report argued that, if properly designed, deferred prosecution agreements have the 'potential to support increased enforcement of anti-corruption laws and increased self-disclosure and compliance by corporations'.[750]

In response to these lobbying efforts, the Government of Canada started a public consultation period, by releasing a public consultation paper entitled 'Expanding Canada's Toolkit to Address Corporate Wrongdoing: Deferred Prosecution Agreement Stream' on 25 September 2017.[751] The Government's press release announcing the public consultation presented deferred prosecution agreements as another tool for prosecutors that could 'increase detection of wrongdoing through self-reporting, and help improve corporate culture and compliance'.[752] It also noted that the US and the UK already had deferred prosecution agreement regimes.[753] According to the consultation paper, deferred prosecution agreements may offer several advantages, including being more effective than criminal prosecutions in 'improving compliance and corporate culture' and motivating companies to 'self-disclose wrongdoing'.[754] From a corporate governance perspective, the consultation paper suggested, there could also be a 'broader beneficial impact on the corporate community more generally,

[747] See for example, Corporate Crime Reporter, 'SNC Lavalin Pushes for Deferred Prosecution Agreements in Canada' (Corporate Crime Reporter, 31 January 2017) <www.corporatecrimereporter.com/news/200/snc-lavalin-pushes-for-deferred-prosecution-agreements-in-canada/>; Kathryn Blaze Baum and Sean Fine, 'A deal denied: How SNC-Lavalin spent years fighting for a deferred prosecution law, but then lost the battle to use it' *The Globe and Mail* (24 July 2019); Terry Glavin, 'The Bigger Scandal Here Is Ottawa's Nonchalance about Dirty Money' *National Post* (13 February 2019).
[748] Bertrand Marotte, 'SNC's fraud, corruption hearing set for 2018' *The Globe and Mail* (26 February 2016).
[749] Transparency International Canada, *Another Arrow in the Quiver? Consideration of a Deferred Prosecution Agreement Scheme in Canada* (Transparency International Canada 2017).
[750] Transparency International Canada News Release, 'New Transparency International Canada Report "Another Arrow in the Quiver? Consideration of a Deferred Prosecution Agreement Scheme in Canada' (12 July 2017).
[751] Government of Canada, *Expanding Canada's Toolkit to Address Corporate Wrongdoing: Deferred Prosecution Agreement Stream, Discussion paper for public consultation* (25 September 2017).
[752] Government of Canada News Release, 'Government of Canada seeks views on addressing corporate wrongdoing - Online public consultation examines Government tools for fighting corporate crime' (25 September 2017).
[753] Ibid.
[754] Government of Canada, *Expanding Canada's Toolkit to Address Corporate Wrongdoing: Deferred Prosecution Agreement Stream, Discussion paper for public consultation* (25 September 2017) 6.

to the extent that DPAs are published and made known'.[755] In addition, the consultation paper emphasised that deferred prosecution agreements may 'reduce the negative consequences for blameless employees, shareholders, customers, pensioners, suppliers and investors', 'enhance the prospects for prosecuting and holding criminally liable the individuals within the corporation who are responsible for the corporate wrongdoing', and 'prevent the company from being disqualified from receiving procurement contracts under conviction-based debarment regimes'.[756] It also included a summary and comparison of the US and UK approaches to deferred prosecution agreements, with detailed discussion of some key aspects.[757] While the consultation paper did not indicate support for either approach in general, it specified that a Canadian deferred prosecution regime would only be available for organisations, including 'corporations, companies, firms, partnerships, and trade unions', similar to England and Wales.[758]

With charges pending,[759] SNC Lavalin contended in its submission to the public consultation that adopting a regime on deferred prosecution agreements would safeguard a level playing field for Canadian companies vis-à-vis competitors from other countries that have introduced deferred prosecution agreements such as the US and the UK.[760]

On 27 March 2018, the Government announced that it had introduced legislative amendments to create 'a made-in-Canada version of a deferred prosecution agreement (DPA) regime, to be known as a Remediation Agreement Regime'.[761] It explained that, among others, remediation agreements would 'help to advance compliance measures, hold eligible organizations accountable for misconduct, while protecting innocent parties such as employees and shareholders from the negative consequences of a criminal conviction of the organization'.[762] It further stated that effectively addressing corporate wrongdoing, including through remediations agreements, 'protects the integrity of markets, addresses barriers to

[755] Ibid.
[756] Ibid.
[757] Ibid 5, 7, 10.
[758] Ibid 4.
[759] Bertrand Marotte, 'SNC's fraud, corruption hearing set for 2018' *The Globe and Mail* (26 February 2016).
[760] SNC-Lavalin, Submission to the DPA/Integrity Regime Consultation DPA Submission (13 October 2017) <www.snclavalin.com/en/files/documents/publications/dpa-consultation-submission-october-13-2017_en.pdf> (while the document seems to be no longer available on the company's homepage, it can be found at <www.macleans.ca/wp-content/uploads/2019/08/A201701177_2019-03-12_08-44-46.pdf> (from page 15). See also, Nicholas van Praet and Jeff Gray, 'SNC-Lavalin says corruption charges weighing on its competitiveness' *The Globe and Mail* (10 November 2015).
[761] Government of Canada News Release, 'Canada to enhance its toolkit to address corporate wrongdoing' (27 March 2018).
[762] Ibid.

economic growth and promotes fair competition to ensure job creation for Canadians'.[763] Canada introduced remediation agreements as part of the Budget Implementation Act, 2018, No. 1, which after passing both houses of Parliament (the House of Commons and Senate) was given royal assent on 21 June 2018.[764]

According to the new legislation, a remediation agreement is 'an agreement, between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement'.[765] The declared objectives of the established remediation agreement regime are: (a) to denounce an organization's wrongdoing and the harm that the wrongdoing has caused to victims or to the community; (b) to hold the organization accountable for its wrongdoing through effective, proportionate and dissuasive penalties; (c) to contribute to respect for the law by imposing an obligation on the organization to put in place corrective measures and promote a compliance culture; (d) to encourage voluntary disclosure of the wrongdoing; (e) to provide reparations for harm done to victims or to the community; and (f) to reduce the negative consequences of the wrongdoing for persons — employees, customers, pensioners and others — who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing.'[766]

Like in England and Wales and France, remediation agreements are only available for organisations, not individuals.[767] They can only be used in relation to a specified list of economic crimes, including in particular corruption, fraud, money laundering and other financial sector crimes.[768] Similarly, the Canadian regime provides a more prominent role to court supervision than in the US. For example, the adoption of a remediation agreement requires judicial approval, confirming specifically that the agreement is in the public interest and that the terms of the agreement are fair, reasonable, and proportionate.[769] Furthermore, any modification or the termination of the agreement based on a breach require court approval

[763] Ibid.
[764] Parliament of Canada, House Government Bill, An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures (21 June 2018) <www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=9727472&View=0> Part XXII.1 (Remediation Agreements).
[765] Canadian Criminal Code, section 715.3(1).
[766] Ibid section 715.31.
[767] Government of Canada, *Remediation Agreements and Orders to Address Corporate Crime* (last modified 11 September 2018) <www.canada.ca/en/department-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html>.
[768] Canadian Criminal Code, section 715.3(1) in combination with schedule to Part XXII.1.
[769] Ibid sections 715.37(1) and 715.37(6).

once it is satisfied that the relevant conditions are met.[770] At the end of the term of the remediation agreement, the court, upon application by the prosecutor and satisfaction that the terms of the agreement have been fulfilled, issues an order of successful completion, which 'stays the proceedings against the organization' as a result of which 'the proceedings are deemed never to have been commenced and no other proceedings may be initiated against the organization for the same offence'.[771]

5.2 Foreign, International, and Local Influences

After this overview and discussion of examples of domestic introductions of corporate non-prosecution agreements, this part identifies and categorises some of the partially overlapping foreign, international, and local influences on domestic legal change.

5.2.1 US and other foreign influence

As shown in the previous part as well as more generally in chapter three, US law and enforcement actions have played an important role in the cross-border rise of corporate non-prosecution agreements.

The introduced procedures reflect the general idea of US non-prosecution and especially deferred prosecution agreements, namely allowing prosecutors to agree with corporations not to prosecute serious suspicions of economic crimes provided the corporation meets certain conditions. Like in the US, these conditions typically include a combination of corporate cooperation with law enforcement authorities, imposition of fines and disgorgement of benefits as well as various measures aimed at preventing future misconduct and reforming corporate culture (through compliance and monitoring programs). The articulated objectives are also similar, focusing in particular on increasing enforcement activity and corporate cooperation, while avoiding perceived collateral consequences associated with prosecution and conviction, especially for innocent employees, shareholders, and other third parties.

Beyond these general similarities, three dimensions of influence on the decision of states to introduce procedures akin to the US deferred prosecution agreements can be identified: (i) perceived effectiveness and appropriateness of foreign law and enforcement actions; (ii) law

[770] Ibid sections 715.38 and 715.39(1).
[771] Ibid sections 715.4(1) and (2).

enforcement cooperation and competition; and (iii) the relationship between the foreign and introducing state.

5.2.1.1 Perceived effectiveness and appropriateness of foreign law

An important aspect in the cross-border diffusion of procedures similar to US non-prosecution and especially deferred prosecution agreements seems to be their perceived effectiveness.

In addition to emulating the general idea, conditions, and objectives of these US procedures in introducing corporate non-prosecution agreements into the domestic legal framework, the domestic introduction processes also regularly contain specific analysis of the US model and comments regarding its effectiveness. For example, in the context of presenting '[m]odels for new approaches', the public consultation paper on the introduction of deferred prosecution agreements in England and Wales included a detailed analysis of the US approach to deferred prosecution agreements.[772] It specifically referred to the 'effectiveness of the US model'.[773] When setting out the principles that underlie the proposed model of deferred prosecution agreements in England and Wales, the consultation paper also noted that '[o]ur proposals are based on the system that operates in the US, but are adapted to make it suitable and appropriate for the specific context of the UK'.[774] Similarly, after considering public responses to the consultation document, the government indicated that 'it remains of the view that the US model offers a good example of the effective use of a voluntary agreement approach, albeit in a very different legislative context'.[775] References to US law and its perceived higher effectiveness can also be found in the discussions surrounding the introduction of CJIPs in France.[776] For example, proponents of the CJIP, including the responsible Minister Michel Sapin, argued during the heated debates in the Senate that French law enforcement against corporate crime must become more pragmatic and effective, using the US an example.[777] Finally, the

[772] See note 699.
[773] UK Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements* (17 May 2012) para 69, and similarly para 67.
[774] Ibid para 71.
[775] UK Ministry of Justice, *Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations* (23 October 2012) para 14.
[776] See notes 729-35. See also, Etienne Vergès, 'La procédure pénale hybride: À propos de la convention judiciaire d'intérêt public issue de la loi n o 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique' (2017) 3(3) Revue de science criminelle et de droit pénal compare 579, 580.
[777] See notes 732 and 734.

introduction process underlying remediation agreements in Canada also contained prominent discussions of the US non-prosecution and deferred prosecution agreements regime.[778]

Furthermore, the perceived effectiveness of US law is illustrated by the role of US settlements with corporations from the introducing state. A prominent example is the Innospec case, which significantly contributed to the start of a discussion about deferred prosecution agreements in England and Wales.[779] In France, a series of DOJ settlements with prominent French companies, including Technip, Alcatel-Lucent, Total, and Alstom, played a dominant role in the introduction of the CJIP.[780] Similarly, Singapore witnessed its first major corruption case in 2017 involving Keppel Offshore & Marine Ltd, a major Singaporean shipping company, and a DOJ investigation into FCPA violations over bribery payments in Brazil.[781] The DOJ investigation was resolved through a deferred prosecution agreement in 2017 which, among others, provided that of the global penalty of USD 422 million, 25 per cent and 50 per cent would be credited towards payments made to authorities in Singapore and Brazil, respectively.[782] Singapore's Senior Minister of State for Law and Education, Indranee Rajah, commented at the time that any penalty under Singapore law would have been far less than under the coordinated resolution.[783] Considering that the company was 'also required under the US DPA to strengthen its internal controls and compliance and anti-corruption programmes', she concluded that '[t]he current resolution therefore achieves more than what we would have been able to do if we had proceeded against the company solely under the PCA [Singapore's Prevention of Corruption Act]'.[784] This was one of the drivers for the introduction of the

[778] See note 758. See also, Australian Government, Attorney-General's Department, *Improving enforcement options for serious corporate crime: Consideration of a Deferred Prosecution Agreements scheme in Australia, Public Consultation Paper* (March 2016) 11 (discussing the achievements of the US deferred prosecution agreements regime).
[779] See section 5.1.2.
[780] See section 5.1.3.
[781] See generally, Gibson Dunn, '2018 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)' (10 July 2018) <www.gibsondunn.com/2018-mid-year-npa-dpa-update/#_ftn160>.
[782] US DOJ Press Release, 'Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay $422 Million in Global Penalties to Resolve Foreign Bribery Case' (22 December 2017); *US v Keppel Offshore & Marine Ltd*, Deferred Prosecution Agreement, US District Court for the Eastern District of New York, Case No 17-CR-697-KAM (22 December 2017).
[783] Singapore Ministry of Law, Oral Answer by Senior Minister of State for Law, Ms. Indranee Rajah SC, to Parliamentary Questions on Keppel Offshore & Marine Ltd Case (8 January 2018) <www.mlaw.gov.sg/news/parliamentary-speeches/oral-answer-by-senior-minister-of-state-for-law--ms-indranee-raj0>.
[784] Ibid.

Criminal Justice Reform Act 2018 that established deferred prosecution agreements in Singapore.[785]

However, these recognitions of the fundamental effectiveness of the US non-prosecution and deferred prosecution agreements regime did not lead to a full transplantation of the US law and approach, and a certain amount of local resistance can be observed, involving efforts to modify some aspects of the US regime that are considered as problematic or inappropriate in the local context.[786]

For example, after noting that 'the lack of judicial oversight is likely to make [the US model] unsuitable for the constitutional arrangements and legal traditions in England and Wales',[787] the UK Justice Ministry's public consultation paper on deferred prosecution agreements concludes that '[t]here are opportunities to learn from the US model of deferred prosecution agreements and to develop a bespoke model for England and Wales that provides for better transparency and greater judicial involvement in the process'.[788] Unlike in the US, the establishment of a deferred prosecution agreement regime primarily through a statutory legal framework and the provision of farther reaching obligations regarding the publicity of such agreements may be seen as an attempt to provide more transparency.[789] As regards the increased judicial involvement, it is notable that the proposed and eventually adopted test for judicial approval of deferred prosecution agreements, namely that the agreement is in the 'interests of justice' as well as 'fair, reasonable, and proportionate', seems to be modelled after US law, albeit outside the context of deferred prosecution agreements.[790] Unlike in the US, deferred prosecution agreements were only made available in England and Wales for

[785] Singapore Criminal Justice Reform Act 2018, section 35 (amending chapter 68 of the Singapore Criminal Procedure Code).
[786] See generally, Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) Law & Social Inquiry 229, 230 (explaining that 'the processes through which these [transnational] norms are constructed, carried, and conveyed, always confront national and local processes that may block, adapt, translate, or appropriate a transnational legal norm and spur its reassessment').
[787] UK Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements* (17 May 2012) 69.
[788] Ibid 70. See also, UK Ministry of Justice, *Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations* (23 October 2012) para 14.
[789] See generally, UK Crimes and Courts Act 2013, c. 22, § 45, schedule 17. On the publicity of deferred prosecution agreements, see UK Crimes and Courts Act 2013, c. 22, § 45, schedule 17, sections 11(8) and 12.
[790] On this point, the public consultation paper refers to US courts applying to consent agreements put forward by the SEC 'the test of whether the proposal is "fair, reasonable, adequate, and in the public interest"' (UK Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements* (17 May 2012) 112 with reference to *SEC v Bank of America Corp,* 2009 WL 2842940). See also, note 705.

organisations, but not individuals, and a small group of economic crimes, including bribery, fraud, money laundering, and certain designated financial crimes.[791]

With some variation, domestic legal systems that have subsequently introduced or are considering the introduction of corporate non-prosecution agreements have made or seem to contemplate making similar adaptations to the US model based on their perception of its appropriateness in the local context. In addition to the French and Canadian examples described above,[792] similar changes relating to the establishment through statutory regimes, increased judicial oversight as well as limiting availability to legal persons and specified economic crimes can also be observed in other domestic legal systems. For example, the Criminal Justice Reform Act 2018, which established deferred prosecution agreements in Singapore, closely reflects schedule 17 of the UK Crimes and Courts Act 2013.[793] Similarly, it appears that the deferred prosecution agreements regime under discussion in Australia would have a statutory basis, provide for increased publicity and approval, and only be available for legal persons and economic crimes.[794] In developing a proposed model for an Australian deferred prosecution agreement scheme, the public consultation paper expressly stated the 'frameworks currently in use in the United States and United Kingdom' were considered.[795] The proposed Australian deferred prosecution agreement was further referred to as a 'hybrid of' and 'consistent with' the English and US deferred prosecution agreements regimes.[796]

Thus, the perceived effectiveness of the US non-prosecution and especially deferred prosecution agreements regime has played and continues to play an important role in the

[791] UK Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements* (17 May 2012) 72. See also, notes 708-11, 713-14.
[792] See sections 5.1.3 and 5.1.4. On Canada, see also Elizabeth Acorn, 'Behind the SNC-Lavalin Scandal: The Transnational Diffusion of Corporate Diversion' (2021) Canadian Journal of Political Science 1, 3 (noting that 'Canada drew from the UK's experience that a stricter form of corporate diversion could guard against criticisms of the practice—particularly concerns over transparency and public trust—and garner widespread support').
[793] Compare generally the UK Crimes and Courts Act 2013, c. 22, § 45, schedule 17 with the Singapore Criminal Justice Reform Act 2018, section 35 (amending chapter 68 of the Singapore Criminal Procedure Code). See also, Singapore Criminal Procedure Code, section 149D (on the availability for legal persons), sections 149F-149J (on judicial oversight), section 149A in combination with schedule 6 (on the availability for specific offences), and section 149J (on publicity).
[794] See Australian Government, Attorney-General's Department, *Improving enforcement options for serious corporate crime: A proposed model for a Deferred Prosecution Agreement scheme in Australia, Public Consultation Paper* (31 March 2017) 6 (availability for legal persons and specified economic crimes), 10-14 (approval), 15 (publication).
[795] Ibid 6.
[796] Australian Government, Attorney-General's Department, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee: Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (2018) 3, 12.

domestic discussions over introducing corporate non-prosecution agreements. At the same time, some resistance can be observed in relation to certain aspects of the US regime that were perceived as inappropriate in the local context and led to some adaptation. This perceived need for adaptation also provided an opportunity for other foreign models to gain influence in the transnational norm diffusion process. In particular, the changes made in the UK deferred prosecution agreements regime were frequently referenced to and picked up in subsequent domestic reforms.

5.2.1.2 Law enforcement cooperation and competition

Another important dimension of foreign and especially US influence on the decision of states to introduce corporate non-prosecution agreements seems to be a desire to improve law enforcement cooperation as well as their international enforcement competitiveness.[797]

For example, the global resolution between the US DOJ and UK SFO in the Innospec case contributed, in many ways, to the initiation of the discussion to introduce deferred prosecution agreements in England and Wales.[798] The rationale of increasing law enforcement cooperation and competition with US authorities was picked up, among others, in subsequent statements by Solicitor-General Garnier who, after noting the shortcomings of the current corporate prosecution regime, explained that '[b]y the time we are ready to prosecute in this jurisdiction, those businesses which have an international presence, particularly in the US, have often reached settlements with overseas authorities which shut us out from taking action here'.[799] The public consultation paper then expressly identifies multijurisdictional cooperation as one of the barriers to improving outcomes and effectiveness of corporate crime enforcement,[800] arguing generally that it is 'important to ensure that there are as few barriers to multi-jurisdictional cooperation as possible'.[801] Highlighting the enforcement competition rationale, the public consultation paper then goes on to explain that

> '[w]ithout such early cooperation, once another jurisdiction has commenced proceedings, the ability of authorities in England and Wales to prosecute can be limited. Under English law

[797] On introducing corporate non-prosecution agreements to enable better cooperation, see generally OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (OECD 2019) 34.
[798] See section 5.1.2.
[799] Edward Garnier, 'DPAs will provide effective tool for combating corporate crime' *The Law Society Gazette* (6 October 2011).
[800] UK Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements* (17 May 2012) paras 38-40.
[801] Ibid para 38.

> there is a bar to prosecuting someone who has already been convicted or acquitted of the same offence. This is particularly relevant in cases involving the US, where US law in the context of serious economic crime has wide extra-territorial reach. However, there is not a similar bar under US law when it comes to prosecuting a person who has already been convicted or acquitted in a foreign jurisdiction, so US prosecutors are not restricted in the same way as their UK counterparts.
>
> Commercial organisations which could be prosecuted in both England and Wales and the US may choose to engage with US authorities so as to prevent action being taken in England and Wales. Resolving a case in the US may also be attractive given the wider and more flexible range of enforcement tools, including non-prosecution agreements (NPAs) and DPAs which do not result in a criminal conviction. The lack of equivalent enforcement tools for UK prosecutors makes negotiations between UK and US prosecutors, and ultimately resolution of the case, difficult.[802]

With some resemblance to England and Wales, DOJ enforcement actions against prominent French companies, such as the deferred prosecution agreements with Technip, Alcatel-Lucent, Total and Alstom, have played an important role in initiating and shaping the debate over the introduction of corporate non-prosecution agreements, the CJIP procedure, in France.[803] In particular, the rationale of improving the competitiveness of French law enforcement authorities through the introduction of the CJIP procedure can be well observed in the discourse. It is illustrated, among others, by the statement of Michel Sapin, the responsible minister for the Sapin II bill, who explained that in light of the competitive disadvantages of French prosecutors, US settlement procedures dominate enforcement against French corporations.[804] He further referred to French companies having been convicted in other jurisdictions, harming their competitiveness and France's image abroad.[805] Prior to the submission of the Sapin II bill to the French Parliament, Minister Sapin had made similar comments in media reports, referring, among other things, to the prosecution of French companies in the US but not in France as 'shocking, and almost insulting for our judiciary system'.[806] These statements were part of a more general 'nationalist reflex' of

[802] Ibid paras 39-40.
[803] See section 5.1.3.
[804] See notes 734. See also, note 732.
[805] See note 735 and accompanying text for the full quote.
[806] Reuters, 'Stung by large U.S. fines, France to tighten anti-corruption laws' *Reuters* (29 March 2016) <www.reuters.com/article/us-france-corruption-idUSKCN0WV1RS>.

French lawmakers to US enforcement actions against French corporations that dominated much of the discourse over the introduction of the CJIP procedure.[807]

Similarly, the introduction of deferred prosecution agreements in Singapore was influenced by the DOJ's deferred prosecution agreement with Keppel Offshore & Marine Ltd, Singapore's first major foreign bribery case.[808] The deferred prosecution agreement not only demonstrated to Singaporean lawmakers the advantages of coordinated settlements with the US in terms of the fines and measures that can be imposed on corporations, but also highlighted the shortcomings of the existing settlement mechanism (conditional warnings) in Singapore.[809] As noted above, the responsible minister opined at the time that participating in the coordinated settlement achieved a better result for Singapore than could have been available if the company had been prosecuted under the then existing law.[810]

Prominent references to improving enforcement cooperation and competition can also be found in the Australian context. For example, when presenting the aims of the proposed deferred prosecution agreement scheme in Australia, the public consultation paper expressly argued that 'implementation of a DPA scheme will … *enable us to use DPAs in international settlements* in cases of offending by multinational companies'.[811] It then specifically referred to the global resolution of corruption investigations into Rolls-Royce through deferred prosecution agreements with US and UK prosecutors as well as a leniency agreement with the authorities in Brazil.[812] Against this background, the consultation paper argued that '[i]ntroduction of an Australian DPA scheme would enable us to build on international

[807] Etienne Vergès, 'La procédure pénale hybride: À propos de la convention judiciaire d'intérêt public issue de la loi n o 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique' (2017) 3(3) Revue de science criminelle et de droit pénal compare 579, 580. See also, M Sébastien Denaja, *Rapport au Nom de la Commission des Lois Constitutionnelles, de la Législation et de L'administration Générale de la République sur le Projet de Loi (n° 3623) relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique* (26 May 2016) (among others, the statement by Pierre Lellouche at page 150).

[808] See section 5.2.1.1.

[809] See for a description and criticism of Singapore's 'conditional warning' settlement mechanism which is not governed by written law but an extension of prosecutorial discretion, Wilson Ang, Paul Sumilas and Jeremy Lua, 'Deferred Prosecution Agreements – Justice delayed or Justice denied?' (2018) 14 Norton Rose Fulbright Asia Pacific Insights: Business ethics and anti-corruption <www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/asia-pacifi-insights---issue-14.pdf?revision=3e7aeab6-78e5-4b95-a118-3d5048729cb3&revision=3e7aeab6-78e5-4b95-a118-3d5048729cb3> 5-7.

[810] See notes 784-85 and accompanying text.

[811] Australian Government, Attorney-General's Department, *Improving enforcement options for serious corporate crime: A proposed model for a Deferred Prosecution Agreement scheme in Australia, Public Consultation Paper* (31 March 2017) 3 (bold in original).

[812] Ibid 3. See also, section 3.3.3.

experience in our response to corporate crime and ensure that we can participate in similar multi-national DPAs and related agreements in the future'.[813]

As illustrated in chapter three, the increasing number of large, coordinated resolutions involving the DOJ and foreign authorities from domestic legal systems that have introduced corporate non-prosecution agreements also attests to the importance of the enforcement cooperation and competition rationale.[814] Similarly, as illustrated by the Rolls-Royce and Airbus global resolutions, there are also some indications that foreign authorities such as the SFO and the AFA are seen as becoming more competitive and taking on leadership roles.[815]

The importance of cooperation and competition rationales have also been recognised by commentators.[816] For example, Garrett observes that the thinking of prosecutors in other countries in relation to the US non-prosecution and deferred prosecution agreement scheme may be that '[i]f you can't beat them, join them'.[817] In 2006 the SFO had discontinued an investigation into bribery by BAE Systems Plc as part of the Al Yamamah contract, as the disclosure of the information requested by the SFO from the company would 'adversely affect relations between the UK and Saudi Arabia', including the latter withdrawing its support from bilateral counter-terrorism operations.[818] Drawing a connection between the UK's decision to introduce deferred prosecution agreements and its unsuccessful prosecution in the BAE case, Garrett speculates, 'had that tool been available earlier, [the UK] could have prosecuted BAE without seeking a conviction and remained sensitive to Saudi interests'.[819] Similarly, he

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[813] Australian Government, Attorney-General's Department, *Improving enforcement options for serious corporate crime: A proposed model for a Deferred Prosecution Agreement scheme in Australia, Public Consultation Paper* (31 March 2017) 3.

[814] Section 3.3.3. See also, Evan Norris, 'How Enforcement Authorities Interact' (Global Investigation Review, 19 August 2019) <https://globalinvestigationsreview.com/benchmarking/americas-investigations-review-2020/1196461/how-enforcement-authorities-interact>; Branislav Hock, 'Policing corporate bribery: negotiated settlements and bundling' (2020) Policing and Society 1.

[815] See section 3.3.3. See also, María González Calvet, Judith Seddon, Paige Berges, Jessica L Soto and Nataša Siveski, 'Four Years and Almost $4 Billion: Airbus Corruption Investigations End with Sky-High Fine' (*Ropes & Gray Client Alert*, 31 January 2020) <www.ropesgray.com/en/newsroom/alerts/2020/01/Four-Years-and-Almost-4-Billion-Airbus-Corruption-Investigations-End-with-Sky-High-Fine?utm_source=alert&utm_medium=email&utm_campaign=Four-Years-and-Almost-4-Billion-Airbus-Corruption-Investigations-End-with-Sky-High-Fine> (noting that the 'prominent role in the Airbus investigation showcases France's evolution, highlighting its capabilities as not only a partner in cross-border investigations, but a competent pilot in command').

[816] See generally, Rachel Brewster and Samuel Buell, 'The Market for Global Anticorruption Enforcement' (2017) 80(1) Law and Contemporary Problems 193.

[817] Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 248.

[818] *R (On the Application of Corner House Research and Others) v Director of the SFO* [2008] UKHL 60, paras 4, 11-14, 22.

[819] Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 248.

comments (together with Zaring) that the adoption of deferred prosecution agreements in England and Wales 'shows how American criminal law can spread overseas', arguing that 'British companies found themselves on the receiving end of American prosecutions, until Britain decided it was better to collaborate with and copy the actions of prosecutors in the United States'.[820]

5.2.1.3 The relationship between the foreign and introducing state

Another dimension which has been identified as important in understanding foreign influence on domestic introduction of corporate non-prosecution agreements is the relationship between the foreign and introducing state, especially as regards power.[821] Scholars have recognised generally that powerful states such as the US are often well-positioned to export their domestic norms and preferences to other countries,[822] including in the context of economic crime policies.[823] While it is difficult to find specific references to this dimension in the domestic discussions underlying the introduction of corporate non-prosecution agreements, some general observations can be made based on the kind of countries that have introduced or are considering the introduction of corporate non-prosecution agreements.

As shown at the beginning of this chapter, these include Argentina, Australia, Brazil, Canada, England and Wales, France, Germany, Ireland, the Netherlands, Singapore, and Switzerland. Albeit at an earlier stage, discussions appear to have started as well in countries such as Ghana, Israel, Kenya, Malaysia, Poland, and New Zealand.[824]

In general, it can be observed that these countries have close economic, political, and/or security ties with the US.[825] In particular, for many of these countries access to the US market and US-dominated economic infrastructure is important for their internationally operating

[820] Brandon L Garrett and David Zaring, 'For a Better Way to Prose-cute Corporations, Look Overseas' *The New York Times* (23 September 2013).
[821] See Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) Law & Social Inquiry 229, 231.
[822] See for example, Gregory Shaffer, 'Transnational Legal Ordering of State Change' in Gregory Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge University Press 2013) 36; Terence C Halliday and Gregory Shaffer, 'Transnational Legal Orders' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015) 58.
[823] See for example, Michael Levi and Peter Reuter, 'Money Laundering' in Michael Tonry (ed), *The Oxford Handbook of Crime and Public Policy* (Oxford University Press 2009) 363. See generally, Peter Andreas and Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford University Press 2006).
[824] Section 5.1.1.
[825] See US Department of State, *U.S. Bilateral Relations Fact Sheets* <www.state.gov/u-s-bilateral-relations-fact-sheets/>.

corporations and export-oriented economies.[826] At the same time, their relationship with the US and its law enforcement authorities is often characterised by tension between close cooperation and competition.[827] This is illustrated by the fact that corporations from many of these countries have reportedly entered into non-prosecution and deferred prosecution agreements with the US DOJ for crimes committed abroad.[828] Other countries have seen the application of US non-prosecution and deferred prosecution agreements in relation to crimes that occurred in their jurisdictions.[829]

In addition to these immediate relations to the US, other connections can also be identified. In particular, there seems to be both a Commonwealth (Australia, Canada, Ghana, Kenya, Malaysia, New Zealand, Singapore, the UK) and regional European connection (France, Germany, Ireland, the Netherlands, Poland, Switzerland, and the UK). The importance of these connections is also exemplified by the subsequent diffusion to other countries of adaptations made by the UK to the US model.[830]

Finally, the importance of these close ties and self-interests in the relationship between the foreign and introducing state is also illustrated by the countries, especially powerful countries, that have so far shown no interest in introducing procedures akin to US non-prosecution and deferred prosecution agreements. For example, while corporate activities in China have been the focus of many US law enforcement actions, including through US non-prosecution and deferred prosecution agreements,[831] China does not seem to contemplate the adoption of similar procedures but has, by contrast, reportedly introduced a criminal blocking statute at the end of 2018, forbidding cooperation with foreign law enforcement agencies without the approval of the competent authority of the Chinese Government.[832]

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[826] See section 3.3.5. See generally, Daniel Drezner, *All Politics Is Global: Explaining International Regulatory Regimes* (Princeton University Press 2006).
[827] See sections 3.3.5 and 5.2.1.2.
[828] See section 3.3.5 (referring to Argentina, Brazil, Canada, France, Germany, Israel, the Netherlands, Singapore, Switzerland, and the UK).
[829] For example, the global resolutions in the Rolls Royce and Airbus investigations related to crimes suspected in Ghana and Malaysia (see section 3.3.3).
[830] See section 5.1.1.1
[831] Kyle Wombolt, Christine Cuthbert, Mark Chu and Tracey Cui, 'China' in Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes, Luke Tolaini, Ama A Adams and Tara McGrath (eds), *The Practitioner's Guide to Global Investigations – Volume II: Global Investigations around the World* (4th edn, Global Investigations Review 2020) 163. See also the US deferred prosecution agreements with Daimler AG, Rolls-Royce, and Airbus mentioned in chapter 3.
[832] Kyle Wombolt, Christine Cuthbert, Mark Chu and Tracey Cui, 'China' in Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes, Luke Tolaini, Ama A Adams and Tara McGrath (eds), *The Practitioner's Guide to Global Investigations – Volume II: Global Investigations around the World* (4th edn, Global Investigations Review 2020) 179-80.

5.2.2 International influence

This part examines the domestic introductions of corporate non-prosecution agreements for signs of international influence, focusing on the OECD-ABC and UNCAC regimes explored in chapter 4. Commentators have remarked that the 'practical value of international standards depends largely on their implementation into domestic legal systems'[833] and making these standards operational in the form of effective laws or guidelines in the domestic realm is a difficult endeavour.[834]

To start with, it can generally be observed that the countries that have introduced or taken serious steps towards introducing corporate non-prosecution agreements are states parties to the UNCAC and OECD-ABC (except for Singapore).[835]

Next, some of the general provisions on corporate liability, sanctions, and procedure in the OECD-ABC and UNCAC are reflected in the domestic legal frameworks introducing corporate non-prosecution agreements. In particular, several domestic laws include provisions that refer to or reflect Article 5 OECD-ABC, which prohibits influencing prosecution by 'considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved'.[836] For example, in the context of factors that the prosecutor may take into account when deciding whether to enter into a deferred prosecution agreement, the joint SFO and Crown Prosecution Service Deferred Prosecution Agreements Code of Practice advises that '[p]rosecutors should have regard when considering the public interest stage to the UK's commitment to abide by the OECD Convention on "Combating Bribery of Foreign Public Officials in International Business Transactions" in particular Article 5'.[837] Reproducing the wording of Article 5 OECD-ABC, it goes on to state that '[i]nvestigation and prosecution of the bribery of a

[833] See for example, Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000) 113.
[834] Ibid. See also, Yvon Dandurand and Vivienne Chin, 'Implementation of Transnational Criminal Law: Issues and Challenges' in Neil Boister and Robert J Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015) 437; Simeon Obidairo, *Transnational Corruption and Corporations: Regulating Bribery through Corporate Liability* (Ashgate 2013) 64.
[835] UN Secretary-General, UN Treaty Collection, United Nations Convention against Corruption <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18>; OECD Secretariat, OECD-ABC Ratification Status as of May 2018 <www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf>. As regards the OECD-ABC, it should also be noted that among the countries that seem to have started discussions over the introduction of corporate non-prosecution agreements Ghana, Malaysia, and Kenya are also not states parties.
[836] See also, section 4.2.2.
[837] SFO and Crown Prosecution Service, Deferred Prosecution Agreements Code of Practice (14 February 2014) section 2.7.

foreign public official should not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.'[838] Similarly, in the context of the factors not to consider when entering into a remediation agreement, the Canadian Criminal Code provides that '[i]f the organization is alleged to have committed an offence under section 3 or 4 of the Corruption of Foreign Public Officials Act, the prosecutor must not consider the national economic interest, the potential effect on relations with a state other than Canada or the identity of the organization'.[839] Among others, the Canadian Criminal Code also identifies as the purpose of remediation agreements to 'hold the organization accountable for its wrongdoing through effective, proportionate and dissuasive penalties',[840] language reflecting Article 3 OECD-ABC and Article 26(4) UNCAC.[841]

Finally, while it is difficult to find specific references in the official documents and debates on the domestic introduction of corporate non-prosecution agreements to treaty monitoring body reports, it seems likely that they have asserted some influence. In particular, close proximity in terms of time between especially OECD-WGB criticism of the authorities in certain states and the domestic introductions of corporate non-prosecution agreements in those states can be observed. The influence of OECD-WGB criticism has been described by those familiar with its monitoring role as 'peer pressure'[842] or 'naming and shaming'[843] from state socialisation perspective.[844]

For example, the UK had been severely critiqued by the OECD for failing to successfully prosecute overseas bribery on several occasions.[845] As explained above,[846] shortly before the

[838] Ibid.
[839] Canadian Criminal Code, section 715.32(3). See also, Elizabeth Acorn, 'Behind the SNC-Lavalin Scandal: The Transnational Diffusion of Corporate Diversion' (2021) Canadian Journal of Political Science 1, 6.
[840] Canadian Criminal Code, section 715.31. See also, Government of Canada, *Expanding Canada's Toolkit to Address Corporate Wrongdoing: Deferred Prosecution Agreement Stream, Discussion paper for public consultation* (25 September 2017) 7; Government of Canada, *Expanding Canada's Toolkit to Address Corporate Wrongdoing: What we heard* (22 February 2018) 13.
[841] See section 4.2.2.
[842] Nicola Bonucci, 'Article 12' in Mark Pieth, Lucinda A Low and Nicola Bonucci (eds), *The OECD Convention on Bribery: A Commentary* (2nd edn, Cambridge University Press 2014) 538; Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press 2015) 61.
[843] Valentina Carraro, Thomas Conzelmann and Hortense Jongen. 'Fears of Peers? Explaining Peer and Public Shaming in Global Governance' (2019) 54(3) Cooperation and Conflict 335.
[844] See also, Elizabeth Acorn, 'Behind the SNC-Lavalin Scandal: The Transnational Diffusion of Corporate Diversion' (2021) Canadian Journal of Political Science 1, 8.
[845] See for example, Peter Alldridge, 'Bribery and the changing pattern of criminal prosecution' in Jeremy Horder and Peter Alldridge (eds), *Modern Bribery Law: Comparative Perspectives* (Cambridge University Press 2013) 228.
[846] Section 5.1.2.

beginning of the public consultation process, the OECD-WGB criticised especially the SFO's use of 'consent civil recovery orders', the then primary civil settlement mechanism for foreign bribery investigations.[847] In the context of reviewing the UK's ability to provide criminal sanctions, the OECD-WGB encouraged the UK to 'pursue legislative and other efforts' to introduce, among others, deferred prosecution agreements.[848] It may also be noted that British (together with Argentinian) examiners had participated, for example, in the Phase 3 report on the US in 2010 where the OECD-WGB complimented the use of deferred prosecution agreements in the US as 'an innovative method for resolving cases, … which has helped to enable a high level of enforcement activity'.[849]

Shortly before discussions over the introduction of a new settlement procedure started in France, in 2014, the OECD-WGB criticised the country for the 'lack of proactivity' of its law enforcement authorities in foreign bribery cases involving French companies.[850] In particular, it noted that '[t]o this day, no French company has yet been convicted for foreign bribery in France, whereas French companies have been convicted abroad for that offence'.[851] After expressing 'serious concerns for France's limited efforts to comply with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions', the OECD strongly encouraged France to consider reforms.[852] Seemingly in reaction to this criticism and even before sending the Sapin II bill to the French Parliament, Minister Sapin communicated in media reports that due to the lack of corporate prosecutions, France is 'badly ranked internationally' and 'under suspicion', which would need to be 'wash[ed] away' through 'strong measures'.[853] The OECD-WGB also expressed strong criticism towards Canada for its lack foreign bribery prosecutions.[854]

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[847] See note 691.
[848] See note 692. See also for similar calls in relation to Scotland, OECD-WGB, *Phase 4 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom* (16 March 2017) 59.
[849] OECD-WGB, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States* (15 October 2010) 38.
[850] OECD-WGB, 'Statement of the OECD Working Group on Bribery on France's implementation of the Anti-Bribery Convention' (23 October 2014).
[851] Ibid.
[852] Ibid.
[853] Reuters, 'Stung by large U.S. fines, France to tighten anti-corruption laws' *Reuters* (29 March 2016) <www.reuters.com/article/us-france-corruption-idUSKCN0WV1RS>.
[854] See for example, OECD-WGB, 'Canada's Enforcement of the Foreign Bribery Offence Still Lagging; Must Urgently Boost Efforts to Prosecute' (28 March 2011); OECD-WGB, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada* (18 March 2011). See also, Elizabeth Acorn, 'Behind the SNC-Lavalin Scandal: The Transnational Diffusion of Corporate Diversion' (2021) Canadian Journal of Political Science 1, 10-11.

Similarly, the Australian Attorney-General's Department's decision to start considering the introduction of deferred prosecution agreements in 2016 may have been motived OECD-WGB pressure to strengthen its anticorruption laws and enforcement. For example, in 2012, the OECD-WGB voiced serious concerns over the lack of foreign bribery enforcement.[855] After implementing many of the OECD-WGB's recommendations, Australia received a 'pass mark' in the OECD-WGB's follow-up report in 2015.[856] However, the report still identified several areas for improving enforcement, including the adoption of a 'clear framework' for 'corporate plea bargaining and self-reporting'.[857] The influence of the OECD-WGB can possibly also be seen in the fact that Australia's Minister for Justice, Michael Keenan, first announced the public consultation paper on an Australian deferred prosecution agreements regime at the OECD Ministerial Meeting, 'The OECD Anti-Bribery Convention and its role in the global fight against corruption: Towards A New Era of Enforcement', on 16 March 2016.[858] In his announcement, he explained that

> [w]ith the challenges our agencies face in investigating and prosecuting foreign bribery cases, the Australian Government is exploring options to improve the flexibility of the criminal justice system in dealing with such offending. To further this, today I am pleased to release a public discussion paper on a possible Australian scheme for Deferred Prosecution Agreements (DPAs).[859]

Referring to the OECD Ministerial Meeting, the later consultation paper on a proposed model for a deferred prosecution agreement regime in Australia also emphasised that Australia is 'an active member of the OECD Working Group on Bribery' and 'reaffirmed Australia's commitment to the Anti-Bribery Convention'.[860] According to the consultation paper, one of the aims of an Australian deferred prosecution agreement scheme would be to 'contribute

[855] OECD-WGB, 'OECD seriously concerned by lack of foreign bribery convictions, but encouraged by recent efforts by the Australian Federal Police' (25 October 2012); OECD-WGB, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia* (12 October 2012) 5, 49.
[856] OECD-WGB, *Phase 3 Follow-up Report on Implementing the OECD Anti-Bribery Convention in Australia* (3 April 2015) 5; Marianna Papadakis, 'OECD gives Australia 'pass mark' for anti-bribery measures' *Financial Review* (13 April 2015).
[857] OECD-WGB, *Phase 3 Follow-up Report on Implementing the OECD Anti-Bribery Convention in Australia* (3 April 2015) 17.
[858] Australian Government, Office of the Minister for Justice, Media Release, 'Exploring new enforcement options for serious corporate crime' (17 March 2016).
[859] Ibid.
[860] Australian Government, Attorney-General's Department, *Improving enforcement options for serious corporate crime: A proposed model for a Deferred Prosecution Agreement scheme in Australia, Public Consultation Paper* (31 March 2017) 4.

towards Australia meeting its international obligations to combat corruption and related criminal conduct'.[861]

5.2.3 Local influence

This final part draws out some additional local influences that may have played a role in the domestic introduction of corporate non-prosecution agreements in some states. In general, transnational law scholars have recognised that the affinity of transnational norms or reform efforts to local demands and discursive frames is one of the most important determinants of state change.[862] This part focuses on enforcement difficulties and perceived shortcomings of the domestic legal frameworks as well as economic considerations and the protection of corporate activity. While recognising that underlying domestic political struggles will regularly be of considerable relevance, they are largely unaddressed because of the difficulty in detecting and evaluating them.[863]

5.2.3.1 Enforcement difficulties and perceived shortcomings of the domestic legal framework

For some time, commentators have observed that the size, economic and political power, and the regularly complex structures and activities of corporations make corporate crime enforcement through traditional processes of prosecution difficult in many respects.[864] In particular, the initial detection of potentially criminal activities, establishment of reliable evidence, and attribution of responsibility within complicated, decentralised, and often

[861] Ibid 3 (bold in original).
[862] See for example, Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) Law & Social Inquiry 229, 255; Gregory Shaffer, 'Transnational Legal Ordering of State Change' in Gregory Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge University Press 2013) 43.
[863] For example, it is currently unclear what the political dynamics were that led to the recent removal of support from one of the major coalition partners in the German Government (Christian Democratic Union) for the Draft Corporate Liability Act (*Gesetz zur Sanktionierung von verbandsbezogenen Straftaten*), which contains a form of corporate non-prosecution agreements in its § 36 (see for example, Corinna Budras, 'Gesetzesentwurf gekippt: Skandale ohne Folgen' *Frankfurter Allgemeine Zeitung* (9 June 2021)).
[864] See for example, Barry Rider, 'Strategic tools – for now and perhaps the future?' in Barry Rider (ed), *Research Handbook on International Financial Crime* (Edward Elgar 2015) 736-37; Yurika Ishii, 'On law enforcement through agreements between the US regulatory authorities and foreign corporations' in Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann and Joachim Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 243; Darryl K Brown, 'The Pervasive Effects of Efficiency in Criminal Process' (2014) 100 Virginia Law Review 183, 204-205; Maurice Punch, 'The organizational component in corporate crime' in James Gobert and Ana-Maria Pascale (eds), *European Developments in Corporate Criminal Liability* (Routledge 2011) 102; William S Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (University of Chicago Press 2006) 5; Sheelah Kolhatkar, 'Has It Become Impossible to Prosecute White-Collar Crime? Financial crimes might be too complicated to take to trial' *Bloomberg Business* (21 October 2015).

transnational corporate structures and activities have been identified as posing many challenges.[865]

References to enforcement difficulties and perceived shortcomings of the domestic legal framework on the prosecution of economic crimes involving corporations can also be detected in the domestic discourse on the introduction of corporate non-prosecution agreements. For example, they played an important role in starting and framing the discussion over deferred prosecution agreements in England and Wales. As demonstrated in section 5.1.2, enforcement difficulties surrounding cases such as Innospec, including the presiding judge calling for reform of the legal framework, led to UK law enforcement officials, including the Director of the SFO and the Solicitor-General, starting a campaign for the introduction of deferred prosecution agreements.[866] During this campaign, frequent reference was made to deferred prosecution agreements as a new and needed tool to improve corporate crime enforcement as well as to descriptions of the existing framework as 'long, expensive and resource-intensive' with '[t]oo few companies … ever held to account for their crimes'.[867] Similarly, it was stated that deferred prosecution agreements would allow prosecutors to 'work more efficiently and cost-effectively'.[868] These themes were prominently reflected in the public consultation paper on the introduction of a deferred prosecution agreement regime which had the fitting title, 'Public consultation on a *new enforcement tool* to deal with economic crime committed by commercial organisations'.[869] In announcing the consultation process, Parliamentary Under-Secretary of State Crispin Blunt and the Solicitor-General Edward Garnier declared that despite 'successive

[865] See for example, Peter Alldridge, 'Bribery and the changing pattern of criminal prosecution' in Jeremy Horder and Peter Alldridge (eds), *Modern Bribery Law: Comparative Perspectives* (Cambridge University Press 2013) 234, 221-22; David Friedrichs, 'Enron et al.: Paradigmatic White Collar Crime Cases for the Century' in Nikos Passas (ed), *Transnational Financial Crime* (Ashgate 2013) 66, 71; Peter M German, 'Internationalization of crime and technology' in Barry Rider (ed), *Research Handbook on International Financial Crime* (Edward Elgar 2015) 42-50; Nikos Passas, 'Globalization, Criminogenic Asymmetries and Economic Crime' in Nikos Passes (ed), *Transnational Financial Crime* (Ashgate 2013) 16; Ulrich Sieber, 'Einführung: Begriff, Entwicklung und Ziele des Europäischen Strafrechts' in Ulrich Sieber, Helmut Satzger and Bernd von Heintschel-Heinegg (eds), *Europäisches Strafrecht* (2nd edn, Nomos/C.H. Beck 2014) paras 204-07; Neil Boister and Robert J Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015) xvi; Bruce Zagaris, *International White Collar Crime* (Cambridge University Press 2010) 2. See generally, Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, Oxford University Press 2001) chapter 3 on Attribution of responsibility and chapter 4 on Criminal responsibility and the corporate entity.

[866] Section 5.1.2.

[867] Edward Garnier, 'DPAs will provide effective tool for combating corporate crime' *The Law Society Gazette* (6 October 2011). See also, section 5.1.2.

[868] Gibson Dunn, '2011 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements' (4 January 2012) <www.gibsondunn.com/2011-year-end-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/#_ftn22> quoting the Director of the SFO, Richard Alderman, at an event hosted by Pinsent Masons' London office on 17 October 2011.

[869] UK Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements* (17 May 2012) (emphasis added).

governments hav[ing] talked about tackling white collar crime' and 'years of good intentions', previous attempts at improving the prosecution of economic crimes had been only 'intermittently successful'.[870] They continued explaining that

> [t]he obstacles are familiar. Investigations and trials are forbiddingly long, expensive and complicated – particularly where offences occur across multiple jurisdictions. Identifying wrongdoing in hidden, specialist or technical fields often depends on commercial organisations cooperating or whistleblowers coming forward, but organisations have little incentive to self-report. Law enforcement agencies complain that they have a relatively narrow range of tools available to identify and bring corporate offenders to justice. In modern corporations, where responsibility for decision-making is distributed quite widely, it is very difficult to prove criminal liability, which depends on establishing that the 'directing mind and will' of an organisation was at fault. The consequence of all of this has been too few organisations held to account for their crimes, and too many victims waiting in vain for restitution.[871]

In their view, deferred prosecution agreements can make a 'valuable contribution' to addressing these obstacles 'without the uncertainty, expense, complexity or length of a full criminal trial'.[872] The consultation paper echoes these statements on many occasions.[873] Among others, it states that

> [t]he present justice system in England and Wales is inadequate for dealing effectively with criminal enforcement against commercial organisations in the field of complex and serious economic crime. The system's deficiencies pose problems for prosecutors, defendants and judges and can have adverse impacts on victims, customers, suppliers and the wider economy. The increasing internationalisation of both the crime and the offending commercial organisations exacerbates the existing problems.[874]

Regarding the 'existing problems', it generally refers to lengthy, complicated, and expensive investigations and procedures, which allow only the pursuit of a limited number of cases.[875] In addition, it identifies problems with the law of corporate criminal liability, referring especially to difficulties in showing that 'the "directing mind and will" of the commercial organisation had the necessary fault element or "mens rea" for the offence'.[876] In summary, the consultation paper suggests that there is 'general recognition that economic crime committed by commercial

[870] Ibid para 2.
[871] Ibid para 3.
[872] Ibid paras 5, 7.
[873] See in particular, ibid chapter 1.
[874] Ibid para 23.
[875] Ibid para 25.
[876] Ibid para 26.

organisations needs to be dealt with more effectively in England and Wales' and that the introduction of deferred prosecution agreements would 'overcome many of the current difficulties associated with prosecuting commercial organisations'.[877]

Albeit with less prominence than in the UK, enforcement difficulties were also part of the discussion in Canada, and deferred prosecution agreements were presented as 'an additional tool for prosecutors' to overcome these difficulties.[878] For example, the 2017 public consultation paper explained that

> [g]iven complex corporate structures and increasingly sophisticated ways of channeling funds and hiding illegal conduct, corporate crimes are often challenging to identify, time-consuming and resource-intensive to prosecute (especially when the alleged wrongdoing involves multiple jurisdictions) and difficult to prove. Investigations may take many years and require significant resources.[879]

The domestic discourse in France has similarly emphasised local enforcement difficulties and the desire to improve its enforcement tools. As discussed in sections 5.1.3 and 5.2.1.2, the inability to conduct successful prosecutions of corporations in France in combination with prominent French companies entering into deferred prosecution agreements with the US DOJ was an important argument for French lawmakers to advocate for and justify the introduction of the CJIP procedure.[880] This rationale was also shared in media reports at the time.[881]

Furthermore, commentators have indicated that the introduction of deferred prosecution agreements in Singapore may have been motivated by local dissatisfaction with the existing informal settlement procedure, the 'conditional warning', which is not governed by written law and does not provide for an elaborate settlement regime for corporate crimes.[882]

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[877] Ibid paras 12, 14. See also, UK Ministry of Justice, *Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations* (23 October 2012) para 6.

[878] Government of Canada News Release, 'Government of Canada seeks views on addressing corporate wrongdoing - Online public consultation examines Government tools for fighting corporate crime' (25 September 2017).

[879] Government of Canada, *Expanding Canada's Toolkit to Address Corporate Wrongdoing: Deferred Prosecution Agreement Stream, Discussion paper for public consultation* (25 September 2017) 4.

[880] See in particular, Senate, Official Summary Record, Draft Law relating to Transparency, the Fight against Corruption and the Modernisation of Economic Life (5 July 2016) <www.senat.fr/cra/s20160705/s20160705_3.html#par_468> Article 12 *bis*, statement by Michel Sapin. See also, sections 5.1.3 and 5.2.1.2.

[881] See for example, Reuters, 'Stung by large U.S. fines, France to tighten anti-corruption laws' *Reuters* (29 March 2016) <www.reuters.com/article/us-france-corruption-idUSKCN0WV1RS>.

[882] See Wilson Ang, Paul Sumilas and Jeremy Lua, 'Deferred Prosecution Agreements – Justice delayed or Justice denied?' (2018) 14 Norton Rose Fulbright Asia Pacific Insights: Business ethics and anti-corruption <www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/asia-pacifi-insights---issue-

5.2.3.2 Economic considerations and the protection of corporate activity

Another dimension of discernible local influence relates broadly speaking to economic considerations and the protection of corporate activity.

Economic considerations played a central role in the governments' campaigns to introduce corporate non-prosecution agreements. For example, the first paragraph of the public consultation paper on the introduction of deferred prosecution agreements in England and Wales states that

> [c]orporate economic crime causes serious harm to its direct victims and grave damage to our economy. In 2012, the National Fraud Authority estimated that fraud committed by all types of offenders costs the UK £73 billion per year.[883]

In its response to the consultation phase, the UK government largely repeated this statement and added that corporate crime 'creates an unfair playing field for companies that comply with the law and can destroy the reputation and integrity of any business, industry, employee or market sector.'[884] Similarly, the first paragraph (after the executive summary) of the government's response to the consultation in Canada stated that

> [c]orporate wrongdoing imposes significant economic, political and social costs. It undermines fair competition, threatens the integrity of markets, constitutes barriers to economic growth, increases the cost and risk of doing business, and undermines public and investor confidence.[885]

Against this background, considerations of financial recovery and protection of corporate activity from foreign law enforcement actions and governance efforts can be observed.[886] This is, for example, illustrated by the explanations in the French Senate of François Pillet, the

14.pdf?revision=3e7aeab6-78e5-4b95-a118-3d5048729cb3&revision=3e7aeab6-78e5-4b95-a118-3d5048729cb3> 5-7. For a discussion enforcement difficulties and perceived shortcomings of the domestic legal system for prosecuting corporate crimes in Australia, see for example Australian Government, Attorney-General's Department, *Improving enforcement options for serious corporate crime: Consideration of a Deferred Prosecution Agreements scheme in Australia, Public Consultation Paper* (March 2016) 6-7.

[883] UK Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements* (17 May 2012) para 1.

[884] UK Ministry of Justice, *Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations* (23 October 2012) para 5.

[885] Government of Canada, *Expanding Canada's Toolkit to Address Corporate Wrongdoing: What we heard* (22 February 2018) 6.

[886] See generally, Nicholas Lord and Colin King, 'Negotiating Non-Contention: Civil Recovery and Deferred Prosecution in Response to Transnational Corporate Bribery' in Liz Campbell and Nicholas Lord (eds), *Corruption in Commercial Enterprise: Law, Theory and Practice* (Routledge 2018) 245-49.

rapporteur of the Sapin II bill, who emphasised that it would be 'better that the proceeds of the fines [from corporate non-prosecution agreements] go to the French Treasury than to the American Treasury!'.[887] The potential amounts at stake had been previously demonstrated to governments by the US DOJ's use of non-prosecution and deferred prosecution agreements with foreign corporations.[888]

In addition, several references can be found relating to the protection of the positive local effects of corporate activity.[889] In particular, reflecting one of the main rationales already seen in the US context, the different reform discussions emphasise the avoidance of negative collateral consequences for innocent third parties such as employees, shareholders, customers, and the domestic economy more generally, mentioning in particular the potentially negative consequences of conviction-based debarment schemes.[890] Another aspect that received frequent mention is the importance of introducing corporate non-prosecution agreements to protect local employment and, relatedly, the competitiveness of local but internationally operating corporations.[891] These rationales were especially well-illustrated in the UK reform process, where the public consultation paper emphasised that

> '[w]hile criminal prosecution can effectively punish a commercial organisation using existing criminal penalties, it can also end up having unintended detrimental consequences, such as adverse share price movements and failure of organisations, which in turn can impact on blameless employees, customers, pensioners, suppliers and investors. A criminal conviction can also mean the organisation is unable to bid for EU and US public procurement tenders, which may be disproportionate and particularly damaging. Occasionally, a criminal investigation and prosecution can lead to the commercial organisation going out of business, leading to job losses and wider damage to the economy. The global collapse of Arthur

[887] See note 731.
[888] See section 3.3.
[889] See generally, Liz Campbell, 'Trying corporations: why not prosecute?' (2019) 31(2) Current Issues in Criminal Justice 269, 281 (referring to 'DPAs as a "soft option" in light of United Kingdom (or indeed other advanced nation-states) protection of corporate activity offshore').
[890] See for example, UK Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements* (17 May 2012) para 7; Government of Canada, *Expanding Canada's Toolkit to Address Corporate Wrongdoing: Deferred Prosecution Agreement Stream, Discussion paper for public consultation* (25 September 2017) 6.
[891] See for example, French Senate, Official Summary Record, Draft Law relating to Transparency, the Fight against Corruption and the Modernisation of Economic Life (5 July 2016) <www.senat.fr/cra/s20160705/s20160705_3.html#par_468> Article 12 *bis*, statement by Michel Sapin (for a translation of the statement, see note 735).

> Andersen in 2002 within weeks of indictment (which was subsequently overturned in 2005 by the US Supreme Court) is a graphic illustration of the problem'.[892]

They were similarly reflected in the French debates, where it was argued that '[t]he idea [of corporate non-prosecution agreements] is to allow our exporting companies or companies established abroad to regularise their situation, and thus to continue their international activities and to be able to operate in certain markets, which would be prohibited by a criminal conviction'.[893]

The Canadian Government rationalised the introduction of remediation agreements, among others, by explaining that these agreements would 'help to advance compliance measures, hold eligible organizations accountable for misconduct, while protecting innocent parties such as employees and shareholders from the negative consequences of a criminal conviction of the organization'.[894] It further stated that effectively addressing corporate wrongdoing, including through remediations agreements, 'protects the integrity of markets, addresses barriers to economic growth and promotes fair competition to ensure job creation for Canadians'.[895]

In this context, the influence of local corporate lobbying efforts can also be observed.[896] In several countries, companies and business organisations have advocated for the introduction of non-trial resolutions.[897] For example, prior to the introduction of the CJIP in France, business organisations lobbied for the introduction of a French deferred prosecution agreements regime, referring especially to the far-reaching corporate governance effects of US deferred prosecution agreements with French companies such as Total.[898] A particularly

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[892] See note 697. See also, UK Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements* (17 May 2012) para 57; Radha Ivory, 'Beyond Transnational Criminal Law: Anti-Corruption as Global New Governance' (2018) 6(3) London Review of International Law 413, 431.

[893] French Senate, Official Summary Record, Draft Law relating to Transparency, the Fight against Corruption and the Modernisation of Economic Life (5 July 2016) <www.senat.fr/cra/s20160705/s20160705_3.html#par_468> Article 12 *bis*, author translation of statement by François Pillet (for a translation of the statement, see note 731).

[894] Government of Canada News Release, 'Canada to enhance its toolkit to address corporate wrongdoing' (27 March 2018).

[895] Ibid.

[896] See generally, Tonya L Putnam, *Courts without Borders: Law, Politics and U.S. Extraterritoriality* (CUP 2016) 10; Gregory Shaffer, 'How Business Shapes Law: A Socio-Legal Framework' (2009) 42 Connecticut Law Review 147.

[897] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions-Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (OECD 2019) 80-81.

[898] See for example, Mouvement des entreprises de France, 'Prévenir les risques de corruption: Note d'information sur l'inflation des normes anticorruption et les risques induits pour toute entreprise française ayant une activité à l'International' (March 2015)

blatant example of corporate influence could be observed in Canada where SNC-Lavalin, a giant engineering multinational charged with corruption in relation to payments in Libya, lobbied for the adoption of remediation agreements together with business organisations such as the Business Council of Canada, the Canadian Chamber of Commerce, the Quebec Federation of Chambers of Commerce, and the Ontario Chamber of Commerce.[899] SNC-Lavalin's effort to establish corporate non-prosecution agreements in Canada was reported as 'the most extensive government relations effort in modern times'.[900] Supporters such as John Manley, the president and chief executive officer of the Canadian Council of Chief Executives, argued that Canada needs to introduce deferred prosecution agreements or similar alternatives to prosecution to avoid competitive disadvantages for Canadian companies and 'align ourselves with our major economic partners', especially the US. He also noted that '[t]he use of deferred-prosecution agreements increased significantly in the U.S. after the Enron Corp. scandal, which led to the collapse of the accounting firm Arthur Andersen LLP and the loss of thousands of jobs', arguing that '[t]he lesson was obvious: When companies are convicted for the actions of rogue employees, innocent people suffer'.[901]

While detailed discussion is outside the scope of this chapter, it can be noted that a few months after remediation agreements had become available in Canada, SNC-Lavalin started advocating for its right to enter into a remediation agreement to resolve investigations for illegal conduct in Libya, arguing, among others, that it would secure and create jobs, increase trade and tax revenue, establish equal footing with foreign companies facing 'similar issues' that are able to enter settlements, and in general protect 'all the innocent employees, pensioners, investors and other stakeholders who are being punished through no fault of their own'.[902]

<www.medef.com/uploads/media/node/0001/04/f32f888f19f1465961d35b51fbf31a7e1623256c.pdf>; Option Droit & Affaires, 'Corruption : Etat des lieux juridique et pratique d'une lutte mondiale' (March 2015) <www.optionfinance.fr/droit-affaires/les-rencontres-dexperts/compliance/corruption-etat-des-lieux-juridique-et-pratique-dune-lutte-mondiale.html>.

[899] See note 748. See also, Mario Dion, *Trudeau II Report* (Parliament of Canada 2019) 1.

[900] Kathryn Blaze Baum and Sean Fine, 'A deal denied: How SNC-Lavalin spent years fighting for a deferred prosecution law, but then lost the battle to use it' *The Globe and Mail* (24 July 2019) quoting Michael Wernick, Canada's most senior civil servant at the time.

[901] John Manley, 'Canada needs new tools to fight corporate wrongdoing' *The Globe and Mail* (29 May 2015). See section 6.2.4 for a discussion of the issue of prosecution of employees.

[902] See Neil Bruce, President and Chief Executive Officer of SNC-Lavalin, 'Thank you for considering our position' (26 October 2018) <www.snclavalin.com/~/media/Files/S/SNC-Lavalin/documents/snc-lavalin-open-letter-october-26-2018-en.pdf>. See also, Neil Bruce, President and Chief Executive Officer of SNC-Lavalin, 'An open letter to Canadians' (19 October 2018) <www.snclavalin.com/en/media/statements/an-open-letter-to-canadians>. As discussed briefly in section 6.2.1 below, these efforts were ultimately unsuccessful and the company entered into a guilty plea agreement.

Similar discussions, including references to the 'Andersen effect', can also be found in other countries such as Australia.[903]

5.3 Conclusion

This chapter set out to examine the domestic introduction of corporate non-prosecution agreements in domestic legal systems outside the US, focusing especially on tracing discernible influences from US and international law identified in the previous chapters. After showing that different countries primarily in the Americas, Asia-Pacific, and Europe have introduced or are seriously considering the introduction of corporate non-prosecution agreements, it has analysed in more detail the events and official (governmental) discussions underlying the introduction of deferred prosecution agreements in England and Wales in 2014, judicial public interest agreements (*convention judiciaire d'intérêt public*) in France in 2016, and remediation agreements in Canada in 2018. Building on this, the chapter has identified and categorised some of the partially overlapping foreign, international, and local influences on domestic legal change.

In line with the previous two chapters, significant influence by US law and enforcement actions could be observed. In particular, the perceived higher effectiveness of the US enforcement model and its heavy reliance on non-prosecution and deferred prosecution agreements was expressly and frequently referred to as a rationale for the domestic introduction of similar procedures elsewhere. In addition, US enforcement actions against prominent corporations from these domestic legal systems seem to have played an important role in igniting domestic debates. However, while US law and practice clearly provided the model for the analysed domestic introductions of corporate non-prosecution agreements, a certain level of local resistance and adaptation could be observed based on the perceived appropriateness of the US procedures in the domestic legal contexts, reflecting also some of the criticism voiced in relation to non-prosecution and deferred prosecution agreements in the US.[904] In particular, adaptations such as limiting availability of these procedures to legal persons and a specified group of economic crimes as well as insisting on a higher degree of oversight and publicity in the UK deferred prosecution agreements model started to be picked up subsequently by other domestic legal systems. These changes to the norms and models of the dominant state during

[903] Australian Government, Attorney-General's Department, *Improving enforcement options for serious corporate crime: Consideration of a Deferred Prosecution Agreements scheme in Australia, Public Consultation Paper* (March 2016) 9-10.
[904] See discussions in section 1.1 and chapter 3.

transnational norm diffusion processes based on local adaptation align well with the theorisation of domestic criminal justice reforms in *Transnational Legal Ordering of Criminal Justice* scholarship,[905] which, among others, highlights that 'domestic actors generate, translate, adapt, appropriate, and resist transnational norms'.[906] In addition to these perceptions of the effectiveness and appropriateness of foreign models, the desire to improve the domestic legal system's capacity to cooperate and compete with US and later other foreign law enforcement authorities in terms of corporate crime enforcement could be identified as another influential factor in the governmental rationalisations of corporate non-prosecution agreements. The significance of these cooperative-competitive rationales in igniting, framing, and often dominating the domestic discussions over the introduction of corporate non-prosecution agreements attests to the pressure for 'functional equivalence' that far-reaching US law enforcement actions can generate,[907] seemingly matching the US 'export strategy' of asserting extraterritorial influence through example and cooperation.[908] Finally, it could be observed that US or other foreign influence on the diffusion of corporate non-prosecution agreements to other domestic legal systems is not unlimited but depends on the relationship between the foreign and introducing state. The states that have introduced or are seriously considering the introduction of corporate non-prosecution agreements have close economic, political, and security ties with the US and among each other. In particular, access to the US market and US-dominated economic infrastructure as well as the protection of free trade and economic liberalisation more generally is an important factor for their internationally operating corporations and export-oriented economies.

As regards international influence, the chapter has shown that express references to the multilateral treaty regime on economic crimes in the domestic discussions and introduced legal frameworks were largely limited to general affirmations of adherence to the OECD-ABC, while the UNCAC was not mentioned in the analysed materials, even though it had been in force for over a decade for the states considered in this chapter at the time they

[905] As discussed in section 2.3.
[906] Ely Aaronson and Gregory Shaffer, 'Defining Crimes in a Global Age: Criminalization as a Transnational Legal Process' (2021) 46(2) Law & Social Inquiry 455, 457. See for a more detailed discussion, sections 2.3.1-2.3.2. See generally, Maximo Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure' (2004) 45(1) Harvard International Law Journal 1; Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer 2011); Jason C Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (Cornell University Press 2011).
[907] See note 655.
[908] See sections 3.3.1-3.3.3.

introduced corporate non-prosecution agreements.[909] In terms of individual provisions, only Article 5 of the OECD-ABC was specifically mentioned as a constraining factor to be considered by prosecutors when offering a corporate non-prosecution agreement in England and Wales or Canada. While no express mention was found, it can be noted that the discussed rationales and introduced legal frameworks in many ways reflect the emphasis on incentivising corporate cooperation and self-regulation in the 2009 OECD Recommendation. However, the main international influence appeared to be linked to both general criticism of insufficient corporate crime enforcement as well as specific endorsements of corporate non-prosecution agreements by the OECD-WGB. These findings align with the general observations regarding the relatively higher influence of non-binding international law and treaty monitoring body practice identified in the previous chapter.

Finally, the chapter has drawn out some additional local influences that were prominent in the investigated materials. In particular, these materials refer to various enforcement difficulties and perceived shortcomings of the respective domestic legal frameworks. The shortcomings in the domestic legal frameworks relate, among others, to problems of detecting crimes, establishing reliable evidence, and attributing liability in increasingly complex corporate structures and activities, including of a transnational nature. Another important dimension of local influence can generally be referred to as economic considerations and the protection of corporate activity. In addition to financial recovery through the imposition of fines and disgorgement in corporate non-prosecution agreements, reform rationalisations to protect corporate activity from foreign law enforcement actions and governance efforts can be observed. Furthermore, references can be found relating to the various positive local effects of protecting corporate activity using corporate non-prosecution agreements, which are strongly reminiscent of rationalisations that were already successful in the US context. They emphasise the avoidance of disproportionate negative consequences of corporate prosecutions, especially as regards potential debarment issues, and the negative collateral consequences for innocent third parties such as employees, shareholders, customers, and the local public more generally. In this context, references can also be found to the ‘Andersen effect’.

[909] On the limitations of the UNCAC, including in comparison to the OECD-ABC, in influencing domestic legal systems, see generally Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press 2015) 97-132.

6 Narratives and the Rise of Corporate Non-Prosecution Agreements

This chapter focuses specifically on the rationales behind the rise of corporate non-prosecution agreements using a narrative lens. It starts by describing the official governmental reform narrative emerging from the analysis in the previous chapters as well as more recent governmental statements and commentary that have largely rationalised the introduction of corporate non-prosecution agreements based on their importance for combatting corporate crime and protecting public welfare. The chapter then presents several challenges to this official narrative from empirical, conceptual, and functional perspectives. In a final part, the chapter explores whether some of the official reform narrative's apparent success in promoting the cross-border rise of corporate non-prosecution agreements may lie not in its (empirically verifiable) effectiveness to achieve the stated aims but in its ability to reflect a 'plausible folk theory'. It then offers two additional narratives with arguably significant explanatory power, emphasising competition and corporate (self-)governance rationales.

6.1 The Official Reform Narrative: The Importance of Corporate Non-Prosecution Agreements to Combating Crime and Protecting Public Welfare

As we have seen throughout this study, governments and, to some extent, international organisations have rationalised the introduction of corporate non-prosecution agreements primarily by reference to their importance in combatting corporate crime and protecting public welfare.

Government officials, public consultation documents, and occasionally even the titles of the introducing legislation have related the adoption of corporate non-prosecution agreements to the need to 'combat',[910] 'battle',[911] or 'fight' against corporate crime.[912] More specifically,

[910] See for example, Edward Garnier, 'DPAs will provide effective tool for combating corporate crime' *The Law Society Gazette* (6 October 2011); Australian Government, Attorney-General's Department, *Improving enforcement options for serious corporate crime: Consideration of a Deferred Prosecution Agreements scheme in Australia, Public Consultation Paper* (March 2016) 5, 7; Australian Government, Attorney-General's Department, *Improving enforcement options for serious corporate crime: A proposed model for a Deferred Prosecution Agreement scheme in Australia, Public Consultation Paper* (31 March 2017) 3; Australian Parliament, Crimes Legislation Amendment (*Combatting* Corporate Crime) Bill 2019, schedule 2 (emphasis added)

[911] See for example, UK Ministry of Justice, *Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations* (23 October 2012) 3 (foreword by Minister of State for Policing and Criminal Justice Damian Green and H.M. Solicitor General Oliver Heald).

[912] See for example, Law relating to Transparency, the *Fight* against Corruption and the Modernisation of Economic Life, No 2016-1691 (9 December 2016), French Official Gazette, No 0287 (10 December 2016)

they have presented corporate non-prosecution agreements as effective and efficient tools for improving corporate crime detection, accountability, and prevention, while at the same time protecting public welfare, especially through avoiding some of the negative consequences of prosecution on the corporation and innocent third parties.[913] On this understanding, corporate non-prosecution agreements are 'justified as a means of securing cooperation … and commitments to operational reforms' from corporate defendants.[914] They provide prosecuting authorities with important and frequently inaccessible information about corporate crimes in a more predictable and resource-saving manner,[915] while allowing governments to collect significant financial penalties and other payments.[916] This narrative was, for example, well-illustrated in the UK's public consultation process, in which the cabinet affirmed that

> [w]e believe that it is therefore in the interests of justice and of economic well-being that investigators and prosecutors should be equipped with the right tools to tackle economic crime. We proposed that prosecutors … should therefore be given a new tool with which to bring commercial organisations to account: Deferred Prosecution Agreements (DPAs). DPAs have the potential to ensure that the SFO and CPS will be made aware of more wrongdoing and able to obtain better evidence of them. Ultimately we consider that DPAs could further contribute to the current trend of an increase in self-reporting by organisations. By having the option of using DPAs alongside existing criminal and civil approaches, prosecutors will be

(emphasis added); Government of Canada News Release, 'Government of Canada seeks views on addressing corporate wrongdoing - Online public consultation examines Government tools for fighting corporate crime' (25 September 2017).

[913] See for example, Ministry of Justice (UK), *Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements* (2012) foreword, chapters 1 and 3; Government of Canada, *Expanding Canada's Toolkit to Address Corporate Wrongdoing: Discussion paper for public consultation* (2017) 6; AFA, *Annual Report* (2018) 40-41; Australian Government, Attorney-General's Department, *Improving enforcement options for serious corporate crime: A proposed model for a Deferred Prosecution Agreement scheme in Australia, Public Consultation Paper* (31 March 2017) 3; German Federal Ministry of Justice and Consumer Protection, *Questions and Answers on the Bill to Strengthen Business Integrity* (*Gesetzentwurf zur Stärkung der Integrität in der Wirtschaft*) (16 June 2020) 10, 3. See also, OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (OECD 2019) 21-22.

[914] Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 949.

[915] See Colin King and Nicholas Lord, *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements* (Palgrave Macmillan 2018) 12; OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (OECD 2019) 21.

[916] Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 949; Nicholas Lord and Colin King, 'Negotiating Non-Contention: Civil Recovery and Deferred Prosecution in Response to Transnational Corporate Bribery' in Liz Campbell and Nicholas Lord (eds), *Corruption in Commercial Enterprise: Law, Theory and Practice* (Routledge 2018) 245-49.

> able to bring more cases to justice, and secure outcomes, including restitution for victims, more quickly and efficiently.[917]

Just a few weeks earlier, US Assistant Attorney General Lanny A Breuer had declared that deferred prosecution agreements have become a 'mainstay of white collar criminal law enforcement', leading to 'unequivocally, far greater accountability for corporate wrongdoing' and a 'sea change in corporate compliance efforts' which have had 'a truly transformative effect on particular companies and, more generally, on corporate culture across the globe'.[918]

In addition, the introduction of corporate non-prosecution agreements is said to be justified because they permit corporations to address allegations of criminal behaviour, make reparations, and prevent future wrongdoing without the uncertainty of trial and adverse collateral consequences of a conviction or equivalent judgement in non-criminal procedures for innocent employees, shareholders, business partners, consumers as well as the public more generally.[919]

Governments have affirmed and elaborated on these crime-combatting and public welfare rationales also after the domestic introduction of corporate non-prosecution agreements. For example, Lisa Osofsky, the current Director of the SFO, has recently noted that

> [w]hile we can't put offending companies behind bars, since 2014 the SFO has had new powers to punish them, deliver justice and compel them to behave better. Under a deferred prosecution agreement, companies must cooperate with the SFO, repay the proceeds of crime, pay a fine and demonstrate changes to prevent further wrongdoing. … DPAs encourage offending companies to uphold the law and become good corporate citizens. They can also prevent unnecessary economic damage where a conviction could put the company out of business and destroy jobs.[920]

The statement further emphasised financial advantages by arguing that

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[917] UK Ministry of Justice, *Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations* (23 October 2012) 32.
[918] Lanny A Breuer, Assistant Attorney, Speech at the New York Bar Association (13 September 2012) <www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association>.
[919] See for example, UK Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements* (17 May 2012) para 7; French Senate, Official Summary Record, Draft Law relating to Transparency, the Fight against Corruption and the Modernisation of Economic Life (5 July 2016) <www.senat.fr/cra/s20160705/s20160705_3.html#par_468> Article 12 *bis*, statement by Michel Sapin (for a translation of the statement, see note 735); Government of Canada, *Expanding Canada's Toolkit to Address Corporate Wrongdoing: Deferred Prosecution Agreement Stream, Discussion paper for public consultation* (25 September 2017) 6. See also, sections 3.1.2 and 3.2.3; Council of Europe (CoE), *Liability of Legal Persons for Corruption Offences* (CoE 2020) 78-79.
[920] Lisa Osofsky, 'Comment: We're defending the UK as a safe place for business' *The Times* (30 June 2021).

> [o]ur strategy is paying dividends. As companies learn the lessons from DPAs, compliance and behaviour improves. And, in the four years to 2020, the SFO's financial impact has tripled. Through fines and other penalties the agency has contributed more than £1.3 billion to the Treasury.[921]

Finally, the statement endeavoured to put the work of the SFO and its use of deferred prosecution agreements into a bigger economic context of public welfare considerations. Accordingly, it is 'not just about fighting crime' but about 'defend[ing] the UK's global reputation for openness, its economy and as a beacon for the rule of law'.[922] It further noted that the 'integrity of Britain as a safe place to do business and invest is critical, especially today when our country is building a new international identity for trade'.[923] More specifically, the statement emphasised that there is 'a lot' worth defending, considering that 'trade is worth £1.1 trillion a year, over half our GDP, and the UK is a global leader in financial services, which contributes over £130 billion to the economy and sustains 1.1 million jobs'.[924]

This narrative and rationalisation of corporate prosecution agreements has also been echoed by members of the business community. For example, the business law firm Gibson Dunn, a self-declared frequent negotiator of these agreements on behalf of corporations,[925] has emphasised their importance for the detection and prevention of crimes in the corporate context. Among others, they note that '[g]iven the realities of government funding and resource limitations, even the highly talented and capable prosecutorial force at DOJ frequently relies–to varying extents–on corporations' good-faith self-assessments and voluntary cooperation'.[926] Rather, they argue, '[a]s veterans of government and private practice alike will recognize from experience, an alternate universe in which companies fight the government tooth-and-nail, engage in lengthy and expansive discovery with no fact synthesis, and perhaps do not disclose potential wrongdoing in the first instance, would be

[921] Ibid.
[922] Ibid.
[923] Ibid.
[924] Ibid.
[925] See for example, Gibson Dunn, '2013 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)' (7 January 2014) <www.gibsondunn.com/2013-year-end-update-on-corporate-non-prosecution-agreements-npas-and-deferred-prosecution-agreements-dpas/>; Gibson Dunn, '2021 Mid-Year Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements' (22 July 2021) <www.gibsondunn.com/2021-mid-year-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements/>.
[926] Gibson Dunn, '2016 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)' (4 January 2017) <www.gibsondunn.com/2016-year-end-update-on-corporate-non-prosecution-agreements-npas-and-deferred-prosecution-agreements-dpas/>.

expensive and wearing for all parties involved'.[927] As regards public welfare functions, they contend that non-prosecution and deferred prosecution agreements

> are widely recognized as the scalpel to the sledgehammer of prosecution: over decades, DOJ and the SEC have honed these critical tools to resolve complex issues in a manner that addresses wrongdoing and corporate structural weaknesses, while preserving the well-functioning and valuable elements of corporations. In the modern era of multi-national conglomerates, in which illegal conduct frequently is limited to a handful of bad actors, lower-level personnel, or a single subsidiary, rarely is corporate wrongdoing so pervasive that it warrants punishing not only individual wrongdoers, but also innocent stakeholders like the employees, shareholders, and communities that depend upon a charged company's continued vitality. The extreme fines, draconian terms, and reputational damage that come with indictment and findings of guilt should be reserved only for those cases where wrongdoing is so extreme, or so pervasive, that it warrants the risk of corporate dissolution.[928]

6.2 Challenges to the Official Reform Narrative

While governments have given reassurances that corporate non-prosecution agreements are here to stay, among others, referring to them as 'the new normal' for resolving corporate criminal charges,[929] several empirical, conceptual, and functional challenges to the official reform narrative can be identified. This part starts by presenting a general lack of empirical evidence as well as inherent tensions between different objectives ostensibly pursued by the introduced regimes, before focusing on corporate recidivism and difficulties with the prosecution of individuals as particularly controversial examples. It then turns to a related challenge to the official reform narrative, namely concerns over introducing procedural 'carrots' to resolve corporate crime cases, while still missing the legal 'sticks' to pursue prosecution in case a resolution is (or should be) deemed inappropriate. In this context, problems relating to the transplantation of a procedural tool from the US to other domestic legal systems are also discussed.

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[927] Ibid.
[928] Ibid.
[929] Ben Morgan, SFO Joint Head of Bribery and Corruption, 'The Future of Deferred Prosecution Agreements After Rolls-Royce', Speech delivered at a seminar for General Counsel and Compliance Counsel from corporates and financial institutions at Norton Rose Fulbright LLP (7 March 2017) <www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce/>. Notably, only four agreements had been entered into at the time since the adoption of the deferred prosecution agreements regime in England and Wales in 2014.

6.2.1 Lack of empirical evidence

Governments have offered significant empirical evidence to support the effectiveness of the proposed official crime-combatting and public welfare rationales neither when introducing corporate non-prosecution agreements nor subsequently.[930]

This lack of empirical grounding is, for example, well-illustrated by a report of the US Government Accountability Office (GAO) in response to congressional requesters on the DOJ's use of non-prosecution and deferred prosecution agreements from 1993 to 2009.[931] The GAO report noted that the DOJ has presented non-prosecution and deferred prosecution agreements as 'invaluable tools in achieving its strategic objective to combat … economic crime', even though 'the public, as well as the Congress, have called into question the effectiveness of these agreements'.[932] As regards effectiveness, the report found that the

> DOJ cannot evaluate and demonstrate the extent to which DPAs and NPAs … contribute to the department's efforts to combat corporate crime because it has no measures to assess their effectiveness. Specifically, DOJ intends for these agreements to promote corporate reform; however, DOJ does not have performance measures in place to assess whether this goal has been met.[933]

The report therefore determined that 'while DOJ has stated that DPAs and NPAs are useful tools for combating and deterring corporate crime, without performance measures, it will be difficult for DOJ to demonstrate that these agreements are effective at helping the department achieve this goal'.[934] It also noted that '[m]odels exist that would allow DOJ to create such measures, including measuring whether a company reengages in misconduct over the long-term or during the course of the agreement or whether a company successfully meets the terms of its DPA or NPA'.[935]

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[930] See generally, Susan Hawley, Colin King and Nicholas Lord, 'Justice for whom? The need for a principled approach to Deferred Prosecution Agreements in England and Wales' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 317-18. See also already, Nicola Padfield, 'Deferred prosecution agreements' (2012) 7(4) Archbold Review 4, 5.
[931] US GAO, Report to Congressional Requesters, *Corporate Crime: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness*, GAO-10-110 (December 2009).
[932] Ibid 20.
[933] Ibid.
[934] Ibid 28.
[935] Ibid.

Similarly, the OECD-WGB found in its Phase 3 report in 2010 on the US's implementation of the OECD-ABC that while '[i]t seems quite clear that the use of [non-prosecution and deferred prosecution] agreements is one of the reasons for the impressive FCPA enforcement record', their 'actual deterrent effect has not been quantified', even if the DOJ claims that it 'hears anecdotally from companies that their use has made FCPA compliance [a] high priority'.[936] The report then 'encourage[d] the United States to share with the Working Group on Bribery any information about the impact of NPAs and DPAs on deterring the bribery of foreign public officials that arises following the GAO 2009 Report'.[937] In its response, the government generally claimed that '[s]cholars have recognized that quantifying deterrence is extremely difficult' and that 'as discussed at the time this recommendation was made, measuring "the impact of NPAs and DPAs in deterring the bribery of foreign public officials" would be a difficult task, save providing certain anecdotal and other circumstantial evidence'.[938]

As far as this study could determine, governments have also not offered significant empirical evidence to support the public welfare rationale, especially as regards the claimed need for corporate non-prosecution agreements to avoid disproportionate collateral consequences of prosecutions for corporations and innocent third parties. In particular, the expressly or implicitly referenced 'Andersen effect', linking prosecution with the danger of business failure, has been shown to lack solid empirical basis.[939] For example, based on an empirical assessment of the conviction data contained in the Corporate Prosecution Registry,[940] Markoff showed that between 2001 and 2010 no publicly traded company failed because of a conviction.[941] In addition, the study found that many convictions took the form of plea agreements that imposed far-reaching compliance programs, demonstrating that corporate

[936] OECD-WGB, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States* (15 October 2010) para 54.
[937] Ibid 20.
[938] OECD-WGB, *Phase 3 Follow-up Report on Implementing the OECD Anti-Bribery Convention in the United States* (20 December 2012) 10 (providing some examples of anecdotal evidence based on discussions with corporations).
[939] See sections 3.2.3. For continued references to the 'Andersen effect' in domestic introduction processes, see also sections 5.1.2 and 5.2.3.
[940] Brandon L Garrett and Jon Ashley, Duke and UVA Corporate Prosecution Registry <https://corporate-prosecution-registry.com/browse/>.
[941] Gabriel Markoff, 'Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century' (2013) 15(3) University of Pennsylvania Journal of Business Law 797. See also, David M Uhlmann, 'Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability' (2013) 72 Maryland Law Review 1295, 1322 (observing that '[t]here is no indication of [serious] collateral consequences in the overwhelming majority of cases resolved by deferred prosecution and non-prosecution agreements').

reform can also be achieved in combination with convictions.[942] An illustrative example, in this context, is the prosecution and conviction by way of plea agreement of Siemens AG for systematic bribery of foreign public officials in various countries and related violations of accounting obligations in 2008.[943] Siemens, a major German engineering company, not only agreed to pay penalties of USD 1.6 billion to US and German authorities, after reportedly already spending close to USD 1 billion on an internal investigation,[944] but also to implement a robust compliance program, retain an independent compliance monitor for a four-year period, and to fully cooperate in ongoing investigations.[945] Despite the conviction, Siemens has remained a major employer and supplier of technology products and services.[946] Similarly, in a more recent example, SNC-Lavalin Construction Inc pleading guilty to and being convicted of fraud in Canada in the discussed Libya case does not seem to have had the devasting effects that the corporation predicted and used as an argument to lobby for the introduction of remediation agreements.[947] According to the plea conviction, SNC-Lavalin not only agreed to pay a penalty of CAD 280 million but the court also issued a three-year probation order, with conditions that SNC-Lavalin Construction Inc cause the SNC-Lavalin Group to implement and strengthen its compliance program, record keeping, and internal control standards and procedures.[948] So far, the conviction does not seem to have significantly impacted on the company's reported performance and future prospects.[949]

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[942] Gabriel Markoff, 'Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century' (2013) 15(3) University of Pennsylvania Journal of Business Law 797.
[943] DOJ Press Release, 'Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines - Coordinated Enforcement Actions by DOJ, SEC and German Authorities Result in Penalties of $1.6 Billion' (15 December 2008). See generally, Hartmut Berghoff, '"Organised Irresponsibility"? The Siemens Corruption Scandal of the 1990s and 2000s' (2018) 60(3) Business History 423.
[944] Kevin E Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (Oxford University Press 2019) 152; Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 10, 180.
[945] DOJ Press Release, 'Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines - Coordinated Enforcement Actions by DOJ, SEC and German Authorities Result in Penalties of $1.6 Billion' (15 December 2008). See also, Kevin E Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (Oxford University Press 2019) 152; Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 10-12.
[946] See Siemens, 'Siemens at a Glance' <https://new.siemens.com/global/en/company/investor-relations/at-a-glance.html>. See also, Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 946.
[947] Public Prosecution Service of Canada Press Release, 'SNC Lavalin Construction Inc. Pleads Guilty to Fraud' (18 December 2019); Jason Kirby, 'SNC-Lavalin pleads guilty to fraud over Libya work' *Financial Times* (18 December 2019). See also, sections 5.1.4 and 5.2.3.
[948] Public Prosecution Service of Canada Press Release, 'SNC Lavalin Construction Inc. Pleads Guilty to Fraud' (18 December 2019).
[949] See for example, SNC-Lavalin, Annual Report 2020: Resilient, Innovative, Future Focused (SNC-Lavalin 2020) <www.snclavalin.com/~/media/Files/S/SNC-Lavalin/investor-briefcase/en/2020/annual-report-2020-en.pdf>.

Notably, some accounting and economics scholars have also started questioning the claim that corporate non-prosecution agreements have necessarily a more positive economic effect on corporations and related, innocent stakeholders than prosecution. For example, in a preliminary study comparing the performance of 109 companies that have received a deferred prosecution agreement with 496 companies that were prosecuted in the US,[950] de Franco, Small, and Wahid find 'no evidence that [deferred prosecution] agreements protect firms' stakeholders from negative consequences'.[951] Instead, based on an analysis of changes in sales levels, number of employees, and total assets, they observe 'negative real consequences accruing to the stakeholders of DPA firms in the post-DPA period relative to control firms, as well as relative to the prosecuted firms'.[952] Similarly, comparing stock market performances, they document lower buy-and hold-returns for companies that have entered into a deferred prosecution agreement than companies that were prosecuted in the first three years following the event.[953]

Lack of empirical evidence or assessment of the (likely) effectiveness of transnationally induced criminal justice reforms in achieving the (especially crime control) ends conventionally claimed is not atypical and has been criticised, for example, in the context of the cross-border and almost global diffusion of anti-money laundering regimes.[954]

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[950] Gus de Franco, R Christopher Small and Aida Sijamic Wahid, 'The Effect of Deferred Prosecution Agreements on Firm Performance' <https://accounting.wharton.upenn.edu/wp-content/uploads/2019/10/De-Franco-Small-and-Wahid-2019-WP.pdf> 3 (indicating that the sample of 109 companies that have received deferred prosecution agreements was made available by Professor Brandon L Garrett of Duke University).

[951] Ibid 24. Similarly, in their study comparing the shareholder wealth effects of non-prosecution and deferred prosecution agreements with those of conviction-based plea agreements from 2001 to 2014, Flore, Kolaric and Schiereck find that stockholders 'generally view the announcement of plea agreements more positively than the announcement of deferred prosecution and non-prosecution agreements' (Christian Flore, Sascha Kolaric and Dirk Schiereck, 'Settlement agreement types of federal corporate prosecution in the U.S. and their impact on shareholder wealth' (2017) 76 Journal of Business Research 145).

[952] Gus de Franco, R Christopher Small and Aida Sijamic Wahid, 'The Effect of Deferred Prosecution Agreements on Firm Performance' <https://accounting.wharton.upenn.edu/wp-content/uploads/2019/10/De-Franco-Small-and-Wahid-2019-WP.pdf> 24.

[953] Ibid. While not including a comparison to prosecuted companies, Kaal and Lacine report a negative stock market response at the end of the terms of the 94 non-prosecution and deferred prosecution agreements entered into by publicly traded companies from 1993 to 2014. They 'interpret the negative market reaction … as the market's acknowledgment that post N/DPA term expiration suboptimal governance practices are likely to continue and are associated with higher costs and lower market value for the respective entity' (Wulf A Kaal and Timothy A Lacine, 'Stock Price Response to Non- and Deferred Prosecution Agreements' (2015) University of St. Thomas School of Law (Minnesota) Legal Studies Research Paper No 15-16 1, 14-16, 19).

[954] See for example, Jason Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (Cornell University Press, 2011); Terence Halliday, Michael Levi and Peter Reuter, *Global Surveillance of Dirty Money: Assessing Assessments of Regimes to Control Money Laundering and Combat the Financing of Terrorism* (Center on Law and Globalization, American Bar Foundation and University of Illinois College of Law 2014) <www.americanbarfoundation.org/uploads/cms/documents/report_global_surveillance_of_dirty_money_1.30.2014.pdf>. See also, Simeon Obidairo, *Transnational Corruption and Corporations: Regulating Bribery through Corporate Liability* (Ashgate 2013).

6.2.2 Inherent tensions between objectives

As observed by Halliday, Levi, and Reuter, the largely absent empirical evidence is particularly problematic when the objectives of the diffused legal regime are 'eclectic, unclear, and potentially in conflict'.[955] From the outset, the official reform narrative has created an inherent tension or even 'paradox' when corporate non-prosecution agreements are introduced both to remedy problems with corporate liability enforcement (arguably reflecting the crime-combatting rationale) and avoid the consequences of conviction, that is, the successful use of corporate liability (arguably reflecting the public welfare rationale).[956] This general tension as well as tensions between related, more specific objectives were not only prominently reflected in the discussions surrounding the domestic introduction processes but also remain largely unresolved in the introduced legal regimes.[957] For example, the Canadian Criminal Code expressly identifies as one of the objectives of remediation agreements 'to reduce the negative consequences of the wrongdoing for persons — employees, customers, pensioners and others — who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing'.[958]

Rather, the decision how to resolve these tensions is primarily passed on to prosecutors who are asked to determine in exercising their prosecutorial discretion which objectives to prioritise.[959] Where the domestic legal regimes provide some guidance on the factors that the prosecutor may take into account when deciding whether to enter into a corporate non-prosecution agreement or pursue prosecution, it may not be immediately helpful but leave the

[955] Terence Halliday, Michael Levi and Peter Reuter, 'Why do Transnational Legal Orders Persist? The Curious Case of Money-Laundering Controls' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 61.
[956] See Liz Campbell, 'Trying corporations: why not prosecute?' (2019) 31(2) Current Issues in Criminal Law 269, 282. See also, Susan Hawley, Colin King and Nicholas Lord, 'Justice for whom? The need for a principled approach to Deferred Prosecution Agreements in England and Wales' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 333-34; Simon Bronitt, 'Regulatory bargaining in the shadows of preventive justice' in Tamara Tulich, Rebecca Ananian-Welsh, Simon Bronitt and Sarah Murray (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge 2017) 211.
[957] See chapters 3 and 5. See also, Phil Prince, 'Conflicts written into Deferred Prosecution Agreement regime' *Policy Options* (22 May 2019); Etienne Vergès, 'La procédure pénale hybride: À propos de la convention judiciaire d'intérêt public issue de la loi n o 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique' (2017) 3(3) Revue de science criminelle et de droit pénal compare 579, 580-81.
[958] Canadian Criminal Code, section 715.31(f).
[959] See for example, UK SFO and Crown Prosecution Service, Deferred Prosecution Agreements Code of Practice (14 February 2014) section 2.6. See also, Brandon L Garrett, 'The Public Interest in corporate Settlements' (2017) 58 Boston College Law Review 1484, 1523-36; Liz Campbell, 'Trying corporations: why not prosecute?' (2019) 31(2) Current Issues in Criminal Law 269, 275-76.

inherent tensions unresolved. For example, in England and Wales, the joint SFO and Crown Prosecution Service Deferred Prosecution Agreements Code of Practice, on the one hand, recommends that

> [t]he more serious the offence, the more likely it is that prosecution will be required in the public interest. Indicators of seriousness include not just the value of any gain or loss, but also the risk of harm to the public, to unidentified victims, shareholders, employees and creditors and to the stability and integrity of financial markets and international trade.[960]

On the other hand, it lists as public interest factors against prosecution that a conviction is likely to have 'collateral effects on the public, [the corporation's] employees and shareholders or [the corporation's] and/or institutional pension holders' as well as more generally 'disproportionate consequences for [the corporation], under domestic law, the law of another jurisdiction including but not limited to that of the European Union, always bearing mind the seriousness of the offence and any other public interest factors'.[961]

It may be argued that these inherent tensions are further increased by requirements that the decision whether to prosecute or offer a corporate non-prosecution agreement 'should not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved', in accordance with Article 5 OECD-ABC.[962]

These observations align with Baer's recent comment that one 'reason that [deferred prosecution agreements] and their close cousins have been able to outlast their critics, … is society's collective inability to decide what corporate crime prosecution is supposed to accomplish'.[963]

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[960] SFO and Crown Prosecution Service, Deferred Prosecution Agreements Code of Practice (14 February 2014) section 2.4. For criticism of this test and in particular the fact that it permits entry into a deferred prosecution agreement without the need for the company to self-report, see Jennifer Arlen, 'The potential promise and perils of introducing deferred prosecution agreements outside the U.S.' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 180-81.

[961] SFO and Crown Prosecution Service, Deferred Prosecution Agreements Code of Practice (14 February 2014) sections 2.8.2(vii) and 2.8.2(vi).

[962] Ibid 2.7; Canadian Criminal Code, section 715.32(3). See also, Susan Hawley, Colin King and Nicholas Lord, 'Justice for whom? The need for a principled approach to Deferred Prosecution Agreements in England and Wales' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 334.

[963] Miriam H Baer, 'Three Conceptions of Corporate Crime (and One Avenue for Reform)' (2020) 83(4) Law and Contemporary Problems 1, 4. See also, Colin King and Nicholas Lord, 'Deferred Prosecution Agreements in England & Wales: Castles Made of Sand?' (April 2020) Public Law 307.

6.2.3 Corporate recidivism

This and the following section focus on two issues that not only emphasise the empirical and conceptual challenges faced by the official reform narrative but have also been the subject of much criticism, namely corporate recidivism and difficulties with the prosecution of individuals.[964]

Criminal lawyers regularly refer to 'high rates of corporate recidivism in the US', including after entering into non-prosecution or deferred prosecution agreements, 'as a sign of the difficulties of achieving change without broader reforms'.[965]

A prominent example of a corporation that has entered into several corporate non-prosecution agreements is HSBC, which commentators have argued 'is not only a repeat DPA-recipient, it is Exhibit A for just how much criminal activity a company can engage in without getting prosecuted'.[966] As discussed in more detail in chapter 3,[967] in 2012 HSBC Holdings Plc and HSBC Bank USA NA entered into a deferred prosecution agreement with the DOJ to resolve investigations into violations of the Bank Secrecy Act, the International Emergency Economic Powers Act, and the Trading with the Enemy Act. In addition to paying forfeiture in the amount of USD 1.256 billion,[968] HSBC agreed to make far-reaching changes to its business practices, management, as well as compliance and governance structures in its entire

[964] See for example, Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 165-68; Jed S Rakoff, 'The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?' *The New York Review of Books* (9 January 2014); Brandon L Garrett, 'The Corporate Criminal as Scapegoat' (2015) 101(7) Virginia Law Review 1790; Nicholas Werle, 'Prosecuting corporate crime when firms are too big to jail: investigation, deterrence and judicial review' (2019) 128(5) Yale Law Journal 1366.

[965] Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 950 with reference to Samuel Buell, *Capital Offenses: Business Crime and Punishment in America's Corporate Age* (WW Norton & Co 2016) 241-46; Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 165-68. See also, Sharon Oded, 'Trumping recidivism: assessing the FCPA corporate enforcement policy' (2018) 188(6) Columbia Law Review Online; FCPA Professor, 'Corporate FCPA Repeat Offenders' (*FCPA Professor*, 21 April 2020) <https://fcpaprofessor.com/corporate-fcpa-repeat-offenders-3/>.

[966] Aaron Elstein, 'Third time's a charm? HSBC enters into yet another deferred prosecution agreement' (*Crain's New York Business*, 11 December 2019) <www.crainsnewyork.com/markets/third-times-charm-hsbc-enters-yet-another-deferred-prosecution-agreement> .

[967] See section 3.3.2.

[968] DOJ Press Release, 'HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement - Bank Agrees to Enhanced Compliance Obligations, Oversight by Monitor in Connection with Five-year Agreement' (11 December 2012). The Press Release also indicated that in addition to the forfeiture of USD 1.256 billion as part of its deferred prosecution agreement with the DOJ, HSBC also agreed to pay USD 665 million in civil penalties, USD 500 million to the Office of the Comptroller of the Currency, and USD 165 million to the Federal Reserve for its anti-money laundering program violations.

global operations which would be supervised by a five-year corporate monitor.[969] In announcing the agreement, HSBC's Chief Executive Officer at the time, Stuart Gulliver, reportedly reassured the public that '[t]he HSBC of today is a fundamentally different organization from the one that made those mistakes'.[970] However, in 2018, one year after the five-year term of the 2012 deferred prosecution agreement had ended, HSBC Holdings Plc entered into a second deferred prosecution agreement with the DOJ to resolve wire fraud charges, agreeing, among others, to the payment of over USD 100 million in fines, extensive changes to its compliance program as well as reporting requirements during a three-year deferral period.[971] Again one year later, in 2019, HSBC Private Bank (Suisse) SA entered into a third deferred prosecution agreement with the DOJ to resolve charges relating to fraud and tax evasion. HSBC agreed to the payment of USD 192 million and extensive cooperation requirements, including bringing its accounts into compliance with US law.[972] In the meantime, HSBC Private Bank (Suisse) SA had also made legal history by agreeing to the first ever CJIP with the French Parquet National Financier to resolve allegations of laundering tax fraud proceeds and unlawful banking solicitation in 2017. Among others, the bank agreed to the payment of EUR 300 million and again extensive cooperation requirements.[973]

Other well-reported examples of corporations entering into several corporate non-prosecution agreements despite being perceived as repeat offenders include ABB, AIG, Bank of New York Mellon, Barclays, Deutsche Bank, JPMorgan, Pfizer, Standard Chartered Bank, UBS, and Wachovia, just to name a few.[974]

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[969] See *US v HSBC Bank USA NA and HSBC Holdings Plc*, Deferred Prosecution Agreement, US District Court for the Eastern District of New York, Case No 12-763 (11 December 2012). See also, section 3.3.2.
[970] James O'Toole, 'HSBC: Too big to jail' *CNN Business* (12 December 2012).
[971] DOJ Press Release, 'HSBC Holdings Plc Agrees to Pay More Than $100 Million to Resolve Fraud Charges' (18 January 2018); *US v HSBC Holding Plc*, Deferred Prosecution Agreement, US District Court for the Eastern District of New York, Case No 1:18-CR-00030-LDH (18 January 2018). See also, Patrick Hardouin, 'Too big to fail, too big to jail: restoring liability a lesson from HSBC case' (2017) 24(4) Journal of Financial Crime 513.
[972] DOJ Press Release, 'Justice Department Announces Deferred Prosecution Agreement with HSBC Private Bank (Suisse) SA Bank Admits to Helping U.S. Taxpayers Conceal Income and Assets from the United States; Agrees to Pay $192.35 Million Penalty' (10 December 2019); *US v HSBC Private Bank (Suisse) SA*, Deferred Prosecution Agreement, US District Court for the Southern District of Florida, Case No 0:19-CR-60359-RKA (10 December 2019).
[973] *Le Procureur de la Republique Financier près le tribunal de grande instance de Paris et HSBC Private Bank (Suisse) SA*, Convention judiciaire d'intérêt public, Réf PNF-11 024 092 018 (30 October 2017). See also, Jamie L Boucher, Ryan D Junck, Valentin Autret, Khalil N Maalouf and Margot Sève, 'France Announces Its First Deferred Prosecution Agreement' (*Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates*, 8 December 2017) <www.skadden.com/insights/publications/2017/12/france-announces-deferred-prosecution-agreement>.
[974] See Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 166-68; Gibson Dunn, '2019 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements' (8 January 2020) <www.gibsondunn.com/2019-year-end-npa-dpa-update/#_ednref98>; ICIJ, 'Global banks defy U.S. crackdowns by serving oligarchs, criminals and terrorists: The FinCEN Files show trillions in tainted dollars flow freely through major banks, swamping a broken enforcement

High levels of corporate recidivism thus provide an empirical challenge to one of the key claims of the official reform narrative, namely that corporate non-prosecution agreements contribute towards crime-combatting and public welfare protection because they prevent future criminal activity through sufficient deterrence and especially corporate reforms.[975] In addition, it may be argued that offering corporate non-prosecution agreements to repeat offenders attests to the discussed inherent tensions between different objectives and factors to be considered. Arguably reflective of a crime-combatting rationale, the domestic legal regimes regularly provide that a history of similar conduct and enforcement actions should be seen as a factor for prosecution and against a corporate prosecution agreement.[976] However, this conflicts with the discussed objectives of protecting corporate activity and especially innocent third-party stakeholders, which may be even more emphasised considering that recidivist corporations will likely be able to point to relatively advanced compliance programs as well as the potentially severe consequences after having already complied with the conditions of an earlier agreement.[977] In this context, it may also be noted that law and economics scholars have pointed to recidivist companies being much bigger in size than non-recidivist companies, while receiving proportionately smaller fines.[978] In some instances, this may lead to a risk of creating a catch-22 situation, where large corporations continue to be offered corporate non-prosecution agreements because of the changes and interests warranting protection already demonstrated in the context of earlier agreements.

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system' (20 September 2020) <www.icij.org/investigations/fincen-files/global-banks-defy-u-s-crackdowns-by-serving-oligarchs-criminals-and-terrorists/>. See generally, Brandon L Garrett and Jon Ashley, Duke and UVA Corporate Prosecution Registry <https://corporate-prosecution-registry.com/browse/>.

[975] See for example, the US Government's response to OECD criticism for a lack of empirical evidence of the deterrent effect of non-prosecution and deferred prosecution agreements, arguing that

> [o]ne of the best sources of anecdotal evidence demonstrating that DPAs and NPAs have a deterrent effect comes from the companies themselves. The companies against which DPAs and NPAs have been brought have often undergone dramatic changes.

(OECD-WGB, *Phase 3 Follow-up Report on Implementing the OECD Anti-Bribery Convention in the United States* (20 December 2012) 10).

[976] See DOJ, Memorandum from Eric H Holder, Jr, Deputy Attorney General, to All Component Heads and US Attorneys on Bringing Criminal Charges Against Corporations (16 June 1999), § V with reference to the US Sentencing Commission Guidelines, § 8C2.5(c) and comment. Similar provisions can also be found in the subsequent versions of the DOJ Principles of Federal Prosecution of Business Entities (see current DOJ, Justice Manual, § 9-28.600 (The Corporation's Past History) (2020)). See also, SFO and Crown Prosecution Service, Deferred Prosecution Agreements Code of Practice (14 February 2014) section 2.8.1(i); Canadian Criminal Code, section 715.32(2)(g); French National Financial Prosecutor's Office and AFA, Guidelines on the Implementation of the Convention Judiciaire D'Intérêt Public (28 June 2019) 7.

[977] For a consideration of these factors in favour of a corporate non-prosecution agreement, see for example SFO and Crown Prosecution Service, Deferred Prosecution Agreements Code of Practice (14 February 2014) sections 2.8.2(iii), (vi), and (vii); Canadian Criminal Code, section 715.32(2)(e); French National Financial Prosecutor's Office and AFA, Guidelines on the Implementation of the Convention Judiciaire D'Intérêt Public (28 June 2019) 7, 13-15.

[978] Dorothy S Lund and Natasha Sarin, 'Corporate Crime and Punishment: An Empirical Study' (2020) University of Pennsylvania Institute for Law and Economics, Research Paper Series No 20-13.

6.2.4 Difficulties with the prosecution of individuals

Another challenge to the official reform narrative relates to difficulties with the prosecution of individuals.

Upon introducing corporate non-prosecution agreements, governments have assured that a corporation is no 'scapegoat' but that the prosecution of culpable individuals is a priority.[979] For example, DOJ policy has continuously emphasised that '[p]rovable individual criminal culpability should be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation, including a deferred prosecution or non-prosecution agreement'.[980] In other words, 'regardless of the ultimate corporate disposition, a separate evaluation must be made with respect to potentially liable individuals'.[981] It has also been recognised as one of the fundamental principles of corporate prosecution that

> [o]ne of the most effective ways to combat corporate misconduct is by holding accountable all individuals who engage in wrongdoing. Such accountability deters future illegal activity, incentivizes changes in corporate behavior, ensures that the proper parties are held responsible for their actions, and promotes the public's confidence in our justice system.[982]

Already the Thompson memo, which for the first time included the possibility of non-prosecution and deferred prosecution agreements in the form of 'pretrial diversion',[983] underlined that

> [p]rosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing.[984]

As regards the decision to offer pretrial diversion, the memo specially noted that one of the factors to be considered by prosecutors is 'whether the corporation appears to be protecting its culpable employees and agents', and that prosecutors 'should be wary of attempts to shield

[979] See Brandon L Garrett, 'The Corporate Criminal as Scapegoat' (2015) 101(7) Virginia Law Review 1789, 1790.
[980] DOJ, Justice Manual, § 9-28.210 (2020). See also, DOJ, US Attorneys' Manual, § 9-28.200 (2008).
[981] DOJ, Justice Manual, § 9-28.210 (2020).
[982] Ibid § 9-28.010 (2020).
[983] See section 3.2.2.
[984] DOJ, Memorandum from Larry D Thompson, Deputy Attorney General to All Component Heads and US Attorneys on Principles of Federal Prosecution of Business Organizations (20 January 2003), § I.

corporate officers and employees from liability'.[985] This is also consistent with the *respondeat superior* standard applicable in US federal criminal cases, according to which a corporation may only be prosecuted if an employee committed a crime.[986] Commentators have gone as far as to argue that in the US harnessing corporations to assist in investigating individual action occurring inside them, including through deferred prosecution and non-prosecution agreements, can deter and detect individual lawbreaking within corporations more effectively than state action can.[987]

Similarly, the government response to the public consultation in the UK in 2012 emphasised that deferred prosecution agreements

> should not be used as a means for individuals to avoid being prosecuted for their crimes. Criminal prosecution is effective in dealing with individuals who commit economic crime, and there is a range of punishments and sanctions for their behaviour, including the ultimate punishment of imprisonment.[988]

The joint SFO and Crown Prosecution Service Deferred Prosecution Agreements Code of Practice for prosecutors provides that

> [i]t will ordinarily be appropriate that those individuals be investigated and where appropriate prosecuted. [The corporation] must ensure in its provision of material as part of the self-report that it does not withhold material that would jeopardise an effective investigation and where appropriate prosecution of those individuals. To do so would be a strong factor in favour of prosecution.[989]

In its operational Guidance for Corporates, the SFO also explains that a deferred prosecution agreement should expressly state that '[i]t does not provide any protection against the prosecution of linked individuals'.[990] The House of Lords Bribery Act Committee has also recently remarked that 'we share the strongly held views of our witnesses that the DPA

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[985] Ibid § VI.
[986] See chapter 3, in particular notes 190-91.
[987] Jennifer Arlen and Samuel Buell, 'The Global Expansion of Corporate Criminal Liability: Effective Enforcement Policy Across Legal Systems' (2020) 93 Southern California Law Review 697, 706-08.
[988] UK Ministry of Justice, *Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations* (23 October 2012) para 47.
[989] SFO and Crown Prosecution Service, Deferred Prosecution Agreements Code of Practice (14 February 2014) section 2.9.1.
[990] SFO, Deferred Prosecution Agreements Guidance for Corporates (2020) <www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements-2/>.

process, far from being an alternative to the prosecution of individuals, makes it all the more important that culpable individuals should be prosecuted'.[991]

Similar references can also be found in the introduction processes and legal regimes in other domestic legal systems.[992]

However, prosecutorial practice does not seem to live up to these affirmations. In the US, scholars have reported for some time that individuals are only rarely prosecuted when corporations settle cases using non-prosecution and deferred prosecution agreements. For example, in an empirical assessment of 306 non-prosecution and deferred prosecution agreements entered into by the DOJ from 2001 to 2014 based on the Corporate Prosecution Registry, Garrett found that only 34 per cent, or 104 companies, included charges of individuals.[993] Most of those prosecuted individuals were not senior level company officials, but 'middle managers of one kind or another'.[994] Of the overall 414 individuals prosecuted, 'thirteen were presidents, twenty-six were CEOs, twenty-eight were CFOs, and fifty-nine were vice-presidents'.[995] He also reported that a 'far-higher' number of prosecutions was unsuccessful than usual in federal white-collar prosecutions and that the imprisonment rate of those who were convicted was comparatively low.[996]

In a follow-up study that includes also empirical data from 2015 to 2018, Garrett confirmed a 'consistent two decades-long pattern' of 'non-charging of individuals when corporations settle serious criminal matters'.[997] It found 30 non-prosecution and deferred prosecution agreements in which overall 59 individuals had been prosecuted alongside the corporation during the four years between 2015 and 2018.[998] Between 2001 and 2018, the study reported that individuals were subject to prosecution in 37 per cent, or 134, of the 497 total non-prosecution and deferred prosecution agreements with corporations.[999] Of the overall 447

[991] House of Lords Bribery Act Committee, *The Bribery Act 2010: Post-Legislative Scrutiny* (March 2019) 88.
[992] See for example, Government of Canada, *Expanding Canada's Toolkit to Address Corporate Wrongdoing: What we heard* (22 February 2018) 13, 17; Canadian Criminal Code, section 715.31(f); French Code of Criminal Procedure, Article 41-1-2(I); French National Financial Prosecutor's Office and AFA, Guidelines on the Implementation of the Convention Judiciaire D'Intérêt Public (28 June 2019) 5-6, 9; French Ministry of Justice, Circulaire relative à la présentation et la mise en oeuvre des dispositions pénales prévues par la loi no 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (31 January 2018) IV, 3.
[993] Brandon L Garrett, 'The Corporate Criminal as Scapegoat' (2015) 101(7) Virginia Law Review 1789, 1791.
[994] Ibid.
[995] Ibid.
[996] Ibid 1791-92.
[997] Brandon L Garrett, 'Declining Corporate Prosecutions' (2020) 57 American Criminal Law Review 109, 129.
[998] Ibid 131-32.
[999] Ibid 132.

individuals prosecuted, 'thirty-four were CEOs (typically former CEOs), thirty were CFOs, and seventeen were presidents'.[1000] In another study, Koehler observed that, between 2008 and 2015, only nine per cent of the 42 non-prosecution and deferred prosecution agreements entered into by the DOJ to resolve FCPA violations resulted in criminal charges against individuals.[1001] However, where the corporation was criminally indicted or entered into a guilty plea agreement, 75 per cent of cases involved charges against individuals.[1002]

While the number of corporate non-prosecution agreements is still much lower in other domestic legal systems considering that they have been more recently introduced and used only in a limited context,[1003] there seem to be even bigger problems with the successful prosecution of individuals. Having been operational for the longest period (outside of the US), the implementation of the deferred prosecution agreements regime in England and Wales provides an illustrative example. Despite having entered into twelve deferred prosecution agreements with corporations since these procedures have become available in England and Wales in 2014, the SFO appears to not have been able to successfully prosecute any related individuals so far.[1004] This shortage of successful prosecutions of individuals in the context of corporate deferred prosecution agreements has been subject to criticism.[1005]

In this context, it can also be noted that these agreements partially included large resolutions such as the already discussed deferred prosecution agreement with Rolls-Royce in January 2017, which, among others, involved a financial sanction of over GBP 497 million,[1006] reportedly the highest fine ever imposed on a company for criminal conduct in the UK at the time.[1007] However, in February 2019, the SFO declared that it would close the Rolls-Royce

[1000] Ibid 132.
[1001] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act' (2015) 49 UC Davis Law Review 497, 545.
[1002] Ibid.
[1003] See section 5.1.
[1004] See Kristin Ridley, 'UK Prosecutor Ends Investigation into Airbus Individuals' *Reuters* (4 May 2021); Joel Cohen, Sacha Harber-Kelly and Steve Melrose, 'Why Corporations Should Rethink How They Evaluate Deferred Prosecution Agreements' *New York Law Journal* (6 May 2021). For a list of the deferred prosecution agreements, see <www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/> accessed 30 September 2021.
[1005] See generally, Susan Hawley, Colin King and Nicholas Lord, 'Justice for whom? The need for a principled approach to Deferred Prosecution Agreements in England and Wales' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 309, 340. See generally, Nicola Padfield, 'Deferred prosecution agreements' (2012) 7(4) Archbold Review 4, 5.
[1006] *SFO v Rolls Royce PLC, Rolls Royce Energy Systems Inc.*, Deferred Prosecution Agreement, Crown Court at Southwark, Case No U20170036 (17 January 2017). See also, section 3.2.2.
[1007] SFO Press Release, 'SFO completes £497.25m Deferred Prosecution Agreement with Rolls-Royce PLC' (17 January 2017). See also, Tola Adeseye, 'SFO and Rolls-Royce agree to half billion pound DPA' (*Morrison Foerster*, 24 January 2017) <www.mofo.com/resources/insights/170124-deferred-prosecution-agreement.html>.

investigation without the prosecution of any individuals.[1008] In announcing the closure, Lisa Osofsky, the Director of the SFO, explained that '[a]fter an extensive and careful examination I have concluded that there is either insufficient evidence to provide a realistic prospect of conviction or it is not in the public interest to bring a prosecution'.[1009] Especially in light of the heavy financial sanctions imposed on the corporation, this decision was severely criticised.[1010] In addition to the lack of individual prosecutions, it can be observed that the initial decision to enter into a deferred prosecution agreement with Rolls-Royce, despite the absence of a self-report of wrongdoing by the company, has also raised concerns about the deferred prosecution agreements regime meeting another one of its claimed crime-combatting rationales, namely to increase enforcement by encouraging corporates to self-report.[1011]

Another example is the conclusion in 2019 of the SFO's cases against three former directors of Tesco Stores Ltd, who were pursued for false accounting in connection with Tesco's 2017 deferred prosecution agreement.[1012] Tesco had entered into the deferred prosecution agreement in April 2017 to settle financial misreporting allegations, agreeing to payments of GBP 129 million, cooperation with the SFO, and the development of a compliance program over the following three years.[1013] While the Crown Court at Southwark found already in December 2018 for two of the former Tesco directors that they had 'no case to answer',[1014] the SFO was unable to offer evidence for the third director in January 2019, leading to a complete acquittal.[1015]

[1008] SFO Press Release, 'SFO closes GlaxoSmithKline investigation and investigation into Rolls-Royce individuals' (22 February 2019).
[1009] Ibid.
[1010] See for example, Rob Evans and David Pegg, 'Campaigners condemn closure of Rolls-Royce bribery inquiry: SFO shuts down investigation into which executives were responsible for payments' *The Guardian* (22 February 2019); Transparency International, 'Lack of Individual Prosecutions in Rolls Royce Bribery Case – Justice not Served' (22 February 2019) <www.transparency.org.uk/lack-individual-prosecutions-rolls-royce-bribery-case-justice-not-served>; Jaclyn Jaeger, 'SFO faces criticism for closing Rolls-Royce, GSK cases' (*Compliance Week*, 22 February 2019) <www.complianceweek.com/sfo-faces-criticism-for-closing-rolls-royce-gsk-cases/24795.article>; BBC, 'SFO drops investigations into Rolls-Royce and GSK' *BBC Business* (22 February 2019).
[1011] See Susan Hawley, Colin King and Nicholas Lord, 'Justice for whom? The need for a principled approach to Deferred Prosecution Agreements in England and Wales' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 309, 325.
[1012] SFO Press Release, 'Deferred Prosecution Agreement between the SFO and Tesco published' (23 January 2019).
[1013] *SFO v Tesco Stores Limited*, Deferred Prosecution Agreement, Approved Judgement, Crown Court at Southwark, Case No U20170287 (10 April 2017).
[1014] SFO Press Release, 'No case to answer' ruling in case against former Tesco executives (6 December 2018).
[1015] SFO Press Release, 'Deferred Prosecution Agreement between the SFO and Tesco published' (23 January 2019). See also, Gibson Dunn, '2019 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements' (8 January 2020) <www.gibsondunn.com/2019-year-end-npa-dpa-update/#_ednref98>.

In relation to the largest deferred prosecution agreement in England and Wales and one of the largest multijurisdictional resolutions so far, the media recently reported[1016] that the SFO (which has so far not commented) has also ended its criminal investigations of individuals in the context of the deferred prosecution agreement with Airbus in January 2020,[1017] involving, among others, a financial sanction of over EUR 990 million.[1018] As highlighted by Dame Victoria Sharp, President of the Queen's Bench Division of the High Court of Justice in England and Wales, when approving the agreement, this financial sanction is 'greater than the total of all the previous sums paid pursuant to previous [deferred prosecution agreements] and more than double the total of fines paid in respect of all criminal conduct in England and Wales in 2018'.[1019]

These apparent difficulties of the SFO with the successful prosecution of individuals have also been noticed by white-collar defence lawyers, commenting, among others, that it may 'undermine or at least shape the SFO's efforts to enter into [deferred prosecution agreements] in the future, to the extent it leads corporations to question the SFO's ability to secure a conviction if forced to prove its case in court'.[1020] Similarly, it has been queried whether under these circumstances corporations will be inclined to self-report,[1021] or rather be asking themselves, 'what is the true price of cooperation and is it worth it'.[1022]

[1016] Kirstin Ridley, 'UK prosecutor ends investigation into Airbus individuals' *Reuters* (4 May 2021); Michael Griffiths, 'UK SFO ends investigations into individuals in Airbus case' *Global Investigations Review* (4 May 2021).

[1017] *SFO v Airbus SE*, Deferred Prosecution Agreement, Crown Court at Southwark, Case No U20200108 (31 January 2020). See also, section 3.2.2.

[1018] *SFO v Rolls Royce PLC, Rolls Royce Energy Systems Inc.*, Deferred Prosecution Agreement, Crown Court at Southwark, Case No U20170036 (17 January 2017). See also, section 3.2.2.

[1019] *SFO v Airbus SE*, Deferred Prosecution Agreement, Approved Judgment, Crown Court at Southwark, Case No U20200108 (31 January 2020) para 1.

[1020] Gibson Dunn, '2021 Mid-Year Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements' (22 July 2021) <www.gibsondunn.com/2021-mid-year-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements/#_ftnref1>. See also Joel Cohen, Sacha Harber-Kelly and Steve Melrose, 'Why Corporations Should Rethink How They Evaluate Deferred Prosecution Agreements' *New York Law Journal* (6 May 2021); Dan Stowers, 'SFO struggles to prosecute individuals following a DPA' (*Lexology*, 1 August 2019) <www.lexology.com/library/detail.aspx?g=23664c49-b588-4d73-a344-ec2385b8c5cc>.

[1021] Joanna Dimock, 'Tesco trial collapse highlights dangers of an early deferred prosecution agreement' (*White and Case Client Alert*, 1 February 2019) <www.whitecase.com/sites/whitecase/files/files/download/publications/tesco-trial-collapse-highlights-dangers-of-an-early-deferred-prosecution-agreement.pdf>.

[1022] Susan Hawley, Colin King and Nicholas Lord, 'Justice for whom? The need for a principled approach to Deferred Prosecution Agreements in England and Wales' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 309 quoting Francesca Titus, 'The true price of a DPA with the SFO' Economia (27 February 2019). See also Maria Cronin and Craig Hogg, 'Time to rethink DPAs after Tesco failures' *The Law Society Gazette* (25 February 2019).

6.2.5 Carrots but no sticks, and transplantation problems

A third and related challenge to the official reform narrative focuses on concerns over introducing procedural 'carrots' to resolve corporate crime cases, while still missing the legal 'sticks' to pursue prosecution in case a corporate non-prosecution agreement is (or should be) deemed inappropriate from the outset or based on the corporation's conduct during the negotiation and implementation of the agreement.[1023] In this context, problems relating to the transplantation of a procedural tool from the US to other domestic legal systems also become apparent.

An important basis for achieving the claimed rationales of corporate non-prosecution agreements, especially as regards the corporation's willingness to self-report, cooperate, and reform, is the existence of a credible alternative, that is the credible risk of prosecution for corporations and associated individuals.[1024]

As shown throughout this study, governments and to some extent international organisations have presented corporate non-prosecution agreements not as a replacement of prosecutions of corporations, let alone culpable individuals, but as an alternative or 'middle ground' where it is the better option from a crime-combatting and public welfare perspective.[1025] At the same time, governments have also rationalised the introduction of corporate non-prosecution agreements in response to enforcement difficulties and perceived shortcomings of the available domestic legal frameworks, especially pertaining to the initial detection of potentially criminal activities, establishment of reliable evidence, and attribution of responsibility within complicated, decentralised, and often transnational structures and activities of large corporations.[1026] However, corporate non-prosecution agreements do not as such address these difficulties but rather circumvent their manifestation by providing an

[1023] On the use of the terms 'carrot' and 'stick' in the context of corporate prosecutions, see for example Brandon L Garrett, *Too big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 147; Gibson Dunn, '2016 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)' (4 January 2017) <www.gibsondunn.com/2016-year-end-update-on-corporate-non-prosecution-agreements-npas-and-deferred-prosecution-agreements-dpas/>.

[1024] See Susan Hawley, Colin King and Nicholas Lord, 'Justice for whom? The need for a principled approach to Deferred Prosecution Agreements in England and Wales' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 318, 334-35, 346. See also, Barry Rider, 'Strategic tools – for now and perhaps the future?' in Barry Rider (ed), *Research Handbook on International Financial Crime* (Edward Elgar 2015) 732-33.

[1025] DOJ, Justice Manual, § 9-28.200 (2020). See discussions in chapters 3, 4, and 5. See also, section 6.2.2.

[1026] See in particular, sections 5.2.3.1 and 5.2.1.1. See also chapter 3, especially sections 3.2.2 and 3.3.5.

alternative and consensual procedural pathway. The underlying legal and practical challenges remain.

As a consequence of this reality, prosecutors (and to some extent approving judges or other officials) may not be entirely free to decide whether entering into a corporate non-prosecution agreement is the better option than pursuing prosecution, arguably undermining a foundational premise of the regime.[1027] This problem is amplified where domestic legal regimes require that the prosecutor must be convinced that a 'realistic prospect of conviction' exists were the investigation to be continued.[1028] In addition, corporations may question prosecutors' ability to pursue prosecutions,[1029] including in light of the described low rates of successful individual prosecutions and frequent offering of corporate non-prosecution agreements to repeat offenders.[1030] Without deeper reforms relating to the underlying challenges, these developments will likely impact on the relative negotiating power of prosecutors and corporations when entering into corporate non-prosecution agreements and, in turn, on achieving the claimed crime-combatting and public welfare rationales.

Despite much higher corporate crime enforcement rates through prosecution, non-prosecution agreements and deferred prosecution agreements, or other resolution mechanisms than in other domestic legal systems,[1031] commentators have also pointed to the problem of prosecutors offering the 'carrot' without holding a sufficiently large 'stick' in the US.[1032] For example, regardless of the comparatively broad powers and rules available to US federal prosecutors, Garrett explains their role as one of 'David when up against the largest and most powerful corporations in the world'.[1033]

[1027] On the importance of prosecutorial decision-making in the context of potentially conflicting objectives, see section 6.2.1.
[1028] See for example, UK SFO and Crown Prosecution Service, Deferred Prosecution Agreements Code of Practice (14 February 2014) section 1.2(i). See also, Canadian Criminal Code, section 715.32(1)(a); French National Financial Prosecutor's Office and AFA, Guidelines on the Implementation of the Convention Judiciaire D'Intérêt Public (28 June 2019) 6-7.
[1029] See note 1021. See also, Victor Aguiar de Carvalho, 'The Shortcomings of the Leniency Agreement Provisions of Brazil's Clean Company Act' (*Global Anticorruption Blog*, 3 February 2020) <https://globalanticorruptionblog.com/2020/02/03/the-shortcomings-of-the-leniency-agreement-provisions-of-brazils-clean-company-act/>.
[1030] See section 6.2.2.
[1031] See section 3.3. See also, OECD-WGB, *2018 Enforcement of the Anti-Bribery Convention: Investigations, Proceedings, and Sanctions* (OECD 2019) 2-4.
[1032] See for example, Brandon L Garrett, *Too big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 1-18.
[1033] Ibid 1. See also, Brandon L Garrett, 'UNITED STATES V. GOLIATH' (2007) 93 Virginia Law Review *In Brief* 105.

However, the risk seems to be even more pronounced in the context of the other domestic legal systems outside the US that have recently introduced procedures akin to US non-prosecution and especially deferred prosecution agreements. The transplantation, broadly speaking,[1034] of norms and ideas from one legal system to another has long been recognised as complex and often challenging.[1035] Any attempt at a comprehensive analysis of the relevant legal, procedural, and practical differences between the approach to corporate crime enforcement in the US and in the other domestic legal systems that have introduced corporate non-prosecution agreements is beyond the scope of this section and study. However, using the US, UK, and (to a lesser extent) Canada and France as examples, three illustrative observations can be made.

First, as explained in more detail in chapter 3, US prosecutors have a greater range of legal options available to secure convictions and other enforcement outcomes.[1036] In particular, US federal prosecutors have at their disposal the threat of exceptionally broad rules on corporate criminal liability and enforcement jurisdiction.[1037] Under US law, corporate criminal liability can be established based on the doctrine of *respondeat superior*, according to which companies are held liable for almost any crime committed by any employee in the context of

[1034] On the various metaphors used in connection with the cross-border diffusion of norms and ideas from one legal system to another, see David Nelken, 'Towards a Sociology of Legal Adaptation' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart 2001) 15-20.

[1035] See generally, Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993); Ugo Mattei, 'Efficiency in legal transplants: an essay in comparative law and economics' (1994) 14(1) International Review of Law and Economics 3; Esin Örücü, 'Law as transposition' (2002) 51(2) International & Comparative Law Quarterly 205; Helen Xanthaki, 'Legal Transplants in Legal Legislation: Defusing the Trap' (2008) 57 International & Comparative Law Quarterly 659; Eliabetta Grande, 'Comparative Approaches to Criminal Procedure-Transplants, Translations, and Adversarial-Model Reforms in European Criminal Process' in Darryl K Brown, Jenia Iontcheva Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019) 67. In the context of corporate crimes, see for example Maximo Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure' (2004) 45(1) Harvard International Law Journal 1; Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer 2011); Jason C Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (Cornell University Press 2011); Barry Rider, 'Strategic tools – for now and perhaps the future?' in Barry Rider (ed), *Research Handbook on International Financial Crime* (Edward Elgar 2015) 750; Jennifer Arlen, 'The potential promise and perils of introducing deferred prosecution agreements outside the U.S.' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 160.

[1036] See in particular, section 3.3.1. See also, Jennifer Arlen, 'Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals into Corporate Cops' in Beria D' Argentine Camilla (ed), *Criminalità D'impresa e Giustizia Negotiated: Esperienze a Confronto* (Giuffrè 2017) 91; Brandon L Garret, 'International Corporate Prosecutions' in Darryl K Brown, Jenia Iontcheva Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019) 434.

[1037] Jennifer Arlen and Samuel Buell, 'The Global Expansion of Corporate Criminal Liability: Effective Enforcement Policy Across Legal Systems' (2020) 93 Southern California Law Review 697, 699-700; Brandon L Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press 2014) 223-24, 242-44.

their employment and that benefits the company.[1038] This reflects a much broader approach to the establishment of corporate criminal liability than exists in the UK.[1039] Since before deferred prosecution agreements became formally available in England and Wales, UK prosecutors have criticised the narrow 'directing mind and will' test that must typically be met to establish corporate criminal liability. For example, in 2013, David Green, then the Director of the SFO, reportedly called for legislative reforms that would make companies more broadly liable for employee conduct.[1040] In this context, he also reportedly explained that '[s]uch a change would assist in the application of [the incoming] DPAs', noting that 'if a corporate can't be prosecuted, why should it agree to a DPA'.[1041] Lisa Osofsky, the current Director of the SFO, has echoed these calls, expressing the hope that lawmakers may adopt the broader US approach to corporate criminal liability or introduce a 'failure to prevent economic crime' offence, modelled on the existing offence for bribery and the facilitation of tax evasion.[1042] The Law Commission of England and Wales is currently considering the issue of expanding corporate criminal liability.[1043] Canadian law on corporate criminal liability follows essentially the same 'identification approach' as in the UK, even though it may look lower down in the corporation to identify the relevant 'directing mind'.[1044] In France, while more recent developments also include considerations of negligent supervision and compliance, corporate criminal liability is principally based on the notion of delegation,

[1038] *New York Central & Hudson River Railroad v US*, 212 U.S. 481, 494-95 (1909); Thomas J Bernard, 'The Historical Development of Corporate Criminal Liability' (1984) 22 Criminology 3, 8-11; Jennifer Arlen and Samuel Buell, 'The Global Expansion of Corporate Criminal Liability: Effective Enforcement Policy Across Legal Systems' (2020) 93 Southern California Law Review 697, 707.

[1039] See for example, Brandon L Garrett, 'International Corporate Prosecutions' in Darryl K Brown, Jenia Iontcheva Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019) 423; Susan Hawley, Colin King and Nicholas Lord, 'Justice for whom? The need for a principled approach to Deferred Prosecution Agreements in England and Wales' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 334; Lorna Emson, Francis Bond and James Reid, 'Is the United States more effective than the United Kingdom at prosecuting economic crime?' (*Lexology*, 7 May 2021) <www.lexology.com/library/detail.aspx?g=4c84f43b-bf3d-49f1-8f10-3fe789c067cf&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2021-05-12&utm_term=>.

[1040] Robert Holland, 'SFO Head Says Companies Should Be Criminally Liable for Employee Theft, Fraud' (*Compliance Week*, 12 June 2013)<www.complianceweek.com/sfo-head-says-companies-should-be-criminally-liable-for-employee-theft-fraud/15055.article> (reporting on statements made at conference organised by the law firm Baker & McKenzie).

[1041] Ibid.

[1042] Lisa Osofsky, 'Future Challenges in Economic Crime: A View from the SFO', Speech at the Royal United Services Institute (8 October 2020) <www.sfo.gov.uk/2020/10/09/future-challenges-in-economic-crime-a-view-from-the-sfo/>; Michael Goodwin, Michelle Sloane and Aimee Riese, 'Failing to prevent economic crime' *The Law Society Gazette* (9 April 2019).

[1043] Law Commission (England and Wales), *Corporate Criminal Liability: A Discussion Paper* (9 June 2021) <www.lawcom.gov.uk/project/corporate-criminal-liability/>.

[1044] Brandon L Garrett, 'International Corporate Prosecutions' in Darryl K Brown, Jenia Iontcheva Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019) 423.

requiring that an employee acted through express power of attorney or delegation of power.[1045] Due to the comparatively higher level of judicial supervision,[1046] it can also be noted that Canadian, French, and UK prosecutors have less flexibility in asserting broad interpretations of corporate criminal liability and jurisdictional rules in the context of deferred prosecution agreements, an important aspect of the DOJ's enforcement approach.[1047]

Second, the potential consequences of a prosecution and conviction for a corporation and associated individuals in the US are significantly harsher than in the UK. For example, individuals may be sentenced to up to 30 years imprisonment for bank fraud in the US, whereas an equivalent offence under the UK Fraud Act carries a maximum sentence of ten years.[1048] For corporations, the available criminal monetary and non-monetary sanctions in the US are significantly more severe than in the UK.[1049] They may also be subject to serious civil and administrative sanctions, including delicensing or debarment from public contracts as well as restricting access to the US market with potentially ruinous consequences.[1050] The availability of such tough sanctions also helps US prosecutors to achieve convictions through guilty plea agreements, which they have significantly more flexibility and discretion to enter into than their UK counterparts.[1051] For example, prosecutors in the US can invite binding guilty pleas through sentencing negotiations, whereas UK prosecutors are unable to anticipate sentencing, which remains within the autonomous competence of the judge.[1052] Similar

[1045] Ibid.
[1046] See sections 5.1.2-5.1.4.
[1047] See section 3.3.1.
[1048] See Lorna Emson, Francis Bond and James Reid, 'Is the United States more effective than the United Kingdom at prosecuting economic crime?' (*Lexology*, 7 May 2021) <www.lexology.com/library/detail.aspx?g=4c84f43b-bf3d-49f1-8f10-3fe789c067cf&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2021-05-12&utm_term=>.
[1049] Jennifer Arlen, 'The Failure of the Organizational Sentencing Guidelines' (2012) 66 University of Miami Law Review 321, 344–51.
[1050] Jennifer Arlen and Marcel Kahan, 'Corporate Governance Regulation through Nonprosecution' (2017) 84 The University of Chicago Law Review 323, 331; David M Uhlmann, 'The Pendulum Swings: Reconsidering Corporate Criminal Prosecution' (2016) 49 UC Davis Law Review 1235, 1257–58.
[1051] Lorna Emson, Francis Bond and James Reid, 'Is the United States more effective than the United Kingdom at prosecuting economic crime?' (*Lexology*, 7 May 2021) <www.lexology.com/library/detail.aspx?g=4c84f43b-bf3d-49f1-8f10-3fe789c067cf&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2021-05-12&utm_term=>; Jenia I Turner and Thomas Weigend, 'Negotiated Case Dispositions in Germany, England and the United States' in Kai Ambos, Antony Duff, Julian Roberts, Thomas Weigend and Alexander Heinze (eds), *Core Concepts in Criminal Law and Criminal Justice: Anglo-German Dialogues, Volume I* (Cambridge University Press 2020) 394-400.
[1052] See for example, US Federal Rules of Criminal Procedure (2021) rule 11(c)(1)(c). See also, section 5.2.2, in particular note 674; Regina Rauxloh, *Plea Bargaining in National and International Law* (Routledge 2012) 26.

limitations regarding the available sanctions and prosecutorial powers have also been noted in Canada and France.[1053]

Third, scholars, in particular the former lead prosecutor of the DOJ's Enron Task Force and now law professor Samuel Buell as well as the prominent law and economics professor Jennifer Arlen, have recently voiced concerns over foreign law reformers paying insufficient attention to US laws regulating the conduct of corporate investigations which are, however, critical to the effectiveness of US corporate crime enforcement.[1054] In particular, they demonstrate that '[d]octrines governing self-incrimination, employee rights, data privacy, and legal privilege, among other areas, largely determine the relative powers of governments and corporations to collect and use evidence of business crime, and thus the incentives for enforcers to offer settlements that reward firms for private efforts to both prevent and disclose employee misconduct'.[1055] Showing important differences between US and UK law, among others, they argue that foreign law reforms that aim to emulate the US approach to corporate crime enforcement, including the introduction of corporate non-prosecution agreements, must reflect the differences in laws that regulate and limit corporations' and states' respective investigative powers.[1056]

Arlen is even more sceptical of the corporate non-prosecution agreement mechanism adopted in France as a tool to combat financial crime. After noting that the laws governing corporate criminal liability in both the UK and France are 'excessively restrictive',[1057] she writes:

[1053] Jennifer Arlen, 'The potential promise and perils of introducing deferred prosecution agreements outside the U.S.' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 188; Jacqueline Hodgson, 'Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice' in Erik Luna and Marianne L Wade (eds), *The Prosecutor in Transnational Perspective* (Oxford University Press 2012) 127-30; Brandon L Garrett, 'International Corporate Prosecutions' in Darryl K Brown, Jenia Iontcheva Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019) 429.

[1054] Jennifer Arlen and Samuel W Buell, 'The Global Expansion of Corporate Criminal Liability: Effective Enforcement Policy Across Legal Systems' (2020) 93 Southern California Law Review 697.

[1055] Ibid 697-98. See also, Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12(2) Law and Financial Markets Review 57; Radha Ivory, 'Transnational Criminal Law or the Transnational Legal Ordering of Criminal Justice: Theorizing Australian Corporate Foreign Bribery Reforms' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 84; Gustavo A Jimenez, 'Corporate Criminal Liability: Toward a Compliance-Orientated Approach' (2019) 26(1) Indiana Journal of Global Legal Studies 353.

[1056] Jennifer Arlen and Samuel Buell, 'The Global Expansion of Corporate Criminal Liability: Effective Enforcement Policy Across Legal Systems' (2020) 93 Southern California Law Review 697, 728-56.

[1057] Jennifer Arlen, 'The potential promise and perils of introducing deferred prosecution agreements outside the U.S.' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 159.

> The provisions governing use of these negotiated settlements [in the Law relating to Transparency, the Fight against Corruption and the Modernisation of Economic Life] does [sic] not provide companies with any material incentives to self-report. It also is not reliably designed to induce companies to fully cooperate by providing prosecutors with material information about unsubstantiated misconduct when this information is most needed. Finally, it is far from clear that France is committed to bringing the individuals responsible for corporate crimes to justice. … Indeed, French reforms could be counter-productive if they operate primarily to enable French prosecutors to insulate French firms from overseas prosecutors, without also enhancing French prosecutors' ability to detect and sanction corporate misconduct.[1058]

Based on the difficulties with deferred prosecution agreements, especially as regards the prosecution of associated individuals and their interplay with the scope of corporate criminal liability, this area of transplantation problems seems to be especially prevalent.

6.3 Plausible Folk Theory and Two Additional Narratives

If there are all these challenges to the official reform narrative achieving its claimed rationales, then the obvious question is: what are other potential explanations for the cross-border rise of corporate non-prosecution agreements?

While any claim to comprehensiveness is beyond the scope of this study, this part makes three suggestions towards answering that question. It first proposes that some of the official reform narrative's success in influencing the cross-border norm diffusion processes lies not in its (empirically verifiable) effectiveness but in its ability to reflect a 'plausible folk theory'. The part then offers two additional narratives with arguably significant explanatory power, emphasising competition and corporate (self-)governance rationales.

6.3.1 The official reform narrative as a plausible folk theory

Scholars following the legal sociologist Terence Halliday have recently suggested that the persistence of transnational criminal justice reform processes, despite challenges of effectiveness and credibility, can be explained, among others, with their ability to reflect 'plausible folk theories' that reassure the public that serious measures are taken to address security and public welfare concerns.[1059]

[1058] Ibid 160.

[1059] See Ely Aaronson and Gregory Shaffer, 'The Transnational Legal Ordering of Criminal Justice' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press

As Halliday, together with Levi and Reuter, explains, a plausible folk theory's influence is 'built not on robust empirical foundations but on parsimony, face validity, a compactness of rhetorical expression, sufficient ambiguity to accommodate potentially conflicting understandings of what it purports to explain, an affinity with extant beliefs about such things as crime … and a failure or resistance to examining too closely the premises and logic of the theory itself'.[1060] They further suggest that for governments and international organisations 'part of the appeal of a plausible folk theory … lies precisely in the fact [it] induce[s] optimism that solutions abound for challenging problems' and that this promise 'offers an umbrella under which actors with diverse interests can find common ground'.[1061] It also alleviates pressure on governments and international organisations to subject their criminal justice reforms to 'rigorous empirical research', which is regularly not only difficult but also resource-intensive.[1062]

Halliday, Levi, and Reuter draw attention to the role of narratives in satisfying 'certain symbolic needs' of publics and domestic or international governance institutions.[1063] For example, in relation to the global diffusion of anti-money laundering regimes, they critically observe that

> [w]hile the AML TLO [anti-money laundering transnational legal order] may not rest on empirical foundations, it does offer a compelling narrative. Its real work is not to change behaviour or stop rule breakers but to "unite good consciences, to show purity in the face of danger, to do cultural work". It creates a persuasive account of a world in which there are dark, nefarious activities that must be stopped. It joins fear of the unknown and of the criminal with the opportunity for states and suprastate institutions to be styled as rescuers. It offers

2020) 24. See generally, Terence Halliday, 'Plausible Folk Theories: Throwing Veils of Plausibility over Zones of Ignorance in Global Governance' (2018) 69(4) British Journal of Sociology 936.

[1060] See note 188. For a more detailed discussion, see also Terence Halliday, 'Plausible Folk Theories: Throwing Veils of Plausibility over Zones of Ignorance in Global Governance' (2018) 69(4) British Journal of Sociology 936, 946-50.

[1061] Terence Halliday, Michael Levi and Peter Reuter, 'Why do Transnational Legal Orders Persist? The Curious Case of Money-Laundering Controls' in Justice' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 71. See also, Gregoire Mallard and Andrew Lakoff, 'How Claims to Know the Future Are Used to Understand the Present: Techniques of Prospection in the Field of National Security' in Charles Camic, Neil Gross and Michèle Lamont (eds), *Social Knowledge in the Making* (Chicago: University of Chicago Press 2011) 339.

[1062] Terence Halliday, Michael Levi and Peter Reuter, 'Why do Transnational Legal Orders Persist? The Curious Case of Money-Laundering Controls' in Justice' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 71.

[1063] Ibid.

> comfort that good is fighting evil. It assures publics … that leaders are acting to assuage fears and control the dark side of globalization.[1064]

Many of these observations also resonate with the findings in this chapter and study more generally.[1065] As demonstrated in the previous part, the official reform narrative, rationalising the introduction of corporate non-prosecution agreements based on their importance for combatting corporate crime and protecting public welfare, is not built on a solid empirical basis. Instead, it allows governments and to some extent international organisations, especially the OECD, to provide a solution to the complex problem of corporate crime enforcement that provides a certain level of face validity or plausibility, while leaving the underlying legal and practical problems surrounding the prosecution of corporate crimes largely unaddressed. In addition, the promoted solution affords much flexibility to various actors and potentially conflicting objectives, regardless of the difficulties this may cause in terms of achieving the claimed rationales. All of this is accompanied by often strong and symbolically charged rhetoric (such as 'combat', 'battle', 'corporate failure' or even 'death penalty', 'collateral consequences for innocent employees, pensioners, etc') that emphasises both the threat and costs of corporate crime as well as of its prosecution. The official reform narrative of corporate non-prosecution agreements communicates to the wider public as well as other public governance institutions that the government or international organisation in question is actively dealing with the problem of economic crimes involving corporations, reaffirming its authority and purpose but without having to assess the effectiveness of the reform efforts empirically, address underlying legal issues, or even decide what corporate crime prosecution is supposed to achieve.[1066]

Thus, the official reform narrative's success in influencing the cross-border rise of corporate non-prosecution agreements can to some extent be attributed to its ability to reflect a 'plausible folk theory'.

[1064] Ibid with reference to Sally E Merry and David Nelken. See also, Jason C Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (Cornell University Press 2011).

[1065] See chapters 3, 4, and 5, and especially the previous parts of this chapter.

[1066] See Ely Aaronson and Gregory Shaffer, 'The Transnational Legal Ordering of Criminal Justice' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 24 with reference to Zygmunt Bauman, 'Social Issues of Law and Order' (2000) 40(2) British Journal of Criminology 225. While not in the context of transnational legal ordering or plausible folk theory, see also Susan Hawley, Colin King and Nicholas Lord, 'Justice for whom? The need for a principled approach to Deferred Prosecution Agreements in England and Wales' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 317-18; Miriam H Baer, 'Three Conceptions of Corporate Crime (and One Avenue for Reform)' (2020) 83(4) Law and Contemporary Problems 1, 4.

6.3.2 Two additional narratives: corporate non-prosecution agreements and their importance for improving competition and legitimising corporate (self-)governance

Based on the materials analysed in this study, two other narratives can be identified with significant explanatory power as regards the rise of corporate non-prosecution agreements.[1067]

The first narrative emphasises the influence of competition rationales on the introduction of corporate non-prosecution agreements. The importance of competition rationales could be observed in the context of three related dimensions, namely between law enforcement authorities, corporations, and governments from different countries.

As shown in the preceding analysis,[1068] states have introduced or are considering introducing corporate non-prosecution agreements not only to improve the effectiveness of their domestic law enforcement authorities as such, including through cooperation with foreign law enforcement authorities, but also in terms of competitiveness *vis-à-vis* their foreign counterparts. This interest seems to correspond to the US's strategic approach to extending non-prosecution and deferred prosecution agreements to foreign corporations through unilateral enforcement actions.[1069]

Similarly, several references were found that emphasised competition rationales from a corporate or business perspective. They were primarily phrased around concerns over a 'level playing field' for corporations and the preservation of 'fair' global competition. Interestingly, these considerations were pushed by corporations and business representatives both in the US (to export corporate non-prosecution agreements) and in other countries (to import corporate non-prosecution agreements).[1070]

Finally, these two dimensions of competition rationales appeared to be important also in the context of the third, governmental dimension considering that they closely relate to government interests in the protection of state sovereignty in criminal law enforcement and the competitiveness of domestic corporations.[1071] In particular, several references could be

[1067] See generally on alternative or counter narratives in the context of crime and punishment, Michael Bamberg and Zachary Wippf, 'Counter Narratives of Crime and Punishment' in Martina Althoff, Bernd Dollinger, Holger Schmidt (eds), Conflicting Narratives of Crime and Punishment (Palgrave, 2020) 23. See also, section 2.2.
[1068] See in particular, section 5.2.1.2.
[1069] See section 3.3.2. See also, section 3.3.5.
[1070] See in particular, sections 3.3.5 and 5.2.3.2.
[1071] See in particular sections 5.1.2.1 and 5.2.3.2. See also, section 3.3.5. On criminal law enforcement as an expression of states' 'sovereignty', see for example Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, Oxford University Press 2018) 35-36; Antoinette Perrodet, 'The Public Prosecutor' in Mireille Delmas-Marty and J R Spencer (eds), *European Criminal Procedures* (Cambridge University Press 2002) 455.

observed that were seemingly intended to reaffirm towards the local public as well as potentially other states that the government is actively exercising its sovereign power over criminal law enforcement and ensuring the delivery of the public goods associated with this exercise.[1072] In addition, the motivation to either 'insulate' domestic corporations from or at least reduce their exposure to foreign, especially US, law enforcement actions and in general improve the competitiveness of domestic corporations through the local availability of corporate non-prosecution agreements was prominently reflected in the investigated countries.[1073] Similarly, the analysed materials also highlighted a governmental desire to regain, maintain, or increase its governance influence over the activities of domestic corporations that operate internationally and, as a result, are subject to corporate reform influences of foreign, especially US, authorities through corporate non-prosecution agreements.[1074] In other words, on this understanding, the introduction of corporate non-prosecution agreements can be seen as an attempt at reducing the incentives for domestic corporations to orientate their business activities and corporate governance structures at US law and preferences in order to avoid law enforcement in the US altogether or enter into non-prosecution and deferred prosecution agreements.[1075] From this governmental competition perspective, it may also be argued that the introduction of corporate non-prosecution agreements, in important ways, also continues earlier contests between states over the role of transnational corporations, their liability, and more generally the shaping of the global economic order.[1076]

The second narrative with significant presence in the analysed materials emphasises the legitimising of corporate (self-)governance and more generally economic considerations in corporate criminal justice.

[1072] See in particular, sections 5.2.1.2 and 5.2.3.2. See also, section 3.3.5. See generally, Antje du Bois-Pedain, Magnus Ulväng and Petter Asp (eds), *Criminal Law and the Authority of the State* (Hart 2017); Ely Aaronson and Gregory Shaffer, 'The Transnational Legal Ordering of Criminal Justice' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 3; John Muncie, 'On Globalisation and Exceptionalism' in David Nelken (ed), *Comparative Criminal Justice and Globalization* (Ashgate 2011) 87.

[1073] See in particular sections 5.2.1.2 and 5.2.3.2. See generally, Jennifer Arlen, 'The potential promise and perils of introducing deferred prosecution agreements outside the U.S.' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 160.

[1074] See in particular, sections 5.2.1.2 and 5.2.3.2.

[1075] See section 3.3.5. For example, Shaffer ascribes this dimension of transnational legal processes' influence on state change to its ability to shift accountability mechanisms, normative frames, and thus associational patterns (see Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) Law & Social Inquiry 229, 246).

[1076] See chapter 4, in particular section 4.2.1.

Starting with their emergence in the US, corporate non-prosecution agreements provided an alternative to prosecution, which encompassed a shift in primary enforcement responsibility from state institutions to corporations.[1077] A central aspect of corporate non-prosecution agreement regimes is the idea that corporations self-investigate and -report potentially criminal activities to law enforcement authorities, help these authorities in understanding what happened, and then prevent future wrongdoing through (partially supervised) self-reform. An important emphasis is therefore not on state-dominated prosecution but rather on corporate (self-)governance with a more distant supervisory role for state authorities.

This shift and fundamental idea are not only at the heart of the investigated corporate non-prosecution agreement regimes outside the US but could also be frequently observed in the accompanying introduction processes.[1078] Albeit so far without express mention of corporate non-prosecution agreements, this development aligns with a more general shift towards incentivising corporate cooperation and self-regulation in the multilateral treaty regime on economic crimes.[1079]

It also aligns with a recently observed broader trend away from state-dominated imposition of liability for corporate crimes towards new forms of private (self-)governance.[1080] In addition to corporate non-prosecution agreements and other forms of corporate non-trial resolutions, recent changes have included, for example, the introduction of failure to prevent offences and compliance-oriented attribution rules.[1081] More generally, legal sociologists and

[1077] See in particular, the discussion in sections 3.1.2 and 3.2. See generally, Jennifer Arlen, 'Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals into Corporate Cops' in Beria D' Argentine Camilla (ed), *Criminalità D'impresa e Giustizia Negoziata: Esperienze a Confronto* (Giuffrè 2017) 91.
[1078] See chapter 5, in particular sections 5.2.1.1 and 5.2.3.1.
[1079] See section 4.2, in particular 4.2.3.
[1080] See for example, Radha Ivory, 'Beyond Transnational Criminal Law: Anti-Corruption as Global New Governance' (2018) 6(3) London Review of International Law 413, 429-432; Carolin Liss and Jason C Sharman, 'Global corporate crime-fighters: Private transnational responses to privacy and money-laundering' (2015) 22(4) Review of International Political Economy 693, 701-702; Simone Lonati and Leonardo S Borlini, 'Corporate compliance and privatization of law enforcement: A study of the Italian legislation in the light of the U.S. experience' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 280; Antoine Garapon and Pierre Servan-Schreiber, *Deals de Justice, Le marché américain de l'obéissance mondialisée* (Presses Universitaires de France 2020); Michael Elliot and Felix Lüth, 'Corporate Liability for Economic Crimes: A Contested Transnational History' in Neil Boister, Sabine Gless and Florian Jessberger (eds), *Histories of Transnational Criminal Law* (Oxford University Press 2021) 215-16, 218.
[1081] See for example, Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12(2) Law and Financial Markets Review 57; Radha Ivory, 'Transnational Criminal Law or the Transnational Legal Ordering of Criminal Justice: Theorizing Australian Corporate Foreign Bribery Reforms' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 84; Gustavo A Jimenez, 'Corporate Criminal Liability: Toward a Compliance-Orientated Approach' (2019) 26(1) Indiana Journal of Global Legal Studies 353.

global governance scholars have for some time diagnosed an increase in government reliance on private entities to shape and implement cooperation and reform standards.[1082] These developments appear to be in tension with conventional, state-oriented perspectives that view the state as the only effective unit to regulate and enforce against corporate crimes.[1083]

Part of the appeal that is not captured by the official reform narrative may thus be that the introduction of corporate non-prosecution agreements enables governments to outsource some of the law enforcement functions traditionally performed by the state,[1084] while still being seen to actively 'combat' corporate crime. To be sure, this is not to suggest that state institutions leave the corporate crime enforcement 'scene' entirely, but rather that they shift towards more of a supervisory role, working through corporate non-prosecution agreements as a form of public-private hybrid governance mechanism.[1085] Relatedly, it can be argued that the introduction of corporate non-prosecution agreements allows governments to promote policy reforms that underpin 'neoliberal thinking about the role of the state and its priorities over social and penal programs'.[1086] In addition, it may be seen as providing governments with policy space for accommodating economic considerations in corporate criminal justice, reflecting, for example, a broader agenda of economic liberalisation, of which reducing regulatory constraints and legitimising corporate activity form an important part.[1087]

[1082] Radha Ivory and Tina Søreide, 'The International Endorsement of Corporate Settlements in Foreign Bribery Cases' (2020) 69 International and Comparative Law Quarterly 945, 950 with reference to Lauren B Edelman, *Working Law: Courts, Corporations, and Symbolic Civil Rights* (University of Chicago Press 2016) 12-13, 223; Kimberly D Krawiec, 'Cosmetic Compliance and the Failure of Negotiated Governance' (2003) Washington University Law Quarterly 487, 494, 522-37. See also, Larry C Backer, 'Global Panopticism: States, Corporations, and the Governance Effects of Monitoring Regimes' (2008) 15 Indiana Journal of Global Legal Studies 101, 101-08, 119-20.

[1083] See for example, Neil Boister, 'The Concept and Nature of Transnational Criminal Law' in Neil Boister and Robert Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015) 18; Sabine Gless, 'Bird's-eye view and worm's-eye view: towards a defendant-based approach in transnational criminal law' (2015) 6(1) Transnational Legal Theory 117, 121 with further references.

[1084] See Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) Law & Social Inquiry 229, 244; Terence C Halliday and Gregory Shaffer, 'Transnational Legal Orders' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015) 56-57.

[1085] See Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) Law & Social Inquiry 229, 244; Terence C Halliday and Gregory Shaffer, 'Transnational Legal Orders' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015) 56-57. See also, Abiola Makinwa, 'Public/private co-operation in anti-bribery enforcement: non-trial resolutions as a solution?' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020) 43.

[1086] Ely Aaronson and Gregory Shaffer, 'The Transnational Legal Ordering of Criminal Justice' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 24 with reference to, among others, Nicola Lacey, 'Punishment, (Neo)Liberalism and Social Democracy' in Jonathan Simon and Richard Sparks (eds), The Sage Handbook of Punishment and Society (Sage 2013) 260.

[1087] For references to these themes in the analysed materials, see for example sections 3.3.5, 4.2.1, and 5.2.1.3. On the broader point of the importance of reducing regulatory constraints and more generally legitimising corporate activity for an agenda of economic liberalisation, see for example Muthucumaraswamy Sornarajah, 'Power and

It is therefore suggested that the two additional narratives, emphasising competition and corporate (self-)governance rationales, contribute to our understanding of why states have introduced corporate non-prosecution agreements. They also help to explain the apparent success of the official reform narrative in promoting the rise of corporate non-prosecution agreements despite various challenges to its effectiveness and credibility; it simply does not tell the whole the story.

6.4 Conclusion

In this chapter, the study has focused on the rationales behind the rise of corporate non-prosecution agreements using a narrative lens.

It has started by distilling the official reform narrative from the previously conducted analysis of the domestic introduction discourses as well as some subsequent governmental statements and commentary. This exercise showed that the official reform narrative largely rationalised the introduction of corporate non-prosecution agreements based on their importance for combatting corporate crime and protecting public welfare.

The chapter then presented several challenges to this official reform narrative from empirical, conceptual, and functional perspectives. It first demonstrated a lack of solid empirical basis for the official reform narrative as well as inherent tensions between different objectives ostensibly pursued by the introduced corporate non-prosecution agreement regimes. It then identified high levels of corporate recidivism and difficulties with the prosecution of individuals as particularly controversial challenges. Lastly, it showed that the introduction of corporate non-prosecution agreements brings with it a risk of introducing procedural 'carrots' to resolve corporate crime cases, while still missing the legal 'sticks' to pursue prosecution in case a resolution is (or should be) deemed inappropriate from the outset or based on the corporation's conduct during the negotiation and implementation phase. The study found that this latter challenge is also likely enhanced in domestic legal systems other than the US due to several transplantation problems, including especially differences between the US and introducing states in terms of the available rules on corporate criminal liability, jurisdiction, and sanctioning as well as often less thought of laws controlling the conduct of corporate

Justice: Third World Resistance in International Law' (2006) 10 Singapore Yearbook of International Law 19, 22.

investigations (among others, relating to self-incrimination, employee rights, data privacy, and legal privilege).

In light of this (not at all comprehensive) list of challenges, the chapter finally turned to the question of how to explain the persistence of the official reform narrative and its apparent success in promoting the diffusion of corporate non-prosecution agreements across borders. Offering three suggestions, the chapter first proposed that some of its success lies not in its (empirically verifiable) effectiveness in achieving the stated aims but in its ability to reflect a 'plausible folk theory'. It then advanced two additional narratives, which rationalise the rise of corporate non-prosecution agreements because of their importance for improving competition between law enforcement authorities, corporations, and governments from different countries as well as for legitimising corporate (self-)governance and more generally economic considerations in corporate criminal justice. On this understanding, the official reform narrative's success can, at least partially, be explained by the simple fact that it does not tell the full story.

7 Conclusion

At the outset, this study was motivated by two surprises. The first surprise was that much of the practical reality of white collar or corporate crime cases did not follow the conventional criminal law enforcement pattern of prosecution and trial aimed at a final determination of responsibility through acquittal or conviction. Rather, the participants in these cases often focused on negotiating pre-trial settlements. For the author of this study, this intuitively brought up associations such as 'two-tier justice', 'get out of jail free card', or 'cost of doing business'; likewise, it raised concerns over adverse impacts on fundamental principles and aims of the criminal justice process such as equality, fairness, and transparency as well as sufficient deterrence and just punishment. As the research progressed, it was observed that many of these or similar associations and concerns were at the heart of the emerging debates between commentators that were either intuitively 'pro' or 'against' negotiated settlements and, seemingly, arguing along lines of political preferences when it comes to the way we should deal with 'big business'.[1088] However, it was also observed that very few people were actually looking at why this change was occurring. What were the reasons for corporate settlement procedures increasingly becoming available in domestic legal systems, and for prosecutors and corporations resorting to their use in practice?

The second surprise related to the way this change seemed to be occurring across state borders. The expectation was that the process would be dominated by state-to-state negotiations leading ideally to a multilateral treaty that formalised an obligation for state parties to ensure that their legislation provided for corporate non-prosecution agreements in the desired form. However, the reality appeared to be different. These legal regimes were travelling across state borders seemingly horizontally, whereas international law was standing on the side-lines, having clearly some role to play, but a much more indirect one than expected.

Together with the sudden rise of corporate non-prosecution agreements in countries other than the US, the project's focus thus gradually shifted to uncovering how and why states are introducing these mechanisms as an alternative enforcement response to the prosecution of economic crimes involving corporations. More specifically, what are the actors, factors, and

[1088] For a flavour of these debates, see section 1.1, in particular notes 35-48.

rationales that have influenced their emergence in the US and rise across domestic legal systems?

This chapter recaps the main conclusions in relation to these questions as well as briefly presents some additional, more general observations. Finally, returning to the study's methodological approach, it suggests the added value of a combined transnational criminal law and narrative lens not only to better understand transnationally induced domestic criminal justice reforms but also to imagine or re-imagine change.

7.1 General Conclusions

Before substantively engaging with the research questions, the enquiry turned to methodology, proposing that a combined transnational criminal law and narrative lens provides a reasonable and promising analytical framework for the study of domestic criminal justice reforms such as the rise of corporate non-prosecution agreements. As presented in chapter 2, a methodological conception of transnational law as a framework to analyse the construction and conveyance of legal norms across borders was adopted, borrowing from transnational legal process studies and especially TLO theory. It was argued that the main advantage of this conception compared to others, such as transnational law applying to transnational situations as well as purely national/comparative or international perspectives, is the capacity to provide a more flexible and yet focused analytical lens to trace the influence of various foreign, international, and local actors and factors or events on domestic legal change. Integrating a focus on narratives into this transnational law framework was found to allow not only critical engagements with the way governments and dominant actors rationalise reforms but also explorations of the existence of other accounts with potentially significant explanatory power.

In applying this analytical framework, the study first considered the curious evolution of non-prosecution and deferred prosecution agreements in the US from initially being introduced as leniency procedures for individual juvenile offenders to becoming one of the major enforcement responses to complex economic crimes involving large US and increasingly also foreign corporations. As shown in chapter 3, non-prosecution and deferred prosecution agreements emerged in US prosecutorial practice at the beginning of the 20th century to protect individuals that had committed offences with limited perceived culpability from the potentially severe consequences of a criminal conviction and to encourage 'good behaviour' in the future. Towards the end of the century, prosecutors of the DOJ suddenly started

extending these utilitarian and rehabilitative considerations to large corporations. The impetus for this extension and the conditions applied in these early agreements could largely be attributed to prosecutorial initiative and prior practice (albeit in relation to individuals) as well as the US Sentencing Commission's expansion of its Sentencing Guidelines Manual to organisations in 1991. Together they established the idea that, like for individuals before, it may be desirable to avoid the negative collateral consequences of a criminal conviction and to incentivise 'good behaviour' now (cooperation) and in the future (compliance and self-investigation) by offering in exchange non-prosecution and deferred prosecution agreements also to corporations. The study found that this paradigm shift was primarily motivated by a desire to increase enforcement efficiency against corporate crimes as well as to mitigate the adverse consequences of the traditional prosecutorial process aimed at conviction.

While the number of corporate non-prosecution and deferred prosecution agreements remained relatively low for the first decade, their use started to increase rapidly in 2003 and reached a fairly consistent level by 2006. This rise could be largely attributed to two domestic events or series of events that shook the US in the early 2000s, namely the 9/11 terrorist attacks and the large corporate fraud scandals involving Enron and other major US corporations. They resulted in immediate changes to corporate crime enforcement policies which catalysed the increased use of non-prosecution and deferred prosecution agreements. In particular, the prioritisation of anti-terrorism enforcement after 9/11 increased the demand for corporate crime enforcement procedures that were not only efficient in terms of required resources but also enabled prosecutors to change the business practices of certain corporations, especially banks, and effectively recruit them for law enforcement purposes. While the scale of corporate greed and economic consequences involved in the Enron and other fraud scandals initially created significant pressure for the US government to take (or be seen to take) tough actions against corporate crimes, the subsequent policies, enforcement actions, and accompanying discourse quickly focused on the need to avoid collateral consequences associated with corporate prosecutions and rather incentivise corporate cooperation and self-regulation. The dominance of these rationales was also well-illustrated by the diagnostic struggles over the prosecution and subsequent failure of Enron's auditor, Arthur Andersen LLP, in 2002. While there were several factual challenges to the narrative that linked Arthur Andersen going out of business to the DOJ's prosecution, it still persevered and shaped much of the subsequent discourse. Since then, prosecutors and commentators in the US and elsewhere have regularly used arguments and rhetoric that directly or indirectly

refer to the avoidance of an 'Andersen effect' to justify the increased use of corporate non-prosecution agreements.

However, these dynamics did not remain limited to acts committed in the US and by US corporations, but, in particular since the late 2010s, the DOJ also started extending non-prosecution and deferred prosecution agreements to foreign corporations and, indirectly, foreign countries. This extension was quite strategic. Against the background of exceptionally broad corporate criminal liability rules and enforcement powers of US prosecutors, it was primarily pursued by way of setting examples through unilateral application to foreign corporations, cooperation with foreign enforcement authorities once similar procedures were available domestically, and diplomatic pressure. Several rationales for this strategic extension could be identified, generally relating to enforcement efficiency as well as economic and political considerations. They included, in particular, direct and indirect financial recovery, levelling the playing field for US corporations, and shaping corporate activities and governance structures to comply with US preferences. In addition, the protection of US national security interests and the functioning of US law and markets as well as the reduction of the financial and political costs associated with the unilateral application of US law outside of the US could also be observed.

The study then considered the influence and role of international law, usually perceived as the traditional vehicle of cross-border norm diffusion. As demonstrated in chapter 4, the multilateral treaty regime on economic crimes can be seen as largely supportive of the extension of corporate non-prosecution agreements, albeit often either implicitly or with some qualifications. While this may be changing with the ongoing revision of the 2009 OECD Recommendation, the multilateral treaty regime on economic crimes does not expressly address corporate non-prosecution agreements. However, the study found that, even in the absence of express standards, support or at least openness to the domestic introduction and use of procedures akin to US non-prosecution and deferred prosecution agreements can be observed. Starting with an analysis of the pre-treaty international contests over corporate liability, the study emphasised the important influence of earlier domestic events in the US and subsequent American 'internationalising' initiatives, especially as regards the enactment of the FCPA in the aftermath of the Watergate scandal and legal changes in reaction to the US 'war on drugs'. The emergence of corporate liability and related enforcement standards in the multilateral treaty regime was thus, in important ways, shaped by US preferences for a preventive and self-regulatory paradigm in combination with far-reaching home state

jurisdiction. While neither the investigated OECD-ABC nor the UNCAC addressed corporate non-prosecution expressly, they established a general framework on corporate liability and enforcement and provided states parties with large regulatory space regarding the domestic introduction of corporate non-prosecution agreements. After the treaty phase, which had established important norms on corporate liability and enforcement in principle, subsequent developments returned to non-binding international instruments, especially in the context of the 2009 OECD Recommendation. It provided, in particular, further details on corporate cooperation and self-regulation, which not only continued the dominant historical paradigm on corporate liability but also reflected important developments and legal changes relating to the emergence and extension of corporate non-prosecution and deferred prosecution agreements in the US. Finally and importantly, the study ascertained that, despite the absence of an express basis in the treaty framework, the treaty monitoring body practice of the OECD-WGB and UNCAC-IRM started accepting and endorsing corporate non-prosecution agreements as compliant with the terms and contributing towards the objectives of the OECD-ABC and UNCAC regimes, albeit with some qualifications. In particular, the OECD-WGB acknowledged early on the potential effectiveness of US deferred prosecution agreements in increasing enforcement of the OECD-ABC, for example, recommending their introduction to the UK already in 2012, two years before the introduction of a regime for deferred prosecution agreements in England and Wales.

In addition to the described 'substantive' influence of the US corporate crime enforcement model, the study also identified some parallels or at least similarities in terms of the method of development in US and international law. In particular, it showed that corporate liability for economic crimes was first established in principle in the US (through case law) and international law (through multilateral treaties), while leaving the development of details, especially on corporate cooperation and self-regulation, to non-binding instruments and guidelines (for example, the US Sentencing Guidelines and Principles of Federal Prosecution of Business Organizations, and the 2009 OECD Recommendation as well as its ongoing revision). The diffusion of this general framework to (other) domestic legal systems was then pursued through DOJ and treaty body practice.

Turning the focus to the introduction of corporate non-prosecution agreements in other domestic legal systems, the study examined, in chapter 5, the domestic introduction processes and accompanying discourses for signs of US and international as well as additional local influences. First, using primarily the introduction of deferred prosecution agreements in

England and Wales in 2014, judicial public interest agreements (CJIP) in France in 2016, and remediation agreements in Canada in 2018 as examples, it observed significant influence by US law and enforcement actions. The analysed materials reflected, in many ways, the rationales that had already led to the rise of corporate non-prosecution and deferred prosecution agreements in the US as well as the US's export strategy to foreign corporations and countries. In particular, the perceived higher effectiveness of the US enforcement model and its heavy reliance on non-prosecution and deferred prosecution agreements was expressly and frequently referred to as a reason for the domestic introduction of similar procedures elsewhere. Similarly, the aim of incentivising corporate cooperation and self-investigation as well as the need to avoid the adverse consequences of the traditional prosecutorial process for corporations and innocent third-party stakeholders played an important role. Even several references to the dangers of the 'Andersen effect' could be located as a justification for the introduction of corporate non-prosecution agreements. As regards the US's export strategy, the study found that the DOJ's unilateral enforcement actions against prominent foreign corporations often ignited and significantly dominated domestic debates. In the same way, a desire to improve the domestic legal system's capacity to cooperate and compete with US and other foreign law enforcement authorities in the context of cross-border coordinated resolutions was identified as an influential factor.

However, the study also ascertained that US influence on the diffusion of corporate non-prosecution agreements to other domestic legal systems was not unlimited. One the one hand, a certain level of local resistance based on the perceived inappropriateness of some aspects of the US model in the domestic legal context could be observed. This led to domestic adaptations such limiting availability to legal persons and a specified group of economic crimes as well as insisting on a higher degree of oversight and publicity. Notably, some of these adaptations or deviations from the model of the dominant state were also subsequently picked up in other domestic introduction processes, arguably leading to a change in the underlying model, even if only in small ways. On the other hand, the study also found the relationship between the foreign and introducing state to be of relevance. The states that have introduced or are seriously considering the introduction of corporate non-prosecution agreements tend to have close economic, political, and security ties with the US and amongst each other. In particular, access to the US market and US-dominated economic infrastructure as well as a shared interest in the protection of free trade and economic liberalisation appeared to be common denominators.

Second, as regards discernible international influence on the domestic introduction of corporate non-prosecution agreements outside the US, the study showed that express references to the multilateral treaties on economic crimes in the domestic discussions and introduced legal frameworks were largely limited to general affirmations of adherence to the OECD-ABC, while the UNCAC was not mentioned in the analysed materials. In terms of individual provisions, only Article 5 of the OECD-ABC was specifically mentioned as a constraining factor to be considered by prosecutors when offering a corporate non-prosecution agreement in some countries. While no express mention was found, it can be noted that the discussed rationales and introduced legal frameworks, in many ways, reflected the emphasis on incentivising corporate cooperation and self-regulation in the 2009 OECD Recommendation. However, the main international influence appeared to be linked to both general criticism of insufficient corporate crime enforcement as well as specific endorsements of corporate non-prosecution agreements by the OECD-WGB.

Third, the study detected some additional local influences. They involved, in particular, various enforcement difficulties and perceived shortcomings of the respective domestic legal frameworks, relating, among others, to problems of detecting crimes, establishing reliable evidence, and attributing liability in increasingly complex corporate structures and activities, including of a transnational nature. Another important dimension of local influence that was found in the analysed materials can generally be described as economic considerations and the protection of corporate activity. It matched, albeit from the introducing state's perspective, several of the US's rationales for extending non-prosecution and deferred prosecution agreements to foreign corporations. For example, motives related to financial recovery and regaining or maintaining regulatory influence over corporate activities and governance structures was observed. In addition, references were found to the importance of introducing corporate non-prosecution agreements to protect domestic corporations from foreign, especially US, enforcement actions and an unfair playing field *vis-à-vis* foreign corporations to whom these procedures were already available, as well as more generally to protect the country's reputation and economy.

Finally, to provide another layer of analysis, the study zoomed in on the rationales behind the rise of corporate non-prosecution agreements using a narrative lens. As shown in chapter 6, the study first identified an official (governmental) reform narrative which primarily rationalised the introduction of corporate non-prosecution agreements based on their importance for combatting corporate crime and protecting certain public welfare interests. It

then presented several challenges to this official reform narrative from an empirical, conceptual, and functional perspective. Focusing on five areas in particular, it first demonstrated a lack of solid empirical basis for the official reform narrative as well as inherent tensions between different objectives ostensibly pursued by the introduced corporate non-prosecution agreement regimes. It then considered corporate recidivism followed by difficulties with the prosecution of individuals as particularly controversial challenges. Lastly, it showed that the introduction of corporate non-prosecution agreements brings with it a risk of introducing procedural 'carrots' to resolve corporate crime cases, while still missing the legal 'sticks' to pursue prosecution in case a resolution is (or should be) deemed inappropriate. The study found that this latter challenge is also likely enhanced in domestic legal systems other than the US due to several transplantation problems, including in particular differences between the US and introducing states in terms of the available rules on corporate criminal liability, jurisdiction, and sanctioning as well as often less thought of laws controlling the conduct of corporate investigations (among others, relating to self-incrimination, employee rights, data privacy, and legal privilege).

In light of such challenges, the study turned to the question, how to explain the nevertheless apparent success of the official reform narrative in promoting the rise of corporate non-prosecution agreements. Offering three suggestions, it first proposed that some of its success lied not in its (empirically verifiable) effectiveness in achieving the claimed aims but in its ability to reflect a 'plausible folk theory'. It then advanced two additional narratives which rationalise the rise of corporate non-prosecution agreements based on their importance for improving competition between law enforcement authorities, corporations, and governments from different countries as well as for legitimising corporate (self-)governance and more generally economic considerations in corporate criminal justice. On this understanding, the official reform narrative's success can, at least partially, be explained by the simple fact that it does not tell the full story.

To summarise, the study found that the emergence of corporate non-prosecution agreements in the US was primarily influenced by domestic developments causing a legal response that prioritised efficiency, national security, and especially economic considerations. The subsequent rise of similar procedures across other domestic legal systems could largely be attributed to US export interests which, in important ways, were supported by international law and organisations, especially in the OECD context, and met with local demands or self-interests of certain states that mirrored the US rationalisation and export strategy.

7.2 Some Additional Observations

While not part of the immediate focus of this study, the research also highlighted some more general developments that situate the rise of corporate non-prosecution agreements within broader transnational law and corporate governance themes. In particular, three developments can be briefly observed.

First, the rise of corporate non-prosecution agreements exemplified the construction by powerful states of transnational norms and influence that 'globalise' local developments.[1089]

Second, it illustrated changing methods of cross-border norm diffusion. While the multilateral treaties on economic crimes attested to a strategic and flexible approach by key actors, especially the US, to establish a general framework on corporate liability and enforcement, further development focused on non-binding international instruments in the form of recommendations or treaty body practice in combination with the extraterritorial application of domestic law.[1090] These observations relate to the way dominant states interact with international law. As generally explained by Krisch, these interactions commonly 'oscillate between [the] two poles … [of] instrumentalization of and withdrawal from international law', with extraterritorial projection of domestic law and informal diffusion of norms contributing to the maintenance of power.[1091]

Finally, it may be argued that the rise of corporate non-prosecution agreements aligns with signs of a more general turn towards corporate self-regulation and a less prominent role for public enforcement not only in the context of economic crimes[1092] but also in other areas such

[1089] See for example, Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd edn, Cambridge University Press 2002) 210, 214 (referring to 'globalized localism' in the context of the *lex mercatoria*); Ethan A Nadelmann, *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (Penn State University Press 1993) (explaining how law enforcement practices common in the US such as controlled delivery were exported to Latin American and then European states to support the US 'war on drugs'). See generally, Gregory Shaffer, 'Transnational Legal Ordering of State Change' in Gregory Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge University Press 2013) 47-48.

[1090] See Michael Elliot and Felix Lüth, 'Corporate Liability for Economic Crimes: A Contested Transnational History' in Neil Boister, Sabine Gless and Florian Jessberger (eds), *Histories of Transnational Criminal Law* (Oxford University Press 2021) 217-18.

[1091] Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16(3) European Journal of International Law 369, 379. See also, Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108(1) American Journal of International Law 1; Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012).

[1092] See section 6.3.2, in particular notes 1077-78.

as human rights or the environment.[1093] It also dovetails with a broader embrace of corporate and more generally private transnational governance analysed, among others, by Cutler and Zumbansen.[1094] In light of current global crises such as the COVID-19 or climate crisis, it may also be argued that these trends will likely continue or even accelerate due to increasing pressure on states, in particular to service rising levels of public debt. This may not only result in reduced law enforcement capacities but also increased interests of states in economic recovery and competition, for which corporations will play an important role.[1095]

7.3 Transnational Criminal Law, Narratives, and the Possibility to Imagine Change

This study has proposed and applied a combined transnational criminal law and narrative lens to investigate how and why states are engaging in transnationally induced domestic criminal justice reforms, using the cross-border rise of corporate non-prosecution agreements as an example. As already noted in chapter 2,[1096] this methodological approach does not as such provide a framework for the normative evaluation of what actors, factors, and rationales should prevail over others. However, it can inform evaluative or critical efforts by shedding light on the underlying interpretive struggles and the realities, dominant or alternative, they try to constitute. This is important because, as Garland notes, 'if critical theory is to be taken seriously, it will have to first engage with things as they actually are'.[1097] In addition, it may allow us to go beyond treating law reform simply as a process of producing responses or solutions to problems but scrutinise the role law reform may play in manifesting or even

[1093] See for example, Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive industries, human rights, and the home state advantage* (Routledge 2014); Joel Bakan, 'The Invisible Hand of Law: Private Regulation and the Rule of Law' (2015) 48 Cornell International Law Journal 279; Rachel Chambers and Anil Yilmaz Vastardis, 'Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability' (2021) 21(2) Chicago Journal of International Law 323; Tim Bartley, 'Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions' (2007) 113 American Journal of Sociology 297; John G Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101(4) The American Journal of International Law 819, 835-837; Paul B Stretesky. 'Corporate self-policing and the environment' (2006) 44(3) Criminology 671.

[1094] For example, A Claire Cutler, 'Locating Private Transnational Authority in the Global Political Economy' in Peer Zumbansen (ed), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (Cambridge University Press 2020) 321; A Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press 2003); Peer Zumbansen and Dionysia Katelouzou, 'The Transnationalization of Corporate Governance: Law, Institutional Arrangements and Corporate Power' (2021) 38(1) Arizona Journal of International & Comparative Law 1. For a historical contextualisation, see also Doreen Lustig, *Veiled Power: International Law and the Private Corporation, 1886-1981* (Oxford University Press 2020) 224.

[1095] See Nico Krisch, 'COVID, Crisis and Change in Global Governance' (The Global, 17 April 2020) <https://theglobal.blog/2020/04/17/covid-crisis-and-change-in-global-governance/>.

[1096] Section 2.2.

[1097] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press 2002) 3.

constructing the very problems it (ostensibly) seeks to address. The point in doing so is, thus, not immediately to come up with better 'counter reforms' but 'to keep open to us ways of thinking and speaking that policy discourses appear to preclude or to disfavour'.[1098] In other words, it may give us the possibility to imagine (and potentially work towards) change in the context of the current reform discussions over corporate non-prosecution agreements and liability as well as beyond.

This possibility, it may be argued, is also especially relevant at a time of growing concerns that 'transnational criminalization processes…may mask the persistent failure of states and international organizations to develop effective tools to address the root causes of the harmful activities' and rather 'perform ideological functions in a period characterized by the global spread of economic policies that have led to growing inequality around the world'.[1099]

While reasonable people can disagree on what interests merit consideration and how much weight should be given to them,[1100] it seems desirable to have a public discourse about the future direction of corporate non-prosecution agreements and corporate crime enforcement more generally that is as informed and transparent as possible. This study hopes to make a contribution in that regard.

[1098] Marianne Constable, 'Law as Language' (2014) 1(1) Critical Analysis of Law 63, 74. See also, Anne Saab, *Narratives of Hunger in International Law: Feeding the World in Times of Climate Change* (Cambridge University Press 2019) 35.

[1099] Ely Aaronson and Gregory Shaffer, 'Defining Crimes in a Global Age: Criminalization as a Transnational Legal Process' (2021) 46(2) Law & Social Inquiry 455, 478. On the role of ideology in criminal justice TLOs, see also Sally E Merry, 'Conclusions: A Processual Approach to Transnational Legal Orders' in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press 2020) 373-79. More generally on law's constitutive role in the global distribution of inequality and corporate power, see, for example David Kennedy, 'Law in Global Political Economy: Now You See It, Now You Don't' in Poul F Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020) 127; Joshua Barkan, *Corporate Sovereignty: Law and Government under Capitalism* (University of Minnesota Press 2013) 9.

[1100] For a discussion of examples of the various interests potentially involved in corporate non-prosecution agreements, see Felix Lüth, 'Corporate non-prosecution agreements as *transnational human problems*: transnational law and the study of domestic criminal justice reforms in a globalised world' (2021) Transnational Legal Theory 1, 6-9.

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