INTERNATIONAL DOUBLE JEOPARDY: U.S. PROSECUTIONS AND THE DEVELOPING LAW IN EUROPE

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I. INTRODUCTION

The general principle that one cannot be twice prosecuted for the same acts or offense appears in the laws of most countries. It is known in the United States as the protection against "double jeopardy;" in Europe and elsewhere the principle is known under the Latin phrase *ne bis in idem*. However, a vexing problem occurs when a person or a company may be subject to criminal prosecutions for the same facts in two different countries. The domestic law of the second country may provide little or no protection, and international agreements vary in their applicability and scope.

The laws and practices in the United States and in Europe differ greatly on this point. U.S. prosecutors generally have a free hand to prosecute individuals and companies that have already been the subject of prosecution in other countries; in Europe, several conventions limit the power to prosecute twice within the continent. Two courts in Paris have recently made interesting contributions to the law in this area. In June 2015 a trial court in Paris held that French authorities could not prosecute French companies whose parents had signed either a Deferred Prosecution Agreement ("DPA") or a Non-Prosecution Agreement ("NPA") with the United States Department of Justice ("DoJ") based on the same facts because doing so could not be consistent with the principle of *ne bis in idem* made applicable by an international agreement to which France is a party.[1] In February 2016, in a related but different case, the Court of Appeals in Paris refused to bar the prosecution in France of an Italian company that had entered a guilty plea in the United States based on the same factual history, ruling that in such a circumstance it was insufficient if the prior matter was based on the same facts unless the substantive laws invoked by the two countries

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1. Cour d'Appel de Paris [CA] [regional court of appeal] Paris, 11e ch., Jun. 18, 2015, N. parquet 06026092035 (Fr.) [hereinafter June 2015 Decision] (obtained from the clerk (*greffier*) of the Tribunal de Grande Instance de Paris and on file with author and the AM. U. INT'L L. REV.).

were substantially the same.[2] These decisions, and in particular the extension of *ne bis in idem* protection giving preclusive effect to a negotiated outcome in the United States, raise important issues in the development of the law, as well as practical questions for the practitioner.

This article will (I) set out the parameters of the current situation, including an overview of U. S. and European laws on the subject; (II) review the recent French decisions; and (III) offer commentary on the problems confronted by multinational corporations at risk of multiple prosecutions and suggest some needed reforms to deal with this issue.

II. THE PROBLEM OF MULTIPLE PROSECUTIONS

Individuals, and particularly multinational companies, face the risk of multiple prosecutions because the same acts can justify prosecution in more than one country, and because there is no accepted international mechanism for allocating responsibility among countries that may investigate the same acts. The laws in the United States and Europe differ widely on how to address this problem.

A. THE SOURCE OF THE PROBLEM

Several scenarios lead to parallel or successive prosecutions. Acts constituting a crime may occur in several different countries, making each country potentially competent to investigate the entire crime of which the acts that took place on its territory were a part. Most countries' criminal laws authorize its government to prosecute its own nationals for criminal acts committed outside the national territory, which may overlap with "territorial" jurisdiction in other countries.[3] Some countries – notably the United States – may base a criminal investigation on the mere fact that a target used U.S. dollars

2. Cour d'Appel de Paris [CA] [regional court of appeal] Paris, 13 ch., Feb. 26, 2016, Dossier n. 13/09208 (Fr.) [hereinafter February 2016 Decision] (obtained from the Clerk of the Court of Appeals and on file with author and the AM. U. INT'L L. REV.).

3. *See e.g.*, Adam Abelson, *The Prosecute/Extradite Dilemma: Concurrent Criminal Jurisdiction and Global Governance*, 16 U.C. DAVIS J. INT'L L. & POL'Y 1, 14-15 (2009); Alexander Layton & Angharad M. Parry, *Extraterritorial Jurisdiction—European Responses*, 26 HOUS. J. INT'L L. 309, 318 (2003).

to consummate an activity that otherwise took place entirely outside the United States. A company or person in this situation faces a critical strategic challenge. One obvious risk is that if a target enters into any agreed-upon outcome such as a guilty plea, a DPA, or an NPA, the authorities in another country may learn of it and begin a new investigation seeking further penalties.

In the absence of a comprehensive international framework, targets of multiple investigations generally rely on strategic negotiating skills rather than on assertions of legal rights to avoid (or minimize) the risk of multiple prosecutions across borders.[4] However, as multi-national investigations increase this issue has received renewed attention in academia,[5] in colloquia,[6] and in "blog" discussions of the subject,[7] and corporate counsel sometimes inveigh against the threat of multiple prosecutions, calling for reform.[8]

4. *See generally,* Frederick T. Davis, et al., *Multi-Jurisdictional Criminal Investigations Pose Challenges*, N.Y.L.J., Nov. 18, 2013, http://www.newyorklaw journal.com/id=1202627815370/MultiJurisdictional-Criminal-Investigations-Pose-Challenges.

5. Juliette Lelieur, *'Transnationalizing'* Ne Bis In Idem*: How the Rule of* Ne Bis In Idem *Reveals the Principle of Personal Legal Certainty*, 9 UTRECHT L. REV. 198 (2013) (exploring the history and reasoning behind the French rule of *ne bis in idem)*. *See also* WILLEM B. VAN BOCKEL, *The Ne Bis in Idem Principle in EU Law: A Conceptual and Jurisprudential Analysis*, 2, (P.J. Slot ed., 2009); Christine Van Den Wynggaert & Guy Stessens, *The International* Non Bis in Idem *Principle: Resolving Some of the Unanswered Questions*, 48 INT'L & COMP. L.Q. 779 (1999); Michele N. Morosin, *Double Jeopardy and International Law: Obstacles to Formulating a General Principle*, 64 NORDIC J. INT'L L. 261 (1995).

6. *International Double Jeopardy: Issues Facing Multinational Corporations in Parallel, Cross-Border Investigations*, https://www.law.georgetown.edu/ continuing-legal-education/programs/cle/multinational-corporations/ (last visited June 1, 2016) (asserting that the absence of coordination between international enforcement authorities is problematic for multinational corporations).

7. Alistair Craig, *OECD Should Protect Against Multi-Country Enforcement*, THE FCPA BLOG, Nov. 11, 2014, 3:58PM, http://www.fcpablog.com/blog/ 2013/11/11/oecd-should-protect-against-multi-country-enforcement.html (arguing for the implementation of a binding mechanism to provide protection from multiple international prosecutions).

8. *See, e.g.*, Peter Herbel, Beat Hess & Massimo Mantovani, *Double Jeopardy—Finding a Balance in Enforcement Actions for Companies*, LEGALWEEK (Nov. 24, 2011, 12:00AM), http://www.eldinternational.com/wp-content/uploads/2012/11/Double-Jeopardy-Legal-Week-Nov-24-2011.pdf (arguing for the need to find balance between anti-bribery enforcement and unfairly punishing corporations).

B. THE LEGAL FRAMEWORK UNDER THE OECD BRIBERY CONVENTION

Multiple prosecutions are not new and can occur under a variety of criminal laws. The current investigation of senior officials of the international soccer organization FIFA is perhaps the most noteworthy recent example.[9] The surge of multiple prosecutions dates to international efforts to fight overseas corruption, and, in particular, to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[10] adopted by the Organization of Economic Co-operation and Development ("OECD") in 1997.[11] The OECD Convention was signed by all European nations, as well as the United States and many other countries, and led to the transposition into each country's laws of criminal prohibitions generally similar to the Foreign Corrupt Practices Act ("FCPA"),[12] which had been adopted in the United States in 1977.[13] Prior to the implementation of the OECD Convention, most persons or companies faced the realistic risk of prosecution in only two countries: in the United States if it triggered the applicability of the FCPA, and in the country (often in the developing world) where the actual bribery took place. Prosecutions in the country of a company's incorporation were rare. In many countries, non-domestic corruption was at least tolerated, and, in some circumstances, an overseas bribe was tax deductible. Following the implementation of the OECD Convention, a person or company engaging in official bribery anywhere in the world may now face the risk of prosecution in any signatory country where it is incorporated or has significant contacts.[14]

9. Robert Anello, *FI-FA Fo Fum: Who Gets to Prosecute Non-Americans*, FORBES (June 8, 2015), http://www.forbes.com/sites/insider/2015/06/08/fi-fa-fo-fum-who-gets-to-prosecute-non-americans/#16683da0300b.

10. Jacqueline L. Bonneau, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 COLUM. J. TRANSNAT'L L. 365, 368 (2011).

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

12. *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited June 1, 2016).

13. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, et seq. (2012).

14. *See* JACINTA ANYANGO ODUOR, ET AL., LEFT OUT OF THE BARGAIN:

The OECD Convention clearly considered the possibility of multiple investigations. Article 4.1 obligates each signatory country to "take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offense is committed in whole or in part in its territory."[15] Additionally, article 4.2 contemplates that each signatory country may have jurisdiction "to prosecute its nationals for offenses committed abroad . . . ."[16] Having recognized the conditions that create a risk of multiple investigations, the Convention provided for no legally enforceable ban on multiple prosecutions, but rather stated (in article 4.3) as follows: "When more than one Party [*i.e.*, signatory country] has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution."[17]

The drafters clearly hoped that in the event of multiple investigations, only one country would actually prosecute a given defendant. Arguments that this provision requires a single prosecution (or gives a defendant the right to one), however, have been routinely rejected, as illustrated by *United States v. Jeong*.[18] In that case, a businessman already convicted of corruption in Korea claimed that Article 4.3 precluded prosecution in the United States for the same facts. The Court rejected this argument, noting: "[W]e conclude that the plain language of Article 4.3 does not prohibit two signatory countries from prosecuting the same offense. Rather, the provision merely establishes when two signatories must consult on jurisdiction."[19]

As a result, multiple prosecutions for the same acts occur frequently. One of the earliest prosecutions involved the Norwegian state oil giant, StatOil. StatOil was prosecuted by Norwegian authorities and ultimately paid a significant penalty.[20] Apparently to

SETTLEMENTS IN FOREIGN BRIBERY CASES AND IMPLICATIONS FOR ASSET RECOVERY 32 (2014).

15. OECD Convention, *supra* note 11, at art. 4.1.
16. *Id.* at art. 4.2.
17. *Id.* at art. 4.3.
18. United States v. Jeong, 624 F.3d 706, 706 (5th Cir. 2010)
19. *Id.* at 711.
20. *Statoil Fined Over Iranian Bribes*, BBC NEWS (June 29, 2004),

its shock—and to the surprise of the Norwegian prosecutors—the DoJ thereupon commenced an independent investigation, which resulted in StatOil agreeing to additional fines for what were apparently the same set of facts that had been involved in the Norwegian case.[21]

As developed below, the United States and Europe have followed quite different courses. In Europe, through a series of domestic laws, international agreements, and expansive interpretation by the courts, the core principle of *ne bis in idem* is generally recognized so that (with some exceptions) a person or company will not face prosecution twice in Europe, or cumulative criminal and administrative pursuits for the same conduct if the latter seeks quasi-penal sanctions. In the United States, the Double Jeopardy clause provides no protection against multiple prosecutions across borders, and U.S. prosecutors and administrative agencies such as the Securities & Exchange Commission can seek cumulative (and often very large) penalties for the same conduct.

C. THE APPROACH IN THE UNITED STATES

1. The Law

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb . . . ."[22] This provision, while considered an important, even fundamental, principle of criminal justice, has nonetheless been subject to two interpretive limitations that restrict its scope.

First, the Clause applies only to prosecutions by the "same sovereign," that is, it prohibits the federal government, or any individual State, from twice prosecuting someone for the same facts,

http://news.bbc.co.uk/go/pr/fr/-/2/hi/business/3849147.stm.

21. *See* Criminal Charges, United States v. Statoil, 06 Crim. 960 (S.D.N.Y. Oct. 13, 2006), http://www.justice.gov/criminal-fraud/case/united-states-v-statoil-asa-court-docket-number-06-cr-960; Nolle Prosequi, United States v. Statoil, 06 Crim 960 (S.D.N.Y. Nov. 18, 2009), http://www.justice.gov/criminal-fraud/case/united-states-v-statoil-asa-court-docket-number-06-cr-960 (including Statoil also consented to comprehensive reviews of its compliance with the FCPA by an independent compliance consultant for three years).

22. U.S. CONST. amend. V.

but does not prohibit the federal government from prosecuting a person convicted or acquitted by a State, or vice versa, or one State from prosecuting a person convicted or acquitted by another, and it gives no weight to prosecutions abroad.[23]

Second, U.S. laws provide very few restrictions on the ability of the government to pursue cumulative criminal and administrative sanctions for the same conduct, even if the latter results in painful financial penalties. In *United States v. Hudson*,[24] the Supreme Court held that administrative sanctions can follow a criminal conviction or acquittal, unless there is the "clearest proof" that legislature intended the administrative sanction to be penal in nature or the sanctions are "so punitive" as to render them, in essence, criminal. As one commentator has written, after *Hudson*, "double jeopardy protection from civil sanctions will attach now only in the rarest of circumstances."[25] As a result, it is very common for a company to face simultaneous, or successive, investigations by the DoJ and the SEC for the same conduct, and to make large payments to both

2. The "Guidelines"

The absence of legally-enforceable protections noted here is tempered by self-imposed – but not legally binding – "guidelines" or "principles" announced by the DoJ. The most important of these is the so-called "Petite Policy," known formally as the "Dual and Successive Prosecution Policy," which provides that prosecution in a State will generally bar federal prosecution based on the same facts, absent some unusual circumstances such as indications that the state result was affected by incompetence or fraud, or in cases where there is an especially important federal interest.[26] These principles are real in the sense that the federal government rarely engages in double prosecution domestically, but they do not define rights that can be

23. *See* Heath v. Alabama, 474 U.S. 82, 90 (1985); *see also* Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory,* 86 WASH. UNIV. L. REV. 769 (2009).

24. Hudson v. United States, 522 U.S. 93, 99-100 (1977).

25. Lisa Melenyzer, *Double Jeopardy Protection from Civil Sanctions After* Hudson v. United States, 89 J. CRIM. L. & CRIMINOLOGY 1007, 1042 (1999).

26. *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-2.000 (2015), http://www.justice.gov/usam/usam-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals.

enforced in court.

Internationally, the DoJ admits of no legal requirement that it give any legal standing to a prosecution elsewhere in the world. Thus, any argument that a U.S. authority lacks the power to investigate or prosecute because another country has already done so will go nowhere.[27] Rather, a U.S. prosecutor will view a non-U.S. prosecution solely as one element, among others, to be taken into account in determining whether to prosecute. Predicting that reaction, or evaluating the likelihood of a decision not to prosecute by a U.S. prosecutor, is uncommonly difficult because it is not only inherently fact-specific, but lacks explicit principles, references, or guidelines.

3. The Practice

Prosecutors in the United States enjoy a high degree of essentially non-reviewable discretion.[28] At least with respect to prosecutions of corporations, they sometimes explain the exercise of that discretion by issuing so-called "guidelines" that purport to set out the principles they follow when making charging decisions. In the area of overseas corruption, the principal guidelines are found in the official "Guidance" regarding FCPA matters jointly issued in 2012 by the DoJ and the SEC.[29] This document in turn refers to so-called "enforcement principles" that have been separately issued, and regularly updated, by the DoJ[30] and the SEC.[31] What is striking

27. *See* discussion in Section III A. on the unenforceability in the United States of international treaties that provide this protection elsewhere.

28. *See, e.g.*, Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 4–5 (2010) ("Under federal law, a public prosecutor has exclusive discretion to decide whether or not to prosecute . . .any crime that is supported by probable cause."); *see also* Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs, 482 U.S. 270, 283 (1987) ("[I]t is entirely clear that the refusal to prosecute cannot be the subject of judicial review.")

29. U.S. DEP'T OF JUSTICE & U.S. SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), www.justice.gov/criminal/fraud/fcpa.

30. U.S. ATTORNEYS' MANUAL, *supra* note 25, § 9-28.000, http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.

31. U.S. SEC. AND EXCH. COMM'N, REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 AND COMMISSION

about all three documents is that while they provide significant detail about the many elements that the prosecutor will take into account in making charging decisions and in negotiating agreed-upon outcomes, the weight given to foreign prosecutions—and the phenomenon of multi-jurisdictional investigations—are not mentioned at all. Furthermore, while senior members of the DoJ and of the SEC occasionally make semi-official "policy statements" that are issued in memorandum form on the agencies' websites, no published text has outlined the principles that prosecutors should follow to determine whether to prosecute in parallel with or successively to a non-U.S. prosecution. This absence is puzzling. It probably results from an inherent difficulty in prescribing specific standards and principles, and perhaps from a concern that an attempt to do so might lead to misunderstandings both with companies being investigated and with foreign prosecutors.

Official reticence is nowhere more apparent than in the few public remarks made by federal officials on this subject, generally in the context of seminars and sometimes in response to questions. In November 2013, for example, the then-head of the DoJ's FCPA unit, together with his counterpart at the SEC, participated in a public discussion held under the auspices of the American Bar Association, of which a transcript was made by a reporting organization.[32] In prepared remarks, the DoJ representative listed "multi-jurisdictional issues" as a topic among "the challenges we face," and noted preliminarily that it has been "the DoJ and U.S. government policy for years to encourage foreign jurisdictions to increase their involvement."[33] He then offered only one concrete principle: that the DoJ will "give credit to [a company under investigation] in terms of the penalties, so it wasn't actually getting hit twice for the same conduct."[34] (In another panel at the same conference, a different DoJ

STATEMENT ON THE RELATIONSHIP OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS (2001), https://www.sec.gov/litigation/investreport/34-44969.htm; *Enforcement Cooperation Program*, U.S. SEC. AND EXCH. COMM'N, http://www.sec.gov/spotlight/enfcoopinitiative.shtml (last modified Feb. 16, 2016).

32. Remarks of Charles Duross and Kara Brockmeyer at the ABA's 2013 FCPA Conference (Sept. 19, 2013), http://www.mainjustice.com/justanti corruption/2013/10/02/remarks-of-charles-duross-and-kara-brockmeyer-at-the-abas-2013-fcpa-conference/ [hereinafter Duross & Brockmeyer Remarks].

33. *Id.*

34. *Id.*

official noted that the DoJ would give "dollar for dollar" credit for payments made to other jurisdictions.) [35] Otherwise, he professed only a willingness to discuss common issues with foreign counterparts, stating:

> So part of that is engagement with our foreign partners and trying to do that [i.e., work together to joint outcomes]. It's not a perfect system by any stretch and there really isn't . . . a sort of framework . . . that covers the different sorts of agreements and understandings . . . . There are definitely going to be challenges to resolve, but really engagement from our perspective is the best way.[36]

Perhaps the most useful predictor of the U.S. official position comes from reviewing publicly reported results and attempting to determine the policy decisions that motivated them. Such a review reveals a range of outcomes and suggests tentative conclusions regarding their actual policy parameters.

On one end, there are a number of what can only be described as "me too" prosecutions where a completed outcome in a country outside the United States was followed by a new, and apparently uncoordinated, prosecution in the United States. The *Statoil* case would appear to fall in this category.[37] The most appropriate lesson to be drawn from this and similar incidents is that the participants may not have anticipated the risk of a U.S. assertion of jurisdiction, or else paid dearly for a strategic decision not to involve U.S. prosecutors at an appropriate point.

At the far end of the spectrum are a very few cases where the DoJ demonstrably expressed an interest in investigation, but ended up not prosecuting based upon a completed prosecution overseas. It is difficult to make a definitive list of such outcomes because the DoJ does not, generally, and as a matter of policy, explain its decisions not to prosecute. In the case of the Dutch offshore services company SBM Offshore, however, the sequence of events is quite clear: in

35. *See* Sean Hecker, et al., *DOJ and SEC Officials' Recent Conference Remarks*, FCPA UPDATE, Nov. 2013, at 5, http://www.debevoise.com/insights/publications/2013/11/fcpa-update (highlighting DoJ Deputy Fraud Section Chief Braun's comments on his agency's current approach to deducting penalties paid abroad and addressing the challenges involved in achieving fair monetary penalties).

36. *See* Duross & Brockmeyer Remarks, *supra* note 32.

37. *See Statoil Fined Over Iranian Bribes*, *supra* note 20.

2012, SBM publicly announced that it was the subject of a DoJ investigation for illicit payments in several countries overseas; in November 2014 SBM announced that it had reached a negotiated outcome with the Dutch prosecutorial authorities, essentially equivalent to an NPA, whereby it paid a very significant fine and avoided Dutch prosecution; and, on the next day, SBM announced that the DoJ had informed the company that the DoJ was no longer investigating the matter.[38]

In between these relative extremes exists a number of instances where there was clear cooperation and coordination between the DoJ and prosecuting authorities overseas, evidenced by simultaneous or orchestrated public announcements, mutual recognition in press releases, and, at least in some cases, a clear allocation of the responsibilities between the prosecuting authorities, as well as financial "credit" for payments made in another country.[39] On what basis this coordination was exercised, and how responsibilities and outcomes, such as how the amounts paid, were allocated, are not publicly clear.

In still other circumstances, the public expressions of "cooperation" may be window dressing that disguised an absence of any real coordination at all. For example, in the publicly announced DPA for French oil giant Total S.A., the DoJ's press release expressed its "deep appreciation for the cooperation and partnership of French law enforcement authorities,"[40] even though Total apparently reached no complementary agreement with French authorities, and thus faced prosecution there even after signing a

38. *Small Country, Big Punch: The Netherlands' Anti-Bribery Prosecution of SBM Offshore*, FCPA UPDATE, Nov. 2014 at 13 [hereinafter *Small Country*].

39. *See, e.g.*, Letter from U.S. Department of Justice, Criminal Division, Fraud Section to Johnson & Johnson, Inc., Case 1:11-cr-00099-JDB, Document 1-1 (Jan. 14, 2011), http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/04/27/04-08-11depuy-dpa.pdf; Press Release, UK Serious Fraud Office, DePuy International Limited Ordered to Pay £4.829 Million in Civil Recovery Order (April 8, 2011), https://www.foley.com/files/DePuy_SFO_Release_18apr11.pdf (acknowledging that the $21,400,000 penalty took into account penalties Johnson and Johnson paid for the same conduct in the United Kingdom and Greece).

40. Press Release, U.S. Department of Justice, French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme (May 29, 2013), http://www.justice.gov/opa/pr/french-oil-and-gas-company-total-sa-charged-united-states-and-france-connection-international.

DPA with the DoJ.[41]

Therefore, there is no firm set of principles that can confidently predict the degree to which U.S. authorities will give any value—let alone a preclusive effect—to non-U.S. prosecutions. It appears likely that their analysis will be similar to that found in the "Petite Policy" respecting federal/state investigations. In those cases where the facts show a real connection with the United States – such as the existence of U.S. victims, significant facts indicating a crime that took place on U.S. soil, or the U.S. nationality of key participants – it will be very hard to argue to U.S. prosecutors that they should take a "back seat" to non-U.S. prosecutors. In those instances where the U.S. prosecutor asserts jurisdiction on a more "extra-territorial" basis – such as where no U.S. actors where involved, only a small part of the alleged crime took place on U.S. territory, the activities of a subsidiary in the United States are attributed to a foreign parent, or jurisdiction is based upon the use of the U.S. dollar – the outcome will probably be determined by the perceived "adequacy" of the non-U.S. outcome. As noted above, the SBM declination by the DoJ immediately followed a significant (and apparently "adequate") result reached by the Dutch authorities.[42] In contrast, in the fifteen years since France has adopted domestic legislation to comply with the OECD Convention by criminalizing overseas bribery, it has not maintained the conviction of a single French company, [43] which may

41. *See* Bruce E. Yannett, et al., *The Total S.A. Action: Are Administrative Orders the SEC's FCPA Resolution of Choice for the Future?*, FCPA UPDATE, July 2013, http://www.debevoise.com/insights/publications/2013/07/fcpa-update; *see also* Deferred Prosecution Agreement, United States v. Total, S.A., Case 1:13CR239, 1-2 (E.D. Va. May 28, 2013), http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/06/12/2013-05-29-total-dpa-filed.pdf.

42. *Small Country*, *supra* note 38, at 2-4.

43. The 2016 conviction of French company Total S.A. and the Italian company Vitol S.A. by the Paris Court of Appeals in the Oil-for-Food prosecution, discussed below, was based on France's statute prohibiting overseas corruption, adopted pursuant to its obligations under the OECD Convention. That case did not, however, involve classic bribery in the sense of a payment being received by a dishonest agent of a government in order to influence that government's decision, but rather involved payments to a foreign regime itself (Iraq under the dictatorship of Saddam Hussein) in violation of the Oil-for-Food embargo restrictions imposed by the United Nations. While the trial court had concluded that the payment and receipt of such payments did not constitute bribery, the Court of Appeals concluded that it did, since the effect was to hide an illegal transaction. This controversial reasoning may well be reviewed by France's Supreme Court

explain why four large, iconic French companies have entered into highly publicized and expensive DPAs with U.S. authorities regarding acts that mostly were committed by non-U.S. actors and mostly outside of the United States.[44]

D. THE DEVELOPING LAW IN EUROPE ON MULTIPLE PROSECUTIONS

The legislatures and courts in Europe have engaged in a number of efforts to provide coherent rights with respect to multiple or successive prosecutions in that continent.

Traditionally, European countries recognized some form of the "dual sovereignty" principle which permitted multiple prosecutions. In France, this approach had been amended by domestic legislation to distinguish between cases in which prosecutions in France are based on a "territorial" application of its criminal laws to acts committed, even in part, in France, and "extra-territorial" applications of its laws to acts committed entirely outside of France (such as conduct occurring abroad committed by a French person or corporation, or where a French person or corporation is a victim). In the latter case, article 113-9 of the Penal Code[45] and article 692 of the Code of Criminal Procedure[46] provide that "no prosecution can take place with respect to a person who has been definitively convicted in another country for the same facts, and, in case of conviction, where the penalty has been performed or suspended." However, for all "territorial" prosecutions, domestic French law does not provide any *ne bis in idem* protection for individuals or companies that have been the subject of prosecutions overseas.

44. *See* Frederick T. Davis, *The Fight Against Overseas Bribery—Does France Lag?*, ETHIC INTELLIGENCE, http://www.ethic-intelligence.com/experts/7546-fight-overseas-bribery-france-lag/ [hereinafter *Bribery]*; Frederick T. Davis, *Corporate Criminal Responsibility in France —Is It Out of Step?*, ETHIC INTELLIGENCE (Apr. 2015), http://www.ethic-intelligence.com/experts/8344-corporate-criminal-responsibility/.

45. CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 113-9 (Fr.). The French Penal Code is available in an "official" English version at https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations.

46. CODE DE PROCÉDURE PÉNAL [CPP] art. 692. The French Code of Criminal Procedure is also available in official English translation at https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations

A number of European treaties now provide fairly comprehensive – although not always consistent – principles with respect to multiple prosecutions when both prosecuting countries are in Europe.

The Council of Europe took a step towards recognizing – and internationalizing – the principle of *ne bis in idem* when in 1975 it modified its procedures for trans-European arrest warrants set forth in the European Convention on Extradition of 1957[47] by providing, in the First Additional Protocol, that a requested country need not extradite a person to a requesting country if that person had already been convicted or acquitted in a third country.[48]

Protocol Number 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in 1984 by the Council of Europe and signed by most but not all of its members, provides in its article 4 that "no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offense for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."[49] While by its terms this provision did not purport to "internationalize" the principle of *ne bis in idem* by forcing recognition of non-domestic prosecutions, its appearance may have contributed to a heightened perception of the importance of the rule.

In 1990, the principal nations of Europe adopted the Convention to Implement the Schengen Agreement ("CISA"), which included this provision in its article 54:

> A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.[50]

47. Additional Protocol to the European Convention on Extradition, art. 2, Oct. 15, 1975, E.T.S. 86.

48. *Id.*

49. Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 4, Nov. 22, 1984.

50. *See* Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, art. 54, June 14, 1985, 2000 O.J. (L 239) 19;

The European Court of Justice ("ECJ") has interpreted Article 54 rather expansively. For example, in *Gözütok and Brügge*, decided in 2003, the Court barred reprosecution even though the earlier proceedings had been the result of negotiated agreements without court intervention.[51] Noting that there remained differences in national criminal legal systems, the Court observed that "there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied."[52]

As of 2009, when the Charter of Fundamental Rights of the European Union entered into full legal effect, citizens in the European Union are now protected, under article 50 of the Charter, by the provision that states, "[n]o one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."[53]

More broadly, in 1966, the United States, France and a number of other countries signed the International Covenant on Civil and Political Rights ("ICCPR").[54] The ICCPR was central to the recent French decisions and will be explored in greater detail in the next section.

Thus, in Europe the principle of *ne bis in idem* has achieved increasingly important status and widespread acceptance across borders within the continent. This evolution has been accompanied by separate changes in European laws regarding the vulnerability of companies to be pursued for both criminal and administrative sanctions, the issue that was largely resolved in the United States in

see also Angelo Marletta, *The CJEU and the Spasic Case: Recasting Mutual Trust in the Area of Freedom, Security and Justice?*, EUR. L. BLOG (Jan. 8, 2015), http://europeanlawblog.eu/?p=2655.

51. Criminal Proceedings Against Hüseyin Gözütok and Klaus Brügge, Joined Cases C-187/01 & C-385/01, 2003 E.C.R. I-1345, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-187/01.

52. *Id.*; *see also* Robin Lööf, *54 CISA and the Principle of* ne bis in idem, 15 EUR. J. CRIME CRIM. L. & CRIM. JUST. 309, 314 (2007).

53. Charter of Fundamental Rights of the European Union, art. 54, Dec. 7, 2010, 2010 O.J. (C 83/02).

54. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

favor of permitting multiple actions by the *Hudson* decision. In 2014, the European Court for Human Rights ruled in the *Grande Stevens* decision that administrative penalties obtained by the Italian Companies and Stock Exchange Commission precluded a criminal prosecution for the same acts by the same company.[55] This result was echoed in 2015 in France by a decision of the Constitutional Court, which barred an imminent trial of individuals and companies accused of insider trading on the ground that the same defendants had already been absolved of responsibility after an administrative investigation by the French Autorité des Marchés Financiers, the rough equivalent of the SEC.[56] Thus, prosecutors and administrative agencies in Europe face significantly stricter limits on their abilities to pursue violations of their economic laws than faced by their U.S. counterparts.

III. THE RECENT FRENCH DECISIONS

Two decisions by French criminal courts in cases related to the so-called Oil-for-Food program – one reached by a Paris trial court in June 2015, the second by the Paris Court of Appeals in February 2016 – provide interesting insights into the problem of cross-border *ne bis in idem*. The circumstances of each case were different; and as of now, the outcomes of the two cases on this issue were also different, although the reasoning of the two courts was not necessarily inconsistent. In any event, both decisions may be further reviewed. The more recent Court of Appeals decision requires a

55. Final Judgment, Grande Stevens v. Italy, App. No.18640/10 (Eur. Ct. H.R. Mar. 4, 2014), http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-4687386-5686720&filename=003-4687386-5686720.pdf (elucidating the court's intentions to provide full justice to the applicants together with incentivizing the legislature to remedy their administrative and structural procedures).

56. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2014-453/454 QPC and 2015-462 QPC, Mar.18, 2015 (Fr.); Antoine Kirry & Frederick T. Davis, *France*, at 15 *in* THE INTERNATIONAL INVESTIGATIONS REVIEW (2015), http://www.debevoise.com/insights/publications/2015/09/the-international [hereinafter Kirry & Davis, *France*]; Antoine F. Kirry & Amanda Lee Wetzel, *Evolution of French Constitutional Law and European Human Rights Law Related to the non bis in idem Principle,* 4 EUR. HUM. RTS. L. REV. 382, 385 (2015); Antoine Kirry et al., *Reform of French Law on Insider Trading Mandated by French Constitutional Council*, WESTLAW J. WHITE-COLLAR CRIM, Aug. 2015, at 1.

stringent scrutiny of a prior judgment as a candidate for *ne bis in idem* protection, insisting that a prior conviction must be based on the same legal theory as well as the same facts to bar reprosecution. The earlier trial court decision, while not overtly inconsistent with the later Court of Appeals reasoning, appears to have been based on a more fluid interpretation of the principle, and then took the additional and innovative step of applying it to a situation where the prior prosecution resulted in a negotiated outcome without a criminal conviction.

A. THE OIL-FOR-FOOD INVESTIGATION

In 2007, French authorities commenced investigations into approximately twenty companies suspected of having violated the terms and conditions of the so-called "Oil for Food" program administered by the United Nations that provided for strictly limited and supervised humanitarian transactions with the Iraq regime headed by Saddam Hussein. Its basic provision relevant here is that companies wishing to do business in Iraq were permitted to do so under carefully supervised procedures where any payments made to the Iraqi government be placed in accounts supervised by the UN to insure that they were distributed to benefit Iraqi citizens and not members of the government dominated by Saddam Hussein. Subsequent investigations, including one headed by former Federal Reserve Bank Chair Paul Volcker, found that many participants in the Oil-for-Food Program cheated by agreeing surreptitiously to pay "surcharges" or other prohibited payments to the Iraqi regime, and not to the designated escrow accounts.[57] This and other reports led to formal criminal investigations in the United States, France, and elsewhere.

In France, the investigation was split into two groups of target companies, known informally as Oil-for-Food I and Oil-for-Food II. Oil-for-Food I proceeded to a trial that resulted in a judgment issued in June 2013, in which all of the corporate and individual defendants

57. James Regan & Thierry Leveque, *Total in Iraq Oil for Food Probe*, REUTERS (Apr. 7, 2010), http://uk.reuters.com/article/uk-total-idUKTRE63545T20100407; Thierry Leveque & Marie Maitre, *Police Grill Total CEO in Iran Corruption Probe*, REUTERS (Mar. 21, 2007), http://www.reuters.com/article/us-total-corruption-idUSL2139546920070321.

were acquitted.[58] The principal reasoning of the trial court was that the payments in question were not "bribes" criminalized by France's statute adopted pursuant to the OECD Convention because they went to the regime itself, rather than to a faithless agent of it. The separate group of companies and individuals investigated in Oil-for-Food II proceeded to trial two years later, and which also resulted in a judgment acquitting all of the defendants, essentially on the same reasoning as in the earlier decision. The public prosecutor appealed both judgments.

In February 2016 the Paris Court of Appeals issued its judgment in Oil-for-Food I. Reversing the trial court, it convicted all of the defendants.[59] It concluded that even though the payments did not take the form of a transfer to a faithless agent but rather went to the regime itself, it amounted to "corruption" because by making such payments both the payers and the recipients thereof violated the applicable laws prohibiting them and requiring transparency. The prosecutor's appeal of the 2015 acquittal in Oil-for-Food II will likely be heard late in 2016 or in 2017.

Both Oil-for-Food I and Oil-for-Food II involved *ne bis in idem* questions, as will be explored below.

B. OIL-FOR-FOOD I – THE TRIAL COURT DECISION ON THE *NON BIS IN IDEM*

One of the defendants in Oil-for-Food I was the Swiss oil company Vitol, S.A. In 2007 it had entered a guilty plea in New York state court to one count of "grand larceny" under New York's penal law. The press release of the District Attorney makes it clear that the underlying facts fit clearly in the common mold of other Oil-for-Food cases, that is, the payments Vitol acknowledged it had illegally made were to the Iraq regime of Saddam Hussein.[60] Vitol

58. *See* June 2015 Decision, *supra* note 1.

59. In the United States, an acquittal is definitive in the sense that the courts interpret the Double Jeopardy clause to prohibit a reviewing court from "reversing" an acquittal or entering a judgment of conviction. In France, an appellate court is essentially a second trial where the Court of Appeals reviews both the facts and the law; the Court can thus enter its own judgment irrespective of the decision of the court of first instance, and may thus convict a previously acquitted defendent. *See generally* Kirry & Davis, *France*, *supra* note 56.

60. Statement of Robert M. Morgenthau, *quoted in* Brendan Pierson, *Vitol*

was clearly charged with "grand larceny" for such payments because New York State does not have any law replicating the federal Foreign Corrupt Practices Act, and thus the parties turned to a "great larceny" theory to permit the case to be resolved in state court.[61] Vitol later became a target of French investigators in Oil-for-Food I. Its claim that the New York guilty plea protected it against further prosecution in France under the principle of *ne bis in idem* was rejected by the investigating magistrate and was renewed by Vitol at trial.

In its final judgment, the Court first rejected Vitol's argument that French domestic law barred further prosecution, ruling that it was not bound by article 113-9 of the Penal Code[62] and Article 692 of the Code of Criminal Procedure[63] because some of the acts alleged to have been committed took place on French territory, and, thus, this was a "territorial" prosecution and did not benefit from the domestic principle of *ne bis in idem.*[64] However, the Court was convinced that it was bound by article 14(7) of the ICCPR which provided that "[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."[65] The Court concluded that this text was not limited to guard against multiple prosecutions by the same state or by other countries in Europe. Rather, its open-ended terms appeared to protect against

Agrees to Pay $17.5M in Oil-for-food Case, LAW360 (Nov. 20, 2007, 12:00 AM ET), http://www.law360.com/articles/40637/vitol-agrees-to-pay-17-5m-in-oil-for-food-case.

61. The Vitol case was unusual in that it appeared to involve *only* state law charges in the United States. Most of the Oil-for-Food cases in the United States included federal charges. In addition to the four cases discussed below that featured in Oil-for-Food II in France, roughly contemporaneously with the Vitol plea two other companies – Chevron and Ingersoll-Rand – settled charges with both federal and state authorities relating to violations of the Oil-for-Food Program, which thus implicated federal fraud and bribery statutes and not "larceny." *See* Press Release, Dep't of Just., Ingersoll-Rand Agrees to Pay $2.5 Million Fine in Connection with Payment of Kickbacks Under the U.N. Oil for Food Program (Oct. 31, 2007), https://www.justice.gov/archive/opa/pr/2007/October/07_crm_872.html.

62. *See* CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 113-9 (Fr.).

63. *See* CODE DE PROCÉDURE PÉNAL [CPP] art. 692.

64. *See* discussion in Section I D.

65. *See* ICCPR, *supra* note 54, at art. 14(7).

multiple prosecutions wherever the events had taken place.[66] Noting that France had not only signed but implemented the ICCPR, the Court felt constrained to apply it in the case before it. [67]

C. OIL-FOR-FOOD II – THE TRIAL COURT DECISION ON *NE BIS IN IDEM*

Separately and roughly two years later, the investigation in Oil-for-Food II got underway with respect to a different set of target companies. The corporate parents of four of the companies in that investigation had previously entered into agreements with the DoJ and, in some instances, with the SEC pursuant to which they had paid significant fines.[68] The parents of two of the companies—AB Volvo, the parent of Renault Trucks,[69] and Flowserve Corporation,[70] the parent of Flowserve Pompes—signed DPAs with the DoJ; Textron, the parent of French subsidiaries David Brown Transmissions France and David Brown Guinard Pompes, signed an NPA.[71]

As Vitol had done previously, these four companies all asked that the investigation be dismissed on the basis of *ne bis in idem* because they had already reached agreements with the DoJ. This was denied by the investigating magistrate, and the four of them, together with the other defendants, proceeded to trial on the merits. In a decision publicly announced on June 18, 2015, but not fully explained until the written judgment was released some months later, the Court acquitted all of the defendants.[72] On this, the Court essentially followed the reasoning of the trial court in Oil-for-Food I, namely that a payment to the actual Iraqi regime did not qualify as a bribe or

66. *Id.*
67. *Id.*
68. *See* Formal Files, United States v. Flowserve Pompes, No. 08-CR-035-RJL (D.D.C. 2008), https://www.justice.gov/criminal-fraud/case/united-states-v-flowserve-pompes-sas-court-docket-number-08-cr-035-rjl [hereinafter Flowserve Files]; Formal Files, United States v. Volvo Constr. Equip., No. 08-CR-069-RJL (D.D.C. 2008), https://www.justice.gov/criminal-fraud/case/united-states-v-volvo-construction-equipment-ab-court-docket-number-08-cr-069 [hereinafter Volvo Files]; Formal Files, In Re Textron Inc. (2007), https://www.justice.gov/criminal-fraud/case/re-textron-inc-2007 [hereinafter Textron Files].
69. *See* Volvo Files, *supra* note 68.
70. *See* Flowserve Files, *supra* note 68.
71. *See* Textron Files, *supra* note 68.
72. *See* June 2015 Decision, *supra* note 1

other act of corruption. With respect to the four whose corporate parents had signed DPAs or an NPA, the Court concluded that the principle of *ne bis in idem* precluded prosecution in France.

In order to apply the principle of *ne bis in idem*, the Court took two steps. First, with respect to each defendant, it reviewed the facts recited in its respective DPA/NPA and concluded that they appeared to be the same as those in the accusations in France. This part of the Court's decision was not entirely new since its reasoning was essentially the same as that adopted with respect to Vitol by the Oil-for Food I Court two years earlier.

Second, the 2015 Court further concluded that the DPAs/NPA in question had the essential qualities of a "judgment," thereby qualifying the companies whose parents had signed them to *ne bis in idem* protection.[73] The Court's reasoning on this second issue is a bit unclear. Notably, it does not refer to any specific act by a U.S. court as having been the basis for the prior conviction, but rather it referred to the U.S. outcomes as "a decision from the Department of Justice [in French: Ministère Public]."[74] The Court noted that it was relying on an expert opinion submitted by a well-known international criminal legal specialist and professor of law in Paris, Didier Rebut.[75] Its apparent reasoning was that the combination of a significant payment together with a protection against further prosecution had all the hallmarks of a prior judgment.

Had it ruled otherwise and allowed the prosecution to proceed, and had there been a conviction, the Court would probably have given the defendants the benefit of the penalties paid under the DPAs/NPA. In those exceptional circumstances where a second European prosecution is possible (for example, in situations where a country has exercised an "opt out" under article 55), article 56 of CISA[76] obligates signatory countries to deduct from any penalty imposed in the second prosecution the amount paid (or, in the case of individuals, the time served) in the earlier one. In a 2013 decision involving a prior prosecution in a non-Schengen country (but one deemed a "territorial" prosecution in France and thus not barred by

73. *See id.* at 31-37.
74. *Id.*
75. *Id.* at 34
76. *See* Schengen Implementing Convention, *supra* note 50, at art. 56.

the principle of *ne bis in idem*, see Section I D. above), the French Supreme Court, without referring to CISA, applied the same principle and allowed a second prosecution to proceed on condition that the prior penalty be deducted.[77] It would appear logical that this reasoning would apply to prior penalties made under an agreed-upon procedure such as a DPA/NPA, although this does not appear to have been yet decided. Thus, the core question in the Oil-for-Food II was whether the Public Prosecutor was allowed to proceed at all.

D. OIL-FOR-FOOD I – THE APPEAL

As noted, the Public Prosecutor appealed the 2013 acquittal of all of the defendants in Oil-for-Food I, which appeal was pending during the conduct and deliberation of Oil-for-Food II. With respect to Vitol, then, the appellate court had before it two separate issues: Was Vitol protected from French prosecution by the principle of *ne bis in idem* based on its New York guilty plea, and if not, did the facts establish its guilt? In the February 2016 Decision, the Public Prosecutor prevailed on both issues.

With respect to *ne bis in idem*, the Court of Appeals apparently accepted that Vitol had pleaded guilty in New York to charges based on the same facts as those presented in the French matter. It emphasized, however, that Vitol had been prosecuted in New York only for "grand larceny," which it characterized as an "economic crime," whereas in France it was pursued for offenses related to "integrity" and "transparency" under France's anti-bribery statute. The Court concluded as follows:

> Since the New York judgment was based on "grand larceny;" it follows that the American judge was concerned with a violation of the [Iraq] embargo only from an economic viewpoint
>
> The crime of active corruption found in French law involves a completely different goal, as is clear from the OECD Convention, namely the guarantee of the integrity of economic participants in the competitive global marketplace, in order to maintain the fairness and transparency of markets.

77. Crim. Pourvoi No. 13-83499, Oct. 23, 2013, https://www.lextenso.fr/lextenso/ud/urn%3AGPL153r8.

> In this context, it is clear that France, as a signatory to international agreements and contrary to the position taken by Vitol, and as a sovereign as emphasized by the Minister of Justice, retains the right to judge economic players that violate these laws, particularly those that insure the fairness of international markets.
>
> Since the New York judgment and the crime admitted there, even assuming that it was established, criminalize different interests, it follows that the decision of the trial court applying the principle of *ne bis in idem* must be vacated.[78]

Having thus held that Vitol was not immune from French prosecution, the Court then went on to rule that Vitol and all the other defendants were guilty of corruption under French laws. In a matter apparently of first impression, it ruled that even though it had not been shown that any of the defendants had engaged, directly or indirectly, in classic bribes paid to a faithless agent, they had been shown to have violated the laws of Iraq and the rules of the U. N. Oil-for-Food program, and had engaged in covert activities to hide this fact. It concluded:

> At the international level, the OECD Convention clearly aims to insure transparency and free competition in international commercial relations; it does not presuppose illicit personal enrichment as a condition of illegality; on the contrary, it presumes only that the transaction involve some advantage, even if non-monetary, accruing to another. This analysis applies even if the ultimate beneficiary was the Iraqi State . . .[79]

The Court's decision on the merits, while not strictly relevant here, will almost certainly be tested by the Supreme Court, to which all of the defendants have applied for review. As stated, it seems irreconcilable with the decision to acquit the defendants in Oil-for-Food 2 as set forth in the June 2015 Decision, those boding favorably for the Public Prosecutor's appeal of those acquittals, at least with respect to those defendants unable to claim protection under the principle of *ne bis in idem*.

The Court's decision on *ne bis in idem*, while reaching an outcome very different from that of the trial court in Oil-for-Food II, is based on reasoning that is quite different from that trial court's approach in

78. February 2016 Decision, *supra* note 2, at 31 (translation by the author).
79. *Id.* at 49 (translation by the author).

Oil-for-Food II but would not necessarily lead to a different outcome if applied to the facts in that case, which were in significant respects different.

The fundamental approach of the 2015 trial court decision in Oil-for-Food I was to focus on whether *the factual basis* for the prior outcome was the same as that before the court. It reviewed the factual references in the predicate DPAs or NPA, and in each instance it concluded that "the facts involved are identical, or intrinsically similar," to those before the court.[80] Having found this identity, it found that article 14(7) of ICCPR required application of the principle of *ne bis in idem*. As noted previously, the 2016 Court of Appeals decision in Oil-for-Food I interpreted the ICCPR to require not just that the facts of the predicate outcome were identical, but that the state interest – as shown by the characterization of the offense – be the same. On this, the Court of Appeals in the February 2016 Decision can point to clear support for its distinction, since article 14(7) of the ICCPR specifically provides *ne bis in idem* protection to parties previously prosecuted for "the same offense," and not on the basis of "the same facts," as is the case under certain international agreements.[81]

Were this different, and arguably more stringent, test announced by the Court of Appeals to be applied to the four defendants in Oil-for-Food II whose appeal is pending, it is not at all clear that they would not pass this test: In Oil-for-Food I, Vitol was in the unusual position of being able to point only to a New York state law guilty plea for "grand larceny," which as noted above probably occurred only because it reached an agreement with the New York District Attorney, whose arsenal of laws with which to charge Vitol (and on which its guilty plea was thus based) did not include overseas bribery charges, which are found in the federal Foreign Corrupt Practices Act.[82] In contrast, the four defendants seeking *ne bis in idem* protection in Oil-for-Food II had been charged with violations of the FCPA. Since the FCPA is entirely consistent with both the OECD Convention (of which it was the principal inspiration) and thus with

80. June 2015 Decision, *supra* note 1, at decision 34 (translation by the author).

81. *See* Section II B.

82. *Id.*

French law criminalizing overseas bribery, it would appear that a reviewing court could conclude that, at least on this ground, the principle of *ne bis in idem* should be applied. The real innovation of the June 2015 Decision, however, was its extension to prior outcomes not based on an entry of a judgment of conviction (whether by plea or trial), but on a negotiated non-criminal outcome such as a DPA or NPA.

IV. THE APPLICATION OF *NE BIS IN IDEM* PRINCIPLE TO NEGOTIATED OUTCOMES NOT RESULTING IN A CRIMINAL CONVICTION

The legal and practical significance of the June 2015 Decision on *ne bis in idem*, and in particular its application to cases previously resolved through a DPA or an NPA, may depend on at least three separate analyses: (1) What, exactly, were the terms of the predicate DPAs and NPA upon which the court based its decision; (2) what is the preclusive effect of DPAs and NPAs under U.S. jurisprudence; and (3) to what degree did the DPA/NPAs involve judicial participation or review. Each of these will be explored in turn.

A. THE DPAS AND NPA IN QUESTION

The Court did not really explore the three agreements entered into by the corporate parents of the four French corporations; however, doing so is important in order to evaluate the Court's decision and likely impact.

The Volvo and Flowserve agreements were DPAs.[83] Pursuant to the terms of each DPA, the defendant agreed to the filing in court of an "information"[84] against it alleging the factual history of each

83. *See* Letter from William Jacobson, Assistant Chief, Fraud Section, U.S. Dep't of Justice, to Danforth Newcomb, Counsel, AB Volvo (Mar. 18, 2008) *in* Volvo Files, [hereinafter Volvo DPA]; *see also* Letter from Stacey Luck, Trial Attorney, Fraud Section, U.S. Dep't of Justice, to Barry Pollack, Counsel, Flowserve Corp. (Feb. 21, 2008) *in* Flowserve Files (hereinafter Flowserve DPA).

84. Normally, under the Fifth Amendment to the Constitution, a defendant has the right that an accusation of a felony (in the form of an indictment) be voted by the members of a grand jury. A defendant can, however, formally waive the right to a grand jury deliberation (see Rule 7(b) of the Federal Rules of Criminal Procedure), in which case an "information" signed only by the prosecutor is filed and then has the same accusatory effect as an indictment.

company's respective illicit acts and charging it with a violation of the FCPA.[85] The prosecutor then agreed that after a period of three years, if the defendant had lived up to the obligations set forth in the DPA (which included, among other things, substantial payments as a fine or penalty and internal corrective efforts to avoid future illicit payments), the prosecutor would, pursuant to Federal Rule of Criminal Procedure 48(b), "dismiss" the information.[86] Curiously, these two DPAs did not require the prosecutor to dismiss the relevant information "with prejudice," a provision that appears in other DPAs[87] and gives such a dismissal the essential force of a preclusive judgment.[88] However, in the event the actual "order of dismissal" filed with the Court three years after the signing of each DPA provided that the dismissal was "with prejudice."[89] This was clearly contemplated by the parties, and each DPA included the obligation of the prosecutor that upon completion of the three-year period he would not continue the criminal prosecutions, which obligation that would be binding even if the dismissal itself had not been preclusive.[90]

An NPA generally does not involve – and in the Textron case applicable to two of the French defendants did not involve – any filing with a court, nor any judicial intervention, at all.[91] Rather, it is simply an agreement between the prosecutor and the defendant that

85. *See* Flowserve DPA, *supra* note 83; Volvo DPA, *supra* note 83.

86. *See* Flowserve DPA, *supra* note 83; Volvo DPA, *supra* note 83.

87. For example, the DPA filed with respect to the American medical devices company Orthofix. *See* Deferred Prosecution Agreement, United States v. Ortohofix Int'l (E.D. Tex. 2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/08/15/2012-07-10-orthofix-dpa.pdf.

88. A dismissal "without prejudice," which a dismissal not otherwise characterized is generally presumed to be, permits the prosecutor to recommence a prosecution.

89. *See* Order Granting Government's Motion to Dismiss, United States v. Flowserve Pompes, No. 08-035 (D.D.C. June 1, 2011) *in* Flowserve Files, *supra* note 68; Order Granting Government's Motion to Dismiss, United States v. Volvo Constr. Equip., No. 08-CR-069-RJL (D.D.C. June 1, 2011) *in* Volvo Files, *supra* note 68.

90. *See* Order Granting Government's Motion to Dismiss, United States v. Flowserve Pompes, No. 08-035 (D.D.C. June 1, 2011) *in* Flowserve Files, *supra* note 68; Order Granting Government's Motion to Dismiss, United States v. Volvo Constr. Equip., No. 08-CR-069-RJL (D.D.C. June 1, 2011) *in* Volvo Files, *supra* note 68.

91. *See infra* Section IV C.

upon payment of agreed-upon sums and the expiry of the stated period (here, three years) during which the defendant will undertake certain corrective steps, the prosecutor agrees that he/she "will not prosecute" the defendant for the acts set forth in the agreement.[92]

B. THE LEGAL EFFECTS OF DPAS AND NPAS

DPAs and NPAs share certain characteristics. Both establish a factual basis for the allegations against the defendant. Corporate DPAs and NPAs typically include a lengthy "Annex" with a detailed recitation of facts that the corporation acknowledges to be true and that set forth the basis for the infractions in question. From the perspective of the prosecutor, this formal acknowledgment accomplishes two important goals. First, it allows the prosecutor to make public statements about the conduct in question, which the DoJ and the SEC view as extremely important in order to educate the public and to deter future violations. Both the DoJ and the SEC typically issue strongly worded press releases, simultaneously with the texts of the DPA/NPA.[93] Second, these factual statements are, in evidentiary terms, "admissions" of the corporation releasing them. So, for example, under Rule 801(d)(2) of the Federal Rules of Evidence[94] such statements could be introduced into evidence in any proceeding against the corporation. Thus, as a practical matter, while the corporation retains the theoretical right to proceed to trial in the event of a failed or lapsed agreement, it could almost never conceive of doing so since it will already have armed the prosecution with abundant, and generally overwhelming, proof.

Importantly, however, neither DPAs nor NPAs establish the guilt of the defendant, and upon completion a corporation has neither admitted guilt nor been convicted of any crime. In theory a corporation could sign a DPA or an NPA and publicly state that it

92. *See generally* Candace Zierdt & Ellen S. Podgor, *Corp. Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1 (2008).

93. *See, e.g.*, Press Release, Flowserve Corporation to Pay $4 Million Penalty for Kickback Payments to the Iraqi Government under the U.N. Oil for Food Program, Feb. 21, 2008, *in* Flowserve Files, *supra* note 68; Press Release, AB Volvo to Pay $7 Million Penalty for Kickback Payments to the Iraqi Government under the U.N. Oil for Food Program *in* Volvo Files, *supra* note 68.

94. *See* FED. R. EVID. 801(d)(2) (listing the conditions for when an opposing party's statement is not considered hearsay).

was innocent. Moreover, such a statement could in some circumstances be literally true. Even a complete recitation of historical facts could, for example, leave open a question of whether the element of "intent" had been satisfied; in other circumstances, a corporation may elect not to pursue a purely legal, or technical, defense that it could nonetheless insist would have prevailed had the matter gone to trial. To a U.S. prosecutor, signing a DPA or NPA and allowing a corporation to trumpet its innocence would be a public relations disaster, and, as a result, DPAs and NPAs typically include a provision that the corporation cannot contest the factual recital it has made, meaning that if it were to claim its innocence or to contest facts set forth in its agreement, it would risk being found to have violated the DPA/NPA and lose its benefits.[95]

Furthermore, it is absolutely crucial for corporations that a DPA/ NPA not result in a judgment of conviction or formal admission of guilt. In terms of pure public relations, no company wants to admit that it is guilty of a crime. More practically, a judgment of conviction may result in the automatic disbarment or "delisting" of the company from the right to participate in public procurement programs.[96] Under the Federal Rules of Evidence, a judgment of conviction is itself deemed proof of "any fact necessary to sustain the judgment,"[97] and, thus, is an even simpler and more effective form of proof than the factual admissions contained in the agreement itself.

DPAs and NPAs diverge, however, in their formal procedures. A DPA involves the filing in court of a formal accusation, in the form of an "information" in lieu of an "indictment."[98] Upon completion, this accusation is then formally dismissed, generally "with

95. *See, e.g.*, Flowserve DPA, *supra* note 83; the Volvo DPA, *supra* note 83.

96. *See* Zierdt & Podgor, *supra* note 92, at 2 (describing the former auditing firm Arthur Andersen that was convicted of various felonies relating to its audit of Enron. Since the SEC will not accept audits performed by convicted felons, Arthur Andersen had little choice but to go out of business (and discharge more than 20,000 employees) even though only a relative handful of its employees had participated in the Enron scandal, and even though the company's conviction was later vacated by the Supreme Court. The apparent unfairness of causing widespread harm to employees and others who did not participate in any crime by insisting on a corporate-level conviction is one of the significant rationales for corporate DPAs and NPAs).

97. *See* FED. R. EVID. 803(22).

98. *See supra* note 83.

prejudice," and is the essential equivalent of a "not guilty" judgment.[99] In its June 2015 Decision in Oil-for-Food II, the French court apparently felt comfortable saying that such an outcome satisfied the first leg of an *ne bis in idem* analysis, and as a matter of common sense, it is easy to see how such a formal, heavily negotiated result that included the payment of very large fines, the recognition of factual responsibility, and substantial negative publicity would constitute an event that should not be repeated without violating *ne bis in idem* principles. The formal effect of such a dismissal in a foreign court is, however, open to more detailed logical analysis that may have practical significance in certain circumstances. Even if a "dismissal with prejudice" has the same legal effect as a "not guilty" judgment, it bears emphasis that "not guilty" is not the same as "innocent" and does not itself prove that the defendant is not in fact guilty, but only that it has not been proved to have been guilty. Allowing a second prosecution because the first did not exclude guilt or affirm innocence would, of course, vitiate the core value of the principle. As noted by the ECJ in review under article 54 of the CISA of an attempted reprosecution when an earlier acquittal was based on the insufficiency of evidence:

> [I]n the case of a final acquittal for lack of evidence, the bringing of criminal proceedings in another Contracting State for the same acts would undermine the principles of legal certainty and of the protection of legitimate expectations. The accused would have to fear a fresh prosecution in another Contracting State although a case in respect of the same acts has been finally disposed of.[100]

There is some ambiguity in the law of double jeopardy, or *ne bis in idem*, regarding whether the principle protects against multiple prosecutions for the same "acts" or for the same "offense."[101] As shown by the February 2016 Decision on appeal in Oil-for-Food I,

99. *See* Section III A.

100. *See* Case C-150/05, Netherlands and Italy v. Van Straaten, 2006 E.C.R. I – 9350.

101. *See* Case C-436/04, Belgium v. Van Esbroeck, 2006 E.C.R. I – 2351, 2362 (noting that article 54 of the CISA refers to "the same acts," and thus "refers only to the nature of the acts in dispute and not to their legal classification," while article 4 of Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and article 14(7) of ICCPR use the phrase "offense"). Article 14(7) of the ICCPR also requires a showing of multiple prosecutions for the same "offense".

the distinction may be more than pedantic.[102] Two countries may characterize the legal consequences of the same acts so differently that the second country might consider that it is charging a different "offense" than that charged by the first, even if based on the same acts. Particularly if the first country chose to charge an offense with extremely light punishment, the second country might wish to argue that it is free to charge a more important offense on the basis of the same acts if it concludes that the first punishment was inappropriately low.[103]

Additionally, each country may have its own concept of the prosecution's burden of proof necessary to respect the presumption of innocence. In the United States, that burden is expressed as "beyond a reasonable doubt," meaning that a judgment of acquittal means only that there was "a doubt" about guilt. In France, the test for criminal conviction is whether the judges (or the jury, in the relatively unusual cases tried to one) have the "intime conviction" that guilt has been shown.[104] To the extent that these burdens differ, a result under one test may not be logically preclusive of another.[105]

Furthermore, in some circumstances, an acquittal may not even be based on issues of factual guilt at all. For example, a defendant claiming that charges are barred by a Statute of Limitations may ask a jury to determine the facts necessary to decide if it can be legally

102. See *supra* Section II D.

103. As noted previously, the Court of Appeals in its 2016 Decision regarding Oil-for-Food I insisted that a prior criminal judgment did not trigger *ne bis in idem* protection because the earlier case had "only" involved grand larceny, while the present prosecution involved corruption. *See supra* Section II D. Notably, however, the defendant paid US$17.5 million to resolve the prior grand larceny case, but was required only to pay an addition 300,000 Euros to resolve the corruption case apparently considered more important by the French court.

104. *See* Patterson v. New York, 423 U.S. 197, 197 (1977); *see generally* SECRÉTARIAT GÉNÉRAL [GENERAL SECRETARIAT], MINISTÈRE DE LA JUSTICE [MINISTRY OF JUSTICE], THE FRENCH LEGAL SYSTEM (2012) (Fr.) (discussing the burden of proof on the prosecution to show the guilt of the defendant with varying degrees of evidence).

105. *See* George Anastaplo, *The O.J. Simpson Case Revisted*, 28 LOY. U. CHI. L. J. 461, 467 n. 16 (1997) (discussing the infamous O. J Simpson case in California, Simpson was acquitted in 1995 by a jury of murder, but in 1997 was found by another jury to be civilly responsible to the family of the victim for the same acts. Such an outcome was possible because the burden of proof for civil recovery – preponderance of the evidence – was much lower, and thus the finding of "a doubt" in the criminal case was not deemed preclusive).

pursued for that reason.[106]

Most practically, countries vary widely in their application of criminal laws to corporations, and facts insufficient for corporate conviction in one country may suffice elsewhere. In the United States, the principle of *respondeat superior* is notably broad, and allows the prosecutor to charge a corporation with criminal responsibility for acts shown to have been committed by virtually anyone connected with the corporation, provided only that the person's intent was even in part to benefit the corporation.[107] In contrast, in the United Kingdom, generally a court can find a corporation guilty of a crime only if the so-called "directing mind" of the corporation, such as its senior management, intended the result.[108] In France, where until relatively recently corporations could not be found liable for crimes at all unless the specific criminal statute so provided, article 121-2 of the Penal Code now provides that a corporation may be liable for the acts of its organs or representatives, a phrase that has been the subject of strict interpretation by the French courts and a subject that has shielded corporations from criminal responsibility U.S. courts would have certainly imposed.[109] If, for example, a corporation were acquitted of corporate criminal responsibility under the relatively demanding standards of French or British law, it would not at all follow that the elements necessary to find the same corporation guilty on the basis of the same facts could not be established in a U.S. proceeding.

Turning, then, to NPAs, the formally preclusive effect of an NPA is even more limited. As noted, an NPA is nothing more than a contract with a prosecutor. While its enforceability against the prosecutor who signed it is not subject to doubt, it is difficult to see how anyone else could enforce such an agreement. This is made

106. *See* Case C-467/04, Spain v. Gasparini, 2006 E.C.R. I – 9245, 9258 (concluding that the principle of *ne bis in idem* bars reprosecution when the defendant had previously been "acquitted finally because prosecution of the offence is time-barred" for European prosecutions reviewable under Article 54 of the CISA).

107. *See* Frederick T. Davis, *Corp. Criminal Responsibility in France – Is it out of Step?*, ETHIC INTELLIGENCE (Apr. 2015), http://www.ethic-intelligence.com/experts/8344-corporate-criminal-responsibility/.

108. *See generally*, AMANDA PINTO & MARTIN EVANS, CORPORATE CRIMINAL LIABILITY (3d ed. 2013).

109. *See* Davis, *supra* note 107.

expressly clear in a provision that appears in the Textron NPA, which echoes in other NPAs and DPAs, which states, "this agreement does not bind any federal, state or local prosecuting authority other than this Office [the Criminal Division of the DOJ]. This Office will, however, bring the cooperation of Textron to the attention of other prosecuting and investigative offices, if requested by Textron."[110]

Hence, under an NPA, the defendant's protection is entirely contractual: no formal accusation is filed, there is no judicial proceeding at all, there is no "judgment" that would trigger a double jeopardy analysis, and there is no "dismissal with prejudice" that would have the same effect.

C. THE EXTENT OF JUDICIAL INTERVENTION

The extent and nature of judicial participation in DPAs and NPAs may bear on the recognition that foreign courts will give them.

With respect to NPAs, the answer is simple: there is no judicial involvement at all, and the entire matter is one of an agreement between the prosecution and the defense. As one judge has noted, "[e]ven a formal, written agreement [setting conditions for non-prosecution] is not the business of the courts."[111]

With respect to DPAs, the issue of judicial participation is a little more complicated. As noted above, the final outcomes in the Volvo and Flowserve cases took the form of an order of dismissal under Rule 48(a) of the Federal Rules of Criminal Procedure. Such dismissals hardly involve the judiciary at all and certainly do not involve judicial review of the DPA or the underlying facts. The Rule, after providing that a prosecutor "may" file for a dismissal (emphasizing its discretionary nature) requires only that the dismissal be with "leave of the court."[112] Such "leave" is virtually always

110. *See* Non-Prosecution Agreement at 3, In Re Textron Inc. (2007), *in* Textron Files [herinafter Textron NPA].

111. *See* Memorandum and Order, United States v. HSBC Bank USA, No. 12-CR-763 (E.D.N.Y. July 1, 2013) (hereafter HSBC Bank Opinion); *see also* Memorandum Opinion, United States v. Saena Tech Corp., No. 14-66, at 51 (D.D.C. Oct. 21, 2015) (noting that "the Court would have little authority, if any, to review an out-of-court non-prosecution agreement between the government and a defendant") [hereinafter Memo Opinion, United States v. Saena Tech Corp].

112. *See* Memo Opinion, United States v. Saena Tech Corp, *supra* note 111, at

granted, and the law provides no basis upon which a court could refuse it. In the two DPAs discussed here, from what appears in the record the prosecutor made very short, pro forma applications for dismissal that simply recited the terms of the DPA.[113] Such applications would normally be (and in these cases, appear to have been) routinely signed by the judge without any inquiry at all. As noted by one judge in the context of a DPA, "[T]he government has near-absolute power under Fed. R. Crim P. 48(a) to extinguish a case it has brought."[114]

While no substantive judicial review at all took place in these cases, the issue of judicial review of DPAs (but not of NPAs) sometimes arises and is a matter of considerable controversy in the United States. Discussion has recently focused on whether DPAs and NPAs are too lenient on large corporations, and especially whether they tend to permit corporations to avoid prosecution by paying fines that are simply a cost of doing business, while the individuals who caused the corporate bad acts avoid any prosecution at all.[115] As a result, there has been considerable pressure on judges in some cases to review DPAs to determine, among other things, if their provisions are "adequate" and "in the public interest."

Under some circumstances, a DPA may come before a federal judge if the prosecutor is obligated to apply to a court to exclude the period covered by the DPA from the passage of time calculated under the Speedy Trial Act ("STA").[116] The STA was adopted by Congress in 1969 to insure that, once charged, a defendant has a prompt trial under time periods set forth in the legislation, absent

51 ("The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent.").

113. *See* Gov't's Motion to Dismiss Criminal Information, United States v. Volvo Constr. Equip., No. 08-CR-069-RJL, at 2 (D.D.C. May 17, 2011) *in* Volvo Files, *supra* note 68.

114. *See* HSBC Bank Opinion, *supra* note 111.

115. *See, e.g.*, BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014); Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, THE N.Y. REV. BOOKS, Jan. 9, 2014, http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/?pagination=false&printpage=true (criticizing the high level officials that were not prosecuted for their connections with the financial crisis).

116. *See* Speedy Trial Act of 1974, 18 U.S.C. § 3161 (2012).

which he must be freed and the charges dismissed.[117] One basis for exclusion from the time period is that the prosecutor and the defendant have agreed in writing to a DPA (although that phrase is not used in the legislation, which speaks of a period "for the purpose of allowing the defendant to demonstrate his good conduct"). In three cases, district judges have written extensive opinions, the most recent on October 21, 2015, setting forth the grounds upon which they will review a corporate DPA when asked for an "exclusion" under the SPA.[118] One of them indicated that he would review the essential fairness of the DPA to determine whether it was in the public interest.[119] In that case, the Court refused to approve an exclusion period because it found the DPA insufficient.[120] On appeal, however, the United States Court of Appeals for the District of Columbia Circuit reversed.[121] Relying largely on principles of separation of powers, the Court broadly upheld the discretion of the prosecutor to make charging decisions, and thus to determine the "fairness" of terms under a DPA. It concluded that the District Court had "significantly overstepped its authority" by denying a time exclusion under the SPA on the basis that the prosecutor "had been unduly lenient" in the DPA.[122] In the other two cases involving review of DPAs, the district judges engaged in more limited review and ultimately approved the DPAs, basically deferring to the discretion of the prosecutor but insisting that any DPA contain elements that would demonstrate that it was genuinely intended to "reform" the defendant, and not as an excuse for the delay of a trial.[123] The reasoning of those decisions would appear to be consistent with the holding in *Fokker Services*. But it is noteworthy that even the limited judicial review afforded in *Saena* and in *HSBC Bank*, and permitted under the *Fokker Services* appellate decision,

117. *Id.*

118. *See* United States v. Fokker Servs. B.V., 79 F. Supp. 3d 160, 165 (D.D.C. 2015), *vacated*, No. 15-3016 (D.C. Cir. Apr. 5, 2016); *see also* HSBC Bank Opinion, supra note 111, at 6-10; Memo Opinion, United States v. Saena Tech Corp, *supra* note 111, at 36-37.

119. *See Fokker*, 79 F. Supp. 3d at 160.

120. *See id.* at 167.

121. United States v. Fokker Service B.V., No. 15-3016 (D.C. Cir. Apr. 5, 2016).

122. *Id.* at slip op. 21.

123. *See* HSBC Bank Opinion, *supra* note 111, at 19-20; *see also* Memo Opinion, United States v. Saena Tech Corp, *supra* note 111, at 3.

appear to be the *only* examples of courts' having reviewed DPAs at all.

Neither of the DPAs involved in the Flowserve and Volvo/Renault matters required the parties to seek an "exclusion" under the STA, but rather relied on the defendant's written waiver of "all rights to a speedy trial."[124] Thus, no judicial review of the DPA was sought or deemed necessary. Such a blanket waiver without court approval may well be unenforceable under the STA.

The near-total absence of judicial participation in DPAs, and its total absence with respect to NPAs, are relevant in the context of international *ne bis in idem* issues because courts in Europe are generally unfamiliar with criminal outcomes not based on extensive judicial participation and review. In 2014, for example, the United Kingdom adopted legislation that for the first time permits a corporation to negotiate an outcome whereby it pays the equivalent of a substantial fine but avoids a criminal conviction – thus, the near equivalent of a DPA. The UK legislation, however, provides for very extensive judicial participation in and review of the outcome negotiated between the prosecution and the defense,[125] and in the first case of a DPA adopted under this legislation, the reviewing judge emphasized the thoroughness of his review to assure that the outcome was "proportionate" to the offense and "in the public interest."[126] In France, where no negotiated outcome similar to a DPA has been possible,[127] a government proposal to introduce a

124. *See* Textron NPA, *supra* note 110.

125. *See* Lord Goldsmith et al., Debevoise & Plimpton, *Deferred Prosecution Agreements Enter Into Force in the UK*, Feb. 24, 2014, http://www.debevoise.com/~/media/files/insights/publications/2014/02/deferred%20prosecution%20agreements%20enter%20into%20force__/files/view%20client%20update/fileattachment/50503356%20v1%20%20client%20updatedeferred%20prosecution%20a__.pdf.

126. *See* Lord Goldsmith et al., Debevoise & Plimpton, *First UK DPA Starts to Answer Questions About Bribery Act Enforcement*, Dec. 1, 2015, http://www.debevoise.com/insights/publications/2015/12/first-uk-dpa-starts-to-answer; *see also* Frederick T. Davis, *First British Deferred Prosecution Agreement – the implications*, ETHIC INTELLIGENCE, Dec. 2015, http://www.ethic-intelligence.com/experts/10555-first-british-deferred-prosecution-agreement/.

127. In France, a procedure exists for what is called a CRPC, which generally stands for "Appearance Based on Recognition of Guilt," which amounts to a negotiated guilty plea. *See infra* note 140. Although this provision has been applicable to corporate defendants in cases involving financial or business crimes

measure permitting a negotiated outcome with very substantial judicial participation and review was withdrawn when the Conseil d'Etat, France's highest administrative body, formally opined that the proposal was inconsistent with French legal principles.[128]

The relevance of judicial participation in the predicate criminal prosecution was extensively discussed by the European Court of Justice in its *Gözütok and Brügge* decision of 2003. The Court had before it two attempted prosecutions where the defendants had earlier entered into agreements with the respective prosecutors in other countries to pay fines, upon completion of which the Court would dismiss the charges. The Court made two specific observations with respect to the prior prosecutions. First, the Court noted "that in such procedures, the prosecution is discontinued by the decision of an authority required to play a part in the administration of criminal justice in the national legal system concerned.[129] The Court continued, explaining, "[s]econd, a procedure of this kind, whose effects as laid down by the applicable national law are dependent upon the accused's undertaking to perform certain obligations prescribed by the Public Prosecutor, penalizes the unlawful conduct which the accused is alleged to have committed.[130]

The Court concluded that under these circumstances the prior agreements, even without any judicial participation, barred further prosecution in Europe. The key reasoning the Court articulated was interesting:

> [N]ational legal systems which provide for procedures whereby further prosecution is barred do so only in certain circumstances or in respect of certain exhaustively listed or defined offenses which, as a general rule, are not serious offenses and are punishable only with relatively light penalties.

such as corruption since 2011, it has been used only once, and even then under circumstances suggesting that it may not be frequently repeated. *See* Frederick T. Davis, *First Corporate Guilty Plea in France – Will there be more?*, ETHIC INTELLIGENCE, Feb. 2016, http://www.ethic-intelligence.com/experts/11539-first-corporate-guilty-plea-france-will/.

128. *Tout savoir sur le projet de loi #Sapin2*, LE PORTAIL DE L'ÉCONOMIE ET DES FINANCES, Mar. 30, 2016, http://www.economie.gouv.fr/transparence-lutte-contre-corruption-modernisation?wb48617274=538CDA0D.

129. *See* Cases C-187/01 & C-385/01, Benelux v. Gözütok & Brügge, 2003 E.C.R. I – 0000, para. 28.

130. *See id.* at para. 29.

> In those circumstances, if Article 54 of the CISA were to apply only to decisions discontinuing prosecutions which are taken by a court or take the form of a judicial decision, the consequence would be that the *ne bis in idem* principle laid down in that provision (and, thus, the freedom of movement which the latter seeks to facilitate) would be of benefit only to defendants who were guilty of offenses which – on account of their seriousness or the penalties attaching to them – preclude use of a simplified method of disposing of certain criminal cases by a procedure whereby further prosecution is barred, such as the procedures at issue in the main actions.[131]

The Court's discussion is ironic in the context of current discussion in the United States emphasizing the possible unfairness of making DPAs and NPAs routinely available—and perhaps unduly favorable—to large corporations in the United States. It anticipated the concerns expressed recently by the United States District Court in Washington, D.C., in the *Saena* decision of October 2015, where the judge concluded his opinion by urging that DPAs be more extensively used in the context of their original purpose, which historically had been to offer disadvantaged individuals a second chance in life and to avoid a criminal conviction.[132]

Since its *Gözütok and Brügge* decision, the ECJ has grappled with the procedural requirements that elevate a predicate proceeding to a status that bars further prosecution in Europe under article 54 of CISA. The Court has consistently held that the first proceeding must have been "finally disposed of," and that it must involve some "determination . . . as to the merits of the case."[133] In its decision in *Miraglia*[134] in 2003, the Court found that a dismissal based purely on procedural grounds was not "finally disposed of" and was not a resolution "on the merits" that sufficed to bar further prosecution in another country.[135] However, in its *Criminal Proceedings Against M* judgment of June 5, 2014 the Court reviewed a request to bar prosecution in Italy after the defendant had been investigated in Belgium for the same acts, which prior investigation had ended in a "non lieu" finding by an investigating magistrate pursuant to Belgian

131. *Id.* at paras. 39-40.
132. *See* Memo Opinion, United States v. Saena Tech Corp, *supra* note 111, at 80-81.
133. *See* Case C-469/03, Italy v. Miraglia, 2005 E.C.R. I – 2011, 2022.
134. *Id.* at 2022.
135. *Id.*

procedures.[136] The Court concluded:

> In order to determine whether a judicial decision constitutes a decision finally disposing of the case against a person . . . it is necessary to be satisfied that that decision was given after a determination had been made as to the merits of the case . . . . In that respect, it is apparent from the settled case-law of the Court that, for a person to be regarded as someone whose trial has been 'finally disposed of' in relation to the acts for which he is alleged to have committed . . . further prosecution must have been definitively barred . . . .[137]

DPAs and NPAs thus appear to have some, but not necessarily all, of the attributes the European Court of Justice has found sufficient to bar reprosecution when the predicate proceeding has taken place in Europe. Once a DPA/NPA is completed, then "further prosecution" in the United States is, as a practical matter, definitively barred, and the company will have paid a significant fine. On the other hand, there has been no "determination" as to "the merits of the case;" even in those few situations where a U.S. court reviews a DPA it does so only to determine whether the DPA is procedurally correct and possibly whether it is in the public interest. The court does not inquire into the underlying facts to determine guilt. Finally, while a company that signs a DPA or an NPA must acknowledge the facts underlying its transgression, it does not need to admit guilt, nor do U.S. procedures require an admission of guilt.[138]

In France, U.S. DPAs do not fit neatly into existing jurisprudence because of the near-absence of any judicial participation.[139] As

136. *See* Case C-398/12, Italy v. M, 2014 EUR-Lex CELEX LEXIS 1, at para. 28 (June 5, 2014).

137. *Id.* at paras. 28, 31.

138. *See* Section III A.

139. In 2015, it appeared that the French Government would propose new legislation, called the "Loi Sapin 2," that would for the first time introduce a procedure roughly equivalent to a DPA whereby a corporation could agree to make payments, and to enter into compliance and reporting obligations, in exchange for which the Public Prosecutor would, upon the successful completion of the corporation's obligations, seek dismissal of the charges against it. On March 30, 2016, however, the *Conseil d'Etat*, France's most senior administrative body also charged with advising on proposed legislation, advised against adoption of such a procedure, which was then dropped from the text of the proposed law. See *Bill on transparency, the fight against corruption and modernizing the economy*, THE CONSEIL D'ÉTAT, Mar. 30, 2016, http://www.conseil-etat.fr/Decisions-Avis-Publications/Avis/Selection-des-avis-faisant-l-objet-d-une-communication-

suggested by the phrase "chose jugée," which appears in article 6 of the Code of Criminal Procedure as a basis for barring a second prosecution,[140] the *ne bis in idem* principle generally applies when there has been a prior "judgment" involving a judicial determination. Indeed, in France, even a "guilty plea," which French procedures permit only under very limited circumstances and which are not nearly as widespread as in the United States, as well as other procedures short of a full trial,[141] are thought to involve not only recognition of guilt by the defendant but a judicial evaluation of the underlying facts. As one writer has noted about continental criminal justice systems generally, even "where the defendant admits his guilt the court is still theoretically obliged to make up its own mind about his guilt or innocence before it pronounces a conviction . . . ."[142]

The jurisprudence of the ECJ, while applicable to all signatory nations in cases arising under it, does not, in this instance, reflect traditional jurisprudence in France that generally tends to require more judicial participation in criminal procedures than is the case in

particuliere/Projet-de-loi-relatif-a-la-transparence-a-la-lutte-contre-la-corruption-et-a-la-modernisation-de-la-vie-economique. The possibility of some sort of negotiated corporate criminal outcome in international corruption cases remains under active discussion in France, but its future is uncertain. *See* Frederick T. Davis et al., *France Takes Steps to Implement Its Anti-Corruption Laws –or Does It?*, 7 FCPA UPDATE 8, http://www.debevoise.com/~/media/files/insights/publications/2016/05/fcpa_update_may_2016.pdf.

140. *See* C. PR. PEN. art. 6.

141. *See* C. PR. PEN. art. 141-2. (stating French criminal procedures provide for two outcomes that share some similarities with DPAs. A "*composition pénale*," the procedures for which are found in Article 41-2 of the Code of Criminal Procedure, is essentially a "diversion" mechanism that permits the prosecutor to reach an agreement with an individual that avoids a criminal prosecution if the individual honors its terms. It does not apply to corporations, nor to crimes punishable by more than five years in prison, and requires the "validation" of the court.); *see also* C. PR. PEN. art. 495-7 (asserting that a somewhat more complicated term is a "*comparution sur reconnaissance préalable de culpabilité*," generally known under its initials "CRPC." The term roughly stands for "appearance on a preliminary recognition of guilt," and its procedures appear at Articles 495-7 et seq. of the Code of Criminal Procedure. A CRPC is, in essence, a guilty plea where the prosecutor proposes terms, including the ultimate penalty, which can be accepted or not by the defendant, all subject to approval by the court. CRPCs can be employed with respect to corporations, but particularly in the absence of any tradition of negotiating outcomes under the procedure, it has not been widely used in that context).

142. *See* Spencer, *Introduction*, at 26 *in* EUROPEAN CRIMINAL PROCEDURES (Mireille Delmas-Marty & J. R. Spencer eds., J. R. Spencer trans., 2002).

the United States[143] In the *Gözütok and Brügge* case in particular, France (along with Belgium and Germany) urged the Court to "preclude [a]rticle 54 from being construed in such a way as to apply to procedures barring further prosecution in which no court is involved."[144]

In the June 2015 Decision in France, the Court concluded, with respect to the two companies whose parents had signed DPAs, that the prior U.S. procedures had resulted in "the extinction of the public proceedings [in French: *action publique*]" in that country, and with respect to those whose parent signed an NPA that the "facts have been determined [in French: *jugés*] pursuant to an impartial, independent and diligent procedure," and thus all of them justified the "extinction" of the proceedings against them in France under article 6 of the Code of Criminal Procedure on the basis of "res judicata" (or, in French, "*chose jugée*").[145]

Especially with respect to an NPA, where no court is involved at all and no legal action is even instituted, and even with respect to a DPA, where the Court's involvement is in most instances strictly limited to processing the papers submitted by the parties without making any factual determination, it was a leap for the French court to defer to the fruits of those proceedings and declare that they deprived the French prosecutor of the power to proceed in France. Further, in neither a DPA nor an NPA is the defendant obligated to admit guilt, a key element of the French CRPC described above.[146] Just last year the French Supreme Court refused to bar prosecution in France where a German prosecutor had made a decision not to pursue a case against the defendant based on the same facts.[147] The Court noted:

> [T]he decision taken by a foreign court can only be regarded as a definitive judgment if, on the date it is issued, a formal public proceeding had been commenced; the decision by the public prosecutor not to, confirmed by the court on the basis that no grounds existed to commence

143. *See generally* Kirry & Davis, *supra* note 56.

144. *See Gözütok & Brügge*, 2003 E.C.R. at para. 41.

145. *See supra* Section III(C) (discussing the French concept of the *"action publique"* and its "extinction"); *see also* C. PR. PEN. art. 6.

146. *See* Textron NPA, *supra* note 110, at 3.

147. *See* Cour de cassation [Cass.] [supreme court for judicial matters] crim., Apr. 2, 2014, Bull. crim., No. 101 (Fr.).

> formal proceedings other than upon the discovery of new facts, does not have the force of a definitive judgment within the meaning of the applicable texts.[148]

Particularly given the "asymmetry" noted in the next section (because the United States will not recognize a French criminal judgment as preclusive under the ICCPR), this leg of the Court's reasoning seems hard to reconcile with French traditions and procedures, and may be subject to scrutiny on appeal.

D. THE IMPLICATIONS OF THE OIL-FOR-FOOD DECISIONS RELATING TO NE BIS IN IDEM

The French Oil-for-Food decisions are likely to have short-term and longer-term impacts.

Short term, both of the Oil-for-Food decisions discussed here may well be reviewed: the Public Prosecutor has appealed the acquittals (and the dismissals on the basis of *ne bis in idem*) in the June 2015 Decision and a decision in the Court of Appeals may be expected in 2017; and all of the defendants (including Vitol, whose *ne bis in idem* claim was rejected by the Court of Appeals) are seeking review of the February 2016 Decision of the Court of Appeals in France's Supreme Court. In the meantime, the decisions will affect defensive strategies for companies involved in multinational investigations that involve or may involve France. At a minimum, the success of the four defendants in Oil-for-Food II to persuade a non-US court to refuse prosecution because their parents had signed DPAs or NPAs will certainly encourage lawyers in similar cases to pursue similar arguments.

The more intriguing implications, however, are longer term. First, the possibility that an outcome negotiated in the United States may preclude prosecution in Europe may inadvertently increase the predominance of U.S. investigations relative to the efforts in other countries. If it is established that U.S. negotiated outcomes preclude prosecutions elsewhere, it would become especially useful to reach such an agreement. This is particularly true because the French June 2015 Decision recognizing the preclusive effects of DPAs/NPAs will not be symmetrical in the sense of contemplating that U.S. courts

148. *Id.* (translation by the author).

would give similar recognition to French judgments of any sort (let alone negotiated outcomes). The United States signed the ICCPR (the cornerstone of the French decision) but expressly stated upon signature that it did not create any enforceable rights in the United States, and the U. S. Congress did not implement it by adopting conforming legislation.[149] Furthermore, the United States noted upon ratification its "understanding" that "the prohibition upon double jeopardy in paragraph 7 [applies] only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause."[150] As a result, all efforts in the United States to rely on the ICCPR in the courts have failed on the ground that the treaty is not "self-executing," and as such does not provide a right or defense in U.S. courts.[151] This asymmetry may encourage a "race to the courthouse" in countries that offer attractive outcomes of the very sort that some commentators have predicted as an unwelcome side-effect of any effort to adopt an international double jeopardy regime.[152] Correlatively, it may discourage companies from entering into discussions with non-U.S. prosecutors that could only lead to outcomes with no preclusive legal effect in the United States.

Second, the decision reflects a situation that cries out for international collaboration. Ideally, the signatories to the OECD Convention might contemplate a more procedurally comprehensive, and binding, version of article 4.3 that would require coordinated prosecutions and only one opportunity to prosecute a given defendant for the same acts. More practically, the principal countries involved should, and undoubtedly will, engage in more effective and transparent cooperation. Officials in the United States, as by far the most active, aggressive and effective enforcers, should be clearer and

149. *See* Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, § III(2), 138 CONG. REC. S4,781-01 (daily ed., Apr. 2, 1992).

150. *See id.* at § II(4).

151. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004); *see also* United States v. Duarte-Acero, 296 F.3d 1277, 1283 (11th Cir. 2002) ("[T]he ICCPR does not create judicially-enforceable rights.").

152. *See, e.g.*, Jordan Moran, *Why International Double Jeopardy Is A Bad Idea*, THE GLOBAL ANTICORRUPTION BLOG, Mar. 9, 2015, http://globalanti corruptionblog.com/2015/03/09/why-international-double-jeopardy-is-a-bad-idea/ (discussing the implications of the international double jeopardy regime).

more transparent about the principles they follow in deciding upon "extra-territorial" prosecutions, and particularly their standards for evaluating the "adequacy" of non-U.S. prosecutions that may be sufficient to satisfy their own interests and lead them to defer to non-U.S. outcomes. This would not only be fair but would also have the salutary effect of encouraging open discussions between targets and non-U.S. prosecutors as well as outcomes similar to the SBM Offshore case.[153]

V. CONCLUSION

The laws of "international double jeopardy" are in flux: In Europe, legislation, treaties and decisions have created a broad but not entirely consistent matrix of principles that in many cases may protect a person or corporation against multiple prosecutions within the continent. The recent decisions by French courts, while still subject to review, offer the intriguing possibilities that the principle of *ne bis in idem* will not only be applied to prior criminal judgments outside of Europe, but also to prior outcomes resulting from negotiations that avoid a criminal judgment at all.

In the United States, there is no legal protection at all against further prosecution of a person or corporation already prosecuted outside the United States. The adamant refusal of U.S. prosecuting authorities and courts to recognize *any* limits on their power to engage in prosecutions that duplicate prosecutions abroad, coupled with the near-total silence of the Department of Justice on the standards it will apply to respect negotiated outcomes in other countries by declining prosecution, does a disservice to the goal of the OECD Convention, and to the goal of coordinated prosecutions generally, because it creates a disincentive to other countries to adopt flexible outcomes such as a DPA, and to companies that might otherwise elect to enter into discussions with authorities in their "home" country or in a country with a substantial interest in the matter. International agreements to address that issue would be welcome, but are unlikely. Much more feasible would be for the Department of Justice to make clear – to multinational corporations and non-U.S. prosecutors alike – the principles that would induce them to decline a U.S. prosecution because of a prior non-U.S.

153. *See id.* at 1-3.

outcome, and to emphasize their willingness to work with their counterparts in other countries to allocate responsibilities to avoid irrational outcomes.