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Summer Enforcement Actions (and Non-Actions): Halliburton, Guilty Verdicts, and Declinations

Despite a relatively slow start to 2017, this summer has been more active on the FCPA front, both for the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ").

On July 27, 2017, the SEC brought its first stand-alone corporate enforcement action since January, against Halliburton, a Houston-headquartered oilfield services corporation, and Jeannot Lorenz, a former Halliburton vice-president (the "Halliburton Order").[1] This marked the third time in 2017 that the SEC

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1. *In the Matter of Halliburton Company and Jeannot Lorenz*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, Securities Exchange Act Rel. No 81222, Accounting and Auditing Enforcement Rel. No. 3884, Admin. Proc. File No. 3-18080 (July 27, 2017).

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brought an FCPA action against a recidivist company[2] and continues the SEC's focus on charging individuals. The Halliburton Order underscores the importance of a company rigorously following its internal controls, especially when strengthened as part of a prior FCPA settlement.

Also during this summer, the DOJ obtained another guilty plea in the longrunning Haiti Telco matter[3] and prevailed at trial against Macau real-estate tycoon Ng Lap Seng.[4] Of particular interest from a corporate enforcement perspective, the DOJ in June announced two "declinations with disgorgement" under the Pilot Program: for Linde North America, a New Jersey subsidiary of a German engineering conglomerate,[5] and for CDM Smith, a privately-held engineering and construction company headquartered in Boston.[6] Over the summer, the DOJ also informed at least five companies that it was closing investigations without taking any enforcement action against the companies. These included MTS Systems, Newmont Mining, Vantage Drilling, IBM, and Net1,[7] suggesting that the DOJ is at least partly clearing out its docket.

The SEC's Halliburton Order

In February 2009, Halliburton and its then wholly-owned subsidiary Kellogg Brown & Root ("KBR") settled a matter involving violations of the FCPA's antibribery and accounting provisions (the "Bonny Island action").[8] The SEC's complaint alleged

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2. Bruce E. Yannett, Andrew M. Levine, Philip Rohlik, and Maxwell K. Weiss, "Corporate Recidivism in the FCPA Context," FCPA Update, Vol. 8, No. 9 (Apr. 2017); *see In the Matter of Biomet, Inc.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21 C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease & Desist Order, Securities Exchange Act Rel. No. 79780, Accounting and Auditing Enforcement Rel. No. 3843, Admin. Proc. File No. 3-17771 (Jan. 12, 2017); *In the Matter of Orthofix International N.V.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21 C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease & Desist Order, Securities Exchange Act Rel. No. 79828, Accounting and Auditing Enforcement Rel. No. 3851, Admin. Proc. File No. 3-17800 (Jan. 18, 2017).
3. *See* United States Department of Justice Press Rel. No. 17-798, "Telecom Executive Pleads Guilty to FCPA Charges in Connection with the Haitian Bribery Scheme," July 19, 2017.
4. *See* United States Department of Justice Press Release No 17-792, "Chairman of a Macau Real Estate Development Company Convicted on All Counts for Role in Scheme to Bribe United Nations Ambassadors to Build a Multi-Billion Dollar Conference Center" July 28, 2017.
5. *See* Kara Brockmeyer, Andrew M. Levine, and Philip Rohlik, "In First Enforcement Action of the Trump Administration, DOJ Issues 'Declination' Regarding Linde North America," FCPA Update, Vol. 8, No. 11 (June 2017).
6. Letter from United States Department of Justice to counsel for CDM Smith, June 21, 2017, https://www.justice.gov/criminal-fraud/pilot-program/declinations.
7. MTS Systems Corp., Form 10-Q for the three months ending July 1, 2017 (filed August 7, 2017) at 47; Newmont Mining Corp., Form 10-Q for the quarterly period ending June 30, 2017 (filed July 25, 2017) at 47; "Vantage Drilling International Announces Closing of FCPA Investigation by the DOJ," http://www.marketwired.com/printer_friendly?id=2230509; Net1 Announces Closure of FCPA Investigation by U.S. Department of Justice, http://www.nasdaq.com/press-release/net1-announces-closure-of-fcpainvestigation-by-us-department-of-justice-20170727-0116; International Business Machine Corp., Form 10-Q for the Quarter ended June 30, 2017 at 44 (filed July 25, 2017). The announcements make clear that the SEC likewise closed its investigations into MTS Systems, IBM, Net1, and Newmont Mining. Vantage Drilling's announcement noted a continuing SEC investigation, leaving open the possibility of future SEC action.
8. *Securities and Exchange Comm'n v. Halliburton Company and KBR, Inc.,* Complaint, Civil Action No.: 4:09-399 (S.D.Tex. Feb 11, 2009). KBR separately plead guilty to substantive violations of the FCPA's anti-bribery provisions. *United States v. Kellogg Brown & Root LLC,* Plea Agreement, Crim. No.: H-09-071 (S.D. Tex. Feb. 11, 2009).

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bribes paid to Nigerian officials, through a variety of agents, by a joint venture of which KBR was a member. In addition to paying $177 million in disgorgement to the SEC (and $402 million to the DOJ), Halliburton agreed to appoint an independent consultant to review its policies and procedures related to the FCPA and to appoint a monitor.[9]

With this summer's entry of the Halliburton Order, Halliburton became a "repeat offender" of the FCPA, the third such company charged this year.[10]

The Halliburton Order – the facts of which Halliburton neither admitted nor denied – involves events in Angola shortly after the 2009 settlement. The SEC found that, between 2009 and 2011, Halliburton violated the accounting provisions in connection with payments to a local Angolan company related to Halliburton's tendering for work from Sonangol, the Angolan state oil company.[11]

"As the third 'repeat offender' enforcement action of 2017, Halliburton serves as a reminder that companies that have faced enforcement actions in the past need to be especially careful to respect their own internal controls."

Angola and Sonangol frequently appear in FCPA enforcement actions. Angola is ranked number 164/176 in Transparency International's Corruption Perceptions Index,[12] one of the lowest ranked countries not a failed state or in the midst of or emerging from a civil war. Angola has served as a primary basis for three FCPA enforcement actions in the last five years (General Cable, Goodyear, and Weatherford International)[13] and played lesser roles in the Rolls-Royce[14] and Odebrecht[15] enforcement actions.

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9. *Id.* at 16.
10. Bruce E. Yannett, et al., "Corporate Recidivism," *supra* n. 2.
11. Halliburton Order at ¶¶ 2-3.
12. https://www.transparency.org/news/feature/corruption_perceptions_index_2016.
13. *In the Matter of General Cable Corporation,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, Securities Exchange Act Rel. No. 79703, Admin. Proc. File No. 3-1775 ¶¶ 12-28 (Dec. 20, 2016); *In the Matter of Goodyear Tire & Rubber Company,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, Securities Exchange Act Rel. No. 74356; Accounting and Auditing Enforcement Rel. No. 3640; Admin. Proc. File No. 3-16400 ¶¶ 12-15 (Feb. 24, 2015); *Securities and Exchange Comm'n v. Weatherford International Ltd.,* Complaint, Case 4:13-cv-3500 ¶¶ 11-24 (S.D. Tex. Nov. 26, 2013).
14. *United States v. Rolls-Royce* PLC, Information, Case No. 2:16-cr-247 ¶ 25 (S.D. Ohio Dec. 20, 2016).
15. *United States v. Odebrecht S.A.,* Information, Cr. No. 16-643 (RJD) ¶ 44 (E.D.N.Y. Dec. 21, 2016).

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In some ways, the facts of the Halliburton Order echo 2015's accounting provisions enforcement action against Hitachi, Ltd.,[16] in that both involve some kind of local content requirement. Such regulations are common, especially in developing nations, requiring the partnering with or retaining of local third parties. By doing so, the regulations seek to ensure that work and profits relating to a contract are shared with local companies and the local community. In effect, such requirements can limit a foreign company's choice of partners to well-connected local businessmen, introducing the risk of cronyism or corruption. Because such requirements are mandatory under local laws, companies need to strictly adhere to their own policies and procedures when entering into such relationships, ensuring compliance with both local laws and the FCPA.

According to the Halliburton Order, officials at Sonangol informed Halliburton in 2008 that Sonangol was considering vetoing further subcontract work due to Halliburton's failure to comply with Angola's local content regulations.[17] The Order found that Halliburton asked Lorenz, who was then based in Brazil but had worked in Angola, to oversee efforts to increase Halliburton's local content in Angola.[18]

The Halliburton Order found that Lorenz identified one project for 2008, but still needed additional local content contracts for 2009. Lorenz proposed outsourcing roughly $15 million in services to a local Angolan company owned by a former Halliburton employee who was also "a friend and neighbor of the government official who would on Sonangol's behalf approve the award of . . . contracts to Halliburton."[19] The Halliburton Order found that, in order to do so, Lorenz first proposed retaining the local Angolan company as a commercial agent. Halliburton rejected this proposal given that, according to the Halliburton Order, the company was not adding any new commercial agents in Africa in the immediate aftermath of settling the Bonny Island action.[20] Additionally, under the company's procedures, even considering such an agent required lengthy due diligence implemented as part of overhauling its internal controls in connection with the earlier settlement.[21]

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16. *Securities and Exchange Comm'n v. Hitachi, Ltd.*, Complaint, Case 1:15-cv-01573 (D.D.C. Sept. 28, 2015).
17. Halliburton Order at ¶ 7.
18. *Id.*
19. *Id.* at ¶ 8.
20. *Id.* at ¶ 9.
21. *Id.*

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The Halliburton Order states that Lorenz then proposed outsourcing in-house functions to the local Angolan company, which required going through Halliburton's procurement process, including competitive bidding. In violation of Halliburton's internal controls, the Halliburton Order states that Lorenz then entered into a draft "bridge agreement" with the local Angolan company, in order to begin paying that company. The Halliburton Order found that Lorenz made false statements to others at Halliburton to gain approval for the agreement.[22] Entering into this contract violated numerous Halliburton internal controls associated with third parties.

According to the Halliburton Order, because of the delay in the contract, a Halliburton senior executive had to fly to the vacation home of the owner of the local Angolan company in Portugal to meet the Sonangol government official, who was vacationing there, to explain the delay.[23] Halliburton then rejected the outsourcing proposal, because the local Angolan company came in last among the other local bidders, with parts of its bid being 42% to 447% higher than the next highest local bidder.[24] Instead of hiring one of the other Angolan bidders, the Halliburton Order states that Lorenz then entered into a lease-sublease arrangement with the local Angolan company, again bypassing Halliburton's internal controls to do so.[25] According to the Halliburton Order, Halliburton made payments of $3,705,000 to the local Angolan company between April 2010 and April 2011, when the arrangement was terminated after Halliburton received a whistleblower complaint.[26]

In addition, the Halliburton Order found that, in a March 2010 review of the contract, required by Halliburton's internal controls, "personnel from the Finance and Accounting department . . . raised concerns" about the arrangement with "senior corporate executives." Such concerns included that the amounts involved exceeded what it would cost "to run Halliburton's entire real estate department in Angola." According to the Halliburton Order, "[t]he senior executives understood that the commercial terms were onerous but allowed the contract reviews to proceed because they believed that by this time only this agreement with the local Angolan company would satisfy Sonangol."[27]

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22. *Id.* at ¶¶ 10-11.
23. *Id.* at ¶ 13.
24. *Id.* at ¶ 14.
25. *Id.* at ¶¶ 15-16.
26. *Id.* at ¶ 19.
27. *Id.* at ¶ 18.

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The Halliburton Order found violations of both the internal controls and books and records provisions of the FCPA.[28] It is noteworthy that Lorenz allegedly tried different arrangements to pay the local Angolan company, two of which were blocked by Halliburton's internal controls, and the third may have been blocked if not for the alleged ignoring of red flags by senior corporate executives. Because of the whistleblower report, itself an internal control, the payments stopped within a year of commencing.

The internal controls violations found in the Halliburton Order are not, therefore, based on the *lack* of internal controls. The Halliburton Order describes in detail the interval controls that existed at the company and how those controls impeded attempts to contract with the local Angolan company. Indeed, the "Legal Standards and Violations" section of the Halliburton Order describes Halliburton's internal controls as being "clearly defined" and "[a]s a result of the prior settlement."[29] Rather, the reason for the enforcement action is that Halliburton did not "maintain"[30] those controls, as evidenced by the fact that Lorenz and "senior corporate executives" were willing to bypass or ignore them. In effect, Lorenz and the "senior corporate executives" appear to have evaded the internal controls brought into being or enhanced "[a]s a result of the prior settlement" very shortly after that settlement had been entered into, a scenario very likely to draw the ire of the enforcement agencies.

Indicating the seriousness with which the SEC views recidivist behavior, Halliburton paid a civil monetary penalty of $14 million, an amount equal to the disgorgement, as well as $1.2 million prejudgment interest, for a total payment of $29.2 million.[31] Halliburton also agreed to retain an independent consultant to review its policies and procedures, including those relating to local content requirements and the use of single-source justifications in Africa; make recommendations; and submit reports to the SEC.[32] In addition, Lorenz was found liable of causing Halliburton's violations of the books and records and internal controls provisions of the FCPA and paid a civil penalty of $75,000.[33]

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28. *Id.* at ¶¶ 24-26.
29. *Id.* at ¶ 26.
30. *Id.*
31. *Id.* at ¶ IV.C.
32. *Id.* at ¶ IV.G.6.
33. *Id.* at ¶ IV.D.

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As the third "repeat offender" enforcement action of 2017, Halliburton serves as a reminder that companies that have faced enforcement actions in the past need to be especially careful to respect their own internal controls. While there has been criticism of the "virtual strict liability" manner in which the enforcement agencies apply the accounting provisions,[34] that criticism loses some force when a company undertakes to strengthen its internal controls in order to resolve an enforcement action and shortly thereafter decides to ignore those very controls.

"To best encourage companies to self-disclose potential FCPA violations, the DOJ and the SEC would be well-served to provide additional guidance regarding under what circumstances they will consider declining to bring any enforcement action, including a 'declination with disgorgement' under the Pilot Program."

DOJ Enforcement Activity

Although the DOJ has not brought a formal corporate FCPA enforcement action since January 2017, the summer involved several notable anti-corruption developments. The DOJ secured a guilty plea from Amadeus Richers, the ninth person charged in connection with bribes paid to Haiti Telco, following his extradition from Panama.[35] In addition, the DOJ prevailed after a four-week trial in obtaining the conviction of David Ng (Ng Lap Seng), a Macau real-estate developer charged with bribing the UN representatives of the Dominican Republic and Antigua and Barbuda in order to support a conference facility Ng hoped to build in Hong Kong.[36] This is the first time the DOJ has obtained a jury verdict against individuals in an FCPA case since the Lindsey Manufacturing trial in 2011.[37] The DOJ also has been more successful in prosecuting cases against corrupt foreign officials, including, on July 18, 2017, a guilty verdict on money laundering charges for Heon-Cheol Chi, the former director of South Korea's earthquake research bureau, who laundered bribes he received through U.S. banks.[38]

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34. *See* "The Year 2016 in Anti-Corruption Enforcement: Record Breaking Activity and Many Open Questions," FCPA Update, Vol. 8, No. 6 at 18-19 (Jan. 2017).
35. United States Department of Justice Press Rel. No. 17-798, "Telecom Executive Pleads Guilty to FCPA Charge in Connection With Haitian Bribery Scheme," https://www.justice.gov/opa/pr/telecom-executive-pleads-guilty-fcpa-chargeconnection-haitian-bribery-scheme?src=ilaw.
36. United States Department of Justice Press Rel. No. 17-849, "Chairman of a Macau Real Estate Development Company Convicted on All Counts for Role in Scheme to Bribe United Nations Ambassadors to Build a Multi-Billion Dollar Conference Center," https://www.justice.gov/opa/pr/chairman-macau-real-estate-developmentcompany-convicted-all-counts-role-scheme-bribe-united.
37. United States Department of Justice Press Rel. 11-596, "California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico" (May 10, 2011).
38. United States Department of Justice Press Rel. No. 17-792, "Director of South Korea's Earthquake Research Center Convicted of Money Laundering in Million Dollar Bribe Scheme" (July 18, 2017).

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On the corporate enforcement front, shortly after issuing a "declination" letter to Linde North America on June 16, 2017,[39] on June 21, 2017, the DOJ issued a "declination" letter – made public on the DOJ's "Declinations" page at the end of June – to CDM Smith, Inc, a privately-held engineering and construction company in Boston.[40] As with prior "declinations" under the FCPA Pilot Program, the letter very generally sets out the findings of the "Department's investigation."

In this case, CDM India, a wholly-owned subsidiary of CDM Smith, allegedly violated the anti-bribery provisions by making $1.18 million in payments to officials at the National Highways Authority of India between 2011 and 2015. The bribes allegedly were paid through fraudulent subcontractors.[41] Significantly, the "declination" letter notes that "[a]ll senior management at CDM India . . . were aware of the bribes for CDM Smith and CDM India contracts, and approved or participated in the misconduct."[42]

The letter cites CDM Smith's timely self-disclosure, thorough and comprehensive investigation, cooperation, disgorgement, unnamed compliance program enhancements, and full remediation, "including but not limited to terminating all of the executives or employees who were involved in or directed the misconduct."[43] CDM Smith also agreed to disgorge just over $4 million. Although details of the investigation are unknown, it is notable that the DOJ appears to base its jurisdiction on an agency theory (senior management at CDM India "also acted as employees and agents of CDM Smith") rather than a U.S. nexus. As in other declination letters and enforcement actions, the DOJ also continues to see disciplinary action, in this case the termination of "all" involved employees, as noteworthy in giving remediation credit.

Contemporaneous with or subsequent to the CDM Smith "declination" letter, at least five issuers announced that they had received letters from the DOJ stating that the government was closing its investigation:

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39. *See* Kara Brockmeyer, Andrew M. Levine, and Philip Rohlik, "In First Enforcement Action of the Trump Administration, DOJ Issues 'Declination' Regarding Linde North America," FCPA Update, Vol. 8, No. 11 (June 2017).
40. Letter from United States Department of Justice, *supra* n. 6.
41. *Id.*
42. *Id.*
43. *Id.*

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- In June 2017, Newmont Mining received a letter from the DOJ stating that no action would be taken with respect to what Newmont described as "certain business activities of the Company and its affiliates and contractors in countries outside the U.S." Newmont Mining had self-disclosed and previously entered into a tolling agreement with the enforcement agencies. The company had previously disclosed receiving a similar closure letter from the SEC in February 2017. [44]
- In July 2017, IBM announced that the DOJ and SEC informed the company that they were closing investigations into the company's activities in Poland, Argentina, Bangladesh, and Ukraine without taking any enforcement action.[45]
- Also in July, Net1, the South African alternative payment provider, announced receiving a letter from the DOJ that it was closing its investigation into allegations involving a South African tender. The company received a similar letter from the SEC in 2015.[46]
- In August 2017, MTS Systems disclosed that it had received similar letters from the SEC and DOJ, closing investigations of gifts, travel, and entertainment issues in Korea and China.[47]
- Finally, also in August, Vantage Drilling International announced that it had received a letter from the DOJ closing an investigation into allegations relating to the Petrobras scandal, but indicated also that an SEC investigation was ongoing.[48]

The Future Fate of Declinations

As noted in our June issue, a declination traditionally has involved the DOJ's (or SEC's) exercising discretion not to bring a case that it could, because of equitable considerations or reasons such as the small size or limited nature of violations.[49]

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44. Newmont Mining Corp., Form 10-Q for the quarterly period ending June 30, 2017 (filed July 25, 2017) at 47.
45. International Business Machine Corp., Form 10-Q for the Quarter ended June 30, 2017 at 44 (filed July 25, 2017).
46. "Net1 Announces Closure of FCPA Investigation by U.S. Department of Justice" (July 27, 2017), http://www.nasdaq.com/press-release/net1-announces-closureof-fcpa-investigation-by-us-department-of-justice-20170727-01161.
47. MTS Systems Corp., Form 10-Q for the three months ending July 1, 2017 (filed Aug. 7, 2017) at 47.
48. "Vantage Drilling International Announces Closing of FCPA Investigation by the DOJ," http://www.marketwired.com/printer_friendly?id=2230509.
49. Kara Brockmeyer, Andrew M. Levine, and Philip Rohlik, "In First Enforcement Action of the Trump Administration, DOJ Issues 'Declination' Regarding Linde North America," FCPA Update, Vol. 8, No. 11 (June 2017).

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Such a "traditional declination" differs from an authority's decision to close an investigation upon concluding it could not carry its burden of proof, given insufficient evidence, lack of jurisdiction, expiration of the limitations period, or other factors.

According to the public announcements, each of the five companies identified above was the subject of substantial investigation, lasting years before the respective closure letters. But it is ultimately unclear whether DOJ (and in certain cases the SEC too) determined there was no basis to act or instead declined to bring an action based on some other reason.

At the same time, it is notable that all "declinations" identified as such under the Pilot Program have involved some form of disgorgement. In particular, these declinations involved either public companies that disgorged profits to the SEC (and therefore were not required to disgorge again to the DOJ) or private companies that disgorged profits to the DOJ under circumstances in which, had the companies been issuers, one might have expected the SEC to obtain disgorgement and the DOJ to refrain from taking action.[50]

As previously have noted, a "declination with disgorgement" under the Pilot Program is not significantly different than a non-prosecution agreement. While a company escapes the ongoing obligations of a non-prosecution agreement, a "declination" under the Pilot Program nevertheless imposes the burdens of a public recitation of factual allegations and disgorgement of illicit profits, and therefore can be viewed as another "non-prosecution" vehicle through which the DOJ resolves an enforcement action. The DOJ also may use "declinations with disgorgement" to obtain disgorgement from private companies under circumstances where the DOJ previously may have simply declined altogether to act.

To best encourage companies to self-disclose potential FCPA violations, the DOJ and the SEC would be well-served to provide additional guidance regarding under what circumstances they will consider declining to bring any enforcement action, including a "declination with disgorgement" under the Pilot Program. While this summer's "declinations with disgorgement" and publicly announced closings of

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50. United States Department of Justice, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" at 2, https://www.justice.gov/criminalfraud/pilot-program.

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investigations do little to clarify the future contours of declinations, the DOJ is currently reviewing the Pilot Program and may provide additional guidance later this year.

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The Obiang Trial Suggests Innovative Approaches to Fighting International Corruption

Over the past two months, the French *Tribunal de Grande Instance* in Paris (the principal trial court) heard evidence in the case against Teodoro Nguema Obiang Mangue (known as Teodorin), on charges of corruption and money laundering, among other allegations. Teodorin is the son of Teodoro Obiang Nguema Mbasogo, the long-time President of Equatorial Guinea, a resource-rich country with a reputation for corruption in addition to some of the most severe poverty in the world. Yet Teodorin, who is currently Vice President, owns vast real estate in Paris, a private jet, a yacht, and a fleet of vintage and modern automobiles, among his other known assets.

The case against Teodorin was primarily the result of diligent efforts by NGOs, including the French anticorruption group Sherpa and the French chapter of Transparency International ("TI"). In 2007, Sherpa and others filed a complaint with the Public Prosecutor in Paris alleging that the ruling families of Equatorial Guinea, Angola, Burkina Faso, and the Republic of the Congo held assets in France that were not the fruits of their official salaries. After a brief investigation, the Public Prosecutor dismissed the claims. Several of the NGOs, joined in some instances by citizens of the countries in question, then used a French procedure known as *constitution de partie civile* to cause a criminal investigation by an investigating magistrate (*juge d'instruction*). This effort was opposed by the Public Prosecutor. A Court of Appeals initially upheld the prosecutor's position and dismissed TI's intervention, but in an important 2010 ruling, the French *Cour de Cassation* (Supreme Court) ruled that TI was a proper *partie civile* authorized to instigate the criminal investigation.[1] Ultimately Teodorin was bound over for trial, now with the support of the Public Prosecutor (as well as the continued active participation of TI and other NGOs). A decision is expected in October.

The procedures that brought Obiang to trial are interesting because they highlight four important differences between French and US criminal procedures, and more generally illustrate several legal deficiencies, in countries like the United States, that often hinder the worldwide fight against transnational corruption:

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1. La Cour de Cassation, Chambre Criminelle, No. J 09-88.272 F-D, No. 6092 (Nov. 9, 2010).

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First, French law embraces a form of so-called "universal jurisdiction," under which a person found in France can be prosecuted for certain kinds of acts committed outside of the country. France's law on universal jurisdiction was most recently revised in 2010.

Second, French law on overseas bribery – adopted in 2000 following the country's accession to the OECD Anti-Bribery Convention – criminalizes both "active" and "passive" bribery – that is, both the giver and the recipient of a bribe can be prosecuted. While the UK Bribery Act, among others, criminalizes both active and passive bribery, the US Foreign Corrupt Practices Act ("FCPA") only addresses active bribery—that is, bribe-giving—rather than bribe taking (although other US laws have been used to pursue bribe takers). Presuming a French court has jurisdiction over a defendant like Teodorin, he can be prosecuted for taking bribes.

Third, France, along with some other countries in Europe and elsewhere, gives presumed victims the formal standing of *parties civiles,* which means that they can be actual parties to a criminal investigation and trial. They can commence an investigation even if (as here) opposed by the public prosecutor; they participate in all aspects of the investigation (and through their attorneys are given access to the official investigative file); they are parties at the trial; and they can seek and be awarded damages at the same trial that considers the guilt of the accused.

Fourth, the French Code of Criminal Procedure provides that in certain instances, found by the Supreme Court to be applicable in this case, a pre-existing NGO with a stated interest in a subject matter may have standing to act as a *partie civile* in – and thus be a formal party to – a criminal proceeding.

Taken together, these procedures—which depart in a number of important respects from the US approach to criminal justice—offer useful responses to several problems with current efforts to combat overseas bribery.

First, virtually all of overseas bribery prosecutions in industrialized countries focus on the so-called "supply side" of corruption, that is, on bribe givers but not recipients. As noted, the FCPA only criminalizes giving or offering a bribe, not taking one; and even in those countries where "passive bribery" is criminalized, overseas passive corruption is rarely prosecuted.

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Second, the French *partie civile* procedure, enhanced by organizational standing provisions, provides a real and important voice to victims of corruption. Bribery is not a victimless crime: it deprives citizens of the affected countries of public funds that are theirs, and undermines the legitimacy of government. Organizational standing is particularly significant when essentially the entire population is a "victim." Yet victims have no formal role in US bribery prosecutions, and are rarely even heard.

Third, victims in developing countries often have little or no ability to pursue criminal or other remedies in their own jurisdiction; their active participation in the criminal pursuit of corrupt leaders in countries with some form of "universal jurisdiction" may be their only means of obtaining justice.

"There is occasional debate about whether corruption . . . should be the object of formal international prosecution at a tribunal modeled on the International Criminal Court. . . . Universal jurisdiction trials such as in the current Obiang case . . . may offer a more flexible and practical approach."

The case against Obiang is a visible step toward a more participatory form of international criminal justice, but it is hardly the first. In May 2016, a Special Chamber sitting in Senegal convicted the former president of Chad, Hissène Habré, of crimes that he committed in the 1980s, when he was President.[2] The evidence showed that he had a hand in the murder of tens of thousands, in systematic rape, and in widespread torture, as well as rapacious looting of Chad's treasury. The Habré trial has appropriately been praised as a model for African justice, but it was also the result of more than a decade of hard work by Chadian victim associations, supported by international NGOs such as Human Rights Watch, exercising their procedural rights as *parties civiles*–without which it is almost certain that no prosecution would have occurred.

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2. *See* Human Rights Watch, "Chad's Ex-Dictator Convicted of Atrocities" (May 30, 2016), *available at* www.hrw.org/news/2016/05/30/chads-ex-dictator-convicted-atrocities.

The Obiang Trial Suggests Innovative Approaches to Fighting International Corruption

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There is occasional debate about whether corruption, or at least so-called "grand corruption," should be the object of formal international prosecution at a tribunal modeled on the International Criminal Court. Yet ICC proceedings have been notably cumbersome and slow, with few results. Universal jurisdiction trials such as in the current Obiang case, or essentially ad hoc proceedings such as the prosecution of Habré in Senegal, propelled by victim participation, may offer a more flexible and practical approach.

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