CORRUPTION ABROAD: FROM CONFLICT TO CO-OPERATION: A COMPARISON OF FRENCH AND AMERICAN LAW AND PRACTICE

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I. INTRODUCTION

A large gulf, in perception and in practice, separates civil and common law criminal procedures. The gulf has been the deepest between France and the United States. France and the United States share a commitment to combating corporate foreign corruption as exemplified by their early support and promotion of the Organization for Economic Co-operation and Development ("OECD") Anti-Bribery Convention.[1] However, the divergent paths taken in their efforts to foster corporate compliance and enforce anti-corruption laws have resulted in geo-political tension as illustrated by French allegations of "legal imperialism" and economic warfare and espionage"[2] following the

1 The Organization for Economic Co-operation and Development [OECD], Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, T.I.A.S. No. 99-215, 37 I.L.M. 1, [hereinafter OECD Convention on Combating Bribery of Foreign Public Officials]. For an excellent summary and explanation of the OECD Convention on Combating Bribery of Foreign Public Officials, *see generally* Mark Pieth, *Article 2—The Responsibility of Legal Persons*, *in* THE OECD CONVENTION ON BRIBERY: A COMMENTARY 173 (Mark Pieth, Lucinda A. Low & Peter J Cullen eds., Cambridge University Press, 1st ed. 2007).

2 *See* ASSEMBLEE NATIONALE, RETABLIR LA SOUVERAINETE DE LA FRANCE ET DE L'EUROPE ET PROTEGER NOS ENTREPRISES DES LOIS ET MESURES A PORTEE EXTRATERRITORIALE, RAPPORT A LA DEMANDE DE MONSIEUR ÉDOUARD PHILIPPE PREMIER MINISTRE, ETABLI PAR *RAPHAEL GAUVAIN*, June 26, 2019 [hereinafter *Gauvain Report*] (*French Parliamentary report making recommendations for re-establishing French and European sovereignty and protecting French companies from extraterritorial laws and measures*); M. OLIVIER MARLEIX & M. GUILLAUME KASBARIAN, COMMISSION D'ENQUETE CHARGEE D'EXAMINER LES DECISIONS DE L'ÉTAT EN MATIERE DE POLITIQUE INDUSTRIELLE, AU REGARD DES FUSIONS D'ENTREPRISES D'ALSTOM, D'ALCATEL ET DE STX, AINSI QUE LES MOYENS SUSCEPTIBLES DE PROTEGER NOS FLEURONS INDUSTRIELS NATIONAUX DANS UN CONTEXTE COMMERCIAL MONDIALISE, ASSEMBLEE NATIONALE Rapport No.897 (Apr. 19, 2018) (*Parliamentary Inquiry into industrial policy decisions of the French State with respect to recent acquisitions by foreign firms of French national champions, and in particular Alstom, Alcatel, and STX and how best to protect French national champions from the effects of globalization*) [hereinafter MARLEIX COMMISSION]; Assemblée Nationale, RAPPORT D'INFORMATION N°4082 DEPOSE EN APPLICATION DE L'ARTICLE 145 DU REGLEMENT DE L'ASSEMBLEE NATIONALE EN CONCLUSION DES TRAVAUX DE LA MISSION D'INFORMATION COMMUNE SUR L'EXTRATERRITORIALITE DE LA LEGISLATION AMERICAINE, *PIERRE LELLOUCHE (PRESIDENT) ET KARINE BERGER (RAPPORTEURE)*, Oct. 5 2016 (*French parliamentary report on American extraterritorial legislation*) [hereinafter *LELLOUCHE/BERGER*].

institution of anti-bribery criminal proceedings by U.S. authorities against large French corporations.[3]

See also Frederick T. Davis, *Where Are We Today in the International Fight against Overseas Corruption: A Historical Perspective, and Two Problems Going Forward*, 23 ILSA J. INT'L & COMP. L. 337, 342 n. 29 (2017) [hereinafter Davis, *Where Are We Today*] (citing Julie de la Brosse, *Le Racket Géant des Amendes Economiques Infligées par les Etats-Unis*, L'EXPRESS (Oct. 11, 2016, 7:40 AM), https://lexpansion.lexpress.fr/actualite-economique/le-racket-geant-des-amendes-economiques-infligees-par-les-etats-unis_1848745.html; Virginie Robert, *Quand le Droit Devient une Arme de Guerre Economique*, LES ECHOS (Oct. 10, 2016, 1:01 AM), https://www.lesechos.fr/2016/10/quand-le-droit-devient-une-arme-de-guerre-economique-1112895); Rachel Brewster & Samuel W. Buell, *Law and Market: The Market for Global Anticorruption Enforcement*, 80 L. & CONTEMP. PROBS. 193, 204 (2017) [hereinafter Brewster & Buell]; Annalisa Leibold, *Article: Extraterritorial Application of the FCPA Under International Law*, 51 WILLAMETTE L. REV. 225, 244 n. 92 (2015) (citing Valérie Segond, *Corruption: La France Piégée* LE MONDE ECONOMIE (Jan. 16, 2015, 3:07 PM), https://www.lemonde.fr/entreprises/article/2015/01/18/corruption-la-france-piegee_4558515_1656994.html). *See generally* William Magnuson, *International Corporate Bribery and Unilateral Enforcement,* 51 COLUM. J. TRANSNAT'L L. 360 (2013); Charles F. Smith & Brittany D. Parling, *American Imperialism: A Practitioner's Experience with Extraterritorial Enforcement of the FCPA*, 2012 U. CHI. LEGAL F. 237 (2012).

3 French companies have been particularly hard hit in FCPA cases, with the fines levied against four companies (Alstom, Total, Technip, and Alcatel) figuring among the top ten highest in history when made. The fines levied were respectively: Alstom (2014)—$772 million, Total (2013) —$398 million, Technip (2010) —$338 Million, Alcatel-Lucent (2010)—$137 million. *LELLOUCHE/BERGER*, *supra* note 2, at 66-67. The fact that all but subsequently "merged" or were largely acquired by U.S. companies—Alstom (power generation division to GE), Alcatel (merger with Lucent), and Technip (merger with FMC Technologies)—has contributed to suspicion in France that the U.S. is using the FCPA as a weapon in its economic competition, often hyperbolically referred to as "economic war," with French national champions. The high fines levied against French banks for sanctions violations, in particular the $8.974 million against BNP Paribas, is viewed in France as providing further evidence of American "legal imperialism." *See* FREDERIC PIERUCCI & MATTHIEU ARON, LE PIEGE AMERICAIN: L'OTAGE DE LA PLUS GRANDE ENTREPRISE DE DESTABILISATION ECONOMIQUE RACONTE (2019) [hereinafter PIERRUCCI & ARON]; ALI LAÏDI, LE DROIT, NOUVELLE ARME DE GUERRE ECONOMIQUE: COMMENT LES ETATS-UNIS DESTABILISENT LES ENTREPRISES EUROPEENNES (2019) [hereinafter LAIDI]; *LELLOUCHE/BERGER supra* note 2, at 67. *See also* Stephane Lauer, *Le cauchemar américain*, LE MONDE (Dec. 30, 2019), https://www.lemonde.fr/idees/article/2019/12/30/sous-couvert-de-lutte-contre-la-corruption-et-le-terrorisme-l-extraterritorialite-du-droit-americain-est-une-arme-de-guerre-economique_6024359_3232.html; Celestine Bohlen, *France Lets U.S. Lead in Corruption Fight*, N.Y. TIMES, (Apr. 6, 2015), https://www.nytimes.com/2015/04/07/world/europe/france-lets-us-lead-in-corruption-fight.html. Recent post-Sapin 2 corruption and bank sanction breaking cases, notably the Société Générale plea bargain, differ significantly from these pre-Sapin 2 cases in the extent of co-operation by the companies and French authorities with American authorities as discussed *infra* Part III(A).

Legal culture lies at the root of the different approaches. French and American criminal procedure law and practice differ markedly as a result of their separate histories and distinct political, social, and corporate cultures.[4] Using criminal proceedings for foreign corporate bribery instituted by the U.S. Department of Justice ("DOJ") against iconic French companies as a comparative law case study, this Article examines how these fundamental differences in criminal law and practice contributed to a confrontational atmosphere towards American anti-corruption efforts. The experience of French "national champions" with American practices strongly "resonated" in France as evidenced in the intense debate on the integration of plea bargaining and whistleblowing into France's anti-corruption arsenal in the Law on Transparency and the Fight against Corruption in the Modernization of the Economy which entered into force in December ("Sapin 2")[5]

The recent use, of *the Convention judiciaire d'intérêt public* ("CJIP"), Sapin 2's major, and most controversial, innovation (also known as the French plea bargain) signals that Franco-American corruption enforcement has moved from confrontation to co-operation. The French specialized prosecutor for financial crime, (*Parquet National Financier*, or "PNF")'s, conclusion of two CJIPs—first with the-Société Générale, one of France's leading banks, and second with AIRBUS, the world leading aeronautical giant—provides hope that differences of legal culture, if properly understood, respected, and integrated into the process, need not hinder collaboration between French and American authorities. In both cases, the French CJIPs were entered into simultaneously with a Deferred Prosecution Agreement ("DPA") with the DOJ, which provided for a 50/50 fine-sharing agreement between the French and American authorities who worked together in the investigative and negotiation process.[6] These two

4 *See generally* JACQUELINE HODGSON, FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE (2005) [hereinafter HODGSON]; ANTOINE GARAPON & IOANNIS PAPADOPOULOS, JUGER EN AMÉRIQUE ET EN FRANCE (2003) [hereinafter GARAPON & PAPADOPOULOS].

5 Loi 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique [Law 2016-1691 of December 9th, 2016 on Transparency, the Fight against Corruption and the Modernisation of the Economy], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 10, 2016 [hereinafter Loi 2016-1691 du 9 décembre 2016].

6 Convention judiciaire d'intérêt public (CJIP) conclue entre le procureur de la République financier et la Société Générale, S.A. le 24 mai 2018 [Public Interest Judicial Agreement ("CJIP") concluded between the national public prosecutor for

negotiated settlements are consistent with a growing worldwide co-operative trend that was initiated in the Oldebrecht (Brazil, Switzerland, USA) anti-corruption settlement and further reinforced in the Rolls-Royce anticorruption settlement.[7]

This article will first outline fundamental differences between French and American criminal law and procedures, with emphasis placed on how fundamental differences between the two legal traditions, in particular the roles played by criminal justice professionals, significantly contributed to French hostility and resistance to the adoption of American style mechanisms for combating corporate corruption.

financial crimes and Société Générale SA] AGENCE FRANÇAISE ANTICORRUPTION [FRENCH ANTICORRUPTION AGENCY], May 24, 2018 (Fr.) [hereinafter SOCGEN CJIP]; Press Release, U.S. Dep't of Justice, Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate (June 4, 2018), https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan [hereinafter DOJ SOCGEN Press Release]. *See also* Convention judiciaire d'intérêt public (CJIP) entre le Procureur de la République et la société AIRBUS SE, le 31 janvier 2020 [Public Interest Judicial Agreement concluded between the national public prosecutor for financial crimes and AIRBUS SE], AGENCE FRANÇAISE ANTICORRUPTION, Jan. 31, 2020 (Fr.)[hereinafter AIRBUS CJIP]; Cloé Aeberhard & Marie-Béatrice Baudet, *Airbus, Amende record pour tourner la page*, LE MONDE, *2-3 february, 2020 at 18* [hereinafter, Airbus, amende record] ; Press Release, U.S. Dep't of Justice, Airbus Agrees To Pay Over $3.9 Billion In In Global Penalties To Resolve Foreign Bribery And Itar Case (Jan. 31, 2020), https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case [hereinafter DOJ AIRBUS Press Release]. The AIRBUS settlement was tripartite, with the UK Serious Fraud Office ("SFO") joining the PNF and DOJ in penalty sharing. *See* Press Release, U.K. Serious Fraud Office, SFO Enters into Deferred Prosecution Agreement with Airbus as Part of a €3.6 Billion Global Resolution (Jan. 31, 2020), https:/www.Sfo.gov.uk/2020/01/31/sfoenters-into-€999.1m-deferred-prosecution-agreement-with-Airbus-as-part-of-a-€3.6billion-global-resolution [hereinafter SFO AIRBUS Press Release].

7 For information regarding the Oldebrecht settlement, *see* Press Release, U.S. Dep't of Justice, Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2006), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve [hereinafter DOJ Odebrecht Press Release]. *See also* OECD, RESOLVING FOREIGN BRIBERY CASES WITH NON-TRIAL RESOLUTIONS: SETTLEMENTS AND NON-TRIAL AGREEMENTS BY PARTIES TO THE ANTI-BRIBERY CONVENTION 189-196 (2019), https://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf [hereinafter OECD Non-Trial Resolutions]. For information regarding the Rolls-Royce settlement, *see* OECD Non-Trial Resolutions, at 197-201; *see also* Tony Melville, *Rolls-Royce Settles Bribery Probes in UK, U.S. and Brazil*, REUTERS (Jan. 16, 2017), https:/www.reuters.com/article/US-rolls-royce-hldg-fraud-settlement-idUSITBN15025C.

Second, the intense debate in France sparked by the shock caused by the substantial fines levied on French "national champions" under the Foreign Corrupt Practices Act ("FCPA"), will be analyzed.

Third, Sapin 2, the legislative response to this perceived American "legal imperialism," will be analyzed and compared to the FCPA and American practice.

Fourth, recent French anti-bribery developments—including the ground-breaking joint Franco-American DPA/CJIP plea bargain arrangement with the major French bank Société Générale for corruption in Libya, the initiation of foreign corruption cases against leading French companies and powerful corporate leaders, and the acceptance of private Non-Governmental Organizations ("NGOs") as civil party victim intervenors in international anti-bribery cases—will be summarized.

Finally, using the tripartite France-UK-US negotiated settlements in the landmark Airbus case as a focal point, this Article will conclude with a prognosis on the success of Sapin 2 and suggestions on how the comparative study of the implementation of anti-corruption measures in France and the U.S. may be used to spur limited cross-Atlantic "legal transplants" aimed at improving international corporate anti-corruption enforcement.

II. FUNDAMENTAL DIFFERENCES BETWEEN FRENCH AND AMERICAN CRIMINAL PROCEDURES

A. Introduction

The gulf between the two legal systems is a result of their separate historical developments; distinct legal, political, and social cultures; and fundamental differences in the roles played by criminal justice legal professionals.[8] Prior to Sapin 2, a lack of familiarity with American criminal procedure and negative perceptions of American extra-territoriality led to French-American tensions following FCPA plea bargain settlements of corporate foreign bribery cases between the DOJ and Securities and Exchange Commission ("SEC") on the one hand, and four major French companies on the other .[9] The severity of

[8] *See generally* GARAPON & PAPADOPOULOS, *supra* note 4; HODGSON, *supra* note 4.

[9] The four major companies were Alcatel, Alstom, Technip, and Total. For a description of these four cases s*ee supra* note 3, *infra* III A.(1-4).

Although the extensive co-operation between French and US Authorities in the recent Société Générale and Airbus cases, *see* SOCGEN CJIP, *supra* note 6;

the sanctions in these four pre-Sapin 2 French corporate corruption cases and the enormous fines levied against French banks for U.S. sanctions-breaking[10] sparked outrage in France. Some French legislators and commentators characterized the actions brought against French companies as "economic warfare" designed to cripple French national industrial champions.[11]

AIRBUS CJIP, *supra* note 6 (signals significant progress towards a more co-operative relationship a revival of tensions cannot be excluded.). *See also* LAÏDI, *supra* note 3, at 181-195.

Other cases illustrating continuing US interest in French international corruption include Sanofi, the leading French pharmaceutical company which consented to pay $27.5 Millions pursuant to a SEC "cease and desist" order relating to corruption in Kazakhstan and several Mideastern countries. *See* Press Release, U.S. Sec. & Exch. Comm'n, Sanofi Charged With FCPA Violations (Sept. 4, 2018), https://www.sec.gov/news/press-release/2018-174 (on Sept. 4, 2018,)

10 *See* Press Release, U.S. Dep't of Justice, BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions (June 30, 2014), https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial [hereinafter DOJ BNP Paribas Press Release]; Marine Garido Martin, *La justice américaine au crible de l'affaire BNP Paribas*, 28 LE PETIT JURISTE 8-9 (Dec. 14, 2014); Press Release, U.S. Dep't of Justice, Crédit Agricole Corporate and Investment Bank Admits to Sanctions Violations, Agrees to Forfeit $312 Million (Oct. 20, 2015), https://www.justice.gov/opa/pr/cr-dit-agricole-corporate-and-investment-bank-admits-sanctions-violations-agrees-forfeit-312.

11 The notion that the U.S. is waging an "economic war" on France against its "national champions" under the guise of penalties for economic sanction violations and corruption has figured prominently in numerous press articles, studies, blogs, books, TV documentaries, and parliamentary reports. *See, e.g.*, Nicolas Baverez, *Guerre des droits* [*Rights' Wars*], LE POINT (May 2, 2019), https://www.lepoint.fr/debats/nicolas-baverez-guerre-des-droits-02-05-2019-2310417_2.php; Paule Gonzalez, *Les cabinets anglo-saxons, chevaux de Troie du department de la Justice* [Anglo Saxon Law Firms, DOJ's Trojan Horses], LE FIGARO (Nov. 13, 2018), https://www.lefigaro.fr/actualite-france/2018/11/13/01016-20181113ARTFIG00379-les-cabinets-d-avocats-anglo-saxons-chevaux-de-troie-de-la-justice-americaine.php; Jean-Pierre Robin, *Comment réagir aux abus du dollar et à l'impérialisme judiciaire américain* [How to Respond to America's Abusive Use of the Dollar and Legal Imperialism], LE FIGARO (Nov. 4, 2018), https://www.lefigaro.fr/vox/economie/2018/11/04/31007-20181104ARTFIG00170-jean-pierre-robin-comment-reagir-aux-abus-du-dollar-et-a-l-imperialisme-judiciaire-americain.php; Jean-Marc Leclerc, Interview with Olivier Marleix, *Sur l'intelligence économique, la France est trop naive* [France's is Too Naive When it Comes to Economic Intelligence], LE FIGARO (Nov. 13, 2019), https://www.lefigaro.fr/international/2018/11/13/01003-20181113ARTFIG00333-olivier-marleix-sur-l-intelligence-economique-la-france-est-trop-naive.php; Jean-Michel Saussois, *Le facteur et le juge face 'aux Américains* [The Postman and the Judge Facing the Americans] THE CONVERSATION (June 20, 2018), http://theconversation.com/le-facteur-et-le-juge-face-aux-americains-90677; *Guerre économique: comment la justice américaine cible les entreprises étrangères*, FRANCEINFO (Jan. 20, 2018), https://www.francetvinfo.fr/economie/entreprises/rachat-d-

These assertions of "economic warfare" and "legal imperialism," whatever may be their validity, tend to hinder the development of effective anti-corporation enforcement, as they cloud the necessary inquiry into how fundamental legal cultural[12] differences that affect perceptions are required to develop effective transnational corruption enforcement mechanisms.

This Article will therefore analyze the role played by French legal professionals in evidence gathering and "internal" investigations, plea bargaining, "civil party" victim intervention in the legal process, administrative agencies practices whistleblowing, business culture and corporate governance. This comparative analysis will facilitate evaluation of the potential for success of Sapin 2's anti-corruption provisions and promote reflection on how successful French anti-corruption procedure initiatives may serve to invite change in controversial aspects of American practice

French criminal procedure may be broadly categorized as hierarchical, state-centric, unified, formal, and "judge-dominated" in opposition to the generally participatory, party-oriented, dispersed, contractual, lawyer-led American system.[13]

These characteristics translate into a criminal process in France in which the actors (police, prosecutors, investigating magistrates, and "sitting" judges) closely interact, within a hierarchy and in conformity with formalized legal rules, to develop a coherent file or "dossier"

alstom/enquete-franceinfo-guerre-economique-comment-la-justice-americaine-cible-les-entreprises-etrangeres_2570427.html; MARLEIX COMMISSION, *supra* note 2; *LELLOUCHE/BERGER*, *supra* note 2. *See also infra* note 105 and accompanying text for more materials on Alstom.

12 The concept of "legal culture" used in comparative law analyses as this Article is far broader than the positive "law" of legislation and case law and encompasses legal institutions, the practice and perceptions of the members of legal professions, the writing of legal scholars, and the widely shared values of a nation, which are all embedded in the general culture and history of the nation. *See generally* Roger Cotterell, *Comparative Law and Legal Culture in* THE OXFORD HANDBOOK OF COMPARATIVE LAW (Reimann & Zimmerman ed., 2006). *See also* GARAPON & PAPADOPOULOS, *supra* note 4, at 17-37 (comparing French and American legal cultures); FREDERIC AUDREN & JEAN-LOUIS HALPERIN, LA CULTURE JURIDIQUE FRANCAISE, MYTHES ET REALITES (2013).

13 BENJAMIN FIORINI, L'ENQUÊTE PÉNALE PRIVÉE: ÉTUDE COMPARÉE DES DROITS FRANÇAIS ET AMERICAIN 41-46 (2018); MIRJAN DAMAŠKA, EVIDENCE LAW ADRIFT (1997); MIRJAN DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1991); Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131, 134-135 (1983); Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480 (1975). *See also* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2003).

upon which critical decisions throughout the process and ultimately guilt or innocence will be largely made.[14] Prosecutors and investigating magistrates, both classified as "judges," are expected to always act in the public interest, or "intérêt géneral," and not as parties to a theoretically equal battle between adversaries as in the U.S. Prosecutors and investigating magistrates are in charge of evidence gathering and look askance at involvement of defense lawyers of other private parties as an infringement on their truth-seeking monopoly.[15] Prosecutors, investigating magistrates, and trial judges—who share the same education and training—perceive themselves as members of the same "corps" gravitating within an essentially civil service system.[16] Defense lawyers are perceived as outsiders and view themselves as apart and as independent defenders of individual liberty.[17] Consequently, commonplace aspects of American criminal procedure—such as internal investigations by private parties, plea bargaining, and self-denunciation—have, until very recently, been met with strong resistance.[18]

B. Legal Professionals and Evidence Gathering

1. Investigating magistrates, prosecutors and the debate over who is a "judge"?

The French investigative magistrate ("juge d'instruction") is the central player in major corporate corruption cases. While investigative magistrates handle less than 1.5 % of criminal cases overall,[19] they are

14 FIORINI, *supra* note 13, at 107-108. *See* text *infra*, note 24.

15 FIORINI, *supra* note 13, at 89-92.

16 HODGSON, *supra* note 4, at 65. *See also* CHRISTOPHE PERRIN & LAURENCE GAUNE, PARCOURS D'AVOCAT(E)S, 65 (2011) (interview with prominent criminal defense attorney, Eric Dupont-Moretti).

17 HODGSON, *supra* note 4; PERRIN & GAUNE, *supra* note 16.

18 For information regarding the French system, *see* Antoine Kirry, Frederick T. Davis, & Alexander Bisch, *France*, 8 THE INTERNATIONAL INVESTIGATIONS REVIEW 114, 114-127 (Nicolas Bourtin ed., 2018) [hereinafter, Kirry, Davis & Bisch]. For an excellent recent introduction to American criminal procedure written from a comparative law vantage point by a former federal prosecutor, international criminal defense and internal investigative counsel, comparative criminal procedure law professor, and member of the Paris bar, *see generally,* FREDERICK T. DAVIS, AMERICAN CRIMINAL JUSTICE: AN INRODUCTION (Cambridge, 2019) [hereinafter, DAVIS]. *See also* Mary Jimeno-Bulnes, *American Criminal Procedure in A European Context*, 21 CARDOZO J. INT'L & COMP. L. 409 (2013) [hereinafter, Jimeno-Bulnes].

19 MINISTERE DE LA JUSTICE, LES CHIFFRES-CLES DE LA JUSTICE (2018). The number of investigative magistrates and cases handled by them has declined over the past decade with a corresponding increase in those disposed of by prosecutors.

generally in charge of the pre-trial investigative process in major corruption cases. Formerly referred to as "the most powerful man in France,"[20] the investigating magistrate remains an essential figure in the French criminal justice system, especially in corruption cases.

The broad support across French society for the investigating magistrate stems from political, social, and cultural influences largely particular to France. France has steadfastly resisted the trend of other European civil law countries towards adopting a more American style "adversarial" criminal procedure system. Most European civil law jurisdictions—and notably for this study, Germany, Italy, and Switzerland—have abolished their equivalent to the investigating magistrate.[21] France, on the contrary, has retained and strengthened the investigating magistrate's role, despite intense efforts by President Nicolas Sarkozy to abolish it in 2009 and major highly-mediatized scandals involving child murder and abuse.[22]

See RENAUD VAN RUYMBEKE, LE JUGE D'INSTRUCTION (6th ed. 2016) [hereinafter VAN RUYMBEKE]; Jacqueline Hodgson & Laurène Soubise, *Prosecution in France*, *in* OXFORD HANDBOOKS ONLINE 8-10, 13, 17-18; BENOÎT GARNOT, HISTOIRE DES JUGES EN FRANCE DE L'ANCIEN RÉGIME A NÒS JOURS 242 (2014); HODGSON, *supra* note 4, at 5, 67; FABRICE LHOMME, RENAUD VAN RUYMBEKE: LE JUGE (2007) [hereinafter LHOMME, LE JUGE] (Judge Van Ruymbeke is one of the best known French investigative magistrates with considerable experience in foreign corruption cases).

20 ANTOINE GARAPON, BIEN JUGER: ESSAI SUR LE RITUEL JUDICIAIRE 159 (2001); LHOMME, LE JUGE *supra* note 19, at 9. The phrase "the most powerful man in France" is attributed to the Famous French novelist, Honore de Balzac, *Splendeurs et miseres des courtisanes,* in LA COMEDIE HUMAINE*,* Bibliotheque de la Pleiade,t .v, Gallimard, 1052, para. 936 (1845).

21 Germany in 1974, Italy in 1989, Austria in 2004, and Switzerland in all cantons by Jan. 1, 2011. *See* Julien Walthier, *Se passer du juge d'instruction à la lumière allemande?*, *in* DU JUGE D'INSTRUCTION VERS LE JUGE DE L'ENQUÊTE 142 (Laurent Kennes & Damien Scalia eds. 2017); STEPHEN THAMAN, COMPARATIVE CRIMINAL PROCEDURES 18 (2008). For a comparative law analyses of the Italian and Swiss reforms, *see* Kevin Mariat, *Les enseignements du système italien*, *in* DU JUGE D'INSTRUCTION VERS LE JUGE DE L'ENQUÊTE 215-236 (Laurent Kennes & Damien Scalia eds. 2017); Edmondo Bruti Liberati, *La Réforme de la procédure Pénale italienne de l'inquisitoire à l'accusatoire*, *in* DU JUGE D'INSTRUCTION VERS LE JUGE DE L'ENQUÊTE 237-260 (Laurent Kennes & Damien Scalia eds. 2017); Laurent Moreillon, *Supprimer conserver ou modifier le juge d'instruction? Enseignments de droit comparé: approche théorique*, *in* DU JUGE D'INSTRUCTION VERS LE JUGE DE L'ENQUÊTE 251-260 (Laurent Kennes & Damien Scalia eds. 2017); Sandrine Rohmer, *Supprimer, conserver ou modifier le juge d'instruction: approche pratique*, *in* DU JUGE D'INSTRUCTION VERS LE JUGE DE L'ENQUÊTE 261-269 (Laurent Kennes & Damien Scalia eds. 2017).

22 VINCENT LE COQ, IMPUNITIÉS, UNE JUSTICE À DEUX VITESSES, 273-278 (Iris granet Cornée, ed. 2017) [hereinafter LE COQ]; DOROTHÉE MOISAN, LE JUSTICIER: ENQUÊTE SUR UN PRÉSIDENT AU-DESSUS DES LOIS, 157-167 (2010). President

The French inquisitorial model[23] of criminal procedure, which originated in 1270 during the reign of Saint Louis, entrusts the investigation of serious criminal offenses to the judiciary. The investigating magistrate, whose formal creation dates to 1522, is mainly insulated from governmental interference and must act as a neutral party. The judge must search for and evaluate evidence both in favor and against suspects and persons whose indictment the judge believes is warranted.

In the state-centric pre-trial inquiry evidence-gathering phase of the French criminal process, the investigating judge marshals the evidence obtained, with police assistance, from searches of corporate offices, document production requests, and the interrogation of witnesses, suspects, and victims. The judge then builds a coherent file, or "dossier," that will be central to an eventual trial.[24] The investigating

Sarkozy's failure to abolish the institution and its traditional support in French political and social culture should not obscure the severe criticism of investigating magistrates in particular cases, notably the highly mediatized "Petit Grégory" child murder and child sexual abuse "Outreau" scandals which led to legislative changes designed to protect defendants. For severe criticism of the Outreau case by one of France's best known criminal defense attorneys, *see* ERIC DUPOND-MORETTI & STÉPHANE DURAND-SOUFFLAND, DIRECTS DU DROIT, 121- 154 (2017). For an analysis of how Outreau illustrates the limits of the "inquisitorial" system by two former magistrates who are France's leading writers on justice, history, and comparative criminal law, *see* ANTOINE GARAPON & DENIS SALAS, LES NOUVELLES SORCIÈRES DE SALEM, LEÇONS D'OUTREAU (2006).

23 Eminent American comparatists warn that civil law professionals may be offended by the term "inquisitorial," and suggest "accusatorial" to be the better term. *See* JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION 127 (3rd ed. 2007); GEORGE FLETCHER & STEVE SHEPPARD, AMERICAN LAW IN A GLOBAL CONTEXT 532 (2005). *See also* Oscar G. Chase, *American "Exceptionalism"and Comparative Procedure*, AM. J. COMP. L. 282-84 (2002); MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL TRANSFORMATIONS/THE RIGHTS REVOLUTION IN THE COURTS OF EUROPE 268-269 (2009) [hereinafter, LASSER]. While contending that the "rights revolution" initiated by "fair trial" judgments of the European Court of Human Rights has partially transformed French criminal procedure from an inquisitorial to an adversarial model Lasser cautions against the use of adversarial/inquisitorial or episodic/concentrated trial distinctions. Many French legal professionals, however, continue to use "inquisitorial" as a badge of honor marking their hostility to the imposition of American criminal procedures. *See* Jimeno-Bulnes, *supra* note 18, at 421-59 (for historical background and a summary of the essential feature and terminology of both traditions).

24 The "dossier" contains all the materials obtained by the investigating magistrate in the course of his "instruction," and illustrates the essentially written nature of French criminal procedure. It constitutes the essence of a French criminal case justifying that it, rather than the accused, is on trial. It has great influence on all key decisions in the criminal process, including the decision to indict and prosecute, and is readily relied upon by trial and appellate judges. *See* HODGSON, *supra* note 4, at

magistrate is responsible for international investigative co-operative efforts—including the transmission of documents and the interrogation of witnesses or parties—in foreign corporate corruption cases. Additionally, the investigating magistrate shares the same guarantee of independence, non-removal from the case, and requirement to be impartial as ordinary French judges. In French parlance, ordinary judges, who like their American counterparts are in charge of procedure in all trials and decide guilt or innocence in bench trials, are referred to as "sitting" judges.[25]

The use of the term "judge" or "magistrate" in French criminal law terminology inevitably shocks common law legal professionals. In France, even prosecutors ("procureurs") are considered judges. They do not possess the same guarantees of independence as "sitting judges," and, unlike investigating magistrates, represent the state and are organized in a hierarchy.[26] Nevertheless, French prosecutors remain emotionally attached to their judicial status and title of magistrate. This institutional ethos is derived from the historical development of French prosecutors and their common professional education with other magistrates.[27]

The continued use of the term "'magistrates" for all three legal professionals-investigating judges, prosecutors, and ordinary judges continues to be a source of much confusion and even reprobation by the European Court of Human Rights and the French Court de Cassation.[28] Despite this criticism, French prosecutors stubbornly cling to

31-32, 246; JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, PRINCIPLES OF FRENCH LAW 123-124, 133 (1998).

25 *See* ROGER ERRERA, ET CE SERA JUSTICE: LE JUGE DANS LA CITE 194 (2013); DOMINIQUE INCHAUSPE, L'INNOCENCE JUDICAIRE 400-01 (2012); Valérie Dervieux, *The French System*, *in* EUROPEAN CRIMINAL PROCEDURES (Mirelle Delmas-Marty & J.R. Spencer eds., 2008).

26 HODGSON, *supra* note 4, at 67.

27 *Id*. at 66-67.

28 *See* Cour de cassation [Cass.] [supreme court for judicial matters] crim., Dec. 15 2010, Bull. crim., No. 7177 (Fr.) (stating that French prosecutor's role in the criminal process is inconsistent with the notion of belonging to the judiciary); Counseil constitutionnel [CC] [Constitutional Court] decision No. 93-326DC, Aug. 11, 1993 (Fr.) (holding that both sitting and standing (prosecutors) "judges" are part of the judiciary, which still holds under French law despite later decisions to the contrary); Sara Sun Beale, *Prosecutorial Discretion in Three Systems: Balancing Conflciting Goals and Providing Mechanisms for Control*, *in* DISCRETIONARY CRIMINAL JUSTICE IN A COMPARATIVE CONTEXT (Michele Caianielle & Jacqueline S. Hodgson eds., 2015); GARNOT, *supra* note 19, at 372.

their use of this terminology insisting that they are an integral part of a unified judiciary.[29]

This heated semantic debate, is rooted in the status and privilege historically granted to French judges. Prosecutors and judges share a common education and training, which creates a sense that they belong to the same "corps." This mentality is strengthened by transfers, promotions, and demotions between "sitting" and "standing" judges, a practice unique to France.[30]

The shared "corps" mentality is reinforced by the necessity for dynamic interaction amongst instructing magistrates, prosecutors, and "judicial" judges at key phases of the criminal procedure. First, prosecutors decide whether and when to commence the instruction phase of the process based on a preliminary investigation ("enquête préliminaire"), carried out by the police. The prosecutor prepares a file with a statement of facts and the corresponding applicable provisions of the criminal code, and this file is then submitted to one or two

29 *See* Mathilde Cohen, *The French Prosecutor as Judge: The Carpenter's Mistake?*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 76-108 (Maximo Langer & David Alan Sklansky eds., 2017); Hodgson & Soubise, *supra* note 19, at 7-8, 15-16; CONSEIL SUPÉRIEUR DE LA MAGISTRATURE, RAPPORT 2007 111 (2008); *Le procureur est-il un magistrat independent comme les autres ?* Conference, Institut des Hautes Etudes sur la Justice (IHEJ) of Apr. 9, 2018 https:/ihej.org/agenda/le.[rpcureur-est-il-un-magistratr-independant-commes-les-autres; François Molins, former chief, Paris prosecutorial office, Comments on Justice and Terrorism of Dec. 12, 2018; ERRERA, *supra* note 25, at 267.

30 This uniquely French transfer system between prosecutors and sitting judges has been denounced as an unacceptable example of the 'corporatism' of the judicial 'corps' by the newly appointed Attorney General ("*Garde des Sceaux"*) of France, Eric Dupont-Moretti. Notably, Dupont-Moretti,was until his appointment as *Garde des Sceaux* in July, 2020, France's best known and most outspoken criminal defense lawyers. He has urged reform of the judicial transfer system and the fostering of a closer relationship between judges and lawyers but recognizes that such reforms cannot be made in the short term due to the strong historical 'corporationist' traditions of the legal professionals in France, *see* Pascal Ceaux, Hervé Gattegno & Plana Radenovis, "Ce que je veux pour la justice", Interview of Eric Dupond-Moretti, LE JOURNAL DU DIMANCHE, July 19, 2020 at 4, https://www.lejdd.fr/Societe/Justice/eric-dupond-moretti-au-jdd-ce-que-je-veux-pour-la-justice-3981719. Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413 1471-74. *See also* JACQUES KRYNEN, L'IDEOLOGIE DE LA MAGISTRATURE ANCIENNE (2009); DANIEL SOULEZ LARIVIERE & HUBERT DALLE, NOTRE JUSTICE: LE LIVRE VERITE DE LA JUSTICE FRANÇAISE 133-159 (Robert Laffont ed., 2002); JACQUES KRYNEN, L'EMPRISE CONTEMPORAINE DES JUGES 420-21 (2012); Jacqueline Hodgson, *The French Prosecutor in Question*, 67 WASH. & LEE 1361, 1371-73 (2010); GARNOT, *supra* note 19, at 372; LASSER, *supra* note 23, at 15-16. The term "standing" judge—also referred to as the "parquet"—derives from the tradition of having prosecutors stand on parquet or wood floors during court proceedings. HODGSON, *supra* note 4, at 67 (note. 13)

investigating magistrates appointed by the Chief Judge of the District Court having jurisdiction. Second, although independent, the investigating magistrate's instruction is formally supervised by the prosecutor. In practice, a continuing dialogue between the investigating magistrate(s) and the prosecutor during the instruction is commonplace, and the presumed separation of roles is a fiction. Third, the instruction phase ends through a back and forth process of submission of the investigating magistrate's instruction file to the prosecutor, who reviews it and prepares a prosecutor's memo, which is transmitted to the investigating magistrate for his consideration in his decision to order dismissal or proceed to prosecution.[31]

Dialogue amongst the three types of magistrates is facilitated by their close physical proximity—often in the same building, justifying the adage "single corps, single courthouse." Communication between the "parquet" and sitting judges, at times contentious, is also required to decide how often scarce resources are to be allocated, as this responsibility is jointly shared by the chief judge of the district court and the district prosecutor.[32]

These interactions requiring continual dialogue illustrate why the question of who is a judge continues to be hotly debated. The French judiciary, often classified as "bureaucratic" and "*corporationalist*" tends to resist reform, especially if it implies the entry of "outsiders" into the judicial sphere of evidence-gathering in the constitution of the "dossier." This culture must be taken into account in analyzing France's capacity to effectively meet the challenges of implementing Sapin 2 in its drive to improve its international anti-bribery efforts.

31 *See* Kirry, Davis, & Bisch, *supra* note 18, at 116; VAN RUYMBEKE, *supra* note 19, at 51-52, 115-120.

32 Cohen, *supra* note 29, at 137. *See also* Jean-Paul Jean, *Projet de reforme de la justice, une avance significative* [*Justice Reform Project Marks a Significant and Relevant Evolution*], LE MONDE (Mar. 13, 2018, 11:00 AM), https://www.lemonde.fr/idees/article/2018/03/13/jean-paul-jean-ce-projet-de-reforme-de-la-justice-marque-une-evolution-significative-pertinente_5269896_3232.html (criticizing the complexity engendered by the sharing of resources between the ordinary "sitting" judiciary and the prosecutors).

France's poor reputation in international corporate cases[33] was the impetus for the adoption of Sapin 2.[34] The central role played by investigating magistrates in the criminal procedure process warrants examination of weaknesses in the institution that have contributed to France's poor performance.

Despite the fascination of the French public with the mythic image of "their little judge" as a solitary figure of moral integrity, investigating magistrates are far from favored subjects of the French treasury. The administration of justice is poorly funded in France, which ranks next to last among the thirty-eight member states of the European Union. Investigating magistrates' shoulder heavy workloads, which include significant administrative tasks, and handle as many as 300 "dossiers."[35] The resources allocated to their instruction of

33 The OECD Working Group on Bribery has, on several occasions, expressed severe criticism of France's anti-bribery efforts. Org. for Econ. Cooperation & Dev. [OECD], *France: Follow-up to the Phase 3 Report & Recommendations* 4 (Dec. 9, 2014), https://www.oecd.org/daf/anti-bribery/France-Phase-3-Written-Follow-up-ENG.pdf ("[T]he enforcement of the foreign bribery offence still falls far short of the expectations expressed by the Working Group during Phase 3"); *Statement of the OECD Working Group on Bribery on France's Implementation of the Anti-Bribery Convention*, OECD (Oct. 23, 2014), https://www.oecd.org/newsroom/statement-of-the-oecd-working-group-on-bribery-on-france-s-implementation-of-the-anti-bribery-convention.htm ("the Working Group remains concerned by the lack of proactivity of the authorities in cases which involve French companies in established facts or allegations of foreign bribery. To this day, no French company has yet been convicted for foreign bribery in France, whereas French companies have been convicted abroad for that offence, and the sanctions for convictions of natural persons have not been dissuasive. . . . the Working Group expresses serious concerns for France's limited efforts to comply with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and strongly encourages France to pursue the reforms which were previously announced and remain necessary."); OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in France* 5 (Oct. 12, 2012), https://www.oecd.org/daf/anti-bribery/Francephase3reportEN.pdf ("Express its particular concern *by the lackluster response of the French authorities in relation to companies sanctioned by other Parties to the Convention*") (emphasis added).

34 *See* Michel Sapin, *Transparence, lutte contre la corruption, modernisation de la vie économique: la France aux avant-postes avec la publication de la loi du 9 dec. 2016*, LETTRES DE LA DAJ NO. 222 (Direction des Affairs Juridiques, Paris) Dec. 2016.

35 LE COQ, *supra* note 22, at 188. The French justice system is seriously underresourced compared to most other European nations. This structural relative underbudgeting is reflected in the very low percentage of prosecutors per capita (3 for 100,000 persons compared to 6 and 8 for Germany and Belgium, respectively, and over 2,600 cases per prosecutor compared to 875 for Germany and 775 for Belgium). Jean-Baptiste Jacquin, *Les carences structurelles de la justice française*, LE MONDE (Oct. 7, 2016), https://www.lemonde.fr/police-justice/article/2016/10/06/les-carences-de-la-justice-francaise-apparaissent-

corruption cases, and, in particular, the critical assistance of specialized police inspectors, have been meager.[36]

Commentators suggest that the underfunding of the work of investigating magistrates is intentional and linked to politicians' displeasure with investigating magistrates' interest in political corruption, both domestic and international.[37] Moreover, the dynamic interaction between the investigation of magistrates and prosecutors, and the designation of the investigating of the magistrate by the chief district judge, are susceptible to abuse and indirect political influence on sensitive corruption cases.[38]

International corruption cases magnify the weaknesses of the institution. The need to work in collaboration with foreign authorities; translate documents and conduct interrogations of non-French speakers; become familiar with foreign and international law; and attempt

structurelles_5009217_1653578.html. The number of prosecutors in the specialized Paris-based financial crimes unit ("PNF"), which handles international corruption cases, is also limited—eighteen prosecutors handling 480 cases. Jean-Yves Lourgouillox, *Le Parquet National Financier (PNF) in De la conformité à la justice négociée, actualité de la lutte anticorruption*, ÉCOLE NATIONALE DE LA MAGISTRATURE (May 17, 2018), http://www.enm.justice.fr/sites/default/files/actu-pdf/Actes-du-colloque_De-la-conformite-a-la-justice-negociee.pdf (see page 28). *See also* Jean-Baptiste Jacquin, *Le livre noir des procureurs sur les rates de la justice*, LE MONDE (July 4, 2017, 11:38 PM), https://www.lemonde.fr/police-justice/article/2017/07/04/le-livre-noir-des-procureurs-sur-les-rates-de-la-justice_5155386_1653578.html (noting, as representative of France as a whole, that 600 criminal cases per year had to be dismissed on statute of limitations grounds due to the lack of available prosecutors in a single middle sized town). Although the number of prosecutors and auxilliaries is on the rise, Charles Duchaîne, a former investigating magistrate who now heads the specialized anti-corruption agency AFA, has tried to lower expectations by stating that PNF's work will necessarily be constrained by the limited resources allotted to it. Elodie Guéguen, *Au cœur du parquet national financier, qui mène l'enquête sur l'affaire Fillo*, FRANCE INFO, (Mar. 30, 2017, 2:35 PM), https://www.francetvinfo.fr/economie/emploi/metiers/droit-et-justice/samedi-investigation-dans-les-coulisses-du-parquet-national-financier_2070217.html. Limited relief may, however, be on the way as a result of recent changes in the Paris prosecutorial office and the funding of new hires. Echoing the comments of Charles Duchaine, president of the Association of Investigating magistrates, Pascal Gastineau, while saluting these reorganizational and funding initiatives, noted the need for additional resources at the investigating "instruction" phase of the process. *See* Jean-Baptiste Jacquin, *Le parquet de Paris se reorganise face a la grande criminalite*, LE MONDE (Dec. 20, 2019, 11 :29 AM), https://www.lemonde.fr/societe/article/2019/12/19/le-parquet-de-paris-se-reorganise-face-a-la-grande-criminalite-organisee_6023449_3224.html.

36 *See* LE COQ, *supra* note 22, at 225-227; ERIC ALT & IRENE LUC, L'ESPRIT DE CORRUPTION, 133-36 (2012).

37 *See* LE COQ, *supra* note 22, at 225-227; ALT & LUC, *supra* note 36, at 133-136.

38 LE COQ, *supra* note 22, at 173.

to trace funds worldwide impose often insurmountable burdens on investigating magistrates. Instead of receiving the necessary support and resources to perform their difficult work, investigating judges have instead often found themselves hindered in their actions. Consequently, investigations are dropped or delayed for years.[39]

Nevertheless, investigating magistrates have been successful in carrying out investigations resulting in convictions in domestic political and business corruption cases.[40] Success has been far rarer in international corruption cases, with the notable exception of the *Elf* case. The *Elf* case is of particular interest as the then partially French state-owned oil major merged—in large part due to this enormous politically-sensitive corruption scandal—into *Total*, one of the four French national champions on which the DOJ imposed heavy fines prior to Sapin 2, as discussed in Part III(B)(4) below. The *Elf* case involved massive corruption, however, as the illegal acts occurred prior to the promulgation of the French law integrating the OECD Anti-Bribery Convention, the charges centered on the reception of kickbacks or "retrocessions" by senior managers of part of the funds allocated for foreign bribery.[41]

Excepting *Elf,* pre-Sapin 2 international corruption investigations have been marked by failure. Two extremely troubling and inter-related unsuccessful investigations, the Taiwan Frégate and Clearstream cases illustrate serious deficiencies in the investigative process led by investigating magistrates.

The Taiwan Frégate case involved the payment of enormous bribes by leading French defense companies, Thales and Thomson-CSF, including, as in *Elf,* allegations of retrocessions. Despite the assistance of foreign colleagues, a murder and a suspected "suicide," and the vanishing of hundreds of millions of dollars, Renaud Van

39 ALT & LUC, *supra* note 36, at 133-36; Frederick Davis, Andrew Levine, & Charlotte Gunka, *France's New Anti-Corruption Framework: Potential Impact for Business in a Multinational World*, N.Y.U. L.: COMPLIANCE & ENFORCEMENT (Dec. 7, 2016).

40 For example, the *Urba* case implicating the Socialist party in the financing of political campaigns and politicians through kickbacks in the attribution of public tenders. *See* HODGSON, *supra* note 4, at 81-82; VAN RUYMBEKE, *supra* note 19, at 91-101.

41 *See* VAN RUYMBEKE*, supra* note 19, at 171-198. The *Elf* case, with its image of a brash investigating magistrate, Eva Joly, pitted against a corrupt "establishment" in the form of colorful senior managers and intermediaries captured the public's interest. Two films about *Elf* were made illustrating the French's penchant for tillilating corruption scandals. *See* LES PREDATEURS (Metro-Goldwyn-Mayer 2007); L'IVRESSE DU POUVOIR (Pan-Europeenne 2006).

Ruymbeke was unable to successfully complete the investigation due to the refusal by three successive Ministers of Finance to release critical documents classified as "sécret défense" (national security secret). France has been roundly criticized for its expansive use of the classification as national security in international corruption cases.[42]

Clearstream, spawned by the *Elf* and Taiwan Frégates cases, was a major political scandal involving a scheme (allegedly planned by the then-Prime Minister and Sarkozy's chief rival, Dominique de Villepin) to link then-candidate and later President, Nicholas Sarkozy, to "retrocessions" from international corruption based on falsified listings of the Luxembourg clearinghouse, Clearstream. This case illustrates two structural weaknesses of the investigating magistrate as an institution. First, Renaud Van Ruymbeke, generally considered one of France's best investigating magistrates, found himself a subject of an internal investigation and at risk of severe disciplinary sanctions due to off-the-record contacts tied to the Frégates and Clearstream cases, which were arguably inconsistent with the criminal procedure code. It appears that Van Ruymbeke was led to commit these uncharacteristic mistakes by his desire to find a way to pursue the Frégates case, demonstrating the negative effect of the isolation of the investigating magistrate when confronted with powerful political interests. Second, the investigation of Van Ruymbeke by his colleagues and the priority given to the "instruction" of Clearstream added to tensions of, and diverted critical resources from, the specialized Paris financial crimes unit or "pôle," of investigating magistrates.[43] This specialized unit created in 2000 is generally viewed as having been a failure with the PNF, led by prosecutors increasingly taking the lead since its creation in 2014. Tensions between the Paris-based investigating magistrates and prosecutors from the PNF have developed with the former sensing a loss of power, exemplified by the reversal of the percentage of cases they respectively handled. Prior to the creation of the PNF in 2014, investigating magistrates were responsible for approximately three

42 LE COQ, *supra* note 22, at 225-47; ALT & LUC, *supra* note 28, at 88-92; OECD Bribery Reports, *supra* note 33.

43 For information on the *Clearstream* case, *see generally* LAURENT VALDIGUIÉ, LE PROCÈS VILLEPIN (2010); FRÉDÉRIC CHARPIER, UNE HISTOIRE DE FOUS: LE ROMAN NOIR DE L'AFFAIRE CLEARSTREAM (2009); VAN RUYMBEKE, *supra* note 19, at 237-354. For criticism of this specialized financial unit, *see* LE COQ, *supra* note 22, at 190-199; *see also* BERNARD BERTOSSA, LA JUSTICE, LES AFFAIRES, LA CORRUPTION 202 (2009) (discussing the former Swiss Chief Prosecutor, who collaborated with French investigating magistrates on several major corruption cases. Bertossa, together with Renaud Van Ruymbeke and European colleagues, launched a call to action against international corruption the ("'Appel de Gèneve').).

quarters of the total cases, a percentage that has declined to one quarter since.[44]

2. Evidence Gathering Mechanisms—The Investigating Magistrate's Constitution of the "Dossier" Compared to American Style Law Firm Investigations

Investigative magistrates, by tradition and by the necessity of countering potential political interference, jealousy guard their independence. Given this conception of their role, investigating magistrates have tended to be wary of "internal" law firm corporate corruption investigations, viewing them as lacking credibility and creating unnecessary interferences complicate their work. This reticence has also been voiced by legislators, civil servants, and other judges who

44 These percentages depend on the classification by prosecutors of a case into preliminary investigations, or "*enquêtes préliminaires,"* within their jurisdiction or as "*information judiciaires*," which are "instructed" by investigating magistrates. *See Jean-Yves Lourgouilloux, Le Parquet national Financier in De la conformite à la justice négociée*, *supra* note 35, at 26-29; Elodie Guéguen, *supra* note 35, at 1. Since the enactment of Sapin 2, the attention of the government, the press, and foreign authorities—notably American—has focused on prosecutors and the PNF rather than the work of Paris-based "specialized" investigating magistrates whose record on international corruption cases has been poor. The prosecutors' embrace of the CJIP—the French "DPA"—in cases such as Société Générale, is seen as heralding the "future," despite reported tensions with the DOJ perceived as 'cow-boys' for their practice of short-circuiting established mechanisms for international legal cooperation. LAÏDI, *supra* note 3, at 319. Leading investigating magistrates have recently expressed concern over a trend to increase the power of prosecutors, thereby diminishing the role of investigating magistrates and leading to the gradual disappearance of the juge d'instruction. They cite, for example, the reduction of the time limit for victims (whose complaints represented three fourths of the caseload of the investigating magistrates "pôle") to file a request to initiate civil party criminal proceedings, in the absence of prosecutorial action, from six to three months in the draft justice reform law and the diminishing number of investigating magistrates with a corresponding increased case-load. *See* Interview with Pascal Gastineau, Investigating magistrate -TGI or 'District' court of Paris and President of the French Association of Investigating Magistrates, FRANCE CULTURE (Apr. 18, 2018). The transfer of experienced investigating magistrates at their request in 2017 is another signal of the unit's decline. *See* Pierre Alonso, *Le Loire, Daieff: deux juges du pôle financier s'en vont,* LIBERATION (May 10, 2017), https://www.liberation.fr/france/2017/05/10/le-loire-daieff-deux-juges-du-pole-financier-s-en-vont_1568596. Concern about the declining importance of investigating magistrates is reflected in the recent decision of France's constitutional court to censure provisions tending to marginize their role in the government's justice reform draft law. *See* Jean-Baptiste Jacquin, *La réforme de la justice partiellement censurée,* LE MONDE (March 23, 2019), https://www.lemonde.fr/societe/article/2019/03/21/la-reforme-de-la-justice-partiellement-censuree-par-le-conseil-constitutionnel_5439385_3224.html.

object to the practice as contrary to the civil law tradition of investing public authorities with the mission of enforcing the criminal law and as leading to unacceptable inequalities based on financial resources.[45]

The reality of French resistance to private law firm-led corruption investigations presents an opportunity for a comparative law analysis to evaluate the value of adopting American style anticorruption practices, such as internal investigations, in France. Are internal corporate investigations a universal requirement for effective anticorruption enforcement? The answer is, *a priori*, no. The use of internal investigations is an exception and not the rule in criminal cases in the U.S. While internal investigations have become standard procedure in corporate corruption cases and are increasingly used in major risky, reputational sexual harassment and product liability cases,[46] most corporate-criminal cases in which a corporation is the defendant are disposed of without the need for private lawyer-led assistance in the form of internal investigation reports.

American style "private" investigations may not be a pre-requisite to effective FCPA enforcement, but their increasing use in major

45 ERRERA, *supra* note 25, at 266-269; JACQUES BEAUME, MINISTERE DE LA JUSTICE, RAPPORT SUR LA PROCEDURE PENALE 70 (July 2014), *available at* http://www.justice.gouv.fr/publication/rap-beaume-2014.pdf;.

46 The Board of Directors of General Motors' ("GM") commissioning of an independent internal investigation of the Chevrolet Cobalt ignition switch recall case exemplifies the vast difference between American and French approaches to internal investigation. The GM investigation was led by Anton Valukas, a prominent former U.S. Attorney and a partner in a major law firm, who was given "carte blanche" (full access and near unlimited resources) to investigate the causes of the faulty device. The Valukas 315 page report, completed in only three months, included findings and recommendations on GM's bureaucratic culture and corporate governance. While prepared as an attorney-client privileged document, it was publicly released soon after its submission to the Board. GM CEO Mary Barra's actions in facilitating the investigation and implementing its recommendations and hiring Kenneth Feinberg, the mass tort compensation expert in charge of the September 11th and BP Deep Horizon cases, to handle restitution to victims was generally lauded as reducing GM's liability and limiting the damage to its reputation. The process was, however, not exempt from criticism. *See* Bill Vlasic, *GM Inquiry Cites Years of Neglect over Fatal Defect,* N.Y. TIMES (June 6, 2014), https://www.nytimes.com/2014/06/06/business/gm-ignition-switch-internal-recall-investigation-report.html (Sen. Richard Blumenthal called the report "the best report money can buy," and the mother of a victim stated "I hope the Department of Justice is able to uncover the entire truth"); *See also,* Sarah Ellison, *The Sexual Harassment Defense Industrial Complex is Growing in the #METoo Era*, WASH. POST (Oct. 17, 2018), https://www.washingtonpost.com/lifestyle/style/the-sexual-harassment-defense-industrial-complex-is-growing-in-the-metoo-era/2018/10/17/8447cf4a-cdd5-11e8-a360-85875bac0b1f_story.html (#Metoo sexual harassment cases, notably at media companies like Fox, NBC, and CBS generated a lucrative market for experienced lawyers to carry out in-depth internal investigations).

cases suggests that both the DOJ and corporate defendants benefit from its use. Investigations are very costly. By having corporate defendants bear these costs, governmental authorities conserve scarce resources creating a virtuous cycle of spending little while receiving significant amounts in fines which are then "invested" in initiating and disposing of more cases.

The availability of highly-skilled, experienced lawyers familiar with the techniques, constraints, mores, and decision-making process of government lawyers with access to and credibility with senior corporate management significantly facilitates evidence-gathering, thereby reducing costs and delay. As it is the corporation, through its lawyers, that first discovers and evaluates much of the evidence, tensions within the corporation may be lessened as compared to the anxiety inherent in the opaqueness of the investigating magistrates' instruction. Having gathered the evidence and interviewed witnesses themselves during the internal investigation, the company's lawyers have gathered sufficient facts to opine on the extent of corruption, if any, within the corporation. Consequently, the company's lawyers can map out a legal strategy, which in international corruption cases increasingly favors initiating settlement negotiations with governmental authorities such as the U.S. DOJ, the U.K. Serious Fraud Office ("SFO"), or France's PNF. In addition, necessary internal corporate reform in companies embroiled in corruption scandals may be fostered by independent internal investigations as in major product liability and sexual harassment cases where the investigators are given broad mandates to examine (and later offer proposed changes in corporate culture and governance).

Unlike their counterparts in the U.S., French "'judges,"—whether investigating magistrates or prosecutors—and French defense attorneys (*avocats*) are neither educated nor trained together, nor is there but rare movement between the two groups. This lack of a common core is an obstacle to the implementation of American-style lawyer-led investigation. In turn, this has led to calls for a "cultural revolution" in the relations between the French defense bar and French judicial and administrative professionals charged with enforcing anti-bribery law.[47]

47 Introduction, Atelier de réflexion, CONVENTIONS-*Réguler la Mondialisation, Enquêtes Internes en France: Enjeux et Perspectives*, [Workshop on Internal Investigations] (Mar. 29, 2017), http://convention-s.fr/wp-content/uploads/2017/04/Programme-Atelier-Cnventions-enque%CC%82tes-internes-29-mars-2017VF.pdf; Eric Russo, Premier Vice-procureur financier [Deputy Attorney-General, Financial Prosecution Unit], Remarks at FRANCE -AMERIQUES

The continued vitality of the investigating magistrate as the key player in the gathering and evaluation of evidence and the pursuit or dismissal of criminal charges presents a challenge to Franco-American cooperation in corporate corruption cases. The inquisitorial method significantly influences the perception and practice of French defense counsel and internal corporate strategy in response to American pressure to cooperate through voluntary disclosure.

American criminal procedure retains the historical and legal cultural imprint of a common law adversarial system in which the accused and accuser, as equal parties, gather and present evidence to a jury in the presence of a sitting judge whose role is to ensure the fairness of the fight.

American criminal justice professionals, including white-collar, corporate defense lawyers—imbued with the mores and manner of working of this adversarial model—are comfortable with the notion that investigating facts and collecting evidence is a task for the parties rather than a neutral judge acting in the public interest.[48]

Experience with intensive and intrusive discovery procedures and strong pressure to undertake costly internal investigations from DOJ prosecutors, motivated by resource considerations, have combined to lead most American and many foreign companies to accept self-disclosure and a duty to cooperate as necessary elements of the settlement process in foreign corruption cases.[49] French resistance to American demands for cooperation is, in part, the result of fundamental differences in practice—such as the central role of the investigating magistrate in the French "inquisitorial" model of evidence gathering and French defense counsel and corporate management's hostility to, or lack of experience with, American style "discovery." The

(Paris) Seminar on *Quelle coopération entre les procureurs et les entreprises, après la loi Sapin 2?* [What type of co-operation between Prosecutors and Companies After the Sapin 2 Law?] (Mar. 27, 2017). The proposed "cultural revolution" in attorney-judicial relations remains a distant dream as illustrated by the flare up in emotions resulting from a recent disciplinary complaint for alleged abusive language filed by the chief prosecutor of Paris against the attorney responsible for defending members of the Paris bar in conflicts arising out of client searches and seizures initiated by prosecutors and investigating magsitrates. *See* Yann Bouchez, *« je tape, je cogne avec les mots, c'est mon devoir d'avocat »*, LE MONDE (June 27, 2020), https://www.lemonde.fr/police-justice/article/2020/06/26/je-tape-je-cogne-avec-les-mots-c-est-mon-devoir-d-avocat-a-l-audience-disciplinaire-de-vincent-niore_6044258_1653578.html.

48 HODGSON, *supra* note 4, at 103-05; DAVIS, *supra* note 18, at 143.

49 PIERRE SERVAN-SCHREIBER, *L'avocat serviteur de deux maîtres?*, *in* ANTOINE GARAPON & PIERRE SERVAN-SCHREIBER, DEALS DE JUSTICE: LE MARCHE AMERICAIN DE L'OBEISSANCE MONDIALISEE 101, 103-09 (2013).

inquisitorial method significantly influences the perception and practice of French defense counsel and internal corporate strategy in response to American pressure to cooperate through voluntary disclosure and calls for internal investigations.

French criminal practice has traditionally not favored internal corporate investigations. The reticence to internal investigations in criminal matters may be attributed to the following:

1. An ingrained legal-cultural view that the criminal law was not an internal matter, but rather one of concern for the society as a whole. Consequently, investigations were properly within the province of those entrusted with the public interest, namely prosecutors belonging to the ministry of public justice ("Ministere Publique") or independent investigating magistrates.[50]
2. Skepticism as to whether corporate internal investigations are mere public relations gestures rather than dedicated attempts to truly discern the facts. This skepticism is fueled by the mutual distrust between business and legal professionals who, until recently, knew little of how each other worked and had little incentive to cooperate.[51] French criminal defense lawyers have had little experience with conducting internal corporate investigations and would be most resistant to the concept of handing over the results to the authorities. Their professional ethos is to strenuously defend their client, jealously guarding their—*and not their client's*—obligation to keep attorney-client communications secret.[52]

50 FIORINI, *supra* note 13, at 89-90.

51 Fred Einbinder, Comments at IHEJ-Scienes PO Seminar Les juristes d'entreprise en France: évolution et dilemmes (Mar. 14, 2013) (debate synthesis *available at* http://forumdelajustice.fr/ihej_wp/wp-content/uploads/2013/04/les_juristes_d_entreprise_en_France_evolution_et_dilemmes.pdf [hereinafter Einbinder, Les juristes d'entreprise].

52 Unlike the attorney-client privilege of American law, under French law it is the lawyer (avocat) who possesses the "privilege" and not the client. French avocats do not feel bound, and resist the notion, that they must disclose privileged communications if the client so desires or unintentionally "waives" the privilege. *See* LAÏDI, *supra* note 3, at 211- 213. The application of the "secret professional" is more a matter of professional ethics and tradition in France, rather than extensive case law as in the U.S. For example, French lawyers were in the forefront of opposition to European directives requiring lawyers to alert authorities to suspect money laundering transactions. Relying on the deep French aversion to denunciations, they successfully and significantly limited the directive's effect by establishing a special French procedure permitting individual lawyers to retain confidentiality by submitting alerts to the President of the Bar Association "*bâtonnier*." *See* Christian

3. Resistance to an internal investigation by corporate management and unions reinforced by the need to comply with complicated data privacy and labor law rules.
4. A lack of expertise in organizing and conducting internal investigations due to the absence of American-style discovery practice in French civil or criminal procedure.
5. The often-successful practice by French criminal defense lawyers of mounting technical challenges to the conduct of public investigations and flaws in the crucial investigative file, or "dossier," rather than undertaking extensive fact-finding themselves.
6. The absence of "attorney-client privilege" for in-house legal counsels in France, complicating coordination of internal investigations between in-house and outside counsel and hindering the building of confidence between corporate staff and lawyers.[53]

Charrière-Bournazel, *Lettre ouverte du bâtonnier de Paris au président de la République*, LE FIGARO, Oct. 10, 2008, at 14. Confidential communications between lawyers representing criminal defendants implicated in the same or parallel corruption investigations, and even between lawyers and investigating magistrates on the progress of an investigation, may be made under the purely informal and solely trust-based guise of the "foi du palais" (confidentiality for legal professionals involved in investigations and trials). *See* Pierre-Olivier Sur, *Pour la défense de la foi du palais*, GAZETTE DU PALAIS (Jan. 3, 2018), https;/www.gazette-du-palais-fr.-actualites professionelles-pour-la-defense-de-la foi-du-palais.

53 French in-house corporate lawyers are not permitted to be members of the bar and do not therefore "possess" the "secret professionnel." Franco-American corporate corruption internal investigations may be seriously compromised by this important differences given the critical role played by in-house counsel in hiring and managing outside counsel, counseling senior management and serving as the first contact between employees and outside counsel in any investigation. *See* Einbinder, Les juristes d'entreprise, *supra* note 51. The law, practice, and scholarly debate on the interplay of foreign and American conceptions of the privilege is uncertain and presents significant risk for companies and individuals in international investigations, especially in light of the European Court of Justice's consistent refusal to extend the privilege to in-house counsel. Additionally, American case law is uncertain. Some American courts faced with this potential conflict have used a "functional equivalence" approach in upholding the corporate privilege for communications of French in-house counsel. Renfield Corp. v. E. Remy Martin & Co., S.A., 98 F.R.D. 442 (D. Del. 1982). Others have explicitly rejected the notion that French in-house counsel were the "functional equivalent" of U.S. lawyers. Louis Vuitton Malletier v. Dooney & Bourke, Inc., 454 F.3d 108 (2d Cir. 2006). Although not possible to verify, the conflict does not appear to have yet been an important issue in major French FCPA cases, perhaps due to the fact that in the majority of these cases the general counsels of the French companies were members of an American bar. For the views of practitioners and scholars, *see* Olivia Radin, *Challenges to Privilege in International Investigations*, N.Y.L.J. (May 15, 2018),

7. The individualistic character of French criminal defense practitioners who usually practice in very small firms and, until recently, often lacked the resources and expertise (particularly regarding language skills) to carry out broad-based, internationally-oriented internal corruption investigations.
8. The costs (particularly if American lawyers are involved).[54]

C. Plea Bargaining

Few criminal cases go to trial in present day America. International bribery cases are no exception—most FCPA cases, including those with non-US parents, are now almost always settled through Deferred Prosecution Agreements ("DPAs"), and on rare occasions Non-Prosecution Agreements ("NPAs").[55] Corporations, dependent on

https://www.law.com/newyorklawjournal/2018/05/15/challenges-to-privilege-in-international-investigations/; Michael Campion Miller & Richard Rondoux, *Foreign In-House Counsel Communications*, N.Y.L.J. (Mar. 8, 2012), https://www.law.com/newyorklawjournal/almID/1202544723163/; John Gergacz, *In-House Counsel and Corporate-client communications: Can EU Law After* Akzo Nobel *and U.S. Law After* Gucci *be Harmonized? Critiques and a Proposal*, 45 INT'L LAWYER 817 (2011); Robert G. Morvillo & Robert Anello, *Attorney-Client Privilege in International Investigations*, N.Y.L.J., Aug. 5, 2008, at 3, 6-7. This issue of the absenece of an attorney-client privilege in the in-house counsel context was addressed in the recent Gauvin Report to the French Parliament, which strongly recommended the creation of the sub-profession of "avocat en entreprise" for in-house counsel. As a consequence, in-house counsel would be bound by the ethical rules of the French bar and would therefore be able to invoke the "secret professionnel" (which is French rough equivalent to the attorney-client privilege), considered to be essential to corporate internal investigations. See *Gauvain Report*, *supra* note 2, at 45-54.

54 For example, the legal costs for the Airbus investigations are reported to be in the range of £100 millions. *Record $4 Billion Airbus Fine Draws Line Under 'Pervasive' Bribery*, TRT WORLD (Feb. 1, 2020), https://www.trtworld.com/business/record-4-billion-airbus-fine-draws-line-under-pervasive-bribery-33402. The financial benefits associated with conducting internal investigations will undoubtably motivate some French firms as evidenced by the issuance of practical guides to French law and practice on internal investigations, *see* Kirry, Davis, & Bisch, *supra* note 18; Stephane de Navacelle, Sandrine dos Santos, & Julie Zorilla, *France*, *in* THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS (Judith Seldon, Eleanor Davison, Christopher Morvillo, Michael Bowes, & Luke Tolaini eds., 2017).
For a description of how white collar criminal defense and investigation practices, once disdained by large US large firms, became top money makers for these same firms, *see generally* Charles D. Weisselberg and Su Li, *Big Law's Sixth Amendment: the Rise of Corporate White-Collar Practices in Large U.S. Law Firms,* 53 ARIZ. L. REV. 1221, 1231-35, 1239-49 (2011).

55 Brandon Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1805-10 (2015) (noting that although the federal prosecutions guilty plea rate has exceeded 95% for many years the rate for bribery is lower). *See also* JESSE

public contracts, often accept DPAs to avoid a formal bribery "conviction" that may jeopardize their very existence, as a bribery "conviction" often constitutes a bar to submitting public works tenders.[56] As a result, in FCPA cases, such as the Alstom case,[57] DPAs are negotiated for operating subsidiaries, permitting them to continue to submit public tenders while the parent and individuals enter ordinary plea bargains which include the stigma of conviction.

EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES xviii-xx (2017) (noting the significant decrease in cases going to trial since the 1990's, which has sharply accelerated recently in corruption cases brought against individual defendants. Non-Prosecution Agreements ("NPAs") and Deferred Prosecution Agreements ("DPAs") have been increasingly used by the DOJ in FCPA enforcement actions, with 86% of cases being disposed of by NPA/DPAs from 2010-2015); Barr Benyamin , Katherine Drummonds, Donna Farag, & Chumma Tum, *Foreign Corrupt Practices Act*, 53 AM. CRIM. L. REV. 1333, 1387 (2016); Ezekial K. Rediker, *The Foreign Corrupt Practices Act: Judicial Review, Jurisdiction, and the Culture of Settlement*, 40 SETON HALL LEGIS. J. 53 (2015) (explaining critical perspectives on the use of NPA/DPA in FCPA cases); Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement,* 49 U. CAL. DAVIS L. REV. 497 (2015) [hereinafter Koehler]; Allen Brooks, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J.L. ECON. & POL'Y 137 (2010).-DPAs differ from other plea-bargained arrangements in that a guilty plea is not entered and judicial approval of the plea is not required. NPAs differ from DPAs in that no charging document is issued judicial approval is not required. Peter Reilly, *Negotiating Bribery: Towards Increased Transparency, Consistency, and Fairness in Pretrial Bargaining Under the Foreign Corrupt Practices Act*, 10 HASTINGS BUS L.J. 347, 348 (2014).

56 *See* DAN K. WEBB, ROBERT W. TARUN & STEVEN F. MOLO, CORPORATE INTERNAL INVESTIGATIONS §1.08 at 1-35 (2007). *See also* U.S. DEP'T OF JUST. CRIM. DIV. & U.S. SEC. & EXCH. COMM'N ENF'T DIV., FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 70 (2012) (stating that debarment from federal or state public contracts for violations of the FCPA is determined by the pertinent federal or state agency under the law applicable to the contrct). For an overview of debarment for foreign bribery in OECD countries, *see* OECD Non-Trial Resolutions, *supra* note 7, at 123-25 (2019). For comparative analysis of public procurement debarment and sanctions for corruption, *see generally* SOPE WILLIAMS-ELEGBE, FIGHTING CORRUPTION IN PUBLIC PROCUREMENT: A COMPARATIVE ANALYSIS OF DISQUALIFICATION OR DEBARMENT MEASURES (2012); Pascale Hélène Dubois, *Domestic an International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank's Sanctions System*, 2012 U. CHICAGO LEGAL F. 195 (2012).

57 *See generally* Press Release, U.S. Dep't of Justice, Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foriegn Bribery Charges (Dec. 22, 2014), https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery [hereinafter DOJ ALSTOM Press Release]. The Alstom case is discussed in detail *infra* Part III(A)(2).

American plea-bargaining practice developed out of the practical necessity of developing an alternative to lengthy jury trials which would have overwhelmed a criminal justice system confronted with an ever-increasing docket of criminal cases.[58] The functioning of the American criminal justice system has been dependent on the use of guilty pleas in most cases for decades. However, contrary to a view held by many American jurists, plea bargaining is not a centuries' old practice of the common law, and it was often criticized until the increase in the complexity and length engendered by the "due process revolution" of the Warren Court, dictated its use in the vast majority of cases.[59] For example, in *Brady v. United States* the U.S. Supreme Court upheld plea bargaining as being consistent with the basic constitutional rights of criminal defendants and urged that great deference be given to prosecutorial discretion in its practice.[60]

DPAs—presently the dominant form of plea-bargaining arrangement in FCPA cases—were not often used in criminal cases involving corporations prior to 2002. Their rapid growth afterwards was a direct result of the "Arthur Anderson effect," which followed the 2002 indictment and conviction of the large, formerly "big five" accounting firm and auditor of scandal-tarred Enron, for obstructing justice by destroying evidence relevant to the Enron investigation.[61] Arthur

58 DAVIS, *supra* note 18, at 74, 151.

59 *See* Albert Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 2-6 (1979). *But see* Malcolm M. Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 7 JUST. SYS. J. 338 (2002) (contending that the prevalence of plea bargaining is a result of fundamental changes in the structure of American criminal procedure, including broad prosecutorial discretion, more numerous and narrowly defined criminal offenses, and the rise of full-time legal professionals, rather than resource constraints). *See also* DAVIS, *supra* note 18, at 104-108 (emphasizing the fundamental change in the prosecutorial role in sentencing wrought by the establishment of Federal Sentencing Guidelines subsequent to the Congressional passage of the Sentencing Reform Act of 1984. Davis contends that the almost exclusive use of plea bargains today may be largely explained by the exorbitant discretionary power granted prosecutors to influence sentencing by filing "5K motions" attesting to defendants' "substantial assistance" "through co-operation" combined with unfettered discretion in charging decisions, particularly given the significant increase in the number and complexity of criminal statutes). *See* PREET BHARARA, DOING JUSTICE: A PROSECUTOR'S THOUGHTS ON CRIME, PUNISHMENT, AND THE RULE OF LAW (2019) at 171-190.

60 Brady v. United States, 397 U.S. 742 (1970). *See also* GARAPON & PAPADOPOULOS, *supra* note 4, at 70-75 (discussing *Brady* and its progeny from a French perspective); Alschuler, *supra* note 59.

61 The Arthur Anderson effect refers to the changes in prosecutorial strategy at the DOJ and attitudes within corporations and amongst corporate employees facing criminal charges wrought by the indictment and conviction in 2002 of the Arthur Anderson accounting firm in the wake of the massive Enron fraud scandal and its

Anderson's conviction, although later reversed by the U.S. Supreme Court, constituted a corporate "death sentence," with repercussions running beyond the effect on Anderson's terminated employees and other stakeholders to severely compromising the efficiency of the auditing process for large public companies.[62]

The American solicitude shown to plea bargaining has not been echoed in other countries until recently, and resistance to the practice has been strong in civil law countries, especially in France.[63] The

aftermath. See, Koehler, *supra* note 55, at 510-11 contending that the DOJ used the "Arthur Anderson effect" to induce companies to enter into NPA's and DPA's. For detailed summaries and analyses of the Arthur Anderson case and its legacy from indictment and conviction in 2002 to the US Supreme Court's reversal of the conviction in 2005, *see* EISINGER, *supra* note 55, at 32-58; BRANDON GARRETT, TOO BIG TO JAIL 19-44 (2014) [hereinafter, GARRETT, TOO BIG].

The Anderson/Enron scandal led to the passage of the Sabanes-Oxley Act ("SOX") in July 2002, which tightened corporate accounting controls and required CEOs and CFOs to certify their companies' books. (Sarbanes-Oxley Act of 2002 § 302, 15 U.S.C. § 7241). *See also* EISINGER, *supra* note 55, at 51; GARRETT, TOO BIG at 37. The Arthur Anderson case and Sarbanes-Oxley Act led corporations and individual corporate officers faced with potential criminal liability to prefer negotiating plea bargains to mounting aggressive defenses, as ArthurAnderson had done. *See* Lisa Kern Griffen*, Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 329-332 (2007); Brooks, *supra* note 54, at 157. Despite initial hopes that the Arthur Anderson case and Sarbanes-Oxley would strengthen prosecutors' hand in obtaining jury convictions, DOJ prosecutors chastised by the reversal of the Arthur Anderson conviction by the Supreme Court and the media attacks that followed, have acted timidly in bringing cases to trial. EISINGER, *supra* note 55, at 51-58, 326-327; GARRETT, TOO BIG at 13.

The use of DPAs and the amount of fines levied on corporations in criminal cases increased dramatically overall after 2002, and in foreign bribery cases specifically since 2004. Griffen, at 329; Brooks, *supra* note 54, at 149; GARRETT, TOO BIG at 240, 262, app. at 292-305) (providing detailed data analyses for criminal cases overall and FCPA cases). Non-Trial resolutions are now used in 96% of foreign bribery cases in the US. *See* OECD Non-Trial Resolutions, *supra* note 7, at 13.

62 *See* Koehler, *supra* note 55, at 500-05; Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform,* 66 FLA. L. REV. 1, 11-18 (2014). *See generally,* JIM PETERSON, COUNT DOWN: THE PAST, PRESENT AND UNCERTAIN FUTURE OF THE BIG FOUR (2017) (providing a provocative analysis of the challenges facing the auditing profession as a consequence of Anderson's demise). The unanimous Supreme Court decision reversing the convictions may be found at U.S. v. Arthur Anderson, 544 U.S. 696 (2005).

63 *See* OECD Non-Trial Resolutions, *supra* note 7, at 24. *See also* Françoise Tulkens, *Negotiated Justice*, *in* EUROPEAN CRIMINAL PROCEDURES 641, 661-664, 668-673 (Delmas-Marty & J.R. Spencer eds. 2002); Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the American Thesis in Criminal Procedure*, 45 HARV. INT'L L. J. 1, 37 (2004) [hereinafter, Langer].

recent adoption of the practice by the French in the anti-corruption area, therefore, offers an interesting foray into comparative law.[64]

In France, the heated debate over the concept of plea bargaining extends beyond the legal community. In addition to academic and professional commentators, the legislature, government, and the corporate world entered the fray over the appropriateness of integrating this mechanism into French law in anti-corruption cases.[65] What gave rise to the intensity of this debate? First, serious concern over the economic danger to European companies posed by American legal imperialism following previously unimaginable hundred-million-dollar plea bargained settlements of foreign corruption and economic sanctions cases brought by American authorities. Second, a sense of the loss of independence and the ability to successfully negotiate and diffuse geopolitical conflicts caused by extraterritorial application of American law and regulation brought home due to plea bargains. Third, a feeling amongst some that acceptance of plea-bargaining arrangements with American authorities was tantamount to extortion and a belief by most that adoption of the mechanism in France would contravene deeply cherished principles of legality. Privatization by the contractualization of one of the essential functions of the State—the Administration of Justice—was greatly feared.

Europeans have long criticized and contested the extraterritorial application of American law. European fears that the application of American law would for the first time inflict serious economic damage were legitimated by a series of FCPA plea-bargained settlements concluded by several champion companies in the midst of the financial

64 Since the early years of the twenty-first century, several OECD member civil law countries—including France, Italy, Germany, Switzerland and the Netherlands—have used plea-bargained mechanisms to enfore anti-foreign bribery laws. OECD Non-Trial Resolutions, *supra* note 7. Germany, remarkably given its former general opposition to the principle of prosecutorial discretion, has resolved 79% of its anti-foreign bribery cases through the use of non-trial resolutions. *Id.* at 13. *See* Tulkens, *supra* note 63, at 663-664. *See also* Peter J. Cullen, *Article 5—Enforcement*, *in* THE OECD CONVENTION ON BRIBERY: A COMMENTARY 289, 308-310 (Mark Pieth, Lucinda A. Low & Peter J Cullen eds., Cambridge University Press, 1st ed. 2007). *But see* Langer, *supra* note 63; DAVIS, *supra*, note 18, at 202 (counseling that caution be used in transplanting American adversarial criminal procedures abroad or concluding too early that transplanted mechanisms have fully taken root in foreign soil).

65 Adrien Roux, *La Loi n2016-1691 du Decembre 2016 dite "Sapin 2"*: *Une Avancee Encore en Retrait des Attentes des Practiciens*, *in* ANTICORRUPTION LA LOI SAPIN 2 EN APPLICATION 147-48 (Maud Lena & Erwan Royer eds. 2018).

crisis commencing in 2008.[66] Whereas in prior crises in which the companies were "caught in the middle" between European and

66 Siemens and Alstom, whose settlements with the U.S. DOJ and SEC for violations of the FCPA resulted in record fines adopted very different strategies with respect to co-operation with the American authorities despite both companies being from civil law countries. Siemens chose to undertake a broad, intensive, and costly internal investigation led by a large U.S. law firm. Siemens' top management, including most of its board members, were dismissed. Later, Siemens successfully sued several former executives, including its ex-CEO, Heinrich Von Pierer, who paid five million euros to his former employer. Despite its enormous economic power and political influence in Germany, prosecutors steadfastly pursued the company and Siemens managers, resulting in the payment of a $800 million fine to the Munich Public Prosecutors Office and the conviction of a few Siemens managers. Siemens' close co-operation and the high quality and resources devoted to its internal investigations were praised by the DOJ and led to a reduction in the fines imposed. *See* GARRETT, TOO BIG *supra* note 61, at 9-12, 246; *Ex-Siemens Execs Found Guilty in Bribery Case*, REUTERS (Apr. 20, 2010), https://www.reuters.com/article/siemens-probe/ex-siemens-execs-found-guilty-in-bribery-case-idUSLDE63J1IN20100420. For a country-specific account of how Siemens' bribery schemes worked, its links with international terrorism, and its effect on the economy and politics of Bangladesh, *see* DAVID MONTERO, KICKBACK: EXPOSING THE GLOBAL CORPORATE BRIBERY NETWORK 173-201 (2019).

Alstom generally followed a traditional French legal defense model in its response to the many investigations launched against it or its employees. As opposed to Siemens, no changes to the management team or the board of directors were made, and internal investigations were slow, incomplete, and only undertaken in direct response to strong prosecutorial actions. Very little information about the corruption investigations was communicated internally or externally. Alstom did not cooperate with the U.S. authorities until being shocked into doing so following the arrest and imprisonment of a senior executive seized at his entry into the U.S. on a business trip. Several former or present Alstom managers were indicted (*mise en examen*) in France, but these indictments were all dismissed with remarkably little press coverage. A settlement with a substantial fine was reached with the Swiss authorities in 2010. Alstom entities and individual executives were indicted in the U.K., resulting in convictions of managers and the company by a jury and jury acquittals in two other trials in 2018. *See infra* note 193. Investigations and proceedings against Alstom entities and former and present employees were launched in several countries including Brazil, Hungary, India, Lithuania, Poland, and Slovenia, and are apparently still continuing. *See* Caroline Michel-Aguirre, *Alstom, une decennie de corruption*, 2635 L'OBS 64-65 (May 8, 2015); Simon Romero, *Insider's Account of How GraftFed Brazil's Crisis*, N.Y. Times, (Apr. 4, 2016), https://www.nytimes.com/2016/04/04/world/americas/insiders-account-of-how-graft-fed-brazils-political-crisis.html. Alstom's lack of cooperation was roundly criticized by the DOJ, which substantially increased the fine imposed. *See* Lindsey Arietta, *How Multinational Bribery Enforcement Enhances Risks for Global Entreprise*s, A.B.A. SEC. BUS. L. BUS. L. TODAY (June 20, 2016), https://www.americanbar.org/groups/business_law/publications/blt/2016/06/08_arrieta/; Jay Holtmeier, *Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities*, 84 FORDHAM L. REV. 493, 497-99 (2015); DOJ Alstom Press Release, *supra* note 57; Karolos Seeger, Matthew Getz, Robert Maddox & Alex Parker, *Alstom's $772 Million FCPA Settlement: The Wages of Late Co-Operation and*

American law, European governments found themselves without opportunities for effective negotiation, which was entirely in the hands of American authorities. This perceived loss of national independence provoked a particularly strong negative reaction in France against plea bargaining and prosecutorial discretion held to be the mechanisms responsible for this state of affairs.[67]

Assessing whether an investigation or the exercise of prosecutorial discretion has been subject to political or diplomatic influence is inherently difficult. However, the preeminent role played for decades by the U.S. in foreign corrupt practices enforcement, as illustrated by a large number of cases, their broad scope, the diversity of corporate nationalities, and severe sanctions imposed, does not indicate that enforcement authorities shied away from the action due to diplomatic concerns or to protect America.

The granting of boundless prosecutorial discretion to structure plea bargaining arrangements, which meted out purely monetary "punishment" as if it were a private contract rather than the law, struck at fundamental French notions of the source and purpose of criminal law as embodied in the Principle of Legality. French criminal law, as embodied in post-revolutionary codes, was strongly influenced by enlightenment legal thinkers dedicated to depriving the State of its means of oppression through the use of arbitrary criminal measures. Compliance with the Legality Principle required that criminal law and procedure be carefully specified in comprehensive and systematic codes and statutes.[68] Criminal law, one of the fundamental expressions of the

Other Lessons of the Settlement, 6 FCPA UPDATE (Debevoise & Plimpton, New York, N.Y.), Dec. 2014. Recent post-Sapin 2 cases, notably the Société Générale case discussed *infra* Part VI below, signal a trend amongst French companies to adopt a cooperative "Siemens model" rather than follow the Alstom approach.

67 *See generally* text and sources cited in *supra* note 3.

68 INCHAUSPE, *supra note* 25, at 323-4, 348-352 ; GARAPON & PAPADOPOULOS, *supra* note 4, at 76-87 ; Olivier Boulon, *Une justice négociée*, *in* ANTOINE GARAPON & PIERRE SERVAN-SCHREIBER, DEALS DE JUSTICE: LE MARCHE AMERICAIN DE L'OBEISSANCE MONDIALISEE 41-56 (2013); CESARE BECCARIA, DES DELITS ET DES PEINES (1765) (French translation by Maurice Chevallier). For an excellent analysis of how the Legality Principle has structured European criminal law and procedure, *see* Markus Dirk Dubber, *Comparative Criminal Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 1313-17 (Mathias Reimann & Reinhard Zimmermann eds. 2006). Dubber explains that the meaning of the principle of legality is radically different in the U.S. and Europe. In Europe, the principle serves as a general organizing principle of criminal law and procedure. In the U.S., the principle of legality, rarely referred to as such, is limited to a vague association with prohibitions against vague or retroactive or criminal laws. Dubber at 1313. Where Europeans looks to the Legality Principle to constrain government power, Americans rely on constitutional caselaw, derived from the fundamental Anglo-American notion of due process.

popular will, could only be created by the legislature and never the judge. Common law countries, on the other hand, continued to use judge-made "common law crimes" into the 20th century as exemplified by English law prior to the Anti Bribery Act of 2010 and the notion of "honest services" used in U.S. anticorruption law.[69]

However, in civil law systems, vagueness and interpretation by analogy were prohibited. The interpretation was required to be strict and any form of judicial or prosecutorial discretion viewed with extreme caution. All violations of criminal statutes had to be pursued, and judges who did not do so faced criminal sanctions.[70] These principles, combined with the inquisitional model of inquiry, led to the adoption by defense counsel of a highly technical approach in defense of their clients, which is still evident in their handling of corporate corruption cases today.

Limited plea bargaining has recently been accepted across continental Europe.[71] In 2004, France adopted a procedure under which, subject to the defendant's recognition of the facts and legal basis of the misdemeanor prosecutors could propose a term of imprisonment not exceeding one year or a fine. This procedure, known as a '*Comparation sur reconnaissance prealable de culpabilite*' *"CRPC"* (appearance precedent to recognition of guilt).[72] The CRPC has had some success for ordinary misdemeanors, having been used in 12% of cases where it is permitted and which did not initially include serious crimes

Dubber at 1316. Examples of the application of the Legality Principle to aspects of French criminal law and procedure germane to this Article, include limitations on prosecutorial discretion, (*see* DAVIS, *supra* note 18, at 44, 144), and traditional resistance to negotiated settlements of criminal cases (now overcome for corporations but retained for individuals in Sapin 2), *see* Boulon, Une justice négociée cited above in this note. *See also* Robert Badinter, *Preface* to BECCARIA, at 9-47, which provides a historical exposition of how Beccaria's work influenced the development of the Legality Principle.

69 Bridget Vuona, *Remember Me, "Part C"? Honest Services Fraud Schemes Involving Bribery Under "Part C" of the Federal Bribery Statute Post*-McDonnell, 55 AM. CRIM. L. REV. ONLINE 35 (2018); MONTY RAPHAEL, BLACKSTONE'S GUIDE TO THE BRIBERY ACT 2010 57-60 (2010).

70 *See generally*, Dubber, *supra* note 68, at 1313-17 .

71 *See* OECD Non-Trial Resolutions, *supra* note 7, at 13, Françoise Tulkens, *Negotiated Justice*, *in* EUROPEAN CRIMINAL PROCEDURES 641, 661-664, 668-673 (Delmas-Marty & J.R. Spencer eds. 2002). Langer, *supra* note 63, at 39-53.

72 The CRPC was instituted by the *Loi Perben II (Perben Law)* of March 9, 2004, and later codified in the Code of Criminal Procedure, Sections 495-7 to 495-16. CODE DE PROCEDURE PENALE [C. PR. PEN.] [CRIMINAL PROCEDURE CODE] art. 495-7 to 495-16 (Fr.).

such as bribery and money laundering.[73] In 2011, the law was amended to permit the use of the CRPC in more serious criminal infractions (most "crimes" or serious felonies) and extended to corporate defendants.[74] However, this extension did not lead to a change in French practice in corruption cases. Despite considerable commentary and anticipation, the CRPC has rarely been used in individual financial and business crimes, and has been used but once with a corporate defendant.[75]

The CRPC's limited success, as compared to the quasi-obligatory recourse to plea bargaining for individuals and corporations for almost all crimes, including corruption, in American practice demonstrates the influence of significant legal, cultural differences between the two systems as described above. These differences are illustrated in the respective terminology used, attitudes towards prosecutorial discretion, the powers of the homologating judge, and the ethos and practices of attorneys and judges.

American terminology emphasizes the consensual, negotiated nature of guilty pleas. NPA/DPA are called "agreements," demonstrating the strong American preference for prosecutorial discretion and upholding the bargain reached between adversaries.[76] In France, on the contrary, the defendant makes an "appearance" in court to recognize his guilt. No notion of negotiation or bargaining is conveyed. French terminology is consistent with the fundamental legality principle of civil European criminal law. Criminal sanctions are not subjects of a negotiation where a bargain is worked out between equal adversaries as a private contract. Instead, they are part of a statutory framework expressing the will of the people administered by agents of the State.

Bargaining, generally perceived as unseemly, is officially precluded. The accused either accepts or rejects the proposed settlement of the prosecutor. In amending the Code of Criminal Procedure (new Article 41-1-2) the drafters of Sapin 2 carefully avoided the word

73 Jean, Projet de réforme de Justice, *supra* note 32, at 20; ERRERA, *supra* note 25 at 250-51.

74 C. PÉN. art. 495-7 to 495-16

75 Frederick T. Davis, *International Double Jeopardy: U.S. Prosecutions and the Developing Law in Europe*, 31 AM. U. INT'L L. REV. 68, 92 (2016) [hereinafter Davis, *International Double Jeopardy*].

76 *See generally Koehler*, *supra* note 55. For an especially useful comparative analysis of plea bargaining and prosecutorial discretion, *see generally* Erik Luna & Marianne Wade, *Prosecutorial Power: A Transnational Symposium: Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413 (2011).

"negotiation," thereby maintaining the fiction, consistent with French legal culture, that justice is imposed by an authority acting in the "public interest" rather than, as in American legal culture, a contract between the parties.[77]

American prosecutors are generally invested with broad discretion in making decisions whether to prosecute or to engage in plea bargaining with defense counsel. The exercise of prosecutorial discretion is largely non-reviewable.[78] French prosecutorial discretion is circumscribed by the transfer of the investigation "instruction" phase of international corporate corruption cases to investigating magistrates, and the opportunity afforded victims, constituted as civil parties, to initiate criminal cases directly.[79] The strong criticism of a measure which would have permitted prosecutors to enter plea bargains after the investigating magistrate had completed his instruction of the dossier illustrates the reticence of French legal professionals to enlarge prosecutorial discretion.[80]

The role of the homologating judge differs significantly between the two systems. Federal judges' role in approving DPAs is limited to procedural compliance, and essentially consists of ensuring that the defendant is advised by a competent legal counsel and gave his consent voluntarily.[81] The appropriateness of the substantive terms of the

77 Astrid Mignon Colombet, *La convention judiciaire d'intérêt public: vers une justice de co-opération*, *in* ANTICORRUPTION LA LOI SAPIN 2 EN APPLICATION 162-63 (Maud Lena & Erwan Royer eds. 2018); ERRERA, *supra* note 25, at 250.

78 DAVIS, *supra* note 18, at 44; Davis, *Where are We Today, supra* note 2*,* at 340-1; Sun Beale, *supra* note 28, at 1-2, 6-8; Sarah Albertin, *Justice transactionnelle et lutte contre la corruption: a la récherche d'un modèle*, ACTUALITÉ JURIDIQUE PÉNAL 354 (2015).

79 Hodgson & Soubise, *supra* note 19, at 12-15; HODGSON, *supra* note 4, at 31. The percentage of investigations commenced by civil party initiatives differs widely geographically and sectorially. It appears to be highest in "economic" (including corruption) cases handled by the Paris-based specialized magistrates. *See* SOULEZ LARIVIÈRE & DALLE, *supra* note 30, at 146.

80 This measure was included in a proposed 2011 amendment to the CRPC plea procedure. *See* ERRERA, *supra* note 25, at 249-250 (expressing concern about the increase of prosecutorial power). *See also* Cohen, *supra* note 29 (noting that similarly to U.S. prosecutors, French prosecutors' discretion is favored by their very limited obligation to give reasons for their decisions. Cohen contends, however, that the close bonds of prosecutors with sitting judges, described in Part II(B)(1) above, paradoxically tends to serve as a brake on the exercise of discretion, since prosecutors fear the loss of face from potential rebuke from their judicial peers).

81 *See* DAVIS, *supra* note 18, at 76-77; Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1869-71 (2005). *See also* Greenblum's arguments in favor of judicial intervention. Greenblum, at 1893, 1896-1904.

agreement are not within the purview of the judge. French law requires that the judge examine the appropriateness of the sanction in relation to the crime, taking into consideration the public interest and perception as well as the personal situation of the defendant, consistent with the subjective individual inquiry that is common in French criminal procedure.[82]

The adoption of this quintessential American practice in Sapin 2 was a defensive measure aimed at quelling American ardors in corporate corruption cases.[83] An empirical study of the French experience would be useful in changing the focus from a defense as an idealized vision of the strict Legality Principle to examining plea bargaining effectiveness as a tool in combating corporate corruption. The incorporation of plea bargaining in French criminal law must be undertaken with great care. The blind borrowing of American practice will lead to rejection of the legal transplant due to its inconsistency with deeply held notions of French democracy and with the mores and methods of the legal professionals. Comparative law analysis of prosecutorial discretion in plea bargaining in practice ought to be undertaken to determine factors that may lead to rejection.

Care was taken in Sapin 2 to avoid such a fate. The recent simultaneous Franco-American plea bargain agreements in the Société Générale corruption case, discussed in Part VI(A) below, offers an actual case permitting an examination of whether the delicate grafting of the organ plea bargaining organ onto a foreign legal system offers hope for success and further Franco-American cooperation.

Comparative law analysis needs to be bi-directional in attempting to see how the very real deficiencies of American plea bargaining, including its "after sales" service of corporate monitoring, may be improved.[84] American plea-bargaining practices have been largely

82 DAVIS, *supra* note 18, at 76-77; HODGSON, *supra* note 4, at 243; GARAPON & PAPADOPOULOS, *supra* note 4, at 258-261.

83 Michel Sapin, *Intervention de Michel Sapin, Ministre de l'Economie et des Finances, l'Ouverture du Global Anti-corruption Summit*, MINISTRE DE L'ECONOMIE ET DES FINANCES (Mar. 10, 2017).

84 The DOJ's Benczkowki Memo adopted a more flexible balancing of benefits against company costs and burdens approach on the decision to impose a monitor and establishing a more formal approval process for their selection. *See* Memorandum from Brian A. Benczkowski, Assistant Att'y Gen., to U.S. Dep't of Justice Crim. Div. Personnel, Re: Selection of Monitors in Criminal Division Matters (Oct. 11, 2018), https://www.justice.gov/opa/speech/file/1100531/download. The Benczkowski memo was preceded by the Morford memorandum issued in 2008, which was a response to the criticisms levied against the opacity of monitorships decisions. Federal courts have on occasion accepted challenges to DOJ's monitor-selection

justified on the pragmatic ground of resource constraints under the refrain that the criminal justice system will fail without it.

A criminal justice system practice as important as plea bargaining should not be justified solely on resource constraints. Doing so obscures valid criticisms of its perceived unfairness, unbridled prosecutorial discretion and the loss of prosecutors' trial skills. Moreover, scholars have contested the notion that "the venerable" institution of plea bargaining was either an intrinsic component of common law criminal procedure or that its proliferation is primarily a question of allocating limited resources.[85]

American "exceptionalism," which is characterized by an individualist, contractual, party-centered orientation to criminal procedure, undoubtably provided a more fertile ground for the growth of DPA-style plea bargaining in anticorruption cases than would be the case in civil law tradition countries, particularly France. However, in comparing American and French experiences, it is useful to recall that the exponential growth in the number and severity of DPAs in FCPA cases dates back only to 2004 and finds its origin in the very practical consideration of ensuring against another Arthur Anderson-type case. The lag—admittedly much greater in France as compared to

process by rejecting all the proposed candidates and appointing their own, or by ordering the disclosure pursuant to a FOIA request of records related to the selection and review of FCPA monitors. *See* Amy Chang, *Monitoring the Monitors: DOJ Ordered to Disclose Info on Monitor Selections*, WHITE COLLAR BRIEFLY (Perkins Coie LLP, Seattle, Wash.), Apr. 23, 2018, https://www.whitecollarbriefly.com/2018/04/23/monitoring-the-monitors-doj-ordered-to-disclose-info-on-monitor-selections/. For scholarly criticism of the monitoring process, *see* GARRETT, TOO BIG *supra* note 61, at 172-195; Virginia Root, *The Monitor-"Client" Relationship*, 100 VA. L. REV. 523 (2014) (suggesting that monitors act more as "legal counselors"). *See also* Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713 (2007) (proposing that monitors act as "professional advisors" with a fiduciary duty to shareholders); Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation through Non-Prosecution*, 84 U. CHICAGO L. REV. 323, 373-374 (2017) (noting that prosecutors seek personal benefits in the selection of monitors). For a blistering criticism from the business media, *see* Nathan Vardi, *The Bribery Law Racket*, FORBES (June 7, 2010), https://www.forbes.com/global/2010/0607/companies-payoffs-washington-extortion-mendelsohn-bribery-racket.html#11f94d4a1b5a; Peter Henning, *An Imperfect Tool for Policing Companies*, INT'L HERALD TRIBUNE (Sept. 19, 2012), https://www.questia.com/newspaper/1P2-36291545/an-imperfect-tool-for-policing-companies. The adoption of monitoring in countries such as the U.K. now provides an opportunity for comparative law study. *See* Christopher David & Emily Stark, *Trans-Atlantic winds of change for Corporate Monitorships,* WILMER HALE (Dec. 11, 2018), https://www.wilmerhale.com/en/insights/blogs/WilmerHale-W-I-R-E-UK/20181211-trans-atlantic-winds-of-change-for-corporate-monitorships.

85 *See* Feeley, *supra* note 59.

Germany—in adopting effective, if controversial, enforcement mechanisms may not be indicative of an unbridgeable gap as may appear at first glance. The following essential questions about plea bargaining should therefore be considered from a comparative law perspective: (1) what is its proper place in a democracy, and is it consistent with due process?; (2) how may legal professionals' mores affect its operation and how might their job skills and ethics be affected by it?; (3) is its predominant use in FCPA cases appropriate?; (4) what ought to be the proper role of judges in reviewing and approving DPAs?; and (5) how might its weaknesses be eliminated?[86]

It is noteworthy that American academics once looked to European practice for solutions to perceived weaknesses in American plea bargaining and arbitrary law enforcement resulting from unlimited prosecutorial discretion, and comparative study has again attempted to foster "reverse resonance."[87] The French debates and legislative response in Sapin 2 to plea bargaining in foreign corporate corruption cases, together with recent cases of its use as examined in Part IV below, offer an initial opportunity for the use of comparative law to provide insights into how enforcement of anti-corruption law on both sides of the Atlantic might be improved. Further progress in cooperation between French and American authorities following the joint DPA/CJIP in the Société Générale case should provide greater opportunity for a fuller comparative "resonance-oriented" analysis towards this goal.

D. Third Party Intervention in Criminal Proceedings – "La Partie

86 The breadth of scholarly and practitioner research and debate on these questions illustrates the underlying unease with plea bargaining as presently practiced in the US. *See generally* GARRETT, TOO BIG *supra* note 61; Reilly, *supra* note 55; H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63 (2011); Griffen, *supra* note 61; Benjamin M. Greenblum, *supra* note 81; Oren Gazal, *Partial Ban on Plea Bargain*s, *Law & Economics Working Papers Archive: 2003-2019* (U. Mich. L. Sch. Law & Econ. Working Papers, Paper No. 05-008 2005); Feeley, *supra* note 59.

87 *See* HODGSON, *supra* note 4, at 5; Michael Vitiello, *Bargained-for-Justice: Lessons from the Italians?*, 48 U. PAC. L. REV. 247 (2017) (reprinted in ARCHIVIO PENALE, no. 2 (2017); Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure*, 118 YALE L.J. 126, 174-176 (2008); Richard Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 542 (1990); Tomlinson, *supra* note 13, at 131-133.

Civile"

French criminal law grants extensive rights to crime victims.[88] The historical roots of this solicitude may be traced to the private law origins of French criminal law and its greater concern with the interests of society at large compared with the state-centered "preserving the king's peace" development of criminal law at common law.[89] Victims' rights include the right to intervene in an ongoing criminal investigation as a separate but equal party, known as the *partie civile* (civil party). The civil party may force the prosecutor or investigating magistrate to open an investigation. Most French corruption and financial crime allegations are commenced in this fashion. [90]

The notion of "victim" is given a very broad interpretation. In corruption cases, the corporation itself is often included, at least initially.[91] Victims increasingly use the civil party status to piggyback on the public action for free, as the investigative costs are mostly borne by the State. Corporations whose employees are under investigation often attempt to join as civil parties at the investigative phase to obtain access to the investigative file, or *dossier*. In addition, obtaining the status of a "civil party" may preserve the reputation of the company which will be viewed, at least temporarily, as a victim. Recently, associations representing victims of corruption have been authorized by the courts to act as civil parties in what is known as *Biens Mal Acquis* ("BMA") or "ill-gotten gains" cases, of which France is the world's focal point.[92] NGO representation may prove to be of great importance in the fight against corruption and should be the subject of

88 *See* HODGSON, *supra* note 4, at 31; Mario Chiavario, *Private Parties: The Rights of the Defendant and the Victim*, *in* EUROPEAN CRIMINAL PROCEDURES 543 (Mirelle Delmas-Marty & J.R. Spencer eds., 2002); Djoheur Zeouki Cottin, *La mise au rebut du juge d'instruction français*, *in* DU JUGE D'INSTRUCTION VERS LE JUGE DE L'ENQUÊTE 180-181 (Laurent Kennes & Damien Scalia eds. 2018). *See also* THAMAN, *supra* note 21, at 23-25.

89 FRANÇOIS SAINT-PIERRE, AVOCAT DE LA DÉFENSE 50-52 (2009).

90 HODGSON, *supra* note 4, at 31; ERRERA, *supra* note 25, at 252.

91 *See Alstom se porte partie civile dans l'enquête de corruption*, CHALLENGES (May 16, 2008, 01:34 PM), https://www.challenges.fr/entreprise/alstom-se-porte-partie-civile-dans-l-enquete-de-corruption-presumee_373296.

92 *See* XAVIER HAREL & THOMAS HOFNUNG, LE SCANDALE DES BIENS MAL ACQUIS (2011) [hereinafter HAREL & HOFNUNG] (for examples of "civil parties" use in "bien mal acquis" cases; DAVID CONN, THE FALL OF THE HOUSE OF FIFA: THE MULTIMILLION-DOLLAR CORRUPTION AT THE HEART OF GLOBAL SOCCER 171, 182, 207, 216 (2017) (for an example of an abusive attempt by a Swiss not-for-profit association which recast itself as the "victim" of its massive corruption scandal — aptly termed the "World Cup of Fraud" by Richard Weber of the IRS by using Swiss "civil party" procedures).

further comparative legal analysis to determine if this tool may be effectively used in other countries—including the US—and by international organizations such as the World Bank.[93]

The facility offered to victims and their representatives to instigate corruption investigations through the *partie civile* procedure may serve as a palliative remedy to the failures of the French legal system to effectively deal with corporate corruption in foreign countries. Up until now, the *Biens Mal Acquis* cases pursued through *partie civile* actions have been brought by French non-governmental organizations dedicated to fighting corruption. NGOs such as Anticor, Sherpa, and Transparency International ("TI-France") have pursued corrupt foreign government officials holding assets in France.[94]

Bien Mal Acquis cases have been successfully instituted in France through *partie civile* intervention. Most noteworthy is the civil party action led by TI-France, commenced on July 10th, 2008 against the heads of the State of Gabon (Omar Bongo), Congo (Sassou N'Guesso), Equitorial Guinea (Teodoro Obliang Nguema), and their entourages.

The broad definition of victims and their representatives for *partie civile* purposes in France in several areas (consumer protection, discrimination, protection of animals, etc.) bodes well for this article's recommendation to extend *partie civile* status to shareholders, employees, unions, and private and public financiers—including International lending banks such as the World Bank and their affiliated regional banks—as well as citizens of the countries harmed by the corruption.

The acceptance of TI, as an association entirely dedicated to combating corruption worldwide with a sufficient interest as a *partie civile* was not without difficulty. TI-France's consecration, opening the door to similar actions by other anti-corruption NGOs, was confirmed by the landmark decision of the French Supreme Court for Judicial Matters (*Cour de Cassation*) on November 9, 2010.[95] This remarkable

93 Jacinta Anyango Oduor et al*., Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, STOLEN ASSET RECOVERY SERIES (The World Bank [WBG] & U.N. Off. on Drugs & Crime 90, *available at* (2014), https://star.worldbank.org/sites/star/files/9781464800863.pdf. [hereinafter Anyango Oduor et al]. *See generally* Mark Piethl, RECOVERING STOLEN ASSETS (Mark Peithl, ed. 2008) (describing the challenges and possible solutions in recovering ill-gotten gains from corruption).

94 See *generally* HAREL & HOFNUNG, *supra* note 92.

95 S. Lavric, *Affaire des «biens mal acquis»: recevabilité de la constitution de partie civile de l'association Transparence International France*, DALLOZ ACTUALITE (Nov. 15, 2010), https://www.dalloz-actualite.fr/essentiel/affaire-des-

decision was preceded by the waging of a two and a half year "judicial guerrilla war" led by French and African anti-corruption advocates in the face of intense politico-diplomatic pressure from the targeted countries.[96] The anti-corruption advocates' work led to the prosecution and conviction for corruption and money laundering of the kleptomaniac Vice-President of Equitorial Guinea, Teodoro Obiang, by the first level criminal court of Paris, recently confirmed on appeal.[97] This significant breakthrough offers fertile ground for comparative law analysis aimed at evaluating legal mechanisms that combat foreign corporate corruption. First, prosecutors (*procureurs*) comprising the *ministère public* do not have a monopoly on representing the "public interest."[98] Second, the role of French civil society as a key actor

biens-mal-acquis-recevabilite-de-constitution-de-partie-civile-de-l-associatio#.XtmngDpKhPY (commenting on the Supreme Court's decision).

96 *See* Maud Perdriel-Vassière, *France's Biens Mal Acquis Affair : Lessons from a Decade of legal Struggle, Open Society Foundations Justice Initiative,* May, 2017, at 4-6, https://www.justiceintiative-org/uloads/8e7d1268-b5-fb-44cf-B549-bcOed6500667/legal-rer. HAREL & HOFNUNG, *supra* note 92.

97 Tribunal correctionnel de Paris [Trial Court for Criminal Matters], Oct. 27, 2017 (ordering a 3-year suspended prison sentence, a €30 million fine and the confiscation of €150 millions worth of property), reported in *Biens mal acquis: Les dates clefs,* TRANSPARENCY INT'L FR., https://transparency-france.org/aider-victimes-de-corruption/biens-mal-acquis/#.XcNs5y2ZN0s (last visited Mar. 10, 2019); Marc-André Feffer, *« Biens mal acquis »: la fin de l'impunité,* 180 HOMMES & LIBERTÉS 31-33, (Dec. 2017), https://www.ldh-france.org/wp-content/uploads/2017/12/HL180-Monde-2.-Biens-mal-acquis-la-fin-de-limpunité.pdf; Dorothée Goetz, *Teodoro Obiang condamné, une première dans l'affaire des « biens mal acquis »*, DALLOZ ACTUALITÉ (31 Oct. 2017), https://www.dalloz-actualite.fr/flash/teodoro-obiang-condamne-une-premiere-dans-l-affaire-des-biens-mal-acquis#.Xtmt2TpKhPY. The decision of the Paris trial court for criminal matters was upheld on appeal on Feb. 10, 2019. *See « Biens mal acquis »: peine alourdie en appel en France pour Téodorin Obiang*, JEUNE AFRIQUE, (Feb. 11, 2020), https://www.jeuneafrique.com/894643/politique/biens-mal-acquis-peine-alourdie-en-appel-en-france-pour-teodorin-obiang/; ALT & LUC, *supra* note 36, at 133-36 (2012); HAREL & HOFNUNG, *supra* note 92, at 64-71. French authorities have recently demonstrated their determination to enlarge the scope of *Biens mal acquis* proceedings to include intermediaries who facilitate corruption by indicting legal professionals and agents in the Teodoro Obliang Nguema case. *See* Simon Piel & Joan Tilouine, « *Biens Mal Acquis » : les « facilitateurs » francais dans le viseur de la justice* LE MONDE (Dec. 19, 2019), https://www.le monde.fr/afrique/article/2019/12/19/biens-mal-acquis-les-facilitateurs-français-dans-le viseur-de-la justice_6023510_3212.html

98 The concept of a public or unitary general interest is a cornerstone of the French legal system. *See* LASSER, *supra* note 23, at 1, 290. The commitment of investigating magistrates to always act in the public interest explains why French society has consistently supported the institution. It is noteworthy that plea bargaining is referred to as a judicial "public interest" agreement ("Convention *d'interet public* judiciaire") in Sapin 2.

in enforcing legal norms now includes deterring corruption and obtaining restitution for victims. Third, in civil party intervenor cases, mandatory referral to an investigating magistrate significantly reduces the potential for political influence on important decisions. Fourth, the participation of associations in the legal process neutralizes the claims made by companies that they settled due to "extortion" or that the process is used primarily to fill the coffers of the state's treasury. Finally, victim-initiated legal actions on foreign corruption—including seizures of ill-gotten gains (*biens mal acquis)*—are public, transparent, and generate considerable media attention.[99]

How does American law compare? How might fundamental aspects of its legal culture influence the adoption of victim led anti-corruption legal initiatives? Do other legal mechanisms exist in American law that could be employed to achieve the same objective? American legal procedure is structurally individualistic, party-centric, de-centralized, and adversarial.[100] Thus, the criminal process is conceived as a battle between two parties: the defendant and the State. Unlike in France, the interests of society as a whole are not represented by a neutral legal professional, as the admittedly idealized investigatory magistrate and the *procureur* are trained and supposed to act with professional ethos closer to an American judge.[101]

One might assume that because American legal culture is far more oriented towards private party initiatives than the French, then private victim corruption actions would be favored in the U.S. Reliance on such an assumption is, however, misplaced. Victims attempting to use American procedure to combat corruption will not encounter an institution such as the French *Ministère Public*, jealous to preserve its elevated role as society's protector. Instead, American victims will have to overcome resistance to their intervention that derives from a political ideology suspicious of claims that the state (or an association) should be granted the right to defend the competing "public interest."[102] The resistance will be framed in terms of "standing to

99 *See* Leslie Wayne, *Shielding Seized Assets from Corruption's Clutches,* N.Y. TIMES (Dec. 30, 2016), https://www.nytimes.com/2016/12/30/business/justice-department-tries-to-shield-repatriations-from-kleptocrats.html; Thomas Hofnung, *Biens mal acquis: saisissante saisie chez Obiang*, LIBÉRATION (Feb. 25, 2012, 12:00 AM), https://www.liberation.fr/societe/2012/02/25/biens-mal-acquis-saisissante-saisie-chez-obiang_798617.

100 GARAPON & PAPADOPOULOS, *supra* note 4, at 229-51.

101 *Id.*; GARAPON & SERVAN-SCHREIBER, *supra* note 49 ,at 12. *See also* ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 115-117 (2009) [hereinafter Burns]. *See generally*, Frase, *supra* note 87.

102 GARAPON & PAPADOPOULOS, *supra* note 4, at 64, 229-231.

sue," with a high bar placed in *Biens mal acquis* type cases. The high bar is a result of a legal culture that traditionally offered a very limited place to the victim in criminal proceedings as evidenced by the victim's need to bring separate civil actions to obtain redress. Anti-corruption NGOs seeking a direct role in American criminal proceedings will, therefore, not be shown the deference given to them in France as private embodiments of the "public interest."[103]

The existence of these obstacles does not imply that civil party or similar intervenor mechanisms consistent with American traditions cannot be successfully used to further the fight against foreign corruption. American procedure has long been successful in integrating the public interest in legal actions, as evidenced, in particular, in environmental law. Qui tam suits—long used as a tool in ferreting out government fraud under the False Claims Act—may, for example, provide a framework on which to build.[104] American lawyers' creativity in developing new or adapting existing collective redress mechanisms may be tapped in corporate foreign corruption cases.[105] Comparative study of developments, such as granting civil party victim standing to French NGOs, may inspire evaluation of similar mechanisms in the U.S. to realize the same objective.

E. Sources of Conflict and Recent Co-operative Initiatives

The use of plea bargaining to dispose of cases has raised legitimate questions from French legislators and commenters as well as American practitioners and academics. "Coerced" pleas are chief

103 *Id.* at 231-39. *See also* DAVIS, *supra* note 18, at 109.

104 GARAPON & PAPADOPOULOS, *supra* note 4, at 239-242. *See also* TOM MUELLER, CRISIS OF CONSCIENCE: WHISTLEBLOWING IN AN AGE OF FRAUD 14-17 (2019).

105 Federal courts have determined that no express or implied private right of action exists under the FCPA. *See* Lamb v. Phillip Morris, Inc., 915 F.2d 2d 1024, 1027-30 (6th Cir. 1990). Congressional attempts to create a statutory private right for redress have failed despite the introduction of a draft "Foreign Business Bribery Prohibition Act" several times since 2008. *See* Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419 (2012) for a discussion of the *Lamb* case, its progeny, and opportunities for individuals, shareholders, and competitors to bring alternative civil actions for FCPA violations. *See also* Benyamin et. al., *supra* note 54, at 1356 (2016); WEBB, TARUN & MOLO, *supra* note 55, at §2.03(7)(c). Proponents for recognizing a private cause of action in FCPA cases cite the success of "private justice" in qui tam cases. Weighing the respective benefits and weaknesses of entrepreneurial lawyering and pubic interest associations in bringing such actios is particularly interesting from a comparative perspective. *See generally* Julie Rose O'Sullivan, "*Private Justice" and FCPA Enforcement: Should the SEC Whistleblower Program include a Qui Tam Provision?*, 53 AM. CRIM. L. REV. 67 (2016).

amongst these concerns due to their perceived lack of transparency, calculation of fines, expectations from internal investigations, legitimacy of "cooperation," and selection of monitors.[106]

In addition, the DOJ has been criticized by foreign governments, associations, and international institutions who have suggested that the retention of the totality of the substantial fines imposed on foreign companies for bribery that largely took place in foreign countries ought to be shared with cooperating foreign authorities and returned to the countries where the corruption took place.[107] Recent steps in the right direction, such as the fine sharing arrangements between the U.S., Brazil, and Switzerland in the Odebrecht settlements, the joint DPA/CJIP in the recent Société Générale Libyan corruption case, and the tripartite PNF/SFO/DOJ co-operation in AIRBUS, taken together with the push to re-distribute to victims in corrupt countries of monies seized from Kleptocrats in BMA cases ought to stem these criticisms.[108] Comparative law and practice analysis contributed to the dialogue that led to such worthwhile initiatives. Further comparative study and interaction, especially between countries with radically different legal cultures such as France and the US, ought to assist in improving understanding and communication thereby lessening unnecessary tensions.

Issues for study should include how fundamental differences between the two countries influence responses to legal change. For example, France and American culture have diametrically-opposed perspectives on the role of money in society. American culture is open about its accumulation and discussion of one's financial situation in public, an outgrowth of the society's vision of money as an instrument of social change and upward mobility.[109] French culture is characterized by a mistrust of the role of money and imposes an obligation of discretion on discussion of personal wealth, particularly when it is

106 *See generally LELLOUCHE/BERGER*, *supra* note 2; LAÏDI, *supra* note 3, at 120-3. *See* GARRETT, TOO BIG *supra* note 61, at 178-89, 191, 271; *supra* note 61 and accompanying text.

107 *See generally* Anyango Oduor et al., *supra* note 93.

108 DOJ Odebrecht Press Release, *supra* note 7. For comments regarding the Société Générale case, see discussion *infra* Part VI(A).

109 *See generally* MICHELE LAMONT, MONEY, MORALS, AND MANNERS: THE CULTURE OF THE FRENCH AND THE AMERICAN UPPER-MIDDLE CLASS (1994) [hereinafter Lamont, Money]; MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS (2013); Retour sur les travaux de Michael J. Sandal, Table Rond au Collège de Bernardins avec Michael J. Sandal, Jean-Baptiste de Foucauld et Jean-Pierre Dupuy interviewed by Antoine Peillon, FRANCE CULTURE, April 15, 2016, https:/www.franceculture.fr-conférences-collège des bernardins.

perceived as a motivating factor for a group in opposition to the interests of society at large.[110]

Not surprisingly, American legal principles and remedies to right perceived wrongs to individuals and society favor financial incentives. U.S. legal culture generally favors innovations in the law developed by its entrepreneurial legal profession. Although perceived abuses of specific measures by entrepreneurial lawyers are criticized, the idea that the creativity of American lawyers is, as a general principle, harmful is not widely held.[111] Examples of such entrepreneurial innovations include: the use of class actions, to combat corporate greed;[112] mass tort litigation;[113] contingency fees and third party litigation financing as a means of facilitating access to justice for persons of limited means.[114]

In contrast, the French legislature—and to an extent the French bar—have reacted negatively to attempts to introduce these American law mechanisms into French law.[115] The bringing of class actions are

110 *See generally* Lamont, Money, *supra* note 109. *See also* THEODORE ZELDIN, THE FRENCH 194, 454-459 (1982).

111 *See generally* LAURENT COHEN-TANUGI, LE DROIT SANS L'ÉTAT: SUR LA DEMOCRATIE EN FRANCE ET EN AMERIQUE (2016) [hereinafter LE DROIT SANS L'ETAT]; JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE at 11-13 (2015); KAGAN, *supra* note 13. For a comparative analysis of the differences between the U.S. and European legal professions, *see* Dietrich Rueschemeyer, *Comparing Legal Professions Cross-Nationally: From a Professions centered to a State-Centered Approach*, 11 AM. BAR FOUNDATION RES. J. 415 (1986).

112 *See generally* PATRICK DILLON & CARL M. CANNON, CIRCLE OF GREED: THE SPECTACTULAR RISE AND FALL OF THE LAWYER WHO BROUGHT CORPORATE AMERICA TO ITS KNEES (2011) (providing a fascinating narrative of the developement of securities class action litigation by entreprenurial lawyers and the fall from grace of its most famous practitioner Lerach). *See also* GARAPON & PAPDOPOULOS, *supra* note 4, at 244-251.

113 *See generally* John G. Fleming, *Mass Torts*, 42 AM. J. COMP. L. 507 (1994); David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. PENN. L. REV. 1565 (2017); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941 (1995); RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT (2007). For a comparative law analysis, *see* Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 405 (2001).

114 *See* COFFEE, *supra* note 111, at 22-26, 210-211.

115 *See* Alexanne Bouvignies, Les Class Actions: Etude de droit comparé entre les droits français et américain 16-28 (2011) (Masters thesis in Comparative European Law, University of Paris 2) (on file with BANQUE DES MEMOIRS, Université Panthéon-Assas) ; Marie-Anne Frison-Roche, *Les résistances mécaniques du système juridique français à accueillir la class action : obstacles et compatibilites*, *in* LES CLASS ACTIONS DEVANT LE JUGE FRANÇAIS : REVE OU CAUCHEMAR ? 22-28 (June 10, 2005).

restricted to a limited number of consumer issues and may only be initiated by consumer associations previously approved by regulators.[116] Contingency fees are, in principle, prohibited, but tolerated if limited to a small percentage as a supplement to the normal fee.[117]

An acknowledgement of the importance of history, the mores, interests, and organizational behavior of components of the legal profession, combined with deep humility on the ability to forecast the effect on the legal system of the abolition or major modification of one of its traditional institutions is necessary in proposing changes designed to improve anticorruption enforcement. The "boomerang effect" of the delayed rejection of foreign legal transplants after an apparent acceptance cannot be ignored.

For example, despite the investigating magistrate's abolition in Italy, Germany, and Switzerland, attempts to do the same in France have failed. The French investigating magistrate may need to be retained to ensure the system's independence.[118] Given the increase in prosecutorial power subsequent to the adoption of American style plea bargaining as enshrined in the CJIP, French prosecutors may fail to pursue international corruption cases, as evidenced by initial prosecutorial obstruction in the *Biens mal acquis* cases discussed–in Part VI(B)(3) of this article. Likewise, the movement of the American criminal justice system towards a European administrative system

116 Group litigation procedures ("actions de groupe," often translated into English as "class actions," were only introduced in France in 2014 and were initially limited to a few consumer protection actions by the Hamon Law. Loi 2014-344 du 17 mars 2014 relative à la consummation [Law 2014-344 of March 17, 2014 Relating to Consumption], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2014, p. 5400. Consumers bringing these actions must be represented by previously-approved government civil society associations only. Lawyers are prohibited from signing up and representing plaintiffs. The scope of class actions that may be introduced was recently expanded to include discrimination, environmental protection, and data privacy by the Law for Justice in the 21st Century. Loi 2016-1547 du 18 novembre 2016 de modernization de la justice du XXIe siècle [Law 2016-1547 of November 18, 2016 on the Modernization of Justice in the 21st Century], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 18, 2016. *See* Julie Martinez, *"La class Action "à la Francaise"*, LE PETIT JURISTE (Oct. 12, 2014), https ://www.lepetitjuriste.fr/la-class-action-a-la-francaise/. For a comparaison of French and American law and practice, *see generally* Bouvignies, *supra* note 115.

117 *See* JEAN-JACQUES TAISNE, LA DEONTOLOGIE DE L'AVOCAT 127 (2019). *See also* SOULEZ LARIVIÈRE & DALLE 119-32 (2002); Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1 (2001).

118 *See* Pascal Gastineau, Investigating magistrate -TGI or 'District' court of Paris and President, Interview with French Association of Investigating Magistrates, FRANCE CULTURE (Apr. 18, 2018).

model due to the almost-exclusive resort to plea bargaining, raises important issues of fairness, public credibility, and participatory democracy that militate for a retention and revitalization of the jury.[119]

F. Administrative Agencies and Specialization

France is a highly centralized, state-centric nation.[120] A strong penchant, therefore, exists for entrusting administrative agencies with important (or for that matter, less important) issues. Delegation of executive or legislative power to administrative agencies is well accepted and seldom gives rise to significant debate. France benefits from a very well-established and independent—by tradition rather than law—administrative law system. Well-regarded administrative judges are organized in a structure distinct from the "ordinary" courts with its own supreme court: the "Conseil d'État." The prestige of French administrative law is demonstrated by its influence in many civil law countries and its presentation by Anglo-American legal scholars as an model for inspiration.[121]

119 *See* sources cited and accompanying text, *supra* note 86.

120 *See* PIERRE ROSANVALLON, L'ÉTAT EN FRANCE DE 1789 A NOS JOURS 95-99, 104-06, 295-397 (1990) ; VALERY GISCARD D'ESTAING, LE FRANÇAIS : REFLEXIONS SUR LE DESTIN D'UN PEUPLE 123-26 (2000) ; BERTRAND BADIE & PIERRE BIRNBAUM, SOCIOLOGIE D'ÉTAT 171-88, 203-10 (1979) (comparing France and the U.S.) ; SANCHE DE GRAMONT, THE FRENCH, PORTRAIT OF A PEOPLE 196 (1969). *See also* LE DROIT SANS L'ETAT, *supra* note 111; THEODORE ZELDIN, FRANCE 1848-1945: POLITICS AND ANGER vol. I, at 157-80 (1979). For a critique of De Tocqueville's views that French statism was inherently incompatible with the promotion of institutions of civil society while American individualism was incompatible with the development of a strong state, *see* generally, STEPHEN W. SAWYER, DEMOS ASSEMBLED: DEMOCRACY & THE INTERNATIONAL ORIGINS OF THE MODERN STATE, 1840-1880 (2018) and Stephen W. Sawyer, *Beyond Tocqueville's Myth: Rethinking the Model of the American State*, *in* BOUNDARIES OF THE STATE IN U.S. HISTORY 57 (James T. Sparrow, William J. Novak and Stephen W. Sawyer eds., 2015).

121 *See* John Bell, *Comparative Administrative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 1267 (Reimann & Zimmerman eds. 2006). *See also* Francesca Bignami, *Comparative Administrative Law*, *in* THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 145, 154 (Mauro Bussani & Ugo Mattei eds., 2012); EVA STEINER, FRENCH LAW: A COMPARATIVE APPROACH 248, 257 (2010). For favorable comparisons with common law countries, *see generally* C.J. HAMSON, EXECUTIVE DISCRETION AND JUDICIAL CONTROL: AN ASPECT OF THE FRENCH CONSEIL D'ETAT (1954); BERNARD SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD (1954); Dominique Custos, *Droits Administratifs Américain et Français: Sources et Procédure*, 2 REVUE INTERNATIONALE DE DROIT COMPARE 285 (2007); Prosper Weil, *The Strength and Weakness of French Administrative Law*, 23 CAMBRIDGE L.J. 242 (1965).

Top legal professionals in the administrative system, assigned to the Conseil d'État, are generally drawn from the prestigious training school, Ecole National d'Administration—commonly referred to as "ENA"—ensuring familiarity with other government officials and the workings of power.[122] Consequently, in the face of criticism of France's inertia in combatting corporate corruption abroad a new administrative agency, the Agence Française Anticorruption (French Anti-Corruption Agency) ("AFA") was established by Sapin 2 to lead French anti-corruption efforts. .

The use of administrative agencies to regulate business is consistent with French historical and political tradition, and therefore better accepted[123] than in the U.S.[124] Nevertheless, the creation of a special agency for corruption presents challenges. How will the agency interact with the criminal justice system, particularly with regard to the levying of sanctions and the plea-bargaining process? Might its low-level sanctions power relative to other countries tend to reduce the deterrent effect of anti-bribery laws? Will the bureaucratic tendency to prioritize process reinforce the "check the box" corruption compliance culture increasingly found in companies? How will it interact, if at all, with civil party "victims" of corruption?

The SEC's corruption deterrence and enforcement effectiveness, with a particular focus on its interplay with the DOJ, should be subjected to comparative law analysis to assess the future effectiveness of

122 *See generally* EZRA SULEIMAN, ELITES IN FRENCH SOCIETY: THE POLITICS OF SURVIVAL (1978).

123 *See* PHILIPPE MONTIGNY, L'ENTREPRISE FACE À LA CORRUPTION INTERNATIONALE 57-60 (2006) (analyzing the fundamental differences between French and American approaches to corruption). Montigny demonstrates that historical, political tradition and economic theory leads the French to seek administrative solutions to issues affecting the public interest. Americans tend, on the contrary, to look to the market and morality. These different approaches led to confrontation over which international institution—the market oriented OECD, favored by the US, or the international public law based, United Nations, favored by the French—would be best suited to serve as the focal point for international anti-bribery efforts. *Id.* at 60-65. *See generally* L. NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW (1998).

124 In relation to administrative agency control, Peter Schuck stated "Americans are profoundly, and perhaps incorrigibly, antibureaucratic." Schuck, *supra* note 113, at 979. Distinguished American law professors have argued that the 'ecomp system of U.S. administrative law is unconstitutional in its judicial acceptance of "deference" to administrative agency decision-making. *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014). Such arguments would be incomprehensible to French businesspersons and legal professionals

the AFA.[125] For example, the AFA's role is specialized and exclusive. Unlike the SEC, corruption prevention is its only mandate.[126] Anticorruption is tangential to the SEC's primary purpose of affording securities market investors the opportunity to protect themselves through the promulgation and enforcement of disclosure rules. The SEC's primary role under the FCPA—enforcement of compliance with accounting books and records requirements—appears to be an afterthought of its drafters.[127] The limited effectiveness of FCPA enforcement in its first quarter century may be partially ascribed to this financial and accounting approach to corruption. However well or poorly the SEC and the DOJ may have worked together on individual FCPA cases, the dual jurisdictional nature of their interplay has not contributed to rendering settlements transparent.

125 Research on the effectiveness of U.S. administrative agency enforcement has raised questions on the validity of generally unchallenged assumptions, notably that the technical specialization of agencies—such as the SEC—is necessarily an advantage in enforcement. The DOJ is a generalist organization, yet its monopoly on federal criminal prosecution, as demonstrated by its stellar record in foreign FCPA cases, has been an advantage. In a field subject to criticism of transparency, the DOJ provides far more guidance than the SEC (e.g., the United States Attorneys' Manual, continuing policy updates in the form of "memos"). The opaqueness of SEC actions—particularly hard to decipher in foreign cases—diminish its impact and may hinder its capacity to cooperate with foreign agencies. The de-listing of French firms (e.g., Alstom) from the New York Stock Exchange further limits the impact of the SEC in FCPA cases. *See generally* Max Minzner, *Should Agencies Enforce?* 99 U. OF MINN. L. REV. 2113 (2015); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); Natalya Shnitzer, *A Free Pass for Foreign Firms? An Assessment of SEC and Private Enforcement Against Foreign Issuers*, 119 YALE L.J. 1638 (2010). *See also* HAMBURGER, *supra* note 124, at 252-56 (2014) (arguing that the deference shown administrative agencies by Congress and the Courts is unconstitutional, especially criticizing the use of "self-reporting" as inconsistent with protections against self-incrimination and due process).

126 The specialized and exclusive role granted to the AFA was an explicit response to perceived weaknesses in the previous anticorruption organizational framework which comprised two non-specialized competing departments. English version of French Anti-Corruption Agency, Annual Report 2017, Section 1.2-*The AFA's Mandate*, https://www.agence-francaise-anticorruption.gouv.fr/files/files/AFA_rapportAnnuel2017GB.pdf. [hereinafter AFA Report] ("The AFA intervenes only as a preventive measure. Although it can detect offences, it is not a judicial authority and is therefore not required by law to investigate, record or prosecute criminal offenses."). Quoting Article 1 of Sapin 2 (English translation) at 11 ("AFA's mandate is to assist the competent authorities and persons involved in preventing and detecting acts of corruption, influence peddling, misappropriation of public funds and favoritism.").

127 *See* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 930, 951-54, 961-64, 980-96 (2012).

Consistent with French administrative practice, the AFA mandate articulates a far more precise and prescriptive role than the SEC. Actual practice will determine whether this specialized and directive approach will make it more effective than the SEC or increase its susceptibility to being neutered through "industry-capture." AFA future practice, particularly in supervising post sanction individual corporate compliance programs, should prove worthy of study by the SEC and DOJ given the perceived lack of transparency of U.S. monitoring programs. Critical analysis, including examination of foreign, and in particular, French practice, of the DOJ's nearly exclusive reliance on plea bargains is also warranted given the growing characterization of the American criminal justice system as "administrative."[128]

G. Whistleblowing

The adoption of the peculiar American tool of whistleblowing spurred an emotional controversy in France. The integration of whistleblowing in Sapin 2 was only achieved after significantly limiting its scope and adding safeguards against its abuse to ensure it did not conflict with French societal and legal cultural norms.[129]

As with plea bargaining, the debate over whistleblowing tended to be emotional and framed in terms of general acceptance or rejection of American culture rather than its effectiveness as an anti-corruption tool. The plea-bargaining controversy focused on its coherence with deeply held tenets of French legal culture, the Legality Principle,[130] the criminal process as a search for truth, and the need to limit prosecutorial discretion. Debate on whistleblowing centered more on the fear that its adoption would violate societal norms that may be traced to traumatic moments of French history.

Nevertheless, the adoption of whistleblowing ("lanceurs d'alerte") in Sapin 2 and its practical implementation raise privacy and labor law issues, which occupy a central role in the legal environment of French business.[131] Comparative legal analysis can therefore play a

128 For criticism of monitoring, *see supra* note 84 and accompanying text. For an argument that the U.S. criminal justice system has been transformed into an administrative system, as virtually all critical decisions are now made by prosecutors, *see* Sara Sun Beale, *supra* note 28, at 33, 46. *See generally* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

129 *See* sources and accompanying text, *supra* note 12 (describing and defining legal cultural considerations).

130 *See* Dubber, *supra* note 68.

131 *See generally* James Whitman, *Two Western Cultures of Privacy : Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004); Jean-Louis Halpérin, *Protection de la vie*

useful role in identifying likely points of tension that need to be defused through adaptation—as would any legal transplant—if whistleblowing is to be successfully integrated into French law and practice.[132]

French commentators tend to overlook the difficulties confronted by American whistleblowers in the past and the ineffectiveness of early legislative attempts, notably the Federal Claims Act, to encourage the practice to combat fraud.[133] Societal norms do not generally favor the practice and tend to lead to the rejection or marginalization of the whistleblower in both countries, as is common elsewhere. It is, however, true that while the embrace of the whistleblower by American society and the enactment of a strong protective legal framework may be of relatively recent vintage, the persistence of animosity towards whistleblowers and resistance to efforts to protect them distinguishes French and American present-day practice. The nature of the debate and the integration of a framework that attempts to offer protection consistent with French norms in the Sapin 2 provides an interesting comparative perspective on the adaptability of anti-corporate corruption tools.

Two particularly traumatic periods of French history—the Revolutionary Reign of Terror and the World War II Occupation—were characterized by widespread denunciations of persons for "crimes." Sanctions included death or torture. The realization that these horrors were inflicted on victims as a result of often anonymous denunciations seared its scars onto the French psyche. French cultural norms place high premiums on privacy and reputation, as is long enshrined in libel

privée et privacy : deux traditions juridiques différente ?, 48 NOUVEAUX CAHIERS DU CONSEIL CONSTITUTIONNEL 59 (2015) ; Isabelle Chaperon, *Un lanceur d'alerte face à la Société Générale*, LE MONDE (Sept. 21, 2019), https ://www.lemonde.fr/economie/article/2019/09/20/societe-generale-un-lanceur-d-alerte-devant-les-prud-hommes_6012372_3234.html; Julien Icard, *Alerte individuelle en droit du travail*, 6 DROIT SOCIAL 545 (2017).

132 *See, e.g.*, Johanna Schwartz Miralles, *Les récompenses financières des lanceurs d'alerte portent-elles atteinte aux droits fondamentaux? Le cas du droit américain,* LA REVUE DES DROITS DE L'HOMME (Oct. 2016) (analyzing the strengths and weaknesses of the use of monetary rewards in American whistleblowing practice). *See also* François Barrière, *Les Lanceurs d'Alerte*, *in* ANTICORRUPTION LA LOI SAPIN 2 EN APPLICATION 103 (Maud Lena & Erwan Royer eds. 2018) (noting a trend towards greater acceptance of whistleblowing following the uncovering by "whistleblowers" of major scandals in France, notably the Mediator drug case). For a Franco-American comparative law analysis of the Mediator case, *see generally* Fred Einbinder, *Mass Torts: Dispute resolution in France and the USA—The VIOXX and MEDIATOR Cases Compared*, 29 WASH. INT'L L.J. 575 (2020).

133 *See* MUELLER, *supra* note 104, at 12-27.

law and, more recently, in data privacy legislation.[134] Consequently, France was not a country open to the the American practice of encouraging anonymity, and multinational companies present in France and America found themselves "caught in the middle" in the development and implementation of anticorruption provisions of their Codes of Conduct. Their legitimate desire to promote uniform rules of employee behavior was thwarted by irreconcilable requirements of American and French law on implementing whistleblowing as an anticorruption tool. Whereas American federal law obliged companies to set up anonymous hotlines for whistleblowing complaints or lose the ability to tender for federally-financed projects,[135] French law prohibited anonymity on pain of criminal whistleblower programs had to be registered and approved by the French Commission Nationale de l'Informatique et des Libertés ("CNIL"), which is charged with protecting strict French data privacy law.[136]

The potential for a company to find itself in the proverbial "dammed if it did, dammed if it didn't" situation was great, as the CNIL and French data privacy law presented a risk in the hardly unlikely event that an investigation of an allegation of corrupt activity included transfers of data between France and the United States. In

134 *See* Samuel Dyens, *Le lanceur d'alerte dans la loi "Sapin 2": un renforcement en trompe d'oeil*, *in* ANTICORRUPTION LA LOI SAPIN 2 EN APPLICATION 17-18 (Maud Lena & Erwan Royer eds. 2018) (contending that references to "denunciations" during the German Occupation in the Second World War and shock at the idea of renumerating in the debates were sincere). Intense animosity to whistleblowing is prevalent in French corporate culture "les entreprises françaises demeurent réticentes à la mise en oeuvre de la procedure d'alert.. dans un système qui, culturement n'est pas prêt à le recevoir" ("French companies remain reluctant to adopt whistleblowing procedures to a cultural reject of the practice"), Summary, Conference, Gide Loyrette, Nouel Law Firm of October 2, 2008. *See generally* Whitman, *supra* note 131; Jeanne M. Hauch, *Protecting Private Facts in France: The Warren and Brandeis Tort is Alive and Well and Flourishing in Paris*, 68 TUL. L. REV. 1219 (1994); Ronald J. Krotosznski, *Reconciling Privacy and Speech in the Era of Big Data: A Comparative Legal Analysis*, 56 WM. & MARY L. REV. 1279 (2015).

135 For example, the Alert Procedure first introduced in Alstom's worldwide Code of Conduct issued in 2007 stated that employees' wishes for "confidentiality" would be respected, explicitly avoiding the term "anonymity" which would have violated French law. The term "confidentiality" was considered broad enough to encompass "anonymity," which, as required by federal law, was guaranteed to employees in the U.S. The Alert Procedure specified that its use would be subject to the laws and rules of the country where the employee lived or worked to provide the flexibility necessary to comply with French or U.S. law. *See* "The Role of Employees and the Alert Procedure," Alstom's Code of Conduct, 9 (2007) at 9 and personal recollections of the Author who drafted the text.

136 *See* text and sources cited *infra* note 199. *See also* OECD, THE DETECTION OF FOREIGN BRIBERY 37-38 (Dec. 12, 2017).

addition, French labor unions, which must be consulted prior to establishing whistleblower programs, may frustrate their implementation through delay and demands for modification. French unions have tended to negatively perceive whistleblower programs as impinging on their own role as the voice for employee complaints. French unions are also not generally known to be especially affectionate to American managerial methods, and their suspicion of ulterior motives would tend to be particularly strong when consulted on the adoption of an American-styled proposal.[137]

French companies with substantial American business and American companies with French subsidiaries have managed this conflict with more or less success.[138] As with other legal dilemmas inherent in international business, familiarity with the legal environment and the business and societal culture underlying anticorruption practices, coupled with common sense solutions and a good deal of patience, are of great assistance in reducing program implementation tensions.

H. Cultural Factors

1. French national and Business Culture

Evaluating the extent fundamental societal values and beliefs—or "culture"—influence business decisions in general, and responses to foreign legal challenges in particular, is not an easy task. The manner in which business is conducted and major decisions made and implemented is often the result of many hard to discern factors by "outsiders" to the concerned enterprise. The "measurement" of the effect that cultural norms have on business decisions involving legal issues has engendered scholarly debate along a fracture line between the twin faults of exaggerating or underestimating cultural influences.[139]

137 *See* Icard, *supra* note 131.

138 *See supra* note 135, referring to the experience of Alstom in reconciling US and French law and practice.

139 *See* PHILIPPE D'IRIBARNE, MANAGING CORPORATE VALUES IN DIVERSE NATIONAL CULTURES: THE CHALLENGE OF DIFFERENCES (2012) (an English translation of Iribarne's influential case study of the French multinational Lafarge—now the world's largest cement company following its merger with the Swiss Holcim to create Lafarge-Holcim); PHILIPPE D'IRIBARNE, LA LOGIQUE DE L'HONNEUR: GESTION DES ENTREPRISES ET TRADITIONS NATIONALES (1989). *See also* Chase, *supra* note 23, at 2-7. *But see* Philip M. Nichols, *The Myth of Anti-Bribery as Transnational Intrusion*, 33 CORNELL INT'L L.J. 627 (2000) (criticizing the exaggeration of cultural differences as a means of avoiding the adoption of anti-bribery legislation and transnational enforcement efforts); John D. Jackson, *Playing the Culture Card in Resisting Cross-Jurisdictional Transplants: A Comment on "Legal Processes and*

Nevertheless, a failure to consider common cultural national traits in business would be even more perilous to the validity of a comparative analysis of the particularly culturally-sensitive topic of international corporate corruption, and will thus be attempted.

French companies' resistance to, or limited cooperation in American anti-bribery cases are partially attributable to several factors, including business strategy, management culture, and corporate governance practice. In addition, the French to view problems and seek remedies from geopolitical and economic perspectives rather than the American penchant for a global legalist approach.[140]

France and the United States have long held the common fundamental political and social values of individualism, freedom, equality, democracy, and human rights forged in their respective revolutions and articulated in their foundational legal instruments—the U.S. Constitution, the Declaration of the Rights of Man, and the Civil Code. Both countries believe these values to be universal and have promoted, sometimes by force, their respective interpretation of these values beyond their borders.

Franco-American relations tend towards the passionate, due in large part to competition over these differing universalist interpretations and unrealistic expectations for mutual respect and recognition. Centuries of exchanges of ideas and persons—as allies in battle and, more recently, for study and work—have fostered a desire for emulation and a sense of comfort and familiarity with the other culture. However, as is often the case in cross-cultural relations, and in particular in Franco-American business encounters, apparent familiarity and shared values paradoxically lead to emotional reactions arising from misunderstandings caused by the failure to appreciate significant cultural gaps that a businessperson would anticipate when interacting in a more "exotic" environment.[141]

Management in large traditional French companies, as the "big four" internationally-oriented "national champions" caught in the FCPA vortex described in Part III(B) below, is highly-centralized with

National Culture", 5 CARDOZO J. INT'L & COMP. L. 51, 52-53 (1997) (contesting the relevance of cultural factors in procedural reform).

140 For a description and harsh critique of American "legal imperialism" from the American legal academy, *see generally* ERIC A. POSNER, THE PERILS OF LEGAL GLOBALISM (2009).

141 Amanda Dianetti, France and the United States: How Intercultural Competence Can Make or Break a Business in a Global World 6, 7 (May 15, 2015) (Senior Honors Thesis no. 93, State University of New York: The College at Brockport) (available at Digital Commons, SUNY Brockport).

power invested, both in law and in practice, in the hands of the CEO. CEOs and senior management are almost exclusively drawn from the ranks of the elite "grande écoles."[142] The graduates of the "grand écoles" often follow their initial "university" education with studies and training at even more elite postgraduate state schools followed by a few years of work in a government ministry.[143] Armed with this strong educational background and initial training, often imbued with a sense of duty to serve the "public interest" as a member of a cohesive "corps," they soon are given corporate management positions at higher levels of responsibility than their American counterparts.[144]

The selection process places a premium on intellectual brilliance, the ability to quickly and comprehensively understand complex issues through a mastery of reports—a skill not dissimilar to the analysis of the "dossier" by the investigating magistrate discussed above. This Napoleonic model of a brilliant powerful executive at the apex of a hierarchal structure with high power distance compared with their American counterparts. French corporate boards have traditionally been composed of like-minded directors drawn from the ranks of successful corporate leaders at similar companies with similar backgrounds as the Chief Executive Officer.[145]

142 The most elite of the "Grandes Ecoles" is Ecole Polytechnique—commonly referred to as "X"—which produces the greatest number of CEOs at companies such as the big four, and was established by Napoleon to train engineers. It symbolically retains its military origins. Studies continue for the best graduates at schools created to prepare for service in particular engineering "corps" such as "Mines" or Ponts et Chausées (Bridges and Roadworks-Civil engineering). The top "engineering" students at X are selected by Mines from whose ranks many CEOs (as the majority of the national champions) are drawn. Graduates of the best business schools (e.g., L'École des Hautes Études Commericiales de Paris ("HEC")) or the National School of Administration (École Nationale d'Administration ("ENA")), whose highest ranked students are selected to be finance inspectors, have increasingly ascended to top management positions. For a critical exposé of the negative effects of the control of key State ministries and national champions (e.g. Alstom, Total) by these graduates who comprise an interconnected caste, *see* GHISLAINE OTTENHEIMER, LES INTOUCHABLES: GRANDEUR ET DÉCADENCE D'UNE CASTE: L'INSPECTION DES FINANCES 30-31, 148-57, 236-41 (2004) [hereinafter OTTENHEIMER].

143 *See OTTENHEIMER, supra* note 142, at 42-44.

144 For an exhaustive analysis of the creation and maintenance of an elite French managerial caste imbued with the notion that they act in the "public interest" in their management of French national champions, *see* PIERRE BOURDIEU, LA NOBLESSE D'ÉTAT 406-15, 428-68 (1989); ROSANVALLON, *supra* note 120, at 82-84.

145 The Boards of the "big four" national champions discussed are illustrative: a majority of the French board members at the time of their respective corruption difficulties were present or former CEOs or senior executives at other national champions, including fellow "big four" companies, with remarkably similar educational backgrounds. It is still common in France, particularly in press articles, to introduce

French CEOs tend to insist on being seen as fully in control of matters that are more commonly assigned to other senior managers in the U.S. The conduct of shareholders' meetings, media presentations, and internal management conferences provide a vivid illustration of this difference in style. Typically, the French CEO will monopolize the proceedings and directly answer most—if not all—questions, including those of a technical nature that would normally be directed to the Chief Financial Officer, General Counsel, or Chief Operating Officer in the U.S.[146]

The distinctive background and management style of French CEOs has probably contributed to the international success of large French companies, including "national champions." Highly intelligent, internationally savvy, and able to handle difficult engineering,

sixty-year-old CEOs of major companies by referencing their school and class ranking, e.g., if they graduated first in their class (*major*). This is a non-uncommon accomplishment for CEOs of major national champions. For example, Alstom's former CEO and CFO were "majors" of X and ENA, respectively. *See* SOPHIE COIGNARD, LES FAUX JETONS 125-27, 158-59, 173-75, 188-95 (2019). The case of Serge Tchruck is particularly telling, as he served as CEO of Elf/Total prior to being named CEO of Alcatel, which during his term of office owned 50% of Alstom in a joint venture with General Electric Company ("GEC") of the U.K. *See* ALSTOM, REGISTRATION DOCUMENT 2009/10 148-157 (2010); TECHNIP, ANNUAL REPORT 2009; ALCATEL-LUCENT, 2009 ANNUAL REPORT ON FORM 20-F.

146 For example, the 2007-2010 Annual Shareholders meetings of Alstom, at which the author in his capacity as general counsel and company secretary shared the podium with the CFO and the CEO. At the crucial extraordinary meeting of December 21, 2014, however, which was convened to approve the acquisition by GE of Alstom's power generation business which represented over two-thirds of Alstom. questions from the shareholders regarding press reports of an impending massive FCPA fine were "answered" by the CEO, rather than the General Counsel, Keith Carr (who was not conversant in French, the language of the proceedings) The CEO claimed that he was prohibited from responding to any such questions by the terms of the DPA, which was still being negotiated (account by author who attended as an individual Alstom shareholder.). In reality, the DPA was agreed upon and was signed that same day..Consistent with DOJ policy, the DPA did not prohibit comment by Alstom, but included a provision designed to avoid denial or minimization by preventing the company from contesting the factual recital in the DPA and subjecting press releases by the company. *See* LAÏDI, *supra* note 3, at 126-127 (describing such "muzzle clauses"). Alstom's CEO, at the time of the GE deal and DPA, continued to state that he is legally prohibited from commenting on the DPA despite the refutation of this opinion by U.S. prosecutors. *See* PIERUCCI & ARON, *supra* note 3, at 277; MARLEIX COMMISSION, *supra* note 2; Davis, *International Double Jeopardy*, *supra* note 75; Caroline Michel-Aguirre, *supra* note 66, at 66. U.S. Alstom's failure to cooperate with the DOJ may have significantly cost its shareholders. *See* Gary G. Grindler and Laura K. Bennett, *True Cooperation: DOJ's "Reshaped Conversation"and its Consequences*, 30 CRIM. JUST. 32 (2015) (quoting Patrick Stokes, Deputy Chief of DOJ's Fraud Unit, stating that had Alstom self-disclosed and cooperated, the DOJ would have sought a penalty 73% less than that paid).

financial, and operational issues, these leaders were often highly successful in expanding their companies' international reach. However, these traits, combined with French perspectives on the role of the State with a corresponding preference for "political" rather than legal analysis, appear to have disadvantaged "national champions" in dealing with international corruption issues. The traditional deference shown to CEO's by their boards of directors and statutory auditors may have also contributed to the greater turmoil suffered by French national champions arising out of U.S. corruption investigations in comparison with the experience of their U.S. (and German) counterparts.[147]

The French state has played a critical role in the fashioning of the national economy and the development of national champions, notably the "big four," and other companies subject to future U.S. sanctions, notably Airbus.[148] Alcatel and Alstom belonged to the

147 The difference between Alstom and Siemens' reaction to very similar corruption investigations is striking in this regard. *See supra* note 66, sources and accompanying text. The complete overhaul of Siemens' management team stands in direct contrast to the lack of any change at Alstom. This cannot be explained by differences in the personal stature of the CEO as Siemens' CEO, Herbert Von Pierrer, (who consistent with company tradition, spent his entire career at Siemens, starting, interestingly enough, as an in-house counsel) was as powerful and well-connected—if not more so—than his Alstom counterpart, Patrick Kron. Rather, the explanation may be largely attributed to the differences between the German split management (supervisory and management boards) and French unified corporate governance (Chairman of the Board and CEO combined in a single person). The German supervisory was free, and felt compelled to take drastic action in the face of what it undoubtably perceived as an existential threat to Siemens' viability as Germany's leading "national champion." French corporate governance mechanisms did not facilitate, and certainly did not compel, strong action in the Alstom case. French business culture would not in any case countenance abrupt management change, especially if, as in the case of Alstom (and Alcatel and Total), the CEO was a highly respected charismatic member of the leadership "caste" with political support and who had "saved" the company from dire straits and made it profitable. *See* PIERUCCI & ARON, *supra* note 3, at 49, 271; Pierre Laporte, *Une organisation de compliance anticorruption de façade: quels enjeux, quels risques? leçons à tirer d'affaires récentes*, in DE LA CONFORMITE A LA JUSTICE NEGOCIEE, ACTUALITE DE LA LUTTE ANTICORRUPTION, ÉCOLE NATIONALE DE LA MAGISTRATURE (May 17, 2018) at 92-94, http://www.enm.justice.fr/sites/default/files/actu-pdf/Actes-du-colloque_De-la-conformite-a-la-justice-negociee.pdf.

Drastic management changes, as at Siemens, are exceedingly rare at French national champions. When made, these are undertaken only when the very existence of the company is in jeopardy, as was the case in the removal of Jean-Marie Messier at Vivendi; and even in these cases, they are done in as "elegant" a fashion as possible after opaque decision-making by "gray eminences," who are epitomes of the best of the leadership "caste." For a fascinating narrative of the Vivendi debacle, *see* JO JOHNSON & MARTINE ORANGE, THE MAN WHO TRIED TO BUY THE WORLD (2003).

148 *See* MARLEIX COMMISSION, *supra* note 2, at 12, 113-20, 161-65.

Compagnie Générale d'Életricité group ("CGE") that was nationalized in the early 1980s.[149] Alstom was rescued by the French State from a bankruptcy that would have led to its demise in 2003.[150] An important percentage of their revenues were, and continue to be in Alstom's case, derived from public contracts.[151] Total, formerly Elf Aquitaine, was closely tied to the state and was a major source of funneling funds to the political party in power.[152]

In sharp contrast to the U.S., the French state's involvement in the economy and in the affairs of "national champions" is viewed as natural. European Union "State Aide" regulations, deficit concerns, and notable failures of state-aided companies has diminished state intervention in recent years.[153] However, calls for the State to intervene to save troubled companies or those targeted for foreign takeover are common and are an important component of political debate.[154] The natural affinity of state-trained corporate leaders for the national interest—such as closing foreign rather than French plants or working with other French companies to do what is best for "*la maison France*" (French national interests)—continues to exert an indirect influence on corporate decision-making. French political theory tends to idealize and idolize the role of the State in society, which is in contradistinction to the American penchant to do the same for the "market."[155]

As a consequence, French companies, government officials, implicated individuals, and the public at large tend to view U.S. anticorruption and economic sanction enforcement actions against national champions through a political lens. Whatever may be the value of such a political diagnosis, reliance on a "political" as opposed to a legal response to perceived American "legal imperialism" and "economic

149 MARLEIX COMMISSION, *supra* note 2, at 204-14; LAÏDI, *supra* note 3, at 15-17.

150 Maxime Vaudano, *Sarkozy a-t-il vraiment sauvé Alstom en 2004 ?*, LE MONDE (Apr. 28, 2014), https://www.lemonde.fr/les-decodeurs/article/2014/04/28/sarkozy-a-t-il-vraiment-sauve-alstom-en-2004_4408468_4355770.html.

151 MARLEIX COMMISSION, *supra* note 2, at 12 (also noting Alstom's national strategic importance in France's nuclear industry).

152 *See* sources and accompanying text, *supra* note 41.

153 *See* Max Lienemayer, *State Aid to Companies in Difficulty—the Rescue and Restruction Guidelines*, *in* THE EC STATE AID REGIME: DISTORTIVE EFFECTS OF STATE AID ON COMPETITION AND TRADE 183-230 (2006).

154 As evidenced by the issuance of the reports of three parliamentary inquiries on the need for state involvement in the defense of French companies. *See* LELLOUCHE/BERGER, *supra* note 2; *Gauvain Report*, *supra* note 2; MARLEIX COMMISSION, *supra* note 2.

155 *See* GARAPON & SERVAN-SCHREIBER, *supra* note 49, at 14-15, 141-42, 148; COHEN-TANUGI, LE DROIT SANS L'ETAT *supra* note 111.

warfare" has not proved to be of practical assistance to French companies in FCPA cases.[156]

In addition, investigating magistrates, as well as the French press, have focused their attention almost exclusively on corruption cases that may have political implications. This search for kickbacks or "retrocessions" to political parties and leaders, including past French presidents, is central to how the French perceive international corruption. Its reprehensive nature lies more in its corruption of French politics than in a moral combat with important geopolitical consequences as was the foundational basis of the FCPA.[157] This distinctive manner of perceiving corruption is analogous to the equally distinctive habit of French individuals defending themselves when faced with allegations of involvement in international corruption, normally by claiming that

156 The French public hoped that the predicament of the imprisoned Alstom executive, Frédéric Pierrucci, and the fine against BNP for economic sanctions breaking might be amicably resolved by their respective presidents. This viewpoint of executive power is an example of the glaring difference in perceptions of the relative roles of diplomacy, politics, and law. In refusing to discuss the case, President Obama noted, a bit sarcastically, that in America the judicial branch was independent from the executive. Anne de Guigné and Pierre-Yves Dugue, *BNP PARIBAS: Obama refuse de s « meler » de l'affaire judiciaire*, LE FIGARO (June 5, 2014), https://www.lefigaro.fr/societes/2014/06/05/20005-20140605ARTFIG00009-l-affaire-bnp-paribas-s-invite-au-diner-entre-hollande-et-obama.php; Caroline Michel-Aguirre & Clément Lacombe, *Nos patrons sont-ils au-dessus des lois*, 2822 L'OBS 58 (2018); Annelot Huijgen, *Alstom: les dessous d'une amende record,* LE FIGARO (Dec. 23, 2014), https://www.lefigaro.fr/societes/2014/12/23/20005-20141223ARTFIG00394-alstom-les-dessous-d-une-amende-record.php. This example of the difference in Franco-American attitudes towards judicial independence and diplomacy is not singular. The Executive Life dispute, which embroiled France's richest businessman, François Pinault, in a case where the major French bank Crédit Lyonnais was charged with violating U.S. laws prohibiting foreign banks from owning American insurance companies. French officials beseeched Secretary of State, Colin Powell, to intervene in California state criminal proceedings on his behalf. Secretary Powell was reported (London Times) to have responded "We're not some banana repûblic-we don't do that sort of thing." *The Other Franco-American Dust-Up*, WALL ST. J. (Dec. 16, 2003), https://www.wsj.com/articles/SB107152802871880800. Julien Dumond, *Le Crédit Lyonnais Menace aux Etats-Unis*, LE PARISIEN (Aug. 27, 2003), https://www.leparisien.fr/faits-divers/le-credit-lyonnais-menace-aux-etats-unis-27-08-2003-F2004341651.php. For a general description of the Crédit Lyonnais case and criticism of the American judicial system in a similar vein to that of Fréderic Pierrucci in LE PIÈGE AMÉRICAIN, (*supra*, note 3) by Crédit Lyonnais' former CEO, *see* JEAN PEYRELEVADE & JEAN-MARIE PONTAUT, SEUL FACE À LA JUSTICE AMÉRICAINE (2006) [hereinafter Peyrelevade].

157 *See* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 930, 951-54, 961-64, 980-96 (2012).

they did not personally profit from the corruption, but rather only acted as required to further the business of their company.[158]

Americans ideological embrace of a "moral" market free from political influence lies at the heart of the justification for the FCPA in 1977, and its extension in 1998, aimed at capturing corruption by non-U.S. companies viewed as distorting the market to the detriment of American competitors. The conflict between French and American perceptions—and their respective framing of the reasons underlying the confrontation—have therefore been greater than with other countries.

2. Communication Styles and Media Coverage

Other general and legal cultural differences may have played a role in exacerbating the apparent miscommunication and misunderstandings in the confrontation between French national champions and U.S. authorities. French communication styles are classified as "high context," with messages that are suggestive, implicit, and inferential as opposed to the extreme "low context" American style, which is direct, explicit, and comprehensive. In addition, albeit seemingly inconsistent with the high/low communication classifications, French and Americans provide feedback differently, with Americans tending to sugarcoat the negative and the French holding nothing back. American negative feedback may therefore be interpreted positively by a French person.[159] These cultural differences may have resulted in mixed

158 PIERUCCI & ARON, *supr*a note 3, at 100; The statements of former Alstom employee and later consultant, Michel Mignot, that "I never took a cent for myself, I didn't think the transactions were illegal, because they were done to get civil engineering contracts around the world and were ordered by senior managers" illustrate the French cultural norm of emphasizing individual propriety and loyalty and reliance on hierarchy as justifications for corruption. David Crawford, *French Firm Scrutinized in Global Bribe Probe*, WALL ST. J. (May 6, 2008), https://www.wsj.com/articles/SB121001983179268511. This French trait of attempting to justify or minimize participation in corruption if the individual was loyal to his company and did not personally benefit finds its analogy in the defense of politicians that they were acting solely on behalf of their political party when charged with corruption. Investigating magistrates have also adopted this culturally influenced "honor" approach in limiting their corruption investigations almost exclusively to cases where political ramifications as evidenced by kickback "retrocessions" are present. *See* LE COQ, *supra* note 22, at 107-16.

159 Dianetti, *supra* note 141, at 26. *See generally* EDWARD T. HALL & MILDRED REED HALL, UNDERSTANDING CULTURAL DIFFERENCES (1990).

messages, particularly on the extent of "cooperation," being passed between French management and American authorities.[160]

French CEOs' prowess in analyzing complex issues in a rational "Cartesian" manner is largely premised on the controlled efficient flow of accurate information up the hierarchy. Such a process is hindered by the lack of clarity inherent in criminal investigations and negotiations between authorities and defendants from countries with vastly different cultural differences.

The lack of a tradition of "discovery" in French civil and criminal procedure, including opposition to the concept internationally to the extent that French national interests might be affected, may also have contributed to distrust increased by wide differences in expectations from the process.[161] Until very recently, French companies who called

160 The disparity between Alstom's public statements that it was cooperating and the DOJ's statements that it had not is an example. *See* DOJ ALSTOM Press Release *supra* note 57.

161 *See* LAÏDI, *supra* note 3, at 123-26, 176-77. The French response to extraterritorial economic sanctions disputes with the U.S. in the late 1960s included the promulgation of a "blocking statute" criminalizing the direct transmission of business or technical information to foreign authorities, which bypassed treaty mechanisms for such transfers. Loi 68-678 du 26 juillet 1968 relative à la communication de documents et renseignements d'ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères, modifié par la loi n°80-538 du 16 juillet 1980 [Law 68-678 of July 26, 1968 on the communication of documents and information of an economic, commercial, industrial, financial or technical nature to foreign physical or legal persons, as amended by Law n°80-538 of July 16th, 1980], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICAL GAZETTE OF FRANCE], July 17, 1980, p. 1799. This blocking statute has not been effectively enforced, with the notable exception of its use against an American lawyer in the Executive Life litigation, Cass. crim., 12 décembre 2007, n° 07-83.228 (*Christopher X*). For a narrative of the Executive Life litigation *see* Peyrelevade, *supra* note 156 and has largely become a dead letter due to its non-acceptance by U.S. authorities and courts as a valid excuse to not accede to U.S. discovery requests. *See* Vivian Grosswald Curran, *U.S. Discovery in a Transnational and Digital Age and the Increasing Need for Comparative Analysis*, 51 AKRON L. REV. 857, 865 (2017). *See also* Daniel Alterbaum, *Comment: Christopher X and CNIL: A Clarion Call to revitalize the Hague Conventions,* 38 YALE J. INT'L L. 217, 223-226 (2013). However, lawyers conducting internal investigations related to anticorruption or economic sanctions may, in the future, run the risk of being criminally prosecuted in France if the drafters' recommendations to enforce the French blocking statute, laid out in the parliamentary Gauvain Report are followed. *See Gauvain Report*, *supra* note 2. A recent decision of the U.S. Distict Court for the Southern District of New York may contribute to this risk. United States v. Connolly, No. 16 Cr. 0370, 2019 WL 2120523 (S.D.N.Y. May 2, 2019). In her holding in *Connolly*, Chief Judge McMahon held that in cases where "extensive coordination" between lawyers

on outside counsel to conduct internal investigations would expect their counsels to prepare reports principally for the board of directors and auditors that placed the company in a positive light as diligently improving its compliance procedures. The criminal defense lawyers, imbued with the ethos of protecting their corporate clients' secrets and best interests, would oblige by limiting their reports to suggestions for improvement and an analysis of risks associated with cases only already uncovered by the authorities or the press, thereby perpetuating the appearance of denial or minimization that would have the tendency to infuriate American authorities.[162] CEOs in corruption cases—cognizant of the past experiences of French companies, including their own—would be tempted to adopt a strategy of grinding delay and attacking the "dossier" through a plethora of technical objections consistent with the tactics of defense counsel, who were almost always successful at reducing the risk to, at most, a small fine and suspended prison terms pronounced many years after the initial "scandal" broke in the press.[163] While such a strategy might have fallen within acceptable norms of conduct between investigating magistrates and defense counsel, it ran the risk of increasing American authorities' ire at the prospect of being led on a string by French "stalling."

conducting the internal investigation and prosecutors amounts to an "outsourcing" of the prosecution, and the corporate internal investigation will be deemed to constitute "state action," which is a requirement for the application of foreign blocking statutes, notably the French one. Frederick T. Davis, United States v. Connolly *and the Risk that "Outsourced" Criminal Investigations Might Violate Foreign Blocking Statutes*, N.Y.U. L.: COMPLIANCE & ENFORCEMENT (Nov. 6, 2019), https://wp.nyu.edu/compliance_enforcement/2019/11/06/united-states-v-connolly-and-the-risk-that-outsourced-criminal-investigations-might-violate-foreign-blocking-statutes/. *See also Fall 2019 HUGHES ALERT,* FCPA & ANTI-BRIBERY 112-13, 125-27 (Hughes Hubbard & Reed LLP, New York, N.Y.), 2019. (detailing the Gauvain Report's recommendations for reinforcing the French blocking statute and AFA's oversight of compliance with it). [hereinafter, Fall 2019, HUGHES ALERT].

162 LAÏDI, *supra* note 3, at 213; PIERUCCI & ARON, *supra* note 3, at 288. For example, tensions inherent in the different Franco-American approaches to internal investigations were evident between Alstom's French and American counsel in the months following the notification by the DOJ that Alstom was a "target" on April 1, 2010. Lead French counsel (who was originally chosen to represent the CEO in an individual capacity) adamantly refused the communication of any documents located on French soil to U.S. authorities and U.S. counsel, believing that such a stance would lead to serious issues in the future (per Author's recollection as Alstom's general counsel at this time).

163 Arnaud Leparmentier, *Corruption et malversations: La justice américaine trop sévère avec les groupes français?*, LE MONDE, February 3, 2019, at 12 (quoting Stephane de Navacelle).

Press coverage, and the reaction of French companies to it in international corruption cases, varies from American practice. The French focus on the political leads to intensive coverage of criminal corruption investigations if politicians are alleged to be involved. Hyperbole, exemplified by promises of implicated suspects to reveal scandalous politically-tinged secrets that will rock the French Republique to its knees, are not uncommon. The narrative fits nicely into the history of the French press uncovering such scandals decades ago.[164] As opposed to American practice, non-politically connected corruption generally receives scant attention. Coverage of the investigations of the "big four" national champions was surprisingly limited until the imposition of massive fines on Alstom. The heavy coverage of their respective corruption woes after the "Alstom moment" centered, however, almost exclusively on the U.S. despite ongoing investigations of Alstom and the other companies in France and several other countries. The alleged effect of the U.S. action on General Electric Company's acquisition of Alstom's power sector as representative of the American threat to French national interests was emphasized rather than the underlying facts of the corruption. The search for a political angle predominates as witnessed by the recent attempt to politicize the Alstom case, years after the GE transaction.[165]

164 For example, *see* media coverage of the Elf scandal, sources and accompanying text *supra* note 41, 42; CHARPIER, *supra* note 43.

165 The "scandal" continues to have political ramifications, as illustrated by the "alert" made to the Paris "parquet" by Olivier Marleix, the chair of the parliamentary commission established to investigate the role of the State in industrial policy in light of GE's Alstom acquisition and Alcatel's merger with Lucent. Marleix's request for investigation of President Emmanuel Macron's then-Minister of the Economy's role in the GE acquisition was made pursuant to the little used Article 40 of the Code of Criminal Procedure, which requires public officials and civil servants to inform prosecutors of any criminal infraction of which they become aware in the exercise of their duties. CODE DE PROCEDURE PENALE [C. PR. PEN.] [CRIMINAL PROCEDURE CODE] art. 40 (Fr.). *See also* ALT & LUC, *supra* note 36, at 66-68; Emmanuel Jarry, Danielle Rouquie & Jean-Baptiste Vey, *LEAD 2-France-Un député vise Macron dans un signalement sur Alstom*, REUTERS (Jan. 17, 2019), https://fr.reuters.com/article/frEuroRpt/idFRL8N1ZH4JZ. The longstanding Alstom scandal remains a subject of considerable public interest as exemplified by the filing of a complaint—in its capacity as a party civil—before the financial section of the Paris district court by Anticor, a French anticorruption association. Anticor's action is aimed at opening a corruption investigation against Patrick Kron, Alstom's former CEO, and the French State for misuse of state funds for its failure to claim its share of profits and dividends from the sale of Alstom's power business to GE. *See* Enrique Moreira, *Affaire Alstom: Anticor dépose plainte pour corruption*, LES ECHOS (July 22, 2019, 11 :08 AM), https://www.lesechos.fr/industrie-services/energie-environnement/affaire-alstom-anticor-depose-plainte-pour-corruption-1039595; Antoine Sillières, *Vente d'Alstom: anticor porte plainte, le PNF saisi*

The French media's political focus is consistent with the state-centric nature of French political and business culture. Political scandal interests the French public and does not require the resources that are required for effective Wall Street Journal-type business-oriented investigative reporting in the international corruption field. Reporting on cases with potential political ramifications in France is facilitated by the porous application of the purported secrecy of the "instruction" carried out by investigating magistrates in such cases. Unlike the preservation of the secrecy of grand jury investigations in the U.S., investigating magistrates—or those close to the investigation—sometimes violate the secrecy of their investigations to preserve their independence and ensure that their investigation is not hindered or terminated by indirect means.[166] Moreover, the greater culturally-based concern with the preservation of "honor" in France, combined with more plaintiff-favorable libel laws, have led French companies to adopt a more forceful denial and minimization strategy than typical of U.S. companies.[167]

sur le rôle de Macron, LE LANCEUR (July 24, 2019), https://www.lelanceur.fr/vente-dalstom-anticor-porte-plainte-le-pnf-saisi-sur-le-role-de-macron/.

166 ALT & LUC, *supra* note 36, at 244.

167 For example, in September 2008, Alstom instituted a libel suit in against David Crawford, the Wall Street Journal journalist who broke the story of Alstom's international corruption problems in a series of articles earlier in 2008. Alstom used its status as "civil party" to bring criminal proceedings against Mr. Crawford, who was arrested, interrogated, and charged as a "mise en examen," a harrowing experience far removed from from libel law procedure in the U.S. The Nanterre criminal court dismissed the charge on March 1, 2011, holding that the journalist had acted in good faith and had conducted a serious investigation of the facts, which excused his unproved defamatory statement that corruption was systematic within Alstom (later accepted as a fact in Alstom's DPA). Alstom, however, claimed victory. *See* Anthony Bondain, *Alstom: le 'Wall Street Journal' donne sa version des faites après le jugement du tribunal*, BOURSIER (Mar. 4, 2011), http://www.boursier.com/actions/actualites/news/alstom-le-wall-street-journal-donne-sa-version-des-faits-apres-le-jugement-du-tribunal-423921.html; Alstom's former CEO and board members have, on several occasions before and after the DPA, publicly minimized the extent of corruption. *See* Michel-Aguirre, *supra* note 66, at 66 (quoting Patrick Kron, former CEO of Alstmon only a handful of contracts of old contracts out of thousands were problematic ("ce sont de vieux contentieux de corruption")). *See also* Graham Ruddick, *Alstom's Bid to Clear Its Name*, THE TELEGRAPH (June 12, 2010) (quoting Alstom's Compliance Head, Jean-Daniel Lainé, two months after the raid by the English police on Alstom sites and at the residences of its top U.K. executives in March, 2010. "I consider that we are among the best in class . . . and have reached a point where it is difficult to be better.").

III. PRE-SAPIN 2 CASES

A. Prelude: Pre-Sapin 2 cases. 'The Big Four'—Alcatel, Alstom, Technip, and Total

The impetus of the enactment of anticorruption sections of Sapin 2 primarily originated in the substantial fines between 2010-2014 for violations of the FCPA imposed on four of France's leading companies—Alcatel-Lucent, Alstom, Technip, and Total—by the DOJ.[168] During this period, France led the list of top-sanctioned companies in both number and the total amount of fines, with Alstom as the all-time recordholder.[169]

These cases share a number of characteristics that illustrate the French corruption environment prior to Sapin 2 that are taken into account in this Article's prognosis for the law's success. First, none of the companies were prosecuted in France, despite Renaud Van Ruymbeke having served as investigating magistrate in each case. Second, unlike similar cases in other countries—notably Siemens—the corruption scandals had little or no effect on corporate management and governance. Third, close capitalistic, operational, managerial, and politically-related ties reinforcing their "national champions" status existed between the companies. Fourth, three of the four companies merged or were acquired by American companies after the resolution of the FCPA actions. Lastly, previous instances of corruption have been uncovered in each company, indicating a corporate culture ripe for a major scandal. A review of the individual cases follows below.

1. Alcatel-Lucent

Alcatel-Lucent no longer exists, as it was acquired by Nokia in November 2016. A telecommunications equipment company created by a 2006 merger between Alcatel SA and Lucent, Alcatel was formerly closely connected to Alstom. Both Alstom and Alcatel were old Alsatian origin concerns which were integrated into Compagnie Générale d'Electricité, the leading post-war French industrial conglomerate, which was subsequently renamed Alcatel-Alsthom in 1991. Alcatel—acting in joint venture with the UK company, General Electric Company ("GEC")—later became the parent company of Alsthom.

168 *See* sources and accompanying text, *supra* note 3.

169 *Gauvain Report*, *supra* note 2, at 19 (Table 1-List of FCPA sanctioned companies from 2008-2018).

Alstom (which dropped the "h" from its name for the occasion) was spun off from Alcatel-Alsthom in 1998.[170] Serge Tchruk—Alcatel's CEO from 1995-2008 during its period of international corruption troubles—was also the CEO of Elf, which became Total, another one of the "big 4 national champions."[171]

Prior to its merger with Alcatel, Lucent dealt with FCPA issues in a manner particularly relevant to the comparative perspective of this Article. In 2003, the DOJ and the SEC commenced FCPA investigations after the filing of a lawsuit by Lucent's competitor, NGC.[172] In the lawsuit, NCG alleged that Lucent had bribed Saudi telecom officials to ensure the use of their technology.[173] The lawsuit was unsuccessful, and both the DOJ and the SEC did not bring enforcement actions. Nevertheless, as a result, Lucent undertook an internal investigation which brought to light compliance deficiencies in China, which were later reported to the American authorities.[174] This led to an NPA and a relatively small fine of $2.5 million dollars.[175]

International corruption issues on the Alcatel side commenced in 2004 when criminal charges were brought by Costa Rican (later settled) and Taiwanese (abandoned) authorities.[176] FCPA investigations soon followed, which led to a DOJ plea agreement with a former employee involved in the Costa Rican corruption and a DPA with a $137 million fine for widespread third-party intermediary-facilitated corruption in a multitude of countries.[177]

A lengthly French investigation was commenced targeting corruption in Costa Rica, Nigeria, and Kenya. This investigation apparently petered out, with the severe decline in the company's fortunes leading to its demise culminating in a take-over by Nokia.[178]

Similiarities between Alcatel and the other "Big Four" and pending new French cases show a pattern. Worldwide corruption, inherited

170 MARLEIX COMMISSION, *supra* note 2, at 53-55; LAÏDI, *supra* note 3, at 15-17; Les Intouchables, *supra* note 142, at 236-240.

171 Dominique Albertini, *Alcatel-Lucent : histoire d'un désastre industriel,* Libération, Oct.ober 8, 2013.

172 *See* Leah Trzcinski, *The Impact of the Foreign Corrupt Practices Act on Emerging Markets: Company Decision-Making in a Regulated World*, 45 N.Y.U. J. INT'L L. & POL. 1201, 1244-50 (2013) (using Alcatel-Lucent as a case study in analyzing divestment decisions relating to corruption).

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id*.

177 Trzcinski, *supra* note 172.

178 *Id.* at 1253-58.

from the "business as usual" pre-OECD Anti-Bribery Convention culture and carried out through a network of third-party intermediaries, was first uncovered by local authorities. Action against locally-based corrupt employees was taken, and formal corporate compliance programs were instituted and strengthened. Notably, American style "private" lawyer-led internal investigations were not conducted. Previous lightly-sanctioned corruption incidents (on the Lucent side) did not lead to major change. Managers, under pressure to obtain results in a difficult environment, continued to employ, if a bit more subtly, the old intermediary system. A French "instruction" was opened, languished, and died out with little or no public information. Systematic change—notably the termination of third-party sales intermediary networks—was only effected when faced with the threat of serious sanction from the American authorities. The corruption investigations significantly added to the growing fragility of Alcatel-Lucent, a company already besiged with intense competitive pressures and management tensions that arose from a difficult cross-cultural merger.[179]

2. Alstom

The Alstom corruption case[180] was the subject of considerable comment and controversy in France due to the company's iconic status as a French technological champion (manufacturer of the "TGV" high-speed train) and the dramatic sale of its power generation and transmission division representing three-fourths of the total company to General Electric ("GE"). News of the proposed sale had the effect of a bombshell coming in the midst of intense political debate and social angst on the loss of French economic independence, jobs, and competitiveness.

In typical French fashion, the government intervened by passing a protectionist law introduced by the Minister of the Economy, Arnaud Montebourg, in an attempt to stop the GE acquisition of Alstom's

179 *Id.* at 1262. The Costa Rican Attorney General's Office later filed an innovative, but unsuccessful, civil action against Alcatel seeking damages on behalf of the Costa Rican people. *See* MONTERO, *supra* note 66, at 229-232.
This attempt to seek restitution in the "public interest" furnishes an interesting subject for comparison with the French law mechanisms of civil party actions brought by associations and the victim restitution requirement of Sapin 2, Article 17 in calculating fines in CJIPs, as discussed in Part III(B)(4).

180 The Alstom corruption scheme was termed "astounding in its breadth, its brazenness and its worldwide consequences." Alstom's failure to cooperate was criticized. Several countries were favorably cited for their cooperation, France was not. DOJ ALSTOM Press Release, s*upra* note 57.

power generation business. This decree (Décret n° 2014-479) enabled the government to delay the GE/Alstom deal, as it required competitive bidding which opened the door to a bid by GE's competitors, Siemens and Mitshubishi, in joint venture.[181] GE would eventually prevail after months of political theatre and complicated transaction provisions aimed at ensuring the protection of French interests in "sensitive" activities. Political and social turmoil together with the spectacle of giant foreign multinationals circling over the remains of a French champion made for excellent press. Alstom's corruption case, therefore, crystallized broad concern over the effect the imposition of American foreign corrupt law on French companies was having on the French economy and independence. Numerous press articles and books on the Alstom deal and its foreign corruption woes have been published, legislative hearings held, and expert and actors in the narrative interviewed and documentaries produced.[182]

181 Décret 2014-479 du 14 mai 2014 relatif aux investissements étrangers soumis à autorisation préalable [Decree 2014-479 of May 14, 2014 on foreign investments subject to prior authorization], JOURNAL OFFICIEL DEL LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZZETTE OF FRANCE], May 14, 2014, NOR: ERNX1411012D. *See* Boris Stoykov, *Investissements en France: le décret Montebourg est-il viable?*, AFFICHES PARISIENNES (May 27, 2014), https://www.affiches-parisiennes.com/investissements-etrangers-en-france-le-decret-montebourg-est-il-viable-4271.html.

182 *See* Marie-Béatrice Baudet & Chloé Aeberhardt, *Affaire Alstom-GE: la justice saisie par l'ancien president de la commission d'enquête parlementaire*, LE MONDE (Jan. 17, 2019), https://www.lemonde.fr/societe/article/2019/01/17/affaire-alstom-ge-la-justice-saisie-par-l-ancien-president-de-la-commission-d-enquete-parlementaire_5410451_3224.html; Marie-Béatrice Baudet & Chloé Aeberhardt, Interview with Fréderic Pierucci, LE MONDE (Jan. 16 2019) https://www.lemonde.fr/economie/article/2019/01/15/zones-d-ombre-sur-la-vente-de-la-branche-energie-d-alstom-a-ge-temoignage-d-un-ancien-cadre-emprisonne-deux-ans-aux-etats-unis_5409271_3234.html. Emmanuel Levy, *Comment les Américains nous ont dérobé Alstom*, MARIANNE, (Jan. 24, 2019), https://www.marianne.net/economie/comment-les-americains-nous-ont-derobe-alstom-frederic-pierucci-raconte; Anne-Sophie Bellaiche, *L'éclairant calvaire de Frédéric Pierrucci lampiste et appât de l'affaire Alstom*, USINE NOUVELLE (Jan. 16, 2019), https://www.usinenouvelle.com/editorial/le-calvaire-de-frederic-pierucci-lampiste-et-appat-de-l-affaire-alstom.N793624; *How the American Takeover of a French National Champion Became Intertwined in a Corruption Investigation*, THE ECONOMIST (Jan. 15, 2019), https://www.economist.com/business/2019/01/17/how-the-american-takeover-of-a-french-national-champion-became-intertwined-in-a-corruption-investigation; Tara Patel, *'American Trap': A French Executive's View from a U.S. Prison Cell*, BLOOMBERG (Jan. 15, 2019), https://www.bloomberg.com/news/articles/2019-01-15/-the-american-trap-an-executive-s-view-from-a-u-s-prison-cell; PIERUCCI & ARON, *supra* note 3; JEAN-MICHEL QUATREPOINT, ALSTOM, SCANDALE D'ÉTAT (2015); LA GUERRE FANTOME: LA VENTE D'ALSTOM A GENERAL ELECTRIC (Along Production 2017) (a documentary film shown on several occassions on French television); Rachel Marsden, *Is U.S. Playing Dirty Pool on Behalf of American Companies*, TOWNHALL (Sept. 26, 2017),

Remarkably, although over four years have passed since the sale of its power sector to GE, the Alstom story continues to periodically erupt on the public scene. The importance given by the press to the recent publication of a book by a French former Alstom executive imprisoned in America for thirty months in connection with bribery in Indonesia is noteworthy. The account goes beyond an emotional narrative of the difficulties faced by the executive navigating the bewildering world of American criminal procedure and the harshness of its prison system. The author's sharp criticism of the American plea-bargaining system and suggestion that Alstom might have significantly alleviated its difficulties had it adopted a more cooperative stance, and comparison of Alstom's corporate governance with that of Siemens, tracks several of the major issues treated in this Article.[183]

Alstom's corruption experience followed a similar, if more pronounced pattern as that of its former sister and parent company Alcatel described above. Alstom's post French OECD Convention implementing legislation corruption woes[184] began in Mexico with the

https://townhall.com/columnists//rachelmarsden/2017/09/27/is-us-playing-dirty-pool-on-behalf-of-american-companies-n2386772; Henri Astier, *Jailed French Executive Who Felt Force of U.S. Bribery Law*, BBC (Apr. 24, 2019), https://www.bbc.com/news/world-europe-47765974. The Alstom saga even engendered a criminal thriller novel replete with murder, international espionage, turncoats, and political intrigue. DOMINIQUE MANOTTI, RACKET (2018). *See also* book review by Yann Plougastel, *Dominique Manotti s'attaque à l'affaire Alstom*, LE MONDE (Apr. 11, 2018, 06 :00 PM), https://www.lemonde.fr/polar/article/2018/04/11/dominique-manotti-s-attaque-a-l-affaire-alstom_6002204_5470928.html.

183 PIERUCCI & ARON, *supra* note 3, at 159-68, 284-90.

184 Alstom (then known as GEC-Alsthom) was involved in serious domestic and international corruption cases prior to French criminalization of foreign bribery in France. Alstom's CEO, COO, and deputy CFO were convicted of paying bribes to public officials to obtain approval for the transfer of Alstom's headquarters from one Parisian suburb to another and the company was investigated by Renaud Van Ruymbeke for possible bribery in the award to GEC-Alsthom of a tramway contract in the city of Nantes. *See* Pascale Robert-Diard, *Petites Chroniques de la Corruption Ordinaire*, LE MONDE BLOG (Apr. 22, 2010), http://corruptionordinaire.blogspot.com/2010/04/; *Tramways Nantais: le juge Van Ruymbeke perquisitionne à la mairie*, LIBERATION (Mar. 14, 1995, 02 :11 AM), https://www.liberation.fr/france-archive/1995/03/14/tramways-nantais-le-juge-van-ruymbeke-perquisitionne-a-la-mairie_127214.

In 1995 South Korean prosecutors launched an investigation into suspicious money transfers from Alstom to two South Korean nationals in connection with suspected bribery in obtaining one of Alstom's most important international contracts—the construction and supply of high-speed trains to South Korea. Alstom's South Korean President confirmed that Alstom had made the payments in exchange for lobbying efforts. The Council of Ethics for the Norwegian global pension fund concluded that it was highly probable that bribery and money laundering had occurred. *See* ANNUAL

discovery of a bribe kickback scheme put into place by senior Alstom executives in Mexico. As with Alcatel in Costa Rico, Alstom quickly fired the executives and made contact with the Mexican authorities. Unlike Alcatel's experience in Costa Rico, however, consequent Mexican administrative and criminal legal actions against Alstom were not settled but dragged on for years with contradictory decisions in the Mexican court system. In 2006, Italian authorities brought criminal proceedings against several active and former Alstom managers, Alstom Swiss, Italian, and notably U.S. subsidiaries and the parent company relating to bribes to public officials to obtain an important Italian infrastructure project and middle eastern infrastructure projects.[185] The Alstom U.S. and Swiss subsidiaries and the charged managers, including Alstom's, Swiss retired chief compliance officer, entered settlements under the Italian "Patteggiamento"[186] plea agreement procedure in 2008.

These cases did not lead to significant change in Alstom practice. Its extensive use of third-party intermediaries continued unabated. The Italian settlements and Mexican proceedings would, however, be used in a wide-ranging corruption investigation carried out by Swiss authorities. Despite an earlier Swiss investigating magistrates' interrogation of Alstom's general counsel and chief compliance officer and a premonitory Wall Street Journal article[187] warning of

REPORT 2011, COUNCIL ON ETHICS FOR THE NORWEGIAN GOVERNMENT PENSION FUND GLOBAL 80-81 (2011) (summarizing its recommendation of Dec. 1, 2010 to the Ministry of Finance to exclude investments in Alstom from the fund).

The lack of internal and external communication—or press coverage—concerning these cases and their denial and minimization portended, in retrospect, serious shortcomings in Alstom's anticorruption efforts.

185 *See* Claudio Gatti, *Alstom at Center of Web of Bribery Inquiries*, N.Y. TIMES (Mar. 29, 2010), http://www.nytimes.com/2010/03/30/business/global/30alstom.html [hereinafter Gatti].

186 Under this Patteggiamento, roughly equivalent to a plea of "nolo contendre" in U.S. practice, the individuals pled "no contest" to bribery. For a description of the Pattigiamento mechanism, *see* Langer, *supra* note 63, at 48-53. *See also* Michael Vitello, *Bargained-for-Justice: Lessons from the Italians?* 48 U. PAC. L. REV. 247, 260-61 (2017). The Swiss and U.S. companies pled to negligence in failing to supervise managers. On several occasions, Alstom's senior management attempted, against the opinion of its General Counsel, to "spin" the individuals' pleas as also having been for negligent supervision illustrating a failure to come to terms with the seriousness of the risk inherent in the growing corruption scandal. For example, an Alstom spokesperson stated, that the Patteggiamento was "not for bribery but for mistakes in the contract process." Gatti, *supra* note 185.

187 David Crawford, *French Firm Scrutinized in Global Bribe Probe*, WALL ST. J. (May 6, 2008), https://www.wsj.com/articles/SB121001983179268511. In response, Alstom initially strenuously denied the existence of corruption issues.

serious corruption investigation troubles, Alstom management were caught by surprise by the taking into custody of Alstom's former chief compliance officer and a highly disruptive Swiss police raid on Alstom's Swiss subsidiaries in late August 2008.[188]

The seriousness of the Swiss actions provided an electroshock for accelerating improvements to Alstom's compliance program. These efforts, however laudable, were insufficient and too late to prevent the turmoil in which the Swiss and other investigations (U.K., U.S., and World Bank, in particular) would plunge the company.[189] In

Relying on the relative favorable environment in France for such suits, Alstom later brought a defamation suit against the WSJ and its reporter. Although defamation was not established, Alstom framed this apparent loss positively, eliciting an unusual "rectification" from the WSJ. *See* Anthony Bondain, *Alstom: le 'Wall Street Journal' donne sa version des faits après le jugement du tribunal*, BOURSIER (Mar. 4, 2011, 10 :03 AM), https://www.boursier.com/amp/news/423921.

188 Alstom was aware that an investigation was underway in Switzerland. Crawford, *supra* note 187. *See also* Jürgen Dahnkamp, Jörg Schmitt & Stefan Simons, *The French Connection: Did Alstom Bribe like Siemens?*, DER SPIEGEL (July 1, 2008), https://www.spiegel.de/international/business/the-french-connection-did-alstom-bribe-like-siemens-a-563161.html. An appointment had been arranged with the Swiss authorities to meet Alstom's former chief compliance officer, a Swiss national, on the morning of the Swiss raid. Alstom's senior management was therefore much taken aback and angered when informed that the Swiss police had arrested him at his home and placed him in preventive detention where he would remain without bail for several weeks instead of questioning the former compliance officer at the prosecutor's offices as previously arranged. Operations at Alstom's main site for its power generation business in Baden were disrupted for several days as computers and mountains of documents were seized in the surprise police raid.

189 *See* Gatti, *supra* note 185. *See also Corruption International—Changer les pratiques: L'Affaire Alstom*, SHERPA (June 26, 2015), https://www.asso-sherpa.org/corruption-internationale-changer-les-pratiques-laffaire-alstom. Swiss authorities coordinated their investigation with Brazilian and UK authorities who initiated their own important investigations into Alstom's activities. The Brazilian legal actions were the subject of reputation-damaging local press, but—as was typical of similar Brazilian cases until Oldebrecht—progressed slowly through the labyrinth of the court system. *See* David Crawford, Antonio Regalado & David Gauthier-Villars, *Bribe Probe Exposes Alstom Network in Brazil*, WALL. ST. J. (June 19, 2008), https://www.wsj.com/articles/SB121382391422986053; Anyango Oduor et al, *supra* note 93, at 105-106; Recommendation of the Council on Ethics for the Norwegian Gov't Pension Fund Glob. to the Ministry of Fin. Regarding Alstom 9-12 (Dec. 1, 2010); Brian Nicholson, *Brazil's Slow Judiciary Just Too Appealing for Some*, INT'L BAR ASS'N (Apr. 4, 2013), https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=742AB812-7754-495B-B7FD-1299FA7B8F77.
The U.K. interest in and broad investigation of Alstom had a similar basis as that of Switzerland, i.e., Alstom's payment of international sales intermediaries from Swiss and U.K. subsidiaries established for that purpose. The SFO investigation would follow a similar path as the Swiss with a massive police raid (which included Swiss police) on Alstom's U.K. headquarters and several other English sites on March 24, 2010. *See* Rob Evans, *Three Directors of Rail Engineering Firm Alstom Held in*

November 2008, Alstom and the Swiss authorities would enter into Switzerland's first international corruption plea bargain agreement under which Alstom paid fines totaling €31.5 million.[190]

In the U.K. on March 24, 2010, a massive surprise police raid—which included Swiss inspectors—of Alstom's London headquarters and several English sites was conducted. The raid included three senior Alstom U.K. executives who were arrested and placed in temporary detention.[191] The SFO instituted three prosecutions for corruption in several countries against several Alstom companies and employees.[192] Two ended in jury acquittals and one in jury convictions and guilty pleas.[193]

Bribery Investigation, THE GUARDIAN (March 24, 2010) https://www.theguardian.com/business/2010/mar/24/alstom-directors-bribery-dawn-raids.

190 Alston Network Schweiz AG, Order to Dismiss Proceedings: Art. 319 et seq. Swiss Code of Criminal Procedure, Case No. EAII.04.0325-LEN (Nov. 22, 2011), *available at* https://globalinvestigationsreview.com/digital_assets/41f493f7-bfee-4075-866c-50d7b71280c4/236-2-Alstom-Swiss-Dismissal-Order.pdf. Alstom Network Schweis AG pled guilty to violations of art. 102, § 2 and Article 322 septies of the Swiss criminal Code for its failure—in conjunction with other companies in the Alstom group—to take all measures and reasonable organizational precautions to prevent bribery of foreign public officials (*see* https://Star.worldbank.org/corruption-cases/sites/corruption-cases/-files/Alstom/summary). The pattern of internal and external denial and minimization and insufficient cooperation is illustrated by the remarks of Alstom's Head of Communications immediately prior to the announcement of the Swiss plea bargain, stating that "personne ne fera la démonstration que nous avons mis en place un système de corruption international" ("no one will be able to prove that a system of international corruption existed at Alstom"), and that such an accusation was "surréaliste" (absurd). *See* Agathe Duparc, *La Suisse est sur le point de condammer Alstom*, LE MONDE (Nov. 19, 2011, 03:06 PM), https://www.lemonde.fr/economie/article/2011/11/18/la-suisse-est-sur-le-point-de-condamner-alstom_1606024_3234.html. *See also* François Pilet, *Les Dénégations d'Alstom Font Grincer les Dent du Ministère Public*, LE TEMPS (Jan. 12, 2011) (citing Swiss authorities expressions of deep disappointment with the lack of co-operation in their investigation and Alstom's disconcerting "*déroutantes*" denial of the SFO's accusations of a worldwide system of corruption.).

191 Sandra Laville & Rob Evans, *Three Directors of Rail Engineering Firm Alstom Held in Bribery Investigation*, THE GUARDIAN (Mar. 24, 2010), https://www.theguardian.com/business/2010/mar/24/alstom-directors-bribery-dawn-raids.

192 *See* Press Release, U.K. Serious Fraud Office, Court Orders Alstom Network UK Ltd. To Pay £16.4 Million (Nov. 25, 2019), https://www.sfo.gov.uk/2019/11/25/sfos-alstom-case-concludes-with-sentencing-of-alstom-network-uk-ltd/.

193 Four convictions (one individual by a jury, two individuals, and Alstom Power Ltd. through guilty pleas) related to bribery of Lithuanian public officials in connection with power generation projects. The guilty plea of April 10, 2018 by Alstom Network, Ltd. for bribery in relation to a Tunisian tramway project, previously under seal, was made public upon the announcement of the jury conviction. Echoing DOJ prosecutors' statements in Alstom's U.S. guilty pleas, the SFO Director Lisa

The World Bank's investigation of Alstom's Hydropower division, which focused on a project in Zambia, resulted in a settlement agreement in February 2012. Alstom was disbarred from World Bank financed hydropower projects and an outside compliance monitor was appointed for three years.[194]

An examination of Alstom's vastly different experience with French and U.S. authorities offers valuable insight into the relative success of the two systems' respective approaches to the enforcement of corporate anticorruption legislation. The differences in results are striking. The French investigations, commenced in 2007, did not lead to a single plea agreement or conviction of any individuals nor the imposition of fines against any Alstom entity. The U.S. investigation, the existence of which was notified to Alstom on April 1, 2010,[195]

Osofsky, a former U.S. prosecutor, stated: "The culture of corruption evident within the Alstom Group was widespread. Their illicit activities to win lucrative contracts were calculated and sustained." Contrary to the U.S. proceedings, where the cooperation of French authorities was notable for its absence, the SFO emphasized the close cooperation of France and more than thirty other countries in the investigation. *Id.* Alstom Network Ltd. was later ordered to pay a fine of £16.4 Million ($21.2 million). *See* Kristin Broughton & Olivia Bugault, Alstom Unit Ordered to pay $21Million in Tunisian Corruption Case, WALL ST. J. (Nov. 26, 2019), https://www.wsj.com/articles/u-k-s-serious-fraud-office-orders-alstom-unit-to-pay-21-million-in-tunisia-corruption-case-11574711300. All individuals and Alstom UK Ltd. were acquitted in jury trials in April and November, 2018 in cases relating to alleged corruption in Hungary, India, and Poland.

194 Press Release, The World Bank, Enforcing Accountability: World Bank Debars Alstom Hydro France, Alstom Network Schweiz AG, and their Affiliates (Feb. 22, 2012), https://www.worldbank.org/en/news/press-release/2012/02/22/enforcing-accountability-world-bank-debars-alstom-hydro-france-alstom-network-schweiz-ag-and-their-affiliates. In an extraordinary communications snafu demonstrating the denial and minimization culture within the company, Alstom's Head of Communications responded to the World Bank's disbarment announcement by stating: "The World Bank made assumptions which were not proved;" that Alstom settled because it "was unable to find evidence it could present in its own defense so we decided to settle;" and that the disbarment would not affect Alstom, apart from one project which involved World Bank funding, and could in any event have newly funded projects performed by non-affected subsidiaries. These comments were rejected in a later company statement by its general counsel. Dionne Searcey & David Crawford, *World Bank Punishes Units of Alstom SA for Bribery*, WALL ST. J. (Feb. 23, 2012), https://www.wsj.com/articles/SB10001424052970203918304577238943984834040.

195 Alstom's U.S. subsidiaries received a subpoena for the production of documents and were informed that they were a target of a grand jury investigation (Author's personal recollection as general counsel at this time).

resulted in the conviction of several individuals[196] and the imposition of the largest FCPA fine in history.[197]

The initial French investigations focused on corruption in Brazil by former employees of an Alcatel subsidiary, Cegelec, acquired by Alstom in its spin-off from its former parent. The managers were indicted but their cases were dropped because their actions occurred prior to the enactment of the French law implementing the OECD Anti-Bribery law, and as such were not illegal at the time.[198] One of the persons indicted expressed pride in having set up the bribery scheme in the service of his former employer and Alstom statements minimized the importance of the revelations by noting that the employees charged were not Alstom employees at the time. [199]

In 2008, Alstom's active and former employees were interrogated by Renaud Van Ruymbeke concerning the Brazilian Cegelec matter and a Zambian hydropower project, which was the subject of a concomitant World Bank investigation. Police "raids" (on a much smaller scale than in Switzerland or the UK) were conducted at several Alstom offices in France.[200] The Zambia investigations would result in the indictment ("mise en examen") of several former and present Alstom managers.[201] Seeking access to the "dossier" and reputational cover,

196 *See s*ources and accompanying text, *infra* note 209.

197 Alstom DOJ Press Release*, supra* note 57.

198 *See* Duparc, *supra* note 190 (confirming that the French investigating magistates had dismissed the indictments in the Cegelec Brazilian case in October 2009).

199 The statements of former Alstom employee and later consultant, Michel Mignot, that "I never took a cent for myself, I didn't think the transactions were illegal, because they were done to get civil engineering contracts around the world and were ordered by senior managers" illustrate the French cultural norm of emphasizing individual propriety and loyalty and reliance on hierarchy as justifications for corruption. Crawford, *supra* note 187 and accompanying text. *See also* Caroline Michel-Aguirre & Clément Lacombe, *Nos patrons sont-ils au-dessus des lois*, 2822 L'OBS 58 (2018).

200 *See* Miranda McLachlan, *Alstom Staff Questioned by Authorities in Probe*, TIMES (May 6, 2008), https://www.thetimes.co.uk/article/alstom-staff-questioned-by-authorities-in-probe-hjk7vvqdwjz; *Alstom au Coeur d'une série d'enquêtes pour corruption*, LES ECHOS (May 7, 2008), https://www.lesechos.fr/2008/05/alstom-au-coeur-dune-serie-denquetes-pour-corruption-488176. From the author's personal recollections in his role as General Counsel, the author was aware of all the interrogations and police raids and was interviewed by Investigating Magistrate Van Ruymbeke and Swiss investigating magistrates.

201 Alstom, Registration Document 2009/10 Annual Financial Report 143 (May 26, 2010), https://www.alstom.com/sites/alstom.com/files/2018/07/08/Global/Group/Resources/Documents/Investors%20document/Registration%20Document%202009-10.pdf [hereinafter Alstom, 2009/10 Reg. Doc.].

Alstom—as it would in the Swiss investigations—intervened in the proceedings as a "victim." Alstom's "victim" status was later revoked as evidence of the company's involvement in the corruption schemes were uncovered.[202] All of the French cases against the persons indicted were later dropped.[203]

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202 Id.

203 *See Alstom asserts it was victim of corruption*, NEW YORK TIMES (May 16, 2008), https://www.nytimes.com/2008/05/16/business/worldbusiness/16iht-alstom.4.12965635.html. Information concerning the indictment and dismissals of cases against several former and active Alstom employees in France is not publicly available, probably due to secrecy requirements of French law "secret d'instruction" for which the investigating magistrate Renaud Van Ruymbeke had a reputation, unlike some of his colleagues, of generally respecting. These indictments (and in a couple of cases, classification as the rough equivalent of "persons of interest") occurred during the "instruction" of the Brazilian and Zambian cases from 2008-2011. The author, in his capacity as general counsel, was responsible for hiring independent defense counsel for these individuals and interacted with outside counsel and the indicted individuals and therefore had knowledge of the progress of the cases. All the indictments were dismissed by April, 2011. Alstom's "civil party" status was revoked in both France and Switzerland in 2010. Alstom referred to ongoing investigations by couching information on corruption cases in vague language such as "certain companies and/or current and former employees of the Group are currently being investigated in various countries," failing to name any countries or "a small number of employees" as it had the previous year when it referred to Swiss and French investigations. Alstom, 2009/10 Reg. Doc., *supra* note 201, at 143. In its Registration for 2010/11 it referred to the formal charges filed in France against its Hydro subsidiary in October, 2010 in the Zambia case but denies that there is any basis for the charge and confusingly claims that the investigation is now 'closed' (perhaps meaning that the 'instruction' phase had ended). Alstom, Registration Document 2010/11 Annual Financial Report 117 (May 26, 2011), https://www.alstom.com/sites/alstom.com/files/2018/07/08/Global/Group/Resources/Documents/Investors%20document/ALS2010_DRF-EN-MEL.pdf. In its 2012/13 report, Alstom finally specified that employees and Group employees were under investigation in France, the U.S., and the U.K. Alstom, Registration Document 2012/13 Annual Report 161 (May 25, 2012), https://www.companyreporting.com/sites/default/files/annual-report-index/alstom-annual-report-2013.pdf.

Several sources have referred to an "instruction" launched in 2013 by Renaud Van Ruymbeke into alleged corruption in Hungary, Poland, and Tunisia, which has appeared to have gone nowhere. *See* PIERUCCI & ARON, *supra* note 3, at 281-82; Marianne Briand, *Affaire Alstom: L'Anticorruption en manque d'énergie*, LE PETIT JURISTE (Aug. 10, 2015), https://www.lepetitjuriste.fr/affaire-alstom-lanticorruption-en-manque-denergie/. However, no information is available on the progress of this instruction and it a reasonable assumption after six years that no charges were filed and the instruction has been terminated, perhaps out of *non bis in idem* concerns arising out of the U.K. investigations (and 2018 acquittals and convictions). *See* Crawford, *supra* note 187 and accompanying text. The delay, lack of prosecution, and information or media coverage of the French instruction on these Alstom corruption cases sharply contrasts with their treatment in Switzerland, the U.K., and at the World Bank. This disparate treatment may be the combined consequence of the lack of an effective plea bargaining mechanism incentivizing those

Alstom did not ignore the French investigations. The compliance program was strengthened, cooperation with the French investigating magistrate offered, and a strong legal defense developed. Alstom' s management, however, was not as shocked as they would later be by the Swiss and U.K. raids. Unlike Siemens, Alstom's management did not hire an independent law firm to undertake a world-wide internal corruption investigation..[204] This muted reaction indicates that the French legal investigations were not viewed as a harbinger of a future serious threat to the company requiring a Siemens-type intensive internal investigation and a major overhaul of the sales intermediary

indicted to cooperate, the skill of French defense counsel, legitimate strict application of law consistent with the "Legality Principle," including short statute of limitations periods (criticized in the OECD Reports) and significant resource constraints. However, possible French laxity in pursuing national champions derives from the absence of evidence of political kickbacks, a pattern discernible in the failure of the authorities to successfully prosecute individuals or corporate entities in any of the "big four" cases.

204 The audit committee of the Supervisory Board of Siemens hired the internationally prominent American law firm, Debevoise & Plimpton, to carry out an extensive, worldwide internal investigation of Siemens' corruption issues in November, 2006 soon after the raid on its premises ordered by Munich prosecutors. The broad-based investigation cost over $ 1.4 billion and took two years to complete. *See* BRUCE ZAGARIS, INTERNATIONAL WHITE COLLAR CRIME: CASES AND MATERIALS 124 (2d ed. 2015). The investigators closely cooperated with the German and American authorities transmitting to them relevant information obtained during the course of the investigation. Great care was taken to ensure compliance with German privacy and labor laws. See, MARTIN T. BIEGLEMAN & DANIEL R. BIEGLEMAN, *Chapter 5—Siemens: A New Commitment to a Culture of Compliance*, *in* FOREIGN CORRUPT PRACTICES ACT COMPLIANCE GUIDEBOOK: PROTECTING YOUR ORGANIZATION FROM BRIBERY AND CORRUPTION (2010). *See also* Julian Klinkhammer, *Varieties of Corruption in the Shadow of Siemens: A Modus Operandi Study of Corporate Crime on the Supply Side of Corrupt Transactions*, *in* THE ROUTLEDGE HANDBOOK OF WHITE-COLLAR AND CORPORATE CRIME IN EUROPE 318, 318-32 (Judith van Erp, Wim Huisman, Gundrun Vande Walle eds., 2015).

In contradistinction to French corporate governance practice, German law requires all large companies to have a bifurcated corporate governance structure with separate management and supervisory boards. This mandatory structure and practice facilitated the exclusive reporting to the Audit Committee by Debevoise & Plimpton. *L'affaire Siemens: Comment s'opère la lute contre la corruption*, LE BIEN COMMUN (Mar. 11, 2009), https://www.franceculture.fr/emissions/le-bien-commun-13-14/laffaire-siemens-comment-sopere-la-lutte-contre-la-corruption (Interview of Antoine Kirry, and attorney at Debevoise & Plimpton, and Philippe Montigny, President and Founder of ETHIC Intelligence, by Antoine Garapon). *See also* Interview of Frederick T. Davis & Bruce Yannett of Debevoise & Plimpton, *Un acteur de premier plan dans la defense des multinationals accuséées de corruption*, CROISSANCES ACTUALITES (March 2009).

channels network, but as an incident on the road taken of incremental improvements in the compliance program.

Soon after the arrests and raids in the UK, an article detailing Alstom's world-wide corruption issues appeared in the New York Times.[205] A few days later, the DOJ notified Alstom and its U.S. subsidiaries that they were "targets" of a grand jury investigation into FCPA violations and related crimes.[206] The American notification did not come as a surprise and was not accompanied by raids or arrest. It did not elicit the initial anger and aggressive defensive communication stance that followed the Swiss and U.K. raids.[207]

Differing perspectives on legal strategy in response to the U.S. authorities, such as whether American counsel should be permitted to undertake and communicate evidence obtained in cross-border investigations, created internal tensions early on. Of particular interest for this study is the debate on such issues being heavily influenced by the attitudes and experiences of criminal defense lawyers from countries with differing criminal procedure frameworks.

On April 13, 2013, Frédéric Pierucci, a French Alstom executive, was arrested upon entry to the U.S., denied bail, and imprisoned, an event that caused internal disarray and substantially modified the extent of Alstom's cooperation with the DOJ.[208] On July 30, 2013, the day after Mr. Pierrucci's accepted a plea bargain in relation to bribery of Indonesian public officials in relation to the Tehran power project, Lawrence Hoskins, a U.K. national and former Alstom executive, was arrested after arriving in the U.S. Virgin Islands on allegations of participation in the Indonesian bribery. Three American Alstom managers also implicated in the Tehran project bribery cooperated in the

205 Gatti, *supra* note 185.

206 The American action was limited to the notification that Alstom entities were "targets" of a grand jury investigation and the serving of subpoenas to U.S. subsidiaries to preserve documents .Travel Act and Money Laundering in addition to FCPA violations were notified.

207 The Swiss and U.K. surprise raids were carefully planned and designed to ensure against any destruction or movement of documents, publicize the respective investigations, and send a clear message to management that the two authorities meant business. They were highly disruptive to operations in both countries, as computers were seized, employees interrogated, and managers arrested.

The in-house American legal team had been advised by the group general counsel of the likelihood of such an action and were therefore in a ready state to coordinate with U.S. outside counsel who had been hired months previously and counsel local management. Local operations were not disrupted.

208 PIERUCCI & ARON, *supra* note 3, at 13-19; LAÏDI, *supra* note, at 165; Matthieu Aron & Catherine Michel, *Le prisonnier de l'affaire Alstom*, 2787 L'OBS 40, April 5, 2018.

investigation and later entered into plea bargains, and two Alstom Indonesian managers await final disposition of their cases.[209] On

209. Pierrucci & Aron, *supra* note 3, at 172. Hoskins contested the indictment contending that the FCPA did not reach foreign nationals who had never traveled to the U.S. as part of the alleged bribery scheme. The U.S. Court of Appeals for the Second Circuit agreed (upholding the District Court of Connecticut) striking down the DOJ's use of a secondary conspiracy theory. United States v. Hoskins, 902 F.3d 69 (2d Cir. 2018). In so holding, the court relied on the legislative history of the FCPA and the presumption against extraterritoriality reinforcing the trend towards limiting extraterritority of U.S. law enunciated in the Supreme Court's landmark case Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010). *See* Joshua Roth, Justin Santolli & Jasen Fears, *Memorandum to Clients: Second Circuit Decision Limits the Extraterritorial Reach of the Foreign Corrupt Practices Act, Fried Frank Client Memorandum*, FRIED FRANK (Aug. 31, 2018) https://www.friedfrank.com/index.cfm?pageID=41&type=3&itemID=1150. *See generally* Christian R. Martinez, *The Curious Case of Lawrence Hoskins: Evaluating the Scope of Agency Under the Anti-Bribery Provisions of the FCPA*, 53 COLUM. J.L. & SOC. PROBS. 211 (2020) (arguing that the DOJ's domestic agency theory was inconsistent with traditional agency principles and a proper interpretation of the FCPA).

While a potentially important restriction on the extraterritorial reach of the FCPA, the Second Circuit's decision provided little relief for Hoskins as an individual. He was tried and convicted of FCPA and money laundering violations by a jury. *See* Dan Portnoy, *The Hoskins Prosecution Comes to an End,* GRAND JURY TARGET (Nov. 27, 2019), https://grandjurytarget.com/2019/11/27/the-hoskins-prosecution-comes-to-an-end/. Hoskins' motion for a judgment of acquittal on all FCPA counts was granted by the trial judge, Janet Bond Arterton, and denied on the money laundering counts. Ruling on Defendant's Rule 29(c) and Rule 33 Motions, U.S. v. Hoskins, Crim. No. 3:12-cr-238-JBA (D.C. Conn. Feb. 26, 2020). Hoskins was sentenced to fifteen months in prison on March 6, 2020. *See Ex-Alstom Exec Gets Over 1 Year For Laundering Bribes*, LAW 360 (Mar. 6, 2020, 03:21 PM), https://www.law360.com/articles/1249123/ex-alstom-exec-gets-over-1-year-for-laundering-bribes.

Three Alstom American managers pled guilty to one count of conspiracy to violate the FCPA. William Pomponi died prior to sentencing and David Rothschild has apparently not yet been sentenced. Ed Thiessen, who testified in the *Hoskins* trial, has apparently also not yet been sentenced. *See* Cara Salvatore, *Ex-Alstom Exec's Emails Show Bribery Strategy, Jury Hears*, LAW 360 (Oct. 29, 2019), https://www.law360.com/articles/1214744/ex-alstom-exec-s-emails-show-bribery-strategy-jury-hears; Stanford University School of Law, Foreign Corrupt Practices Act : Enforcement Action Dataset, *available at* http://fcpa stanford.edu/enforcement-action.html ?id=474 (last consulted on December 7, 2019); Press Release, U.S. Dep't of Justice, Former Senior Alstom Executive Convicted at trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy (Nov. 8, 2019), https:/www.justice.gov/opa/pr/former-senior-alstom-executive-convicted-trial-violating-foreign-corrupt-practices-act-money; Alstom's Indonesian subsidiary's president and director of sales and the deputy general manager of Marubeni's overseas power project department for conspiracy to violate the FCPA and money laundering were recently unsealed. *See* Richard L. Cassin, *DOJ Charges Former Alstom and Marubeni Execs with FCPA Offenses*, FCPA BLOG (Feb. 19, 2020), https://fcpablog.com/2020/02/19/doj-charges-former-alstom-and-marubeni-execs-with-fcpa-offenses/.

December 22, 2014, Alstom and three of its subsidiaries entered into DPAs for FCPA accounting disclosure violations and foreign corruption.[210]

What explains the striking difference in the results of the French and American Alstom prosecutions? The absence of a legislative framework for and practice with plea bargaining, hostility to "whistleblowing," overburdened investigative magistrates, and an apparent lack of governmental motivation to exert pressure to reform on "national champions" all contributed. The importance of corporate culture and governance as an additional factor is demonstrated by the adoption of different strategic responses by Alstom and Siemens when confronted with their respective national and U.S. corruption prosecutions.

The Alstom corruption case, following on the heels of the BNP fine, summarized below, can be considered to be France's BAE or Siemens "moment" in reference to the corruption scandals that rocked the U.K. and Germany in 2006 and led to major change in the anticorruption landscape of both countries. Alstom continues to make headlines following parliamentary hearings investigating whether any relation may have existed between DPA negotiations and GE's acquisition of its power sector and revelations made by Fréderic Pierrucci, the French executive sentenced to a thirty-month prison term for his role in an Alstom bribery scheme in Indonesia.[211]

3. Technip

Technip is a large engineering, construction, and services company with expertise in complex oil and gas projects. It merged with the American FMC Technologies, Inc. to form TechnipFMC, Inc. in 2017. Publicized as a marriage of equals, the subsequent staffing of all the top positions by Americans and the movement of real decision-

210 *See* DOJ ALSTOM Press Release, *supra* note 57.

211 *Supra* note 165 and accompanying text. Alstom, together with Siemens, , once again found themselves in the headlines in June 2020, in an international corruption case. Alstom and Siemens Italian subsidiaries and employees are under investigation in connection with an alleged bribery scheme relating to Milan subway contracts. See Emilio Parodi, Italy arrests Siemen, *Alstom executives over Milan subway deals,* REUTERS (June 23, 2020), https://www.reuters.com/article/us-italy-arrests-siemens-alstom/italy-arrests-siemens-alstom-executives-over-milan-subway-deals-idUSKBN23U1J4#:~:text=MILAN%20(Reuters)%20%2D%20Italian%20tax,contracts%2C%20prosecutors%20said%20on%20Tuesday.

making to Houston at the expense of Paris has generated bitterness in France.[212]

Technip's FCPA investigation culminated in a DPA with the DOJ and an SEC settlement signed on June 28, 2010, under which Technip agreed to pay a total of $338 million stemming from its involvement in a decade-long bribery scheme of Nigerian public officials in connection to a $6 billion contract to construct liquified natural gas extraction sites ("LNG") on Bonney Island in Nigeria.[213]

Technip was part of a multinational consortium—known as "TSJK"—formed to build the LNG project comprising Technip, the Italian Snamprogetti, the American Kellogg Brown and Root (a subsidiary of Halliburton), and the Japanese JGC Corporation. Unlike the Alcatel and Alstom cases, the TSJK cases involved a single country: Nigeria. TSJK's multinational composition and the involvement of nationals from other countries in the scheme, which precipitated separate investigations in several jurisdictions, rendered no less complex the prosecution of these cases.

Of particular relevance to our study is the fact that evidence of the TSJK bribery was first uncovered by the French investigating magistrates, Renaud Van Ruymbeke and Eva Joly in their *Elf* (now Total) investigation. Their consequent opening of a judicial investigation of Technip and Halliburton in 2003 was the very first undertaken for bribery of a foreign public official in France. Renaud Van Ruymbeke diligently pursued the investigation, including launching rogatory letters to Switzerland and Monaco in an attempt to trace the real beneficiaries of funds, which flowed through intermediary accounts in the scheme.[214] The investigation's focus on Halliburton was fraught with highly sensitive diplomatic and political ramifications, given the

212 Clément Fayol, *Technip : après le fiasco de la fusion de "airbus du paeapétrolier", la facture française*, MARIANNE (Mar. 5, 2020); Anne Feitz, *TechnipFMC: la fusion tourne à l'avantage des Américains*, LES ECHOS (May 11, 2017, 01 :01 AM), https://www.lesechos.fr/2017/05/technipfmc-la-fusion-tourne-a-lavantage-des-americains-152979 (mentioning that the French state owns 3.9% of Technip, down from the 7.44% owned prior to the merger.

213 Press Release, U.S. Dep't of Justice, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (June 28, 2010), https://www.justice.gov/opa/pr/technip-sa-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-240-million. Technip settlement with the SEC for violating for books and records, and internal control violations provided for the payment of $98 million in disgorged profits. Technip agreed to retain an independent compliance monitor for a two-year period.

214 Eric Decouty, *A Nigerian Contract at the Heart of a Corruption Affair*, LE FIGARO (Dec. 20, 2003), https://www.globalpolicy.org/component/content/article/172-general/30253.html.

possible implication of its former CEO, then-Vice President of the United States Dick Cheney.[215]

Whether a result of this political/diplomatic sensitivity, the tendency of the interrogated Technip managers to place the blame on Halliburton or insufficient resources, Renaud Van Ruymbeke referred the Technip/Halliburton to the U.S. authorities, who then became the indisputable leaders of the investigation and prosecution.[216]

4. Total

Total, formerly known as *Elf,* is one of largest oil and gas companies in the world. Its massive size, the nature of its industry, necessary presence in corruption-prone countries, and close ties to the French State as a strategic asset and a potential source of funds for financing political parties made it an inviting target for corrupt schemes.

As described above, in Part II(B)(1), *Elf* Total was at the heart of France's largest politically-tinged international corruption scandal in a quarter of a century. The seven year-long investigation from 1993-2000, which—exceptionally for France—led to criminal convictions and prison terms, related to corrupt payments made a decade before the enactment of the French OECD anti-bribery implementing

215 *Id.*

216 *See* Elizabeth Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. OF INT'L L. 1, 28-30 (2012), (suggesting that lack of political will to pursue national champions combined with the superior U.S. enforcement capacity explains why the U.S. almost always takes on the leading role in multijurisdictional enforcement actions, as in the TSKJ cases). *See also* Barbara Crutchfield George & Kathleen A. Lacey, *Investigation of Halliburton Co./TSKJ's Nigerian Business Practices: Model for Analysis of the Current Anti-Corruption Environment on Foreign Corrupt Practices Act Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 503, 503 (2006).

In addition to the fines levied on Technip and its fellow consortium members, the English lawyer who set up the illegal arrangements, Jeffrey Tesler, was later convicted in the U.S. and sentenced to a prison term of twenty-one years for FCPA violations. *See* Press Release, U.S. Dep't of Justice, UK Solicitor Pleads Guilty for Role in Bribing Nigerian Government Officials as Part of KBR Joint Venturer Scheme (Mar. 11, 2011), https://www.justice.gov/news (enter the article's name in the search box; then follow hyperlink). In sharp contrast to the heavy fines levied on Technip by DPA and the prison time given to Jeffrey Tesler by the DOJ in furtherance of his plea bargain, sanctions in France consisted of light fines of €10,000 and €5,000 levied by the Paris district court on respectively, Technip's general and commercial managers for Africa. *See* Maria Dolores Hernandez J., Paris Court Sentences Two Former Technip Execs for Nigeria Bribes, FCPA BLOG (Feb. 1, 2013, 11:38 AM), https://fcpablog.com/2013/02/01/paris-court-sentences-two-former-technip-execs-for-nigeria-b/.

legislation.[217] The *Elf* scandal was a prelude to later U.S. and French enforcement actions and is germane to furthering an understanding of the differences between them.

Total's FCPA enforcement action culminated in a three-year DPA under which Total agreed to pay a total of $398 million, which at the time was the fourth-largest FCPA fine in history.[218] The bribery consisted of payments, made between 1995 and 2004, of approximately $60 million to Iranian public officials in connection with contracts to develop Iranian gas fields. It was the first coordinated action by French and U.S. authorities in a major foreign bribery case. Total was awarded credit for cooperation in notable contrast to Alstom.[219]

Unlike in the Alstom, Alcatel, or Technip cases, enforcement actions against Total and its CEO were simultaneously publicly announced by French prosecutors, seven years after the initiation of the investigation in France.[220] The case against Total resulted in the imposition of a paltry fine in comparison to the U.S. action of €500,000 and a dismissal of the prosecutors' request to freeze €250 million in assets, estimated to be the value of the benefits of the corruption.[221] The case against the CEO and two Iranian consultants were rendered

217 *See* VAN RUYMBEKE, *supra* note 19, at 171-198. *See also* Total Fined By French Court in Iraq Oil-For-Food Case, REUTERS (Feb. 26, 2016), https://www.reuters.com/article/us-france-total-iraq/total-fined-by-french-court-in-iraq-oil-for-food-case-idUSKCN0VZ1AM.

218 *See Press Release, U.S. Dep't of Justice, French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme*, U.S. DEP'T OF JUSTICE (May 29, 2013), [hereinafter DOJ TOTAL Press Release]https://www.justice.gov/opa/pr/french-oil-and-gas-company-total-sa-charged-united-states-and-france-connection-international. The fines levied under the Total DPA were divided between the DOJ ($248 million) and SEC (153 million).

219 *See DOJ TOTAL* Press Release, *supra* note 218; *see also* Muriel Boselli & Jonathon Stempel, *UPDATE 4-Total Settles U.S. Bribe Probe for $398 mln; CEO May be Tried*, REUTERS (May 29, 2013), https://www.reuters.com/article/total-iran/update-4-total-settles-u-s-bribe-probe-for-398-mln-ceo-may-be-tried-idUSL2N0EA1UE20130529.

220 Muriel Boselli & Jonathon Stempel, *UPDATE 4-Total Settles U.S. Bribe Probe for $398 mln; CEO May be Tried*, REUTERS (May 29, 2013), https://www.reuters.com/article/total-iran/update-4-total-settles-u-s-bribe-probe-for-398-mln-ceo-may-be-tried-idUSL2N0EA1UE20130529.

221 Emmanuel Jarry, *French Court Fines Oil Group Total in Iran Bribery Case*, REUTERS (Dec. 5, 2018), https://www.reuters.com/article/us-total-iran-fine-idUSKCNOKIE; Eric Piermont, *Total Condamné à 500,000 euros d'amende Pour Corruption en Iran*, LE MONDE (Dec. 21, 2018, 3:46 PM),Ehttps://www.lemonde.fr/international/article/2018/12/21/total-condamne-a-500-000-euros-d-amende-pour-corruption-en-iran_5401005_3210.html

moot due to their earlier deaths—the CEO died in a tragic plane crash in Russia in 2014.[222]

Total was also one of the major players in the "Oil for Food" corruption scandal that arose from a program placed under U.N. auspices to alleviate the harshness of the economic sanctions imposed on Iraq following Sadam Hussein's invasion of Kuwait by authorizing limited sales of Iraq's oil. In violation of the UN program's rules, the Iraq's authorities imposed a 10% surcharge on buyers, such as Total, of the oil which was corruptly diverted to public officials.[223] Both French and U.S. authorities opened investigations against Total, other French companies, and several individuals in 2004. In February 2016, the Paris Court of Appeals imposed a fine on Total of €750,000 for corrupting Iraqi public officials reversing an acquittal by the Paris criminal court in 2013. [224] The French investigation and court proceedings were excruciatingly long, due in large part to difficult legal issues (i.e., applicability of the *ne bis in idem* or "double jeopardy" rule to the U.S. enforcement actions, extraterritoriality limits, categorization of the infractions, and misuse of the company's assets). These issues were decided favorably for the prosecution by the criminal division of the French Supreme Court for Judicial Matters "Cour de Cassation" in an extraordinary long (148 pages) and complicated decision published on April 4, 2018.[225] The final disposition of the cases against Total and the individuals upon remand is still pending.

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222 *See Oil Giant Total Fined in France for Iran Corruption*, FRANCE 24 (Dec. 21, 2018, 5:11 PM), https:/www.france24.com/en/20181221-oil-giant-total-fined-France-iran-corruption; *see also Total jugé pour «corruption» pour des contrats en Iran*, LE FIGARO (Oct. 9, 2018, 4:53 AM), https://www.lefigaro.fr/flash-eco/2018/10/09/97002-20181009FILWWW00098-total-juge-pour-corruption-pour-des-contrats-en-iran.php.

223 *See* Sharon Otterman, *Iraq: Oil for Food Scandal*, COUNCIL ON FOREIGN RELATIONS (Oct. 28, 2005), https://www.cfr.org/backgrounder/iraq-oil-food-scandal. *See generally* INDEP. INQUIRY COMM. INTO THE U.N. OIL-FOR-FOOD PROGRAMME, MANIPULATION OF THE OIL-FOR-FOOD PROGRAMME BY THE IRAQI REGIME (Oct. 27, 2005), https://www.files.ethz.ch/isn/13894/ManipulationReport.pdf.

224 Paris, 26 février, 2016, n°13/09208,D.2016.1240, note J. Lelieur; *see* Laurence Frost, *Total Fined by French Court in Iraq Oil-For-Food Case*, REUTERS (Feb. 26, 2016) https://www.reuters.com/article/us-total-iran-fine/french-court-fines-oil-group-total-in-iran-bribery-case-idUSKCN1OK1IE.

225 Cour de Cassation [Cass.] [supreme court for judicial matters] crim., Mar. 14, 2018, Bull. Crim., No. 16-82117. *See* Julie Gallois, *Pétrole contre nourriture: précisions en matière de corruption d'agents publics étrangers et d'abus de biens sociaux*, DALLOZ ACTUALITÉ (Apr. 4, 2018), https://www.dalloz-actualite.fr/flash/petrole-contre-nourriture-precisions-en-matiere-de-corruption-d-

The comparative treatment of the Total corruption cases by French and American authorities is striking in the enormous disparity in the fines and the time taken to finally dispose of the case. These differences can be explained by the availability of plea bargain arrangements in the U.S., the gauging of relative risk by management, and political will.

B. The Impact of Pre-Sapin 2 Major Economic Sanction Breaking Cases on French Opinion

While not a corruption case, the record fine of $8,974 million, dated June 30, 2014, levied on BNP Paribas ("BNP"), France's largest bank, for Cuban, Iran, and Sudanese sanctions violations further contributed to the general French interest in American foreign corruption law.[226] Unlike the situation in Alstom, BNP's U.S. subsidiaries were not directly involved, nor were the transactions in BNP illegal under French or European law. Jurisdiction, based on the use of the U.S. dollar in the transactions, was therefore extraterritorial, leading to bewilderment and outrage from French politicians, businesspersons, lawyers, and commentators who urged President Hollande to attempt to negotiate the BNP fine directly with President Obama during a trip to Paris.[227]

IV. THE ANTI-CORRUPTION PROVISIONS OF SAPIN 2

A. Enactment of the Law after Legal Challenge

Sapin 2 was adopted into French law on December 9, 2016, following months of intense legislative debate and amendment, including a negative opinion by the Conseil d'État (State Council) on the draft law's key, and most controversial, innovation: the "Convention Judiciare d'Intérêt Public" of French plea bargain arrangement.[228] The

agents-publics-etrangers-et-d-#.XbtKziYrnE. *See also Fall 2019 HUGHES ALERT*] *supra* note 161, at 117-19.

226 *See* DOJ BNP PARIBAS Press Release, *supra* note 10.

227 *See* LAÏDI, *supra* note 3, at 172-77. *See also LELLOUCHE/BERGER*, *supra* note 2, at 93-102, 114-19.

228 *See Avis consultatif sur le projet de loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*, CE AVIS (Mar. 30, 2016), [(Advisory opinion of March 30, 2016 of the Council of State on the Transparency, Anti-corruption and Economic Modernisation Act 2016-1691 of December 9, 2016, at 11])], https://www.legifrance.gouv.fr/Droit-francais/Les-avis-du-Conseil-d-Etat-rendus-sur-les-projets-de-loi/2016/Projet-de-loi-relatif-a-la-

nature of the Conseil d'État's objections—the absence of transparency, opportunity for advocacy, and a role for the victim—confirm the thesis of this article: that attempting to graft anticorruption tools from one markedly different legal system to another requires careful pruning if rejection is to be avoided.

B. Summary of the Key Provisions of Sapin 2 (Article numbers refer to Loi 2016-21691 du 9 dec. 2016, supra note *5*)

1. An affirmative obligation for companies, and government funded industrial and commercial institutions ("EPICs"), to prevent corruption (Articles 11, and 17)

French companies employing more than 500 employees, or subsidiaries belonging to a group employing 500 persons in France, with more than €100 million in sales and certain government funded industrial and commercial institutions (EPICs) must implement the following eight "best practices" measures designed to prevent corruption:

a) adopt a Code of Conduct providing clear detailed guidance on permitted and prohibited actions. The requirement that this Code must be integrated into the "règlement interieur" (binding corporate policies), and therefore subject to consultation by employee representatives, demonstrates the legislative intent to render the Code binding, and not merely aspirational. The requirement to detail what may, and may not be, done by the employees, is consistent with the Principle of Legality in criminal matters. In doing so, the legislators paradoxically opted for the detailed drafting preferred by Americans over the briefer general principle French drafting style used in private law (e.g. Contracts) and "soft" law instruments;
b) establish a whistleblowing, or in French parlance–"procédure d'alerte"–as discussed more fully below in Section IV.B.2;
c) set up a process of risk mapping, that identifies and evaluates sectorial, specific business, and geographical risks, and how they may be mitigated;
d) establish training programs for employees at high risk of exposure to corruption;

transparence-a-la-lutte-contre-la-corruption-et-a-la-modernisation-de-la-vie-economique-FCPM1605542L-30-03-2016.

e) develop and implement a rigorous due diligence program for clients, suppliers, contractors and intermediaries;
f) carry out internal and external audits to verify that books and records do not conceal corrupt transactions;
g) institute internal or external accounting procedures to ensure that the books and accounts are not used to conceal acts of corruption of influence peddling; and
h) set up an internal disciplinary sanctions policy.

2. Whistleblowers and their protection (Articles 6-16)

The whistleblowing ("lanceurs d'alert") provisions represent both a significant break with French practice and continuation of its prudent approach to this anticorruption tool. In accepting that whistleblowers may remain anonymous and permitting the outsourcing of the procedure the law overcomes both the strong historical fear of the "denonciator" and cultural mores, which frowned on any recourse outside of the "family." Anonymity is also wisely granted to those accused until the allegation is proven, thereby reducing the risk of false denunciations and internal strife within the company.

The definition of the whistleblower is prudent when taking into account French concerns with American practices. Article 6 of Sapin 2 the whistleblower is defined as "any individual who reveals or reports, *disinterestedly and in good faith*, a crime or misdemeanor, or a serious threat or harm to the *public interest* of which she had *personal knowledge*." The disinterested and good faith criteria eliminate individuals involved in the corruption, who often are the best source of "firsthand" knowledge, and may thereby frustrate detection and investigative efforts. Potential broad interpretations of these criteria may further hinder the deterrence and remedial purposes of whistleblowing.

Consistent with strong French cultural mores, financial rewards—long available in the US—are prohibited. A provision for limited financial assistance, as an advance to cover legal expenses or to temporarily assist whistleblowers who find themselves in dire straits due to their "alert" (present in former article 14), was struck down as unconstitutional by France's constitutional court ("Conseil Constitutionnel").[229]

229 Conseil constitutionnel [CC] decision no. 2016-741DC, Dec. 8, 2016, AJDA 2016.2404 The facility to grant financial relief was considered to exceed the Defender of Rights' ("Défenseur des droits") Defender's attribution under article 71-1 of the Constitution (1958 CONST. art. 71-1) to assist persons claiming to be victims

Whistleblowers are required to follow the company's internal hierarchical process prior to "blowing the whistle" to the administrative authorities or, as a last resort, the press. Although designed to further prevention of corruption and dispose of or remedy the specific issue raised by those best suited to act rapidly, and strongly supported by Transparency International France, adoption of this "let's not wash our dirty linen in public" approach risks dissuading employees from sounding the alert.

The uncertainty inherent in the interpretation of concepts as broad as "disinterested" and "good faith," the unavailability of financial incentives, and the hurdles that whistleblowers would have to navigate, are not likely to encourage employees of French companies to sound the alert. Unlike other Sapin 2 innovations (such as the creation of AFA, the French Anti-Corruption Agency, or the French DPA, the CJIP), neither French institutions, nor commentators, have championed its alert procedure's provisions. Detractors of the very notion remain in the majority while those in favor offer faint praise in the hope that Sapin 2's recognition of whistleblowing may, in the long term, spur the change necessary to make alert procedures effective in France.[230]

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of discrimination. *See* Marie-Christine Sordino, *Lanceur d'alerte et droit pénal: entre méfiance et protection?*, *in* ANTICORRUPTION LA LOI SAPIN 2 EN APPLICATION 183 (Maud Lena & Erwan Royer eds. 2018); Sophie Pelicier-Loevenbruck & Charles Dumel, *Decrypting the New Whistleblower Law in France*, INSIGHT 7-8 (Littler Mendelson P.C., New York) (May 24, 2017), https://www.littler.com/publication-press/publication/decrypting-new-whistleblower-law-france. For a comparison of Franco-American financial reward perspectives and practice, *see* Johanna Schwartz Miralles, *Les récompenses financières des lanceurs d'alerte portent-elles atteinte aux droits fondamentaux? Le cas du droit américain?*, LA REVUE DES DROITS DE L'HOMME (2016), https://journals.openedition.org/revdh/2383.

230 *See* Dyens, *supra* note 134 and Barrière, *supr*a note 132. *See also* Roux, *supra* note 65, at 150. Institutional hostility is exemplified by the negative reaction of French administrative agencies, demonstrated notably by the French privacy authorities, the *Commission Nationale informatique et libertés* ("CNIL"), the previous strict regulation, and scope restrictions of alert procedures that remained in effect until 2014, which sometimes conflicted with alert procedures established by French multinationals in response to Sarbanes-Oxley. The CNIL published a blanket authorization ("autorisation unique-AU-004"), updated in June 2017, to integrate Sapin 2 to alleviate the cost and delay burdens imposed on business by the requirement that whistleblowing schemes obtain prior approval from the CNIL. While providing welcome clarity for enterprises, in compliance with this update, and the new government Sapin 2 implementing decrees ("décrets"), such as no. 2017-564 of April 20, 2017, establishing procedures for the treatment of alerts will require effort from companies and likely be burdensome for smaller companies (i.e., fifty employees or less) not covered by Sapin 2, except for whistleblowing. *See* August & Debouzy, *Protection des lanceurs d'alert: publication du décret sur le recueil des signatures*

Unlike American law and practice,[231] Sapin 2 does not provide protection from retaliation, nor offer monetary incentives to French whistleblowers. The contrast between French and American attitudes towards whistleblowers and their legal protection is strikingly exemplified by the stories of two former managers who both worked for the Swiss banking giant, UBS. The first—an American, Bradley Birkenfield, a senior finance executive—participated in *illegal tax evasion and money laundering schemes hatched by UBS but later blew open the* scandal of great benefit to the U.S. Treasury in disclosures before a U.S. Senate subcommittee. Mr. Birkenfield spent thirty months in prison as a result but received an enormous whistleblowing payment of $104 million. The second—a Frenchwoman, Sylvie Gibaud, a marketing executive—unwittingly caught in the whirlwind whose alert, together with those of two French UBS colleagues brought in billions to the French treasury. None of them received any financial assistance or moral support from the government. All suffered financial and emotional distress. The failure of Sapin 2 to establish an effective legislative framework to effectively protect whistleblowers faced with a business and cultural environment that is not conducive to the practice is a major flaw of the law.[232]

(May 12, 2017), https://www.august-debouzy.com/fr/blog/1002-protection-des..emails&utm_campaign=2017-05-12; *see also* Stéphanie Faber, *Changes to the CNIL's Blanket Authorization for Whistleblowing in France*, GLOBAL IP & TECH. L. BLOG (Squire Patton Boggs, Washington, D.C.), Sept. 4, 2017, https://www.iptechblog.com/2017/09/changes-to-the-cnils-blanket-authorization-for-whistleblowing-in-france/ (French unions view individual alert procedures as a potential threat to their role as agents of collective action, and a potential danger for wrongly accused employees). *See* Icard, *supra* note 131, at 113-14 ; *see also* Emeline Cazi, *Mediator, UBS, HSBC: les rudes lendemains des lanceurs d'alerte*, LE MONDE (Apr. 26, 2016, 1:56 AM), https://www.lemonde.fr/societe/article/2016/04/25/mediator-ubs-hsbc-les-rudes-lendemains-des-lanceurs-d-alerte_4908085_3224.html (describing the tribulations of French whistleblowers, including intimidation, firing, public disparagement, and financial difficulties, notably endured by the three whistleblowers in the UBS case); *New Whistleblower Protection Law in France Not Yet Fit for Purpose*, TRANSPARENCY INT'L (June 20, 2016), http://blog.transparency.org/2016/06/20/new-whistleblower-protection-law-in-france-not yet-fit-for-purpose.

231 *See* O'Sullivan, *supra* note 105, at 74- 82.

232 *See* BRADLEY C. BIRKENFELD, LUCIFER'S BANKER: THE UNTOLD STORY OF HOW I DESTROYED SWISS BANK SECRECY (2016); STÉPHANIE GIBAUD, LA FEMME QUI EN SAVAIT VRAIMENT TROP (2014). Birkenfeld and Gibaud's respective personalities, as described in their narratives, provide a remarkable contrast consistent with national and gender stereotypes that may reinforce French resistance to American-style whistleblowing. Birkenfield comes across as an aggressive, brash, partying bachelor living the "good life" to excess as the lone American at Swiss headquarters who as an experienced banker admits to knowing, at least to an extent, that his

The major defects in the Sapin 2 whistleblowing procedures may be cured in the future as a result of the adoption of a EU Directive on October 7, 2019 regarding the protection whistleblowers which, unlike Sapin 2, does not require the whistleblower to have personal knowledge of the violation of the law, nor to prove that they are disinterested or acting in good faith.[233] The ceiling for establishing an anonymous alert procedure is set at fifty employees—considerably lower than the 500 employee trigger for establishing a comprehensive compliance program and being subject to audit by AFA under Sapin 2.

3. The Creation of a dedicated anti-corruption administrative agency (Articles 1-5, 17, Sapin 2)

The AFA, a new agency created by Sapin 2, is an administrative agency set up to audit French companies' anticorruption compliance programs. It is invested with limited investigative and sanctioning

activities are illegal. This is opposed to the naïve, inexperienced Gibaud, a French mother in charge of planning events in her home country who incurs trouble when she resists destroying evidence when ordered by her superior. *See also* GARRETT, TOO BIG *supra* note 61, at 225-29. American academic studies have shown that whistleblowing over time works to decrease illegal and ethical corporate behavior. *See* Gretchen Morgenson, *Whistle-Blowers Spur Companies to Change their* Ways, N.Y. TIMES, (Dec. 16, 2016), https://www.nytimes.com/2016/12/16/business/whistle-blowers-corporate.html. Recent calls to strengthen French whistlebower laws from prominent public officials, such as Jacques Toubon a former Minister and present "Défenseur des Droits," may foreshadow a change in French attitudes. *See*, Anne Michel, *Le Défenseur des droits veut renforcer la protection des lanceurs d'alerte en France*, LE MONDE, (Dec. 4, 2019, 11:15 AM), https://www.lemonde.fr/societe/article/2019/12/03/le-defenseur-des-droits-veut-renforcer-la-protection-des-lanceurs-d-alerte-en-france_6021466_3224.html. Michel Sapin has also expressed support for a broadening of whistleblowing protections citing the popularity of the "whistleblowing" work of Dr. Irène Frachon. *See* Eric Feferberg, *Lanceurs d'alerte:l'Assemblée nationale pose les fondements d'une protection*, LE POINT (June 7, 2016), https://www.lepoint.fr/politique/lanceurs-d-alerte-l-assemblee-nationale-s-apprete-a-poser-les-fondements-d-une-protection-07-06-2016-2045063_20.php. The publicity and widespread approval of the courageous work of a French doctor, Irene Frachon in uncovering the major Mediator pharmaceutical scandal, presently the subject of a historic criminal trial in Paris of the Servier company, its senior management, and the French pharmaceutical regulatory agency provides further indication of a slow change in public attitudes towards whistleblowing. *See* LA FILLE DE BREST (Haut et Court 2016) (a popular film narrating the struggle of Dr. Frachon in fighting Servier in the Mediator Scandal). *See* Einbinder, *Mass Torts, supra* note 132, at 595 n.75, 616 n.174.

233 *See Fall 2019 HUGHES ALERT*, *supra* note 161, at 114-16. EU Member States (e.g., France) will have two years to transpose this Directive into their national law.

powers.[234] It is entrusted to publish anti-corruption guidelines, advise public authorities and companies, verify the proper implementation of corporate compliance programs, protect and provide financial assistance to whistleblowers, monitor post sentence compliance programs and serve as the focal point for coordination of international anti-corruption efforts (e.g., OECD Convention monitoring).[235]

Given its very recent creation, a definitive study of AFA effectiveness, as compared with the SEC and DOJ, can yet be undertaken. However, a prognosis which considers its strengths and weaknesses will be attempted based on its initial work, allocated resources and organizational structure, and French business and legal cultural norms.

i. Advantages

The AFA's exclusive purpose is to prevent corruption. Unlike the SEC, its anticorruption mission is neither tangential nor an afterthought. It will not need, as does the DOJ, to make tough decisions on how best to allocate its resources amongst competing subjects of concern. This exclusive focus should prove to be a significant advantage. Necessary expertise can be more easily developed and marshalled if an organization has but one objective. Coordination issues and jurisdictional fights are inevitable when responsibility is shared amongst two or more agencies, such as the SEC and DOJ. The AFA ought to be able to reduce, if not eliminate, these problems in the implementation of its preventive role.

As specified in Article 4 of Sapin 2, the AFA may order companies to produce documents, inspect company sites and conduct interviews necessary to carry out its corruption prevention mission.

Unlike U.S. federal anticorruption authorities, the AFA is not empowered to investigate corruption nor impose criminal sanctions. It is authorized, however, to impose civil fines up to €1 million for corporations and €200,000 for individuals for failure to implement the eight corruption prevention measures mandated by the Act (Art. 17.V of

234 *Articles 3 of Sapin 2; see* Christophe Rolland, *Création de l'Agence française anticorruption par la loi "Sapin 2": quells moyens pour quelle action? In in* ANTICORRUPTION LA LOI SAPIN 2 EN APPLICATION 13-16 (Maud Lena & Erwan Royer eds. 2018).

The AFA is an administrative agency and lacks jurisdiction to investigate violations of the criminal law or impose criminal fines. Article 17 of Sapin 2; *see* Fall 2019 HUGHES ALLERT, *supra* note 161, at 21.

235 *See* Fall 2019 HUGHES ALERT, *supra* note 161, at 16-25, 26-39, 44-53 (Part Two (Auditing Activities), Part Three (AFA's Consulting Activities, and Part Four (AFA's International Activities), respectively).

Sapin 2) and impose fines of €30,000 for obstruction of an AFA audit.[236] These powers appear to be sufficient for the AFA to carry out its prevention mission. The limits on its powers should be an advantage as it reinforces its clearly defined focus as compared with the lack of clarity and transparency on the respective missions of the SEC and DOJ sometimes encountered in practice.

The AFA's leadership team has expended significant time and effort in promoting the work of their agency to businesspersons and legal professionals, often in tandem with in-house corporate compliance officers with whom it has dealt, at numerous seminars and conferences. The choice of an experienced former Investigating Magistrate known for his integrity, competence, and frankness as Director has facilitated these exchanges. These efforts, designed to inform the business community of the agency's compliance expectations while allaying fears about the intrusiveness of their investigations have been well-received. The sincerity of the AFA's intention to be transparent with business is demonstrated by the publication (including excellent English translations) of reports on the AFA's scope of work and objectives, practical compliance best practices guides, a set of questions to be answered, and documents furnished by companies in preparation for the AFA's control, as well as a Charter of Rights and Duties for companies controlled by the AFA.[237]

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236 Sanctions are proceeded by a "warning" letter and only imposed after submission of the proposed fine to a hearing before a sanctions committee made of six judges, two from each of the following: the French Administrative Supreme Court (Conseil d'Etat), Supreme Court for ordinary matters (Cour de Cassation), and French Audit Court (similar to the General Accountability Office in the US). The corporation or individual may be represented by counsel at this hearing. *See* AGENCE FRANÇAISE ANTICORRUPTION, CHARTE DES DROITS ET DEVOIRS DES PARTIES PRENANTES AU CONTRÔLE (2017), https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2017/11/charte_controle_octobre_2017.pdf. The Sanctions Committee has rendered one decision to date, on July 4, 2019 (Sonepar). The Committee decided not to follow AFA's demand to issue an injunction with potential severe financial sanctions in case of its violation to force Sonepar to align its compliance program with AFA's strict methodology on risk mapping and Code of Conduct drafting. *See* Fall 2019 HUGHES ALERT, *supra* note 161, at 112.

237 AFA, Annual Report 2017, *supra* note 126 at 26-39; AGENCE FRANÇAISE ANTICORRUPTION, GUIDE PRATIQUE : LA FONCTION COMPLIANCE ET CONFONFORMITÉ ANTICORRUPTION DANS L'ENTREPRISES, (Jan. 2019) https://www.agence-francaise-anticorruption.gouv.fr/files/files/2019-01-29_-_Guide_pratique_fonction_conformite.pdf; *Contrôles des Entités à l'article 17 de la loi N°2016-1691 du 9 Décembre 2016 - Questionnaires et pièces à fournir,* AFA (Feb. 2018), https://www.agence-francaise-anticorruption.gouv.fr/files/2019-07/Questionnaire%20art.17%202018%20V5.pdf

These laudable initiatives combined with France's state-centric tradition, the strength and credibility of its administrative law, and the relative ease French business has in dealing with administrative agencies bode well for the success of the AFA's efforts to enlist business as a "partner" in France's post-Sapin 2 efforts to improve its international anticorruption reputation.[238] The agreement of the DOJ to the AFA's designation as Société Générale's monitor in the ground-breaking Franco-American CJIP/DPA settlement, a role which the AFA desires to play to the maximum extent possible, has significantly bolstered AFA's credibility.

ii. Potential Weaknesses

The AFA, with a team of over forty inspectors is not, *a priori*, understaffed. However, the Ministry of Justice in general, and anticorruption enforcement in particular, has historically been poorly funded.[239] The AFA's compliance program is ambitious in both number and depth. It has agreed to work as monitor in major U.S. administered cases such as Société Générale. The AFA may find the workload required for these tasks challenging as well as fulfilling, as work accumulates and the initial enthusiasm for its action wanes under criticism from business interests and possible budget constraints. AFA is placed under the dual authority of the Ministries of Justice and Finance and does not possess the status of an independent administrative agency. While its partial attachment to the Ministry of Finance might be perceived advantageous from a financial perspective, having "two masters" may cause confusion and hinder innovation and efficient decision-making. Legal and financial professionals have different backgrounds, skills, perspectives, and objectives, which do not favor communication and a consistent approach. The AFA may find itself subject to territorial and funding battles between the two administrations. Moreover, if funding becomes an issue, the AFA's credibility

238 Compliance practitioners representing French companies who have been or are in the process of being audited by the AFA have generally been favorable in their evaluations of the professionalism of the AFA. While noting initial difficulties attributed to the lack of AFA staff's experience with the process and the general environment of business and suspicion of legal professionals, AFA personnel have tended to be fast learners and diligent as their experience broadens. The statement of Richard Tollet, former in-house counsel at Technip now at Hughes Hubbard Paris, at December 19, 2019 ABA anticorruption subcommittee meeting confirmed by conversations of the Author with several Paris based lawyers and "Chatham Rule" statements at conferences devoted to the subject.

239 LE COQ, *supra* note 22, at 224-27.

will suffer outside of France, and in particular in the U.S., where the Justice Department and legal professionals in general are rarely, if ever, placed in a subservient role to finance as is common in France.

Faced with the challenge of promoting and controlling compliance in a great number of companies—many of which, unlike large French multinationals, lack any experience in the field—the AFA risks succumbing to the bane of compliance programs—a "check the box" mentality—and over-confidence in preventive tools. This risk, which the AFA is working hard to avoid, is far greater in the French centralized mandatory system that was imposed by Sapin 2 than in the U.S., despite the increased regulatory requirements of Sarbanes-Oxley and Dodd-Frank.

The work of the AFA creates several novel issues for the French legal system. How will the AFA interact with prosecutors and investigating magistrates responsible for investigation and enforcement? The AFA may not have an investigative role, but its compliance control and monitoring duties will inevitably affect certain companies' positions in legal actions. Despite AFA's leadership team's earnest intention to listen to the concerns of French businesses and their legal counsels, the lack of a shared professional background may prove to be an obstacle in the realization of the objectives of the AFA to work with companies to detect and prevent corruption for the general interest of the French nation. In particular, the diametrically-opposed views of the AFA's Director and senior team and both French in-house and outside legal counsel on the necessity of recognizing and preserving attorney-client communications may prove to be a source of significant tension undercutting the trust needed for effective AFA compliance evaluations, particularly in audits which have the potential to intersect with internal or French or foreign criminal investigations.[240]

240 The intensity of the debate over attorney-client privilege was recently illustrated by AFA's Director, Charles Duchaine, commenting as a conference keynote speaker that attempts by counsel to "privilege" documents in AFA audits would be negatively considered and a bad way to start the process. Notably, Mr. Duchaine referred to his years of experience as an Investigating Magistrate in justifying his negative view of outside lawyers attempts to use the "privilege" or "secret professionnel." The AFA's Deputy Director had on previous occasions commented positively on the fact that French (and European) law do not recognize any attorney-client privilege for in-house counsels. In response, outside counsel, not surprisingly, referred to their traditional role as protector of the defense rights of clients consistent with the Legality Principle. These exchanges, despite the reciprocal esteem and sincerity of the parties to the debate and their common intention to work for the benefit of French interests, poignantly illustrate the distance remaining between the traditional perspectives of French lawyers committed to defending their clients against the potential overreach of the French state, and French judges and administrators

Sapin 2 did not follow the U.K. Bribery Act's innovative Section 7 new offense of "strict enterprise liability" for failure to prevent corruption, nor its defense of adequate procedures.[241] Doing so would have run counter to fundamental principles of "legality." The AFA's determination of the conformity of an enterprise's compliance program may, however, be of great importance in the decision of a prosecutor to initiate an investigation or an investigative magistrate's decision to indict "mise en examen." What significance will AFA's determination have on private civil actions? What will be the status of the documents, interviews, or comments elicited in AFA's compliance control or monitoring role? Will they be "privileged?" May they be transmitted to foreign authorities such as the DOJ? What about the interaction between AFA control and an internal investigation? The AFA's effectiveness will not necessarily be negatively impacted by the process of resolving these difficult issues. However, their uncertainty, if not addressed, will negatively impact the AFA's credibility and hinder its effectiveness.

As any administrative agency, the AFA will be at risk of "industry capture" as well as political interference, particularly given its lack of the status of an Independent Agency. These risks may be limited in actuality, at least at present, but are central to the AFA's credibility given the high expectations for Sapin 2 as palliative to France's deficiencies in anticorruption.[242]

equally committed to serving the "general interest." *See* comments made at the 8th Edition of 'Les Débats du Cercle Montesquieu' *(*Apr. 11, 2019); The recently issued Guidelines on the Implementation of the CJIP reflect Director Duchaine's views on "privilege," as the prosecutor is entitled to draw negative inferences from a company's withholding of documents based on attorney-client privilege. *See* LE PROCUREUR DE LA REPUBLIQUE FINANCIER & AGENCE FRANÇAISE ANTICORRUPTION, LIGNES DIRECTRICES SUR LA MISE EN OEUVRE DE LA CONVENTION JUDICIARE D'INTERET PUBLIC 10 (June 26, 2019) ("Implementing Guidelines for Public Interest Judicial Settlement Agreements") [hereinafter CJIP Guidelines]. The widely divergent views between French prosecutors and lawyers on the importance of the attorney-client privilege (*"secret professionnel"*) in criminal cases has recently been the subject of extreme tension and reciprocal recriminations following recent public disclosure that the telephone records, including client communications, of several prominent criminal defense lawyers had been examined without the issuance of a judicial warrant in a high profile corruption case involving the former French president, Nicholas Sarkozy. *See* Mark Leplongeon, *Afffaire Bismuth-Sarkozy: La nouvelle affaire des écoutes,* LE POINT (June 24, 2020), https://www.lepoint.fr/politique/exclusif-affaire-bismuth-sarkozy-la-nouvelle-affaire-des-ecoutes-24-06-2020-2381670_20.php (see 34-40).

241 *See* RAPHAEL, *supra* note 69, at 10-21.

242 The record of anticorruption and compliance agencies in other countries, notably the U.K., exposed to similar risks has been mixed. *See* Miralles, *supra* note 132.

Lastly, a lack of expertise or political and diplomatic influences may lead to an unbalanced sectorial or geographical prioritization of its workload hurting credibility.

The experience of other French administrative agencies should guide the AFA in its development. The positive experience of the CNIL protecting data privacy should be considered.[243] Comparative legal and in-depth empirical studies of similar agencies in other civil countries, such as Italy, the U.S. (DOJ and SEC), and U.K. (SFO) should be useful in assisting the AFA in meeting its challenges. Likewise, an examination of the AFA's organization and mission under Sapin 2 and its effectiveness in practice by U.S. federal authorities and American academics could inspire needed changes to such debatable components of American anticorruption efforts as the lack of transparency in the appointment process, costs and findings of compliance monitoring.[244]

4. Plea bargaining-CJIP, the "French DPA" (Article 22, Sapin 2)

Plea bargaining was the most controversial issue in the legislative and public debate on Sapin 2. The debate was often framed in extreme

The French Ministry of Justice set up a task force to examine how to best design an agency dedicated to detecting and preventing corruption, and commendably studied and sought advice from existing agencies in the U.S., U.K., the Netherlands, and Italy and concluded that the specialized dedicated agency model of the Netherlands and Italy were better suited than that of the SFO in the U.K. AFA Annual Report, *supra* note 126, at 10.

243 The Commission Nationale de l'Informatique et des Libérties ("CNIL") (French data privacy agency) has an excellent reputation and is considered the European leader in data privacy protection. Unlike the AFA, it has the status of an independent administrative agency. It appears to be better resourced with 192 employees.

244 *See* Christopher David & Emily Stark, *Trans-Atlantic Winds of Change for Corporate Monitorships?*, Dec. 18, 2018, WILMER HALE W.I.R.E. BLOG (Wilmer Hale LLP, New York), Dec. 18, 2018, https://www.wilmerhale.com/en/insights/blogs/WilmerHale-W-I-R-E-UK/20181211-trans-atlantic-winds-of-change-for-corporate-monitorships; *see also* Memorandum from Assistant Attorney Gen. Brian Benczkowski to All Criminal Division Personnel regarding the Selection of Monitors in Criminal Division Matters (Oct. 11, 2018), https://www.justice.gov/criminal-fraud/file/1100366/download. The "Benczkowski memo" attempts to address criticisms of corporate monitorships lack of transparency, conflicts of interest, and high cost and burdens to corporate operations by setting out criteria for deciding whether the appointment of a monitor is appropriate. For an early scathing criticism of corporate mentorships in corruption cases, *see* Nathan Vardi, *The Bribery Racket*, FORBES, (June 7, 2010, 12:00 AM), https://www.forbes.com/global/2010/0607/companies-payoffs-washington-extortion-mendelsohn-bribery-racket.html#19b13251b5a6.

"pro-" or "anti-" American terms, with a tendency to ascribe ulterior geopolitical "economic war" motives to this long-established American criminal procedure practice, or to attribute the failings of French corporate foreign corruption enforcement solely to its absence in the French anticorruption arsenal.

Comparative law experts, informed by a comparative law analysis which recognized the resources constraint origin rather than ideological basis of the American practice, provided a necessary counterpoint.[245] The drafters of the legislation apparently benefitted from the drafter's exposure to this pragmatic perspective, which helped them successfully balance the necessity of integrating a mechanism crucial for effective anticorruption enforcement success with legitimate concerns about preserving fundamental principles of French criminal law, as noted in the Conseil d'État's consultative legal opinion.[246] This achievement is remarkable, given the common belief, especially after the negative legal opinion by the Conseil d'État, that this innovation would be abandoned. The perservance of the government and legislators may be attributed to the sense of urgency stemming from well-founded fears that future "Alstoms" may be in the wings.

The French equivalent of a DPA, the CJIP, permits a corporation, *but not individuals*, to enter into an agreement proposed by the public prosecutor under which the company recognizes the facts of the corruption *without admitting guilt*. The company must agree to pay a fine proportionate to the benefits obtained from the acts of corruption, limited to 30% of the average of its last three years' turnover, implement an acceptable corruption prevention program, and be placed under AFA monitorship for up to three years.[247]

The prosecutor must inform victims, "partie civiles," of his decision to propose the French CJIP.. Victims may present evidence establishing the nature and amount of their damages payment of which

245 Bohlen, *supra* note 3.

246 CE, Dec. 10, 2016, Rec. Lebon., Avis sur un projet de loi relatif à la transparence, a la lutte contre la corruption et à la modernisation de la vie économique du Conseil d'Etat [Opinion of the Council of State on the draft law on transparency, anti-corruption and the modernization of the economy], https://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=59D853345DA53CBDD0436A5A3043F29C.tplgfr28s_3?cidTexte=JORFTEXT000033560422&idArticle=JORFARTI000033560423&dateTexte=20161210&categorieLien=cid.

247 Loi 2016-1691 du 9 décembre 2016, *supra* note 5, Art. 17. *See also* Frederick T. Davis, *France's New Anticorruption Law—What Does it Change?*, GLOBAL ANTICORRUPTION BLOG (Mar. 2, 2017), https//globalanticorruption.blogcom/2017/03/02/frances-new-anti-corruption-law-what-does-it-change.

may be a condition of the agreement. Agreements must be submitted for approval to a judge and are then published together with a press communique from the prosecutor on the AFA website.

The very title of the French CJIP , *Convention Judiciare d'Intérêt Public*, is illustrative of the care taken to integrate deeply held tenants of French procedure, particularly in light of the Counseil d'État's reservations and criticism of American practice. It is a "Judicial" agreement in the "Public Interest." It emanates from a prosecutor who considers himself to belong to the same "corps" of magistrates as the "sitting judge." It must be approved by a sitting judge after a public hearing.

The "public interest," requirement is satisfied since the prosecutor is part of the "ministère public," which represents the public as a whole.[248] This is to be contrasted with American practice, where the agreement is perceived as a reasonably "bargained" private deal, largely hammered out by lawyers with similar training and experience.[249] Including the term "judicial" in the title emphasizes the important role to be played by the French judge in contrast to the American judge's mere rubber stamping of DPAs. Together with the opportunity for civil parties to seek restitution, the CJIP provides a response to two aspects of American practice—excessive prosecutorial discretion and the lack of focus on victims' rights—that have received much criticism.[250]

Sapin 2 adopts a pragmatic approach in its acceptance of the fiction, previously used by the SEC, of permitting companies to enter into agreements recognizing the reality of the commission of corrupt

248 *See* Luca d'Ambrosio, *Settlement Agreements under French Sapin II Law: In search of the "Public Interest"*, N.Y.U. L.: COMPLIANCE & ENFORCEMENT (Mar. 11, 2019), https://wp.nyu.edu/compliance_enforcement/2019/03/11/settlement-agreements-under-french-sapin-ii-law-in-search-of-the-public-interest/.

249 *See* FIORINI, *supr*a note 13, at 211 (cautioning against viewing the adoption of the American "private" approach as a panacea).

250 *See* Robert P. Mosteller, *Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness*, 36 N.C. J. INT'L L. & COM. REG. 319 (2011); Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate prosecution Agreements,* 82 N.Y.U. L. REV. 1434 (2007); Prett Bharara, *Corporations Cry Uncle and their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53 (2007); Barry A. Bohrer & Barbara L. Trencher, *Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation*, 44 AM. CRIM. L. REV. 1481 (2007); Matt Senko*, Prosecutorial Overreaching in Deferred Prosecution Agreements*, 19 S. CAL. INTERDISC. L.J. 163 (2009).

acts without admitting guilt, thereby avoiding the "death sentence" of exclusion from access to public tenders.[251]

Practitioner commentators have expressed skepticism that French companies will readily avail themselves of Sapin 2's CJIP innovation, contending that the uncertain case law applying the relatively new concept of corporate criminal liability combined with the lack of incentives to "self-report" will confirm corporate officers' instincts, grounded in the poor record of French justice in successfully prosecuting corruption cases, to deny and delay.[252]These legal differences dovetail with French corporate cultural traits (respect for hierarchy, formalism including a belief that liability may be discharged by written documentation and can never be established by oral statements, and an entirely individualistic conception of legal liability) that lead to a nearly obsessive concern within corporate legal departments and amongst executives for the drafting of "delegations of authority." The author's personal experience as in-house counsel at French companies suggests that this approach to corporate and individual liability may pose significant risk for French companies in their dealings with American corporate corruption investigations.

The adoption of the DPA mechanism in French law was a major innovation in French criminal procedure. The French legislature strictly limited the use of DPA's to corporations. Contrary to U.S. practice, individuals cannot negotiate a French DPA. The exclusion of individuals from the process was dictated by political considerations, and compliance with the Legality Principle. In addition, US policy to

251 *See*, Edward Wyatt, *S.E.C. Changes Policy on Firm's Admissions of Guilt*, New York Times, N.Y. TIMES, (January 6, 2012), https://www.nytimes.com/2012/01/07/business/sec-to-change-policy-on-companies-admission-of-guilt.html.

252 *See* Kirry, Davis & Bisch, *supra* note 18, at 152-53 (summarizing cases in which French courts struggled to decide employee/officer delegation of authority and capacity to bind issues in interpreting CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 121-2 (Fr.), which introduced corporate criminal liability in 1994.). *See also* Frederick T. Davis, *Limited Corporate Criminal Liability Impedes French Enforcement of Foreign Bribery Laws*, GLOBAL ANTICORRUPTION BLOG (Sept. 1, 2016), https://globalanticorruptionblog.com/2016/09/01/guest-post-unduly-limited-corporate-criminal-liability-impedes-french-enforcement-of-foreign-bribery-laws/;
DAVIS, *supra* note 18, at 164-67 (comparing French and U.S. law and noting that American law has, since 1909, applied a broad common law "respondeat superior" concept of corporate criminal liability in federal and most state courts. In contrast, European law has limited liability to cases where the criminal act was clearly within the non-delegated authority of corporate employees/officers or directors with authority to bind.); Miriam H. Baer, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19 J. L. & POL'Y 1, 3 (2010) (questioning the usefulness of criminal corporate liability in rehabilitating corporate culture).

hold individuals personally responsible for corruption as set out in the Yates memo may have influenced this decision.[253] Some commentators, including prominent prosecutors involved in Franco-American corporate criminal investigations, have advocated offering individuals the opportunity to conclude negotiated transactions without admission of guilt by broadening the existing alternative plea bargain "composition pénale" mechanism of French law to include the serious crime of corruption.[254] Doing so, they argue, would encourage certain individuals to cooperate, facilitating the investigation and the conclusion of the corporate CJIP by eliminating conflicts while better-ensuring equality of treatment between corporate and individual defendants.[255]

5. Clarity on Extraterritorial Jurisidiction and Elimination of the Need to Prove Prosecution in the Country of Occurrence of the Corrupt Act (Article 16, Sapin 2**)**

The Sapin 2 Law eliminates two technical impediments to French action:

a) It expands the extraterritorial reach of French law by a clear statement that French law applies to the operations of French companies overseas and foreign companies operating in France "all or some of their activities in France";

253 Memorandum from Deputy Attorney Gen. Sally Yates to all U.S. Attorneys regarding Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download. *But see* Memorandum from Deputy Attorney Gen. Rod Rosenstein to U.S. Attorney Heads of Department Components regarding Policy on Coordination of Corporate Resolution Penalties (May 9, 2018), https://www.justice.gov/opa/speech/file/1061186/download (announcing a DOJ policy of achieving an "overall equitable result" by crediting and apportioning financial penalties, fines, and forfeitures for the same misconduct and, whenever possible, coordinating with state, local, and foreign authorities in resolving cases and establishing a DOJ working group on corporate enforcement and accountability.).

254 Les Débats, *supra* note 240. (Prosecutors have suggested that prosecutors innovate by taking advantage of the discretion, or 'opportunité de poursuite', to dismiss a case or negotiate in accordance with C. PR. PÉN. art. 41-1 on a case by case basis, granted to them by the Ministry of Justice's guidance memo, or "circulaire," of Jan. 31, 2018, following the enactment of the law.). *See also* Maxence Delorme, *Les conventions judiciares d'intérêt public: l'exemple du tribunal de grande instance de Nanterre*, *in* DE LA CONFORMITE A LA JUSTICE NEGOCIEE, ACTUALITE DE LA LUTTE ANTICORRUPTION 43 (2018).

255 Suggested by Charles Duchaine, Director of the AFA and a former prosecutor and Guillaume Daieff, Vice-President of the Nanterre prosecutorial office during at the conference of April 11, 2019, *see Les Débats, supra* note 240.

b) It establishes that French prosecutors may act even if a corrupt act has not been the subject of prosecution in the country where it occurred.

C. Evaluation of Sapin 2—Prognosis

The enactment of Sapin 2 is an important, if tardy, response to valid criticism of French inertia and feet dragging in the enforcement of antibribery law against French companies in foreign corruption cases. The success of the law in deterring corruption through preventive measures and increased enforcement will depend on the effectiveness of the AFA established by Sapin 2 to focus exclusively on corruption prevention and the institutions entrusted with anti-corruption enforcement—prosecutors, investigating magistrates and anti-corruption NGO's.

Despite intense controversy, the CJIP, a plea-bargaining mechanism for corporations, was adopted. The French legislature's prudent adaption of this crucial American anticorruption tool took into account deeply cherished aspects of French criminal procedure, including judicial review of the plea and the limitation of the procedure to corporations.[256] Early signs, notably the general acceptance and use of CJIPs (as in the *Société Générale* case and the initial work of the well-resourced AFA) provide ample reasons for hope. Technical impediments to prosecution related to extraterritoriality, as discussed above, were removed. Optimism, however, should be tempered by shortcomings in the law, such as the inadequacy of whistleblowing protections. The demoralization of investigating magistrates resulting from prosecutors' increased use of the preliminary inquiry (*enquête préliminaire*) mechanism, strategic conflicts of interest between corporations and their employees, and inertia inherent in French business culture present challenges which must be met to guarantee future success.

The threat posed by costly and complex multi-jurisdictional anticorruption enforcement, along with the need to reduce reputational damage by taking strong action, will increase the likelihood that French corporate management will break with their prior tactics of delay and minimization in favor of initiating internal investigations to uncover compliance practice deficiencies within their companies. The introduction of this quintessential American investigative tool has and

256 Astrid Mignon Colombet, *La convention judiciaire d'intérêt public: vers une justice de co-opération*, *in* ANTICORRUPTION LA LOI SAPIN 2 EN APPLICATION 161,63 (Maud Lena & Erwan Royer eds. 2018).

will continue to be a source of tension within French companies and amongst French legal professionals.[257] Successful adoption of this tool in France will require addressing the interface issues between internal and governmental investigations, further training of French legal professionals in investigative techniques, and providing information and support to employees requested to participate.[258]

257 Personal Interview with Guillaume Daïeff, Vice President of Nanterre Prosecutorial Office (in Paris on April 2, 2019).

258 LE COQ, *supra* note 22 (noting that a number of members of the Paris bar, French prosecutors investigating magistrates, and legal scholars are familiar with the complex interface issues and have offered useful advice on how they might be resolved.); *see*, *e.g.*, Le Dreau & Benjamin Grundler, *infra* note 308, at 28 (emphasizing the need for administrative and judicial authorities to be vigilant in avoiding misusing information obtained in internal investigations. Le Dreau and Grundler cite the prosecutor and former Investigating Magistrate who handled the UBS case, Guillaume Daïeff, who cautions government investigators tempted to use "evidence" obtained from internal investigations against the twin risks of violating individual defendants' fair trial rights by the obtention of evidence inconsistent with the "legality" principle, or the investigator's manipulation by the corporation.); *see also* Daïff, and Poissonnier, *infra* note 308. For an excellent and comprehensive Franco-American comparative law study on internal criminal investigations, *see generally* FIORINI, *supra* notes 13 (noting that French judges and defense counsels were first confronted with the inherent tension between the objectives of internal and judicial investigations by the law of August 24, 1993, which authorized civil parties and indictees to request the Investigating Magistrates to supplement their investigations by suggested additional interrogation of witnesses, including the civil party or indictee, and demanding the further production of documents. Article 82-1 of the Law attempted to separate the private interests of the civil party or indictee from the general interest by providing that only evidence useful to the Investigating Magistrate in the discovery of the truth ("*utiles à la manifestation de la verité*") should be pursued.).

Several members of the French bar are fully qualified, by extensive experience in France and membership in U.S. state bars. Some have experience in U.S. and other foreign criminal corruption cases, including appointment as DOJ, SEC, and World Bank monitors to conduct independent internal investigations in France. The Parisian bar has taken positive steps to provide guidance to the legal profession on how to reconcile the differences between U.S. and French traditions and the often conflicting interests of corporate and corporate employees as evidenced in their Report and recommendation on internal investigation. Likewise, certain French prosecutors and investigating magistrates, notably Guillaume Daïeff influenced by their experience in multi-national anti-corruption investigations and have broken with their "corps'" traditional antipathy to "private" justice by commenting positively on independent internal investigations. *See* LAÏDI, *supra* note 3, at 115-117 (Acceptance of French law firms as by the DOJ and the SEC that French law firms are up to the task and may be "certified" as "independent" internal investigators in competition with the large American law firms who have monopolized the field up to now is required to overcome the criticism by the French legal profession, disoriented corporate employees, and tenants of the "economic war" theory that American anticorruption investigations and enforcement are characterized by opaque "clubliness" and insensitivity to French culture. Interrogation of French employees and other witnesses in English by non-French proficient American lawyers is a particularly

In this author's experience, Sapin 2 has engendered a change in attitude amongst French legal professionals. This change in attitude augurs well for increased cooperation with American authorities, the acceptance of imposing large fines on French corporate offenders, and much needed change in corporate boardrooms. Whether they are prosecutors, corporate counsel, compliance officers, or government officials, this change in attitude augurs well for increased cooperation with American authorities, the acceptance of French authorities imposing large fines on French corporate offenders, and the necessary permeation into corporate boardrooms for much needed change.[259]

egregious example of such insensitivity and cultural arrogance. One could only imagine the reaction of an American employee in the same situation were a French lawyer to show up for an interview speaking only French. American lawyers assigned to conduct internal investigations are often unfamiliar with basic aspects of French legal practice, notably furnishing the person interrogated with a summary of the interview for corrections and signature, causing confusion for the interviewee that is often not voiced to the interviewer. These failures border on negligence, as the quality of the information obtained in interviews conducted under such conditions is inherently compromised. The CJIP Guidelines recognize the importance of internal investigations in CJIPs. Companies are required to submit the results of their internal investigations and audits to the PNF and describe the nature of the violations with the greatest possible accuracy. CJIP Guidelines*, supra*, note 241, at 9. *See* Gary DiBianco et al., *Transatlantic Actional Approach on Corporate Cooperation: How Newly Issued French and UK Guidelines Compare to U.S. Practices*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (June 28, 2019), https://www.skadden.com/insights/publications/2019/10/transatlantic-approach-on-corporate-cooperation.

259 As evidenced by the proliferation of well-attended conferences and training programs at which top AFA, PNF officials, French defense counsel, and general counsels of French companies who have been subject to investigation openly and frankly discuss agency prevention efforts, general prosecutorial strategy, and experience with investigations and settlements. Many of the participants have expressed relief since the enactment of Sapin 2 from the opprobrium of being castigated at international conferences for the poverty of French enforcement efforts, and this represents a dramatic change in anticorruption enforcement discourse in France. The Author can personally attest to these changes through participation in several of these conferences and training sessions. For example, *The Global Anti-Corruption Summit* in Paris, organized by the Business & Legal Forum on March 10, 2017—at which Michel Sapin (Minister of Finance) and Charles Duchaine (AFA) were speakers—and the workshop on *Multiple Penalties Risk in Anticorruption Prosecution: Is there real coordination between the agencies* hosted in Paris by the *Association Française des Juristes d'Entreprises* (French national in-house lawyers association) on October 25, 2016—at which the Author together with Pablo Quinoes, then-Deputy Chief of the Fraud Section of the DOJ, and Karen Seymour, Partner at Sullivan & Cromwell, spoke—and *Enquêtes Pénales internationals: qulles coordination entre les pays?,* organized by FRANCE-AMERIQUES on December 12, 2016—at which spoke Eliane Houlette, then-Chief of the PNF (French national prosecutorial office), Nicolas Bonnucci (OECD Director of Legal Affairs), Frederick T. Davis (member of N.Y. and Paris bars, former U.S. federal prosecutor and legal scholar) amongst

Comparative law analysis played an important role on both sides of the Atlantic in provoking reflection on what works, what may not work, and the extent to which "borrowed" anticorruption mechanisms may be effectively integrated if properly integrated by taking account of legal culture.[260]

The repercussions of France's "Alstom moment" and the realization that cooperation may be desirable for significantly reducing fines, have led numerous French lawyers to modify their own traditional resistance and to counsel corporate clients to do the same. The Paris Bar has been particularly active in preparing for a change in view, as evidenced by recent initiatives aimed at improving the internal investigations framework through the issuance of recommendations for attorneys on carrying out internal corporate investigations, seminars, and training programs for members of the Bar seeking to acquire expertise. Comparative Law analysis has played an important role in these initiatives as evidenced by the recommendation of the Paris Bar that lawyers undertaking an internal corporate investigation issue an "Upjohn warning,"[261] Upjohn warnings are derived from U.S. practice in

others experienced in Franco-US cross-border anti-corruption investigations. In addition, the *Ecole Nationale de la Magistrature* (French National Training School for Judges) has a series of training sessions which commenced in December 2019 for prosecutors, investigating magistrates, and investigators on internal investigations and negotiated plea bargaining (CJIP) led by French prosecutors, including Guillaume Daïeff, and other attorneys (from the Paris and N.Y. bars)—including Stephane de Navacelle—experienced in these matters, and the Author.

260 French legislators and their staffs traveled to the U.S. to meet with SEC and DOJ staff on anti-corruption issues. U.S. and French legal scholars and practitioners also testified. Their findings were integrated into the findings and recommendations of the three parliamentary enquiries on the effect of U.S. legislation on French strategic interests, including "national champions." *See LELLOUCHE/BERGER*, *supra* note 2; *Gauvain Report*, *supra* note 2; MARLEIX COMMISSION, *supra* note 2. *See also* Antoine Garapon & Astrid Mignon Columbet*, D'un droit défensif à un droit coopératif: La necessaire réforme de notre justice pénale des affaires*, 2016 REVUE INTERNATIONAL DE DROIT ÉCONOMIQUE 197-215 (2016) (Fr.) (which exemplify the use of comparative law analysis in the development of concrete influential proposals for reform).

On the U.S. side, forums for discussions on anti-corruption developments in France, especially Sapin 2, have provoked reflection in the U.S. on issues such as monitoring and excessive prosecutorial discretion in plea bargained agreements. Examples of such forums include presentation and discussion of French anti-corruption developments by Nicholas Tollet, Hughes Hubbard the December 18, 2019 meeting of the ABA International Law Section, Anti-Corruption sub-committee, law school initiatives such as the Program on Corporate Compliance and Enforcement at NYU School of Law, the World Bank Institute on Governance and corruption, and the Institut de Hautes Etudes Sur la Justice.

261 Upjohn Co. v. U.S., 449 U.S. 383 (1981); Paris bar recommendation of Upjohn warnings- Recommendation 1.3; Vademecum de l'avocat chargé d'une enquête

internal investigations. The interviewing lawyer warns the person being interviewed that she is acting on behalf of the corporation and not the person being interviewed.[262]

V. TRANSNATIONAL RESONANCE

A. American Resonance in France

Given the preeminent, and for a considerable period exclusive, role of the U.S. as enforcer of international anti-bribery law, practitioners' concern and scholars' research has been focused on the "resonance" of the FCPA on the development of national anti-bribery laws.[263] Specific attention is paid to the U.K.'s Bribery Act of 2010[264] and major FCPA enforcement actions which spawned or were concomitant with actions brought by national authorities against major foreign companies, as in the Siemens cases.[265]

interne, Conseil de l'Ordre du Barreau de Paris, September 13, 2016 cited in *Projet de rapport sur les problématiques et les enjeux liés au statut et au rôle de l'avocat enquêteur dans le cadre d'une enquête interne* (approved December 13, 2019) item 32; Stephane de Navacelle, Presentation at American Bar Association Section of International Law's Anti-Corruption Subcommittee Meeting (Dec. 14, 2016).

262 *See* Kirry, Davis & Bisch, *supra* note 18, at 120; *see also* DAVIS, *supra* note 18, at 129-132.

263 *See* Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 V.A. L. REV. 1611 (2017) [hereinafter Brewster].

264 *See* RAPHAEL, *supra* note 69. *See also* Spahn, *supra* note 216; Jessica Naima Djilani, *The British Importation of American Corporate Compliance*, 76 BROOK. L. REV. 303, 313-14 (2010). *But see* Samuel B. Richard, *To Bribe a Prince: Clarifying the Foreign Corrupt Practices Act through Comparisons to the United Kingdom's Bribery Act of 2010*, 37 B.C. INT'L & COMP. L. REV. 419, 448-450 (2014) (arguing for "reverse resonance.").

265 The Siemens case was a fundamental breakthrough in international cooperation in the enforcement of the OECD Anti-Bribery Convention. U.S. and German authorities joined forces in the exchange of information under its mutual legal assistance provisions. Sanctions, while reduced in recognition of the company's extensive cooperation and serious internal investigative efforts, were nonetheless serious, including the highest total fines in anti-bribery history ($1.6 billion shared equally between the German and American authorities) and the later convictions of several senior executives. *See* Sara Sàenz, *Explaining International Variance in Foreign Bribery Prosecution: A Comparative Case Study*, 26 DUKE J. COMP. & INT'L L. 271, 281, 293 (2015); Brandon L. Garrett, *Globalized Corporate Prosecutions,* 97 V.A. L. REV. 1775, 1785-88 (2011); Edward Wyatt, *Former Siemens Executives are Charged with Bribery*, N.Y. TIMES (Dec. 13, 2011), https://www.nytimes.com/2011/12/14/business/global/former-siemens-executives-charged-with-bribery.html.

Professor Rachel Brewster's important study on how the multidirectional relationship between international law (OECD Convention), U.S. domestic law (FCPA enforcement), and domestic politics eventually enabled effective FCPA enforcement against both U.S. and foreign companies and demonstrates the value of evaluating "international resonance's feedback mechanisms."[266]

Sapin 2's enactment and French parliamentary investigations into the national security and economic competitiveness aspects of FCPA enforcement against French national champions illustrate the validity of Brewster's "feedback" approach.[267] By enacting international anti-bribery legislation in Sapin 2, French legislators undoubtably hoped that their resolve to implement more effective anticorruption legislation might alleviate the pressure from U.S. authorities to impose severe penalties in future cases.[268] However, an argument for Sapin 2 based on the possible benefit of American forbearance in return for the adoption of American-style enforcement mechanisms ran the risk of exacerbating opposition to the legislative changes based on strongly-held political (i.e., loss of sovereignty, national security, economic war) and legal cultural (i.e., civil law tradition's *legality* principles and denunciation history, both discussed in Part II above).

Although the Minister of Economy, Michel Sapin, for whom the law is named, invoked the need for legislative change to respond to the OECD's strong criticism of France's lax enforcement of international anti-bribery legislation, it did not present an obstacle to its passage. Sapin's framing of the debate[269] in terms of upholding France's international obligations and restoring its international standing in the corruption field, within the framework of the consensus based,

266 *See* Brewster, *supra* note 263, at 1612. *See also* Brewster & Buell, *supra* note 2.

267 *See* Brewster, *supra* note 263, at 1612. *See also Gauvain Report*, *supra* note 2.

268 *See* Brewster, *supra* note 263, at 1641. *See also* LELLOUCHE/BERGER, *supra* note 2.

269 Michel Sapin, the former Ministry of Finance, promoted Sapin 2 as necessary to enable France to meet the highest international anticorruption standards. He readily acknowledged that the OECD's negative report on France's anticorruption efforts (*supra* note 26), and the Alstom case (discussed in Part III(A)(3) above) spurred the government to take urgent action. *See* Sapin, *supra* note 34; *see also* Roux, *supra* note 65, at 147-48. Sapin's comments, reiterated at several seminars, demonstrate the effect of international and intra-national "resonance." For example, Sapin has criticized the notion that American authorities have used anticorruption laws to weaken French companies to facilitate their takeover by American competitors. In his view, the fines imposed by U.S. authorities were reasonable and proportional and only levied due to the inability of French authorities to police French companies themselves. *See* Leparmentier, *supra* note 163, at 12-13.

relatively discrete OECD consultation procedure, provided political cover for the legislative change. Focusing on the need to act following severe criticism by the OECD tended to narrow the debate to the technical issues as to what improvements ought to be made to best enable France to become an effective player in the fight against international corruption. Certain of these "technical" issues, such as the adoption of a CJIP and whistleblower protections, engendered intense debate, including the issuance of a negative opinion by the Conseil d'État concerning the CJIP provisions of the draft law.[270] Resistance to adoption, however, was principally articulated in legal cultural rather than political terms. Despite the strong legal cultural-based criticism, Sapin 2 did succeed in introducing into French law measures, such as CJIP's that have proved to be useful in anti-bribery enforcement in the U.S. and elsewhere after intelligently adapting the "legal transplant" in an attempt to limit the risk of rejection by the body of French law and practice.

Sapin 2's adaption, therefore, provides an example of international resonance's feedback mechanism in the anti-bribery field similar to the "international-competition neutral" enforcement strategy, analyzed by Professor Brewster, that enabled federal prosecutors to charge foreign as well as American corporations with FCPA violations following the entry into force of the OECD Convention.[271]

The adoption of Sapin 2 is an example of the dramatic change in the international anti-bribery law and enforcement practice landscape spurred by U.S. enforcement pressures. This Article offers a prognosis on whether Sapin 2 will provide a sufficient impetus for France to follow countries, such as Germany, to the forefront of effective anti-bribery enforcement.[272] While it may be premature to definitively assess whether initial recent initiatives, such as the conclusion of CJIP by banks in corruption and economic sanction cases, signal that France is on such a road. However, legislative changes, such as the widespread

270 *See* Roux, *supra* note 65, at 150 (citing JORF 0287 du 10 décembre 2016 avis de CE sur le project de loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique [Opinion on the Bill Relating to Transparency, the Fight Against Corruption and the Modernization of Economic Life], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 10, 2016, p. 111.).

271 Brewster, *supra* note 263, at 1671-1682.

272 *See* OCED, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN GERMANY (Mar. 2011), https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Germanyphase3reportEN.pdf; OECD, IMPLEMENTING THE ANTI-BRIBERY CONVENTION PHASE 4 REPORT: GERMANY (2018), http://www.oecd.org/corruption/anti-bribery/Germany-Phase-4-Report-ENG.pdf.

adoption of DPAs in several countries[273] and markedly better cooperation between U.S. and other national authorities, resulting notably in fine-sharing as in the Odebrecht case, [274] demonstrate the strong "resonance" of U.S. legal culture and enforcement practice.

These developments illustrate that international anti-bribery efforts have reached a certain level of maturity. Further progress will require strengthening the trend towards increased co-operation and recovery sharing between national enforcement authorities combined with a lesser reliance of the U.S. as the "motor" of enforcement.

B. Opportunities for Reverse Transnational Resonance—French Practice as a Mirror for Reflecting on How to Reform American Practice

Intra-national resonance in the field has almost exclusively been a one-sided affair with extremely high American fines on foreign companies provoking political responses leading to legislative and enforcement practice initiatives which entail significant legal cultural change. American practice, on the contrary, has been little, if at all, challenged since American companies rarely found themselves subjects of foreign enforcement action.

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273 The recent adoption of DPAs in several countries, such as Argentina, has been heralded as essential to progress in anticorruption efforts. *See* Benjamin N. Gedan & Daniel R. Alonso, *Only Criminals Can Clean Up Argentina's Corruption: A Plea for Plea Bargains in Buenos Aires*, FOREIGN POLICY (Nov. 15, 2018, 3:46 AM), https://foreignpolicy.com/2018/11/15/only-criminals-can-clean-up-argentinas-corruption/; Guillermo Jorge & Fernando Basch, *Jorge and Basch: Argentina Introduces Deferred Prosecution Agreements, Standards for Compliance Programs*, THE FCPA BLOG (Jan. 16, 2018 12:28 PM), https://fcpablog.com/2018/01/16/jorge-and-basch-argentina-introduces-deferred-prosecution-ag/. The adoption of DPAs in Singapore has also been a catalyst to anticorruption progress. *See* Richard J. Gibbon & Kristen Bender, *DPA Regime a Landmark Change to Singaporean Law*, THE NAT'L L. REV. (Aug. 20, 2018), https://www.natlawreview.com/article/dpa-regime-landmark-change-to-singaporean-law. In the U.K., however, strong criticism of DPAs' effectiveness and the conduct of the SFO in securing them has been voiced by judges, defense lawyers, and commentators. *See* Max Walters, *High Court Slams 'Inconsistent' SFO Over DPA*, L. SOC'Y GAZETTE (Apr. 20, 2018), https://www.lawgazette.co.uk/law/high-court-slams-inconsistent-sfo-over-dpa-/5065772.article. The mixed reception of the American import has led countries, such as Canada, to carefully consider the specificities of their own legal tradition from a comparative law perspective in designing a DPA framework, as did France. *See* Kees Thompson, *The Role of Judicial Oversight in DPA Regimes: Rejecting a One-Size-Fits-All Approach*, GLOBAL ANTICORRUPTION BLOG (Apr. 16, 2018), https://globalanticorruptionblog.com/2018/04/16/the-role-of-judicial-oversight-in-dpa-regimes-rejecting-a-one-size-fits-all-approach/.

274 *See Oldebrecht Press Release*, U.S. DEPT. OF JUSTICE, *supra* note 7.

This failure to challenge may be a partial reason why certain aspects of American enforcement practice subject to harsh criticism by American commentators[275] have not been modified. The DOJ's now significant experience in cooperative anticorruption enforcement offers an opportunity for change. DOJ's increasing international and comparative law and practice sophistication and deference to legal cultural differences when confronted with issues arising out of cooperative efforts with national authorities bodes well for such "reverse resonance."

The necessary rebalancing of international anti-bribery enforcement from an exclusive American base to several national centers should be combined with an examination of those aspects of American practice that have engendered criticism discussed below. The use of a comparative law analysis will facilitate the introspective analysis to effect necessary change while affording the opportunity of exploring possible useful innovations to American practice derived from foreign legal culture and practice. In doing so, the value of intra-national, comparative reciprocal feedback mechanisms may be demonstrated.

Great care, as was exercised by the French in adopting the CJIP plea bargain arrangement modeled on the U.S. DPA, will need to be exercised in considering the implementation of innovations of French law that might be made to improve American anticorruption practice. Limited borrowings from different legal systems may be successful if adaptations necessary to ensure coherence with the fundamental characteristics of the borrowing system are implemented. Attempts to force major transplants requiring the integration of new components divorced from the underlying legal culture will be quickly and thoroughly rejected.

For example, strengthening the "public interest" character of corporate corruption enforcement and ensuring some measure of control over prosecutorial power may be worthy criminal procedure reform goals in the U.S. Nevertheless, confiding corruption cases to a neutral and independent investigating magistrate in a victim's representative-initiated legal action, as in France, would be foolhardy.

1. Plea Bargaining

Amongst American criminal enforcement mechanisms recently-transplanted into foreign legal anticorruption frameworks, plea

275 For example, *see generally* EISINGER, *supra* note 55, at 56; *see also* GARRETT, TOO BIG *supra* note 61.

bargaining has had the most dramatic effect. A long-established practice, essential to the functioning of the U.S. criminal justice system, plea bargaining runs counter to strongly held tenants of most legal systems, especially those within the civil law tradition.[276] It is therefore remarkable that despite strong opposition from many quarters in France, the CJIP procedure ('Convention Judiciaire d'Interêt Public') was adopted in Sapin 2 and used in recent sanctions cases, the first time being in an international bribery case in the Société Générale case.[277]

The widespread adoption of plea bargaining in anti-bribery exemplifies the reality of intra-national resonance in anti-bribery. France, as other adapting countries, was stimulated to do so by American pressure in the form of the imposition of serious sanctioning of several of its national champions.[278] The American "contractual" approach was eventually accepted because it had proven to be efficient.

Nevertheless, in effecting this legal transplant in Sapin 2, care was taken to introduce safeguards in the procedure designed to preserve the essential French legal cultural principles of Legality and Public Interest and avoid the excesses of American practice. This included severe restrictions on the bargaining process between the prosecutor and the defendant and subjecting all DPAs to the approval of a judge acting in the "public interest."[279] Most importantly, only corporate bodies may enter into CJIPs. Individuals may not avail themselves of this innovation. This dichotomy of treatment reflects the attachment of the French to deeply held ideals of justice. Concern was expressed that well-off defendants would be able to negotiate better deals than those with limited means, and that the truth-seeking moral function of trials would be compromised by negotiated deals. This desire to avoid perceived American plea-bargaining excesses is not limited to France or civil countries, but is also found in the U.K. Bribery Act's judicial

276 *See* discussion of Legality Principle, *supra* note 68.

277 *See* Part VI(A) for a discussion of this case.

278 *See* Part II(A) (discussing French national champions) and Part IV(A) (discussing American resonance).

279 *See supra* note 98 (emphasizing the fundamental importance of the concept of "public interest" in the French legal system. Perceived deviations from this principle are criticized as attacks on the French Revolution's idea of equality under the law and the government's responsibility to act consistently with the will of the people.). *See* GARAPON & PAPADOPOULOS, *supra* note 4, at 235-236, 313; *see also* Ambrosio, *supra* note 249.

approval of settlement requirement and limitations placed on plea bargains for physical persons.[280]

The weaknesses of the almost-exclusive use of plea bargaining in criminal cases—unfettered prosecutorial discretion, the loss of trial lawyering skills, unequal treatment of defendants, and decreased public confidence in the system—have been the subject of severe criticism in the U.S. American legislators and legal professionals would be wise to reflect on why France and other countries felt obliged to tailor American plea-bargaining practice to fit their own legal cultures in analyzing how their own system might be modified.

Comparative law study may be of considerable assistance in analyzing, for example, the effect the demise of the jury trial[281] has had on the administration of American criminal justice. The jury and greater judicial influence on sentencing formerly played an important role in limiting prosecutorial power in America. Constraints deriving from application of the "legality" principle in criminal procedure, or through confiding investigations to neutral investigating magistrates, were needed in countries such as France, where limited jury "control" of prosecutors was available.

As long as the jury and judges in sentencing were important players in the American criminal process, the much-decried weaknesses of the present system were less severe, or at least so perceived. A reversal of the strong trend towards jury elimination and sentencing reform may be the best American response to the challenges posed by increased criminalization of white-collar crime. If no such reversal is forthcoming, a close look at other legal systems mechanisms of control needs to be made. The adoption of substantive judicial review of negotiated plea bargains, as the French provided in Sapin 2, and as the U.K. had previously done in enacting the U.K. Bribery Act, may prove to be essential.

280 *See* RAPHAEL, *supra* note 69, at 82-83.

281 *See* BURNS, *supra* note 101, at 92-94; *see also* DAVIS, *supra* note 18, at 149-150 (criticizing the virtual demise of jury trials, contending that it has resulted in rendering many prosecutors institutionally lazy as they simply "overcharge" defendants for more serious crimes than supported by the evidence). *See also* Paul Barrett, *Plea Deals are Easy, Juries are Hard*, BLOOMBERG (July 23, 2015, 4:49 PM), https://www.bloomberg.com/news/articles/2015-07-23/u-s-prosecutors-keep-losing-trials-in-overseas-corruption-cases.

2. Monitoring

DOJ and SEC mandated FCPA corporate compliance monitoring programs have been criticized as being costly, inefficient, opaque, rife with cronyism, and infected with conflict of interests. Recognizing that a problem exists, the DOJ has attempted to rectify the perceived weaknesses in its monitoring programs through guidelines set out in Memos.[282]

The monitoring mechanisms chosen respectively by the DOJ and the AFA are a product of fundamental legal cultural differences between the U.S. and France.[283] The focus of the DOJ monitoring system, consistent with the primacy given to private contractual solutions to issues perceived primarily as public in France, is on the choice of a private individual, invariably a lawyer and preferably experienced in the litigation process, that resulted in the DPA. The monitor is perceived as a neutral, chosen by both parties to ensure that their "private" negotiated agreement is fully-implemented. From the outset, the DOJ naturally favored monitors that inspired confidence and with whom they were comfortable. It was therefore natural that monitors were often chosen from the ranks of former prosecutors who had joined large law firms or set up niche law firms. Corporate legal counsel, drawn from the same elite of the profession, followed the DOJ's lead. Inevitably, this inward-looking private contractual process led to the appointments of monitors who shared the perceived best qualities of the DOJ and corporate resulting in real and perceived issues of cronyism and conflict of interest. This "revolving door" between DOJ prosecutors, prominent law firms, and the lucrative market for legal services in the field has become a much-criticized feature of American practice.

Prosecutors accustomed to almost unfettered discretion in their charging and negotiating decisions and corporate lawyers imbued with a similar ethos often formed as prosecutors themselves will tend to view judicial, or any "public" intervention for that matter, in the process as an intrusion. This private contractual perspective reinforced by

282 *See* Cunningham, *supra* note 62 and accompanying text.

283 *See* Laurent Cohen-Tanugi, *The Independent Corporate Monitor: Who, What, When and How?*, 1 INT'L. REV. OF COMPLIANCE & BUS. ETHICS 7,8 (2019). *See also,* William T. Pizzi*, Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform,* 54 OHIO ST. L.J. 1325, 1327, 1346–51 (focusing on legal cultural differences in prosecutorial discretion and judicial supervision which arguably would also apply to monitoring).

the DOJ's own "hands-off" approach, and the legitimate concern of corporations to preserve business secrets, has not been conducive towards public disclosure of corporate monitoring reports, the study of which could assist other companies' corruption compliance and improve the credibility of monitoring.

The French approach to monitoring, equally reflecting strong national legal cultural mores, places the AFA at the center of the process. The AFA intends to act as monitor itself, assisted as necessary by outside consultants, in most corruption enforcement cases whether settled by a CJIP or part of the sentence in cases resulting in conviction.[284] Under Sapin 2, monitoring fees are subject to a cap.[285] By capping fees and entrusting the substance of the work, rather than solely the procedural guidelines, to an administrative agency, the French are acting consistently with their strong state-centric tradition, their anxiety over the influence of money in justice, and their implicit distrust of lawyers. In addition, as evidenced by the DOJ's acceptance of AFA's role as monitor in the landmark Société Générale CJIP/DPA, the French government (strongly-supported by French companies and the public) is striving to "re-nationalize" French control of anticorruption enforcement.[286]

The AFA's monitoring work is only in its infancy and cannot yet be evaluated. At least one French lawyer and member of the New York Bar, with significant monitoring experience including the DPA-mandated monitor of the French national champion Alcatel, has expressed concern that the AFA's takeover of monitorships and Sapin 2's capping of fees may prove detrimental to proper international compliance practice.[287] Nevertheless, later comparative study of the AFA monitoring experience, and in particular, the potential for improving preventive compliance and business and public acceptance of the mechanism through public disclosure of AFA monitoring reports, the accumulation of experience within a single agency of civil servants unlikely to pass through "revolving doors," and the broadening of

284 *See* Brewster & Buell, *supra* note 2, at 205, 211; *see also* CJIP Guidelines, *supra* note 241, at 3 n. 5.

285 FRENCH NAT'L FIN. PROSECUTOR'S OFF. & FRENCH ANTI-CORRUPTION, GUIDELINES ON THE IMPLEMENTATION OF THE CONVENTION JUDICIAIRE D'INTÉRÊT PUBLIC 13, https://www.agence-francaise-anticorruption.gouv.fr/files/files/EN_Lignes_directrices_CJIP_revAFA%20Final%20(002).pdf. The cap on monitoring fees is determined in the CJIP itself after an assessment by the AFA which takes into account the content and length of the monitoring program based on information provided by the company to be monitored.

286 *See* CJIP Guidelines, *supra* note 241, at 3 n.5.

287 *See* DOJ SOCGEN Press Release, *supra* n.6.

monitors beyond the narrow base of elite lawyers, may prove useful in the U.S. as an exercise in "reverse resonance." Adoption in the U.S. of specific aspects of the yet-untested French model would be premature and inappropriate, given the gap between the respective legal cultures. However, integrating general features of French focus, such as a greater concern with the public interest and judicial oversight, should be considered in reflecting on reform in the U.S.

Additionally, monitoring would assure a gain in effectiveness and credibility in the business world by broadening the monitor candidate base beyond lawyers and judges. Appointing individuals, such as former compliance officers, general counsels, and CEOs having had first-hand experience with the behavioral and psychological issues faced by businesses with corruption scandals, would be beneficial to the monitoring process.

Truly effective "reverse resonance" would be attained by the designation of high-level, non-American monitors in FCPA cases, proficient in foreign languages with extensive experience in the compliance field. The World Bank's anticorruption monitoring system, which combines aspects of both the French and U.S. systems, presents an ideal opportunity to experiment with these suggested innovations prior to their eventual adoption in the U.S.[288]

3. The "Civil Party" in the "Biens mal acquis" Context

The 2010 landmark decision of the French Supreme Court granting standing to two anti-corruption NGO's (Sherpa and Transparency Intenational) to bring criminal cases led to the judgment of the criminal court of Paris in 2017, which found Teodorin Obiang, Vice-President of Equatorial Guinee, guilty of corruption and money-laundering.[289] Other 'bien mal acquis' cases in which civil parties have played an important role have led to the indictment of the nephew of Sassou Nguesso, the president of the Republic of the Congo, and to the reported imminent indictment of Rifaat al-Assad, the uncle of the Syrian president Bachar-al-Assad.[290]

288 *See* Cohen-Tanugi, *supra* note 283.

289 *Id.* at 8.

290 *See* Jean, s*upra* note 32 and accompanying text. Simon Piel & Joan Tilouine, *Le neveu de Denis Sassou-Nguesso mis en examen à Paris dans l'affaire des «biens mal acquis»,* LE MONDE, March 30, 2017, https://www.lemonde.fr/afrique/article/2017/03/14/congo-brazzaville-le-neveu-du-president-mis-en-examen-dans-l-affaire-des-biens-mal-acquis_5094434_3212.html; *Biens mal acquis: vers un procès pour l'oncle de Bachar al-Assad,* L'EXPRESS (Mar. 21, 2019, 03 :46 PM),

These cases illustrate that the commitment of French authorities to break with France's former practices of corruption ignored the abuse of power by public officials in countries considered to be in France's zone of influence. To Implement this dramatic change in French policy, diplomatic and economic pressures had to be overcome and arguments based on international law, notably sovereign immunity, successfully contested. This would not have been possible without the tenacity of French NGOs acting as third-party intervenors in the criminal cases.[291]

Given the efforts of American authorities and international institutions, especially the World Bank, to root out corruption and attempt to recover looted assets from kleptomaniac public officials specifically in developing countries,[292] the innovative legal acceptance of the work of private organizations dedicated to anti-corruption merits close study by U.S. corruption enforcement authorities, anti-corruption NGOs, and comparative criminal procedure legal scholars.

French law, which combines criminal and civil remedies along with the 'public interest' represented by prosecutors with private third-party victims in the same proceeding, may not be transferable to the

https://www.lexpress.fr/actualite/societe/justice/biens-mal-acquis-vers-un-proces-pour-l-oncle-de-bachar-al-assad_2068614.html.

291 The prosecutors in charge of the preliminary investigation ("enquête prélimiaire") in the Obiang and Nguesso cases rapidly dismissed the action in 2007. The prosecutors continued to obstruct the investigation until 2012 by first attempting to block the opening of an investigation known as an "*information judiciaire* "by the investigating magistrates and later refusing to sign off on their request to broaden the scope of the investigation to include newly discovered evidence. Had the NGOs not been permitted (after a three-year legal battle through the French court system) to intervene in the process as a collective civil party to assist the investigating magistrates, it is highly unlikely that these cases would have led to indictments and the conviction of Obiang. *See* Piel & Tilouine, *supra* note 291; *Biens mal acquis: vers un procès pour l'oncle de Bachar al-Assad,* L'EXPRESS, *supra* note 291; Maud Perdriel-Vaissière, *L'affaire des 'Biens Mal Acquis' Quels enseignements après 10 ans de combat judiciaire?*, SHERPA (Dec. 2016), https://www.asso-sherpa.org/laffaire-biens-mal-acquis-enseignements-apres-10-ans-de-combat-judiciaire-2. Concerning the international legal issues, such as sovereign immunity, involved in this case, *see* Summary 2018/3, International Court of Justice (ICJ) decision of June 6, 2018 (ICJ) in Immunities and Criminal Proceedings (Equitorial Guinea v. France) at 1-9. https://www.icj-cij.org/files/case-related/163/163-20180606-SUM-01-00-EN.pdf The success of French NGOs' interventions, and similar successes in Spain and Italy, are all the more noteworthy given difficulties faced by similar NGOs in other European countries such as Poland, Malta, and Slovakia. *See* Matt R. Lady, *Combattre la corruption en europe: quel rôle pour la société civile?*, THE CONVERSATION (Apr. 22, 2018), https://theconversation.com/combattre-la-corruption-en-europe-quel-role-pour-la-société-civile-93967.

292 *See* Anyango Oduor et al., *supra* note 93, at 32.

U.S. However, reflection on the importance of third-party action as evidenced by the French experience in effective anti-corruption enforcement may lead to change entirely consistent with American legal culture. For example, with the passage of legislation permitting third-party indemnification in international corruption cases as introduced several times in Congress.[293]

VI. RECENT DEVELOPMENTS LIKELY TO FOSTER MORE EFFECTIVE ANTI-CORRUPTION ENFORCEMENT IN FRANCE AND FURTHER FRANCO-AMERICAN COOPERATION

A. The Société Générale case: Franco-American cooperation exemplified by the inaugural use of Sapin 2's innovative plea bargain procedure (CJIP) in an international corruption case

On May 24, 2018, one of France's leading banks, Société Générale, signed simultaneous plea bargain agreements: a CJIP with the French PNF and a DPA with the U.S. DOJ, both involving active corruption of Libyan public officials.[294]

This case is highly noteworthy for several reasons: first, the CJIP is the first international corruption case agreed to by a French "national champion" in an international corruption case. The Société Générale CJIP affords France an opportunity to credibly respond to the criticisms that French authorities fail to successfully pursue French companies involved in international corruption, which was the main impetus for enacting the anti-corruption provisions of Sapin 2, and

293 *See* Press Release, Congressman Ed Perlmutter, Perlmutter Introduces Legislation to Help Stop Corruption and Foreign Bribery Under the Trump Administration (Mar. 16, 2017), https://perlmutter.house.gov/news/documentsingle.aspx?DocumentID=1652 (Congressman Perlmutter of California has been persistent in introducing legislation, 'The Foreign Business Bribery Prohibition Act (H.R. 1549) to create a private right of action under FCPA but unable to get his colleagues to follow his lead.). *See generally* Daniel Pines, *Amending the FCPA to Include a Private Right of Action*, 82 CALIF. L. REV. 185 (1994).

294 *See* DOJ SOCGEN Press Release, *supra* note 6 (The signing date of the CJIP is May 24, 2018. Sapin 2 provides for a ten-day "reflection" period during which the company may retract its agreement with the CJIP. The CJIP became final upon judicial approval on June 4, 2018.). *See generally* Stephane de Navacelle & Sandrine Dos Santos, *La première CJIP conclue avec le Parquet national financier en matière de corruption internationale et en accord avec le Department of Justice étasunien*, 39 REVUE INTERNATIONALE DE LA COMPLIANCE ET DE L'ÉTHIQUE DES AFFAIRES-SUPPLÉMENT À LA SEMAINE JURIDIQUE ENTREPRISES ET AFFAIRES 33, 33-34 (2018) (Fr.) (For commentary on what the Society Generale CJIP portends for future Franco-American Cooperation and the PNF perspective on the value of corporate cooperation.).

particularly the CJIP.[295] The PNF had previously concluded four CJIPs.[296] The groundbreaker, involving the Swiss subsidiary of HSBC, was not for corruption but for unlawful solicitation of French customers and money laundering of tax evasion proceeds.[297]

The first corruption based CJIPs involved three subcontractors to France's mostly state-owned electricity company Electricité de France ('EDF'). Two foreign and one French subcontractors (SAS SET Environment, SAS Kaefer Wanner, and SAS Poujaud) paid commissions to an EDF purchasing department employee to obtain or retain thermal power maintenance contracts.[298] These first CJIPs were groundbreaking, but none involved corruption perpetrated by a French company in a foreign country as in Société Générale.

Second, the Société Générale CJIP arose out a preliminary investigation 'enquete préliminaire' rather than from an indictment or 'information'.[299] This is important for two reasons: first, preliminary investigations remain solely within the jurisdiction of prosecutors and do not need to be submitted to investigating magistrates for 'instruction'. As noted above, the strong trend within the PNF towards using the preliminary investigation classification to resolve cases considerably strengthens PNF prosecutors at the expense of the power of juge d'instruction. This may facilitate future co-operation with U.S. authorities who have felt frustrated with the delay and opaqueness of 'instructions' carried out by juges d'instruction and may feel more at ease with 'fellow' prosecutors. Second, disposing of the case via a preliminary inquiry is beneficial for the company which avoids being bound

295 *See* OECD Non-Trial Resolutions, *supra* note 7, at 212-14 (Annex B. Case Study (10)).

296 *See Fall 2019 HUGHES ALERT* , *supra* note 161 at 101-103.

297 *See Convention judiciaire d'intérêt public entre Le Procureur de la République Financier et HSBC Privat Bank (Suisse) SA du 30 octobre, 2017*, Cour d'Appel de Paris Tribunal de Grande Instance de Paris (2017) (HSBC agreed to pay a total of €300 million, comprised of approximately €158,000,000 in fines and €142,000,000 to the French State as a "civil party" victim).

298 *See* Valérie de Senneville, *Les bataillons anticorruption passent à l'offensive*, LES ECHOS (Mar. 7, 2018, 7 :02 AM), https://www.lesechos.fr/politique-societe/societe/les-bataillons-anticorruption-passent-a-loffensive-130973. *Fall 2019 HUGHES ALERT*, *supra* note 161, at 101–03 (detailing the Gauvain Report's recommendations for reinforcing the French blocking statute and AFA's compliance oversight). *See also* Roux, *supra* note 65, at 193-95.

299 *See also* OECD Non-Trial Resolutions, *supra* note 7, at 212-14 (Case Study 10).

by the legal characterization of the facts required in an 'instructed' CJIP.[300]

Third, the French CJIP and U.S. DPA were concluded and posted simultaneously, which together with the equal 50/50 sharing of the $585 (US) total in fines, demonstrated to the public that the American and French authorities could cooperate on major corruption cases. This sent a positive signal to French companies contemplating a cooperative 'Siemens' type rather than the traditional Alstom-like 'deny and delay' strategy when 'caught in the middle' of multi-jurisdictional corruption investigations.

B. The UBS Case: France imposes a mega-fine altering the existing landscape for corporate risk calculations

On February 20th, 2019, the criminal division of the Paris District Court ('Tribunal de grande instance') found the Swiss bank UBS and its French subsidiary and five former executives guilty of illegally soliciting clients in France and aggravated money laundering of tax fraud proceeds.[301] These acts levied fines totaling €4.5 billion and included punishments of suspended prisons terms ranging from six to eighteen months.[302] The parent company, UBS Switzerland, was fined €3.7 billion euros, the French subsidiary, €15 million, and the parent subsidiary and the 5 convicted executives, an additional €800 million on a joint and several basis to compensate the French state who joined the proceedings as a civil party.[303]

300 Email from Frederick T. Davis, Partner, Debevoise & Plimpton LLP, to author (Feb. 10, 2019) (Frederick T. Davis notes that the present lack of a framework for "negotiating" the facts in a CJIP concluded at the preliminary inquiry stage will be source of unease for French legal professionals given the traditional French legal culture which favors the final establishment of facts by neutrals (e.g., *juges d'instruction*).).

301 *See* Amélie Champsaur et al., *French Criminal Court Orders UBS to Pay a Record EUR 4.5 Billion in Tax Fraud Case*, CLEARY GOTTLIEB STEEN & HAMILTON (Feb. 28, 2019), https://www.clearygottlieb.com/-/media/files/alert-memos-2019/french-criminal-court-orders-ubs-to-pay-a-record-eur-45-bill-pdf.pdf.

302 *Id.*

303 *See* Amélie Champsaur et al., *supra* note 302; *see also* Mathilde Damgé, *Evasion Fiscal: UBS Condamnée à Une Amende Record de 3,7 Milliards d'euros*, LES ECHOS (Feb. 20, 2019, 01 :55 PM), https://www.lemonde.fr/economie/article/2019/02/20/le-geant-bancaire-suisse-ubs-condamne-a-une-amende-record-de-3-7-milliards-d-euros_5425825_3234.html; Danièle Guinot, *UBS Condamnée à Une Amende Record de 4,5 milliards d'euros*, LE FIGARO (Feb. 20, 2019, 03 :35 PM), https://www.lefigaro.fr/societes/2019/02/20/20005-20190220ARTFIG00301-ubs-condamnee-a-une-amende-record-de-45-milliards-d-euros.php.

The UBS case, unlike Société Générale, did not involve foreign bribery. Nevertheless, it promises to substantially change the way French and non-French companies operating in France will perceive and calculate risk in international corruption cases which often include money laundering allegations. The total of the fines are by far the highest ever levied in France for any type of infraction. They were significantly higher than the amounts UBS paid in settlements in the U.S. and Germany for similar infractions,[304] and those paid by HSBC and Société Générale in their groundbreaking CJIPs discussed above. The case was 'instructed' by investigating magistrates who were able to compile a persuasive 'dossier' permitting the prosecutors to adopt a tough line at trial.[305] Serious settlement discussions between UBS and the prosecutors were reported to have taken place.[306] Apparently, unable to use the CJIP procedure, which was not yet available during its negotiations, UBS was unwilling to admit guilt as required under the little used CRPC procedure due to the potential negative consequences of such an admission in France and abroad.[307] Guillaume Daïeff, one of the investigating magistrates in UBS, has become one of the leading proponents for using CJIPs. Daieff's support for the French DPA exemplifies the recent trend towards acceptance of negotiated deals in criminal cases amongst legal professionals in France.[308]

304 *See* Champsaur et al., *supra* note 302.

305 *Id.*

306 *Id.*

307 *See* Champsaur et al., *supra* note 302; Personal Interview with Guillaume Daïeff, Vice President of Nanterre Prosecutorial Office (in Paris on April 2, 2019) (According to one of the UBS investigating magistrates, UBS' legal counsel was concerned about the effect of making such an admission on U.S. proceedings). The CPRC ("Comparation sur Reconnaissance Préalable") is discussed in Part II(C) above.

308 *See* Guillaume Daïeff & Ghislain Poissonnier, *Les premiers pas prometteurs de la justice pénale négociée*, JCP (2018) at 952. *See also* Charles Duchaine & Salvator Erba, Comments at "Les Débats," *supra* note 240 (In addition to prosecutors such as Daïeff, top AFA officials—including its director, Charles Duchaine, also a longtime former investigating magistrate—and AFA Deputy Director Salvator Erba have publicly voiced support for the CJIP procedure, citing Société Générale as a watershed for cooperation with American authorities). Guillaume Daïeff is now a prosecutor and Vice President of the Nanterre Prosecutorial Office. *See also,* Constance Ascione Le Dreau & Benjamin Grundler, *Les personnes physiques face à la justice négociée*, 1 REVUE INTERNATIONALE DE LA COMPLIANCE ET DE L'ETHIQUE DES AFFAIRES 26, 27 (Feb. 2019) (Members of the French defense bar, while making efforts to adapt to the CJIP have expressed concerns about the potential for the diminishing of defendant's rights engendered by this departure from France's traditional resistance to negotiated justice).

After UBS, French corporate boards, executives, and their legal counsel enmeshed in international corruption investigations will be more likely to carefully consider the advantages of concluding a CJIP than before. [309]Minimizing the risk, delaying the moment of reckoning, and attacking whistleblowers or the investigative press may have previously worked in France due to the interminable delay of instructions,[310] pitifully small fines for infractions, and very limited risk of conviction in the past. In imposing substantial fines and simultaneously convicting senior executives, the Paris criminal court in UBS demonstrated that the use of these tactics is risky, thereby significantly increasing the attractiveness of the CJIP option already rendered credible in Société Générale, HBSC, and the EdF cases discussed above.[311]

The large damages obtained by the Republic of France, acting as a civil party, are significant from a comparative law perspective as they illustrate the ease of integrating aggrieved victims, including the state, into the judicial process which ought to inspire other legal systems, such as the USA, to do the same in a manner consistent with their legal traditions.

C. The "Big One?" - Airbus-Franco-American (and UK) co-operation confirmed

The recent simultaneous resolution of the international corruption investigations of the European aeronautical giant, Airbus by the conclusion of a CJIP and deferred prosecution agreements by respectively French, UK and USA authorities demonstrates that the paradigm for Franco-American relations in anti-bribery has shifted from the confrontational to the co-operative.[312] These landmark agreements

309 *See generally* Frederick T. Davis, *The UBS Conviction: The Dawn of a New Era*, 35 INT'L ENFORCEMENT L. REP (Mar. 2019) http://ielr.com/content/ubs-conviction-dawn-new-era-france.

310 Grundler, *supra* note 259. The UBS case took seven years from the opening of the preliminary investigation to the end of the trial compared to 18 months for Société Générale.

311 *See* Champsaur et. al, *supra* note 302 (the former minister of the Budget for whom Sapin 2 is named, Michel Sapin, stated that the UBS verdict "lends credibility" to CJIPs and ought to persuade U.S. authorities that "we do the job in France" and therefore Americans "need not do it in the US.").

312 Phillippe Escande, *L'Europe Sur Les Traces Américaines*, LE MONDE (Jan. 31, 2020), https://www.lemonde.fr/economie/article/2020/01/28/enquete-anticorruption-la-fin-d-un-cauchemar-pour-airbus_6027499_3234.html [hereinafter sur les traces]. Véronique Guillermard, *Corruption: Les Leçons de L'affaire Airbus*, ÉCONOMIE (Feb. 4, 2020), https://www.lefigaro.fr/societes/corruption-les-lecons-de-l-affaire-airbus-20200204; *see also* Stéphane Lauer*, L'amende Infligée à Airbus,*

entered into between the parent company, Airbus SE and respectively, the PNF (Fr.), SFO (UK) and the DOJ (USA) on January 31, 2020 provided for the payment by Airbus of combined penalties of more than $3.9 billion for foreign bribery (and violations of the US Arms Export Control Act).-[313] In the largest global foreign bribery resolution in history, the French authorities will be paid the lion's share of the fines, approximately $2.29 billion, with the UK receiving $1.09 billion and the US, $527 million, divided between FCPA and International Traffic in Arms Regulations (ITAR violations).

Airbus is a European venture, the parent company, Airbus SE, the signatory to the deferred prosecution and CJIP agreements, is a European publicly traded limited liability company established under the law of the Netherlands.[314]Its major shareholders are the French, German and Spanish governments whose collective shareholding is limited to 28%.[315] Airbus' main production facilities and management centre are located in France.[316] France, from the beginning of the aviation age, has been a pioneer in aviation with a long history of innovation and strong government support. Airbus is a major employer, the number one choice for employ for graduating French enginneers from elite institutions and a source of great French pride.[317]

Far more than any of the "Big Four" previous national champions who found themselves caught in the web of FCPA violations, Airbus is locked in a momentous battle between aeronautical titans, namely with the American Boeing, for world market supremacy. The competition between the two duopolistic competitors is at a particularly feverish pitch with a budding tariff war over allegations of the granting

une Bonne Affaire Géopolitique, LE MONDE (Feb. 4, 2020), https://www.lemonde.fr/idees/article/2020/02/03/l-amende-de-3-6-milliards-d-euros-infligee-a-airbus-une-bonne-affaire-geopolitique_6028191_3232.html.

313 *See* DOJ AIRBUS Press Release, *supra* note 6; SFO AIRBUS Press Release, *supra* note 7.

314 Statement of facts prepared pursuant to paragraph 5 (1) of Schedule 17 to the Crime and Courts Act 2013, Regina v. Airbus SE, Crown Court of Southwark (January 31, 2020) at 4 [hereinafter, AIRBUS Statement of Facts].

315 *Id.* at 5.

316 AIRBUS CJIP, *supra* note 6, at 2.

317 *See* Camille Lecuit, *Les Entreprises Préférées des Étudiants D'école de Commerce et D'ingenieurs Françaises*, LE FIGARO ÉTUDIANT (Apr. 9, 2019), https://etudiant.lefigaro.fr/article/les-entreprises-preferees-des-etudiants-d-ecoles-de-commerce-et-d-ingenieurs-francaises_244979a4-30c8-11e8-9681-0cc61fd9e303/; *see also* Bruno Declairieux, *Le Palmarès des Meilleurs Employeur de France*, CAPITAL (Apr. 26, 2018), https://www.capital.fr/votre-carriere/les-meilleurs-employeurs-de-france-1273620.

of unfair subsidies, which has been the subject of endless litigation.[318] Airbus's strategic abandonment of its poor-market-performing Superjumbo A 380, and Boeing's disastrous design issues with its new 737 Max airplane have exacerbated the tensions and increased the stakes for each company to attempt to destabilize the other.[319]

The investigations into international corruption at Airbus derive in large part from self-reporting in 2016 to the UK's Export Finance agency by Airbus's president, Thomas Enders, following an internal audit ordered by Airbus' general counsel, John Harrison. The audit determined that the company had failed to disclose certain export sales intermediaries it used in UK financed projects to the agency.[320] Soon afterwards, the UK's Serious Fraud Office and the French Financial Crimes Prosecutors Office (PNF) opened inquiries.[321] Further corruption investigations followed, with prosecutors in Munich, Germany opening an investigation into allegations of illegal commissions made by the Austrian Ministry of Defense in connection with the sale of 15 Eurofighter "Typhoon" planes, resulting in the levying of a fine of €81 million by the German authorities for failure to exercise adequate internal control over the payments to intermediaries.[322] .

Enders' recent retirement engendered a corporate governance scandal with political overtones due to his much-criticized golden parachute.[323]

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318 *See* Jack Nicas & Julie Creswell, *Boeing's 737 Max: 1960s Design, 1990s Computing Power and Paper Manuals*, N.Y. TIMES (Apr. 8, 2019), https://www.nytimes.com/2019/04/08/business/boeing-737-max-.html (the European Union and the United States have been in a fourteen-year fight over government aid to Airbus, which the World Trade Organization ruled illegal in 2018. Consequently, the U.S. is readying a list of European products to tax in retaliation prompting EU's announcement that it is doing the same to counter U.S. governmental subsidies to Boeing.).

319 *See* LAÏDI, *supra* note 3, at 191; *see also* David Gelles, *The Costs for Boeing Start to Pile Up as 737 Max Remains Grounded*, N.Y. TIMES (Apr. 12, 2019), https://www.nytimes.com/2019/04/12/business/boeing-planes-economy.html (design errors in the MCAS system of the 737 Max appear to have been the cause of the Indonesian Lion Air and Ethiopian Airline crashes leading to the worldwide grounding of existing 737 Maxes and delay in placing new ones in operation with substantial reputational and financial costs for Boeing.).

320 AIRBUS Statement of facts, *supra* note 314, at 9.

321 *Id.* at 34-35; *see* AIRBUS CJIP, *supra* note 6, at 38. The U.K. Export Finance Agency and Airbus notified and met with the SFO in April 2016. The SFO opened a criminal investigation in July 2016. The French PNF's criminal investigation was also commenced in July 2016.

322 *See id.* at 184-85.

323 *See* Chloé Aeberhardt & Marie-Béatrice Baudet, *Airbus: Le Parachute Doré de Tom Enders*, LE MONDE (Apr. 3, 2019),

Speculation abounds in France as to why Airbus's CEO, Anders, and its general counsel, John Harrison, adopted a more co-operative, self-reporting approach marking a departure from the "traditional" delay and minimization tactic previously employed by France's "big four" national champions. Commentators contend that the duo's strategy was devised in the hope that their cooperation with the UK and French authorities might lessen the potential harshness of the American authorities' response. To this end, they made extensive disclosures to British authorities and refused to invoke France's blocking statute despite the surprise and discomfort this reportedly caused the French presidency.[324] Most French commentators were convinced that

https://www.lemonde.fr/economie/article/2019/04/02/airbus-un-parachute-dore-de-36-8-millions-d-euros-pour-tom-enders_5444509_3234.html (reporting that according to the leading French corporate governance watchdog, Proxinvest, Tom Enders was granted a €36.8 "golden parachute" package upon his retirement in April 2019. Questions have been raised of the propriety of agreeing to such a generous package in light of the ongoing corruption investigations, the risks of which may very likely have been underestimated by the Board of Directors. French politicians and commentators were especially dismayed that Airbus' decision was not subject to recent French corporate governance reforms mandating shareholder approval of CEO renumeration packages, as Airbus is incorporated in the Netherlands. Coincidentally, similar packages were granted to retiring CEOs of two of the "national champions" implicated in international corruption scandals—Technip's Thierry Pilenko and Alstom's Patrick Kron. While also severely criticized in France, these awards escaped legal scrutiny as Technip had reincorporated in the U.K. upon its merger with FMC and Patrick Kron's package, although voted down by a majority of shareholders, was agreed by Alstom's board prior to the entry into force of the rule requiring majority shareholder approval had become mandatory.); *see also* Nabil Wakim, *Le Patron de TechnipFMC Part Avec des Indemnités de Départ Colossales… en Laissant Un Groupe Très Déficitaire*, LE MONDE (Mar. 21, 2018), https://www.lemonde.fr/economie/article/2019/03/21/polemique-sur-les-colossales-indemnites-de-depart-du-patron-de-technipfmc_5439309_3234.html. For an analysis of French corporate governance from a comparative perspective, including executive compensation, *see generally* VERONIQUE MAGNIER, COMPARATIVE CORPORATE GOVERNANCE: LEGAL PERSPECTIVES (2017).

324 Tim Hepher, *Airbus Shares Fall After Report of U.S. Joining corruption Probe*, REUTERS (Dec. 20, 2018), https://www.reuters.com/article/us-airbus-probe/airbus-shares-fall-after-report-of-u-s-joining-corruption-probe-idUSKCN1OJ1I0, (reporting that U.S. authorities had expressed frustration over the slowing down of the investigation due to the French blocking statute. Nevertheless, the U.S. DPA and the U.K. statement of facts and Approved Judgment underlined the importance of the French blocking statute an its applicability to Airbus, thus demonstrating the care exercised by the U.S. and the U.K. authorities to integrate French law and policy considerations in the investigating process and illustrate their cooperation in the public Airbus resolution documents.). *See* AIRBUS Statement of Fact, *supra* note 314. Approved Judgment Before the President of the Queen's Bench Division (the Rt. Hon. Dame Victoria Sharp) in the matter of s45 of the Crime and Courts Act 2013, SFO Airbus SE, January 3&, 2020 [hereafter Airbus Approved Judgment] at 34.

American sanctions against Airbus will be motivated by American national interest in its 'economic war' with Europe, and especially with France in the field of aeronautics.[325]

Neither Anders, who is German, reported not to be a Francophile and viewed by French and German colleagues as closely tied to 'the Americans,'[326] nor Harrison, an Englishman were educated or integrated in a 'corps' as senior "Big 4" management. This fact coupled with Harrison's intensive experience as in-house counsel for French companies confronted with U.S. corruption investigations (Alcatel, Technip and Airbus) may explain why the inertia and belief in their impunity common to French executives in traditional French companies in similar circumstances did not influence their strategy.

The reality of the American threat was evidenced by the opening by the DOJ, in December 2018, of a criminal investigation against Airbus for alleged corruption in Asia and in particular, Malaysia which caused Airbus shares to drop as much as 10% after its reporting.[327] Commentators undertaking the hughly speculative endeavor of calculating the financial and reputational risks for Airbus of the imposition of American sanctions estimated fines and loss of reputational risks for Airbus would be in the €1 to €5 range.[328] The DOJ penalty for FCPA violations as agreed in the DPA was significantly lower than a half a billion euros and the reputational risk mitigated by the favorable perception of the co-operative and comprehensive tri-partite resolution. The recent tri-partite resolution of the international corruption investigations which hung over the future of the European

325 *See* LAÏDI, *supra* note 3, at 183-189; Marie-Béatrice Baudet et al., *Les Dessous de L'Opération Mains Propres en Cours Chez Airbus*, LE MONDE (Oct. 14, 2017), https://www.lemonde.fr/economie/article/2017/10/13/les-dessous-de-l-operation-mains-propres-en-cours-chez-airbus_5200278_3234.html.

326 *See* LAÏDI, *supra* note 3, at 185-89.

327 *Id.* at 192; *see* Chris Bryant, *Boeing Has Another Reason to Lord It Over Airbus*, BLOOMBERG (Dec. 20, 2018), https://www.bloomberg.com/opinion/articles/2018-12-20/boeing-has-another-reason-to-lord-it-over-airbus. Most commentators take the commonsense view that multinationals embroiled in international bribery scandals pay a significant reputational cost, with associated financial losses as a consequence. However, calculating these costs as well as the reputational and financial benefits (particularly in highly volatile stock markets) of resolving cases, as has Airbus, is difficult and subject to some controversy. *See generally* Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance -Evidence from 1993-2013*, 70 THE BUSINESS LAWYER 1, 112-119 (2015); *see also* F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View from the Trenches and a proposal for Reform,* 93 VA. L. REV. ONLINE 121, 129-30 (2007).

328 *See* Bryant, *supra* note 327.

aeronautical giant, is critical in evaluating whether the paradigm for French-American relations in anti-bribery has moved from the confrontational to the co-operative.

This Article argues that Airbus, which built on the foundation initiated in the Sociéte Générale case, demonstrates that co-operation has become the model for French-American anti-bribery efforts. This new co-operation between the respective authorities remains fragile and subject to reversal given the legal and cultural differences and the economic rivalry between the countries discussed throughout this Article. Nevertheless, the Author is persuaded that the following reasons justify the conclusion that the future heralds co-operation, rather than confrontation.

First, the success of the trans-national investigative teams constituted in Airbus augurs well for co-operation in future cases The exchange of information about investigative methods, differences in legal systems and ways to improve co-operation that facilitated the constitution and operation of the joint teams had been initiated by intense French-American contacts prior to Airbus. These contacts included testimony given by top level US officials (SEC, DOJ, STATE), French and American anti-corruption lawyers and scholars at the parliamentary hearings that led to the Berger-Lellouche, Marleix and Gauvain Reports and fact finding missions of French parliamentarians who had reciprocal meetings in the US.[329]

Second, the deference shown the US to French interests, including the remitting of the largest part of the fines to the French treasury,[330] runs counter to the argument that US FCPA actions against French national champions are initiated solely to gain competitive advantage for US firms while extract money for the US Treasury[331] supporting the view that the Airbus resolutions signify a move away from the use of the FCPA as a tool of economic war. US defererence in the Airbus case included explicit recognition of French sovereign interests in the conformity of US authorities with the French blocking statute in obtaining evidence.[332]

Third, the fact that the French and American authorities (as well as those of the UK) simultaneously concluded their respective DPA

329 *See* Berger/Lellouche, *supra* note 2, at 78-79; *see also* Marleix and Gauvain Reports, *supra* note 2, at 101, 163.

330 AIRBUS DOJ DPA, *surpa* note 6, at 4-5; AIRBUS DOJ Press Release, *supra* note 6, at 3.

331 *See* sur les traces, *supra* note 313.

332 AIRBUS DOJ DPA *supra* note 6, at 8.

type agreements and announced publicly their contents is a remarkable demonstration of close co-ordination. This is especially true given the different legal requirements for DPA's, legal cultures and communication styles of the three countries involved. For example, both the French and UK authorities obtained the necessary judicial approval for their respective CJIP and DPAs,[333] while the US wrapped up the various internal agreements between US agencies (DOJ and State Department) on the sharing of fines amongst them and with the French authorities prior to their simultaneous announcements.[334]

Last, Airbus SE entered into a French CJIP even though this DPA type arrangement does not permit individuals to do so contrary to US law. This demonstrates that companies can be persuaded to enter into cross-border resolutions thereby furthering French-US anti-bribery co-operation even in the face of differences in essential features of national law.

D. A New French Aggressiveness in Pursuing French and Foreign Individuals for Corruption

Recently, French authorities have shown a formerly uncharacteristic aggressiveness in pursuing French captains of industry, foreign kleptomaniacs and even officers of international organizations. In April, 2018, one of France's richest and most powerful captains of industry, Vincent Bolloré, chairman of the supervisory board and the major shareholder of the 'national champion' media group, Vivendi, and owner of a major infrastructure company focused on investments in French speaking Africa, was taken into custody and placed under formal investigation in connection with alleged contributions to the presidents of Guinea and Togo disguised by the underbilling of advertising work during their political campaigns.[335]

333 Approved Judgment Before the President of the Queen's Bench Division (the Rt. Hon. Dame Victoria Sharp) in the matter of s45 of the Crime and Courts Act 2013, SFO Airbus SE, Jan. 3, 2020 at 34 [hereafter Airbus Approved Judgment]; *see* Airbus CJIP, *supra* note 6. The English judge took great care to ensure that the SFO-Airbus DPA was consistent with the public interest. American legislators looking for a mechanism for effective judicial review of DPA's in response to criticism of excessive prosecutorial discretion would do well to look to the high quality and educational value of her opinion as an example.

334 *See* AIRBUS CJIP, *supra* note 6; *see also* SFO AIRBUS Press Release, *supra* note 7; *see also* Deferred Prosecution Agreement, US v. AIRBUS SE, Case N°1:20-er-00021 (TFH) US Dist. Ct. D.C. (Jan. 31, 2020) at 3,13.

335 *See* Liz Alderman, *Vincent Bolloré, French Billionaire, Faces a Rare Corruption Inquiry*, N.Y. TIMES (Apr. 25, 2018); Gaspard Sebag & Franz Wild, *Bollore Stays in Custody as French Bribery Cops Face 'Taboo'*, BLOOMBERG (Apr. 25,

Building on their work in pursuing kleptomaniac public officials in French speaking Africa, French companies together with individual executives are increasingly being charged and tried before French courts for corruption for payments formerly tolerated as the normal way of doing business in many African countries.[336]

The indictment of Tsunekasu Takeda, president of the Japanese Olympic committee, for corruption of public officials in connection with the successful Japanese bid for hosting, the 2020 Olympic Games in Tokyo following an investigation by the prominent instructing magistrate, Renaud Van Rumbeke, also signals a departure from France's pre-Sapin 2 reticence, largely based on legal constraints, to extend corruption investigations for matters beyond its borders.[337]

This dramatic change in French policy towards high-level foreign officials with assets located in France is exemplified by the recent ongoing trial of Rifaat El-Assad, the uncle of Syrian dictator Bachar El-Assad, for corruption and money laundering in a *biens mal acquis* based action brought by two anti-corruption associations.[338]

These recent initiatives having attracted the attention of the American authorities and press should facilitate future Franco-American co-operation by demonstrating the seriousness of France's anti-corruption commitment. Such co-operation would be particularly welcome given the involvement of U.S. authorities in assets recovery in the Obliang case and corruption investigations of the International Olympic committee. [339]

2018), https://www.bloomberg.com/news/articles/2018-04-25/french-regulators-make-waves-with-high-profile-corruption-probes.

336 *See, e.g.*, Luc Leroux, *La Société Bourbon Jugée Pour « Corruption D'agents Publics » Dans Trois Pays D'Afrique*, LE MONDE AFRIQUE (Mar. 19, 2019), https://www.lemonde.fr/afrique/article/2019/03/18/la-societe-bourbon-jugee-pour-corruption-d-agents-publics-dans-trois-pays-d-afrique_5437575_3212.html (reporting on the investigation and trial for corruption of the Bourbon company, a world leader in the supply of marine services in offshore oil and gas projects and the individuals making up its senior management team.).

337 Yann Bouchez, *Le Patron des JO de Tokyo 2020 Mise en Examen*, LE MONDE (Jan. 12, 2019), https://www.lemonde.fr/sport/article/2019/01/11/l-homme-fort-des-jo-de-tokyo-2020-mis-en-examen-pour-corruption-active_5407570_3242.html.

338 The two associations—Sherpa and Transparency International France—acting as civil parties, commenced this action in 2013. The defendant, Rifaat al-Assad, was indicted in June of 2016 and the case "instructed" by Renaud Van Ruymbeke. *See* Garance Le Caisne, *Le clan Assad en procès à Paris*, LE JOURNAL DU DIMANCHE (Dec. 8, 2019).

339 Sports offer a particularly fertile field for corruption. This is particularly true for major international sports events such as the FIFA World Cup and the Olympic Games where the confluence of enormous sums of sponsor money, national pride, denial by emotionally involved fans, and historically weak internal and external

VII. CONCLUSION

International corruption is an extremely serious problem that leads to massive uneconomic transfers of resources that hinder development, destroys trust in government, and contributes to geopolitical instability.[340] Despite the adoption almost two decades ago of international instruments designed to combat bribery, notably the OECD Anti-Bribery Convention, effective enforcement of anti-corruption laws, including the assessing of substantial fines and convictions of involved corporate executives is of relatively recent origin. Enforcement efforts were for many years confined to U.S. authorities leading to extremely negative perceptions of the "extraterritorial" imposition of American law, procedure, and methods.[341] Allegations of

compliance control over powerful international organizations benefitting from unique managerial frameworks under unique Swiss law. The preeminent historical roles played by France and the U.S., particularly in the Olympic movement, militates for their continued strong interest in corruption in sports and the need for cooperation to combat it. For French perspectives on how Sapin 2 and recent specific French laws on sports and corruption may contribute to these efforts, *see* David Roizen & Gladys Bezier, *La « Loi Sapin 2 », Son Impact Sur le Sport et le Silence Des Acteurs*, 181 JURISPORT 23 (Dec. 2017); Stephane Rousseau, *L'alerte éthique ('whistleblowing') au service d'une meilleure governance*, 50 RJTUM 571 (2016).

340 An increasingly vast literature on international corruption exists. For narratives and studies evidencing its serious singular negative geo-political, economic, social, and moral consequences, *see* LAURENCE COCKCRAFT & ANNE-CHRISTINE WEGENER, UNMASKED-CORRUPTION IN THE WEST (2017); LAURA S. UNDERKUFFLER, CAPTURED BY EVIL: THE IDEA OF CORRUPTION IN LAW (2013). *See also* MICHELA WRONG, IT'S OUR TURN TO EAT (2009); ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, NO LONGER BUSINESS AS USUAL: FIGHTING BRIBERY AND CORRUPTION (2000).

341 A failure to differentiate between the "extraterritoriality" of recent American legal actions against French financial institutions for violations of economic sanctions and the international corruption cases discussed in this Article tends to inflame the debate and exacerbate geo-political tensions. In the BNP-Paribas sanction breaking case for example, the main jurisdictional basis—the use of the dollar—was largely "extraterritorial." Coupled with a direct conflict of law (BNP acted in conformity with French and European law) and opposing foreign policy positions (worldwide isolation of the U.S. on Cuban sanctions, differences on how best to influence Iran and Sudan) the charge of American "legal imperialism" seems appropriate. In the Alstom corruption case, however, jurisdiction was notably firmly grounded in the activities of Alstom's U.S. subsidiaries and activities occurring on U.S. territory. Moreover, French and American authorities share the same commitment to combating corruption, as evidenced by their OECD Convention obligations. Nevertheless, American anticorruption cases were tarred with the same brush of extraterritoriality, legal imperialism, and "economic warfare" as in the economic sanctions cases by commentators, politicians, and national security and "economic intelligence" experts. French legislators were able to draw upon an excellent Berger/Lellouche bi-partisan report on the extraterritorial application of American law. *See LELLOUCHE/BERGER*, *supra* note 2. French legal practitioners and scholars

corruption always elicit highly emotional responses due to the particularly repulsive immoral nature of the crime. The anger, denial, and shock of companies and individuals charged with corruption is often far greater than when confronted with allegations of other serious, but less morally reprehensible, illegalities such as antitrust or securities regulation violations.[342] The intensity of foreign governmental and corporate criticism of American "legal imperialism" in the anticorruption enforcement field should therefore not be viewed as surprising.

Nevertheless, the virulence of the French reaction to American enforcement actions brought against French multinationals is singular. German companies, and in particular Siemens, risked as least as much as their French counterparts from American authorities. However, after the absorption of the initial shock, they took forceful action rapidly embracing cross border cooperation with the American authorities and vigorously anticorruption enforcement by their own authorities. Germany became a leader in corporate anticorruption despite international criticism of its retention of essential elements of its specific legal

have positively contributed to the discourse by carefully analyzing the differences between the two types of cases, *see* Laurent Cohen-Tanugi, The Extraterritorial Application of American Law: Myths and Realities (Working Paper, Feb. 2015); Régis Bismuth, *Pour une appréhension nuancée de l'extraterritorialité du droit américain-Quelques réflections autour des procédures et sanctions visant Alstom et BNP Paribas*, ANNUARE FRANÇAIS DE DROIT INTERNATIONAL 785 (2015). For US scholarly commentary, *see* Austen L. Parrish, *Fading Extraterritoriality and Isolationalism? Developments in the United States*, 24 IND. J. GLOBAL LEGAL STUD. 207 (2017); S. Nathan Williams, *The Sometimes "Craven Watchdog": The Disparate Criminal-Civil Application of the Presumption against Extraterritoriality*, 63 DUKE L.J. 1381 (2014) (arguing for aligning criminal cases such as the FCPA with the strong presumption against extraterritoriaity in civil cases decided in the *Morrison* case).

342 *See* COCKCRAFT & WEGENER, *supra* note 340; UNDERKUFFLER, *supra* note 340. The explanation lies in Professor Underkuffler's distinction between condemnation of the *act* of breaking a law and the condemnation of a person with the *status* of "corrupt". *See also* MONTERO, *supra* note 66; MUELLER, *supra* note 104. The author's personal experience as Alstom's general counsel supports the singularity of corruption cases. Alstom had to pay substantial fines for European competition law violations and devoted significant legal management time and expense to counter class actions for alleged securities law violations. Yet, the perceived need to deny and then minimize these violations and allegations to avoid internal and societal reprobation did not exist. *see also* EUGENE SOLTES, WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL (2016) (exploring the moral issues and consequences of corruption and provide a fascinating account of why strong initial denial and later minimization almost always follows corruption allegations).

system, notably its refusal to impose criminal liability on corporations preferring administrative sanctions.[343]

Recent developments in other civil countries, notably Brazil, as evidenced in the Odebrecht case, and Italy show a similar trend. Yet, Germany, Brazil, and Italy are all civil countries whose laws, procedures, and cultural and professional mores differ markedly from the U.S. France's failure to adapt to the changing landscape of international anticorruption enforcement can therefore not be explained by its belonging to the civil law tradition.

The uniqueness of French resistance to international standards of anticorruption enforcement partially finds its source in the peculiarities of French history, such as an intense aversion to denunciation and a Napoleonic "corps" business culture, which fostered a feeling of impunity permitting deny and delay tactics from the leaders of its "national champions." France's centralized state and public interest tradition, a tendency to analyze international corruption from a political and "economic war" perspective, and institutional inertia to change as exemplified in its retention of the investigating magistrate contributed to a greater resistance to contractual-based, negotiated "adversarial" outcomes than in comparable civil law countries as Germany and Italy.

This Article's comparative law study of Franco-American criminal procedures for corporate bribery abroad analyzed how these fundamental differences between the legal cultures contributed to the considerable controversy in the France's engendered by the enactment of international corruption provisions of the 2016 Sapin 2 Law. The debate in France over how to improve its muchcriticized foreign antibribery enforcement record arose from intense discomfort with the application by American authorities (DOJ & SEC) of the FCPA to French companies, particularly its "national champions" such as Alstom. This debate and legislative response illustrate the typically emotionally charged response in France to attempts to modify French law and practice when companies are confronted with the effects of perceived American legal imperialism.

343 The issue of German corporate criminal liability has been a subject of much discussion within and outside German for many years. Draft laws have recently been introduced to change German law in the wake of several corporate scandals, notably Volkswagen. *See* Wolfgang Spoerr, *New Corporate Criminal Liability in Germany-Paradigm Shift or Evolution?*, FINANCIER WORLDWIDE (Sept. 2018), https://www.financierworldwide.com/new-corporate-criminal-liability-in-germany-paradigm-shift-or-evolution#.XuE6G2pKg6A.

Recent developments, notably the use of the most important innovation of the Sapin 2 law, the CJIP, in a 50/50 fine sharing cooperative venture with the DOJ who simultaneously entered into a DPA in the *Société Générale* case and the landmark *Airbus* tri-partite (France, U.K., and U.S.) investigation and plea bargain arrangements represent an important change in France's approach to international corruption enforcement. *Société Générale* and *Airbus* provide examples of how legal cultures can adapt to the need to change. These cases have positively modified perceptions towards cooperation and unquestionably fostered it through the constitution of joint investigative teams. Nevertheless, they do not in themselves guarantee that the new era of French-American cooperation in the anti-bribery field would endure. National sensitivities and economic interests will continue to present challenges for the future. The risk that the "grafting" of the legal transplant of negotiated settlements decried as an example of the American "lawyerization" of criminal procedure may later boomerang.[344]

Comparative law analysis of the French debate and legislative response provides useful insight into the tensions caused by the dynamic interplay of different legal system in regulating international business practices. A critical lesson is that adoption of another system's anti-corruption tools, as the French acceptance of American style corporate plea bargaining requires careful modification to render them palatable to the legal culture adapting the new mechanism.

Studying this process of adaptation offers a practical guide to the risks and opportunities for legal transplants[345] by stimulating inquiry

344 Frederick T. Davis and Antoine Garapon, two of the most prominent and prolific writers on French-American criminal procedures, while strongly favoring the use of comparative analysis in reform efforts strongly warn against grafting transplants without careful consideration of the distinctive traditions, cultural needs, and expectations of the receiving nation. *See* DAVIS, *supra* note 18, at 2-3; *GARAPON & PAPADOPOULOS*, *supra* note 4, at 297-305. American "Lawyerization" of Criminal Procedure is a phrase borrowed from Jimeno-Bulnes, *supra* note 18, at 431, and refers to the effective elimination of the judge in the criminal process as a consequence of the almost exclusive use of plea bargaining. *See generally* KAGAN, *supra* note 13.

345 *See* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1993); Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997*). But see* Langer, *supra* note 63, at 29-39 (questioning the appropriateness of Watson's "legal transplant" metaphor). *See also* Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L.J. 126 (2008) (providing an excellent comparison of German and American criminal procedures aimed at offering avenues of reform of much criticized aspects of American practice, in particular, plea bargaining); DAVIS, *supra* note 18, at 3-4 (cautioning against attempting to engraft criminal procedure mechanisms from one

into how best to implement improvements in a country's international anticorruption arsenal. To be successful, "grafting" of mechanisms rooted in the soil of another legal culture will need the care of experienced gardeners cognizant of the difficulties inherent in such endeavors.

International "soft law" peer review from international organizations, such as the OECD, with substantial fines levied by American authorities on French "national champions" provided the international resonance necessary to pressure the French legislature to adapt French legal culture to meet the need to improve France's international anticorruption enforcement efforts. Up to now, given U.S. leadership in this field, this resonance has been almost wholly one-way. Analysis of French legal mechanisms—such as civil party intervention, strong administrative agencies, and judicial control of settlements—may offer useful opportunities for "reverse resonance" in reforming much criticized aspects of American criminal procedure such an excessive reliance on plea bargaining, unfettered prosecutorial discretion, and the absence of effective victim remedies.

Comparative criminal procedural study will further the international cooperation amongst enforcement authorities, legislators, and legal professionals necessary to combat corruption. It also may provide sufficient guidance and incentives for corporate executives to cooperate by reducing the quandary of being "caught in the middle."[346]

country to another while promoting the comparative study of other national systems to encourage critical analysis); Pizzi, *supra* note 284, at 1327, 1373..

346 *See* Sharon Oded, *Coughing Up Executives or Rolling the Dice?: Individual Accountability for Corporate Corporation,* 35 YALE L. & POL'Y REV. 49, 76-86 (2017); *See also* Matt Reeder, *Bad Math: State-Centric Anti-Corruption Enforcement + International Information Sharing Agreements = Conflicting Corporate Incentives*, 49 INT'L LAW. 325, 335-341 (2016).

COMPARISON OF AMERICAN AND FRENCH ANTI-CORRUPTION LEGISLATION	
USA	**France**
PLEA BARGAINING ARRANGEMENTS:	
• DEFERRED PROSECUTION AGREEMENT « DPA », NPA	• CONVENTION JUDICIAIRE D'INTERET PUBLIC – « CJIP »« CJIP »
SCOPE	
• Corruption, Money Laundering, OFAC, Economic Sanctions, Antitrust	• Corruption, Money Laundering
AVAILABILITY	
• Legal Persons, Individuals	• Legal Persons Only
REQUIRED ADMISSIONS	
• Statements of Facts/Violations of Law	• Fact Admissions not required if plea entered at preliminary investigation stage; required if « instruction » phase commenced
JUDICIAL APPROVAL & REVIEW	
• Review severely limited by case law • Public interest analysis not required • Public hearing, generally without victims • Judicial modification within case law limits • Appeal of disapproval possible	• Unlimited Judicial Review • Public hearings at which victims are present • Judge must act in public interest • Judge must fully approve or disapprove • Decision is irrevocable and non-appealable
INTERNAL INVESTIGATIONS	
• Required submission to Authorities • Well-established practice of meetings , exchange of information and negotiations between prosecutors and defense attorneys	• Required to submit to prove "co-operation" • Investigating Magistrate/Defense Attorney meetings generally not favored, limited negotiations (but change anticipated)
WHISTLEBLOWING-SCOPE AND PRACTICE	
• Very broad scope encompassing many facets of	• Relatively limited scope • Of recent origin

government regulation and criminal law. • Long history of use (False Claims Act of 1863) • Well accepted by society • Well compensated, including « bonus »	• Viewed with suspicion within companies, unions and society • No compensation and limited reimbursement for legal expenses subject to proof of good faith
SANCTIONS	
• Individuals : FCPA-5 years +$100-250K fines f or twice value of gain • Money laundering-20 years +$500K or twice value of gain • Legal Persons: Fines-unlimited • Guidelines for Calculation : Yes, specific	• Individuals :Corruption-10 years+150KE • Money Laundering 5 years +375K euro may be doubled if « aggravated » • Legal Persons :CJIP-Fines up to 30% of companies average 3 year turnover plus indemnification of victims • 750K euros, if convicted • Guidelines for Calculation: Yes, general
COMPLIANCE REQUIREMENTS & MONITORING	
• Preventive internal compliance programs not required nor supervised by agencies	• Approval of Preventive Compliance program by AFA
• Monitoring, by lawyers, generally required	• Monitoring undertaken by AFA