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# FCPA Update

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## Transport Logistics and DOJ Settle First Corporate FCPA Enforcement Action of 2018

On March 13, 2018, the U.S. Department of Justice ("DOJ") announced that it had entered into a deferred prosecution agreement ("DPA") with Transport Logistics International Inc. ("TLI"), a Maryland-based provider of logistical support services for the transportation of nuclear materials.[1] The DPA resolves charges that TLI conspired to violate the FCPA's anti-bribery provisions by bribing a Russian official. Based on TLI's inability to pay, DOJ agreed to accept $2 million as the appropriate criminal penalty, even though a higher penalty amount resulted from the U.S. Sentencing Guidelines calculation.

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1. *United States v. Transport Logistics International, Inc.*, Deferred Prosecution Agreement, No. 18-CR-00011 TDC (D. Md. Mar. 12, 2018), https://www.justice.gov/criminal-fraud/file/1044656/download [hereinafter "TLI DPA"].

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While blockbuster fines levied against large multinational corporations grab headlines, the TLI resolution serves as a reminder that the FCPA applies with equal force to small and medium-sized companies. As illustrated by the inability-to-pay analysis required in TLI, an FCPA enforcement action against a smaller company may result in severe consequences, including a threat to that company's ability to continue as a going concern. Yet the judicial criticism to which the TLI DPA was subject raises the question as to whether the DOJ gave too much consideration to that threat.

## The TLI DPA

According to the TLI DPA, between 2004 and 2014, TLI conspired with others to make corrupt payments of over $1.7 million to offshore bank accounts of shell companies. The payments were allegedly made at the direction and for the benefit of Vadim Mikerin, a Director at JSC Techsnabexport ("TENEX") – a subsidiary of Russia's State Atomic Energy Corporation – and President of Maryland-based TENAM, TENEX's wholly owned subsidiary and representative in the United States.[2] To conceal the bribe payments, TLI's co-presidents Mark Lambert[3] and Daren Condrey[4] and others allegedly caused the preparation of fictitious invoices from TENEX to TLI that described non-existent services. Mikerin allegedly conspired with the TLI executives to wire payments for those purported services to bank accounts in Cyprus, Latvia, and Switzerland. In a (rather transparent) attempt to disguise the scheme, Mikerin, Lambert, Condrey, and others used code words like "lucky figures," "lucky numbers," and "cake" to refer to these illicit payments.[5]

The DOJ brought charges against three individuals allegedly responsible for the misconduct. In June 2015, Condrey pleaded guilty to conspiring to violate the FCPA and to commit wire fraud;[6] he has not yet been sentenced. In January 2018, Lambert was charged with FCPA violations, wire fraud, and money laundering, among other charges.[7] Unlike his former colleague, Lambert has pleaded not guilty.

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2. TLI DPA at A-2, A-3; *see also United States v. Mikerin*, Plea Agreement at 11, No. 14-CR-0529 TDC (D. Md. Aug. 31, 2015), https://www.justice.gov/criminal-fraud/file/783791/download [hereinafter "Mikerin Plea Agreement"].
3. *See United States v. Lambert*, Indictment at A-4, No. 18-CR-0012 TDC (D. Md. Jan. 10, 2018), https://www.justice.gov/criminal-fraud/file/1044676/download [hereinafter "Lambert Indictment"].
4. *See United States v. Condrey*, Plea Agreement, No. 15-CR-0336 TDC (D. Md. June 17, 2015), https://www.justice.gov/criminal-fraud/file/783886/download [hereinafter "Condrey Plea Agreement"].
5. *See, e.g.*, TLI DPA at A-4.
6. Condrey Plea Agreement at 1.
7. Lambert Indictment at 1.

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In an unusual twist, the DOJ also brought charges against Mikerin – the Russian official who allegedly received bribes from TLI – for conspiracy to commit money laundering.[8] Mikerin, who had been serving a 48-month sentence in Virginia's Petersburg Medium Federal Correctional Institution, was released on April 24, 2018. Unlike most bribe recipients in FCPA matters who are located abroad and rarely (if ever) travel to the United States, Mikerin – a Russian national who served as president of Maryland-based TENAM from 2010 to 2014 – was a resident of Maryland.[9]

TLI did not self-disclose the alleged misconduct, but it did receive full credit for its cooperation and remediation, which included producing relevant documents and interviewing key witnesses (including a Russia-based individual to whom the DOJ did not have access) and providing factual downloads to the DOJ. According to the DPA, TLI also terminated all employees who engaged in the alleged misconduct.[10]

"As illustrated by the inability-to-pay analysis required in TLI, an FCPA enforcement action against a smaller company may result in severe consequences, including a threat to that company's ability to continue as a going concern."

The DPA points out that TLI's cooperation assisted the DOJ in its individual prosecutions, which likely took some of the pressure off the TLI corporate resolution, resulting in the reduction of the corporate fine and the decision not to appoint a monitor.

TLI and the DOJ agreed that the appropriate criminal penalty for TLI, taking into account the 25% cooperation discount off the bottom end of the applicable U.S. Sentencing Guidelines range, was over $21.3 million.[11] TLI represented to the DOJ, however, that it was unable to pay a fine in that amount. TLI argued –

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8. *See* Department of Justice Press Release, *Former Russian Nuclear Energy Official Sentenced to 48 Months in Prison for Money Laundering Conspiracy Involving Foreign Corrupt Practices Act Violations* (Dec. 15, 2015), https://www.justice.gov/opa/pr/former-russian-nuclear-energy-official-sentenced-48-months-prison-money-laundering-conspiracy; Boris Rubizhevsky, the owner and sole employee of NexGen Security Corp – which allegedly performed consulting services on behalf of Ohio-based "Cylinder Corporation A" – also pleaded guilty in June 2015 to conspiracy to commit money laundering in connection with Cylinder Corp. A's scheme to make payments to Mikerin to secure TENEX business. *See United States v. Rubizhevsky*, Plea Agreement, No. 15-CR-0332 TDC (D. Md. June 25, 2015), https://www.justice.gov/criminal-fraud/file/783851/download.
9. TLI DPA at A-3.
10. *Id.* at 3-5.
11. *Id.* at 8.

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and the DOJ agreed, after consulting a forensic accounting expert – that $2 million represented the maximum penalty that TLI could pay without "substantially jeopardiz[ing] the continued viability of the Company."[12] In addition to reducing the criminal fine to $2 million, the DOJ allowed TLI to "self-monitor," and provide reports to the DOJ, for a three-year period.[13] The DPA also requires the company to continue to cooperate with the DOJ's ongoing investigations and to implement an ethics and compliance program throughout its operations.

## Inability-to-Pay Analysis

In 2014, when charging Smith & Wesson with FCPA violations, U.S. Securities and Exchange Commission ("SEC"), in its press release, quoted an official as noting that the case should serve as "a wake-up call for small and medium-size businesses that want to enter into high-risk markets and expand their international sales."[14] Four years later, the TLI enforcement action serves as another illustration of the challenges faced by small and midsize companies caught in the crosshairs of FCPA enforcement.

By all accounts, TLI fully cooperated with the DOJ, and likely expended significant resources to review emails and financial records, interview witnesses (including one located in Russia), and report its findings to the DOJ.[15] TLI also remediated to DOJ's satisfaction, terminating all employees engaged in misconduct and substantially improving its compliance program.[16] Among other things, TLI designated a chief compliance officer, implemented payment controls requiring multiple reviews and signatures, and instituted policies that prohibit payments to bank accounts that do not bear the payee's name or that are located in countries other than where the payer resides or where services are rendered.[17] Nevertheless, even applying the full cooperation discount off the bottom of the U.S. Sentencing Guidelines range resulted in a criminal penalty over ten times the $2 million that TLI claimed it was able to pay.[18]

This case and other recent cases brought by the DOJ and the SEC raise the question of whether the fine levels now customarily levied by the DOJ and the SEC in FCPA cases are reasonable and sustainable, in particular with regard to

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12. *Id.* at 5, 9.
13. *Id.* at D-1.
14. SEC Press Release No. 2014-148, *SEC Charges Smith & Wesson With FCPA Violations* (July 28, 2014), https://www.sec.gov/news/press-release/2014-148.
15. TLI DPA at 3-4.
16. *Id.*
17. *Id.* at 4.
18. *Id.* at 8-9.

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small and midsize companies. The increased need for inability-to-pay analyses in FCPA matters in recent years underscores this concern. Just last month, in its order charging Elbit Imaging with violations of the FCPA's accounting provisions, the SEC reduced Elbit's penalty to $500,000 in consideration of its financial status. Elbit was in the process of winding down its operations by selling its principal assets to service debt obligations.[19] Concern over financial viability post-settlement is not limited to smaller companies. In its November 2017 DPA with SBM Offshore N.V., the DOJ granted a 25% discount off the bottom of the Sentencing Guidelines range at least in part due to SBM's inability otherwise to pay the fine (the agreed fine was $238 million).[20] In December 2016, the penalty to be paid by Odebrecht S.A., the Brazil-based global construction conglomerate, to authorities in the United States, Brazil, and Switzerland was reduced from $4.5 billion (which reflected a 25% discount off the bottom of the Sentencing Guidelines range) to $2.6 billion on the basis of an inability-to-pay analysis.[21]

The increased prevalence of inability-to-pay analysis in recent years may suggest that penalty amounts may threaten continued viability of certain FCPA offenders regardless of their size. While the reduced-penalty settlements demonstrate the U.S. government's willingness to consider a company's financial viability, such decisions are left to the authorities' discretion, increasing the risks for smaller companies or those in a difficult financial position.

## Judicial Criticism of the TLI DPA

In an interesting twist, Judge Theodore D. Chuang of the U.S. District Court for the District of Maryland, who approved the TLI DPA, questioned whether the reduced penalty – only 10% of the penalty amount under the Guidelines – would appropriately punish TLI and serve as a deterrent for others.[22] The judge seemed unpersuaded by the argument that a penalty higher than $2 million would jeopardize

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19. *In the Matter of Elbit Imaging Ltd.*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, Imposing a Cease-and-Desist Order, and Imposing a Civil Monetary Penalty, at ¶ 28, Securities Exchange Act Rel. No. 82849, Accounting and Auditing Enforcement Rel. No. 3925, Admin Proc. File No. 3-18397 (Mar. 9, 2018), https://www.sec.gov/enforce/34-82849-s; *see also* Paul R. Berger, et al., "Beyond 'Virtual Strict Liability': SEC Brings First FCPA Enforcement Action of 2018," FCPA Update, Vol. 9, No. 8 (Mar. 2018), https://www.debevoise.com/~/media/files/insights/publications/2018/03/fcpa_update_march_2018.pdf.

20. *United States v. SBM Offshore N.V.*, Deferred Prosecution Agreement at 7, No. CR 17-686 (S.D. Tex. Nov. 29, 2017), https://www.justice.gov/criminal-fraud/file/1017346/download; U.S. Dep't of Justice Press Release, *SBM Offshore N.V. And United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries*, (Nov. 29, 2017), https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case.

21. *United States v. Odebrecht, S.A.*, Plea Agreement, No. 16-CR-643 (E.D.N.Y. Dec. 21, 2016), https://www.justice.gov/criminal-fraud/file/920101/download.

22. *See, e.g.*, Adam Dobrik, "*Why is the goal always to save the company?" judge asks FCPA prosecutor*, Just Anti-Corruption (Mar. 26, 2018), https://globalinvestigationsreview.com/article/jac/1167181/%E2%80%9Cwhy-is-the-goal-always-to-save-the-company-%E2%80%9D-judge-asks-fcpa-prosecutor; *see also* Transcript, *United States v. Transport Logistics International, Inc.*, No. 18-CR-00011 TDC (D. Md. Mar. 22, 2018).

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TLI's viability and put the jobs of innocent TLI employees at risk, asking, "Why is it always the goal to save the company?[23] Judge Chuang observed that TLI and its personnel "engaged in crimes," and noted the comparative absence of government concern over collateral consequences of individual criminal prosecutions, such as the harm caused to innocent family members in those circumstances.[24]

Judge Chuang also took issue with the extent of TLI's cooperation and remediation. He noted that DPAs should be "reserved for companies that have engaged in extraordinary cooperation and have entirely rid themselves of all remnants of the prior criminal activity."[25] The judge observed that, although TLI terminated the employment of those engaged in the alleged misconduct, board members of TLI "who oversaw, or failed to oversee, the company during the time period of the fraud" continued to serve on TLI's board.[26] He also emphasized that TLI did not self-disclose to the DOJ.

Judge Chuang reluctantly approved the DPA, citing the ruling in *United States v. Fokker Services* that a district court "may only fail to approve a DPA if it is not 'geared to enabling the defendant to demonstrate compliance with the law' and is instead 'a pretext intended merely to evade the Speedy Trial Act's time.'"[27] But the concerns he expressed resonate beyond the TLI case, and beyond the cases involving inability-to-pay analysis. Were more courts to adopt Judge Chuang's view of what constitutes sufficient remediation to warrant a DPA, companies may have to engage in a complete overhaul of their leadership to obtain a DPA, potentially forced to remove anyone who held a position of power at the time of the alleged wrongdoing.

So far, there is no indication that the DOJ plans to revise its requirements to meet Judge Chuang's standard. It is also likely that the magnitude of the fine reduction in the TLI case and other facts specific to this matter, such as the participation of senior TLI executives in the alleged wrongdoing, had a strong impact on the court's position. Nevertheless, Judge Chuang's views on the type of remediation and disciplinary action DPAs should require offer an interesting perspective. With some commentators criticizing U.S. authorities for taking an overly demanding view of

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23. *Id.*
24. *Id.*
25. *United States v. Transport Logistics International, Inc.*, Order at 2, No. 18-CR-00011 TDC (D. Md. Apr. 2, 2018) [hereinafter "TLI Order"].
26. TLI Order at 2.
27. *Id.* at 3 (quoting *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 744 (D.C. Cir. 2016) (reversing Judge Leon's rejection of a DPA)); *see also* Sean Hecker, et al., "Judicial Scrutiny of Deferred Prosecution Agreements: The Latest Chapter," FCPA Update, Vol. 6, No. 7 (Feb. 2015), https://www.debevoise.com/~/media/files/insights/publications/2015/02/fcpa_update_feb_2015.pdf.

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cooperation and remediation (and disciplinary action against individuals in particular), Judge Chuang's comments in connection with the TLI Order indicate that at least one judge believes the DOJ is, in fact, too lenient.

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# French Supreme Court Limits Protection Against Double Jeopardy After Prior U.S. Resolutions

International corporations facing criminal investigation by prosecutors in more than one country often face a vexing problem: will an outcome in one country bar or limit prosecution in another country based on the same facts? Generally speaking, there are few laws addressing this issue, and "international double jeopardy" (or, as the principle is known in Europe and elsewhere, *ne bis in idem*) is not an internationally recognized rule. While most countries recognize the principle that it is unfair to prosecute someone twice for the same acts, the classic application of the principle has been to limit this to prosecutions by the same sovereign. As a result, a prosecution in one country, irrespective of the outcome, traditionally has not barred prosecution in another. Such is certainly the case in the United States, where the "single sovereign" limitation on the protection afforded by the double jeopardy clause is rigorously applied.

Within Europe itself, the outlook is not quite so grim because some countries, through their domestic legislation, offer limited but nonetheless real protection against double prosecution in certain circumstances. More broadly, several Europe-wide treaties provide that no two countries within Europe can prosecute the same defendant for the same offense. Because the United States is not a signatory of these treaties, however, they do not address outcomes reached in the United States.

In 2016, two decisions from the Paris Court of Appeals had offered some additional protection against "follow on" prosecutions after an outcome reached in the United States. Adopting very different theories, they offered strong arguments that a person or corporation that reached a definitive outcome to a criminal matter in the United States could not be prosecuted for the same offenses in France.

In January and March 2018, however, these two decisions were reversed by France's highest judicial court, the Cassation Court. These new rulings appear to eliminate two defenses that had previously been available to guard against multiple prosecutions for the same conduct.

## 1. Relevant Statutory and Treaty Provisions

In common with some other countries in Europe, French domestic criminal law protects against multiple prosecution in a relatively small category of cases. The French Criminal Code sets out in statutory language its principles of "territoriality," that is, the circumstances under which French criminal law applies to conduct that occurs outside of the national territory. Article 113-2 of the French Criminal Code

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provides for "territorial" application of French law to any offense where one or more acts take place in France. Articles 113-6 and 113-7 provide for "extraterritorial" application of French law, under which French criminal law may apply to acts taking place entirely outside of France if either the perpetrator or the victim is French.[1]

Based on this distinction, French law then provides that a complete criminal conviction in another country will bar prosecution in France – but only if the French prosecution is "extraterritorial" that is, if no act took place in France. Specifically, Article 113-9 of the French Criminal Code and Article 692 of the French Code of Criminal Proceedings both provide that in such a circumstance:

> "*no prosecution can take place with respect to a person who proves he or she has been definitively tried in another country for the same facts, and, in case of conviction, where the sentence has been served or is time-barred.*"

There is a certain logic and common sense to this approach: if a case is "territorial", then French policy is not to limit the powers of its prosecutors based on what other countries might do. But if the French prosecution is based only on an "extraterritorial" basis, the law recognizes a need to defer to the potentially greater interest of another country in pursuing the violation.

France is also a signatory of treaties providing for a protection against multiple prosecutions. Among these is the Article 14(7) of the International Covenant on Civil and Political Rights ("ICCPR"):[2]

> *"[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."*

Although they were not discussed in the two cases described below, several provisions of Europe-wide treaties also include double jeopardy protection. The most frequently used of these are Article 54 of the Convention to Implement the Schengen Agreement; Article 50 of the E.U. Charter of Fundamental Rights; and Article 4 of Protocol No. 7 to the European Convention on Human Rights[3].

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1. These provisions in the French Penal Code appear in English translation at https://www.legifrance.gouv.fr/content/location/1740.
2. The text of the ICCPR may be found at http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx. It was signed in New York on December 16, 1966, and entered into force on March 23, 1976. Both France and the United States are signatories, although the United States made a number of reservations.
3. On February 20, 2018, the European Court of Human Rights reaffirmed that this Article 4 of Protocol No. 7 does not prevent an individual from being prosecuted or punished by the courts of a state party to the European Convention on Human Rights on the grounds of an offense of which he or she had been acquitted or convicted by a final judgment in another state party, even if the two states are members of the European Union. *See Krombach v. France*, No. 67521/14.

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These treaties, of course, have no bearing on the preclusive effect of prior prosecutions in the United States, which is not a "contracting party" to any of them.

## 2. The Oil-for-Food 1 Case

The so-called "Oil for Food" criminal cases involved several companies and individuals charged with corruption-related offenses taking place between 2000 and 2003 in the context of the Oil-for-Food program. Under that program, the United Nations provided for strictly limited purchases of oil from Iraq – otherwise generally prohibited under embargoes against the regime of Saddam Hussein – to be used for humanitarian purposes, and specifically prohibited payments directly to the regime. A number of companies and individuals were pursued in France for violating the United Nations rules by making payments directly to the regime. Those prosecutions are known as *Oil-for-Food 1* and *Oil-for-Food 2*. Among the defendants in *Oil-for-Food 1* were the French oil company Total SA ("Total"), the Swiss energy company Vitol LTD ("Vitol"), and eight individuals.

"[S]everal Europe-wide treaties provide that no two countries within Europe can prosecute the same defendant for the same offense. Because the United States is not a signatory of these treaties, however, they do not address outcomes reached in the United States."

### The Paris Criminal Court decision

As part of its defense, Vitol noted that it already had been prosecuted in New York State Court based on the same facts, had entered a guilty plea for "grand larceny" under New York criminal law, and had paid a very substantial fine. It argued that it should not be prosecuted in France because of the *ne bis in idem* rule.

On July 8, 2013, the Paris Criminal Court first rejected Vitol's argument under the French statutory provisions noted above. It held that at least some of Vitol's offense took place in France, and thus that its French prosecution was a "territorial" one that permitted French prosecutors to further prosecute irrespective of an outcome elsewhere.

The Criminal Court ruled in Vitol's favor, however, on the basis of its interpretation of Article 14(7) of the ICCPR. The Criminal Court noted that nothing in this provision limited the *ne bis in idem* principle to prosecutions by the

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same sovereign. On this basis, it prohibited a second prosecution in France, and dismissed the case against Vitol.

The Criminal Court also acquitted all the other defendants on the ground that the payments in question went to the Iraqi regime itself and not to a so-called "faithless agent," and therefore did not constitute corruption under French law.

### The Paris Court of Appeals Decision

On February 16, 2016, the Paris Court of Appeals overturned the Criminal Court's decision and found all the defendants guilty.[4]

With respect to Vitol's argument under Article 14(7) of the ICCPR, the Court of Appeals accepted that the protection was not limited to a "single sovereign" situation. It emphasized, however, that the provision, by its terms, prohibits multiple prosecutions for the same "offense." It then held that even though the "facts" in the New York and French prosecutions were the same, Vitol was not charged with the same "offense" since in New York it had pleaded guilty to grand larceny, whereas in France it was being pursued for corruption. The Court of Appeals characterized grand larceny as a mere "economic crime," which it sharply distinguished from the crime of corruption, which "involves a completely different goal, […] namely the guarantee of the integrity of economic participants in the competitive global marketplace, in order to maintain the fairness of exchanges [and] clean the markets."[5]

As to the merits of the case, the Court of Appeals decided that, although the payments were not made to foreign public officials but to the Iraqi state, they still amounted to corruption. It then went on to find the defendants guilty of corruption under French laws and imposed fines of €750,000 against Total and €300,000 against Vitol.

### The Cassation Court Decision

The Court of Appeals decision was thus a partial victory for those attempting to find some protection against multiple prosecutions because the Court appeared to accept the applicability of the ICCPR, even if "two sovereigns" were involved.

On March 14, 2018, the Cassation Court rejected this position. Rather than adopting the reasoning of the Court of Appeals that Vitol failed because it had pleaded guilty to a different "offense" than the one for which it was pursued, the Cassation Court ruled much more broadly that Article 14(7) of the ICCPR

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4. The translations appearing in this article are by the authors.

5. The "mismatch" between the grand larceny charge in New York and the corruption charge in France was probably because Vitol was prosecuted by state rather than federal authorities in the United States. A state prosecutor has no power to enforce the federal Foreign Corrupt Practices Act, and there is no exact analogue of the FCPA in the New York Penal Law; the parties apparently used "grand larceny" as the closest comparable crime as the basis for Vitol's guilty plea.

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"prevent[s] double jeopardy for unique facts, [and] appl[ies] only in cases where both proceedings were initiated in the territory of the same State."

The Cassation Court's interpretation of Article 14(7) of the ICCPR appears to be in line with one already made by the United Nations Human Rights Committee[6] and by the Cassation Court of Belgium,[7] as well as with other commentators.[8] It appears to put an end to protection against double jeopardy in France for the same conduct when the first proceedings were initiated in the United States and the subsequent French prosecution is "territorial" (i.e., when at least part of the alleged wrongdoing took place in France).

However, as implicitly indicated by the Cassation Court, in the context of a prior conviction in another European Union member state, the protection against double jeopardy may apply before French courts on the basis of Article 50 of the E.U. Charter of Fundamental Rights providing that "[n]o one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."

As to the merits of the case, the Cassation Court confirmed that the payments amounted to corruption under French law and confirmed the convictions of Total, Vitol, and most of the individual defendants.[9] This case, which is now final with regards to Total and Vitol, counts as one of the rare convictions of companies prosecuted for corruption before French courts, although not for "classic" corruption involving the payment of a bribe to a disloyal state employee or agent.[10]

This March 2018 decision on the *Oil-for-Food 1* case may well have an impact on the *Oil-for-Food 2* case currently pending before the Paris Court of Appeals. In that case, the Paris Criminal Court concluded, in a June 2015 decision, not only that Article 14(7) of the ICCPR applies in a multi-sovereign situation, but took a further step to apply the *ne bis in idem* bar when the prior outcomes

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6. United Nations Human Rights Committee, "General Comment No. 32" (Aug. 23, 2007) at para. 57: "[Article 14(7)] does not guarantee ne bis in idem with respect to the national jurisdictions of two or more States. This understanding should not, however, undermine efforts by States to prevent retrial for the same criminal offence through international conventions."
7. Cassation Court of Belgium, No. 8738 (Feb. 20, 1991): "Whereas article 14, paragraph 7, of the International Covenant on Civil and Political Rights is only intended to prohibit, in the same country, after a final judgment of acquittal or conviction, further prosecution for the same offense; this provision, which embodies the principle of non bis in idem and does not tend to recognize the international value of a repressive judgment, is not applicable in the event of a conviction pronounced by a foreign court." *See also* Cassation Court of Belgium, No. 050767 (July 26, 2005).
8. *See, e.g.*, Fair Trial Rights in ICCPR, Journal of Politics and Law, Vol. 2, no. 4 (2009).
9. The Cassation Court did vacate the conviction of three individuals who had been charged with misuse of corporate assets. Their cases are remitted to another Paris Court of Appeals for a retrial.
10. The €750,000 fine eventually imposed on Total amounts to the maximum applicable fine under French law at the time of the offenses. Under the most recent French criminal law provisions, corporations convicted of corruption would now face a maximum fine up to €5 million, which can be increased to ten times the proceeds of the offence, not to mention the possible confiscation of the proceeds of the corruption and the mandatory exclusion from public procurement for up to five years.

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were not convictions, but were Deferred Prosecution Agreements ("DPA") or Non-Prosecution Agreements ("NPA") reached with the U.S. Department of Justice ("DOJ"), ruling that a DPA and NPA had all the attributes of a criminal conviction, even though formally no judgment of conviction was entered. It would now appear likely that the Paris Court of Appeals will not reach the DPA/NPA issue if it follows the reasoning in *Oil-for-Food 1* that the ICCPR does not apply to multi-sovereign situations at all.

### 3. The Tesler Case

The *Tesler* case produced unusual decisions in the Paris Criminal Court and Court of Appeals that suggested a protection against further prosecution – at least of individuals – after a negotiated guilty plea in the U.S. based on the courts' rather negative view of U.S. guilty plea procedures.

This case involved a British citizen, Jeffrey Tesler, who had been prosecuted before a federal court in Texas and entered into a plea agreement with the U.S. DOJ, in which he pleaded guilty to FCPA charges for acts of corruption in relation to foreign public officers, committed between 2000 and 2004 in Nigeria and France. He served a significant prison sentence and paid a large fine, but was later brought to trial in France on charges of corruption based on the same facts.

#### The Paris Criminal Court and Court of Appeals Decisions

Tesler apparently alleged that he had "no choice" about whether or not to plead guilty in Texas because U.S. criminal procedures virtually forced him to do so, since the only alternative was likely conviction and a very lengthy prison term. On September 21, 2016, the Paris Criminal Court noted that the Paris prosecutor "did not deny" that this was the case, and thus assumed the accuracy of the defendant's assertion. On this basis, it dismissed the case against the defendant, reasoning that the Texas guilty plea had deprived him of his right to self-defense in France.

On September 21, 2016, the Paris Court of Appeals upheld the Paris Criminal Court decision dismissing the case against Tesler. The decision was based on two principal conclusions. First, the Court of Appeals agreed that Tesler's guilty plea was, in essence, involuntary:

> "*It is difficult to conclude that this situation* [i.e., the guilty plea] *resulted from a considered and personal decision by the accused (even if surrounded by lawyers) when faced with American judicial authorities armed with such powers and capable of proceeding against him to obtain particularly lengthy sentences (several decades) if he refused to plead guilty.*"

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It then went on to find that, having pleaded guilty in the United States, he could no longer fairly defend himself in France:

> "[The U.S. guilty plea] *prohibited* [the defendant] *from contradicting his acknowledgement of guilt for fear that the U.S. authorities would walk away from their agreement and reopen the prosecution against him, thus depriving him of his ability to insist on his innocence without abandoning his right against self-incrimination or his right of self-defense.*"[11]

While the Court of Appeals mentioned the principle of *ne bis in idem* in its decision, its reasoning was primarily based on the defendant's right to a fair trial under Article 6 of the European Convention on Human Rights. The opinion was specifically aimed at the perceived inadequacies and unfairness of the U.S. criminal justice system and thus was limited to prior U.S. outcomes, but given the role of the U.S. DOJ in leading international investigations under the FCPA and other laws, a ruling that individuals, and possibly corporations, could raise to prevent a "follow on" prosecution in France (or potentially in other countries in Europe) following a U.S. guilty plea could have significant impact.

"Given the near-total evisceration of the two Paris Court of Appeals decisions by the Cassation Court, with respect to previous criminal outcomes in the United States, it now appears that no treaty or general defense right provides [international double jeopardy] or similar protection against a subsequent prosecution in France."

### The French Cassation Court Decision

On January 17, 2018, the Cassation Court reversed the Paris Court of Appeals' decision. Without a lengthy discussion, and specifically without any analysis of U.S. guilty plea procedures that had animated the lower courts, the Cassation Court simply ruled that the defendant had not been deprived of his right to a fair trial because his appearance in French courts was not governed by the provisions of the agreement concluded with the DOJ. The Cassation Court then ruled, in application of the Article 692 of the French Code of Criminal Proceedings noted above, that because some of the

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11. *See* Frederick T. Davis, "Paris Court Rules that a US FCPA Guilty Plea Precludes Subsequent Prosecution in France" (July 2017), https://globalanticorruptionblog.com/2017/07/05/guest-post-paris-court-rules-that-a-us-fcpa-guilty-plea-precludessubsequent-prosecution-in-france/#more-9529.

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corruption acts had been committed in France, the U.S. decision did not preclude prosecution in France. The Article 14(7) of the ICCPR was not discussed.

Under French procedures, the case against Tesler is now remanded to a different Court of Appeals (in Versailles), where the defendant may still pursue some variant of his *ne bis in idem* argument.

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*The Oil-for-Food 1* and *Tesler* decisions in the Paris Court of Appeals had provided some hope that companies and individuals who reached resolutions with the U.S. DOJ could protect against further prosecution in France. In so providing, however, the decisions created an obvious asymmetric anomaly: while they appeared to rule that French authorities must respect outcomes reached in the United States, the converse would clearly not be true because there is simply no basis under which the DOJ (or any other criminal or regulatory authority in the United States) would be under any legal constraint to respect a French (or European) outcome. Specifically, even though the United States is a signatory to the ICCPR, it had filed a reservation on the *ne bis in idem* provision, and in any event the ICCPR has been consistently interpreted in U.S. courts to be a "non self-executing treaty" that confers no rights on individuals.[12]

Given the near-total evisceration of the two Paris Court of Appeals decisions by the Cassation Court, with respect to previous criminal outcomes in the United States, it now appears that no treaty or general defense right provides *ne bis in idem* or similar protection against a subsequent prosecution in France. An individual or company can look only to the limited protection provided by French domestic law if it can argue that the subsequent French prosecution is entirely "extra-territorial."

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

# FCPA Update

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