FCPA Update

A Global Anti-Corruption Newsletter

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DOJ Uses Money Laundering Statute To Prosecute Foreign Officials for Bribery – But Will This Change with New Legislation?

The FCPA provides DOJ with a powerful tool to combat global corruption. But the statute reaches only one side of a corrupt exchange, prohibiting the paying and offering – but not the soliciting or accepting – of bribes. Courts have made clear that foreign officials cannot be charged with *conspiring* to violate the FCPA because the statute's legislative history reflects a congressional policy determination to exempt foreign officials.[1] In many cases, however, DOJ has pursued foreign officials who have accepted bribes by charging them with other violations, most commonly money laundering.

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1. *See United States v. Castle*, 925 F.2d 831, 831-32 (5th Cir. 1991); *see also United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).

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This article discusses a recent example of this approach: the prosecution, announced last month, of a high-level official of Ecuador's public police pension fund ("ISSPOL"), for engaging in a bribery scheme with a money manager, who was also charged. Although the government's allegations read like a classic FCPA fact pattern, DOJ has charged both the bribe payor and the foreign official with money laundering, not FCPA violations.

DOJ's reliance on such legal theories might change markedly if Congress passes the Foreign Extortion Prevention Act ("FEPA"). This pending legislation, which has bipartisan support, seeks to make it a crime for a foreign official to demand or accept a bribe. Below, we consider the impact that the enactment of FEPA might have on DOJ's FCPA enforcement.

The ISSPOL Case

On March 2, 2021, DOJ unsealed charges against two Ecuadorian citizens for their alleged roles in a bribery and money laundering scheme involving ISSPOL.[2] The charges against John Luzuriaga Aguinaga, the ISSPOL Risk Director and a member of ISSPOL's investment Committee, and Jorge Cherrez Miño, president and director of a group of investment fund companies incorporated in Florida, were filed in the Southern District of Florida on February 10 and February 19. In separate criminal complaints, Luzuriaga and Cherrez were each charged with one count of conspiracy to commit money laundering. Luzuriaga was arrested on February 26 and is scheduled to be arraigned on June 21, and an arrest warrant has been issued for Cherrez, whom authorities believe is in Mexico.

The ISSPOL, controlled by the Ecuadorian government, is the public institution responsible for managing the financial contributions by Ecuadorian police officers toward their social security. Luzuriaga served as ISSPOL Risk Director and served on ISSPOL's Investment Committee from approximately 2014 through 2019. In the latter role, Luzuriaga influenced ISSPOL's investment decisions, including the hiring of fund managers.[3]

DOJ alleges that Cherrez paid more than $2.6 million in bribes to ISSPOL officials, including $1.4 million to Luzuriaga, to steer ISSPOL's funds to Cherrez's investment companies.[4] In late 2015 or early 2016, Luzuriaga reviewed and approved a "swap transaction" agreement with Cherrez's investment company. This led to a series of

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2. Criminal Complaint, *United States v. Jorge Cherrez Miño*, Case no. 1:21-mj-02326-LFL (S.D. Fla. Feb. 22, 2021) (hereinafter "Cherrez Complaint"); Criminal Complaint, *United States v. John Robert Luzuriaga Aguinaga*, Case no. 1:21-mj-02270-AOR (S.D. Fla. Feb. 11, 2021) (hereinafter "Luzuriaga Complaint").
3. Luzuriaga Complaint, ¶ 10; Cherrez Complaint, ¶ 14.
4. Cherrez Complaint, ¶ 15; Luzuriaga Complaint, ¶ 15.

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transactions between 2016 and 2019, in which Cherrez's investment company made huge profits at the expense of ISSPOL.

According to the criminal complaints, Cherrez received ISSPOL payments through his Panamanian company's U.S. bank account, where he then transferred a portion of that money to his U.S. investment fund companies and their U.S. bank accounts. Overall, Cherrez received approximately $65 million in profit through this scheme.[5]

Meanwhile, Luzuriaga received bribes in checks and wire transfers to his personal accounts and those of his relatives. Additionally, Cherrez facilitated payments to Luzuriaga by providing Luzuriaga with a debit card for a U.S. bank account for which Cherrez held signatory authority.[6] Along with financial transaction data, the government collected text messages in which Cherrez and Luzuriaga allegedly discussed, planned, and confirmed the bribe payments.[7]

"The ISSPOL case is the latest example in a trend of DOJ prosecuting foreign officials using the money laundering statute because the FCPA does not reach bribe recipients."

Charging Foreign Officials With the Money Laundering Statute

The ISSPOL case is the latest example in a trend of DOJ prosecuting foreign officials using the money laundering statute because the FCPA does not reach bribe recipients. A few other prominent examples are as follows:

- *Sargeant Marine*: Five individuals who played a major role in an eight-year scheme to pay bribes to foreign officials in Brazil, Venezuela, and Ecuador pleaded guilty to charges under the FCPA in 2020.[8] On January 27, 2021, Daniel Comoretto Gomez, a former manager at Venezuela's state-owned

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5. *Id.*
6. Cherrez Complaint, ¶ 25; Luzuriaga Complaint, ¶ 25.
7. Cherrez Complaint, ¶¶ 27-30; Luzuriaga Complaint, ¶¶ 27-30.
8. U.S. Dep't of Justice, "Sargeant Marine Inc. Pleads Guilty and Agrees to Pay $16.6 Million to Resolve Charges Related to Foreign Bribery Schemes in Brazil, Venezuela, and Ecuador" (Sept. 22, 2020), https://www.justice.gov/opa/pr/sargeant-marine-inc-pleads-guilty-and-agrees-pay-166-million-resolve-charges-related-foreign; *see also* Kara Brockmeyer, Andrew Ceresney, et al., "The Year 2020 in Review: Another Record-Breaking Year of Anti-Corruption Enforcement," FCPA Update, Vol. 12, No. 6 (Jan. 2021), https://www.debevoise.com/insights/publications/2021/01/fcpa-update-january-2021.

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oil company Petróleos de Venezuela SA (PDVSA), pleaded guilty to one count of conspiracy to commit money laundering in connection with the Sargeant Marine scheme.[9]

- *Other PDVSA Officials*: Lennys Rangel and Edoardo Orsoni, both former PDVSA officials, were charged in November 2019 with conspiracy to commit money laundering related to a scheme to help a Florida-based contractor secure and retain PDVSA contracts in exchange for bribes.[10]
- *Donville Inniss:* A former member of the Barbados Parliament and former Minister of Industry of Barbados was charged with one count of conspiracy to launder money and two counts of money laundering in relation to a scheme where Inniss received bribes from a Barbadian company and laundered the funds through a bank and dental company in the Eastern District of New York.[11]

The Foreign Extortion Prevention Act

A bill introduced in Congress in August 2019 would expand U.S. criminal law to expressly reach foreign officials who demand or accept bribes. Rather than amending the FCPA, however, the bill proposes to amend one of the primary domestic bribery statutes, Title 18, United States Code, Section 201. The FEPA would add the following offense:

> Whoever, being a foreign official or person selected to be a foreign official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for –
>
> (1) being influenced in the performance of any official act; or
>
> (2) being induced to do or omit to do any act in violation of the official duty of such official or person,
>
> shall be fined under this title or imprisoned for not more than two years or both.

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9. Information, *United Sates v. Daniel Comoretto*, 1:21-cr-00014-ENV-1 (E.D.N.Y. Jan. 27, 2021); Waiver of an Indictment, *United Sates v. Daniel Comoretto*, 1:21-cr-00014-ENV-1 (E.D.N.Y. Jan. 27, 2021).
10. Indictment, *United States v. Lennys Rangel*, No. 1:19-cr-20726 (S.D. Fla. Nov. 1, 2019), https://www.justice.gov/criminal-fraud/file/1270496/download; Indictment, United States v. Edoardo Orsoni, No. 1:19-cr-20725 (S.D. Fla. Nov. 1, 2019), https://www.justice.gov/criminal-fraud/file/1270526/download; *see also* January 2021 FCPA Update, *supra* note 2.
11. U.S. Dep't of Justice, "Former Member of Barbados Parliament and Minister of Industry Charged with Laundering Bribes from Barbadian Insurance Company" (Aug. 6, 2018), https://www.justice.gov/opa/pr/former-member-barbados-parliament-and-minister-industry-charged-laundering-bribes-barbadian; *see* U.S. Dep't of Justice, "Former Member of Barbados Parliament and Minister of Industry Found Guilty of Receiving and Laundering Bribes from Barbadian Insurance Company" (Jan. 16, 2020), https://www.justice.gov/opa/pr/former-member-barbados-parliament-and-minister-industry-found-guilty-receiving-and-laundering; *see also* January 2021 FCPA Update, *supra* note 8.

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At various points in 2020, additional members of Congress from both parties added their names as cosponsors. With the Biden Administration's expected focus on combating global corruption – and interest in finding areas of legislative agreement in a divided Congress – this bill is likely to find support in the current Congress.

Although the draft legislation certainly could be amended before enactment, a number of observations can be made about how this statute might impact DOJ's anti-bribery enforcement:

- Under *McDonnell v. United States*, 136 S. Ct. 2355 (2016), to establish a violation of Section 201, the government must prove an "official act," *i.e.*, a decision or action on a "question, matter, cause, suit, proceeding or controversy" involving a "formal exercise of government power" and which is "specific and focused." The FCPA, by contrast, has been interpreted not to require proof of an official act.[12] Since the FEPA would amend Section 201, this would create the anomalous situation in which the government might charge both the bribe payor and bribe recipient with the same corrupt exchange and yet need to prove that the recipient undertook an "official act," without needing to prove that the payor sought such an "official act."
- The FCPA has a "business nexus" requirement, meaning the statute reaches only bribes intended to obtain or retain business. The FEPA – in its most recent formulation – has no such requirement. Again, this lack of parity between conduct that is illegal when undertaken by the bribe payor versus by the recipient would be anomalous.
- Similarly, the FCPA has certain affirmative defenses – such as payments for "reasonable and bona fide expenditures" and payments that are lawful under the written laws of the foreign country – that are currently absent from FEPA.
- Under DOJ policy, the Fraud Section has primary jurisdiction to prosecute violations of the FCPA's anti-bribery provisions and regularly works jointly with U.S. Attorneys' Offices around the country. But the FEPA would amend Section 201, not the FCPA. It is unclear whether the Fraud Section would be given primary jurisdiction over prosecutions under this statute or whether authority would be vested elsewhere within DOJ. Presumably, DOJ would want to take care to implement appropriate safeguards to ensure that investigations and prosecutions involving this new offense do not unduly interfere with diplomatic relations and national security interests. Nonetheless, given that DOJ already

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12. *See United States v. Ng Lap Seng*, 934 F.3d 110, 130 (2d Cir. 2019).

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pursues charges against foreign officials under the money laundering statute and others, the enactment of the FEPA might have the salutary benefit of prompting DOJ to promulgate policies more broadly regarding cases against foreign officials, promoting consistency and fairness in its approach.

As noted, the FEPA is not yet the law, and the issues discussed above may be addressed through amendments during the legislative process. In the meantime, DOJ can be expected to continue using the money laundering statute to pursue foreign officials engaged in bribery – at least in cases, such as the ISSPOL prosecution, in which the defendants further their bribery scheme through wire transfers to or from the United States.

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Former Braskem CEO Pleads Guilty for Role in Long-Running Bribery Case

On April 15, 2021, Jose Carlos Grubisich, a Brazilian national and former CEO of Braskem S.A. ("Braskem"), a publicly traded Brazil-based petrochemical company, pleaded guilty in Brooklyn federal court. The charges included conspiring to violate the FCPA's anti-bribery provisions and conspiring to violate the books and records provisions of the FCPA and to fail to accurately certify Braskem's financial reports.[1] Grubisich admitted that he and his co-conspirators helped divert approximately $250 million from Braskem to bribe Brazilian government officials in return for lucrative contracts and preferential treatment.

Grubisich's plea is part of a long-running investigation involving Braskem and Odebrecht S.A. ("Odebrecht"), a global construction conglomerate also based in Brazil.[2] Odebrecht, which is now called Novonor, maintains a controlling stake in Braskem, a U.S. issuer.[3] Although recent FCPA enforcement actions have regularly targeted individuals,[4] cases against executives at the highest level of public companies remain relatively unusual.

Background

In December 2016, Braskem and Odebrecht each pleaded guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA.[5] According to the Odebrecht plea agreement, Odebrecht and its co-conspirators effectively paid approximately $788 million in bribes to officials, political parties, candidates, and intermediaries in Angola, Argentina, Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, and Venezuela.[6]

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1. U.S. Dep't of Justice, Press Release No. 21-333, "Former Chief Executive Officer of Publicly Traded Petrochemical Company Pleads Guilty to Foreign Bribery and Securities Law Violations" (Apr. 15, 2021), https://www.justice.gov/opa/pr/former-chief-executive-officer-publicly-traded-petrochemical-company-pleads-guilty-foreign.
2. *See* Sean Hecker, Andrew M. Levine, et al., "The Year 2016 in Anti-Corruption Enforcement: Record-Breaking Activity and Many Open Questions," FCPA Update, Vol. 8, No. 6 (Jan. 2017), https://www.debevoise.com/insights/publications/2017/01/fcpa-update-january-2017.
3. *Ownership Structure*, Braskem, http://www.braskem-ri.com.br/ownership-structure.
4. *See, e.g.*, Kara Brockmeyer, et al., "The Year 2020 in Review: Another Record-Breaking Year of Anti-Corruption Enforcement," FCPA Update, Vol. 12, No. 6 (Jan. 2021), https://www.debevoise.com/insights/publications/2021/01/fcpa-update-january-2021.
5. Plea Agreement, *United States v. Braskem S.A.*, Case No. 16-CR-644, at 5 (E.D.N.Y. Dec. 21, 2016) ("Braskem Plea Agreement"), https://www.justice.gov/opa/press-release/file/919906/download; Plea Agreement, *United States v. Odebrecht S.A.*, Case No. 16-CR-643, at 4 (E.D.N.Y. Dec. 21, 2016) ("Odebrecht Plea Agreement"), https://www.justice.gov/opa/press-release/file/919916/download; *see also* U.S. Dep't of Justice, Press Release No. 16-1515, "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, 2016), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.
6. Odebrecht Plea Agreement, Attachment B at ¶¶ 19-21.

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According to the Braskem plea agreement, between 2002 and 2013, the company participated in this conspiracy. The agreement states that Braskem did so primarily by generating funds partially used for bribe payments, transferring them to an Odebrecht unit in charge of making improper payments (the Division of Structured Operations, or "DSO"), and authorizing bribes to Brazilian officials and employees of Petrobras, Brazil's state-owned oil company.[7] In addition, the plea agreement states that Braskem failed to maintain internal controls and falsified its books and records.[8]

Braskem agreed to pay a total fine of approximately $632 million, with the United States and Switzerland each receiving 15% of this amount ($94.89 million), and Brazil receiving the remaining 70% ($442.84 million).[9] Braskem separately agreed to a settlement with the SEC and Brazilian and Swiss authorities, in which the company agreed to disgorge $325 million in profits.[10]

Grubisich's Indictment

In November 2019, almost three years after the corporate resolutions, Grubisich was arrested at Kennedy International Airport in New York.[11] A three-count indictment was unsealed, charging Grubisich for his role in the bribery and money laundering scheme involving Braskem and Odebrecht.[12] In addition to his role as CEO of Braskem, Grubisich previously served as a member of the Board of Directors of Braskem and in various capacities for Odebrecht. The indictment charged Grubisich with: (1) one count of conspiracy to violate the anti-bribery provisions of the FCPA (Count I); (2) one count of conspiracy to violate the books and records provisions of the FCPA and to fail to certify financial reports (Count II); and (3) one count of conspiracy to commit money laundering (Count III).[13]

As alleged in the indictment, between 2002 and 2014, Grubisich, acting with others, "agreed to make millions of dollars in corrupt payments to, and for the benefit of, government officials, political parties and others in Brazil to secure an improper advantage and to obtain and retain business for Braskem and Odebrecht."[14]

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7. Braskem Plea Agreement, Attachment B at ¶¶ 24-29, 32.
8. *Id.* Attachment B at ¶¶ 32-33.
9. *Id.* at 18-19.
10. *Id* at 19.; *see also* U.S. Sec. & Exch. Comm'n, Press Release No. 2016-271, "Petrochemical Manufacturer Braskem S.A. to Pay $957 Million to Settle FCPA Charges" (Dec. 21, 2016), https://www.sec.gov/news/pressrelease/2016-271.html.
11. Corinne Ramey & Paulo Trevisani, "Former CEO of Brazilian Petrochemical Giant Braskem Is Arrested," Wall Street Journal (Nov. 20, 2019), https://www.wsj.com/articles/former-ceo-of-brazilian-petrochemical-giant-braskem-is-arrested-11574286578?mod=article_inline.
12. U.S. Dep't of Justice, Press Release No. 19-1278, "Former Chief Executive Officer of a Brazilian Petrochemical Company Charged for His Role in a Scheme to Pay Bribes to Brazilian Officials and to Falsify Company Books and Records" (Nov. 20, 2019), https://www.justice.gov/opa/pr/former-chief-executive-officer-brazilian-petrochemical-company-charged-his-role-scheme-pay.
13. Indictment, *United States v. Grubisich*, Case No. 19-CR-102 (E.D.N.Y. Feb. 27, 2019).
14. *Id.* at ¶ 20.

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Specifically, Grubisich helped create an off-books Braskem-controlled slush fund designed to fraudulently transfer money from Braskem to Odebrecht's DSO through multiple shell companies known as the "Caixa 2 Entities."[15] The DSO "effectively functioned as a stand-alone bribe department within Odebrecht."[16] It received funds from various Odebrecht-related entities, such as Braskem, and funneled that money to bribe recipients using a series of offshore entities and bank accounts around the world.[17]

According to the indictment, as CEO of Braskem, Grubisich helped negotiate and approve bribes from the DSO to government officials on Braskem's behalf.[18] For example, Grubisich directed co-conspirators to negotiate bribes totaling $4.3 million to Brazilian officials to prevent Petrobas from reassigning a lucrative contract for the construction of a polypropylene (plastics) plant in Brazil to one of Braskem's competitors.[19] Before stepping down as CEO, Grubisich helped initiate negotiations with Brazilian officials to obtain favorable pricing on a long-term contract with Petrobas for naphtha, a raw material used for petrochemical operations.[20] As part of these negotiations, Grubisich directed a co-conspirator to initiate bribe negotiations on behalf of Braskem with Brazilian officials.[21] Although Grubisich left his role as CEO in 2008, these negotiations ultimately resulted in Brazilian officials helping Braskem receive favorable pricing on the naphtha contract in exchange for approximately $12 million in bribe payments from Braskem.[22]

"Although recent FCPA enforcement actions have regularly targeted individuals, cases against executives at the highest level of public companies remain relatively unusual."

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15. *Id.* at ¶¶ 11, 19- 20, 24-25.
16. *Id.* at ¶ 18.
17. *Id.*
18. *Id.* at ¶ 26.
19. *Id.* at ¶¶ 27-29.
20. *Id.* at ¶¶ 30-31.
21. *Id.* at ¶ 31.
22. *Id.* at ¶ 32.

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Grubisich also played a role in misrepresenting Braskem's financial statements and signed false certifications submitted to the SEC. Those certifications, "attested that Braskem's annual reports fairly and accurately represented Braskem's financial condition" and stated that Grubisich "disclosed all fraudulent conduct by Braskem's management and other employees with control over Braskem's financial reporting."[23] After leaving his position at Braskem, Grubisich continued communicating with the DSO about the maintenance and use of the funds that were not properly recorded.[24]

Motion to Dismiss the Indictment

In August 2020, Grubisich filed a motion to dismiss the indictment and to compel the production of a Bill of Particulars.[25] Grubisich argued, among other things, that Count I of the indictment should be dismissed, or at a minimum severed, because it was duplicative in charging two distinct bribery conspiracies, and one of them was time-barred.[26] Grubisich also took issue with Count II, arguing that he withdrew from the books and records conspiracy as a matter of law when he left his position as Braskem's CEO in 2008.[27]

In October 2020, the Honorable Raymond J. Dearie of the United States District Court for the Eastern District of New York denied Grubisich's motion to dismiss.[28] The court found that Count I was not impermissibly duplicative and that the conspiracy "is fairly characterized as a continuing scheme to bribe foreign officials in order to obtain and retain business for Braskem and Odebrecht."[29]

Moreover, Count II could not be dismissed as time-barred. The court reasoned that the assertions raised in Grubisich's motion presented issues of fact to be determined by a jury and that it was premature to conclude that he withdrew from the alleged conspiracy when he stepped down as Braskem's CEO.[30]

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23. *Id.* at ¶ 21.
24. *Id.* at ¶¶ 39-40.
25. Defendant's Memorandum of Law in Support of His Motions to Dismiss the Indictment and to Compel Production of a Bill of Particulars, *United States v. Grubisich*, Case No. 19-CR-102 (E.D.N.Y. Aug. 5, 2020).
26. *Id.* at 5-11.
27. *Id.* at 11-15.
28. Memorandum & Order, *United States v. Grubisich*, Case No. 19-CR-102 (E.D.N.Y. Oct. 22, 2020). Judge Dearie reserved decision on the motion to compel production of the Bill of Particulars.
29. *Id.* at 5.
30. *Id.* at 6.

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The court also rejected Grubisich's arguments as to Count III (conspiracy to commit money laundering). Notably, the Memorandum & Order ended with the statement that "Defendant's robust attack on the Indictment does raise issues that may warrant critical attention after an evidentiary record has been established, but the arguments presented do not justify favorable action by the Court on the motions to dismiss."[31]

Plea

Ultimately, Grubisich pleaded guilty to both FCPA-related charges before Judge Dearie. Under the terms of the plea, Grubisich agreed to forfeit $2.2 million. Sentencing is currently scheduled for August 5, 2021.

As Grubisich highlighted in his motion to dismiss, this case involves a Brazilian national approving the payment of bribes to Brazilian officials in connection with Brazilian contracts. Although there is a connection to the United States – American depositary shares of Braskem are traded on the New York Stock Exchange and some of the alleged wire transfers went through United States-based banks – the majority of the conduct is focused in Brazil. This matter again reflects the FCPA's extraterritorial reach and DOJ's use of the statute to prosecute foreign nationals.

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31. *Id.* at 12.

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