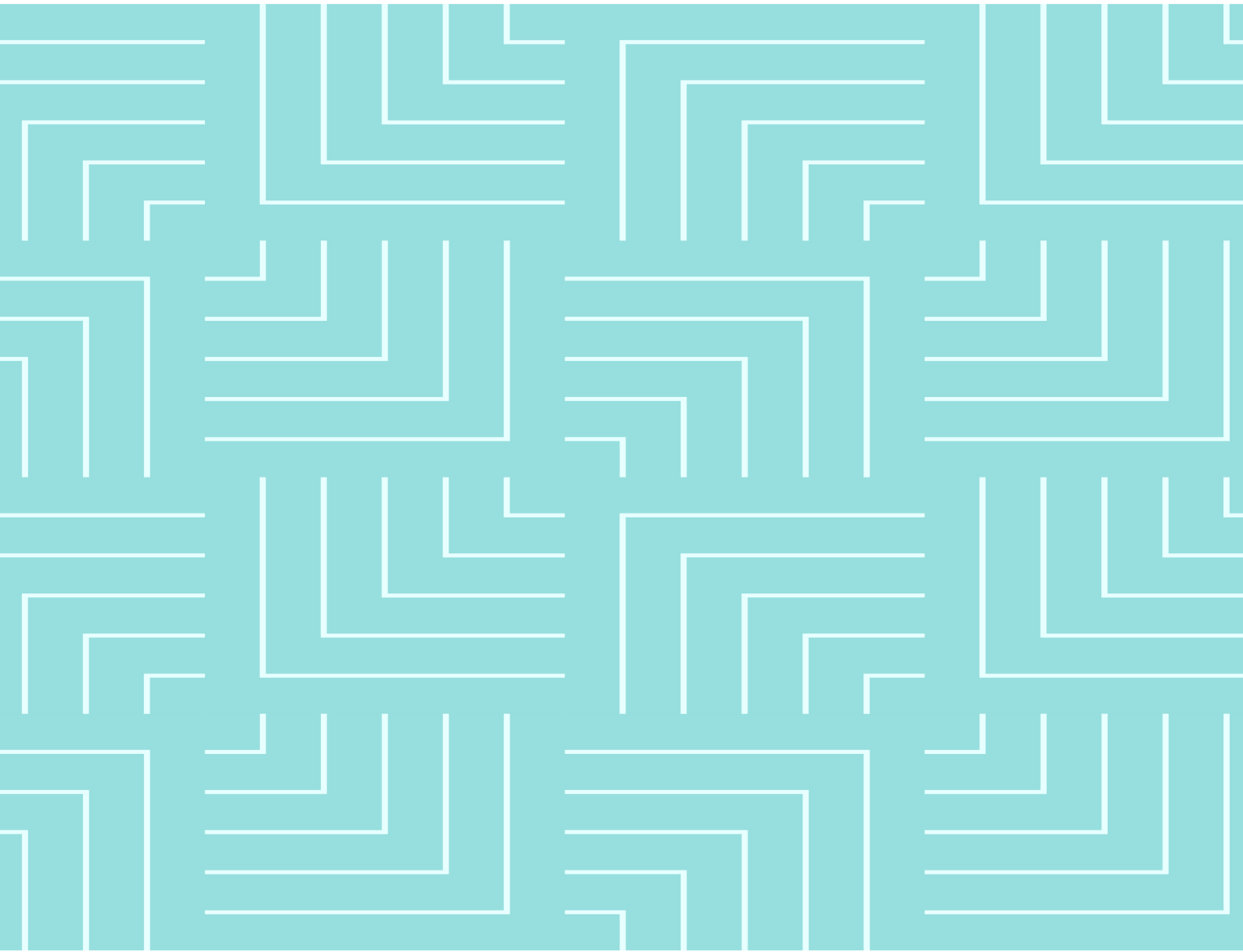
Resolving Foreign Bribery Cases with Non-Trial Resolutions

Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention



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RESOLVING FOREIGN BRIBERY CASES WITH NON-TRIAL RESOLUTIONS

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Table of contents

Tables

Figures

Boxes

Chapter 1. The increasing use of non-trial resolutions to resolve foreign bribery cases

1.1. The term "resolution" describes a diverse and growing number of enforcement tools for resolving foreign bribery cases

Non-trial resolutions, commonly known as "settlements", refer to a wide array of mechanisms developed and used to resolve criminal matters without a full court proceeding, including foreign bribery cases, based on an agreement with an individual or a company and a prosecuting or another authority. Where appropriate, non-trial resolutions can also be available and used in administrative or civil proceedings. This Study looks at non-trial resolutions available to enforce the foreign bribery laws in the Parties to the OECD Anti-Bribery Convention. It also looks at non-trial resolutions used to resolve cases in the foreign bribery sphere including based on offences alternative to the foreign bribery offence as illustrated by a selection of cases throughout this Study.[12] As shown in Figure 1, the vast majority of the resolution systems applicable for foreign bribery in the Parties to the Convention are available in criminal proceedings: 39 resolutions for legal persons (75%) and 50 resolutions for natural persons (91%).[13]

For the purpose of this Study, non-trial resolutions (hereafter also "resolutions") encompass those instruments, which can be used to resolve foreign bribery offences or other offences in the foreign bribery sphere (hereafter "other related offences") with sanctions and/or confiscation without a full trial on the merits. These resolutions can, however, also impose other sanctions and conditions, such as the design and implementation of an effective compliance program.

While resolutions do not involve a full trial, the courts can still be part of the process to varying degrees. In the **United Kingdom**, for instance, in order to conclude a *Deferred Prosecution Agreement* (*DPA*), the UK Serious Fraud Office (SFO) makes a preliminary application to the court at the end of negotiations. The preliminary application is usually shortly followed by the final application. A judge must make a declaration that resolving the matter by way of a *DPA* is in the interests of justice and that the terms are fair, reasonable and proportionate.[14] Conversely, in **Norway**, court validation is not required to either issue or conclude an *Optional Penalty Writ* (also known as a *Penalty Notice*), even though the resolution has the effect of a judgement. Between these two extremes, several

[12] The database used to support data and, in places, provide examples for this study contains enforcement actions in which sanctions and/or confiscation were imposed based on at least one foreign bribery charge as well as alternative offences used to prosecute cases within the foreign bribery sphere. For a description of how these categories have been used, see Germany Phase 4 Report, paras. 89 *et seq*.

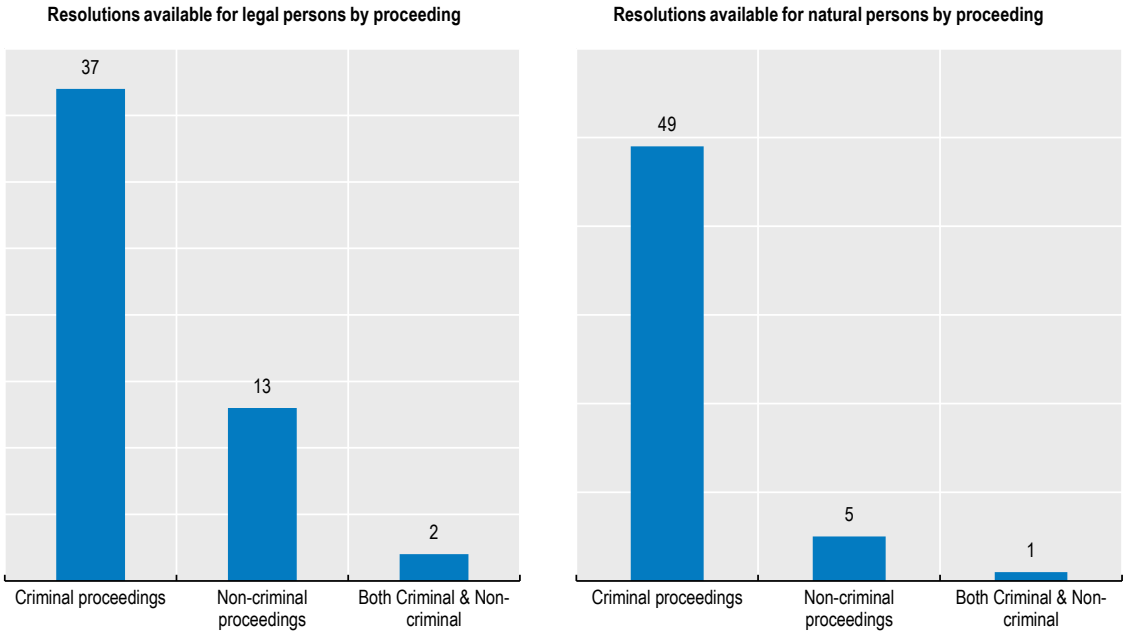
[13] See Tables 3 and 4 for the answers to question 7a.

[14] UK Crime and Courts Act 2013 Schedule 17c paras. 7(1) and 8(1) (a) & (b).

systems provide for various forms of judicial review of the proposed resolution mainly to ensure that all the substantive or procedural requirements are satisfied. Judicial review over resolutions is discussed in greater detail in Chapter 5.1.

The non-trial resolutions in this Study may result in a range of different outcomes. In particular, only some successfully concluded resolutions result in a conviction. For instance, **Italy**'s *Patteggiamento*, which is akin to a plea deal, allows for an immediate resolution of charges that leads to the alleged offender being sanctioned (but without an admission of guilt). In contrast, under the **United States** *DPA* in criminal matters and **Chile**'s *Conditional Suspension of Proceedings*, prosecution is deferred and eventually dropped if the alleged offender successfully abides by the terms of the agreement. The legal effect of non-trial resolutions is further discussed in Chapters 2 and 4. Similarly, while several resolutions have both a punitive and a confiscatory component, certain only have the latter. This is the case for the *Declination with disgorgement* in the **United States** under the US Department of Justice's (DOJ) Corporate Enforcement Policy[15] for the Foreign Corrupt Practices Act (FCPA).[16]

Figure 1. Total number of resolutions available in the countries covered by the Study



Source: OECD data collection questionnaire results, Tables 3 and 4.

Non-trial resolutions hence cover a wide variety of enforcement mechanisms. From **Argentina**'s *Effective Cooperation Agreement* to **France**'s *Convention Judiciaire d'Intérêt Public* (*CJIP*) and **Brazil**'s *Leniency Agreement*, the diversity of names given to these procedures is a testament to the variety of systems designed by the Parties to the

[15] Corporate Enforcement Policy (USAM 9-47.120), www.justice.gov/criminal-fraud/corporate-enforcement-policy.

[16] The Foreign Corrupt Practices Act of 1977 (15 U.S.C. §§ 78dd-1, et seq.)

Convention.[17] These may either be grounded in the law, as with **Chile**'s *Conditional Suspension of Proceedings* in the Code of Criminal Procedure,[18] or in policy guidance, as in the **United States** where the use of *DPA*s for legal persons has evolved under guidance that the DOJ and the US Securities and Exchange Commission (SEC) developed for criminal and non-criminal enforcement actions, respectively.[19]

The diversity in forms and conditions of non-trial resolutions can, in part, be explained by the fact that each system is grounded in the legal tradition of the country where it is applied. Although these instruments respond to similar concerns of a practical nature, they follow the fundamental principles of each country's legal framework. In **Norway**, for instance, a prosecutor cannot resort to an *Optional Penalty Writ* where imprisonment is sought for the offence. As aggravated corruption is punishable by a term of imprisonment for natural persons, this system is mainly used for legal persons in foreign bribery cases.[20]

1.2. A large percentage of foreign bribery cases are resolved through resolutions, instead of trial

1.2.1. An increasing use of non-trial resolutions among Parties to the Convention

Non-trial resolutions have become a prominent means for resolving economic crimes, including corruption and bribery of foreign public officials or other related offences. According to the OECD database of concluded foreign bribery cases, the 44 Parties to the Convention have successfully concluded 890 foreign bribery resolutions since the Convention entered into force on 15 February 1999. Of these, 695 were concluded through non-trial resolutions. As shown in Figure 2, this represents 78% of concluded resolutions imposing sanctions or confiscation for foreign bribery.[21]

As seen in Figure 3, over half of the Parties to the Convention (23 out of 44) have successfully concluded a foreign bribery action. Of these 23 enforcing countries, 15 have used a non-trial resolution mechanism, at least once, to resolve a foreign bribery case with either a legal or a natural person (3 countries in each case), or both (9 countries). In 8 countries, the authorities have enforced their foreign bribery laws exclusively through trials, even though some of these countries, resolutions are now available to resolve foreign bribery cases. In 5 of these 8 countries (**Austria, Bulgaria**, **Hungary**, **Luxembourg**, and **Poland**) these trials only involved natural persons, while **Belgium, Japan,** and **Korea** have secured convictions of both legal and natural persons at trial. Some countries have convicted legal persons both through trial and non-trial resolutions (e.g. **France**, **Germany**, **Italy**, and the **United Kingdom**). Some countries

[17] Argentina: Corporate Liability Law – 27401 Art 9; France: Article 41-1-2. of the French Code of Criminal Procedure (CCP); Brazil: Article 16 I of the Corporate Liability Law.

[18] Article 249 of the Chilean Code of Criminal Procedure.

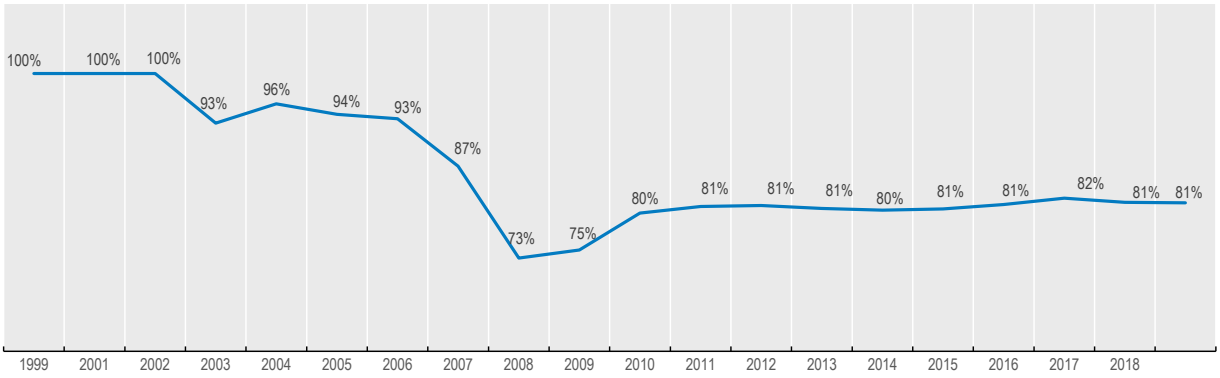
[19] See Jennifer Arlen, "*Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals Into Corporate Cops*", April 2017, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 17-12, www.eifr.eu/uploads/eventdocs/596f2377ec5fa.pdf.

[20] Norway Phase 4 Report, para. 81.

[21] For the 17 Parties covered by this Study, non-trial resolutions constituted approximately 82% of all of their foreign bribery enforcement actions.

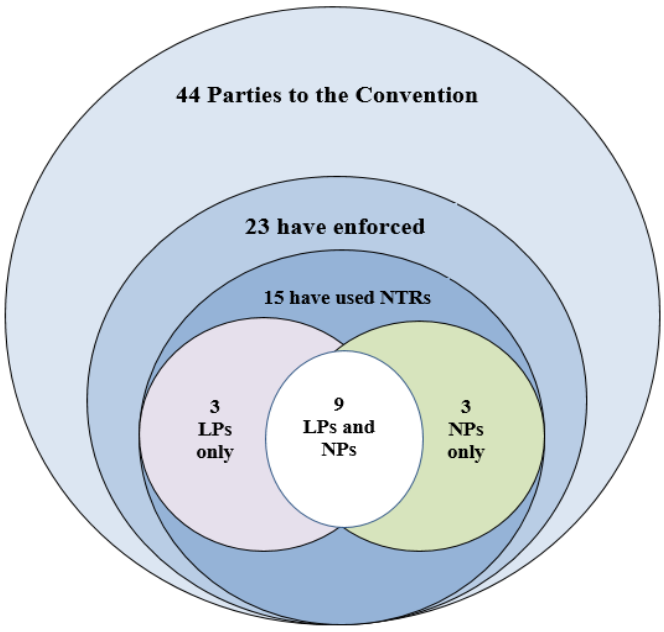
have convicted natural persons both through trial and non-trial resolutions (e.g. **France**, **Germany**, **Norway**, the **United Kingdom**, and the **United States**).

Figure 2. Cumulative percentage of non-trial resolutions in Working Group countries' foreign bribery enforcement actions since the Anti-Bribery Convention's entry into force



Source: This graph reflects non-trial resolutions concluded between 15 February 1999 and 30 June 2018. OECD database of concluded foreign bribery cases.

Figure 3. How many Parties to the Convention have used non-trial resolution mechanisms to resolve a foreign bribery case?



Note: NTR stands for Non-Trial Resolutions.

The 15 countries that have concluded at least one foreign bribery case with a non-trial resolution tend to use such mechanisms very frequently. Based on publicly available information, seven countries have exclusively used these instruments to enforce their foreign bribery laws (**Australia**, **Brazil**, **Chile**, **Israel**, the **Netherlands**, **Spain**, and **Switzerland**). In addition, 14 countries have resolved more than 50% of their foreign

bribery cases using non-trial resolutions. France and Sweden have only used non-trial resolutions to resolve respectively 11% and 17% of their foreign bribery cases. With respect to **France**, one reason is that the *CJIP*, designed to resolve economic crimes by legal persons, is a relatively recent instrument, introduced in December 2016.[22] The *CJIP*, was used for the first time in June 2018 to resolve, a prominent foreign bribery case with Société Générale, in parallel with the **United States.** Previously, France only had the *Comparution Immediate sur Reconnaissance Préalable de Culpabilité* (*CRPC*), which amounts to a plea deal and had only been used in one foreign bribery case[23] since its adoption in 2004.[24]

The factors explaining the increasing use of non-trial resolutions to resolve foreign bribery matters are mainly of a practical nature.[25] In general, governments have limited resources available to devote to corporate criminal enforcement. Investigating and prosecuting foreign bribery requires tremendous time and financial resources. Collecting evidence is complex and resource-intensive. As the offences typically involve several jurisdictions, investigation often requires mutual legal assistance (MLA) from foreign jurisdictions. Obtaining MLA can sometimes take months, if not years before assistance is provided, thus creating a risk that the evidence may become less valuable over time or even, in certain jurisdictions, the case may become time-barred or otherwise less viable. Bribery schemes are increasingly complex and their investigation requires the support of highly specialised professionals, including forensic accounting experts. The investigation is all the more challenging that both the bribe giver and the bribe taker have a shared interest in concealing the crime from law enforcement authorities and these crimes often lack a direct victim eager to bring evidence to the authorities.

As a matter of example, during the Working Group on Bribery's Phase 3 evaluation of **Norway**, representatives of the Norwegian prosecuting agency (ØKOKRIM) explained that they preferred using *Optional Penalty Writs*, over taking a foreign bribery case to trial, because such trials are "usually long and place a large burden on law enforcement resources".[26] Referring to **Switzerland**'s non-trial resolutions, the Working Group on Bribery emphasised that: "such procedures have undeniable advantages for law enforcement authorities, in that they streamline procedures and reduce costs."[27]

Non-trial resolutions are an efficient tool for resolving complex foreign bribery cases. With these instruments, prosecutors have the option to resolve foreign bribery matters without

[22] France: Article 41-1-2. of the French Code of Criminal Procedure, enacted by Law n°2016-1691 of 9 December 2016, article 22.

[23] The CRPC was concluded against a natural person on 13 September 2016.

[24] The CRPC was created by a law of 9 March 2004 on the adaptation of the justice system to the new forms of criminality (Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité).

[25] Jennifer Arlen, "*Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals Into Corporate Cops*", April 2017, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 17-12, page.1

[26] Norway Phase 3 Report, para. 64.

[27] Switzerland Phase 3 Report, para. 41.

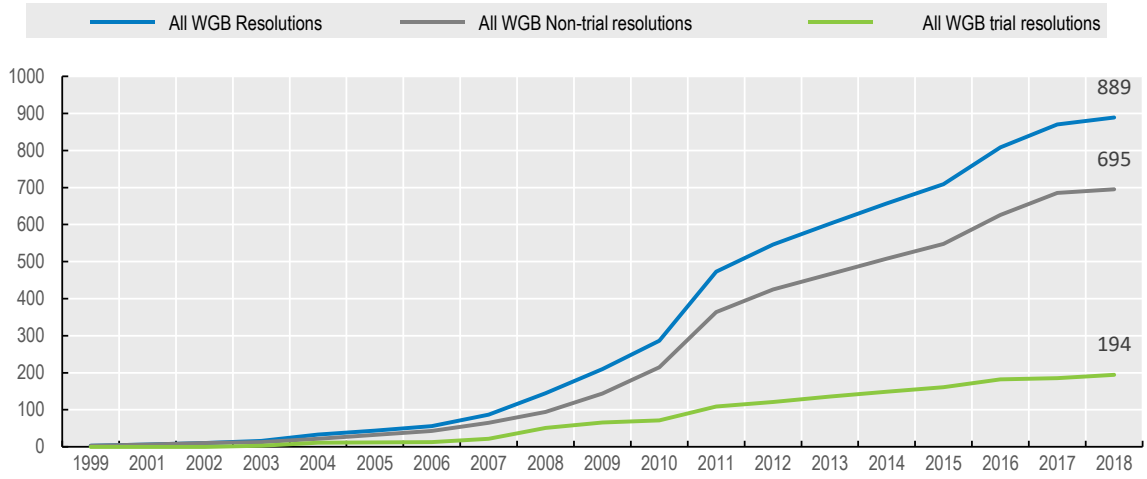
engaging the full range of resources necessary to prosecute a case through a trial on the merits and any potential appeal proceedings.

1.2.2. Non-trial resolution mechanisms have become a driver of enforcement.

Non-trial resolution systems could also indirectly contribute to an overall increased enforcement of the foreign bribery offence. Academics note that "trials are time-consuming and expensive and divert the time and attention of the judge and the prosecutorial team for an extended period, reducing their ability to pursue other cases."[28] To the extent that non-trial resolutions save time and free up resources, law enforcement authorities can use fewer resources to resolve more cases. This may potentially increase the pace of enforcement investigations and ultimately the number of enforcement actions. Shorter proceedings also maximise prosecutors' chances of completing an enforcement action before cases become time barred in countries where the prosecution itself, including appeals, must be finally concluded within the limitations period.[29] The Working Group has indeed regularly emphasised in its country evaluations how statute of limitations in some jurisdictions can present a substantial impediment to prosecutors' ability to successfully enforce foreign bribery laws.

Figure 4 shows both that the substantial majority of foreign bribery resolutions were reached through non-trial resolution mechanisms.

Figure 4. Cumulative number of Working Group on Bribery resolutions (1999 to mid-2018)



Source: OECD database of concluded foreign bribery cases.

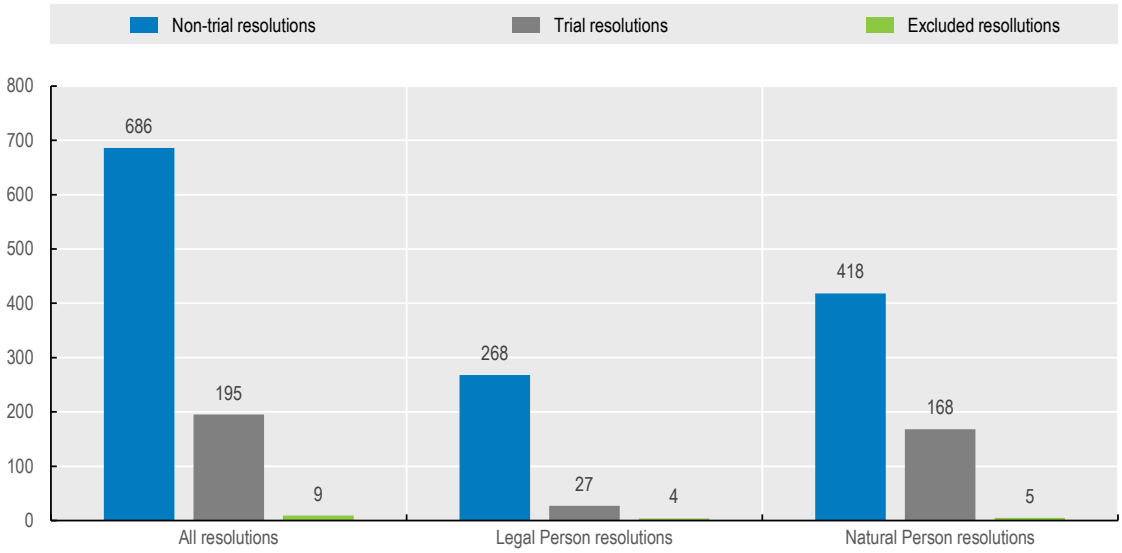
As shown in Figure 5, this pattern in usage is true both for legal and natural persons. At the same time, the proportion of non-trial resolutions is higher for legal persons than for natural persons. Whereas 91% of the resolutions with legal persons (268 out of

[28] Jennifer Arlen, "*Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals Into Corporate Cops*", April 2017, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 17-12, page.1.

[29] Italy Phase 3 Report, para. 13.

295 resolutions) did not involve a trial, this was only true for 72% of the resolutions with natural persons (418 out of 586 resolutions).

Figure 5. Working Group on Bribery's use of non-trial resolutions to resolve foreign bribery matters since the Anti-Bribery Convention entered into force



Source: OECD database of concluded foreign bribery cases.

At the country level, case data indicates that the three biggest enforcers of the foreign bribery offence[30] have used non-trial resolutions to resolve over three-fourths of their cases, namely: **Germany** (80%), the **United Kingdom** (79%) and the **United States** (96%). Together these enforcers account for 80% of all the Working Group on Bribery's enforcement actions and nearly 90% of all the non-trial resolutions since the entry into force of the Convention.

Brazil provides an example of how non-trial resolutions can contribute to boosting enforcement, including of a recent regime of liability of legal persons (which otherwise may have taken years before being enforced). At the time of its 2014 Phase 3 evaluation, Brazil had yet to successfully conclude one foreign bribery case. In 2013, however, it had enacted the Organized Crime Law (Law 12,850), which created the possibility for natural persons to enter into a *Cooperation Agreement*.[31] Brazil later added the possibility of entering into a *Leniency Agreement* with legal persons to complement its new regime of liability for legal persons. In 2017, the Working Group noted that "in January 2016, Brazil concluded its first foreign bribery case by way of a leniency agreement with a Brazilian company, and cooperation agreements with 10 natural persons. Significant sanctions were

[30] The database used for this Study contains enforcement actions in which sanctions were imposed based on at least one foreign bribery charge as well as alternative offences used to prosecuted cases within the foreign bribery sphere. For a description of how the Working Group has used these categories, see Germany Phase 4 Report (paras. 89 et seq.).

[31] Brazil Phase 3 Report, para. 100.

imposed for a range of offences, including foreign bribery. In addition, Brazil now has eight ongoing cases, five of which were initiated after Phase 3 (from a total of 21 allegations)."[32]

Conscious that "detecting the crime is the first step, and a challenge, to any effective enforcement of the Convention,"[33] a number of Parties to the Convention have also endeavoured to use non-trial resolutions to enhance self-reporting and cooperation, thus increasing detection and enabling the successful investigation and prosecution of foreign bribery cases. This point is further examined in Chapter 3.2 and 3.3.

1.3. Developments in resolving foreign bribery cases

1.3.1. Current snapshot of non-trial resolutions in countries Party to the Convention

As discussed in the previous section, non-trial resolutions have historically played a prominent role in how the Parties to the Convention enforce their foreign bribery offence. The prevalence of non-trial resolutions has only grown over time, as the Parties have adopted an increasingly wide range of non-trial resolution systems.[34] While non-trial resolutions may have once been perceived as incompatible with the inquisitorial approach traditionally found in civil law jurisdictions,[35] most of the Parties have some form of non-trial resolution for both natural and legal persons, including a sizeable number of civil law countries. As shown in Figure 6, 23 of the 44 countries Party to the Convention (48%) are known to have at least one non-trial resolution for legal persons: Argentina, Australia, Austria, Brazil, Canada, Chile, the Czech Republic, Estonia, France, Germany, Israel, Italy, Japan, Latvia, Mexico, Netherlands, Norway, Slovenia, South Africa, Spain, Switzerland, the United Kingdom, and the United States. Additionally, 28 Parties to the Convention (57%) have at least one non-trial resolution for natural persons: Argentina, Australia, Austria, Brazil, Canada, Chile, Colombia, Costa Rica, the Czech Republic, Estonia, Finland, France, Germany, Hungary, Israel, Italy, Japan, Latvia, Mexico, the Netherlands, Norway, Slovenia, South Africa, Spain, Sweden, Switzerland, the United Kingdom, and the United States.

In the aggregate, the 27 Parties to the Convention covered in this Study are known to have one or more non-trial resolution potentially applicable to either legal or natural persons. Altogether they have 68 different non-trial resolution systems potentially available for foreign bribery cases. At least 30 of these resolutions (44%) have been used to impose

[32] Brazil Phase 3 Follow-up Report, page.4.

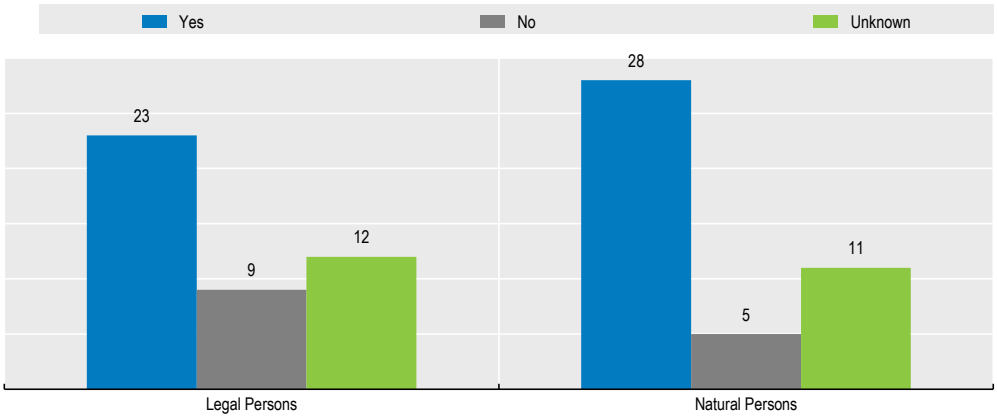
[33] OECD (2017), The Detection of Foreign Bribery, www.oecd.org/corruption/anti-bribery/The-Detection-of-Foreign-Bribery.pdf, page 9.

[34] The trend among the Parties to the Convention mirrors the larger global context in which countries around the world are adopting mechanisms to resolve criminal proceedings without a full trial. According to a 2017 study of 90 jurisdictions, the number with a "trial waiver system" increased from 19 before 1990 to 66 by the end of 2015. See Fair Trials International, The Disappearing Trial Report: A global study into the spread and growth of trial waiver systems (27 Apr. 2017).

[35] Since at least the start of the 21st century, scholars have observed that civil jurisdictions have increasingly adopted non-trial resolution systems equivalent to common-law plea bargaining. *See, e.g.* Françoise Tulkens, *Negotiated Justice*, *in* EUROPEAN CRIMINAL PROCEDURES 641, 662 (M. Delmas-Marty & J.R. Spencer eds., 2002); Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 Harv. Int'l L.J. 1, 37 (2004).

sanctions in at least one foreign bribery case. While the features of the Parties' various resolution systems are further described in Chapter 2, an idea of the diversity of resolutions available can be seen by considering three key dimensions.

Figure 6. Number of countries Party to the OECD Anti-Bribery Convention that have a non-trial resolution system for foreign bribery

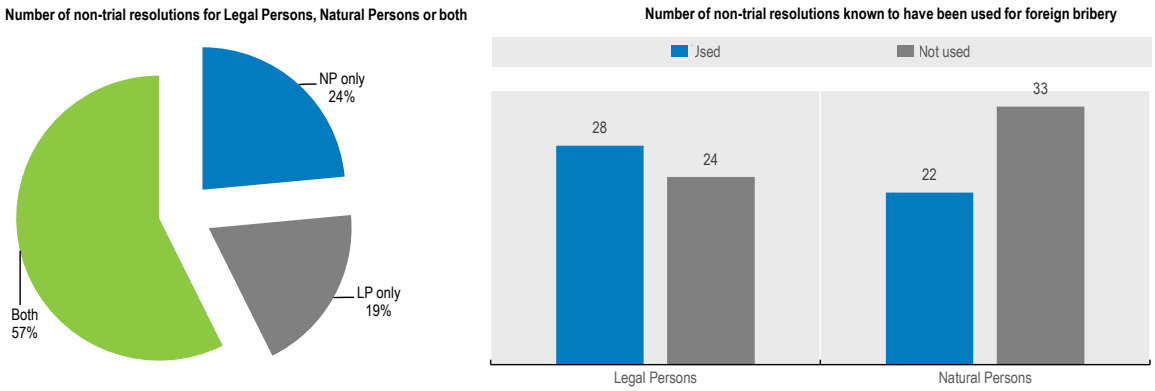


Source: OECD data collection questionnaire results, Table 7.

The first dimension is whether a resolution system has been designed for natural persons, legal persons, or both natural and legal persons. As shown in Figure 7, 39 resolution systems (57%) covered in this Study are available for both natural and legal persons. A further 13 systems (19%) are only available for legal persons, while 16 systems (24%) are designed exclusively for natural persons. Thus, in total, there are 52 different non-trial resolution systems for legal persons and 55 systems for natural persons. In terms of practice, 28 of the 52 resolutions (54%) potentially available for legal persons have in fact been used to impose sanctions in at least one foreign bribery case. For natural persons, only 22 of the 55 potentially available resolutions (40%) have actually been used to sanction foreign bribery. In part, this difference reflects the fact that a larger percentage of resolutions for natural persons is found in Parties that have yet to enforce their foreign bribery offence. Nonetheless, resolutions with natural persons have been used less frequently than those for legal persons.[36]

[36] Of all the non-trial resolutions covered in the Study, roughly one-half (48%) of those available for legal persons and one-quarter (25%) of those available for natural persons have been used. The difference in usage is even starker for the resolution systems intended for only legal or natural persons: while 54% of the former have been used, the same is true for only 13% of the latter.

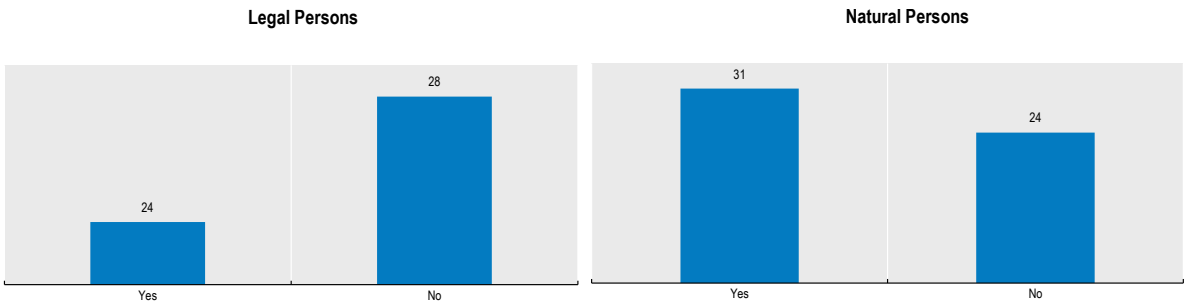
Figure 7. Number of non-trial resolutions for legal and natural persons



Source: OECD data collection questionnaire results supplemented by Secretariat research; the OECD database of concluded foreign bribery cases.

A second key dimension is whether the non-trial resolution system results in a conviction. Among the 68 resolution systems covered in the Study, 32 (47%) can result in a conviction and 36 (53%) do not. The parties to the Convention have notably differed in their approach towards legal and natural persons in this respect. Thus, while only 2 of the 13 resolution systems (15%) designed exclusively for legal persons result in a conviction, 9 of the 16 resolution systems (56%) intended exclusively for natural persons result in a conviction. Of the 39 resolution systems that apply to both natural and legal persons, slightly more than half (54%) result in conviction. Thus, as shown in Figure 8, only 24 of the 52 resolution systems available for legal persons result in a conviction. For natural persons, 31 of the 55 systems available result in a conviction. It is not clear whether this pattern stems from policy considerations (for example, to encourage corporate entities to report misconduct by eliminating potential collateral consequences such as debarment) or if it reflects the legacy of traditional notions of justice tying convictions to personal guilt, which may seem anomalous when dealing with abstract corporate entities.

Figure 8. Number of non-trial resolutions resulting in conviction



Source: OECD data collection questionnaire results, Tables 12 and 13.

In practice, the non-trial resolution systems without conviction appear to have been used more frequently to sanction foreign bribery cases. Of the 30 resolution systems that have actually been used to impose sanctions on either natural or legal persons, 18 systems (60%) do not impose a conviction. The preference for non-conviction based resolutions can also be seen in the fact that 18 of the 36 resolution systems (50%) available to natural and/or legal persons without conviction have been used at least once in such cases. In contrast,

only 12 of the 32 non-trial resolution systems (38%) available to natural and/or legal persons with conviction have been applied in foreign bribery cases.

When a non-trial resolution results in a conviction, this may reduce the likelihood that they will be used by either legal or natural persons. The effect, however, appears to be stronger for legal persons. Of the 29 non-trial resolution systems available for legal persons without conviction, 15 systems (52%) have actually been used to resolve a foreign bribery matter. On the other hand, legal persons have only used 7 of the 23 systems with conviction (30%) available to them. This pattern was reversed for natural persons. While 10 of 30 of the available resolutions (33%) for natural persons with conviction had been used in foreign bribery case, this was only true for 4 of the 25 non-trial resolutions without a conviction (16%).

The vast majority of the 32 non-trial resolutions resulting in a conviction will involve the court in some fashion. Four of these non-trial resolutions (13%), however, result in the equivalent of a conviction without any judicial involvement: the *Prosecutor's Penal Order* (**Latvia**), *Punitive Order* (**Netherlands**), *Optional Penalty Writs* (**Norway**), and the *Summary Punishment Order* (**Switzerland**). This in effect gives the prosecution service a quasi-judicial role, albeit with the consent of the accused. In addition, these sorts of resolutions typically can only be used to impose a fine or some other sanction not involving imprisonment, although the Swiss *Summary Punishment Order* can be used to impose a prison term of up to six months. Furthermore, it may also be possible for the accused to appeal the imposed resolution. In the **Netherlands**, the accused has 14 days to appeal the imposed *Punitive Order* before it becomes final. In **Switzerland**, a written rejection of the *Summary Punishment Order* may be filed with the public prosecutor within 10 days by the accused, other affected persons, and the Office of the Attorney General of Switzerland or of the canton in federal or cantonal proceedings respectively. Unless a valid rejection is filed, the summary penalty order becomes a final judgment.[37] Finally, as discussed in Chapter 5, the Parties to the Convention also may rely on non-judicial forms of oversight to ensure that non-trial resolutions are used appropriately.

A third major dimension to the various approaches taken across countries Party to the Convention that have adopted various non-trial resolutions is the range of offences to which each resolution can apply. As a preliminary point, the Parties to the Convention report that none of the non-trial resolutions covered in this Study are exclusively limited to foreign bribery. Some resolution systems are broadly applicable to all offences. This is the case, for example, for the *Plea Agreement* in **Australia** and *Plea Agreement* in **Latvia** as well as *Diversion* in **Austria**.

Other resolution systems are limited to certain offences. Countries Party to the Convention have taken a wide range of approaches for determining which offences may be resolved through a particular non-trial resolution. Some non-trial resolutions are available only for certain expressly specified offences. For example, **Argentina** has restricted its non-trial resolution systems for legal persons to offences such as domestic or international bribery, extortion, unjust enrichment, and aggravated false accounting. Likewise, **France**'s *CJIP*, which was promulgated in 2016, is intended for companies in relation to active (supply-side) bribery, including the bribery of foreign public officials, as well as other related

[37] Swiss Criminal Procedure Code, Article 354 1 and 3. Article 354 provides that the "Office of the Attorney General of Switzerland or of the canton in federal or cantonal proceedings respectively" can file a written rejection of the Summary Punishment Order "if so provided".

offences.[38] **Brazil** has similarly made its *Leniency Agreement* available for bribery cases, public procurement fraud, and other acts that violate public administration rules and principles or international commitments undertaken by Brazil. The United Kingdom also has a specified list of offences for which DPAs are available.[39] Some countries that are considering adopting new non-trial resolution systems are also contemplating this approach. **Australia**, for instance, reports that the *DPA* system that it is currently considering would apply to a specific list of offences, including money laundering, terrorist financing and other specified offences. Interestingly, however, Australia's draft legislation would allow companies to resolve certain other offences (known as "secondary" offences), if the company is already using a *DPA* to resolve one of the permitted offences.

Other systems are intended to resolve any offences contained within a given class of offences. For example, **Norway**'s *Optional Penalty Writ* can be imposed for any offence that permits the imposition of a fine without imprisonment. Other resolutions are limited to offences that are not especially serious (e.g. the **Czech Republic**'s *Agreement on Guilt and Punishment*). Still others are limited based on the length of the prison sentence that the offence could incur. **Spain**'s *Conformidad* is available for offences punishable by no more than six years' imprisonment. Since 1983, the same is true for the *Transaction*, a non-trial resolution in the **Netherlands**, whereby the right to prosecute will be extinguished if the accused fulfils certain conditions. Previously, the *Transaction* was only available for offences punishable by a fine.[40]

Finally, some countries make resolutions available for most offences, while excluding only a list of certain crimes. For example, **France**'s version of a guilty plea, the *Comparution sur Reconnaissance Préalable de Culpabilité (CRPC)*, which is available to natural or legal persons, is generally applicable for any offence unless expressly excluded. The offences excluded from the *CRPC*'s field of application include manslaughter, political offences, and aggravated sexual offences.

1.3.2. Historical development

The potential use of non-trial resolution systems for foreign bribery has attracted increased attention in recent years as more countries Party to the Convention have adopted them. A few non-trial resolution mechanisms were developed by Parties with either common law or civil law legal systems long before foreign bribery was criminalised.[41] As shown in

[38] Pursuant to Article 41-1-2 of the French CCP, as amended by Law n°2018-898 of 23 October 2018, the *CJIP* can be used to resolve allegations of the following offences: active and passive domestic, foreign and private-to-private bribery, active and passive trading in influence, tax fraud and related money laundering.

39 Crime and Courts Act 2013 Schedule 17 Part 2.

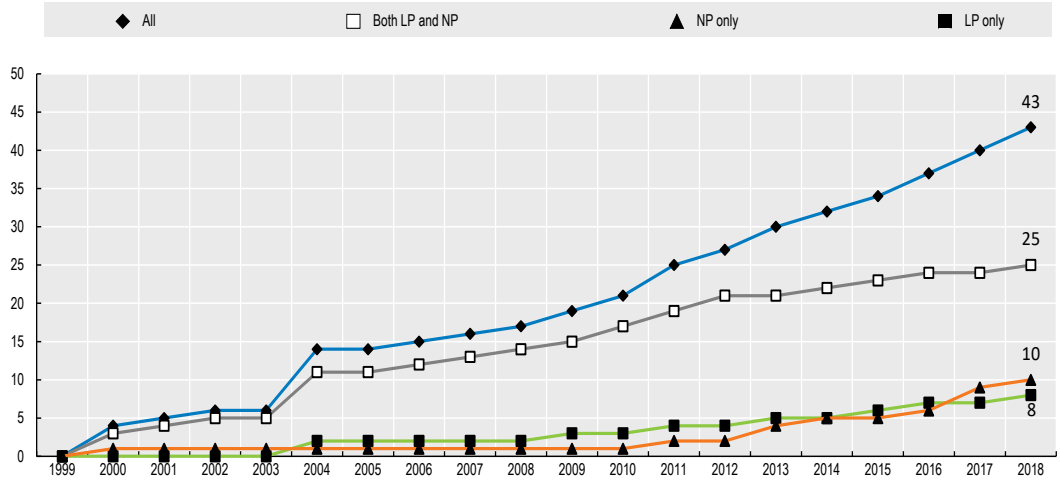
40 Peter J.P. Tak, The Dutch Criminal Justice System: Organization and operation (Wetenschappelijk Onderzoek – en Documentatiecentrum, Den Haag, 1999).

[41] For common-law examples, the **United Kingdom** and the **United States** have made extensive use of *Plea Agreements* since at least the mid-1880s. See Albert Alschuler, "Plea bargaining and its history," 79 Columb. L. Rev. 1, 5-6 (1979). For civil-law examples, Germany appears to have adopted its Penal Order procedure in 1879, while Spain adopted its Conformidad procedure in 1882. See Günter Plath, Expert Report on the "Permissibility of the Penal Order procedure under Federal Code of Criminal Procedure § 407" (1 Sept. 2011); Spain's Ley de Enjuiciamiento Criminal de 14 de septiembre de 1882 (3rd edition, 1899), article 655.

Figure 9, the Parties have also adopted a considerable number of additional non-trial resolutions since the Convention entered into force on 15 February 1999. In many cases, these newer non-trial resolutions were expressly designed to be used for complex economic crimes, such as foreign bribery (e.g. **France**'s *CJIP*) or **Argentina**'s *Effective Cooperation Agreement*).

In large part, this trend has been traced to a desire to improve judicial economy in an effort to address increasing caseloads both to combat crime and to reduce backlogs undermining the right to a speedy trial.[42]

Figure 9. Cumulative total of non-trial resolution systems adopted after Convention's entry into force



Note: This graph reflects the date when each resolution mechanism entered into force, if known; otherwise, it reflects the date when the legislation or policy creating the resolution was enacted or adopted.
Source: Secretariat research.

One of the most striking trends over time is the growth in the number of resolutions available exclusively for legal persons. Before 2000, it appears no Party had adopted a non-trial resolution system exclusively designed for legal persons. In 2000, the **United Kingdom** created the *Administrative Order* under the Financial Services and Markets Act.[43] Since 2010, however, at least six Parties to the Convention have all adopted at least one non-trial resolution system for legal persons: **Argentina** (*Effective Cooperation Agreement* and *Penalty Exemption*), **Brazil** (*Leniency Agreements*), **Canada** (Remediation

42 See Françoise Tulkens, "Negotiated Justice," in European Criminal Procedures 641, 662 (eds., M. Delmas-Marty & J.R. Spencer, 2002) (observing that the 1987 Council of Europe Recommendation R(87)18 "expressly recommend[ed] the guilty plea procedure with a view to accelerating justice"); see also Maximo Langer, "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure," 45 Harv. Int'l L.J. 1 (2004).

43 While it is not clear that such orders have been used to penalise foreign bribery *per se*, the UK Financial Conduct Authority has used this resolution to sanction companies for failing to establish or implement procedures for preventing foreign bribery. See United Kingdom Phase 4 Report, para. 68 (citing FCA sanctions imposed on Besso Ltd. And JLT Speciality in cases related to foreign bribery).

Agreement) **France** (*CJIP*), the **United Kingdom** (*DPA*), and the **United States** (*Declination with Disgorgement* instituted by the DOJ under its FCPA Corporate Enforcement Policy).

Significantly, 9 of the 11 non-trial resolution systems (approximately 82%) expressly designed for legal persons do not result in a conviction. These include **France**'s *CJIP*, **Brazil**'s *Leniency Agreement*, the **United Kingdom**'s *DPA*, and the **United States**' policy favouring *declinations with disgorgement* when companies self-report and meet other criteria in criminal matters. Only **Argentina** has adopted non-trial resolution systems exclusively for legal persons that result in a conviction, namely: the *Effective Cooperation Agreement* and the *Penalty Exemption*.

Such choices may affect the frequency in which the non-trial resolutions are used. Table 1 compares the average length of time that elapsed between the time when non-trial resolution systems became available and when they were first applied in a foreign bribery case. Whereas resolutions available to legal persons were used on average just under six years after the date they became available for foreign bribery, it took just over eight years on average before resolutions for natural persons were used for foreign bribery. This suggests that legal persons may be more likely to use non-trial resolutions than natural persons. Legal persons, however, appear to be more reluctant than natural persons to use non-trial resolutions resulting in a conviction. For legal persons, resolutions without convictions were used on average roughly two earlier than those imposing a conviction. For natural persons, however, there was virtually no difference in the use of the two types of resolution. This may reflect the need for legal persons to avoid the collateral consequences of a conviction, most notably debarment from public procurement or ineligibility for certain public advantages. Incentives for alleged offenders to enter non-trial resolutions are further discussed in Chapter 3.3.

The pattern for legal persons held true even when limiting the sample to the 17 enforcing countries that have at least one non-trial resolutions system that imposes a conviction and at least one that does not impose a conviction. In that sample, the average time it took for a non-conviction system was 4.6 years, while it took 8.7 years on average before a foreign bribery resolution was concluded with a non-trial resolution imposing a conviction.[44] This finding also correlates with the fact discussed above that a smaller proportion of non-trial resolutions that impose sanctions with a conviction have actually been used than their non-conviction counterparts.

Table 1. Speed in which accused offenders resorted to available non-trial resolution systems once Convention entered into force

Average time from resolution systems' creation to first use in a foreign bribery case

Eligible offender	All non-trial resolutions*	Conviction	No conviction
Legal Persons	5.7 years	7.4 years	5.3 years
Natural Persons	8.395 years	8.409 years	8.362 years

Note: This table only reflects the 25 resolution systems available to legal persons and the 14 systems available to natural persons that are known to have been used to resolve a foreign bribery case.
Source: OECD database of concluded foreign bribery cases, plus supplemental research by the OECD Secretariat.

[44] There were not enough enforcing countries with both conviction and non-conviction resolution options for natural persons to run a similar test.

Some possible explanations from the perspective of natural persons might be that resolutions without conviction may still impose a stigma that is perceived as being less tolerable than that associated with legal persons. It may also be the case that the sanctions imposed on natural persons are perceived as being more burdensome than for legal persons again without regard to whether the resolution results in a conviction. Finally, the risk of imprisonment, which for natural persons would be the main consequential difference between resolutions with or without conviction, may have less of an impact in legal systems that have the option of suspending custodial sentences for economic crimes.

1.3.3. Recent developments in the use of non-trial resolutions

The availability of non-trial resolutions has had a clear influence on how the Parties to the Convention have enforced their laws criminalising foreign bribery. The vast majority of the Working Group on Bribery enforcing countries (15 of 23) have relied on non-trial resolutions in some fashion to enforce their foreign bribery laws. This includes 7 enforcing countries (30%) that have exclusively used non-trial resolutions to handle their concluded foreign bribery cases: **Australia**, **Brazil**, **Chile**, **Israel**, the **Netherlands**, **Spain, and Switzerland.** Collectively, these countries have concluded 40 separate resolutions (4% of the 890 resolutions in the OECD database of concluded foreign bribery cases). Eight enforcing countries (35%) have used a combination of trial and non-trial resolutions to conclude 769 resolutions, representing 86% of total resolutions: **Canada**, **France**, **Germany**, **Italy**, **Norway**, **Sweden**, the **United Kingdom**, and the **United States**.

Among the countries that have relied on both trial and non-trial resolutions, the vast majority of their resolutions were, on average, concluded through non-trial resolutions. **France** was the jurisdiction least likely to conclude a foreign bribery matter without trial, concluding only 2 of 18 resolutions (11%) through some type of non-trial resolution, including its 2018 *CJIP* with ***Société Générale***. At the other end, **Italy** was the most likely to resort to a non-trial resolution, having reportedly concluded 20 of 21 foreign bribery resolutions (approx. 95%) through its *Patteggiamento* procedure. The **United States** also concluded over 96% of its foreign bribery matters through some form of non-trial resolution, including *Plea Agreement*, *Non-Prosecution Agreement (NPA)*, *Deferred Prosecution Agreement (DPA)*, and *Declinations with Disgorgement*. With this background in mind, this section of the Study will examine some of the ways in which non-trial resolutions have shaped the countries Party to the Convention' foreign bribery enforcement efforts.

Finally, certain countries have enforced their foreign bribery laws exclusively by trial. According to the OECD database of concluded foreign bribery cases, 8 of the 23 enforcing countries (35%) have only sanctioned foreign bribery following a conviction at trial: **Austria**, **Belgium**, **Bulgaria**, **Hungary**, **Japan**, **Korea**, **Luxembourg**, and **Poland**. Collectively, these countries have imposed sanctions in 81 of the 890 resolutions (9%) across all countries Party to the Convention. Three of these countries (**Austria**, **Belgium**, and **Hungary**) have forms of non-trial resolutions that could be applied in foreign bribery cases for natural and, at least in the case of Austria, legal persons.

Countries whose first foreign bribery resolution was a non-trial resolution

In certain Parties to the Convention, non-trial resolutions provided the means to obtain the first-ever foreign bribery resolution. The **Netherlands** did not enforce its foreign bribery offence against natural or legal persons for more than 11 years after the Convention entered

into force for the country.[45] In late December 2012, Dutch prosecutors concluded an out-of-court *Transaction* in the ***Ballast Nedam case***. As part of the resolution, the corporate group agreed to pay EUR 5 million and to abandon a tax claim worth EUR 12.5 million. Within a year, the Netherlands had also reached a resolution with Ballast Nedam's auditors, KPMG. The Dutch Public Prosecution Service found that the audit by KPMG had been carried out deliberately in a way that made it possible for Ballast Nedam to conceal the payments to foreign agents and the corresponding shadow administration. KPMG agreed to pay EUR 7 million in fines and confiscation. Furthermore, KPMG committed to strengthen its anti-corruption compliance programme, subject to the supervision of the Netherlands' Authority for the Financial Markets (AFM). In November 2014, the **Netherlands** concluded a third resolution with SBM Offshore N.V. (***SBM Offshore case***). As a result, SBM agreed to pay USD 240 million, including a USD 40 million fine plus USD 200 million in confiscation. [46]

In October 2016, **Brazil** first imposed sanctions in connection with the bribery of foreign public officials when it concluded a *Leniency Agreement* with Embraer, a Brazilian aerospace and defence company (***Embraer case***). The company also simultaneously concluded resolutions with US authorities concerning the same matter. This resulted in a combined sanction of USD 205 million for alleged bribery of foreign public officials in several countries. The Brazilian portion was BRL 64 million (USD 20.5 million). This primarily reflected BRL 58 million in disgorgement, plus a fine of BRL 6 million. This resolution constituted a major accomplishment given that Brazil only adopted its Corporate Liability Law in 2013 in order to create administrative liability for foreign bribery and other corruption offences.

Likewise, **Israel**'s first foreign bribery conviction came through a *Plea Agreement* in the ***Nikuv case***. In December 2016, Nikuv International Projects Ltd pleaded guilty to the bribery of a foreign public official in order to obtain contracts to produce identification cards in an African country not party to the OECD Anti-Bribery Convention.[47] As part of the plea deal, the company agreed to pay NIS 4.5 million (USD 1.15 million) in fines and forfeiture. It also agreed to establish an anti-bribery compliance programme. Perhaps most significantly, the company agreed that it and its relevant officers and employees would cooperate in the investigation and prosecution of any officials in Lesotho. In exchange, Israel agreed to not pursue charges against the Israeli natural persons concerned.

Chile's first foreign bribery resolution was also concluded through a non-trial resolution. In the ***Asfaltos case***, the prosecution resorted to the *Conditional Suspension of Proceedings* mechanism. After originally closing the case, Chilean authorities reopened the matter at the conclusion of the Phase 3 evaluation of Chile. Ultimately, both the company and its manager resolved the allegations with a *Conditional Suspension of Proceedings*. The company agreed to donate CLP 10 million (USD 13 500) to an educational centre. The commercial manager agreed in turn to make a donation of CLP 1 million (USD 1 300) and to keep the prosecution service informed of his place of residence.[48]

[45] Netherlands Phase 3 Report , para. 44 ("As of the time of this report, there have been no finalised foreign bribery cases in the Netherlands.").

[46] Netherlands Phase 3 Written Follow-up Report.

[47] "In first, Israeli company convicted of bribing foreign official," Times of Israel (15 Dec. 2016).

[48] Chile Phase 3 Follow-up Report, page 49.

Countries whose foreign bribery resolutions are exclusively non-trial resolutions

In some countries, non-trial resolutions have (so far) provided the only means for imposing liability for foreign bribery offences. **Israel**'s only other concluded case connected with a foreign bribery scheme was resolved in January 2018 through a *Conditional Agreement* reached with Teva, Israel's biggest company and one of the world's largest generic pharmaceutical companies ***(Teva case)***. As a result of this agreement, the prosecution agreed not to prosecute the company for false accounting in violation of Israel's Securities Law in exchange for a payment of NIS 75 million (then USD 22 million). The prosecutors concluded that it would be in the public interest to conclude this non-trial resolution given that, *inter alia*, the company had already paid USD 519 million to authorities in the United States to resolve related FCPA charges. [49]

For its part, **Spain** recently recorded its first convictions for foreign bribery when two natural persons plead guilty in a 2017 case involving a publishing company's efforts to obtain contracts by bribing the Minister of Education in Equatorial Guinea. The company was not charged because the offence took place before Spain had adopted its new criminal corporate liability regime.[50]

In certain other countries, non-trial resolutions constitute the exclusive means by which companies have been sanctioned for foreign bribery, even though natural persons have been convicted at trial. This is the case in **Norway**, which has sanctioned four companies in cases involving foreign bribery.[51] In contrast, Norconsult, the only company to contest foreign bribery allegations at trial, was ultimately acquitted by the Supreme Court in 2013 on the grounds that certain fact-specific considerations made it inappropriate to convict and punish the entity.[52]

Countries whose non-trial resolutions enhanced their foreign bribery enforcement record

In Parties to the Convention, non-trial resolutions have prompted larger (or more frequent) resolutions than those available in the past. **France** recently employed a new form of non-trial resolution, the *CJIP*, in a foreign bribery case. The *CJIP*, which was enacted in December 2016, notably does not entail a conviction, unlike France's older non-trial resolution system, the *Comparution sur reconnaissance préalable de culpabilité* (*CPRC*). The CRPC has not yet been used in a foreign bribery case for a legal person. In June 2018, a judge validated France's first *CJIP* concerning a foreign bribery matter in the ***Société Générale case***.[53] In the **United States**, the DOJ concomitantly announced that it had reached separate non-trial resolutions with Société Générale S.A. and its subsidiary SGA Société Générale concerning foreign bribery. In total, Société Générale agreed to pay

[49] The Foreign Corrupt Practices Act of 1977 (15 U.S.C. §§ 78dd-1, et seq.)

[50] Raquel Flórez, Client Update, "Spain's first foreign bribery convictions: a watershed moment?", Freshfields Bruckhaus Deringer (9 Mar. 2017).

[51] In the Statoil case, Norway resolved the foreign bribery allegations through an Optional Penalty Writ predicated on trading in influence. The United States also sanctioned the matter as an FCPA violation.

[52] See Norway Phase 4 report at paras. 16 & 149-151.

[53] French National Prosecutor's Office for Financial Crime, Press Release (4 June 2018).

USD 585 million criminal penalty of which USD 500°000 is to be paid as a criminal fine on behalf of its subsidiary, SGA Société Générale. In addition, half of the amount of the fine was credited to the French authorities. In France, Société Générale signed the first *CJIP* ever reached in a foreign bribery case in May 2018. As part of the resolution, Société Générale agreed to pay in total USD 292.8 million (EUR 250.15 million) to the French Treasury, equal to 50 percent of the total criminal penalty otherwise payable to the U.S. authorities. In addition, the bank was subjected to a two-year monitorship under the supervision of the French Anti-Corruption Agency (AFA).

France's use of its new non-trial resolution system made headlines for a number of reasons. First, the monetary penalties imposed on Société Générale dramatically exceeded what had been imposed under previous foreign bribery cases following conviction at trial.[54] Second, France's new *CJIP* resolution system appeared to have facilitated the first coordinated resolution between French authorities and the DOJ. Third, the *Société Générale case* marked the first time that French authorities had required a company to undergo a monitorship following a resolution of foreign bribery cases.[55] Finally, although this was the first *CJIP* for foreign bribery, it was the fifth *CJIP* that had been concluded since the resolution system became available on 1 June 2107. This suggests that the *CJIP* is seen as an attractive mechanism for resolving complex economic crimes.

1.3.4. Recent developments in adopting non-trial resolutions

The countries Party to the Convention continue to expand the number of non-trial resolutions available for foreign bribery cases. **Australia** and **Canada** have conducted in-depth public consultations on whether to adopt *DPA*-like resolutions to encourage companies to detect and report offences (the legislative initiatives undertaken by those two countries are further discussed below). Significantly, both countries expressly linked their consideration of these new resolution systems to other countries' experience with similar tools, such as **Brazil**, **France**, the **United Kingdom** and the **United States**.[56] Some countries Party to the OECD Anti-Bribery Convention report that they have provided insights about their non-trial resolution systems to other Working Group countries developing their own systems. This shows that countries Party to the Convention are continuing to harmonise their legal frameworks, in part to help enable effective cooperation in complex foreign bribery cases.[57] **Switzerland** is also considering adopting a DPA scheme. In November 2018, the Attorney General called for the government to amend the criminal code to introduce DPAs to help prosecutors hold companies accountable for economic wrongdoing. The Ministry of Justice began considering whether to introduce

[54] In 2018, the Cour de Cassation upheld the conviction of Total S.A. for unlawful payments made to Iraq in the context of the Oil-for-Food scandal. Total was ordered to pay a EUR 750 000 fine. In the same case, the Vital was also obliged to pay EUR 300 000 for its conduct in the Oil-for-Food scandal.

[55] The authority in charge of monitoring is the French Anti-Corruption Agency (AFA), which was created by the same law that introduced the CJIP (Law n°2016-1691 of 9 December 2016).

[56] See, e.g. Press release by Michael Keenan, Australian Minister for Justice, "New tools to tackle white-collar crime" (31 Mar. 2017); Government of Canada, "Expanding Canada's Toolkit to Address Corporate Wrongdoing: Discussion paper for public consultation" (Sept. 2017) at page 5.

[57] See, e.g. Australian Attorney-General's Department, Public Consultation Paper, "A proposed model for a Deferred Prosecution Agreement scheme in Australia (Mar. 2017).

DPAs in March 2018, and the matter is expected to be discussed by Switzerland's parliament in 2019.[58] Finally, in 2016, Japan adopted amendments to its Criminal Code introducing a new non-trial resolution system, available for both legal and natural persons.[59] This system, called *Agreement Procedure*, became available in June 2018 and is further discussed in Chapter 2.6.

Australia is considering a new Deferred Prosecution Agreement regime

On 6 December 2017, the Australian government introduced legislation that would, *inter alia*, amend the Director of Public Prosecutions Act 1983 in order to establish a *DPA* scheme.[60] This legislation was developed after two separate public consultations between 2016 and 2017. Since then the proposed amendments have been undergoing examination by different Senate committees. In parallel, the Attorney-General's Department prepared a draft Code of Practice to explain how the *DPA* would work, if adopted.

The explanatory memorandum accompanying the proposed amendment explains that the *DPA* was proposed in part to help make it easier to detect and investigate complex corporate crime, including foreign bribery. It observed that such investigations often involve massive amounts of documents and data, disputes over legal privilege, and the difficulties of obtaining evidence overseas through MLA.[61] Given its focus on fighting economic crime and improving corporate culture, the proposed Australian *DPA* regime is only intended to be available to corporations for specified economic offences.[62] As currently proposed, the Australian *DPA* would require the company to admit to facts detailing the misconduct, pay a financial penalty. In addition, the *DPA* may impose other terms, such as for example, requiring the company to disgorge any ill-gotten profits or other benefits obtained from the offence, to compensate victims, to adopt or strengthen a corporate compliance programme, to cooperate in the investigation of company executives or other individuals implicated in the wrongdoing, or even to pay the reasonable costs that the Commonwealth incurred in negotiating the *DPA*.[63]

In terms of oversight, the Australian legislation foresees that no *DPA* would go into effect until an appointed former judicial officer (called an "approving officer") has determined that the *DPA* is fair, reasonable, proportionate, and in the interests of justice. Furthermore,

[58] See GIR, Swiss Attorney General calls for DPAs, Waithera Junghae, 21 November 2018, and GIR Switzerland favours US-style DPAs, Emily Casswell, 25 May 2018

[59] Act no. 54 of 2016 (Act to Amend Parts of Criminal Procedure Code and Other Acts). Code of Criminal Procedure (CCP), art. 350-2 – 350-15.

[60] The draft Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 also contains proposed amendments to Australia's substantive criminal law concerning the elements of the foreign bribery offence and to create a new offence for a corporate body to fail to prevent foreign bribery by an associate.

[61] See Explanatory Memorandum to Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, para. 2.

[62] See Explanatory Memorandum to Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, paras. 2 & 11.

[63] See draft Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, Schedule 2, Sections 17C(1) & (2); see also Explanatory Memorandum to Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, para. 12.

the Commonwealth Director of Public Prosecutions must conclude that the *DPA* is in the public interest before the *DPA* is submitted to the approving officer for consideration. If the *DPA* is concluded, no criminal proceedings would be instituted against the company in either federal court or in a court of any State or Territory concerning the offence(s) specified in the agreement unless the company materially breaches the *DPA* or obtained it on the basis of information that it knew or should have known was inaccurate, incomplete or misleading.[64]

In general, the *DPA* would be published on the website, but the Director may, if appropriate, decide to publish a redacted version without the name of the company or other material, or to not publish the *DPA* at all. This could be done, for example, in order to avoid prejudicing a pending investigation or trial or to otherwise advance the interests of justice. If the *DPA* is materially breached, then the prosecution would have the right to initiate prosecution or to seek to vary the terms of the *DPA.* Any variation would need to be approved by the approving officer applying the same standard used to approve the initial *DPA*.[65]

Documents (except for the *DPA* itself) indicating that a company is or was party to a *DPA* or sought to negotiate a *DPA* cannot be admitted as evidence against it. Any documents (again other than the *DPA* itself) prepared solely for the purpose of negotiating the *DPA* would also as a general rule not be admissible into evidence. Those evidentiary restrictions would not apply if criminal proceedings are initiated after a company materially breaches the *DPA* or if the company gave inconsistent evidence or testimony in another criminal or civil proceeding. The agreed facts contained in a *DPA* can also be used for proceedings under the Proceeds of Crime Act 2002 following any criminal proceedings that may be started after a material breach.[66]

Canada has developed its own DPA regime following a public consultation

In **Canada,** the government introduced legislative amendments in the Budget Implementation Act 2018 to create a new non-trial resolution system, referred to as a "Remediation Agreement Regime". After receiving Royal Assent in June 2018, the amendments went into force on 19 September 2018. This new system resembles the DPAs found in the **United Kingdom** and the **United States** in so far as it provides companies[67] with a way to report and resolve specified economic crimes, such as foreign bribery, without receiving a conviction. According to the government of Canada, the introduction of Remediation Agreements will provide prosecutors with more flexibility to hold companies accountable without triggering the collateral consequences of a formal conviction, which can harm innocent third parties such as employees or shareholders. It

[64] See Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, Schedule 2, Sections 17A(1)-(3); see also Explanatory Memorandum to Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, para. 13.

[65] See Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, Schedule 2, Sections 17D(8) & (9), 17F.

[66] See Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, Schedule 2, Sections 17H(1), (3). & (5).

[67] Technically, the Remediation Agreement regime is applicable to all organisations as defined under Section 2 of the Criminal Code, with the exception of public bodies, trade unions and municipalities. See Budget Implementation Bill 2018, Act C-74, Section 715.3(1).

also expects that they will serve as a means of strengthening corporate compliance measures.[68]

In the fall of 2017, **Canada** had conducted a public consultation on corporate wrongdoing seeking input on the introduction of a Canadian version of the DPA. The consultation also sought views on the overall effectiveness of Canada's "Integrity Regime", which was adopted in 2015, to ensure that ethical companies obtain government contracts and public benefits awarded by Public Services and Procurement Canada.[69] During the consultation, the government met with over 370 participants and more than 70 written submissions from businesses, non-governmental organizations, individuals and the legal profession.[70] The majority of participants supported the adoption of a DPA regime, mainly to encourage self-reporting and to promote compliance and rehabilitation.[71] (The Canadian Remediation Agreement is further discussed in Chapter 2.2.)

1.4. Resolutions have enabled the coordinated resolution of large multi-jurisdictional cases

International cooperation among jurisdictions has advanced a great deal over time. The vast majority of foreign bribery cases involve some level of international cooperation among prosecuting authorities at the investigatory stage, and as this Study highlights, non-trial resolutions are also increasingly coordinated across jurisdictions. When circumstances allow for multi-jurisdictional non-trial resolutions, all stakeholders tend to benefit from the finality of the resolution with the cooperating jurisdictions. Finality of a multi-jurisdictional resolution often helps: (1) create efficiency for multiple prosecuting authorities that can allocate resources to other matters, (2) provide greater certainty for defendants based on the agreements in which they enter, (3) ensure that all criminal conduct can be addressed even if it occurred in several jurisdictions beyond the reach of any one enforcement agency, and (4) fairly distribute any compensation, fines, disgorgement, or other penalties among the participating jurisdictions.

For prosecuting authorities, assistance in the investigatory stage often leads to coordinated multi-jurisdictional resolutions. Indeed, all of the case summaries in Box 2 involved prosecuting authorities sharing information with one another. At the investigatory stage, international cooperation is often a two-way street: prosecuting authorities and law enforcement both receive and provide assistance to one another. Such assistance is often "formally" requested and executed pursuant to a bilateral treaty, such as a Mutual Legal Assistance Treaty (MLAT), or multilateral treaties, such as the United Nations Convention against Corruption. In 2017, the DOJ announced that, since 2012, there has been "an increase of 147% in the number of annual requests from foreign counterparts seeking US-

[68] Public Services and Procurement Canada, News Release, "Canada to enhance its toolkit to address corporate wrongdoing" (27 March 2018).

[69] Mark Morrison, Michael Dixon & Liam Kelley, "Another Step Forward: Canada Announces Impending DPA Legislation and Further Integrity Regime Amendments," Blakes Client Alert Bulletin (27 Feb. 2018).

[70] Department of Justice Canada, Backgrounder, "Remediation Agreements and Orders to Address Corporate Crime" (27 March 2018).

[71] Government of Canada, Summary of Public Consultation, "Expanding Canada's toolkit to address corporate wrongdoing: What we heard" (22 Feb. 2018).

based evidence to support foreign bribery and corruption investigations."[72] Law enforcement authorities and prosecutors also exchange information on an "informal" or police-to-police/prosecutor-to-prosecutor level, which may take place before, during, after, or absent a formal request. In sharing information with one another, prosecuting authorities and law enforcement better understand the facts surrounding a case, and often have the opportunity to consider the potential for a multi-jurisdictional resolution.

As discussed in Chapter 6.3, the challenges inherent in coordinated multi-jurisdictional resolutions generally arise from the fact that authorities involved in the resolution work within their own respective domestic legal and institutional framework. Also, these authorities may reach different conclusions about various aspects of a case. For example, one country may determine that a monitor/other form of independent oversight is necessary, while another does not, as was the case in the ***Rolls-Royce*** and ***Société Générale cases***. In contrast, in the ***Odebrecht case***, both the **United States** and **Brazil** required independent monitors. Indeed, multi-jurisdictional resolutions are often able to proceed even when there are differences among jurisdictions, as evidenced in the list of cases in Box 2.

As noted by many commentators in media reports and academic analysis, the last decade has seen a steady increase in the use of coordinated multi-jurisdictional non-trial resolutions. These resolutions sometimes involve up to three Parties to the Convention (as illustrated in the case summaries in Annex B). Starting with the 2008 ***Siemens AG*** non-trial resolution coordinated between the United States and Germany, a number of coordinated multi-jurisdictional non-trial resolutions has followed at a pace that has increased exponentially since 2016. This trend is likely to continue, especially as countries continue to cooperate in the investigatory stages, strengthen their anti-corruption laws, and prioritize prosecutions of foreign bribery. Coordinated multi-jurisdictional resolutions have often proven to be an advantageous way to resolve cases for both prosecuting authorities and defendants for some of the following reasons:

- Perhaps most significantly, the various jurisdictions involved in a global resolution will take into account the sanctions imposed by other jurisdictions, thus reducing the risk that a defendant will be unfairly subjected to penalties disproportionate to the conduct in question. For example, (1) in the ***Siemens*** resolution, the **US** and **German** authorities gave consideration to the amounts the company would pay in both jurisdictions in reaching a global resolution; (2) in the ***Odebrecht*** resolution, the company and the **United States**, **Brazil**, and **Switzerland** agreed on the distribution of the penalties to the various jurisdictions; (3) in the ***VimpelCom*** resolution, the **Dutch** and **US** authorities agreed to impose equal fines, based on the circumstances of the case; (4) in the ***Standard Bank*** resolution, the **UK** court that approved the *DPA* took into account the fact that the terms of the proposed UK DPA were brought to the attention of the SEC and that, as a result, the SEC had announced its intention to impose a civil fine of USD 4.2 million for separate but related conduct. In turn, the **US** SEC took into consideration the proposed disgorgement figure in the UK DPA when imposing the civil fine; and (5) in the ***Rolls-Royce*** resolution, the DOJ credited the USD 25.5 million paid to **Brazil**

[72] Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General Trevor N. McFadden Speaks at American Conference Institute's 7th Brazil Summit on Anti-Corruption American Conference Institute's 7th Brazil Summit on Anti-Corruption (May 24, 2017) (Also from 2012 to 2017, there was "a 75% increase in the number of annual requests for foreign evidence made in support of U.S. prosecutors conducting FCPA and corruption investigations.").

aspart of a parallel resolution because the conduct underlying the resolutions overlapped.

- In the context of a multi-jurisdictional resolution, prosecuting authorities can work to more fairly sanction defendants for conduct that most squarely fits within their jurisdictional reach. For example, in the ***Rolls-Royce case***, the **United States**, **UK**, and **Brazil** worked together to determine which authority was best placed to investigate and prosecute the various schemes involved.
- Defendants often agree to provide continuing cooperation both in the jurisdictions involved in a global resolution, as well as to other foreign authorities. For example, ***Odebrecht***, ***Rolls-Royce***, ***Siemens***, and ***VimpelCom*** agreed to cooperate with foreign authorities as part of their respective resolutions.
- Prosecuting authorities may agree not to prosecute certain conduct, leading to a more predictable outcome for all parties. For example, in the ***Standard Bank case***, the DOJ decided not to bring a separate action against the bank when the UK DPA covered the relevant conduct and appropriately sanctioned the bank. In the ***Rolls-Royce case,*** the **United States** and **United Kingdom** agreed not to prosecute **Rolls-Royce** for additional conduct pre-dating the respective resolutions and arising from the currently opened investigations into Airbus and Unaoil.
- Depending on the breadth of the conduct at issue and the prosecuting authorities involved, a multi-jurisdictional resolution can put an end to all jurisdictions investigating the conduct. However, as explained in Chapter 6.3, this may not always be the case.

Box 1. Good Practices in Coordinated Multi-Jurisdictional Resolutions

1. Cooperate early: prosecuting authorities that learn about conduct that may be prosecuted in multiple jurisdictions should consider sharing information early in order to better understand the facts, as well as to consider whether a global resolution is possible.
2. Determine what issues must be addressed if a multi-jurisdictional resolution is possible: e.g. an efficient method for information sharing, the jurisdictions best suited to prosecute certain conduct, the necessity for a defendant's continuing cooperation in other jurisdictions, how the terms of a resolution in one country may impact other jurisdictions, whether a monitor is necessary, whether a jurisdiction may agree not to prosecute a defendant under certain circumstances, and the timing of releasing information publicly.
3. Prioritise fairness: consider the sanctions imposed by other jurisdictions when determining any penalties and fines.

Box 2. Significant coordinated resolutions in large multi-jurisdictional cases

Odebrecht – To date, ***Odebrecht*** is the largest ever foreign bribery resolution. The investigation began in **Brazil**, which shared information with the **United States** and **Switzerland** early in the investigation. Information sharing was a key component in allowing the countries to reach coordinated resolutions with the company, which ultimately agreed to pay a criminal penalty of USD 2.6 billion. The **United States** and **Switzerland** received 10% each of the total criminal penalty and **Brazil** received the remaining 80%. In addition, Braskem S.A., an Odebrecht subsidiary, agreed to pay a criminal penalty of approximately USD 632 million and disgorgement of USD 325 million. The **United States** and **Switzerland** received 15% each of the criminal penalty and **Brazil** received the remaining 70%. Each of the three jurisdictions considered the fines that would be paid to other jurisdictions. For example, in the plea agreement with the US DOJ, the **United States** agreed to credit the amount of the fines and confiscation that Odebrecht S.A. would pay to **Brazilian** and **Swiss** authorities. Furthermore, Odebrecht agreed to cooperate with other foreign authorities, although the specifics of such cooperation are detailed in the respective resolution agreements. Finally, Odebrecht agreed to be subject to an independent monitor in **Brazil** and a separate monitor in the **United States**.

***Rolls-Royce* –** This case resulted in a coordinated global resolution with the SFO and the US DOJ, and another coordinated resolution between the US DOJ and the Brazilian Federal Prosecution Service (FPS). Generally, the **United Kingdom** and **United States** were prosecuting different conduct, and the **United States** and **Brazil** were prosecuting similar conduct. Although the three authorities learned about the company's conduct in different ways, the jurisdictions worked together at an early stage to determine which authority was best placed to investigate the conduct involved, which facilitated the multi-jurisdictional resolution. As part of its resolution with the U.S. DOJ, Rolls-Royce committed to cooperate with foreign states. Although the resolutions were coordinated, the three jurisdictions took varying approaches in their final agreements. For example, in the **United Kingdom,** the company received credit for cooperation despite its failure to self-report. The Court ultimately granted a 50% reduction based on the "extraordinary" level of cooperation provided by Rolls-Royce and the fact that the conduct Rolls-Royce ultimately reported was "far more extensive" (and of a different order) than what may have been uncovered without the cooperation. In the **United States,** the DOJ granted a 25% reduction in the context of its separate DPA, taking into account the lack of self-reporting.[73]

While Rolls-Royce agreed to corporate independent oversight and reporting in the **United Kingdom**, the US DOJ did not include a similar requirement. The DOJ credited the USD 25.5 million paid to **Brazil** as part of a parallel resolution because the conduct underlying the resolutions overlapped. With some exceptions, the **United States** and the **United Kingdom** agreed not to prosecute Rolls-Royce for additional conduct pre-dating the respective resolutions and arising from the currently opened investigations into Airbus and Unaoil.

Siemens – The ***Siemens*** case was the first coordinated resolution between two Parties to the Anti-Bribery Convention. In 2006, the **German** authorities commenced an investigation into Siemens AG and its employees for possible foreign bribery and

[73] Different rules apply to the calculation of fines in the United States and United Kingdom. Under the UK sentencing guidelines, there is no clear mechanism to penalise a lack of a full self-report.

falsification of corporate books and records. Shortly thereafter, Siemens AG disclosed potential FCPA violations to the DOJ and SEC, which closely cooperated with **German** authorities. Siemens resolved the matter with combined penalties of more than USD 1.6 billion in 2008. The **United States** and **Germany** simultaneously announced the sentences. As part of its guilty plea, Siemens AG agreed to continue fully cooperating with the DOJ, the **German** and other foreign authorities in their ongoing investigations. When determining the level of the fine, both authorities took into account the expected substantial punishment to be imposed by one another.

Société Générale – In 2018, the Société Générale reached a parallel resolution with the French Parquet National Financier and the DOJ in the first coordinated resolution by these authorities in a foreign bribery case. **France** and the **United States** began sharing information during the investigative stage and ultimately allowed for a faster resolution of the case. The authorities shared evidence from their parallel investigations and reached a coordinated resolution with Société Générale. The **United States**-**French** cooperation reportedly involved daily contacts between the authorities during negotiations. As part of the **French** resolution, Société Générale agreed to be subject to a two-year corporate monitor by the **French** Anti-Corruption Authority (AFA). The US authorities did not impose a monitor, but the company agreed to self-report to the DOJ for 3 years.

Standard Bank – In November 2015, a UK court approved a DPA between the SFO and Standard Bank. The company agreed to pay a fine of USD 16.8 million and USD 8.4 million to disgorge profits. Standard Bank was also required to cooperate with any other agency or authority, domestic or foreign in related investigations. Significantly, **United Kingdom** authorities consulted with their **United States** counterparts and ultimately, the DOJ agreed to take no action to the extent that the conduct would be captured in the UK DPA and that appropriate sanctions be imposed. The SEC imposed a civil penalty of USD 4.2 million with regard to conduct not covered in the UK DPA. The SEC took into consideration the proposed disgorgement figure in the UK DPA when imposing the civil fine. In turn, the UK court that approved the DPA took into account the fact that the terms of the proposed UK DPA was brought to the attention of the SEC and that, as a result, the SEC had announced its intention to impose a civil fine of USD 4.2 million for separate but related conduct when approving the final terms of the DPA. In addition, the **United Kingdom** consulted with the Tanzanian authorities who also had potential jurisdiction over domestic corruption. Tanzania agreed that the SFO would take the lead on the basis that the SFO could sanction the conduct and obtain compensation for Tanzania.

VimpelCom – Between 2006 and 2012, VimpelCom, a **Dutch**-based telecommunications provider, together with its wholly-owned Uzbek subsidiary Unitel, conspired to pay over USD 114 million in bribes to an Uzbek government official. The VimpelCom bribery case is linked to the **Swedish** telecommunication provider Telia Company AB (formerly TeliaSonera AB), leading **Switzerland**, **Sweden**, and the **United States** to open investigations into VimpelCom, Telia, and a third telecom company. In February 2016, VimpelCom agreed to the terms of a global resolution with both the **Dutch** and the **US** authorities, whereby both jurisdictions agreed to impose equal fines. As part of the DPA, VimpelCom agreed to cooperate with foreign authorities and multilateral development banks (MDBs) in any investigation of the company, its subsidiaries or affiliates as well as its executives, employees and agents.

Source: Annex B.