

Prosecution of Foreign Companies and Foreign Individuals

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One of the more interesting trends in FCPA enforcement is the DOJ's willingness to prosecute foreign companies and individuals. Some may argue that DOJ needs to focus on US companies which engage in foreign bribery and leave the prosecution of foreign companies to foreign prosecutors in their respective countries. Foreign companies become even more concerned when it comes to the prosecution of foreign officers and employees who are required to serve prison time in US jails.

This is not a new phenomena. In the criminal antitrust world, foreign companies and individuals have been prosecuted in the United States since the 1990s and no one has raised any significant complaints. Some argued that US prosecutors had no business charging foreign companies and individuals for actions

outside the US, but courts uniformly rejected these arguments because global cartels have a direct impact on US consumers.

The argument is harder to make in the anti-corruption front. What exactly is the US interest in making sure that a foreign company does not bribe foreign officials? This is a troubling question when the foreign company's connection to the US may be limited to the use of US telephones, emails or other instrumentalities of commerce. DOJ has a better argument as to US interest in prohibiting foreign companies which are listed on US stock exchanges from engaging in foreign bribery because of the impact such conduct may have on US investors.

With the increasing global war against corruption, companies run the risk of multiple prosecutions by multiple countries. A plea agreement in the United States may require coordination of plea agreements in every other jurisdiction where a company can be prosecuted. The globalization of anti-corruption enforcement means that a company may be required to resolve cases in multiple countries. It is easy to imagine but hard to resolve how multiple prosecutions and plea agreements may work, especially where each country adopts different laws, standards and policies.

The globalization of anti-corruption enforcement has far-reaching implications, especially when it comes to criminal prosecution of individuals. How will China react when the US prosecutes its first Chinese national for foreign bribery in China on behalf of a US company?

Will China retaliate by prosecuting US individuals under its foreign bribery individual and making US officials serve jail time in Chinese prisons for foreign bribery which may occur outside China (or even inside China)?

Some countries have difficulty understanding how and why the US can prosecute foreign countries and individuals for bribery which occurs outside the United States. Eventually these countries may

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see a need to “retaliate” against the US’ lead role in prosecuting foreign bribery cases and initiate criminal prosecutions against US nationals in foreign courts.

If and when this happens, US politicians, law enforcement officials and businesses are certain to complain about these foreign prosecutions. Foreign governments may respond by saying what is “good for the goose is good for gander.”