1. Introduction

Abiola Makinwa and Tina Søreide

Around the turn of the millennium, the international development community, especially the World Bank, the United Nations and Transparency International, succeeded in the milestone accomplishment of criminalizing corruption worldwide. The United Nations Convention against Corruption of 2003 and other global and regional conventions were followed by reforms and implementation at the national level. This resulted in far more harmonized legislation and tougher sanctions in many countries, and citizens gained a clearer picture of how corruption damages society.

The stakeholders who advanced these anti-corruption conventions recognized the collusive character of corruption and the fact that such crime often involves international firms. Accordingly, they encouraged governments to criminalize not only corruption, but also foreign bribery. With vital support from the United States, the Organisation for Economic Co-operation and Development (OECD) achieved consensus among its members around the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Known as the Anti-Bribery Convention, it meant that nearly all the large exporters among OECD member countries could hold liable individuals and firms for bribes paid to public officials abroad.[1] The ensuing enforcement of foreign bribery law is a main theme of this volume.

For many governments, signing the conventions turned out to be far easier than executing them. Twenty years after the signing of the OECD Convention in 1997, a range of countries that loom large in terms of export had never applied the rule. A clear majority of the states parties to the Convention had fewer than five enforcement actions, although their markets hosted numerous firms with trade or investments in high-risk sectors of high-risk societies.[2] Even though the United States intensified its enforcement and applied universal jurisdiction – which meant that firms headquartered elsewhere would

[1] HEIMAN, FRITZ AND MARK PIETH. CONFRONTING CORRUPTION: PAST CONCERNS, PRESENT CHALLENGES, AND FUTURE STRATEGIES. Oxford University Press, 2017.

[2] The OECD Working Group on Bribery provides facts about cross-country variation in regulations and enforcement practices at the country level: http://www.oecd.org/corruption/oecdantibriberyconvention.htm.

have to comply with US regulations – many observers considered the foreign bribery legislation ineffective. Critics accused governments of refusing to hold 'their companies' responsible for bribery if it was found necessary to secure commercial benefits.[3] Several incidents that support such claims are mentioned in the comprehensive evaluation reports of the OECD Working Group on Bribery in International Business Transactions (WGB). Nonetheless, irrespective of political will in the countries, the phenomenon of business-related corruption remains difficult to combat through criminal law. Bribes are disguised as legitimate transactions, often buried in complex corporate structures and financial secrecy centres and thus well hidden from investigators. Victims cannot report the crime because they are unable to pinpoint the causes of government dysfunction and theft. Prosecutors who suspect corruption find it difficult if not impossible to prove the sort of guilt or negligence necessary for criminal prosecution.[4]

Facing the risk of de facto impunity for perpetrators, enforcement agencies sought pragmatic solutions. Especially in the United States, they started to apply new techniques, beginning around 2005. In particular, they sought to combine enforcement actions with a demand for a more compliant business culture, offering milder sanctions for corporate offenders that cooperate in investigations and demonstrate commitment to the international rules against corruption.

One of the first examples was the case against Siemens. Before its offices were raided in November 2006, the global engineering powerhouse had a solid reputation, respected for its technology and for, apparently, adhering to the highest ethical standards. But the company's façade of rectitude hid one of the largest business scandals ever discovered: it turned out that Siemens representatives had been using bribery as a business strategy all over the world. A decade later, after a range of enforcement cases involving other multinationals, the director of the United States Securities and Exchange Commission, Linda Thomsen, described the Siemens case as 'unprecedented in scale and geographic reach', with corruption involving 'more than $1.4 billion in bribes to government officials in Asia, Africa, Europe, the Middle East and the

[3] Dell, Gillian and Andrew McDevitt. Progress report 2018: Assessing enforcement of the OECD Anti-Bribery Convention. Transparency International Berlin, Sept. 2018.

[4] Søreide, Tina. Regulating Corruption in International Markets: Why Governments Introduce Laws they Fail to Enforce. In Eric Brousseau, Jean Michel Glachant and Jérôme Sgard (Eds) The Oxford Handbook on International Economic Governance and Market Regulation. Oxford University Press, 2019.

Americas'.[5] The Siemens employees involved in bribery knew the transactions were illegal and falsified corporate books to hide them. There was no sort of self-reporting that started the case, and when confronted by investigators, the top management team refused to admit the facts. After a year of negotiations with prosecutors, the case against the corporation was concluded with settlements in 2008. The company paid record-high fines to US and German authorities. It also promised to cooperate in ongoing investigations of corrupt payments, to implement and maintain a robust compliance programme, and to report its performance to the US Department of Justice.

Cases that resemble the Siemens story in several ways involve Alstom, Rolls-Royce and Odebrecht. However, there are now an increasing number of cases in which firms – unlike Siemens – have self-reported their bribery, cooperated from the start and negotiated settlements with hardly any fine payment at all, as in the case involving Ralph Lauren.[6] In a 2019 report on enforcement practices, the OECD Working Group on Bribery confirms that the use of new forms of non-trial enforcement in foreign bribery cases has increased sharply. Many member governments not only consider this practice to be more resource efficient than other approaches; they also find that it *drives* enforcement, because it encourages firms to self-report incidents of bribery and, as the report points out, 'increases the pace of enforcement investigations and ultimately the number of enforcement actions'.[7] Among the 23 states parties to the OECD Anti-Bribery Convention that have successfully concluded a foreign bribery action, 15 have offered one or more settlements to end cases at the pre-trial stage. According to TRACE, a non-profit anti-corruption organization, there has been a sharp increase in non-US investigations. As of 31 December 2018, there were 303 ongoing investigations, conducted by authorities in 36 countries, concerning alleged bribery of foreign officials. While the United States was conducting 107 of these investigations, European countries together accounted for 157, more than half the total. Countries in other regions made up the rest.[8]

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[5] 'Lessons from the massive Siemens corruption scandal one decade later', *The Conversation*, 13 December 2018: http://theconversation.com/lessons-from-the-massive-siemens-corruption-scandal-one-decade-later-108694.

[6] The United States Department of Justice provides facts about the bribery schemes and settlements in all these cases, although the settlements were coordinated with enforcement agencies in other countries as well; see https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.

[7] OECD. Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention. 2019, pp 17–24.

[8] TRACE. Global Enforcement Report 2018. TRACE International, 2019.

The spread of negotiated settlements brings into sharp focus a fragmented anti-corruption landscape. Seeking to understand this regulatory patchwork and map the evolving settlement practices in corruption cases, we conducted a survey under the auspices of the International Bar Association (IBA) among representatives of the legal community in 66 countries in all regions.[9] Across these 66 countries, we found important differences with respect to rule of law, the prosecutor's freedom to negotiate a settlement, and transparency. In some jurisdictions, a high level of prosecutorial discretion creates legal space for cooperation with the prosecutor. In other jurisdictions, principles of mandatory prosecution and legality reduce or eliminate such cooperation space. In some jurisdictions, corporate settlements occur even though the government has not formally introduced this enforcement mode, and therefore there are few guidelines on how to practise it. We also found differences in the legal hurdles to be overcome by the application of identification theories of criminal liability as contrasted with *respondeat superior* or other strict liability regimes. Furthermore, there are differences regarding the extent of judicial oversight, the requirements for a guilty plea or acknowledgment of guilt, double jeopardy rules and principles of corporate criminal liability. Added to this are new questions surrounding certification, as well as the growing demand from civil society that corporations must compensate victims of their corruption in the settlement process.

Varying jurisdictional approaches and requirements pose a challenge for corporations in international markets, as well as for enforcement agencies that depend on each other for efficient enforcement and that, increasingly, coordinate enforcement actions. One jurisdiction's predictable benefits for those who self-report incidents of corruption will have little effect on corporations' incentives to cooperate if other jurisdictions use that information to convict the firm of misconduct. A coordinated enforcement strategy is necessary for protecting firms against double jeopardy, yet it depends on some sort of consensus among jurisdictions around the main enforcement principles. With such aims in mind, the OECD WGB has tried to classify the different sorts of non-trial enforcement by distinguishing between five types of settlements:

> Form 1 results in the termination of an investigation without prosecution or in the termination of another enforcement action, subject to the fulfilment of specific conditions, notably disgorgement of profits. Form 2 leads to the suspension or deferral of a prosecution or other enforcement action, subject to the fulfilment of

[9] MAKINWA, A. O. AND T. SØREIDE. *Structured Criminal Settlements: Towards Global Standards in Structured Criminal Settlements for Corruption Offences*. The International Bar Association (IBA), Anti-Corruption Committee, Structured Criminal Settlements Sub-Committee. December 2018.

> specific conditions. Form 3 encompasses all administrative and civil proceedings that result in a final decision imposing sanctions without criminal conviction. Form 4 includes resolutions that amount to a conviction, but do not imply an admission of guilt. Form 5 covers the resolutions equivalent to plea agreement, which require the defendant's admission of guilt and amounts to a conviction.[10]

The OECD finds, however, no sharp and clear distinction between these settlement regimes and it recognizes that some regimes do not fit into any of these five categories. While the OECD uses 'non-trial resolutions' as a convenient umbrella term for the various approaches based on dialogue and cooperation, we refer in this volume to the family of such resolutions as *negotiated settlements*. This is a simple, neutral term that reflects cooperation and agreement between regulatory authorities and alleged offenders. In all forms of settlement, such cooperation, as well as the corporate offender's strategies to prevent crime, is taken into consideration in the determination of the eventual sanction. In that sense they all offer the opportunity to prevent corruption by rewarding 'good corporate behavior'.

The IBA survey results highlight the need for global dialogue. Across countries, legal scholars are discussing whether the practice of negotiated settlements is desirable or not, debating its advantages and disadvantages, its prospects and shortcomings. But the fact remains that corporations around the globe are affected by the de facto practice of negotiated settlements offered by the primary enforcing jurisdiction, the United States. Governments worldwide realize that they need to reform their systems, at least to some extent. As noted by Drago Kos, Chair of the OECD Working Group on Bribery, in the Foreword to this volume, the WGB sees a need to develop best-practice recommendations for governments on the use of non-trial resolutions in bribery cases.[11] This volume offers scholarly perspectives on this topic and is motivated by the challenges associated with corporate criminal liability.

1. TOWARDS A PRINCIPLED APPROACH

When it comes to corporations, there are severe shortcomings associated with traditional methods of criminal prosecution, including in the capacity to uncover, investigate or establish criminality. Law enforcement in corruption

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[10] OECD. Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention. 2019.

[11] Several contributors to this volume assisted in developing draft guidelines for the WGB's consideration as part of the Recommendation 6 Network initiative. For documents provided by the network, see https://www.nhh.no/en/research-centres/corporate-compliance-and-enforcement/guidelines-for-non-trial-resolutions/.

cases is impeded also by conflicts of interests in politics, by the length of the traditional criminal process, and by corruption in judicial systems. Therefore, the alternative to a negotiated settlement most often looks like impunity, rather than an arm's-length investigation leading to efficient court proceedings and a crime-deterring penalty.

Ideally, negotiated settlements for bribery offences help to socially engineer corporate behaviour by mandating a rigorous review of bribery risks, not only internally, but also externally, with third-party intermediaries and along the supply chain. For regulatory authorities, rewards for voluntary disclosure and self-policing can help address the information asymmetries and real-world challenges they face when trying to discharge a criminal burden of proof in complex multi-jurisdictional transactions with multiple levels of decision making. At the same time, robust anti-bribery compliance programmes, required by many jurisdictions as a precondition for a negotiated settlement solution, can help corporations better manage bribery risk, reputational damage and the costs associated with regulatory breach. Furthermore, anti-bribery controls intersect with regulatory issues such as combating money laundering, financing of terrorism, tax evasion and fraud, and protection of data integrity and privacy, all of which require a coordinated corporate strategy.

The lack of coherence in global regulatory frameworks means that the results of settlements can be uncertain. This runs contrary to the aim of securing confidence in the ability of criminal justice systems to sanction corruption. Outlining the advantages and difficulties of a principled approach to negotiated settlements for foreign bribery is an important contribution to the discourse on effective mechanisms for fighting corruption in a globalized world.

To this end, contributors to this volume look at the question of negotiated settlements from three perspectives. They first examine settlements in the *context* of broader criminal law enforcement against corruption offences. The purpose, history, models and practice of negotiated settlements provide a backdrop for the question of a principled approach to settlements. Second, the authors look at the effectiveness of settlements from the viewpoint of *deterrence*. How do different criminal justice systems respond to negotiated settlements, what kinds of trade-offs are governments faced with, and what are the key elements needed to ensure that negotiated settlements will deter bribery? How does multiplicity of enforcement efforts affect overall deterrence, and what factors are important to ensure that a negotiated settlements framework encourages voluntary disclosure or cooperation on the part of alleged offenders?

A third perspective is that of *justice*, as authors examine negotiated settlements in relation to criminal justice principles. How do we evaluate negotiated settlements regimes? What is the involvement of private actors as co-investigators in corporate crime enforcement? What is the underlying purpose and rationale of negotiated settlements, and do they serve as an instru-

ment to obtain justice? Whose justice is it, anyway? How are the rights of individuals caught up in negotiated resolution between alleged offenders and prosecutors protected?

2. PART I: CONTEXT

Chapters in the first section of this book consider negotiated settlements in context. A negotiated settlement opens the possibility for exercise of prosecutorial discretion regarding the size and substance of sanctions and ensures that the case ends at the pre-trial stage. This is a feature that deviates substantially from traditional criminal law procedures. The contributors to this section explore the position of negotiated settlements in the landscape of anti-corruption law enforcement at the national and international levels, as well as from the perspectives of policing global procurement and protecting the funds used for sustainable development projects.

In the opening chapter, Mark Pieth looks at settlements in a broad law enforcement context and provides an overview of salient questions regarding corporate resolutions of bribery offences. He points out that whereas plea agreements have long been commonplace in common law jurisdictions such as the United States, most continental European lawyers used to adhere to a different view, in which settlements were regarded as going against established principles of fair procedure. Settlements were considered a breach of the concept of equality, contravening the notion of legality and often forcing defendants to give up their privilege against self-incrimination. Pieth notes that attitudes have changed, however, and after outlining the advantages and challenges of settlements in anti-corruption enforcement, he concludes that there is an urgent need for regulation. There has to be openness about the facts of the case for a settlement of this type to win public trust. However, as the facts themselves are negotiated, they represent a formal, rather than substantive, truth. This has implications for the risk of double jeopardy. The more blurred the punitive function of a given settlement, the weaker the settlement will be as a protection against future procedures on the same matter. Some sort of oversight of the settlement procedures and outcome is desirable, a sort of judicial review, although that raises new difficulties, for example with respect to the prosecutor's use of evidence if the settlement is disapproved. For solutions, Pieth points to the Recommendation 6 Network's International Guidelines for Non-Trial Resolutions of Foreign Bribery Cases as a promising proposal for harmonization of needed standards, although this is probably just a first step toward more principled and coordinated enforcement.

Global change is evidenced by the spread of negotiated settlements for corruption offences across both common law and civil law jurisdictions. The starting point was the US Foreign Corrupt Practices Act (FCPA). Using

a unique dataset, Brandon Garrett describes the path and growth of FCPA prosecutions in the United States. He observes that settlements, which are a flexible and informal form of enforcement, have dominated the enforcement approach in the United States, where very few such cases are brought to court. Despite politicians' rhetoric about individual responsibility and their pledges to imprison corporate offenders, enforcement actions against corporations seldom lead to prosecution against employees, and top corporate leaders are hardly ever prosecuted. Increasingly, enforcement actions are a result of international cooperation between investigators and prosecutors, a trend that effectively globalizes US enforcement practices.

While the US system has several components from which other countries can learn, in particular the incentives for voluntary self-disclosure, cooperation, remediation, and disgorgement of ill-gotten gains, Garrett's analysis suggests that several features of this approach are inconsistent with a clear and principled approach towards settlements. Enforcement actions happen almost entirely through negotiation between corporations and prosecutors, which means there are compromises in factually complex and uncertain circumstances. The cases are enforced largely without judicial review, and despite clear guidelines, it is difficult to tell whether there is consistency across cases and equal treatment of offenders. The combination of backward-looking punishment through fines and rewards for compliance in the future might confuse the public, which generally wants to see criminal penalties that are proportional to the gravity of the acts and likely to deter crime. Pointing to the growth and spread of anti-corruption enforcement worldwide, Garrett suggests there will be more settlement-based enforcement outside the United States. This trend needs to be accompanied by more emphasis on judicial review and transparency, in contrast to the prosecutor-driven US approach towards the FCPA. International cooperation in investment and enforcement creates new opportunities to pursue both sides of a corrupt scheme – the bribe takers as well as the bribe payers. A component of the US enforcement system that might appeal to other governments willing to act against international corruption, Garrett suggests, is the Kleptocracy Asset Recovery Initiative, in which the US Department of Justice seeks to recover corrupt payments from bribe recipients. This approach addresses the demand side of bribes, and not only the supply side.

As more countries roll out enforcement approaches that centre upon rewarding alleged bribery offenders for cooperation or collaboration with prosecuting authorities, we can see patterns emerging. Referring to results from the IBA survey of settlement practices and regulations, Abiola Makinwa observes that negotiated settlement regimes are emerging in countries that have differing underlying criminal justice principles. She divides settlements into two broad categories: non-trial resolutions that avoid the criminal trial in its entirety and

that focus primarily on prevention *ex ante*, and conviction-based regimes that occur within the criminal trial process and mitigate punishment *ex post*. She focuses on the growing phenomenon of non-trial resolutions in her chapter and notes that while some countries have explicit guidelines governing the conduct of such negotiations between alleged offenders and prosecuting authorities, in other countries this interaction is not explicit and indeed is rather opaque. Makinwa argues that explicit non-trial resolution frameworks provide the strongest incentive for private sector entities to comply with anti-bribery laws through voluntary disclosure and cooperation. She observes that since non-trial resolutions replace the criminal trial, the organization of such settlements has important rule-of-law implications. Using findings from the IBA survey, Makinwa examines non-trial resolutions in light of key rule-of-law indicators of judicial oversight, transparency and predictability. She suggests that to preserve the legitimacy of non-trial resolutions, a global response, consisting of minimum standards that encourage transparency and judicial oversight and protect the interests of all stakeholders, including the 'ultimate victims', is essential.

Makinwa concludes that explicit, non-trial resolution regimes work in the public interest by addressing the complexities inherent in anti-corruption enforcement, bridging governance gaps and creating new pathways for corporate governance. By pointing to the enforcement mechanisms that are more likely to influence business operations, Makinwa underscores the importance of considering what sort of regulation will have effects in the 'real world'. In the search for clearer principles and harmonized enforcement regarding corporate offenders, we should not be steered too narrowly by traditional views about the underlying principles of criminal justice. As the subject of an enforcement action, a corporate offender is very different from an individual. Governments may need to allow the emergence of distinct forms of enforcement vis-à-vis corporations and not let the traditional criminal law approach become a straitjacket that prevents efficient action against the problem of foreign bribery.

The use of settlements to end bribery cases can have a spillover effect on other anti-corruption law enforcement regimes. To redress the societal harm caused by corruption, public procurement agencies and development banks have developed debarment regimes to deter corrupt conduct. This means that corporations found responsible for bribery and some other sorts of crime can be excluded from participation in public tenders. Drawing on her studies of anti-corruption approaches to public procurement, Sope Williams-Elegbe examines the impact of settlements on debarment systems. Using the debarment systems in the European Union and the United States as her reference points, she argues that the objectives of debarment in public procurement and the objectives of a negotiated settlements regime are often mutually reinforc-

ing. She observes that while the factors considered by regulators in debarment cases and in corporate bribery cases are similar in some respects, the debarment system depends very much on the ability of the justice system to investigate and adjudicate allegations of misconduct. Changes in the enforcement system will affect the public procurement debarment system. The use of settlements poses a clear risk that the enforcement action will provide weaker information for public procurement agencies about the extent of a potential bidder's corporate wrongdoing, thereby weakening the justification for debarment. In that respect, settlements may undermine an important anti-corruption mechanism in public procurement.

On the other hand, settlement agreements often involve a programme for stronger internal compliance systems and external monitoring of corporate operations. Such steps may reduce the relevance of debarment in public procurement if bidders, having demonstrated compliance, can be found eligible again for contracting with government, regardless of their crime in the past. Given the low rate of detection of corporate offences, the emergence of settlement-based enforcement may assist in changing corporate behaviour in a manner that benefits procurement processes in both domestic and international markets. For procurement agents to allow former perpetrators to participate in public tenders, enforcement actions must include reliable requirements for corporate self-policing and compliance, and effective monitoring of performance. Such predictability will have the indirect effect of reducing the risk of debarment and thus it may have a generally positive effect on corporate offenders' incentives to self-report and cooperate with criminal law investigators. Therefore, with clearer guidelines concerning settlements, and coordination across government institutions, these enforcement systems will be less likely to undermine one another. This is especially important with respect to cross-border cases, where a firm faces corporate enforcement actions in more than one jurisdiction.

Settlements can also play a role in safeguarding development funds from corruption by encouraging good corporate behaviour, voluntary disclosure and cooperation with multilateral development agencies. Pascale Dubois, Kathleen Peters and Roberta Berzero discuss the use of settlements in the World Bank Group's sanctions system in the broader context of the Integrity Vice Presidency's (INT) mission to advance the core development impact of the World Bank. It took time for the development community to classify corruption as an unacceptable practice rather than an accepted cost of operating in developing countries. That recognition, in the 1990s, triggered numerous anti-corruption initiatives and studies to determine how best to act against the problem. While the answers and strategies are still evolving, the INT has done important groundwork that is useful to governments globally as they have developed, evaluated, improved and fine-tuned their sanctions systems. The

INT can debar firms from participating in tenders for World Bank-financed contracts as a means to sanction corporate offenders. In many circumstances, however, it appears preferable to offer a settlement with detailed requirements, as such requirements (a) allow the INT to access valuable information through companies' independent investigations and disclosures, and (b) might help set the standards for corporate compliance while bringing the misbehaving actor back to the market much sooner. For this reason, by August 2019 the INT had concluded more than 130 settlements on behalf of the World Bank Group.

The chapter authors show that the use and operation of settlements in this context demands a careful balance between effective enforcement, on the one hand, and legitimacy of outcome (transparency, due process and predictability), on the other. While the World Bank obviously is committed to a rule-of-law doctrine, its principles for the use of settlements have had to develop in a multicultural environment. Arguments and values need to be defended before stakeholders in very different societies, with different views on human rights, fairness and integrity in markets. Over the years, the INT has encouraged several forms of cooperation for more law-efficient enforcement in the countries where the World Bank operates. In addition to imposing sanctions on actors involved in corruption, among other forms of wrongdoing, the INT promotes local investigation and prosecution of bribe receivers. In particular, the unit provides information to the countries potentially affected by corporate offences, including a summary of allegations and findings of the investigation. While there are clear limits to the use of such information for enforcement actions, it has substantial value as intelligence for national authorities that might pursue their own investigations. In addition, the World Bank sanctions system has elicited constructive cooperation with other development banks. In their chapter, Dubois, Peters and Berzero provide a comparative analysis of the use of settlement mechanisms by multilateral and regional development banks. This analysis underscores the centrality of preventive compliance programmes and voluntary cooperation as tenets of the settlement process.

3. PART II: DETERRENCE

Do negotiated settlements achieve the desired outcome of deterrence? Differences in corporate crime enforcement across jurisdictions result in variations in the discretionary authority of prosecutors and in the credit afforded offenders for cooperation. In addition, the reality of multi-jurisdictional enforcement may result in a variety of efficiency trade-offs.

Tina Søreide and Kasper Vagle start by asking what the concept of efficient deterrence means in a criminal justice context, and how a jurisdiction's practices and regulations reflect trade-offs against such values as fairness and expenses per case. Countries have different perceptions about how to prevent

crime, and these differences are expressed in their regulatory and institutional frameworks for the use of settlements. The more discretionary authority granted to prosecutors to negotiate settlements in corporate bribery cases, the better able they might be to conclude cases with results that deter crime. More discretion is consistent with high public trust in the ability of judicial institutions to conclude cases with results that deter crime; it also reflects an emphasis on the independence of prosecutors, and confidence that they operate with integrity in situations of few instructions and weak oversight. However, in countries with few enforcement cases, the freedoms 'granted' to prosecutors more often reveal political inaction and regulatory immaturity. Sometimes there is reason to suspect that lack of regulation covers up high-level collusion and enables the government to protect allies in the private sector. Drawing on results from the IBA negotiated settlements survey, Søreide and Vagle map worldwide patterns of prosecutorial discretion for settlement negotiations, finding substantial cross-country variation. By developing a Prosecutor Discretion Index, they investigate whether prosecutors' freedom to determine the content of settlements correlates with other government characteristics, such as the extent of corruption in society, democratic performance, or budget for law enforcement. While there are few clear patterns in this respect, well-performing democracies have a somewhat higher inclination to develop rules that limit the prosecutor's freedom. Among the jurisdictions that do enforce corporate liability in foreign bribery cases, there seems to be a trend towards developing guidelines as enforcement intensifies and governments see the need to protect judicial predictability and promote institutional integrity. At the same time, the authors note, the countries that have developed more rules for negotiated settlements can all be criticized for examples of offender-friendly outcomes, failure to pursue cases against corporate leaders, or shortcomings in the extent of information shared with the public. Going forward, it seems that all countries can improve on this agenda, even if they have modern laws or principles for the use of settlements in cases of this sort.

Variations in corporate criminal enforcement and levels of discretionary authority affect the deterrent impact of settlements. Jennifer Arlen, in her analysis of effective corporate criminal liability, sets out minimum requirements to ensure that deferred prosecution agreements (DPAs) can achieve their promise and not undermine deterrence. She argues that there is potential promise but also peril in introducing DPAs outside the United States. Such worldwide reforms are, in her view, potentially risky or bound to fail because DPAs generally impose lower sanctions on companies than do convictions. Arlen presents a policy framework to ensure that DPAs enhance enforcement. Its key requirements, in addition to corporate self-reporting and full cooperation, are corporate criminal liability for misconduct by all employees, adequate sanctions, guarantee of full restitution by companies of any benefits they

obtained from misconduct, adequate funding for corporate enforcement, criminal actions against white-collar defendants, and laws that provide adequate protections for and rewards to whistleblowers. Arlen stresses the importance of structuring the enforcement regime in a manner that predictably rewards self-disclosure of wrongdoing and proactive cooperation with investigators. In addition, she emphasizes that it is necessary to pursue cases against the responsible individuals, despite the pull to move on once the case is concluded against their employer, as the risk of personal liability reinforces the deterrent effect of corporate liability. Countries that adopt reforms without these minimum requirements in place will not necessarily strengthen their regime in a manner that reduces firms' inclination to offer bribes. Arlen applies the policy framework in evaluating recent reforms adopted in the United Kingdom and France. Her conclusions about vulnerabilities in these systems provide valuable insights for all countries that are pursuing reforms in this area.

Arlen's policy recommendations give rise to a number of follow-up questions. Why should corporate offenders negotiate a penalty if they can obtain fairer treatment in court and possibly be acquitted of any wrongdoing? What factors determine companies' willingness to provide evidence in settlement cases? What factors other than a penalty discount may tempt corporate offenders to self-report and collaborate with law enforcers? How important are offers of confidentiality, and what options exist for combining such offers with a legitimate procedure? With a focus on how to create incentives for self-reporting and cooperation, Lucinda Low and Brittany Prelogar consider the complexity of the voluntary disclosure calculus for companies. They argue that as a growing number of jurisdictions adopt tools to facilitate non-trial resolutions of foreign bribery matters, and corruption cases become increasingly multi-jurisdictional, the alignment of incentives gradually becomes more important. Pointing to the need for alignment is not the same as suggesting replication of the US enforcement system. It is possible to align incentives across different criminal justice systems while still recognizing and accommodating unique national characteristics. But governments that want to contribute to efficient enforcement in international markets need to have a conscious policy to achieve that. Low and Prelogar outline the lessons that can be learned from the US experience of offering incentives for voluntary disclosure and cooperation. This leads to their conclusion that coupling the availability of non-trial resolutions with clear, predictable guidance regarding the mitigation benefits available to companies for engaging in various behaviours – such as self-reporting, cooperation and remediation – may amplify public policy benefits.

A great challenge with intensified use of settlements in foreign bribery cases is the growing risk of duplicative multi-jurisdictional enforcement. Sharon Oded explains how multinationals that accept a settlement in one

country may expose themselves to similar claims from other countries, finding themselves in a situation with few rights, escalating expenses and no clear end to the trouble. Such consequences clearly demotivate firms to self-report incidents of bribery and hence they may well seek to hide the crime when it happens, instead of committing to self-policing and cooperation with enforcement agencies. Implicitly, the more jurisdictions enforce the foreign bribery legislation, the more difficult it is for each jurisdiction to deter crime in line with the principles described by Jennifer Arlen unless there is some form of coordination among enforcement agencies. Oded analyses the US Department of Justice response to this problem, the 'anti-piling on' policy of May 2018, in light of recent multi-jurisdictional enforcement cases. Based on his analysis, and with a focus on how enforcement systems affect the motivation of potentially culpable corporations, Oded presents the contours of a socially desirable, multi-jurisdictional, anti-corruption framework. He does not advocate full alignment of national anti-bribery laws or the establishment of a universal enforcement authority to replace currently active public prosecutors. Instead, he argues for interested sovereign states to agree on and adopt a set of principles aimed at enhancing the effectiveness of the global fight against foreign bribery.

4. PART III: JUSTICE

As an increasing number of jurisdictions adopt negotiated settlements regimes, a fundamental question that arises is whether, or to what extent, these settlements satisfy the fundamental principles of criminal justice. How does a negotiated settlement process uphold the presumption of innocence until proven guilty and the principles of due process, representation and impartiality?

To probe this issue, Kevin Davis begins by asking what makes for a good settlement or settlement process. He notes that the procedural features of negotiated resolutions have special implications for efficiency and legitimacy. Using the United Nations Convention against Corruption as his premise, he argues that the primary objectives of anti-corruption initiatives include effectiveness, efficiency and due process, with condemnation, compensation and prevention as subsidiary objectives. These terms can have different meanings as they are not defined by the United Nations, and there are trade-offs between them. However, difficulties in defining concepts and reaching consensus around a framework for evaluation are no excuse for ignoring the questions. The victims of corruption exist even in cases where enforcement agencies cannot identify them, or where the victims cannot trust their governments to administer compensation fairly. While negotiated settlements might be considered a more efficient enforcement action vis-à-vis corporations than traditional criminal law approaches, Davis asks whether efficiency in these contexts is

even possible without fairness. In this manner, his chapter reminds us about the risks of evaluation criteria that are too narrow. Governments ought to supplement the objectives of negotiated settlements with widely endorsed objectives of legitimacy and fairness, even if there is no consensus in the United Nations around the practical interpretation of these terms in specific settings. Davis urges caution and points out that for central agencies it may be easier to list these components of justice than to apply them in cases of negotiated settlements that are designed to achieve multiple objectives.

Further exploring the compatibility of negotiated settlements with principles of criminal justice, Simone Lonati and Leonardo Borlini discuss a key aspect of this question, namely, the involvement of private collective entities in the anti-corruption investigation. They explain what the concept of 'self-investigation' entails in matters of possible corporate liability. They also note that the scepticism of civil law systems, which require clear distinctions between roles in proceedings – unlike the primarily common law-inspired approach, which enlists corporations as allies in the detection and combating of crime – has lessened significantly in recent years. However, despite the potential benefits of cooperation between the offender and enforcement agencies, as described in several chapters, we should not naively ignore the problems with policies that rely on offenders to self-investigate and report their crimes. The concept fundamentally challenges the public monopoly on initiatives in criminal matters as well as, ultimately, the very idea of state control of the law enforcement process. This is a problem because it implies conflict of interests in several forms. In particular, a policy of self-investigation and self-reporting depends on corporate units to inform public enforcement bodies of the very acts that may qualify as criminal offences, in a situation where inaction might be both convenient and more profitable for the corporation.

The risk of consequences for those who choose inaction might be unsubstantial in jurisdictions with a functional constitutional protection against self-incrimination. Nevertheless, corporate rewards for self-reporting might reduce defence attorneys' incentives to recognize constitutional safeguards protecting individuals from compulsion, as testimonies given by affected employees may contain elements that could reduce or exclude corporate liability. Despite the rules on what sort of evidence can be used in court, the details may help investigators and attorneys reach a situation in which the responsibility is placed on individuals alone. In order to illustrate and concretize the points, Lonati and Borlini describe the Italian regime, which resembles those in several civil law countries in continental Europe and thus serves as a representative case. Several features of this regime preclude or prevent the use of negotiated settlements in corporate liability cases. That fact does not seem to worry the authors, who contend that public prosecutions play an instrumental

role in promoting zero tolerance, which serves in turn to encourage an ethical and compliance-based corporate culture.

In the final chapter, corporate crime enforcement is further analysed by Susan Hawley in her chapter with Colin King and Nicholas Lord. They use the new deferred prosecution agreements (DPAs) regime in England and Wales as their reference point and ask critical questions for all stakeholders in the negotiated settlements discourse. Are DPAs intended to deter future corporate crime or to serve as punishment for past wrongdoing? Do they represent a form of punishment that appeases societal indignation against corporate criminal behaviour and fosters trust in enforcement, or do they offer too much leniency, allowing offenders to negotiate away criminal liability for harmful activities? In other words, what is the purpose and rationale behind the policy decision to let negotiated settlements be the main mode of enforcement in corporate bribery cases?

The authors consider the instrumental and symbolic aspects of DPAs as a sanction for corporate crime within a context in which corporate prosecutions historically have been rare. They note the 'underlying confusion' and 'blurring' of the lines between regulatory and criminal procedures in this area, between the determination of wrongdoing and incentives for risk prevention, and between reactions against the corporation and against the responsible individuals. Reviewing five enforcement cases, they point to serious concerns with the use of DPAs, in particular the risk that current enforcement practices fail to deter bribery. That, they argue, implies that recidivism is a reasonable concern, although there is no rule that forbids enforcement agencies from offering another settlement. As it appears that the enforcement agencies will continue to use DPAs, enforcement authorities should clarify this mechanism for the public. They could install clearer guidelines for the design of an 'ideal' DPA that ensures corporate crime is punished sufficiently to deter crime and that engenders public confidence. In addition, enforcement practice needs to be taken in the direction of *some* sort of penalty against responsible employees.

5. CONCLUSION

The authors of this volume explore current practices around negotiated settlements in bribery cases and consider the scope for a more coordinated international approach. Several of them describe the emergence of negotiated settlements as a necessary, pragmatic deviation from a too-costly and risky court procedure. While this enforcement mode creates space for mechanisms that will prevent bribery more efficiently than a traditional criminal law approach, as elaborated in the economic literature on crime, several of the chapters make clear that this sort of enforcement does not meet the high standards of fairness and legitimacy associated with criminal law values.

As noted at the beginning of this chapter, international governmental organizations can launch initiatives and shape policies that make a clear difference in the fight against corruption. By offering an arena for collaboration between prosecutors and by evaluating country performance, the OECD Working Group on Bribery plays a critical role in policy evolution. Achieving international consensus around best-practice recommendations for more legitimate, efficient and harmonized enforcement practices across countries is an essential step in the right direction. However, it will not necessarily be enough to resolve the discrepancies in legitimacy between negotiated settlement outcomes and the ideal criminal law procedure with trial. There seems to be a fundamental difficulty in combining forward-looking, risk-preventive measures with the backward-looking criminal law process of determining wrongdoing, assigning blame, and imposing punishment. We cannot expect governments to resolve this difficulty within a regime that allows space for offenders to investigate their own offences and negotiate the facts of their case before they decide to accept a sanctions package. Whereas an evolution towards consensus around principles for negotiated settlements will raise the bar for this sort of enforcement, governments may need to also consider their use of corporate criminal liability in broader perspective. However, as authors in this volume note, while different countries will find different solutions, it is possible to align incentives across different regulatory set-ups. For some countries it will make sense to combine criminal liability with non-criminal regulation for market integrity. That allows them to separate the criminal, backward-looking functions, relevant in severe crime cases, from forward-looking administrative requirements, in which milder sanctions for failure to implement crime-preventive measures make good sense. In continental Europe, for example, the concept of negotiated settlements is far simpler to use in a non-criminal setting, and in such jurisdictions it may be necessary to reform regulations and institutions for the sake of aligned incentives and harmonized enforcement practices. In other countries, especially in the common law countries where plea bargaining and out-of-court settlements are a well-established and formally recognized practice, it will be easier to strengthen the use of settlements as a type of formalized, non-conviction-based enforcement for allegations of foreign bribery.

In the end, jurisdictions should strive to combine the different objectives of law enforcement with the mechanisms and incentives that most efficiently promote compliance on the ground. At the same time, they should help construct and seek alignment with a common best practice in this regard. As noted legal scholars, legal practitioners and anti-corruption experts, the authors of this volume bring a broad range of perspectives to this challenge. Their analyses of different settlement regimes, reflections on questions of effectiveness and principle, and discussion of the practical normative implications of different approaches will be of value to the global anti-corruption community.