« CAUGHT IN THE MIDDLE » CORPORATE CORRUPTION ABROAD : A COMPARISON OF FRENCH AND AMERICAN LAW AND PRACTICE

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I. Introduction

A large gulf, in perception and in practice, separates common law criminal procedures from civil law criminal procedures. The gulf, is at present, at its deepest beween France and the United States. France and the United States share a commitment to combating corporate foreign corruption as exemplified by their early support and promotion of the OECD Anti-Bribery Convention. [1] The divergent paths taken in their efforts to foster corporate compliance and enforce anti-corruption laws have resulted in geo-political tension as illustrated by French allegations of « legal imperialism » and « economic warfare and espionage » [2] following the institution of anti-bribery criminal proceedings by US authorities against large French corporations. [3]

Legal culture lies at the root of the different approaches. French and American criminal procedure law and practice differ markedly as a result of their separate histories, and distinct political, social and corporate cultures. [4] A review of criminal proceedings for foreign corporate bribery instituted by the U.S. Department of Justice ('DOJ') against iconic French companies provides an excellent comparative law case study illustrating the fundamental differences in criminal law and practice between the countries. This study is timely given the intense debate surrounding the adoption of the recently promulgated anti-corruption provisions of the Sapin II Law (hereafter « Sapin II ») [5]

The present study will first outline fundamental differences between French and American criminal law and procedures. Emphasis will be placed on how the confrontation of the two legal traditions, and in particular, their different institutional structures and conceptions of the roles played by legal professionals in the criminal justice system, significantly contributed to French hostility and resistance to the adoption of American style mechanisms for combating corporate corruption.

1 Organization for Economic Co-Operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21November, 1997 (hereafter the « OECD Convention ») ; For an excellent summary and explanation of the OECD Convention *See generally* Pieth, Low & Cullen (ed.) The OECD Convention on Bribery-A Commentary (2007)

2 *See generally Rapport d'information de Mme. Karine Berger déposé en application de l'article 145 du règlement de l'Assemblée Nationale en conclusion des travaux de la mission d'information commune sur l'extraterritorialite de la législation Américaine du 5 octobre, 2016* [French parliamentary report on American extraterritorial legislation –October 5th, 2016] (hereafter « Berger »)

3 Celestine Bohlen, « *France Lets US lead in Corruption Fight »,* N.Y. Times, April 6th, 2015 (https:/www.nytimes.com/2015/04/06/world/europe/France-lets-us-lead-in-corruption-fight.html) (hereafter, « Bohlen »)

4 *See* Antoine Garapon & Ioannis Papadopoulos, Juger en Amérique et en France (2003) (hereafter « Garapon, Juger ») ; *See also* Jacqueline Hodgson, French criminal justice : A comparative account of the investigation and prosecution of crime in France (2005) (hereafter « Hodgson »)

5 *Loi n° 2016-1691 du 9 décembre, 2016 Relatif A la Lutte Contre La Corruption et la Transparence de la Vie Economique 2016* [Law 2016-1691 of December 10th, 2016 on Transparency and the Fight against Corruption in the Modernization of the Economy], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE, December 10th, 2016 (hereafter « Sapin II »).

Second, the experience of French companies "caught in the middle" between French and American criminal proceedings and the considerable controversy thereby engendered by this interplay of the two legal cultures will be summarized. Third, the nature of the highly emotional debate in France over American 'legal imperialism' and the recent legislative response of Sapin II to this perceived threat will be analyzed. Last, a prognosis on the success of Sapin II and suggested opportunities for limited cross-Atlantic 'legal transplants' aimed at improving the efficacy of attempts at combating corruption will be offered.

II. Fundamental differences in criminal procedure

The gulf separating the two legal systems is a result of their separate historical development, distinct legal, political, and social cultures, and fundamental differences in the nature and roles played by criminal justice legal professionals. [6] The confrontation between French and American approaches to criminal procedure evidenced by recent settlements of corporate foreign bribery cases involving the French companies- Alstom, Alcatel, Technip, Total [7] will likely continue. These foreign corporate corruption cases together with sizeable fines levied against French banks for US sanctions-breaking [8] led to considerable controversy and even outrage in France. Many French legislators and commentators characterized the actions brought against French companies as « economic warfare » designed to cripple French national industrial champions. Such assertions, whatever may be their validity, cloud the inquiry into how fundamental legal cultural differences affect perception and therefore responses to transnational criminal prosecutions for corruption.

A comparative legal analysis of evidence gathering, plea bargaining, third party intervention, the role of administrative agencies, and whistleblowing will be made to facilitate evaluation of the potential for successful implementation of recently legislation France and possible changes in American procedures.

A. Evidence Gathering-The critical role of the investigating magistrate

1. The investigating magistrate's place in the French criminal justice system

The French investigative magistrate (' juge d'instruction') is the central player in major corporate corruption cases. While investigative magistrates intervene in only 5% of criminal cases overall they are often in charge of the entire pre-trial process in major corruption cases. [9] Formerly referred to as ' the most powerful man in France' [10] the investigating magistrate remains an essential figure in the French criminal justice system, especially in corruption cases.

6 *See generally,* Hodgson *supra* note 4
7 The fines levied were respectively ; Alstom (2014)- $772 million, Total (2013)-$398 million, Technip (2010)-$338 Million, Alcatel-Lucent (2010)-$137 million, Berger, at 66-67
8 Banque Nationale de Paris « BNP »- $8,974 Millions, Berger, *supra* note 2 at 67
9 Hodgson, *supra* note 4, at 5 ; *See* generally Renaud Van Ruymbeke, Le Juge d'Instruction (1988) (hereafter « Van Ruymbeke ») Judge Van Ruymbeke is one of the best known French investigative magistrates with considerable experience in foreign corruption cases.
10 Van Ruymbeke, *id.* at 3 ; The phrase is attributed to either Napolean or Balzac or both

The broad support across French society for the investigating magistrate stems from political, social and cultural influences largely peculiar to France. France has steadfastly resisted the trend of other European civil law countries towards adopting a more American style 'adversarial' criminal procedure system. While Germany, Italy and Switzerland abolished their equivalent to the the investigating magistrate[11] France, on the contrary, retained and strengthened the investigating magistrate's role despite intense efforts by President Nicolas Sarkozy in 2007 to abolish it.

The French inquisitorial model [12] of criminal procedure which originated in 1270 in the reign of Saint Louis entrusts the investigation of serious criminal offenses to the judiciary. The investigating magistrate, whose formal creation dates to 1522, is largely insulated from governmental interference and must act as a neutral party The judge must search for and evaluate evidence both in favor and against suspects and persons whose indictment the judge believes is warranted. The investigating magistrate shares the same guaranty of independence (non-removal from the case) and requirement to be impartial as ordinary or 'sitting' trial judges. In French parlance, ordinary judges, who like their American counterparts decide guilt or innocence in bench trials are referred to as « sitting » judges[13]

The use of the term 'judge' or magistrate' in French criminal law terminology inevitably shocks common law legal professionals. In France, even prosecutors (« procureurs ») are considered judges 'magistrats' albeit referred to as ' standing judges' They do not possess the same guarantees of independence as « sitting judges » and unlike investigating magistrates represent the State and are organized in a hierarchy. Nevertheless, French prosecutors remain deeply emotionally attached to their judicial status and title of magistrate. This institutional ethos is derived from the historical development of French prosecutors and their common professional education with other magistrates. The continued use of the term 'magistrates' for all three legal professionals-investigating judges, prosecutors and ordinary judges continues to be a source of much confusion. Despite this criticism, French prosecutors stubbornly cling to their use of the terminology.

2. Evidence gathering during the 'instruction' phase of the criminal process

In the state-centric pre-trial inquiry evidence gathering phase of the French criminal process the investigating judge marshalls the evidence obtained, with police assistance, from searches of corporate offices, document production requests, the interrogation of witnesses, suspects, indictees and victims to build a coherent file or « dossier » that will be central to an eventual trial. The investigating magistrate is responsble for international investigative co-operative efforts, including the transmission of documents and the interrogation of witnesses or parties, in foreign corporate corruption cases.

11 Germany in 1974 , Italy in 1988, Switzerland in 2009 Stephen Thaman, Comparative Criminal Procedures (2nd Edition, 2008) at 18 (hereafter « Thaman »)

12 Eminent American comparativists warn that « civilists » may be offended by the term « inquisitorial » and suggest « accusatorial » to be the better term. *See* George Fletcher, American law in a Global Context 532 (2005) ; John Henry Merryman and Rogelio Pérez-Perdomo, The Civil Law Tradition 127 (3rd edition 2007), (hereafter « Merryman »). Many French legal professionals, however, prefer to use the term to mark their differences and hostility to American criminal procedures.

13 Dominique Inchauspé, *L'Innocence Judiciaire at* 400-401(2012); Valérie Dervieux, *The French system* in Mirelle Delmas-Marty & J.R. Spencer (eds.) European Criminal Procedures (2008) hereafter « Dervieux » at 239. In the most serious cases, heard in the « cour d'assises », juries composed of three professional judges and six laypersons decide guilt or innocence.

3. Challenges to Franco-American co-operation

The continued vitality of the investigating magistrate as the key player in the gathering and evaluation of evidence, and the pursuance or dismissal of criminal charges, presents a challenge to Franco-American co-operation in corporate corruption cases.
The inquisitorial method significantly influences the perception and practice of French defense counsel and internal corporate strategy in response to American pressure to co-operate through voluntary disclosure.

In present day America, few cases, whether civil or criminal, go to trial, and foreign corruption cases follow this trend. [14] Nevertheless, American criminal procedure retains the historical and legal cultural imprint of a common law adversarial system in which the accused and accusor, as equal parties, gather and present evidence to a jury in the presence of a « sitting » judge whose largely passive role is to ensure the fairness of the « fight » [15] American criminal justice professionals, including corporate defense lawyers, impregnated with the mores and manner of working of this adversarial model are comfortable with the notion that investigating facts and marshalling evidence is a task for the parties rather than a neutral judge acting in the 'public interest'.

Experience with intensive and intrusive « discovery » procedures and strong pressure to undertake costly internal investigations from DOJ prosecutors, motivated by resource considerations, have combined to lead most American companies and many foreign concerns to accept self-disclosure and a duty to co-operate as necessary elements of the settlement process in foreign corruption cases. [16] French companies' resistance to or limited co-operation in American anti-bribery cases may be partially attributable to several factors including business strategy, management culture and corporate governance practice. In addition, a tendency to view problems and seek remedies from geo- political and economic perspectives as opposed to American ' legalism ' [17] has influenced French decision-makers. French resistance to American demands for co-operation may, however, also be caused by fundamental differences in practice, such as the central role of the investigating magistrate in the French inquisitorial model of evidence gathering, and French defense counsel and corporate management's hostility to or lack of experience with American style « discovery ».
The inquisitorial method significantly influences the perception and practice of French defense counsel and internal corporate strategy in response to American pressure to co-operate through voluntary disclosure and calls for internal investigations.

14 *Accord,* Brandon Garett, *The Corporate Criminal as Scapegoat, 101 Va.L.Rev.1789, 1805-1810 (2015) (hereafter « Garett Scapegoat »)* Professor Garett notes that although the federal prosecutions guilty plea rate has exceeded 95% for many years the rate for bribery is lower. *See also,* Jesse Eisenger, The Chickenshit Club- Why the Justice Department Fails to Prosecute Executives xviii-xx (2017), noting the significant drop-off in cases going to trial since the 1990's. This decrease has sharply accelerated recently, particularly in corruption cases brought against individual defendants.
15 Hodgson, *supra* note 4 at 103-5
16 Pierre Servan-Schreiber, *L'avocat serviteur de deux maîtres ?* in Garapon and Servan-Schreiber, Deals de Justice (2013) at 103-9 (hereafter « Garapon, Deals »)
17 See generally, Eric Posner, The Perils of Global Legalism (2009) for a stringent criticism of global legalism (hereafter « Posner, Perils »)

B. Plea Bargaining

Plea bargaining generated intensely heated controversy which extended beyond the legal community. In addition to academic and professional commentators, the Legislature, Government, and the corporate world entered into the fray of intense debate over the appropriateness of integrating this mechanism into French law. What explains the intensity of the debate ?

First, serious concern over the economic danger to European companies posed by American « legal imperialism » following previously unimaginable hundred million dollar settlements of foreign corruption and economic sanctions cases brought by American authorities. [18] Second, a sense of the loss of European independence and its ability to respond or succesfully negotiate and diffuse geo-political conflicts caused by extraterritorial application of American law and regulation as it had in the past. Third, a feeling amongst some that acceptance of plea bargaining arrangements with American authorities was tantamount to extortion and a belief by most that adoption of the mechanism in France would countervene deeply cherished longstanding principles of Legality upon which the French Republic was founded. Privatisation of one of the essential functions of the State-the Administration of Justice- was greatly feared.

18 Siemens and Alstom, whose settlements with the US Department of Justice (DOJ) and Securities and Exchange Commission (SEC) for violations of the Foreign Corrupt Practices Act (FCPA) resulted in record fines adopted very different strategies with respect to co-operation with the American authorities despite both companies being from civil law countries.
Siemens chose to undertake a broad, intensive, and costly internal investigation led by a large US law firm. Siemens top management, including most of its board members were dismissed. Later, Siemens successfully sued several several former executives, including its ex-CEO, Heinrich Von Pierer who paid five million euros to his former employer. Despite its enormous economic power and political influence in Germany, prosecutors steadfastly pursued the company and Siemens managers resulting in the payment of a $800 million fine to the Munich Public Prosecutors Office and the conviction of a few Siemens managers. Siemens' close co-operation and the high quality and resources devoted to its internal investigations were praised by the DOJ and led to a reduction in the fines imposed. *See* Brandon Garrett, Too Big To Jail 9-12, 246 (2014) (hereafter « Garrett, Too Big « Ex-Siemens Execs Found Guilty in Bribery Case » Reuters, April 20, 2010
Alstom, on the other hand, did not co-operate with the US authorities until being shocked into doing so following the arrest and imprisonment of a senior executive seized at his entry into the US on a business trip. Alstom generally followed a traditional French legal defense model in its response to the many investigatios launched against it or its employees. No changes were made in the senior management or board. Several former or present Alstom managers were indicted (« mise en examen ») in France but these indictments were all dismissed with remarkably little press coverage. Alstom entities and individual executives were indicted in the UK and these cases are proceeding to trial. *Serious Fraud Office (SFO) News Releases*. Investigations and proceedings against Alstom entities and former and present employees are proceeding in several countries, including Brazil, India, Lithuania, Poland and Hungary and a settlement with a substantial fine was reached with the Swiss authorities in 2010.
Alstom's lack of co-operation was roundly criticized by the DOJ and substantially increased the fine imposed. *See* Lindsay Arrieta, *How Multinational Bribery Enforcement Enhances Risks for Global Entreprise*s, Business law Today, June 2016 (hereafter « Arrieta ») ; Jay Holtmeier, *Cross-Border Corruption Enforcement : A Case for Measured Coordination Among Multiple Enforcement Authorities,* 84 Fordham L ; Rev. 493, 497-9 (2015) (hereafter « Holtmeier » ; *Press release U.S. Dep't of Justice, Alstom Pleads guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foriegn Bribery Charges (December 22, 2014) http:/www. Justice.gov/opa/pr/alstom-pleads guilty and agrees to pay $772 million criminal penalty bribery ;* Heckler, Levine, Seeger, Yannett, Davis and Michaels, « Alstom's $772 Million FCPA Settlement : The Wages of Late Co-Operation and Other Lessons of the Settlement. » FCPA Update, Debevoise and Plimpton (2014)

Europeans have long criticized and contested the extraterritorial application of American law. European fears that the application of American law would for the first time inflict serious economic damage were legitimated by a series of Foreign Corrupt Practices Act « FCPA » plea-bargained settlements concluded by several « champion » companies in the midst of the financial crisis commencing in 2008. Whereas in prior crises in which the companies were « caught in the middle » between European and American law, European governments found themselves without opportunities for effective negotiation which was now entirely in the hands of American authorities. This perceived loss of national independence provoked a particularly strong negative reaction in France against plea bargaining and prosecutorial discretion held to be the mechanisms which were viewed as responsible for this state of affairs. [19]

The granting of boundless prosecutorial discretion to structure plea bargaining arrangements which meted out purely monetary « punishment », as if it were a private contract rather than the law, struck at fundamental French notions of the source and purpose of criminal law as embodied in the principle of Legality. [20] French criminal law as embodied in post Revolutionary codes was strongly influenced by Enlightment legal thinkers dedicated to depriving the State of its means of oppression through the use of arbitrary criminal measures. Compliance with the Legality Principle required that.criminal law and procedure be carefully specified in comprehensive and systematic Codes and statutes. Criminal law, one of the fundamental expressions of the popular will, could only be created by the the Legislature and never the judge. Common law countries, on the other hand, continued to use judge made « common law crimes » into the 20th century as exemplified by English law prior to the Anti Bribery Act of 2010 and the notion of « honest services » used in US anti corruption law. [21] In civil law systems, however, vagueness and interpretation by analogy were prohibited, interpretation was required to be strict and any form of judicial or prosecutorial discretion viewed with extreme caution. All violations of Criminal statutes had to be pursued and judges who failed to do so faced criminal sanctions. These principles, combined with the inquisitional model of inquiry, led to the adoption by defense counsel of a highly technical approach in the defense of their clients which is still evident in their handling of corporate corruption cases today.

19 Berger at 27, 119

20 Inchauspé at 323-4, 348-352 ; Garapon, Juger *supra* note 4 at 76-87 ; Olivier Boulon, *Une Justice negociée* in Garapon, Deals *supra* note 16 at 41-56

21 Markus Dirk Dubber, *Comparative Criminal Law* in The Oxford Handbook of Comparative Law 1313-17 (Mathias Reimann and Reinhard Zimmermann eds. 2006) ; Monty Raphael, The UK Bribery Act 2010, 10-21 (2010)

Limited plea bargaining has recently been accepted across continental Europe, including in France, with the enactment of Sapin II. Adoption of this quintessential American practice was a defensive measure aimed at quelling American ardors in corporate corruption cases. Empirical study of its implementation should serve to shift the debate from a philosophical defense of an idealized vision of the strict Legality principle to an examination of its effectiveness as a tool in combatting corporate corruption. Integration of plea bargaining in French criminal law must be undertaken with great care. Blind borrowing of American practice will lead to rejection of the legal transplant due to its in-consistency with deeply held notions of French democracy and the mores and methods of the legal professionals responsible for making it work.

Comparative law analysis of prosecutorial discretion and plea bargaining in practice should be employed to avoid the factors for rejection and facilitate a limited integration. This comparative law analysis needs to be bi-directional to attempt to see how the very real deficiencies of American plea bargaining including its « after sales » service of corporate monitoring may be improved. American plea bargaining practices typically find their sole justification in the need for pragmatic solutions to resource constraints-the refrain that « the criminal justice system will fail without it ».

The following essential questions about plea bargaining need to be considered from a comparative law perspective : What is its proper place in a democracy ?, Is it consist with due process ?, How may legal professionals' mores affect its operation and how might their job skills and ethics be affected by it ? , Is it suitable for foreign corrupt corruption cases ?, What ought to be the proper role of judges in reviewing and approving settlements ?

It is noteworthy that American academics once looked to European practice for solutions to perceived weaknesses in American plea bargaining and arbitrary law enforcement resulting from unlimited prosecutorial discretion. [22] The recent French debates and legislative response to plea bargaining in foreign corporate corruption and sanction breaking offers a new opportunity for the use of comparative law in improving criminal justice on both sides of the Atlantic.

C. Recourse to administrative agencies

France is and has always been a highly centralized state-centric nation. A strong penchant therefore exists for entrusting administrative agencies with important (or for that matter, less important) issues. Delegation of executive or legislative power to administrative agencies is well accepted and seldom gives rise to significant debate. France benefits from a very well established and, independent, by tradition rather than law, administrative law system. Well regarded administrative judges are organized in a structure distinct from the « ordinary » courts with its own supreme court, the « Conseil d'Etat » or (« Supreme court » for administrative law). The prestige of French administrative law is demonstrated by its use as a model for many civil law countries, notably Japan and Turkey, who both undertook an extensive comparative study of major legal systems before adapting their law during their respective « modernizations » [23]

22 Hodgson, *supra* note 4 at 5
23 John Bell, *Comparative Administrative Law* 1267 in The Oxford Handbook of Comparative Law (Reimann & Zimmerman eds. 2006

Top legal professionals in the administrative system, assigned to the Conseil d'Etat, are generally drawn from the prestigious training school « Ecole national d'Administration » commonly referred to as « ENA », ensuring familiarity with other government officials and the workings of power. Consequently, it is not surprising that faced with criticism of its inertia in using the law to combat corporate corruption abroad France a major role was assigned to a new administrative agency, the French Anti-Corruption Agency. « AFA » in Sapin II.

Although French administrative agencies may be generally well perceived the creation of a special agency for corruption presents challenges. How will the agency, interact with the criminal justice system, in particular in the levying of sanctions and the plea bargaining process ? Might its low level sanctions power relative to other countries tend to reduce the deterrent effect of anti-bribery laws ? Will the bureaucratic propensity to prioritize process reinforce the « check the box » corruption compliance culture increasingly found in companies ? How will it interact, if at all, with civil party 'victims' of corruption ?

The SEC's corruption deterrence and enforcement effectiveness, with a particular focus on its interplay with the DOJ, should be subjected to comparative law analysis to assess the future effectiveness of the AFA. For example, the AFA's role is specialized and exclusive. Unlike the SEC, corruption prevention is its only mandate. Anti-corruption is tangential to the SEC's primary purpose of affording securities market investors the opportunity to protect themselves through the promulgation and enforcement of disclosure rules. The SEC's primary role under the FCPA- enforcement of compliance with accounting books and records requirements –appears to be an afterthought of its drafters.The limited effectiveness of FCPA enforcement in its first quarter century may be partially ascribed to this financial and accounting approach to corruption. However well or poorly the SEC and the DOJ may have worked together on individual FCPA cases, the dual jurisdictional nature of their interplay has not contributed to rendering settlements transparent.

Consistent with French administrative practice, the AFA mandate articulates a far more precise and prescriptive role than the SEC. Actual practice will determine whether this specialized and directive approach will make it more effective than the SEC or increase its susceptibility to being neutered through « industry-capture ». AFA future practice, particularing in supervising post sanction individual corporate compliance programs may prove worthy of study by the SEC and DOJ given the lack of transparency of US monitoring programs. [24]

24 *See generally*, Garrett, Too Big at 191-2, 267, 271

French criminal law grants extensive rights to crime victims**.** The historical roots of this solicitude may be traced to the private law origins of French criminal law and its greater concern with the interests of society at large compared with the state-centered "preserving the king's peace" devlopment of criminal law at common law. [25] Victim rights include the right to intervene in an ongoing criminal investigation as a separate but equal party, known as the "partie civile" (civil party). The civil party may force the prosecutor or investigating magistrate to open an investigation. Most French corruption and financial crime allegations are commenced in this fashion. [26]

« Victim » is given a very broad interpretation. In corruption cases the corporation itself is often included, at least initially. Victims increasing take advantage of the « piggyback » advantages of the civil party status, particularly the fact that the costs are mostly borne by the State. Corporations may attempt to join at the investigative phase to obtain access to the investigative file or « dossier » as well as for the reputational value of being viewed as the « victim »**.** Recently, associations representing victims of corruption have been authorized by the courts to act as civil parties in what is known as « bien mal acquis **»** BMA » or (ill gotten gains) cases, of which France is the world's focal point**.** [27]
NGO representation may prove to be of great importance in the combat against corruption and should be the subject of further comparative legal analysis to determine if this tool may be effectively used in other countries, including the US, and by international organizations such as the World Bank [28]

25 François Saint-Pierre, Avocat de la Défense 50-52 (2009)
26 Hodgson *supra* note 4 at 31
27 *See,* Xavier Harel and Thomas Hofnung, Le Scandal des Biens Mal Acquis (2011) (hereafter «Harel »)
28 World Bank, *Left Out of the Bargain-Settlements in Foreign Bribery 90 (2014)*

The facility offered to victims and their representatives to instigate corruption investigations through the partie civile procedure may serve as a palliative to the failures of the French legal system to effectively deal with corporate corruption in foreign countries. Up to now the « biens mal acquis » cases pursued through « partie civile » actions have been brought by French non-governmental-organizations « NGO's » dedicated to fighting corruption. NGO's such as Anticor, Sherpa and Transparency International (France) have pursued corrupt foreign government officials holding assets in France. « Bien Mal Acquis » cases have been successfully instituted in France through partie civile intervention. Most noteworthy is the civil party action led by Transparency International France « TI » commenced July 10th, 2008 against the heads of State of Gabon (Omar Bongo), Congo (Sassou N'Guesso and Equitorial Guinea (Teodoro Obliang Nguema) and their entourages. French corporations have not yet been named nor directly involved which may partially explain France's leading role in pursuing this avenue of attack.

The broad definition of victims and their representatives for partie civile purposes in several areas (consumer protection, discrimination, protection of animals…) bodes well for this article's recommendation to extend partie civile status to shareholders, employees, unions, private and public financiers, (including International lending banks such as the World Bank and their affiliated regional banks) as well as citizens of the countries harmed by the corruption.

The acceptance of TI, as an association entirely dedicated to combating corruption worldwide with a sufficient interest as a « partie civile » was not without difficulty. TI's consecration, opening the door to similar actions by other anti-corruption NGO's was confirmed by the landmark decision of the French Supreme Court « Cour de Cassation » of November 9th, 2010. This remarkable decision was preceded by the waging of a two and a half year « judicial guerrila » led by French and African anti-corruption advocates in the face of intense politico-diplomatic pressure from the targeted countries.[29]

This significant breakthrough offers fertile ground for comparative law analysis aimed at evaluating legal mechanisms for combatting corporate foreign corruption.
First, prosecutors « procureurs » comprising the « ministère public » do not have a monopoly on representing the « public interest »* Second, the French penchant for recognizing « civil society » associations as key actors in enforcing legal norms now includes deterring corruption and obtaining restitution for its victims. Third, mandatory referral to an investigating magistrate in civil party intervenor cases significantly reduces the potential for political/diplomatic influence on investigative and charging decisions. Fourth, neutralization of claims of « extortion », agency fund seeking and unfairness to those suffering most from corruption. Last, victim initiated foreign corruption legal actions including ill gotten gains « biens mal acquis » seizures are public, transparent and generate considerable media attention.

29 Harel *supra* note 27 at 64-71; Eric Alt & Irène Luc, L'Esprit de Corruption 133-6 (2012) (hereafter « Alt ») Leslie Wayne, *Shielding Seized Assets from Corruption's Clutches,* NYT, December 30, 2016

*The concept of public interest (« interet public ») is a cornerstone of the French legal system. The commitment of investigating magistrates to always act in the « public interest » explains why French society has consistently supported the institution. It is noteworthy that plea bargaining is referred to as a judicial public interest agreement (« convention d'interet public judiciare ») in Sapin II.

How does American law compare ? How might fundamental aspects of its legal culture influence the adoption of victim led anti-corruption legal initiatives ? Do other legal mechanisms exist in American law that might be employed to achieve the same objective ?

American legal procedure, by tradition, ideology and the ethos and organization of its legal professionals, is structurally individualistic, party-centric, de-centralized, and adversarial. [30]
The adversarial criminal process is conceived as a battle between two parties -the defendant and the State. Society or the « public interest » is not represented by an organic « neutral » judge as the investigatory magistrate or a « prosecutor » whose training and professional ethos leads to insistance on being classified as part of the judiciary.

One might assume that the absence in American criminal procedure of a tripartite system in which a powerful central function conceives its role as guardian of the public « good » would facilitate private victim corruption actions. Reliance on such an assumption might prove misplaced. Victims attempting to use American procedure to combat corruption will not encounter an institution jealous to preserve its elevated role as society's protector. They will, however, have to overcome resistance to their intervention arising from a political tradition and an ideology that conceives society as the sum of competing private interests which the law arbitrates and does not recognize the existence of a decipherable general « public interest » to be promoted by the law. The resistance will be framed in terms of « standing to sue » with the bar likely placed high in BMA type cases. The high bar is a result of a legal culture that traditionally has granted if at all a very limited place to the victim in criminal proceedings as evidenced by their need to bring separate civil actions to obtain redress. In addition, anti-corruption NGO's seeking a direct role in American criminal proceedings will not be shown the deference given to them in France as private embodiments of the « public interest ».

The existence of these obstacles does not imply that civil party or similar intervenor mechanisms consistent with American traditions cannot be successfully used to further the fight against foreign corruption. American procedure has long been successful in integrating the « public interest » in legal actions as evidenced, in particular in environmental law. Qui Tam suits, long used as a tool in ferreting out government fraud cases, may, for example provide a framework on which to build. American lawyers creativity in developing new or adapting existing obtaining collective redress mechanisms may be tapped in corporate foreign corruption cases. [31]

The risk of political and diplomatic influence cannot be reduced in the United States by confiding corruption cases to a neutral and independent investigating magistrate in a victim's representative initiated legal action. Limited borrowings from different legal systems may be successful if adaptations necessary to ensure coherance with the fundamental characteristics of the borrowing system are implemented. Attempts to force major transplants requiring the integration of new components divorced from underlying legal culture will be quickly and thoroughly rejected. The institution of the investigative magistrate operating within the French inquisitorial tradition is so foreign to American essential elements of criminal procedure that any attempt to import it would be foolhearty.

30 Garapon, *supra* note 4 at 229-251
31 *See* Webb, Tarun & Molo, Corporate Internal Investigations §2.03(7)(c) (2007)

Assessing whether an investigation or the exercise of prosecutorial discretion has been subject to political or diplomatic influence is inherently difficult. However, the pre-eminent role played for decades by the United States in foreign corrupt practices enforcement as illustrated by the large number of cases, their broad scope, the diversity of corporate nationalities and severe sanctions imposed, does not indicate that enforcement authorities shied away from action due to diplomatic concerns or to protect American companies. American investigative and enforcement methods relying on internal corporate investigations and the almost exclusive use of plea bargaining to dispose of cases have raised legitimate questions from French legislators and commentors as well as American practitioners and Academics. Chief amongst these are a perceived lack of transparency, (despite the availability of detailed guidelines and the immediate Internet posting of plea bargained agreements), on the methods for calculating fines, expectations from internal investigations, the meaning of « co-operation » and how monitors are chosen. [32]

In addition, criticism has been levied against the retention by American authorities of substantial fines instead of sharing them with co-operating foreign authorities or distributing them to victims in the countries where the corruption occurred as well as the perception that « extortionate » measures (jailing of charged suspects, threats of loss of bank licenses, exclusions from public tenders..) to force plea bargains. Recent developments, notably the sharing with Brazil and Switzerland of over 80% of the enormous fine imposed in the Oldebrecht plea bargain and the strong push to re-distribute to victims in corrupt countries of monies seized from Kleptocrats in BMA cases are important steps in the right direction and will stem some of these criticisms. [33]

Comparative law and practice analysis contributed to the dialogue that led to such worthwhile initiatives. Further comparative study and interaction, especially between countries with radically different legal cultures such as France and the US, ought to assist in improving understanding and communication thereby lessening unnecessary tensions. Comparative study of developments such as the granting of civil party victim standing to French NGO's may inspire evaluation of similar mechanisms in the US to realize the same objective.

D. Whistleblowing

We now turn to an examination of why the movement to adopt the peculiar American tool of whistleblowing sparked an emotional controversy in France and how after considerable modification designed to adapt the practice to ensure its coherence with French societal and legal cultural considerations it was integrated into the Sapin II.

32 *See generally* Berger *supra* note 2 ; *See generally* Garett, Jailed *supra* note 18 at 178-178, 278-9
33 Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalities to resolve Largest Foreign Bribery Case in History, *DOJ Press Release* December 21, 2016 http:/www.justice.gov.opa.oldebrecht

As with plea bargaining, the debate over whistleblowing tended to be emotional and framed in terms of general acceptance or rejection of American culture rather than its effectiveness as an anti-corruption tool. The plea bargaining controversy focused on its coherance with deeply held tenants of French legal culture-the legality principle, the criminal process as a search for truth, and the need to limit prosecutorial discretion. Debate on whistleblowing centered more on the fear that its adoption would violate societal norms that may be traced to traumatic moments of French history.

Nevertheless, the adoption of whistleblowing (« lanceurs d'alerte ») in Sapin II and its practical implementation raise privacy and labor law issues which, unlike American practice, occupy a central role in the legal environment of French business. Comparative legal analysis can therefore play a useful role in identifying likely points of tension that need to be defused through adaptation, as would any legal transplant, if whistleblowing is to be successfully integrated into French law and practice. [34]

French comentators tend to overlook the difficulties confronted by American whistleblowers in the past and the ineffectiveness of early legislative attempts, notably the Federal Claims Act to encourage the practice to combat fraud. Societal norms do not generally favor the practice and tend to lead to the rejection or marginalization of the whistleblower in both countries, as elsewhere. It is, however, true that while the embrace of the whistleblower by American society and the enactment of a strong protective legal framework may be of relatively recent vintage, the persistence of animosity towards whistleblowers and resistance to efforts to protect them distinguishes French and American present day practice. The nature of the debate and the integration of a framework that attempts to offer protection consistent with French norms in the Sapin II provides an interesting comparative perspective on the adaptability of anti-corporate corruption tools. [35]

Two particularly traumatic periods of French history-the Reign of Terror and the World War II Occupation- were characterized by widespread denounciations of persons for « crimes ». Sanctions included death or torture. The realization that these horrors were inflicted on victims as a result of often anonymous denounciations seared its scars onto the French psyche. French cultural norms place high premiums on privacy and reputation as long enshrined in libel law and more recently in data privacy legislation. Consequently, France was not a country open to the integration of American style whistleblowing into the French business landscape. (36)

34 Arrieta, supra 18

35 Alt, supra note 29 at 127-32 ; Kevin Abikoff, Corporate Governance §10.1-10.03 ; *See generally*, Beverly Earle & Gerald Madek, *The Mirage of Whistleblowing Protection under Sarbanes-Oxley : A Proposal for Change, 44 American Business Law journal 1*(2007)

36 *« Les entreprises françaises demeurent réticentes à la mise en œuvre de la procédure d'alert… dans un systéme qui, culturement n'est pas prêt à le recevoir » (French companies remain reluctant to adopt a whistleblowing procedure into a system that culturally rejects it »)*
Summary of Gide, Loyrette, Nouel « Whistle or not Whistle » conference of October 2, 2008

Multinational companies present in France and America found themselves « caught in the middle » in the development and implementation of anti-corruption provisions of their Codes of Conduct. Their legitimate desire to promote uniform rules of employee behaviour was thwarted by irreconciable requirements of American and French law on implementing whistleblowing as an anti-corruption tool. Whereas American federal law obliged companies to set up anonymous hotlines for whistleblowing complaints or lose the ability to tender for federally financed projects, French law prohibited anonymity on pain of criminal liability. Whistleblower programs had to be registered and approved by the French CNIL, charged with protecting French strict data privacy law. The potential for a company to find itself « dammed if it did, dammed if it didn't » was great as the CNIL and French data privacy law presented a risk in the hardly unlikely event that an investigation of an allegation of corrupt activity included transfers of data between France and the United States. In addition, French labor unions are given wide berth under French labor law requiring their consultation to frustrate the implementation of whistleblower through delay and demands for modification. French unions have tended to negatively perceive whistleblower programs as impinging on their own role as the voice for employee complaints. French unions are also not generally known to be especially affectionate to American managerial methods and their suspicion of ulterior motives would tend to be particularly strong when consulted on the adoption of an American styled proposal.

French companies with substantial American business and American companies with French subsidiaries have managed this conflict with more or less success. As with other legal dilemnas inherent in international business familiarity with the legal environment and the business and societal culture underlying anti-corruption practices coupled with common sense solutions and a good deal of patience are of great assistance in reducing program implementation tensions.

III. Sapin II

A. Prelude

The impetus for the enactment of anti-corruption sections of the Sapin II 2 primarily originated in the substantial fines from 2010-2014 for violations of the FCPA imposed on four of France's leading companies, Alstom, Alcatel-Lucent, Technip and Total by the DOJ. During this period, France easily led the list of top sanctioned non-US companies in both number and total amount of fines with Alstom as the all time recordholder.

The Alstom corruption case [37] was the subject of considerable comment and controversy in France due to the company's iconic status as a French technological champion (manufacturer of the « TGV » high-speed train) and the dramatic sale of its power generation and transmission division representing 3/4th of the total company to General Electric. News of the proposed sale had the effect of a bombshell coming in the midst of of intense political debate and social angst on the loss of French economic independence, jobs and competitiveness.

37 The Alstom corruption scheme was termed « *astounding in its breadth, its brazeness and its worldwide consequences* » Its failure to co-operate was criticized. Several countries were favorably cited for their co-operation, France was not. *DOJ press conference*, Dec. 22, 2014 *supra* 18

In typical French fashion the government intervened by invoking a recent protectionist law to re-open the deal for other bidders (notably Siemens). GE would eventually prevail after months of political theatre and complicated transaction provisions aimed at ensuring the protection of French interests in « sensitive » activities. Political and social turmoil together with the spectacle of a giant foreign multinationals circling over the remains of a French champion made for excellent press. Alstom's corruption case therefore crystallized broad concern over the effect the imposition of American foreign corrupt law on French companies was having on the French economy and independence.Several general press articles, studies and books on the Alstom deal and its foreign corruption woes were published and legislative hearings held on it held.[38]

While not a corruption case, the June 30th, 2014 record fine of $8.974 million levied on BNP, France's largest bank, for Cuban, Iran and Sudan sanctions violations further contributed to French interest in American foreign corruption law. Unlike the situation in Alstom, the BNP`s US subsidiaries were not directly involved nor were the transactions in BNP illegal under French or European law. Jurisdiction, based on the use of the US dollar in the transactions, was therefore extraterritorial leading to bewilderment and outrage from French politicians, businesspersons, lawyers and commentators who urged President Hollande to attempt to negotiate the BNP fine directly with President Obama during a trip to Paris. [39] The Alstom corruption case, following on the heels of the BNP fine, can be considered to be France's « BAE or Siemens Moment » in reference to the corruption scandals that rocked the UK and Germany in 2006 and later led to major change in the anti-corrupt landscape of both countries.

1. Summary of the anti-corruption provisions of Sapin II

Sapin II was adopted into French law on December 10th, 2016 following months of intense legislative debate and amendment including a negative opinion by the Conseil d'Etat on the draft law's key and most controversial innovation – the « Convention Judiciare d'Intérêt Public » of French plea bargain arrangement. The nature of the Conseil d'Etat's objections – the absence of transparency, opportunity for advocacy and a role for the victim- confirm the thesis of this article that attempts to graft anti-corruption tools from one markedly different legal system to another requires careful pruning if rejection is to be avoided.

i. An affirmative obligation to prevent corruption-

French companies employing more than 500 employees or subsidiaries belonging to a group employing 500 persons in France with more than €100 in sales must implement the « best practices » measures designed to prevent corruption listed below (Article 11) :

38 *See generally*, Jean-Michel Quatrepoint, Alstom, Scandale d'Etat (2015)
39 *See* Berger *supra* note at 93-102, 114-119

-The adoption of a Code of Conduct providing clear detailed guidance on permitted and prohibited action. The requirement that this Code be integrated into the « règlement interieur » (binding corporate policies), and therefore subject to consultation by employee representatives, demonstrates the legislative intent to render the Code binding and not merely aspirational. The requirement to detail what may and may not be done by employees is consistent with the Principle of Legality in criminal matters. In doing so the legislators paradoxically opted for the detailed drafting preferred by Americans over the briefer general principle French drafting style used in private law (eg. Contracts) and « soft » law instruments.

-Establish a whistleblowing, or in French parlance, – procédure d'alerte » - as discussed more fully below

-Set up a process of risk mapping that identifies and evaluates sectorial, specific business and geographical risks and how they may be mitigated

-Establish training programs for employees at high risk of exposure to corruption

-Establish and implement a rigourous due diligence program for clients, suppliers contractors and intermediaries

-Carry out internal and external audits to verify that books and records do not conceal corrupt transactions

-Set up an internal disciplinary sanctions policy

ii. Whistleblowing (Article 10)

The whistleblowing (« lanceurs d'alert ») provisions represent both a significant break with French practice and continuation of its prudent approach to this anti-corruption tool. In accepting that whistleblowers may remain anonymous and permitting the outsourcing of the procedure the law overcomes the strong historical fear of the « denonciator » and cultural mores which frowned on any recourse outside of the « family ».Anonymity is wisely also granted to those accused until the allegation is proven thereby reducing the risk of false denounciations and internal strife within the company.

The definition of the whistleblower is prudent taking into account French concerns with American practices ; « any individual who reveals or reports, distinterestedly and in good faith, a crime or misdemeanor, or a serious threat or harm to the public interest of which she had had personal knowledge, » (underlining added)

The disinterested and good faith criteria eliminates individuals involved in the corruption who often are the best source of « first hand » knowledge and may thereby frustrate detection and investigative efforts. Potential broad interpretations of these criteria may further hinder the deterrence and remedial purposes of whistleblowing. The specific prohibition of rewards for information (limited financial assistance, for example to cover legal expenses, may be available) is not likely to encourage reticent employees to use the « alert procedure ». Sapin II does not provide protection from criminal prosecution nor incentivize a French Birkenfeld. Birkenfeld played a critical role in the UBS tax evasion and money

laundering scandal investigation and despite his involvment in the scheme received a substantial reward after serving his prison term. [40]

Whistleblowers are required to follow the company's internal hierarchical process prior to « blowing the whistle » to the administrative authorities and in last resort the press. Although designed to further prevention and dispose or remedy the issue by those best suited to act rapidly and strongly supported by Transparency International France, adoption of this « let not wash our dirty linen in public » approach risks dissuading employees from sounding the alert.

The ceiling for establishing an anonymous alert procedure is set at 50 employees considerably lower than the 500 for establishing a comprehensive compliance program.

iii.The Creation of a dedicated anti-corruption administrative agency (Articles 1-8)

The new agency, created by Sapin II the Agence Française Anticorruption « AFA » (French Agency for the Detection and Prevention of corruption) is invested with investigative and limited sanctioning powers. It is entrusted to publish anti-corruption guidelines, advise public authorities and companies, verify the proper implementation of corporate compliance programs, protect and provide financial assistance to whistleblowers, monitor post sentence compliance programs and serve as the focal point for co-ordination of international anti-corruption efforts (eg. OECD Convention monitoring).

Given its very recent creation, no empirical study of AFA effectiveness as compared with the the SEC and DOJ, can yet be undertaken. However, a prognosis based on the apparent strengths and potential weaknesses will be attempted. The AFA exclusive purpose is to prevent corruption. Unlike the SEC its anti-corruption mission is not tangential nor an « afterthought ». It will not need, as does the DOJ, to take tough decisions on how best to allocate its resources amongst competing subjects of concern. This exclusive focus should prove to be a significant advantage. Needed expertise can more easily be developed and marshalled if an organization has but one objective. Co-ordination issues and jurisdictional fights are inevitable when responsibility is shared amongst two or more agencies as the SEC and DOJ. The AFA ought to be able to reduce if not eliminate these problems in the implementation of its preventive role.The AFA may order companies to produce documents, inspect company sites and conduct interviews necessary to carry out its corruption prevention mission. Article 6 (II).

40 *See* Gibaud, La Femme Qui en Savait Vraiment Trop 12 (2014). The author is a long suffering Whistleblower who alerted French authorities to the UBS scandal in France. *See also* Garrett, Too Big *supra 18 at 225-229*

Unlike US federal anti-corruption authorities, the AFA is not empowered to investigate corruption nor impose criminal sanctions. Its sanction power (civil fines up to €1 million for corporations and €200,000 for individuals) art.11 (III) are limited to failures to implement mandatory corruption prevention measures.These powers appear to be sufficient for the AFA to carry out its prevention mission. The limits on its powers should be an advantage as it reinforces its clearly defined focus as compared with the lack of clarity and transparency on the respective missions of the SEC and DOJ sometimes encountered in practice.

Potential weaknesses of the AFA include :

-Adequacy of its resources (70 permanent employees)
-Concern over independence as it is placed under the dual authority of the Ministry of Justice and Finance and does not posess the status of an independent administrative agency
-Risk of excessive bureaucratisation of compliance prevention programs leading to a « check the box » mentality and over-confidence in preventive tools
-Uncertainty on the nature of interaction with prosecutors and investigating magistrates reponsible for investigation and enforcement
- Industry « capture » or exercice of political influence
-Inadequate attention given to corporate foreign corruption or unblanced sectorial or geographical prioritization resulting from lack of expertise or political/diplomatic influence

The experience of other French administrative agencies should guide AFA in its development. The positive experience of the CNIL protecting data privacy should be considered.[41] Comparative law analysis and empirical study, with similar agencies in other civil countries, such as Italy, as well as the US (DOJ, SEC) and UK (Serious Fraud Office-SFO) should be useful in assisting the AFA in meeting its challenges. Likewise, an examination of AFA's organization and mission under Sapin II and its effectiveness in practice by US federal authorities and American academics could inspire needed changes to such debatable components of American anti-corruption efforts as post sentence monitoring with its lack of transparency in the appointment process, costs and findings

iv. Plea bargaining-the « French DPA » (Article 17)

Plea bargaining was the most controversial issue in the legislative and public debate on Sapin II .The debate was often framed in extreme « pro » or « anti » American terms with a tendency to ascribe ulterior geo-political « economic war » motives to this long established American criminal procedure practice or attribute the failings of French corporate foreign corruption enforcement solely to its absence in the French anti-corruption arsenal.

41 The « Commisson nationale de l'informatique et des libertés » « CNIL » (French data privacy agency) has an excellent reputation and is considered the leader in Europe in data privacy protection. Unlike the AFA, it has the status of an Independant Administrative Agency and appears better resourced with 192 employees.

A more nuanced view, informed by comparative law analysis emphasing the resources constraint rather than ideological basis of the practice, was voiced on occasion. The drafters of the legislation apparently benefitted from the drafter's exposure to this pragmatic perspective which helped them successfully balance the necessity of integrating a mechanism crucial for effective anti-corruption enforcement success with legitimate concerns about preserving fundamental principles of French criminal law as noted in the Conseil d'Etat consultative legal opinion. [42] This achievement is remarkable given the common belief, especially after the negative legal opinion by the Conseil d'Etat, that this innovation would be abandoned. The perservance of the Government and legislators may be attributed to the sense of urgency stemming from well- founded fears that future « Alstoms » may be in the wings.

The French equivalent of a Deferred Prosecution Agreement « DPA », the « Convention Judiciaire d'Intérêt Public » permits a corporation , but not individuals, to enter into an agreement proposed by the public prosecutor under which the company recognizes the facts of the corruption without admitting guilt (underlining added). The company must accept to pay a fine proportionate to the benefits obtained from the acts of corruption, limited to 30% of the average of its last 3 years' turnover, implement an acceptable corruption prevention program and be placed under AFA monitorship for up to 3 years.
The prosecutor must inform victims « partie civiles » of his decision to propose the « French DPA ». Victims may present evidence establishing the nature and amount of their damages payment of which may be a condition of the agreement. Agreements must be submitted for approval to a judge and are then published together with a press communique from the prosecutor on the AFA website.

The very title -« Convention Judiciare d'Intérêt Public » of the French DPA is illustrative of the care taken to integrate deeply held tenants of French procedure, particularly in light of the Counseil d'Etat's reservations and criticism of American practice. It is a « Judicial » agreement in the « Public Interest ». It emanates from a prosecutor who considers himself to belong to the same « corps » of magistrates as the « sitting judge ». It must be approved by a « sitting » judge after a public hearing.

It is deemed to be a consistent with the « public interest » as the prosecutor is part of the « ministère public » whose ethos is the represention of the « public » and not only the State. This is to be contrasted with American practice where the agreement is perceived as a reasonably « bargained » private deal largely hammered out by lawyers with similar training and experience. The judicial approval process, intended to be more than a « rubber stamp» and the opportunity afforded for civil parties restitution provide positive responses to those aspects of American practice - excessive prosecutorial discretion and the lack of focus on victims rights -that have received much criticism.

42 *See* Bohlen *supra* note 3 citing Antoine Garapon « because if we won't do the job for ourselves the Department of Justice will do it for us »

The Sapin II law adopts a pragmatic approach in its acceptance of the fiction, previously much used by the SEC, of permitting companies to enter into agreements recognizing the reality of the commission of corrupt acts without admitting guilt, thereby avoiding the « death sentence » of exclusion from access to public tenders. The intention not to let individual offenders off the hook is reaffirmed by the exclusion of individuals from the DPA process consistent with the French conceptions of the Legality principle and perhaps, not unconcidentally, with US policy as laid out in the Yates memo, which has received considerable attention in France. [43]

v. Clarity on Extraterritorial Jurisidiction and Elimination of the need to prove prosecution in country of occurrence of the corrupt act (Article 16)

The Sapin II Law eliminates two technical impediments to French action ;
-The extraterritorial reach of French law is expanded by a clear statement that it applies to the operations of French companies overseas and foreign companies operating in France « all or some of their activities in France »,
-French prosecutors may act even if the corrupt acts has not been the subject of prosecution in the country where it occurred.

B. Evaluation of Sapin II

The enactment of Sapin II is an important, if tardy, response to valid criticism of French inertie and feet dragging in the enforcement of anti-bribery law against French companies in foreign corruption cases. The law removes technical impediments that prevented or perhaps permitted prosecutorial inertie. Despite intense controversy, the law adopted Plea bargaining and whistleblowing but innovated by prudently adapting these American anti-corruption tools to take account of deeply cherished aspects of French criminal procedure.The success of the law in deterring corruption through preventive measures and increased enforcement will depend on the effectiveness of the French Anti-corruption Agency set up by Sapin II to focus exclusivity on corruption prevention and the institutions entrusted with enforcement-Prosecutors, investigating magistrates and anti-corruption NGO's.

Comparative law analysis has an important role to play on both sides of the Atlantic in provoking reflection on what works, what may not and the extent « borrowed » anti-corruption mechanisms may be effectively integrated if properly integrated by taking account of legal culture.

43 Memorandum on Individual Accountability for Corporate Wrongdoing, Office of the Deputy Attorney General of September 9th, 2015

C. Parallel Developments-

1.Internal investigations- Role of the French lawyer « avocat »

French criminal practice has traditionally not favored internal corporate investigations. The reticence to internal investigations in criminal matters may be attributed to the following :

-Societal and legal cultural view that the criminal law was not an « internal » matter but one of concern for the society as a whole. Investigations were properly within the province of those entrusted with the « public interest », namely prosecutors, part of the « Ministère Public » , and investigating magistrates

-Extreme skepticism as to the capacity of a corporate internal investigation to ferret out the facts

- Resistance by corporate management and unions reinforced by need to comply with complicated data privacy and labor law rules

-Absence of American « discovery » in civil matters resulting in the absence of a tradition and expertise in organizing and conducting internal investigations

-Orientation of criminal defense lawyers towards technical challenges to the conduct of the investigation and the « dossier » with considerable success.

-Perception that internal investigations serve no purpose and are mere « whitewashing »

-Absence of « Attorney-client privilege » for in-house legal counsels

-Individualistic nature of French legal counsel who usually practice in very small firms and lack the resources and expertise (particularly language skills) to carry out foreign corruption internal investigations

-Mutual distrust between business and judicial worlds and a lack of incentive to co-operate

-Costs (particularly if American lawyers are involved)

The repercussions of France's « Alstom moment » and the realization that co-operation may be desirable in significantly reducing fines have led a number of French lawyers to modify their own traditional resistance and counsel corporate clients to do the same. The Paris bar has been particularly active in preparing for a change in view as evidenced by recent initiatives aimed at improve the framework for internal investigations by the issuance of Recommendations for attorneys on carrying out internal corporate investigations and seminars and training programs for members of the bar seeking to acquire expertise.Comparative Law analysis has played an important role in these initiatives as evidenced by the Recommendation including an « Upjohn warning » [44]

44 Presentation by Stephane de Navacelle at ABA Section of International Law's Anti-Corruption subcomittee meeting of December 14th, 2016

IV. C**onclusion**

International corruption is an extremely serious problem leading to massive uneconomic transfers of resources that hinder development, destroy trust in government and contribute to geo-political instability. Despite the adoption almost two decades ago of international instruments designed to combat bribery, notably the OECD Anti-Bribery Convention, effective enforcement of anti-corruption laws, including the assessing of substantial fines and convictions of involved corporate executives is of relatively recent origin. Enforcement efforts were for many years confined to US authorities leading to extremely negative perceptions of the « extraterritorial » imposition of American law, procedure and methods. Allegations of corruption always elicit highly emotional responses due to the particularly repulsive immoral nature of the crime. The anger, denial and shock of companies and individuals charged with corruption is often far greater than when confronted with allegations of other serious, but less morally reprehensible, illegalities such as antitrust or securities regulation violations. [45]The intensity of foreign governmental and corporate criticism of American « legal imperialism » in the anti-corruption enforcement field should therefore not be viewed as surprising. [46]

Nevertheless, the virulence of the French reaction to American enforcement actions brought against French multinationals is singular. German companies, and in particular Siemens, risked as least as much as their French counterparts from American authorities. However, after the absorption of the initial shock, they tend to take forceful action, embrace co-operation and undertake vigorous enforcement by their own authorities. Recent developments in other countries, notaby Brazil in the Oldebrecht case, show a similar trend.

Germany and Brazil are both civil countries whose laws, procedures, cultural and professional mores differ markedly with the US legal system. Unlike France, however, they have adopted a general American approach, especially concerning corporate and prosecutorial cross border co-operation while retaining elements of their specific legal systems despite international criticsm (German refusal to impose criminal liability on corporations preferring administrative sanctions)

The uniqueness of French resistence up to now may therefore find its source in the peculiarities of French history and its specific business and legal cultures as described above. French and American criminal procedure law and practice differ markedly as a result of different histories, culture, instructional structures and inertias in adapting to changes in the environment.

45 An increasingly vast literature on international corruption exists. Two books explore the moral issues and consequences of corruption and provide a fascinating account of why denial and minimization always follows bribery allegations. *See* generally Laura Underkuffler, Captured by Evil (2013) and Laurence Cockcroft and Anne-Christine Wegener, Unmasked-Corruption in the West (2017)

46 The entrepreneurial nature of the American legal profession and the deal making approach of American criminal and regulatory law contibutes to the disarray of foreign legal professionals. *See generally,* John C. Coffee, Entrepreneurial Litigation-Its Rise, Fall and Future (2015), Stephen Breyer, The Court and the World, 91-133 (2015), Garapon, Deals, *supra 16,* Posner, Perils, *supra 17*

Criminal procedures for corporate bribery abroad provide an excellent comparative law case study of these differences in a field that has engendered considerable controversy and a recent French legislative response- Sapin II.The debate in France over how to improve its much criticized foreign anti-bribery enforcement record arose from intense discomfort with the application by American authorities (DOJ & SEC) of the « FCPA » to French companiesThis debate and legislative response illustrates the typically emotionally charged response in France to attempts to modify French law and practice when companies are confronted with the effects of perceived American « legal imperialism »

Comparative law analysis of the French debate and legislative response provides useful insight into how legal systems, particularly those from different major legal traditions (civil for France, and common law for the US) deal with the tensions caused by the interplay of the two systems' in regulating International business practices. The adoption of the American anti-corruption tools of whistleblowing and plea bargaining required their careful modification to render them palatable to French legal culture.

Studying this process of « adaptation » offers a practical guide to the risks and opportunities for « legal transplants » [47] by stimulating inquiry into how best to implement improvements on both sides of the Atlantic.Further comparative criminal procedural study will further the international co-operation amongst enforcement authorities, legislators and legal professionals necessary to combat corruption. It also may provide sufficient guidance and incentives for corporate executives to co-operate by reducing the quandary of being « caught in the middle » (48)

47 Alan Watson and Pierre Legrand's classic studies should be read to obtain an understanding of the fierce debate among comparativists on the causes of the difficulties in successfully implementing « legal transplants » *See* Alan Watson, Legal Transplants : An Approach to Comparative Law (1993), Pierre Legrand, *The Impossibility of Legal Transplants* 4 Maastricht Journal of European And Comparative Law 111 (1997)

48 *See* Matt Reeder, *Bad Math/ State-Centric Anti-Corruption Enforcement +Interntional Information Sharing Agreements=Conficting Corporate Incentives,* 49 The International Lawyer 325 (2016)