Revista de Derecho

ARTÍCULO DE INVESTIGACIÓN
RESEARCH ARTICLE

FCPA and TCA: Introducing the Presumptions of Final Judgment and Joint Investigation

FCPA y TCA: Introduciendo las Presunciones de Adjudicación Final e Investigación Conjunta

JAVIER CORONADO DIAZ

Javier Coronado es abogado egresado de la Universidad Javeriana, con una maestría en derecho por University of Pennsylvania (Philadelphia. Estados Unidos) y certificación ACAMS en Legislación contra el Lavado de Activos. Tiene licencia para ejercer en Colombia y en el Estado de New York. Cuenta con amplia experiencia en litigios penales y de extinción de dominio. Igualmente, se ha desempeñado como profesor de la Universidad Javeriana de cursos relacionados con derecho penal y procesal penal. coronado@pennlaw.upenn.edu

Abstract

On February 2, 2016, the Congress of Colombia passed the Transnational Corruption Act ("TCA") in an effort to fight international corruption like the Foreign Corruption Practices Act ("FCPA") does in U.S. This paper explains why TCA and FCPA define different legal standards for corporate liability. It also explains how these differences increase economic costs for legal entities doing business in Colombia and U.S. Against this backdrop, this paper suggests the implementation of one universal set of anti-corruption rules. However, based on the unlikeliness of achieving such an international consensus, it also suggests that law enforcement agencies enforce anti-bribery statutes such as the TCA and FCPA under certain rebuttable presumptions.

Keywords

International Corruption, Transnational Corruption Act, Foreign Corruption Practices Act (FCPA), Corporate Liability.

Resumen

El 2 de febrero de 2016, el Congreso de Colombia aprobó la ley sobre corrupción transnacional ("TCA"), un esfuerzo local por combatir la corrupción internacional como lo es la *Foreign Corruption Practices Act* (FCPA) en Estados Unidos. Este artículo explica por qué TCA y FCPA definen estándares legales diferentes para la responsabilidad corporativa. También explica por qué estas diferencias incrementan los costos económicos para las entidades legales con negocios en Colombia y EE.UU. En ese contexto, este artículo sugiere la implementación de un cuerpo universal de reglas anticorrupción. Sin embargo, con base en las pocas probabilidades de obtener un consenso internacional de este tipo, también sugiere que las agencias encargadas apliquen leyes anticorrupción como lo son TCA y FCPA bajo ciertas presunciones rebatibles.

Palabras clave

Corrupción Internacional, Ley 1778 de 2016, Ley de Prácticas Corruptas en el Extranjero (FCPA), Responsabilidad Penal de las Empresas.

Fecha de recepción: 2 de abril de 2018
Fecha de aceptación: 2 de marzo de 2019

1. INTRODUCTION

On December 20, 1977, the United States ("U.S.") President Jimmy Carter signed the Foreign Corruption Practices Act ("FCPA"), "a pioneering statute and the first law in the world governing domestic business conduct with foreign government officials in foreign market." (Koehler, 2012, p. 2). The FCPA was a U.S. Congress reaction to the results of the investigation started in the mid-1970s by the Office of the Watergate Special Prosecutor and continued by the Securities and Exchange Commission ("SEC") and the Senate's Subcommittee on Multinational Corporations. Ibid. Notably, U.S. law enforcement had found at that time that multiple local companies were paying "questionable or illegal payments" to secure government contracts within other countries (Darrough, 2009). While U.S law did not directly forbid such payments, Congress and Government believed that the bribery of foreign officials was "ethically repugnant and competitively unnecessary." (Carter, 1977) U.S. Congress and Government further believed that these corrupt practices between corporations and public officials harmed U.S. relations with other countries (Carter, 1977).

After entering into force, the FCPA had two major amendments. First, in 1988, the Congress amended the FCPA to include "an express facilitating-payment exception, certain affirmative defenses, and a revised knowledge standard applicable to payments made to foreign officials indirectly through third parties such as agents." (Searle Civil Justice Institute, 2012). The Congress amended the FCPA after multiple Government reports documenting the adverse impact that the FCPA was having in the country's exports (Searle Civil Justice Institute, 2012). Subsequently, in December 1997, the Congress amended the FCPA again to be consistent with certain provisions of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business ("OECD Convention"). Critically, this second amendment expanded the scope of the FCPA to reach foreign companies and individuals not covered by the original version (Searle Civil Justice Institute, 2012, pages. 4-5).

The 1988 amendment of the FCPA mandated the U.S. President to "pursue an international agreement criminalizing foreign bribery through the OECD." (Darrough, 2009). The Organization for Economic Cooperation and Development ("OECD") is an international organization that promotes economic progress and world trade (OECD, 2017). U.S. efforts concluded with the approval of the OECD Convention. In it, signatory countries are required to "(1) criminalize bribery of foreign public officials, (2) hold corporations and other legal persons liable for bribery, (3) prohibit off-the-books payments and other accounting practices that may facilitate corruption, (4) make bribery an extraditable offense and (5) provide mutual legal assistance to each other in bribery cases." (Carr, 2008, pags. 6-7)

The OECD Convention does not define a specific set of rules to fight international corruption. Nor does it establish a universal body in charge of enforcing anti-bribery laws. Instead, the OECD Convention requires signing countries to fight international corruption under a "functional equi-

valence" basis. Accordingly, countries are allowed to design and implement anti-bribery laws consistent with the "idiosyncrasies of their individual legal systems." (Carr, 2008, pags. 8-10) The former Chair of the OECD Working Group on Bribery in International Business Transactions ("OECD Working Group") explains the rationale behind this "functional equivalence" as follows:

> "According to the functional approach of comparison attention is drawn to the overall working of systems rather than individual institutions. The assumption is that each legal system has its own logic and is not necessarily determined by the legal texts alone. Practices and informal rules are part of this approach as well as other aspects of the legal system taking over ancillary functions. Therefore, the focus of comparison would lie on overall effects produced by a country's legal system rather than the individual rules." (Pieth, 2017)

In May, 2013, the OECD launched accession discussions with Colombia and the OECD Secretary-General stated that "[w]ith 47 million citizens and the third largest economy in Latin America, Colombia will greatly enrich the OECD with its varied experiences." (OECD, Launch of Colombia's Accession Process to the OECD, 2017). Colombia believed that the OECD was as an outstanding opportunity to partner "with the countries with the best social, economic and government practices." (Presidency of Colombia, 2017). In these accession discussions, the OECD encouraged Colombia to implement the OECD Convention (*República de Colombia*, 2014, *Proyecto de Ley* 159).

In fact, the OECD Working Group had reviewed Colombia's compliance with the OECD Convention and returned multiple recommendations (OECD, Phase 2 Report on Implementing the OECD Anti-Bribery Convention in Colombia, 2015). Notably, the OECD Working Group had identified gaps in Colombian laws pertaining the liability of corporations engaging in acts of international corruption (OECD, Phase 2 Report on Implementing the OECD Anti-Bribery Convention in Colombia, 2015, pags. 36-95).

Against this backdrop, on February 2, 2016, the Congress of Colombia passed the Transnational Corruption Act ("TCA") (República de Colombia, 2016, Ley 1778). For the first time in the history of Colombia, the Congress approved a specific regime for sanctioning legal entities bribing foreign officials. Ibid. However, as this paper will further explain, the TCA and FCPA have different legal standards for corporate liability.

Mainly, this paper suggests that the existence of different legal standards for fighting international corruption adds costs to companies doing business in Colombia and U.S. Accordingly, it suggests the implementation of a universal set of anti-corruption rules. However, based on the unlikeliness of achieving an international consensus for enacting such set of rules, it also suggests that countries such as the U.S. and Colombia could mitigate the costs of multiple and diverse anti-bribery law enforcement if law enforcement agencies operate under two rebuttable presumptions. First, under a presumption of final judgment, meaning that in cases where

a country complying with the OECD Convention ("OECD Country") renders a final decision about an anti-bribery investigation, law enforcement agencies of other OECD Countries should treat that decision as adequate and final. Additionally, law enforcement agencies from OECD Countries should operate under a presumption of joint investigation so cases involving multiple jurisdictions are investigated in only one coordinated enforcement action.

Part I of this paper describes the similarities and differences between FCPA and TCA. Critically, it compares the provisions that these acts have for prosecuting legal entities that engage in the bribery of foreign officials. Part II of this paper analyses the economic costs that these differences have for companies doing business in Colombia and U.S. Lastly, Part III of this paper suggests actions that law enforcement agencies from these two countries can take to mitigate the negative consequences of having different legal standards for fighting international corruption.

2. FCPA AND TCA: TWO DIFFERENT WAYS OF FIGHTING INTERNATIONAL CORRUPTION

2.1. Overview of the Foreign Corruption Practices Act

The FCPA is both a criminal and a civil statute and has two types of provisions: the anti-bribery provisions, and the books and records and internal control provisions (U.S. House of Representatives, 2017, 15 U.S.C., §§ 78m(b), 78dd-1, 78dd-2, 78dd-3). The U.S. Government has summarized the core of each type of provisions as follows:

> "The anti-bribery provisions prohibit US persons and businesses (domestic concerns), US and foreign public companies listed on stock exchanges in the United States or which are required to file periodic reports with the Securities and Exchange Commission (issuers), and certain foreign persons and businesses acting while in the territory of the United States (territorial jurisdiction) from making corrupt payments to foreign officials to obtain or retain business. The accounting provisions require issuers to make and keep accurate books and records and to devise and maintain an adequate system of internal accounting controls. The accounting provisions also prohibit individuals and businesses from knowingly falsifying books and records or knowingly circumventing or failing to implement a system of internal controls." (Criminal Division of the US Department of Justice and the Enforcement Division of the US. Securities and Exchange Commission, 2012, pag. 2)

Two different U.S. Government agencies enforce the FCPA: the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"). The DOJ handles all criminal actions involving FCPA provisions, and civil actions related to the anti-bribery provisions against non-Issuers (Criminal Division of the US Department of Justice and the Enforcement Division of the US. Securities and Exchange Commission, 2012, pags. 4-5).

The DOJ resolves most of its corporate FCPA actions through non-prosecution agreements ("NPAs"), deferred prosecution agreements ("DPAs"), and plea agreements (Searle Civil Justice Institute, 2012, pags. 11-12). Under a NPA, the DOJ does not pursue a legal action against the defendant if the defendant agrees to cooperate with the investigation and other enforcement actions; and to comply with certain compliance measures and "undertakings." (Criminal Division of the US Department of Justice and the Enforcement Division of the US. Securities and Exchange Commission, 2012, pag. 77) Under a DPA, the DOJ "files a charging document with the Court; [and] it simultaneously requests that the prosecution be deferred, that is, postponed for the purpose of allowing the company to demonstrate its good conduct." (Criminal Division of the US Department of Justice and the Enforcement Division of the US. Securities and Exchange Commission, 2012, pag. 76). DPAs generally require the defendant "to pay a monetary penalty, waive the statute of limitations, cooperate with the government, admit the relevant facts, and enter into certain compliance and remediation commitments." (Criminal Division of the US Department of Justice and the Enforcement Division of the US. Securities and Exchange Commission, 2012, pag. 76). If the defendant complies with the DPA, the DOJ moves to dismiss its criminal charges. Plea agreements require the defendant to accept all or some of the criminal charges, in exchange of one of the following actions of the DOJ:

> "(A) not bring, or will move to dismiss, other charges;
>
> (B) recommend, or agree not to oppose the defendant's request, that a sentence or sentencing range is appropriate or that a provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or
>
> (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement)." (U.S. House of Representatives, USCS Fed Rules Crim Proc , 2017, Rule 11)

The SEC may also bring civil actions to enforce the FCPA but only when the violation of this statute is committed by an issuer or its agent. The SEC has the authority to seek a variety of remedies before a federal court or in administrative proceedings, including monetary penalties, disgorgement of ill-gotten gains, prejudgment interest, an injunction, or a cease order prohibiting current and future violations. The SEC commonly resolves corporate FCPA cases through consent decrees whereby the defendant does not accept the charges but agrees to pay a civil penalty and implement a number of compliance measures (Criminal Division of the US Department of Justice and the Enforcement Division of the US. Securities and Exchange Commission, 2012, pags. 11-12). The Commission also subscribes NPAs and DPAs (Criminal Division of the US Department of Justice and the Enforcement Division of the US. Securities and Exchange Commission, 2012, pags. 76-77).

The general five-year statute of limitations applies to the criminal enforcement of the FCPA pursuant 18 U.S.C. § 3282. Under 28 U.S.C. § 2462, the SEC has a five-year statute of limitations to pursue any "suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture." (Criminal Division of the US Department of Justice and the Enforcement Division of the US. Securities and Exchange Commission, 2012, pags. 34-35).

Scholars concern about the U.S. Government's widespread use of DPAs, NPAs, and plea agreements to enforce the FCPA against companies because there is little or no judicial scrutiny of the Government actions (Koehler, A Snapshot of the Foreign Corrupt Practices Act, 2016, pag. 170). Notably, scholars criticize that the legal interpretation of the FCPA is generally not the outcome of an adversarial proceeding between the Government and the defendant but the result of a private arrangement in which the defendant has enough incentives to not challenge the Government's theories (Koehler, The Facade of FCPA Enforcement, 2010). Scholars further argue that the U.S. Government's way of enforcing the FCPA also makes companies pay unnecessary costs in the design and implementation of FCPA compliance programs (Koehler, 2010, pags. 1001-1004).

2.2. Overview of the Transnational Corruption Act

The TCA created an administrative regime to prevent all legal entities from engaging in the bribery of foreign officials, regardless of any parallel criminal or civil actions against the individuals who participate in the bribery (*República de Colombia*, 2016, *Ley* 1778, *artículos* 1-29). The Colombian Congress had previously approved Act 1474 of 2011 to sanction international corruption but this act had several defects according to the OECD (OECD, Phase 2 Report on Implementing the OECD Anti-Bribery Convention in Colombia, 2015, pag. 67).

Under the TCA, a corporation is administratively liable when "(1) a director, employee, contractor, or shareholder (whether or not they have the legal authority to bind the entity), (2) gives, offers, or promises, (3) to a foreign public official, (4) directly or indirectly, (5) money, any other good with monetary value, or any other benefit or prerequisite, (6) in exchange for the official to perform, omit, or delay any act related to the exercise of the official's functions, and (7) in relation to international business transactions" (*República de Colombia*, 2016, *Ley* 1778, *artículo* 30).

The Superintendency of Corporations enforces the administrative sanctions defined by the TCA. It conducts administrative investigations of apparent violations of the TCA, declares if the company violated the law and if necessary, calculates and enforces the pertinent administrative penalties (República de Colombia, 2016, Ley 1778, *artículos* 5-22). The TCA establishes a ten-year statute of limitations for the Superintendency's administrative enforcement actions (*República de Colombia*, 2016, *Ley* 1778, *artículo* 19).

Under the TCA, legal entities can avoid o reduce penalties when they self-report any infractions, cooperate with the Superintendency's investigation, and have a TCA compliance program in place (*República de Colombia*, 2016, *Ley* 1778, *artículo* 19). In fact, the Superintendency has the statutory duty of encouraging legal entities to adopt and implement TCA compliance programs (*República de Colombia*, 2016, *Ley* 1778, *artículo* 23).

The Colombian Congress alleged "practical" reasons for not making legal entities criminally liable for engaging in transnational bribery (*República de Colombia*, 2000, *Ley* 599, *artículo* 433). Notably, the Congress alleged that the definition of criminal liability for legal entities participating in international corruption would require tremendous legal reforms because "it would be necessary to adjust the law to guarantee the participation of the legal entity in all the stages [of the criminal procedure]; and in the substantive part [of the law], it would be mandatory to modify substantially our current concepts of actus reus, intention, negligence, culpability, and of the crime itself." (Bill number 159, 2014)

Apart from creating a new corporate liability regime, the TCA amended several provisions of the Colombian Penal Code and Criminal Procedure Code. Interestingly, the Act modified the crime of transnational bribery (still only enforceable against individuals) to make it consistent with the new provisions (*República de Colombia*, 2016, *Ley* 1778, *artículo* 30). The TCA also authorizes Colombian courts to suspend the operations of any legal entity that benefits from a crime against public administration such as transnational bribery (Act Number 1778, 2016, Article 35). Furthermore, if an officer of a legal entity is convicted of transnational bribery, the TCA authorizes the Superintendency to fine that entity when it approved or tolerated the bribery and obtained a profit (*República de Colombia*, 2016, *Ley* 1778, *artículo* 34).

3. COMPARING THE FCPA AND THE TCA REGIME FOR LEGAL ENTITIES

The TCA does not have any provisions similar to the books and records and internal control provisions that the FCPA has. Accordingly, if any comparison can be made between these two statutes, it should concern the FCPA's anti-bribery provisions.

Based on the outline of the FCPA and TCA that was made in the previous chapter, U.S. and Colombia enacted these statues with the purpose of fighting international corruption. There is also a resemblance between FCPA and TCA in the consequences that they set forth for a violation of their anti-bribery provisions (Criminal Division of the US Department of Justice and the Enforcement Division of the US. Securities and Exchange Commission, 2012, pags. 68-74; *República de Colombia*, 2016, *Ley* 1778, *artículo* 5). Notably, proceedings under these two statutes may result in economic penalties and measures to enjoin additional violations. Similarly, legal entities may suffer exclusion or debarment from certain activities or industries, ineligibility to obtain licenses, and additional civil or criminal proceedings under other laws and regulations.

There are also similarities involving the type of legal entities that can be held liable under both FCPA and TCA. They both authorize the law enforcement to prosecute any type of legal entity regardless of its corporate form (U.S. House of Representatives, 2017, 15 U.S.C., § 78dd-2; *República de Colombia*, 2016, *Ley* 1778, *artículo* 30). Furthermore, the existence of jurisdiction over a legal entity under both statutes depends on the legal entity's ties with Colombia in the TCA or U.S in the FCPA, including whether the company committed an overact within national territory (U.S. House of Representatives, 2017, 15 U.S.C., §§ 78dd-1(a), 78dd-1(6); *República de Colombia*, 2016, *Ley* 1778, *artículos* 1-3). Both FCPA and TCA apply principles of parent-subsidiary and successor liability in evaluating corporate liability (Criminal Division of the US Department of Justice and the Enforcement Division of the US. Securities and Exchange Commission, 2012, pag. 27; *República de Colombia*, 2016, *Ley* 1778, *artículo* 2), and under both statutes a parent company can be found liable for pre-acquisition violations of the anti-bribery provisions (Criminal Division of the US Department of Justice and the Enforcement Division of the US. Securities and Exchange Commission, 2012, pag. 28; *República de Colombia*, 2016, *Ley* 1778, *artículo* 6).

FCPA and TCA also share some features regarding the legal basis for finding a company liable. For instance, both statutes apply general principles of corporate liability (Criminal Division of the US Department of Justice and the Enforcement Division of the US. Securities and Exchange Commission, 2012, pag. 27; *República de Colombia*, 2016, *Ley* 1778, *artículo* 2), and include provisions to sanction legal entities that use third parties to violate the law (U.S. House of Representatives, 2017, 15 U.S.C., § 78dd-1(a)(3); *República de Colombia*, 2016, *Ley* 1778, *artículo* 2). Additionally, both the FCPA and the TCA require an offer, promise or payment of something valuable to a foreign official as an element of the law violation (U.S. House of Representatives, 2017, 15 U.S.C., § 78dd-1; *República de Colombia*, 2016, *Ley* 1778, *artículo* 2). However, neither the FCPA nor the TCA require a monetary benefit or define a *de minimis* value for the "bribe" element of the offense (U.S. House of Representatives, 2017, 15 U.S.C., § 78dd-1; *República de Colombia*, 2016, *Ley* 1778, *artículo* 2). Moreover, the definition of "foreign official" under these two legislations covers not only officers, employees or representatives of a foreign government or a public international organization; but also entities "controlled by the government of a foreign country that performs a function the controlling government treats as its own" (United States Court of Appeals for the Eleventh Circuit, United States v. Esquenazi, 2014).

Nevertheless, the FCPA and the TCA define different legal standards for finding a legal entity liable. This paper already anticipated these differences when it outlined the nature of the agencies involved in the enforcement of each statute and the procedures that they follow. Furthermore, the TCA's regime is based on administrative and not criminal or civil actions. The FCPA qualifies the required *mens rea* for prosecuting a legal entity in two ways that the TCA does not. First, the FCPA requires that the legal entity making the payment or offer to the foreign official follows the purpose of "obtaining or retaining business." (U.S. House of Representatives, 2017, 15 U.S.C., §

78dd-1) Second, the FCPA only prohibits offers or payments made "corruptly." The corrupt motive is related to an "evil motive or purpose, an intent to wrongfully influence the recipient." (Legislative History - Senate Report No. 95-114, 1977) The TCA does include a similar condition.

The FCPA also has a group of exceptions and defenses that are not in the TCA. The FCPA allows legal entities to make payments that facilitate or expedite the performance of routine-nondiscretionary government functions (U.S. House of Representatives, 2017, 15 U.S.C., §§ 78dd-1(b), 78dd-2(b), and 78dd-3(b)). The FCPA also does not prohibit payments that are lawful under the written laws and regulations of the foreign country (U.S. House of Representatives, 2017, 15 U.S.C., §§ 78dd-1(c)(1), 78dd-2(c)(1), and 78dd-3(c)(1)). Moreover, in the FCPA, legal entities are not held liable if they can prove that the alleged bribe was actually a reasonable and bona fide expenditure directly related to the promotion, demonstration, or explanation of products or services; or to the execution or performance of a contract with a foreign government or agency. (U.S. House of Representatives, 2017, 15 U.S.C., §§ 78dd-1(c)(2), 78dd-2(c)(2), and 78dd-3(c)(2)). The TCA does not include similar defenses or exceptions.

4. THE COSTS OF MULTIPLE AND DIVERSE ANTI-BRIBERY LAW ENFORCEMENT

Regardless of the undisputed benefits that anti-corruption laws such as FCPA and TCA have for legal entities and communities around the globe, they make legal entities incur in several costs (Committee on International Business Transactions, 2009). Critically, legal entities are required to pay attorney fees, and monetary penalties if the corporation is found liable. Ibid. Moreover, legal entities need to allocate resources to compliance programs and internal investigations and audits, as an effort to prevent or mitigate any liability (Committee on International Business Transactions, 2009, pags. 8-9).

Anti-corruption due diligence is generally a time consuming and expensive element of business transactions, especially if the company is participating in a merger or an acquisition with a foreign company or a company with international operations (Committee on International Business Transactions, 2009, pags. 9-10). The principles of parent-subsidiary and successor liability governing anti-corruption statutes, same as the third-party provisions, compel companies to be deep carefully into the current and past practices of their counterparts. Ibid.

A company subject to anti-corruption laws such as FCPA and TCA may also have to face negative consequences in its competitiveness. (Arbatskaya, 2018). Notably, a company that is required to comply with these statutes can be in disadvantage as to other participants in the market that are not required to follow similar compliance (Committee on International Business Transactions, 2009, pags. 10-11). Moreover, these laws often force companies to create strains in their business partners because they are expected to monitor and even question and restrain any of

the partners' practices that are not in compliance with anti-corruption laws. Ibid. Similarly, the competitiveness of a legal entity can be negatively affected by anti-corruption laws if it starts avoiding practices and interactions with foreign officials that are actually permitted. Ibid.

Anti-corruption laws such as FCPA and TCA may also incentive non-complying enterprises to stress or "play up" the possibility of corruption in at least one of their markets as a strategy for lessening or eliminating any competition (Committee on International Business Transactions, 2009, pags. 15-16). Critically, "[c]ompetitors might bring a suit after losing a foreign contract and allege that the contract was lost because of the defendant's illegal bribes." (Sivachenko, I., 2012, pag. 421). Furthermore, the "additional profits made, costs saved, knowledge gained, and relationships formed by companies subject to the jurisdiction of the non-enforcers could be used in subsequent endeavors, thus increasing their competitiveness." (Committee on International Business Transactions, 2009, pag. 16).

Moreover, when a company is required to comply with two or more anti-corruption legal regimes that are different from each other, as it happens to a company that needs to comply with both TCA and FCPA, that company generally has to further increase its compliance-related expenses. Scholars have previously highlighted how risk-adverse companies that can not anticipate what the anti-corruption legal framework is, spend significant time and money in compliance and due diligence measures, and internal audits and investigations. (Koehler, 2010, pags. 1001-1004).

Lastly, when the scope of anti-corruption obligations is not clear to these companies, they stop engaging in "not only objectionable conduct but also acts that should be permitted and even encouraged." (Committee on International Business Transactions, 2009, pag. 11). Accordingly, "the absence of legislative, judicial, or administrative guidance on how to comply with ambiguous statutory terms results in a host of direct and indirect costs to businesses and unnecessarily burdens corporations, leading to the loss of competitive edge and abandonment of business opportunities." (Sivachenko, I., 2012, pag. 411).

5. MITIGATING MEASURES: UNIVERSAL ANTI-BRIBERY LEGISLATION AND THE PRESUMPTIONS OF FINAL JUDGMENT AND JOINT INVESTIGATION

To mitigate the costs of compliance with different anti-corruption regimes, countries should enact a universal set of anti-bribery rules enforced by an international organization such as the World Trade Organization or the United Nations (Hills, 2014, pags. 487-492). This initiative could "place all multi-national corporations on a level playing field with a uniform act to combat corruption in the international realm." (Hills, 2014, pag. 491) Moreover, an international enforcement agency would not only ensure parity in the application of this universal set of rules but would also preclude multiple proceedings grounded on the same facts. Ibid.

However, obtaining the necessary consensus among different countries to adopt this universal set of rules seems unlikely. The OECD is illustrative of this dynamic because the OECD Working Group only obtained the necessary approval for enacting the OECD Convention by defining that the signing parties legal framework would be evaluated under a "functional equivalence" standard (OECD , 1997). The UN Convention also had to follow a similar approach (United Nations Office on Drugs and Crime, 2017).

There is, however, at least one way to guarantee uniformity in anti-corruption enforcement without departing from what is possible and feasible. Critically, law enforcement agencies enforcing statutes such as FCPA and TCA could investigate and prosecute international corruption under two rebuttable presumptions. First, in cases where an OECD Country has reached a final determination about an issue of corruption, the law enforcement agencies from the rest of the OECD Countries should treat this determination as adequate and final. Additionally, law enforcement agencies should operate under a rebuttable presumption of joint investigation, meaning that cases involving several jurisdictions should be reviewed under a mutually conducted investigation.

5.1. The Presumption of Final Judgement

This first presumption rests on the functional equivalence that should exist between the measures enacted by all countries that are part of the OECD Convention such as U.S. and Colombia. Again, under this legal standard, the anti-bribery laws of all OECD Countries are supposed to be adequate to combat international corruption. Moreover, OECD Countries enact statutes such as the FCPA or the TCA following the same OECD Convention purpose and principles. Additionally, the OECD Convention has a peer-review system that guarantees functional equivalence between the legal framework of all OECD Countries, and is considered to be the gold standard of monitoring by Transparency International (OECD, 2017).

The presumption of final judgement is also supported in the well-known consequences of foreign prosecutions in FCPA enforcement actions (Pulecio, 2014). The U.S. Attorney's Manual advises the DOJ to consider the results of foreign bribery-related proceedings by defining that "effective prosecution in another jurisdiction" as a ground for initiating or declining charges against the target of a FCPA prosecution (U.S Department of Justice, 2017, §§ 9-27.220, 9-27.240 and 9-28-300). The American Bar Association Standards for Criminal Justice also recommend prosecutors to consider the "availability and likelihood of prosecution by another jurisdiction." (American Bar Association, 2017, Standard § 3-3.9) Therefore, non-compulsory sources are already encouraging the U.S. Government to weigh foreign anti-corruption proceedings.

Moreover, primary sources of U.S. law should compel the DOJ to decline prosecution against a defendant that has been convicted or acquitted in another jurisdiction in Latin America (Pulecio, 2014, pag. 36). The U.S. Constitution's double jeopardy guarantee should preclude addi-

tional U.S. criminal prosecutions in these cases because the "local crime of bribery in a Latin American jurisdiction is the same offense as the pertinent anti-bribery provisions in the FCPA." (Pulecio, 2014, pag. 40) Notably, the dual sovereignty doctrine should not inhibit the double jeopardy protection for these cases because "the U.S. and most part of Latin America as a matter of law, share their sovereignty, as they are in fact part of the same international effort -reflected in at least the three international instruments mentioned above- dedicated to fight against bribery of public officials." (Pulecio, 2014, pag. 45)

Similarly, when a corporation participates in a criminal proceeding in Latin America as a crime victim and the issue of the bribe is decided by a court of law, this issue should not be re-litigated in an FCPA action to be consistent with the collateral estoppel doctrine. Scholars support this notion with the following arguments: i) under Latin American laws, a corporation in these cases would be a "party"; ii) the issue of the bribe, litigated and decided before the courts of the foreign jurisdiction, would be the same as the one discussed pursuant to a DOJ investigation; iii) the bribe would be the ultimate issue of an FCPA criminal action, and iv) a successful criminal prosecution in Latin America would result in a conviction or an acquittal (Pulecio, 2014, pag. 47).

Lastly, a successive U.S. prosecution based on offenses already tried in Latin America might expose these countries to liability under the Inter-American Convention on Human Rights since this treaty also bars double jeopardy under the doctrine of "non bis in idem" (Pulecio, 2014, pag. 49). Accordingly, countries in Latin America may also have incentives to prevent multiple criminal proceedings grounded in the same acts of transnational corruption.

5.2. The Presumption of Joint Investigation

Under this presumption, law enforcement agencies from OECD Countries should review issues of corruption involving two or more jurisdictions under a mutually conducted investigation. Specifically, law enforcement agencies should conduct a joint investigation using one of two models (Conference of the Parties to the United Nations Convention against Transnational Organized Crime, 2017): they should conduct a parallel and coordinated investigation, or create one team with officers from the different jurisdictions that are involved in the case to aid their local investigations. Ibid.

This presumption of joint investigation is based on the OECD countries' obligation of consulting with other countries "the most appropriate jurisdiction for prosecution" in cases that involve multiple jurisdictions (OECD Convention, Article 4). In fact, since 2007, the OECD Working Group has advised signatory countries that "[c]ooperation in investigating cases involving multiple jurisdictions is desirable in the interests of efficiency, and to that end, the network of prosecutors should be strengthened." (Spahn, 2012, pag. 21).

Joint investigations of corruption issues are also encouraged by article 49 of the UN Convention: "States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis." (General Assembly of the United Nations, 2003)

Moreover, joint investigations can help different enforcement agencies to build and keep their professional relationships, and speed up any cooperation that is required during corruption-related enforcement actions (United Nations Office on Drugs and Crime, 2017, pags. 18-19). Similarly, joint investigations "alleviate the misunderstandings created by real and perceived differences between legal systems and facilitate and expedite requests and other communications between the participating States." (United Nations Office on Drugs and Crime, 2017, pag. 19)

In fact, the DOJ and law enforcement agencies from other countries have already teamed up to investigate foreign corruption cases. For example, DOJ received significant assistance from the authorities of Colombia, Panama, Philippines and the United Kingdom in the FCPA investigation that led to the conviction of the former co-chief executive officer of Petro Tiger Ltd (U.S. Department of Justice, 2017). Likewise, the U.S. prosecution of Odebrecht S.A. and Braskem S.A. for conspiracy to violate the FCPA was aided by the governments of Brazil and Switzerland (U.S. Department of Justice, 2017). Moreover, "since 2006, the DOJ and the SEC have been crediting an increasing number of international assistance provided by other countries. Between 2006 and 2017, 31.41% of enforcement actions were benefited from some type of foreign assistance." (Pontes, 2018, pags. 34-35)

Similarly, article 24 of the TCA authorizes the Superintendency of Corporations to engage in any of the international cooperation's mechanisms defined by the OECD Convention (*República de Colombia*, 2016, *Ley* 1778, *artículo* 24). In fact, the Superintendency of Corporations has executed agreements with its counterparties in Peru and Brazil to cooperate in enforcement actions involving those jurisdictions, and is seeking to execute similar agreements with Ecuador, Mexico, and Uruguay. (Superintendencia de Sociedades, 2018).

5.3. Benefits of these presumptions

Based on what this article previously explained about the economic costs that anti-corruption laws such as FCPA and TCA have for companies, law enforcement of these laws under the presumptions of final judgment and joint investigation (the "Presumptions") may reduce a company's expenses associated with its defense in more than one investigation on the same case. Critically, a company would not be required to retain attorneys from different jurisdictions to

represent it in multiple investigations, or to pay multiple penalties upon conviction. Similarly, these Presumptions could reduce the chances that a company is required to perform multiple internal investigations and audits in furtherance of the same case. Moreover, these Presumptions could shed light on the compliance programs and due diligence protocols that companies should implement to avoid prosecution for violating anti-bribery laws.

5.4. Reasons to depart from these presumptions

Law enforcement agencies from countries such as Colombia and U.S. may conduct their actions under the Presumptions when facing cases that involve two or more OECD Countries. Nevertheless, law enforcement agencies should be able to depart from these Presumptions if they observe circumstances reasonably suggesting that operating under these Presumptions would be prejudicial for the effective prosecution and sanction of international corruption. As cautioned by article 4.4. of the OECD Convention, "Each Party [to the OECD Convention] shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps."

Law enforcement agencies should also be able to depart from these Presumptions if they have reasons to question the efficacy, fairness, or accuracy of the proceedings previously conducted by another government. Unfortunately, studies suggest that not all the OECD countries are equally effective in prosecuting corruption despite having the appropriate framework (Hatchard, 2007, pag. 8). Similarly, corruption investigations could involve allegations that jeopardize the independence of a country's law enforcement agencies. In certain cases, a joint investigation could also face problems such as "the lack of common standards and accepted practices, issues around the supervision of the investigation, and the absence of mechanisms for quickly solving these problems." (United Nations Office on Drugs and Crime, 2017, pag. 19)

Nevertheless, law enforcement should give deference to the Presumptions, and the analysis for departing should depend on the facts of each case.

6. CONCLUSION

U.S. and Colombia enacted the FCPA and TCA, respectively, with the purpose of combating international corruption. In fact, there is a resemblance between these two statutes in the consequences that they define for violations to their anti-bribery provisions. Furthermore, FCPA and TCA share certain features for imposing corporate liability. Nevertheless, FCPA and TCA have different enforcement agencies and procedures. In addition, TCA enables Colombia to initiate administrative and not criminal or civil actions like the FCPA does in U.S. Moreover, the FCPA qualifies the *mens rea* that is required to prosecute a legal entity in ways that the TCA does not, and has a group of exceptions and defenses that are not in the TCA.

Among the negative consequences that these different legal standards have, there is an impact for companies doing businesses transactions in Colombia and U.S. Compliance with any anti-corruption statute such as the FCPA or TCA already forces companies to face several additional, direct and indirect, economic losses. When legal standards for combating corruption differ, these economic losses are multiplied.

The implementation of a universal set of anti-bribery rules, enforced by only one international body, would certainly mitigate the negative consequences of the differences between anti-corruption statutes such as FCPA and TCA. Nevertheless, obtaining the necessary consensus among the different countries to enact this set of universal anti-bribery legislation seems unlikely.

There is, however, one measure that is feasible. Countries such as the U.S. and Colombia could mitigate the costs of having different rules for fighting international bribery if law enforcement agencies investigate and prosecute cases involving multiple jurisdictions under two rebuttable presumptions. First, law enforcement agencies should operate under a presumption of final judgment, meaning that in cases where a country complying with the OECD Convention renders a final decision in a bribery investigation, law enforcement agencies from other OECD Countries should also treat that decision as adequate and final. Additionally, law enforcement agencies from OECD Countries should act under a presumption of joint investigation, so cases involving multiple jurisdictions are investigated under only one coordinated enforcement action.

The first presumption is based on the functional equivalence of anti-bribery provisions enacted under the OECD Convention. It is also based on the notion that international cooperation is impacting FCPA actions already. Moreover, non-compulsory guidelines encourage the U.S. Government to weigh foreign anti-corruption prosecutions. Similarly, the protections of double jeopardy and of collateral estoppel should compel prosecution declinations in cases where the target has been convicted or acquitted in Latin America. A successive U.S. prosecution for offenses previously litigated in Latin America could expose countries in that region to legal actions under the Inter-American Convention on Human Rights.

The presumption of joint investigation is based on the obligations set forth by the OECD Convention, and article 49 of the UN Convention. Joint investigations help law enforcement to build and retain professional relationships, and speed up any cooperation that is required to investigate a case. Furthermore, joint investigations mitigate any misunderstandings resulting from real and perceived differences in the anti-bribery legal framework. In fact, the DOJ and law enforcement agencies from other countries have already teamed up to investigate foreign corruption cases. Similarly, the article 24 of the TCA authorizes the Superintendency of Corporations to engage in any of the international cooperation mechanisms of the OECD Convention.

These presumptions could help to minimize the costs that diverse anti-bribery regimes have for companies by reducing expenses associated with a defense in multiple investigations based on the same facts. Similarly, the chances that a company requires multiple internal investigations and audits in furtherance of the same issue would be reduced if these presumptions are applied by law enforcement agencies. Moreover, the enforcement of anti-bribery provisions under these presumptions may shed light on the compliance programs and due diligence protocols that companies should implement to avoid prosecution in different jurisdictions.

The law enforcement agencies of countries such as Colombia and the U.S. should conduct their investigations under these presumptions of final judgment and joint investigation when facing cases involving two or more jurisdictions of OECD countries. Nevertheless, law enforcement might depart from these presumptions when they reasonably believe that the application of the Presumptions to the specific case might be prejudicial for the effective prosecution of international corruption.

Lastly, additional legal and academic initiatives are required to neutralize all the negative costs that anti-corruption laws have for international business. For example, measures to reinforce the trust that law enforcement agencies have in their peers from other countries should be implemented to reduce the number of cases where law enforcement agencies decide to depart form the Presumptions. Nevertheless, the implementation of the Presumptions of final judgment and joint investigations in OECD Countries might help to synchronize anti-corruption laws and international business transactions.

BIBLIOGRAPHY

Articles

Arbatskaya, M. et al. (2018). *The Impact of the Foreign Corrupt Practices Act on Competitiveness, Bribery, and Investment*. Available at SSRN: https://ssrn.com/abstract=3001262 or http://dx.doi.org/10.2139/ssrn.3001262

Carr, I. (2008). The OECD Anti-Bribery Convention Ten Years. *Machester J. Int'l Econ. L.*, 3-35.

Carter, J. (1977). Foreign Corrupt Practices, and Investment Disclosure Bill . *2 Pub. Papers 2157*. USA

Committee on International Business Transactions. (2009). *The FCPA and its impact on international business transactions- should anything be done to minimize the consequences of the U.S' unique position on combating offshore corruption?* . Available at: http://www2.nycbar.org.

Darrough, M. N. (2009). The FCPA, and the OECD Convention: Some Lessons from the U.S. Experience. *Journal of Business Ethics*, 255-276.

Hatchard, J. (2007). Recent Developments in Combating the Bribery of Foreign Public Officials: A Cause for Optimism? *85 U. Det.Mercy L. Rev. 1*.

Hills, L. (2014). Universal Anti-Bribery Legislation Can Save International Business: A Comparison of the FCPA and the UKBA in an Attempt to Create Universal Legislation to Combat Bribery around the Globe. *13 Rich. J. Global L. & Bus.*, 469-492.

Koehler, M. (2012). The Story of the Foreign Corrupt Practices Act. *Ohio St. L.J.* , 929-1014.

Koehler, M. (2016). A Snapshot of the Foreign Corrupt Practices Act . *14 Santa Clara J. Int'l L.*, 143-202.

Koehler, M. (2010). The Facade of FCPA Enforcement. *41 Geo. J. Int'l L*, 907-1009.

Pieth, M. (2017). *Making the OECD Initiative Against Corruption Work*. Available at: http://www.oas.org/juridico/english/pieth2000.htm

Pieth, M. (2017). *Functional Equivalence in the OECD Convention on Combating Bribery*. Available at: http://www.ethic-intelligence.com/experts/381-functional-equivalence-in-the-oecd-convention-on-combating-bribery/

Pontes, Marcelo. (2018) The Impact of International Cooperation on FCPA Enforcement. Available at SSRN: https://ssrn.com/abstract=3213734 or http://dx.doi.org/10.2139/ssrn.3213734

Pulecio, D. (2014). The United States Foreign Corrupt Practices Act and Latin America: The Influence of Local Prosecutorial Efforts in Transnational White-Collar Litigation. *International Law, Revista Colombiana de Derecho Internacional*, 21-58.

Searle Civil Justice Institute. (2012). *The Foreign Corrupt Practices Act: An Empirical Examination of Enforcement Trends.* http://www.masonlec.org/site/rte_uploads/files/FINAL%20FCPA%20REPORT%20PDF.pdf.

Sivachenko, I. (2012). *Corporate Victims of 'Victimless Crime': How the FCPA's Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance*. 54 B.C. L. Rev. 393 (2013), 393-431.

Spahn, E. (2012). Multi-Jurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention. 53 Virginia. Journal of International Law 1, 1-52

OECD Authorities

OECD. (2017). *OECD Working Group on Bribery in International Business Transactions*. Available at: http://www.oecd.org/corruption/anti-bribery/anti-briberyconvention/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm.

OECD. (2017). *History - OECD*. Retrieved from http://www.oecd.org/about/history/

OECD. (2017). *Members and Partners*. Available at: http://www.oecd.org/about/membersandpartners/

OECD. (2017). *Launch of Colombia's Accession Process to the OECD*. Available at: http://www.oecd.org/fr/pays/colombie/launch-of-colombia-accession-process-to-oecd.htm

OECD. (2015). *Phase 2 Report on Implementing the OECD Anti-Bribery Convention in Colombia*. Available at: http://www.oecd.org/daf/anti-bribery/colombia-oecdanti-briberyconvention.htm.

OECD. (1997). *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Adopted by the Negotiating Conference*. Available in: http://www.oecd.or

U.S. Authorities

American Bar Association. (2017). *Standards for Criminal Justice: Prosecution and Defense Function*. Available at: http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html#3.9 (last visited May 1, 2017).

Criminal Division of the US Department of Justice and the Enforcement Division of the US. Securities and Exchange Commission. (2012). *A resource guide to the US Foreign Corrupt Practices Act*.

U.S. Department of Justice. (2017). *Former Chief Executive Officer of Oil Services Company Pleads Guilty to Foreign Bribery Charge*. Available in: https://www.justice.gov/opa/pr/former-chief-executive-officer-oil-services-company-pleads-guilty-foreign-bribery-charge.

U.S. Department of Justice. (2017). *Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History*. Available at: https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-.

U.S. House of Representatives. (2017). 15 U.S.C.

U.S. House of Representatives. (2017). USCS Fed Rules Crim Proc.

U.S Department of Justice. (2017). *USAM*. Available at: https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution

United States Court of Appeals for the Eleventh Circuit, United States v. Esquenazi, 2014).

United States Court of Appeals for the Eleventh Circuit (2014). United States v. Esquenazi, 752 F.3d 912

U.S. Senate. (1977). Legislative History - Senate Report No. 95-114.

Colombian Authorities

Presidency of Colombia. (2017). *Statement of President Santos regarding the entry of Colombia to the OECD*. Available at: http://wsp.presidencia.gov.co/Prensa/2013/Mayo/Paginas/20130530_03.aspx

República of Colombia (2016). Ley 1778, *por la cual se dictan normas sobre la responsabilidad de las personas jurídicas por actos de corrupción transnacional y se dictan otras disposiciones en materia de lucha contra la corrupción*.

República of Colombia (2000). Ley 599, *por la cual se expide el Código Penal*.

República of Colombia (2014). Proyecto de Ley 159, *por la cual se dictan normas sobre la responsabilidad de las personas jurídicas por actos de corrupción transnacional y se dictan otras disposiciones en materia de lucha contra la corrupción*.

Superintendencia de Sociedades (2017). *SuperSociedades define criterios para la adopción de programas de ética empresarial*. Available at: http://www.supersociedades.gov.co/noticias/Paginas/2016/SuperSociedades-define-criterios.aspx

Superintendencia de Sociedades (2017). *SuperSociedades busca expandir la cooperación internacional en la lucha contra la corrupción empresarial*. Available at: https://www.supersociedades.gov.co/Noticias/Paginas/2018/SuperSociedades-busca-expandir-cooperacion-internac-en-lucha-contra-la-corrupcion-empresarial.aspx

U.N. Authorities

Conference of the Parties to the United Nations Convention against Transnational Organized Crime. (2017). *Draft Informal Expert Working Group on Joint Investigations*. Available at: https://www.unodc.org/documents/treaties/COP2008/crp5.pdf

General Assembly of the United Nations. (2003). *Resolution 58/4* . Available at: http://www.un-documents.net/a58r4.htm

United Nations Office on Drugs and Crime. (2017). *Cross-Cutting Issues International Cooperation - Criminal Justice Assessment Toolkit*. Available at https://www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html.

United Nations Office on Drugs and Crime. (2017). *Legislative guide for the implementation of the United Nations Convention against Corruption*. Available at: https://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf