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1

Sites of Conflict

WHEN FRÉDÉRIC PIERUCCI'S FLIGHT touched down at New York's JFK airport after a twenty-four-hour trip from Singapore on April 14, 2013, he did not imagine that he was about to spend the next fourteen months of his life in a high-security prison in Rhode Island. Whisked off the plane in handcuffs, Pierucci was informed by the FBI that his arrest was linked to an investigation against Alstom on corruption charges. The French multinational transport and energy giant was suspected to have engaged in bribery to win a power contract in Indonesia ten years earlier. Since the start of investigations in 2010, the company had not fully cooperated with US authorities, to the great dismay of the Department of Justice and the US Attorney's Office for the District of Connecticut investigating the case.

Assistant District Attorney David Novick was aware that he had not yet caught a central figure and confirmed that the goal was to prosecute Alstom's top management, most notably Patrick Kron, the company's CEO. Accusing Pierucci of conspiracy in acts of corruption of an Indonesian official, Novick was investigating a violation of the US Foreign Corrupt Practices Act, punishable with up to ten years in prison and a fine of 500,000 US dollars. What the thirty-five-year-old assistant district attorney really wanted, however, was information to help bring a stronger case against Alstom. "Mr. Pierucci, I strongly advise you not to call your company. We would like you to do things for us," Novick stated.

Jetlagged, without sleep, and handcuffed, Pierucci had to respond to the offer Novick presented, to become an informant in his own company. It ran counter to the two instructions he had received during an internal training session for these kinds of instances: "(1) don't say anything and (2) call Alstom's legal department, which will immediately send a lawyer," similar to the Miranda warning one sees on television during an arrest.¹ "For the time being, you should give up the help of a lawyer," Novick suggested, "but of course, that

is your choice.” Without imaging for a second what it would cost him, Pierucci turned down the offer and asked to call his company’s legal department and the French Consulate.²

This decision sealed the indictment for corruption and money laundering and started a nightmare that would last five and a half years. Considered a flight risk, he was denied bail and transferred to a high-security prison, where he would remain for fourteen months. In the hope of more favorable conditions, he pled guilty in July 2013 on the advice of the company’s lawyer, a decision he later described as a “monumental error,” because it closed off any possibility of arguing that he was far down in the chain of command.³ For four months, he shared with fifty-four inmates a dormitory containing five showers and two toilets without doors. For nine months, he was not allowed to go out into the courtyard. At times, he did not even have a window. Over the course of his stay, three inmates were found dead in unexplained circumstances. During the first year, Pierucci, a father of four, was permitted to see his wife only once for a duration of two hours. He saw his children again after family and friends succeeded in putting up \$1.5 million for bail so that he could be released in 2014. By then, he had been fired from Alstom following his guilty plea. He returned to Connecticut in September 2017 for the trial and was sentenced to thirty months in prison (which ended up including some of the time spent awaiting trial). He was released in September 2018.

Behind his personal plight lies a much broader story about Alstom’s battles with the US legal system. Pierucci was one of three Alstom managers who were charged and ended up pleading guilty to a seven-year scheme to bribe Indonesian officials to secure a public contract worth \$118 million.⁴ With the pressure put on individual officers, the companies involved in the bribery began to cave in. Marubeni Corporation, Alstom’s Japanese consortium partner in the Indonesian scheme, pled guilty on March 19, 2014, and was sentenced to a criminal fine of \$88 million.⁵ On December 22, 2014, Alstom surrendered. It admitted to bribing officials around the world, including in Indonesia, Saudi Arabia, Egypt, the Bahamas, and Taiwan. The company was sentenced to the “largest-ever criminal foreign bribery fine,” as the Department of Justice proudly announced.⁶ The cases brought against individual managers were crucial in achieving the outcome, as Assistant Attorney General Leslie Caldwell stated: “It was only after the department publicly charged several Alstom executives—three years after the investigation began—that the company finally cooperated.”⁷ Saluting the record sentence, First Assistant US Attorney Michael J. Gustafson of the District of Connecticut declared, “Today’s historic resolution

is an important reminder that our moral and legal mandate to stamp out corruption does not stop at any border, whether city, state or national.”⁸

Despite the record fine, Alstom’s case is not isolated. We see more and more corporations on trial, investigations with headquarter raids, some spectacular arrests, and frequent headlines about fines of stunning amounts. In 2008, Alstom’s German competitor Siemens was prosecuted in Germany, the United States, Italy, and Liechtenstein for similar corruption charges worldwide and paid \$1.8 billion dollars, including a settlement in the United States for \$800 million. A decade later, foreign corrupt practices enforcement has cost Swedish telecom provider Ericsson over \$1 billion in criminal and civil penalties, second only to the Brazilian oil company Petrobras’s \$1.78 billion settlement in 2018. Environmental damage and fraud were most visibly prosecuted in the car emission scandal known as “Dieselgate,” which started when the US Environmental Protection Agency issued a notice of violation against German car manufacturer Volkswagen.⁹ Investigations in at least twenty countries worldwide included a growing number of private lawsuits, with criminal convictions and arrest warrants against senior management, such as former CEO Martin Winterkorn. The emissions scandal subsequently engulfed a large portion of the automobile industry, with charges brought against Daimler, BMW, and Fiat Chrysler, among others. The impact of this scandal is comparable to the 2010 Deepwater Horizon disaster that involved one of the greatest oil spills off the US coast. In 2015, BP agreed to pay \$20.8 billion to the US government and five other Gulf of Mexico states.¹⁰ In the financial industry, settlements and fines have accumulated to over \$240 billion ten years after the crisis, with Bank of America estimated to lead with cumulative sanction of \$76 billion.¹¹

For individual companies and sometimes entire industries, the sanctions imposed are severe, marking a sea change from earlier decades. Although corporate crime is nothing new, we seem to be moving away from the time of the robber barons of the nineteenth century or the intractable global corporate misconduct of the twentieth century. From even a glimpse of the cases listed above, it seems that those who encourage or turn a blind eye to corporate fraud, negligence, or outright criminality in global markets will pay a heavy price.

An End to Corporate Impunity or American Imperialism?

Many observers have taken note of this sea change, but there is little consensus about the motivations and stakes behind the efforts to crack down on corporate criminality. What is more, one can, depending on one’s reading of current

events, arrive at widely different conclusions about the desirability of law enforcement in global markets.

On the one hand, critics of corporate impunity will salute the rise in law enforcement, which is finally reaching powerful companies. From this perspective, multinational corporations have evaded legal constraints for far too long, systematically engaging in strategies that sought to find the most advantageous setting and maximize profits at the expense of societal and environmental norms. The conviction of managers responsible for outright violations is both necessary and a matter of socioeconomic equality. Criminals tried and convicted for other crimes find themselves in situations that are not different, often even much worse, than white-collar criminals, and the latter have considerably more resources for their legal defense. Even a quick glimpse at the most recent corporate criminal prosecutions shows the breadth and depth of detrimental business activities for individual health, safety, and livelihood. From a “global corporate justice” perspective, executives and companies are now finally being held legally accountable despite their high mobility.¹² The Alstom case and similar examples simply show that bribery is being prosecuted at home and abroad, which previously would have been improbable for a business of such strategic importance and with such close connections to the French government.

On the other hand, geopolitical observers warn about the American dominance in imposing rules of conduct that draw on what is largely domestic law, pointing to the extraterritorial reach of US enforcement agencies acting as the new “global police.” Since the turn of the century, America has stepped up efforts to enforce its economic sanctions, reduce corruption, and fight money laundering and tax evasion with judicial programs reaching far beyond its borders. In many instances, critics point to the promotion of national economic and security interests driving enforcement rather than loftier ethical standards for international business. This would explain the disproportionate effect on foreign companies observed in recent years. According to one overview, three quarters of the \$25 billion of fines collected for money laundering, corruption, and sanctions violations have come from foreign companies, while US companies have been fined less than \$5 billion.¹³ Another dataset listing fines levied in corporate criminal cases shows that foreign companies make up 16 percent of federal prosecutions but account for 57 percent of the total of fines.¹⁴ As one can see in Figure 1.1, the countries whose companies are most profoundly affected are the allies of the United States.

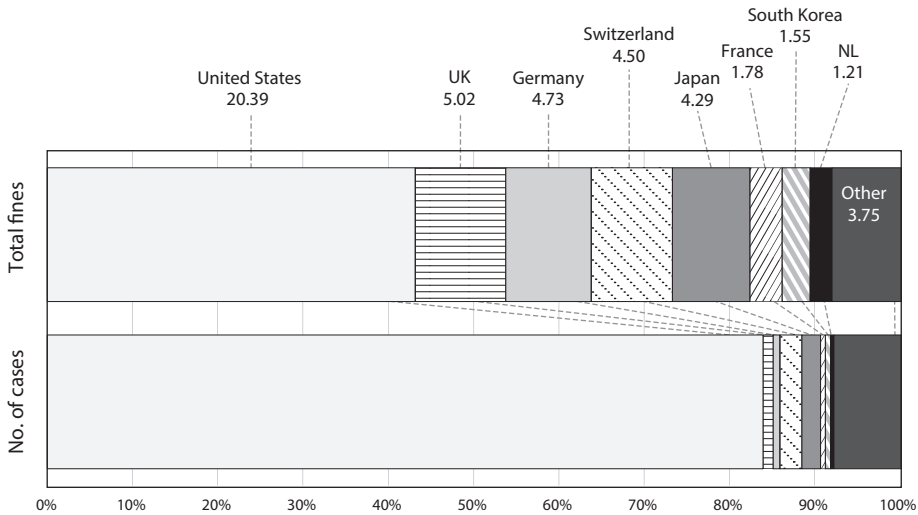


FIGURE 1.1. Corporate criminal fines by country of origin (in billion USD).
Data source: Garrett and Ashley, *Corporate Prosecution Registry*, 2021.

For international relations scholars, this pattern is of little surprise, reflecting the structure of economic interdependence. Companies who participate most actively in the market transactions with or within the United States are necessarily more exposed to its legal system. What is more, interdependence provides the opportunity to strategically exploit network structures to put pressure on adversaries for strategic reasons, which Henry Farrell and Abraham Newman have theorized as “weaponized interdependence.”¹⁵ Put differently, the economy and the companies operating within it serve as a transmission belt for geopolitical struggle and global influence, a phenomenon described as “geoeconomics.”¹⁶ In a geoeconomic perspective, legal challenges of foreign companies can be studied as instruments of interstate conflict. In the case concerning Alstom, several observers have highlighted the links between Alstom’s legal battle and the proposed takeover of its energy branch by the American power company General Electric. Once finalized, the takeover not only strengthened the competitor; it gave the American multinational conglomerate control over the maintenance of French nuclear power plants, with clear implications for energy security.¹⁷

This book shares the geoeconomic perspective of the interdependence literature. Litigation is not simply the neutral pursuit of specific charges that are either right or wrong. Yes, in our interconnected global economy,

multinational companies can become the site of interstate conflict in pursuit of national economic interests. The extraterritorial expansion of US legal reach builds on economic nodes in connected markets, and we need to study for which ends these are exploited. But the focus on its strategic implications or the supposed arrogance of American imperialism obscures an understanding of the nature of change and the long-term impact that such geopolitical tactics can produce by using a legal form.¹⁸

How Extraterritorial Law Enforcement Leads to the Rise of Negotiated Corporate Justice

Through a geopolitical analysis of corporate criminal prosecutions, this book seeks to show the roots of the profound institutional transformations of corporate accountability that have gone far beyond the strategic interactions in individual cases. It provides a sequential story that connects an understanding of American corporate criminal law, its extraterritorial application, and the ensuing intergovernmental tensions with a comparative analysis of legal reforms in numerous countries across the world. It argues that American extraterritorial law enforcement has triggered a clash of normative regimes across not just territorial but also sectoral lines. Managing these clashes brings to the foreground national variations in corporate liability, issues of judicial sovereignty, and sectoral challenges in domains ranging from economic regulation, fiscal oversight, health or environmental protection, and data privacy to counterterrorism or foreign policy. The result of this reshuffling is a global trend I describe as the rise of negotiated corporate justice.¹⁹ Holding corporations liable for their conduct in the global economy in a variety of settings increasingly relies on flexible new legal instruments that allow prosecutors to settle a case rather than bring it to court and seek convictions.

“Negotiated justice” is a broad label that allows me to describe commonalities in the legal evolutions of countries from both civil law and common law traditions. Empirically, this book will focus more narrowly on corporate criminality, although the actual instruments and institutions in each country do not always compare neatly to corporate criminal law in the United States. Still, we can see a shared trend toward incentive-based administrative approaches for dealing with corporate misconduct in global markets. In part, this evolution builds on the growing acceptance of plea bargaining in many justice systems in recent decades. In a detailed survey of criminal law, Langer shows that only

eleven countries had plea bargaining mechanisms prior to the 1970s. By 2018, of sixty countries surveyed, 93 percent had introduced them.²⁰ For corporate offenses more specifically, we observe an increasing importance of settlements and other nontrial resolutions. Notable corporate prosecutions in Europe that ended in such resolutions are the administrative and criminal procedures used for the Siemens cases in Germany, the *patteggiamento* concerning Pirelli in Italy, and the penalty notice that concluded the Statoil case in Norway.²¹ What is more, both common law and civil law countries have introduced nontrial resolution regimes that emulate the negotiated settlements used by the United States in recent years: the United Kingdom in 2013, Brazil in 2014, Spain in 2015, France and Colombia in 2016, Mexico in 2017, and Argentina, Japan, Peru, and Singapore in 2018.²² The names for these new types of settlements vary from “deferred prosecution agreement” (United States), “remediation agreement” (Canada), “effective collaboration agreement” (Argentina), or “leniency agreement” (Brazil) to “judicial agreement in the public interest” (France).²³ Despite this variation, the basic features are similar and allow me to speak of “negotiated corporate justice”: they are incentive-based instruments that provide for the administrative resolution of corporate liability questions rather than trying companies in court.

In a nutshell, this book argues that the extraterritorial reach of American corporate criminal law and its geopolitical implications have led to the rise of negotiated corporate justice around the world. The strategic use of law across borders triggered a profound transformation of norms and domestic institutions abroad. The reason for this substantive change is that law is not a neutral medium that can be understood as a tool of geopolitics only, even when it is used unilaterally across borders. Contrary to other geoeconomic struggles, like economic sanctions or trade wars, litigation is not a border conflict that works by controlling market access. Legal challenges enter into societies. Laws enshrine societal norms validated by domestic institutions, but they also encapsulate moral perspectives on the behavior of firms in global markets that can gain traction beyond their original legal system. This book sheds light on the clash in moral perspectives across territorial and sectoral lines that accompany individual cases. Even if one is keenly aware of the geopolitical stakes, it is difficult to protect domestic companies challenged in US courts by arguing in favor of corruption, environmental degradation, fraud, abuse of market dominance, tax evasion, or arms trading. In current investigations, governments are as much in a bind as their companies. Why did the German government not monitor its automobile industry more closely and turn a blind eye to greed

and pollution? How could technology and energy companies engage for decades in such massive and widespread corruption of foreign officials? How can the competitive edge of the entire financial industry of countries such as Switzerland be built on helping foreign nationals evade taxation? Once we unravel the moral economy of corporate justice that is at stake in current conflicts, we see that future dynamics will not be shaped just by who does what and why but also by beliefs about what is right and wrong.

Market Power and Legal Irritants

To shift the focus from weaponized interdependence to longer-term legal adaptation across countries allows scholars to analyze both the structural features and tools of interstate conflict and the normative order it creates. In their new interdependence approach, Farrell and Newman lay out how the central role of the United States in informational and financial networks gives them effective jurisdiction over nodes that are crucial to other market participants.²⁴ By using this competence, they can extract information or exclude participants in ways that further their strategic interests. The jurisdictional competence they identify is indeed central but has broader consequences that are endemic to legal challenges: they raise questions about, first, who is competent to judge a case and, second, which norms should be used to guide the judgment. In global markets, deciding these issues comes with considerable friction.

In the case of corporate criminal liability, the first issue is not settled through international law in global markets. Criminal justice systems are national prerogatives, and little case law exists on how to resolve jurisdictional disputes between states. It is therefore resolved *de facto* by stealth and power. In cases where jurisdictional competences are tenuous, US prosecutors have the ability to structure resolutions in ways that avoid jurisdictional challenges. Focusing on a US subsidiary rather than a foreign entity, as was done in the Alstom case, can induce multinational corporations to produce evidence, monitor compliance, and eventually sanction misconduct internally. However, the key to the success of these legal strategies is the market power of the US economy. Failure to cooperate with an internal investigation does not just have judicial consequences; the ultimate risk is exclusion from the market through the revocation of a US license, disbarment from public contracts, or freezing of financial assets. Put differently, negotiated justice relies on the credibility of threats and bargaining power in the global economy. This

implies a fundamental challenge to the way we conceive of the relationship between law and the economy, where normative principles structure economic exchange. At the global scale, the relationship between law and the economy is inverted. Rather than creating the basis for market exchange, the effectiveness of the law depends on the distribution of economic resources. Law does not shape the market, as textbooks tell us; the market shapes the reach of law.

The second issue endemic to legal challenges is the necessity to establish a hierarchy of norms. The friction that arises when domestic law is applied to corporate conduct abroad triggers what Andreas Fischer-Lescano and Gunther Teubner call “regime collisions” between competing normative approaches.²⁵ As normative regimes clash across territorial and sectoral lines, the legal activism inherent in the extraterritorial application of effective jurisdictional authority creates irritation. Contrasting it with the notion of a “legal transplant,”²⁶ Teubner refers to this phenomenon as a “legal irritant”:

When foreign rule is imposed on a domestic culture, . . . something else is happening. It is not transplanted into another organism, rather it works as fundamental irritation which triggers a whole series of new and unexpected events.²⁷

The unexpected events this book draws attention to are institutional changes in the countries that see their multinational companies targeted by the threat of US prosecutions. First, governments everywhere do not want to stand accused of letting their own companies get away with the corruption, fraud, environmental damage, and unethical practices that US investigations have brought to light. Second, and more opportunistically, if these practices are to be sanctioned with considerable financial penalties, there is no reason the payments should go to the American justice system only. Third, governments are eager to reclaim judicial sovereignty over their companies and within their territory, both through domestic legal reform and through more explicit multilateral efforts that spell out the rule of transborder interactions. All these ambitions require more flexible and incentive-based legal instruments. In sum, the spread of negotiated justice as the principal form of dealing with corporate misconduct is thus the result of American market power in a geoeconomic world and the normative collisions triggered by the extraterritorial expansion of US corporate criminal law.

Unfolding the Argument

National legal systems become intertwined with the global markets in ways that have important normative implications for global capitalism: whether we consider it a good or a bad phenomenon, who wins and who loses, and how we discipline the participants in an integrated economy. Understanding these dynamics requires connecting different evolutions that are rarely considered together: how societies express aspirations of moral rectitude that should govern the global business activities of firms, how corporate criminal offenses are dealt with in the United States, the increasingly extraterritorial reach of American law, the geopolitical tensions arising from law enforcement abroad, and the diffusion of legal instruments across countries. This book develops each of these steps in separate chapters to provide an account of the geopolitics of corporate justice and its institutional consequences.

Chapter 2 begins with a theoretical discussion of legal change across territorial boundaries. Acknowledging the two-sided nature of law as an instrument of norm inscription and an instrument of hierarchy, the chapter frames the challenges of corporate criminal law in the global economy as a case of normative regimes collision. This allows for the analysis of competing moral narratives on how to discipline and punish crime in world markets. Negotiated justice, the chapter concludes, represents a fundamental paradigm change away from the retributive ambitions of criminal justice toward a regime seeking to manage corporate conduct and avoiding the repetition of offenses.

The book then discusses each of the steps that led to this paradigm change in detail. Chapter 3 begins by discussing the evolutions of the American approach to corporate criminality, highlighting in this specific case the functioning and rationale behind a negotiated approach. This introduction helps to see the dynamics that can generate biases and probes in particular the differential treatment received by domestic and foreign firms. It shows that for a variety of reasons, foreign firms are considerably more likely to pay a fine in federal prosecutions and estimates the magnitude of the fine to be over six times larger for similar types of criminal charges.

The home bias of US corporate criminal law is of global importance as the reach of American domestic law was extended unilaterally far beyond its territorial boundaries in recent decades.²⁸ Chapter 4 analyzes the development of extraterritoriality and shows that it relies on market power and the expansion of economic networks in which the United States holds a hegemonic position. The chapter also demonstrates that extraterritoriality is not just a

feature in the domain of economic sanctions or the fight against corruption but a sweeping development ranging from economic policy and regulation to the fight against organized crime, foreign policy, security, and control over intelligence and data.

Chapter 5 analyzes the implications of this development from a geoeconomic perspective. Drawing on the notion of *lawfare*, a portmanteau word created out of *law* and *warfare*, I refer to the use of legal instruments to gain a strategic advantage in interstate conflicts as “economic lawfare.”²⁹ Through case studies of conflict in US relations with the EU, China, and Japan, I clarify how economic lawfare is different from global law enforcement or international economic governance, in particular through the unilateral imposition of legal norms. This analysis of economic and legal statecraft helps to explain how unilateral strategies influence multilateral efforts in creating normative convergence around sectoral regimes.

Chapter 6 discusses the reactions in other countries to these challenges. A comparative analysis of institutional change in common law countries—the United Kingdom and Canada—and civil law countries—France, Brazil, and Germany—lays bare the incremental institutional change that I refer to as the rise of negotiated corporate justice. In a legal arms race to strengthen the national capacity to intervene and reinforce the domestic capacity to deal with corporate misconduct across countries, numerous countries are revising their instruments for dealing with corporate criminal liability in integrated markets.

The conclusion summarizes the overarching trends and discusses the challenges of negotiated corporate justice. It highlights how law and economic interdependence work together in managing conflict in global markets but also points to the shortcomings of the emergent paradigm. Repeated outrage over corporate scandals and over the inadequacy of punishment highlight that the most important challenge for corporate justice is the cohesion of liberal democratic societies.

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