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Corruption and Controlling Shareholders

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Abstract

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Abstract

Controlling shareholders have been directly involved in some of the largest and most consequential bribery scandals in the world over the course of the last decade. Nevertheless, the academic literature and the dominant international model of anticorruption law have neglected the dynamics and implications of controlling shareholder involvement in the payment of bribes. We examine how controlling shareholders may be uniquely positioned to lead corrupt schemes, and analyze the incidence of this phenomenon in recent U.S. enforcement actions under the FCPA and in Brazilian enforcement actions under the Car Wash (*Lava Jato*) anticorruption operation. Controlled companies account for a minority of the FCPA cases, but for a large majority of the Brazilian cases. Controlling shareholders were implicated in a significant portion of actions against controlled companies in both contexts. We argue that the dominant international model premised on organizational liability and incentives for compliance programs is ill-suited to address cases of bribery led by controlling shareholders, and call for a distinct array of legal responses.

Introduction

In 2008, German engineering giant Siemens paid a record-breaking US$1.6 billion to settle accusations of worldwide bribery, at that point the largest sanction ever imposed under the U.S. Foreign Corrupt Practices Act of 1977 ("FCPA").[1] Eight years later, in 2016, Brazilian construction giant Odebrecht eclipsed Siemens with a US$3.5 billion global settlement.[2] Both the

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[1] U.S. Securities and Exchange Commission, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), https://www.sec.gov/news/press/2008/2008-294.htm. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78a, 78dd-1, 78dd-2, 78ff, 78m, 78o (2006).

[2] U.S. Department of Justice, Press Release (Dec. 21, 2016), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.

Siemens and Odebrecht prosecutions illustrate the persistence of large-scale corporate corruption and the growing efforts of enforcement authorities to fight it on a global scale. Yet despite high-level similarities, the Siemens and Odebrecht scandals also differ in important respects: these companies had different corporate ownership and governance structures, which left a mark in the anatomy of the resulting bribery schemes.

Siemens is a German publicly traded company with a dispersed ownership structure and no controlling shareholder.[3] Its massive bribery scheme was carried out by lower-level managers in foreign jurisdictions. Although Siemens is a German company with distinct corporate governance features, such as employee representation in the supervisory board, its bribery scheme fit squarely within the paradigm of dispersed stock ownership and managerial corruption that triggered the Watergate scandal, prompted the adoption of the U.S. FCPA, and continues to inspire international policymaking and discourse on anticorruption. We call this paradigm *agent-led bribery*.

Odebrecht's corruption scandal differed from Siemens's not only in magnitude but also with respect to the architecture of the bribery scheme. The scandal implicated two companies belonging to a family-owned conglomerate: Odebrecht S.A., the group's holding company based in Brazil, and Braskem, a listed Brazilian chemical and petrochemical company. Both companies were controlled by the Odebrecht family, whose members occupied managerial positions and were directly involved in the bribery payments. This case fits a paradigm we call *CS-led bribery*.

CS-led bribery matters. Scandals involving CS-led bribery have been at the heart of major political crises in the last decade. The Samsung scandal in South Korea and the Car Wash (*Lava Jato*) operation in Brazil were major contributors to the impeachment of Presidents Park Geun-hye and Dilma Rousseff in 2016.[4] Israel's Prime Minister Benjamin Netanyahu has faced charges for an agreement with the controlling shareholder of a newspaper group to weaken its competitor in exchange for favorable coverage.[5] Peru has confronted a deep political crisis since the unearthing of Odebrecht's bribery scheme in the country. It has had six presidents in five years, four of whom have served time in jail since 2017 for their involvement in Odebrecht's scheme.[6]

This Article starts from the premise that the international debate about anticorruption policies has been implicitly or explicitly dominated by the paradigm of agent-led bribery in NCS companies. We argue that this paradigm provides only a partial picture of corporate bribery around

[3] Siemens's founding family owns approximately 5% of its shares, a majority of which are held by institutional investors.

[4] Sang Yop Kang & Kyung-Hoon Chun, *Korea's Stewardship Code and the Rise of Shareholder Activism: Agency Problems and Government Stewardship Revealed*, *in* GLOBAL SHAREHOLDER STEWARDSHIP 256 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022) (on South Korea); Rachel Brewster & Andres Ortiz, *Never Waste A Crisis: Anticorruption Reforms in South America*, 60 VA. J. INT'L L. 531, 537 (2020).
Anticorruption Reforms in South America, (on Brazil).

[5] Matt Stoller*, How Israel's Antimonopolists Helped Take Down Benjamin Netanyahu*, PROMARKET, Nov. 13, 2019.

[6] Marco Aquino, *Peru's presidents and years of political turmoil*, REUTERS, Dec. 7, 2022.

the world, for two reasons. First, dispersed ownership is rare in most jurisdictions.[7] Second, controlling shareholders of family-controlled CS companies often have both opportunities and incentives to become personally involved in corrupt activity.[8] Taken together these insights suggest that in most countries when corporate bribery happens it will happen in CS companies and, at least in family-controlled CS companies, it often will be CS-led.

To explore the significance of CS-led bribery for anti-corruption law and policy we analyze the ownership structures and patterns of corporate bribery documented by law enforcement agencies operating in two distinct contexts, enforcement actions under the FCPA in the United States and under Operation Car Wash in Brazil. We find that most—though by no means all—FCPA enforcement actions concern agent-led bribery in companies with no controlling shareholders. By contrast, most of the Brazilian investigations concerned controlled companies whose controlling shareholders were directly involved in the bribery payments. In both jurisdictions, enforcement agencies encountered examples of CS-led bribery that involved substantial sums of money being paid to high-level officials and had dramatic economic and political effects.

These findings are significant because agent-led and CS-led bribery demand different legal responses. To control agent-led bribery, it is logical to use the threat of organizational liability to mobilize the corporate apparatus to prevent, monitor and sanction corrupt managers and employees. That is a less effective response to CS-led bribery, because there is typically little hope of inducing a company to devote meaningful resources to regulating misconduct that directly implicates a controlling shareholder. The dominant international model of legal responses to corporate bribery emphasizes the imposition of organizational liability, with discounted sanctions for companies that adopt compliance programs. A different model is required to combat CS-led bribery.

Our analysis is consistent with numerous works in the literature on comparative corporate governance which suggest that companies with different ownership structures are often best served by distinct legal regimes,[9] as well as with recent works underscoring the broader economic and social consequences of ownership structures.[10] It is also broadly consistent with the handful of

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[7] Dan W. Puchniak, *The False Hope of Stewardship in the Context of Controlling Shareholders: Making Sense Out of the Global Transplant of a Legal Misfit*, AM. J. COMP. L. (forthcoming).

[8] *See*, *e.g.*, Randall Morck & Bernard Yeung, *Family Control and the Rent-Seeking Society*, 28 ENTREPRENEURSHIP: THEORY AND PRACTICE 391, 403 (2004) ("oligarchic families plausibly have an innate advantage as political rent seekers because of their blood ties with political elites, longevity, small number, ability to precommit, discretion, power to punish, and multiple simultaneous business operations"). *See also* Ronald J. Gilson, *Controlling Family Controlling Shareholders in Developing Countries: Anchoring Relational Exchange*, 60 STAN. L. REV. 633 (2007) (arguing that family-owned corporations can anchor relational exchange by using their advantages as long-term repositories of reputation).

[9] *See id.* at 46; Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PA. L. REV. 1263 (2009); Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271 (2017); Puchniak, *supra* note 7.

[10] *See* Mariana Pargendler, *Controlling Shareholders in the Twenty-First Century: Complicating Corporate Governance Beyond Agency Costs*, 45 J. CORP. L. 953 (2020); Mariana Pargendler, *The Grip of Nationalism on Corporate Law*, 95 IND. L. J. 533 (2020).

legal articles that consider the relationship between ownership structures and corporate criminal liability.[11] However, the latter set of contributions have generally focused on the distinction between publicly-traded corporations (which are assumed to be widely held) and closely-held corporations (which are assumed to be small or medium-sized, and owner managed). Our analysis provides both theoretical reasons and empirical evidence that the phenomenon of CS-led bribery is far broader, encompassing listed companies with a controlling shareholder as well as giant closely-held corporations, often tied in a business group structure.

The remainder of this Article is structured as follows. Part I describes how different ownership structures produce distinct opportunities and incentives for shareholders to engage in corporate bribery. Part II presents the results of our empirical study of the ownership structure and shareholder involvement in corruption investigations in Brazil and the United States. Part III argues that agent-led bribery and CS-led bribery are best addressed by a distinct set of legal responses. The final Part concludes.

I. Ownership Structure and the Anatomy of Corporate Corruption

A. Variations in Corporate Ownership Structures

There is significant variation of ownership structures within and across jurisdictions around the world. While there is no single definition of a controlling shareholder, for our purposes a CS company has a shareholder that controls sufficient votes to influence voting outcomes and corporate decision-making.[12] Identifying a controlling shareholder in this way is a highly fact-specific inquiry. In the empirical analysis in Part II below we code companies whose large shareholders own more than 20% of voting stock as CS companies, though this threshold can easily be both over and under-inclusive in practice.[13]

CS companies represent a large segment of the global corporate landscape.[14] In most countries, more than one-third of public companies have a single controlling shareholder holding

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[11] *See*, *e.g.*, Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 151 (Alon Harel & Keith N. Hilton eds., 2012) (distinguishing the regime applicable to large firms characterized by a separation between ownership and management and closely held firms, finding that only the latter "are held strictly criminally liable for the employees' crimes," while the former are subject to a *de facto* "duty based" liability regime); Nicola Selvaggi, *Are All (Corporate) Wrongdoings the Same? Large Firms, Small Sized Enterprises and the Limits of a Monistic Approach in the EU Context*, 2 EUR. CRIM. L. REV. (2021) (distinguishing between "small-sized" and "broad shareholder-based companies"). For a notable exception *see* Calixto Salomão Filho, *Controle e Corrupção*, CAPITAL ABERTO, Mar. 4, 2018 (discussing the connection between concentrated ownership and corruption in Brazil).

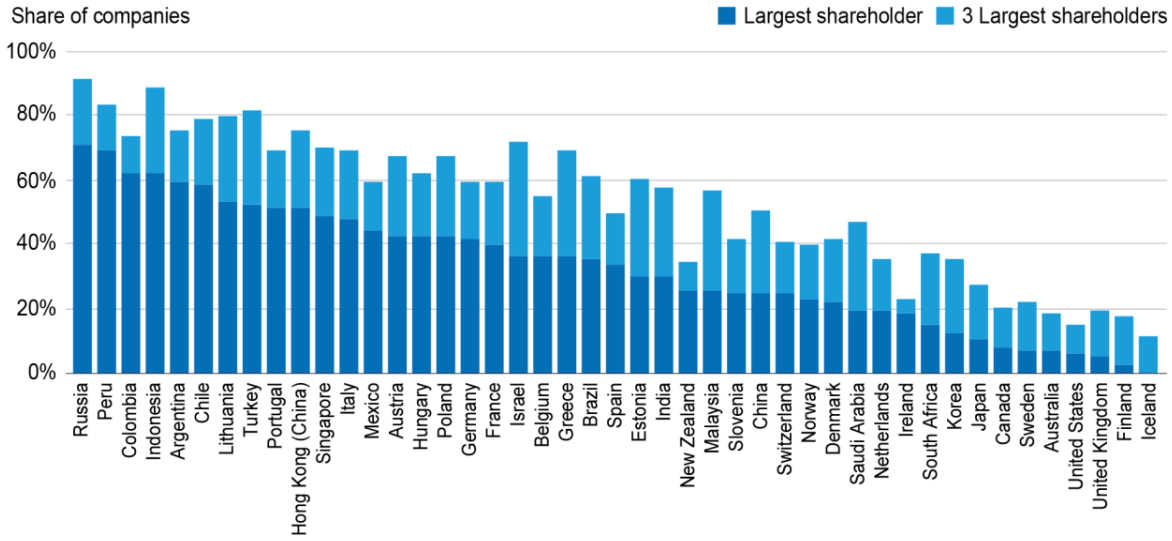
[12] This is the definition used by Bebchuk & Hamdani, *supra* note 9, at 1267 (citing the Delaware case of *Aronson v. Lewis*).

[13] We follow previous studies in relying on 20 percent of voting rights as a proxy for control. *See*, *e.g.*, Rafael La Porta et al., *Corporate Ownership around the World*, 54 J. FIN. 471, 477 (1999) (using ownership of 20 percent of votes as a proxy for the presence of a controlling shareholder); Mara Faccio & Larry H.P. Lang, *The Ultimate Ownership of Western European Corporations*, 65 J. FIN. ECON. 365, 380 (2002).

[14] Gur Aminadav & Elias Papaioannou, *Corporate Control around the World*, 75 J. FIN. 1191 (2020). At the same time, the ownership of today's NCS companies is not fully dispersed, but increasingly concentrated in the hands of institutional investors. OECD Corporate Governance Factbook 10 (2021) (hereinafter "OECD Factbook").

a majority of the company's equity.[15] In Russia, Peru, Colombia and Indonesia, more than 60% of public companies have a majority controlling shareholder, compared to only around 5% of public companies in the U.S. and U.K. [16] In all countries, most companies are not publicly traded, and most close corporations have controlling shareholders. Moreover, a focus on majority equity ownership greatly underestimates the presence of CS companies, given the prevalence of control through non-majority blocks as well as the wide use of control-enhancing devices such as dual-class shares and corporate pyramids in numerous jurisdictions. For instance, although family-controlled business groups (*chaebols*) continue to dominate South Korea's economy and equity markets, little more than 10% of public companies have a controlling shareholder that holds a majority of the equity.[17]

Figure 1. Ownership concentration by market as of end 2020 (source: OECD Factbook 2021)



A. Ownership structures and incentives to engage in corporate bribery

This section describes how different ownership structures affect the ability and incentives of shareholders to engage in corporate bribery, here defined as bribery of public officials using resources extracted from the company or business group. This definition encompasses bribes that are aimed at benefitting the company as well as bribes aimed at benefitting an individual to the detriment of the company and its minority shareholders.

Much of the literature on corporate bribery ignores the possibility of shareholders being directly involved in corporate bribery, primarily because it tends to focus on NCS companies. In a NCS company, dispersed shareholders have neither the economic incentives nor the practical

[15] *Id.* at 23.
[16] *Id.*
[17] *Id.* There is no single definition of a family firm. For a review of existing definition and proposal of a new definition to be operationalized, *see* European Commission, Final report of the expert group. Overview of family-business-relevant issues: research, networks, policy measures and existing studies (2009). In this article we rely on the looser definition in Marianne Bertrand & Antoinette Schoar, *The Role of Family in Family Firms*, 20 J. ECON. PERSP. 73, 74 (2006) ("Family firms are characterized by a concentration of ownership, control and often key management positions among family members, even after the retirement of the firms' founders").

power to engage in corporate bribery. They do not have direct access to corporate resources, and even if they did, collective action problems would discourage them from investing much effort in bribery. As a result, bribery in NCS companies is invariably agent-led bribery: bribe payments are made by employees, whether they be corporate officers, senior managers or lower-level employees.

By contrast, in CS companies the controlling shareholder (or shareholders) typically occupy managerial positions in the corporation and so are positioned to be directly involved in bribery.[18] This may, for example, entail negotiating the relevant quid-pro-quo agreements and authorizing the improper payments. In addition, to the extent that controlling shareholders are able to extract resources from the firm for their personal use—whether in the form of executive perquisites or related-party transactions or private information—they may use those resources to fund payment of bribes. We characterize these forms of direct controlling shareholder involvement in corporate bribery as *CS-led bribery*.

Controlling shareholders often will have stronger incentives than non-controlling shareholders to engage in corporate bribery, especially when it increases the value of the firm.[19] One reason is that controlling shareholders typically have a large economic stake in the company or group of companies. Second, in jurisdictions that offer low levels of legal protection to outside investors, controlling shareholders can often obtain a disproportionately high share of company value by extracting firm resources for personal use—in economic parlance, they enjoy high private benefits of control. Private benefits of control both increase the economic benefits of bribery and can be used to compensate controlling shareholders for the risk of engaging in bribery. Third, for reasons we elaborate upon below, controlling shareholders may be more effective than agents at reducing the transaction costs of bribery.

One reason why CS-led bribery might entail relatively low transaction costs is because controlling shareholders may find it relatively easy to conceal bribe payments, at least in settings with low levels of investor protection and high private benefits of control. In these situations, controlling shareholders may be able to channel a portion of the private benefits they extract to public officials. Corrupt payments channeled through controlling shareholders may attract less oversight than bribes paid directly from the corporate treasury. The lower the risk of detection, the more attractive the corrupt transaction.

The idea that CS-led bribery may be associated with relatively low transaction costs also rests in part on the idea that controlling shareholders, or at least, certain types of controlling shareholders, have distinctive ways of mitigating doubts about whether parties to corrupt bargains will abide by their commitments. A bribery transaction hinges on the parties' ability to make credible commitments both to exchange official favors for bribes and to refrain from disclosing corrupt behavior in ways that trigger either legal or non-legal sanctions. Neither of these types of

[18] Scholars have argued that, where investor protection is sufficiently low, the family continues to occupy managerial positions even in controlled companies for fear of expropriation by outside managers. Mike Burkart, Fausto Panunzi & Andrei Shleifer, *Family Firms*, 58 J. FIN. 2167, 2170 (2003).

[19] The first two points below suggest that controlling shareholders will have relatively strong incentives to engage in other forms of misconduct besides bribery.

commitments is legally enforceable. Consequently, the parties to corrupt bargains must either minimize their reliance on such commitments or resort to non-legal mechanisms to make their commitments credible. The first approach involves controlling shareholders taking matters into their own hands so as to limit access to incriminating information by non-shareholder employees or agents. The second approach relies on mechanisms such as relational sanctions, reputational sanctions, and psychological attachments to norms that favor upholding commitments.[20]

Drawing on the work of other scholars, Randall Morck and Bernard Yeung offer several reasons why entrenched controlling shareholders with a long-term orientation—*long-term controlling shareholders*—may have an advantage in deploying non-legal mechanisms to make corrupt commitments credible.[21] First, long-term controlling shareholders will internalize the costs of relational and reputational sanctions imposed over a relatively large number of future periods and so will be relatively easy to deter from reneging on their commitments. Second, these types of shareholders should be both able and willing to impose relational or reputational sanctions over a relatively long period of time on officials who renege on their commitments. Third, firms run by long-term controlling shareholders may have relatively stable corporate cultures, including cultures that tolerate corruption. Fourth, if these firms do in fact have stable corrupt corporate cultures they will, over time, be able to cement corrupt commitments by making themselves vulnerable to a specific kind of relational sanction: they can strategically share evidence of past misconduct to give counterparties the ability to punish defection by disclosing the incriminating information.[22] In short, by putting their personal reputations on the line, long-term controlling shareholders may be able to induce public officials to provide costly favors that they would not dare to provide if solicited merely by a manager of a firm.

Controlling families are the paradigmatic examples of long-term controlling shareholders.[23] First, family control endures over decades, while tenures of professional managers are often short. Second, when intra-familial inheritance is possible, family ties may cause the current generation of family shareholders to treat "the next generation's utility as the equivalent of their own."[24] Third, the culture of family-controlled firms, including a tolerance for corruption (if any) might be more stable over time than the culture of firms run exclusively by professional managers.

The claim that controlling shareholders of family-controlled firms have relatively strong incentives to become involved in corporate bribery suggests, at a minimum, that there will be non-trivial levels of bribery among family firms doing business in countries with corruptible officials. This line of argument also implies that, all other things being equal, there will be greater levels of CS-led bribery in societies where family-controlled firms are more prevalent. In those countries,

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[20] *See, e.g.*, David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 392-394 (1990).
[21] Morck & Yeung, *supra* note 8.
[22] The idea that sharing compromising information can enhance the credibility of commitments to corruption bargains is discussed in Diego Gambetta, *Why is Italy Disproportionally Corrupt?: A Conjecture*, INSTITUTIONS, GOVERNANCE AND THE CONTROL OF CORRUPTION 133 (K. Basu & T. Cordella eds., 2018).
[23] We leave to further research the question of whether and to what extent firms controlled by other actors, such as states or foundations, also fit the paradigm.
[24] Gilson, *supra* note 8 at 643.

in any given period, there will be more people with relatively strong incentives to take advantage of opportunities to engage in corporate bribery, including opportunities that are unavailable to mere agents. A more subtle implication of this line of argument is that the relative effectiveness of CS-led bribery will give an economic advantage to firms with family-controlled ownership structures and high private benefits of control. Over time this should cause an increase in the size or proportion of economic activity captured by such firms and further increase the prevalence of CS-led bribery. Of course, all of these predictions about the relationship between variations in corporate ownership and the prevalence of CS-led bribery in society rest on the critical assumption that, aside from variations in ownership structure, all other things remain equal across the companies and countries being compared. This assumption flies in the face of evidence that there are significant cross-country variations in levels of bribery and that family businesses have systematically different ethical orientations from other firms.[25]

We have no way of testing broad hypotheses about the prevalence of CS-led bribery, the criminogenic propensities of different ownership structures with respect to bribery, or the mechanisms used to facilitate bribes. To do that we would have to be able to examine variations within a representative sample of the universe of incidents of corporate bribery. Unfortunately, corporate bribery, like many other illicit activities, is very difficult to study in this way. Corrupt actors go to great pains to conceal their activities and law enforcement agencies reveal information about only a subset of the cases that come to their attention, usually just the ones they choose to prosecute. These factors influence the mix of cases we are able to observe in unpredictable ways. For instance, CS-led bribery may be more difficult to detect. Alternatively, if firms involved in CS-led bribery systematically have more (or less) economic or political clout than firms implicated in agent-led bribery, then law enforcement agencies may prosecute a disproportionately small (or large) proportion of the cases of CS-led bribery that they detect. These sorts of confounding factors make it extremely difficult to draw inferences about underlying patterns of bribery from cases documented by law enforcement agencies.

For all these reasons, rather than exploring broad claims about the relative prevalence of CS-led bribery, in the remainder of this article we focus on a relatively narrow hypothesis, but one with direct policy implications. Specifically, in the next Part we investigate the hypothesis that law enforcement agencies will encounter non-trivial and harmful levels of CS-led bribery among family-controlled companies doing business in countries with high levels of corruption.

II. Encounters with CS-led Bribery

In this Part we show that prominent law enforcement agencies charged with responding to corporate bribery encounter non-trivial numbers of cases of CS-led bribery. Some of those cases

[25] See e.g., WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2022 29 (2022) (documenting cross-country variations in corruption in government); Pedro Vazquez, *Family Business Ethics: At the Crossroads of Business Ethics and Family Business*, 150 J. BUS. ETHICS 691 (2018) (surveying literature generally finding that family firms are considerably different from non-family firms regarding ethical issues); Mario Daniele Amore & Riccardo Marzano, *Corporate Ownership and Antitrust Violations*, 65 J. L. & ECON. 369 (2022) (finding that family firms are less likely to be involved in antitrust indictments).

involve corruption on a large scale involving high level officials. In the first section below we focus on the U.S. agencies charged with enforcing the FCPA. In the second section we document experiences with CS-led bribery in proceedings involving Brazilian authorities responsible for investigating Operation Car Wash, perhaps the largest corruption scandal in recent history.

A. CS-led Bribery in FCPA Enforcement

The U.S. law enforcement agencies charged with enforcing the FCPA, namely, the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC), are by far the most active enforcers of prohibitions on transnational bribery.[26] Since the FCPA covers a broad range of companies doing business in many different countries, FCPA enforcement actions are a natural place to look for confirmation that CS-led bribery is an important phenomenon.

The FCPA creates two distinct sets of obligations for companies and individuals. The first set, the anti-bribery provisions, prohibit payment of bribes to foreign—meaning, non-American—public officials.[27] Roughly speaking, those provisions apply to: (i) U.S. companies, nationals or residents; (ii) "issuers", i.e. companies with securities listed on a U.S. exchange; (iii) any person who engages in relevant kinds of misconduct while in U.S. territory; and (iv) "any officer, director, employee, or agent" or "any stockholder thereof acting on behalf of" a person listed in the first three categories.[28] The FCPA also contains "accounting provisions" that require issuers (as well as their consolidated subsidiaries and affiliates) to keep accurate books and records and maintain adequate accounting controls and which are often used to sanction companies and individuals suspected of being involved in foreign bribery.[29] Violations of the FCPA are subject to both criminal and civil sanctions, with the DOJ focusing on criminal enforcement and the SEC focusing on civil enforcement.[30]

We examined the prevalence of CS-led bribery in FCPA enforcement actions initiated by the DOJ and the SEC in the five-year period from 2017-2021. The actions were identified by searching the Foreign Corrupt Practices Act Clearinghouse, a database that compiles FCPA proceedings brought by the SEC, DOJ, or both.[31] In many instances, separate enforcement actions

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[26] TRANSPARENCY INTERNATIONAL, EXPORTING CORRUPTION 2022: ASSESSING ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION 8 (2022) (these data only cover major exporting nations).

[27] 15 U.S.C. §§ 78a, 78dd-1, 78dd-2, 78dd-3.

[28] CRIMINAL DIVISION OF THE U.S. DEPARTMENT OF JUSTICE AND ENFORCEMENT DIVISION OF THE U.S. THE SECURITIES AND EXCHANGE COMMISSION, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, SECOND EDITION 9-10, 35-36 (2020) [RESOURCE GUIDE].

[29] 15 USC 78m(b)(2). In addition, a rarely applied provision of the securities laws suggests that any person who controls a company that violates any part of the FCPA can be held civilly liable as a "control person" unless they can show that they "acted in good faith and did not directly or indirectly induce" the misconduct. Securities Exchange Act of 1934, s. 20(a), 15 U.S. Code § 78t.

[30] RESOURCE GUIDE, *supra* note 28, 3-4.

[31] Four enforcement actions retrieved from the FCPA Clearinghouse database using this approach were excluded from our analysis because the defendants were charged as recipients rather than payors of bribes. See US v. Rodrigo Garcia Berkowitz, Docket No. 19-cr-00064 (E,D.N.Y. filed February 8, 2019), US. v Donville Inniss, Docket No. 18-CR-00134 (E.D.N.Y. filed March 15, 2018), U.S. v. Gulnara Karimova (S.D.N.Y. Docket No. 19-CR-00165 filed March 7, 2019) and U.S. v. Master Halbert, Docket No. 19-00089 (D. Haw. Filed January 24, 2019). Another enforcement action, U.S. v. Michael Leslie Cohen, (E.D.N.Y. Docket No. 17-CR-00544 filed October 5, 2017), was

targeting related misconduct were brought against affiliated actors such as employees, shareholders (individual or corporate) and subsidiaries. We treated each group of enforcement actions against affiliated actors and their co-conspirators as a single "case." Our dataset consisted of 193 enforcement actions, grouped into 101 cases. Forty-seven cases included multiple enforcement actions while fifty-four consisted of a single enforcement action. We should stress that some (a handful) of these enforcement actions were ultimately resolved without any finding of liability, and others have not yet been resolved, so the allegations we document below have not necessarily been proven.

We collected ownership data for each entity involved in an enforcement action from Capital IQ. Specifically, Capital IQ provided information on the entities' current and historic shareholders, as well as their ownership structures. Shareholders owning between 10-20% of a given company were coded as "large" shareholders, while those owning over 20% were coded as "controlling" shareholders. Additional information regarding the entities' shareholders was gathered from the text of the enforcement actions and supplementary information was gathered through Internet searches. For entities with dual-class structures, public filings (typically Forms 20-F or 10-K) provided information regarding the shareholders' voting power.

Table 1 shows that 26 out of 101 cases (26%) included a bribe-paying company with a controlling shareholder among the defendants. However, in only 14 of the cases was the controlling shareholder an individual or a family. Other cases involved companies controlled by institutional investors, states (Brazil and Sweden) and, in one case, a charitable foundation.

excluded because the defendant, who was the subject of a separate civil action for his role in a bribery scheme, was charged with fraud.

Table 1. Controlling shareholders in FCPA cases, 2017-2021			
Ownership structures represented in case	Total cases		CS-led cases
No controlling shareholder	75		
Controlling shareholder (>20%)	26		
Institutional investor		6	
State		4	
Foundation		1	
Individual/family		14	11
Total	101		

Notes:

(1) Two cases are listed as involving a company with a controlling shareholder because they are linked to a set of enforcement actions that were announced shortly before the time frame of our analysis. See Securities and Exchange Commission v. Michael L. Cohen and Vanya Baros, Docket No. 17-CV-00430 (E.D.N.Y. filed January 26, 2017) together with U.S. v. Och-Ziff Capital Management Group LLC, Docket No. 16-CR-00516-NGG (E.D.N.Y. filed September 29, 2016) and In the Matter of Och-Ziff Capital Management Group LLC, Oz Management LP, Daniel S. Och, and Joel M. Frank, Securities Exchange Act of 1934 Release No. 78989, September 29, 2016; U.S. v. Jose Carlos Grubisch, E.D.N.Y. Docket No. 19-CR-102 ((E.D.N.Y. filed February 27, 2019) and U.S. v. Braskem S.A., Docket No. 16-644 (E.D.N.Y. filed December 21, 2016).

(2) Four cases in which the defendants were described as controlling unnamed closely held companies are listed as involving companies with controlling shareholders. See U.S. v. Charles Quintard Beech III, Docket No. 17-Cr-00006 (S.D. Tex. filed January 4, 2017); U.S. v. Deck Won Kang, Docket No. 20-cr-01077 (D.N.J. filed December 17, 2020), U.S. v. Jorge Cherrez Miño and Luzuriaga Aguinaga, CR. No. 21-CR-20528 (S.D. Fla. filed October 15, 2021); U.S. v. Naman Wakil, Docket No. 21-20406 (S.D. Fla. filed July 29, 2021).

We classify 11 out of 101 cases (11%) as instances of CS-led bribery, all of them involving companies with individual or family controlling shareholders.[32] In six cases the enforcement actions in our dataset targeted an individual controlling shareholder or shareholders, and perhaps other employees, but not the company itself.[33] In three cases the U.S. authorities had not brought any enforcement action against the controlling shareholder, at least as of the end of 2021, but their role was described in the charging documents.[34] In two cases, both the company and the controlling

[32] For additional details see the Appendix, Tables A1 and A2.

[33] U.S. v. Cyrus Allen Ahsani and Saman Ahsani, Docket No. 19-CR-00147 (S.D. Tex. filed March 4, 2019) and U.S. v. Steven Hugh Hunter, Docket No. 18-CR-00415 (S.D. Tex. filed March 4, 2019); U.S. v. Charles Quintard Beech III, Docket No. 17-Cr-00006 (S.D. Tex. filed January 4, 2017); U.S. v. Deck Won Kang, Docket No. 20-cr-01077 (D.N.J. filed December 17, 2020); U.S. v. Frank James Lyon, Docket No. 19-00008 (D. Haw. Filed January 16, 2019); U.S. v. Jorge Cherrez Miño and Luzuriaga Aguinaga, CR. No. 21-CR-20528 (S.D. Fla. filed October 15, 2021); U.S. v. Naman Wakil, Docket No. 21-20406 (S.D. Fla. filed July 29, 2021).

[34] In the Matter of Elbit Imaging Ltd., Securities Exchange Act of 1934 Release No. 82849, March 9, 2018; U.S. v. Jose Carlos Grubisich, E.D.N.Y. Docket No. 19-CR-102 (E.D.N.Y. filed February 27, 2019); In the Matter of Vantage Drilling International, Securities Exchange Act of 1934 Release No. 84617, November 19, 2018.

shareholders were sanctioned.[35] In one case, the enforcement action in our dataset was aimed at individuals whose employer had been sanctioned shortly before the timeframe covered by our data.[36]

Some of the cases of CS-led bribery appear to involve relatively small-scale corruption, often in small or medium-sized companies. For example, the case against Elbit Imaging Ltd., an Israeli company which made suspicious payments to offshore consultants at the direction of its controlling shareholder, resulted in financial penalties of just $500,000.[37] The charges against Charles Quintard Beech III, who was charged with paying bribes to obtain contracts with Venezuela's state-owned oil company, PDVSA, resulted in financial penalties of under $1 million.[38]

Even cases of CS-led bribery that did not involve giant companies sometimes involved large-scale corruption. Naman Wakil, who, like Beech, was charged with bribing PDVSA and other Venezuelan agencies, allegedly paid bribes to obtain at least $250 million in contracts.[39] Meanwhile, the case against the Ahsani brothers, which stemmed from revelations that their family-controlled Monaco company had helped tens of clients pay bribes to obtain oil and gas contracts around the world for over a decade, was labeled "The World's Biggest Bribery Scandal" by the journalists who first broke the story.[40]

The cases of CS-led bribery also involve some of the world's largest companies undertaking corruption on a grand scale. One of the defendants in our dataset, Jose Carlos Grubisich, was part of the Odebrecht case, which as we explain below, involved corporate bribery on an enormous scale. Sargeant Marine was described as the world's largest asphalt trading, storage and transportation business.[41] Last but certainly not least, J&F Investimentos, a Brazilian holding company owned by the Batista brothers, controls JBS, the world's largest meat and protein producer. The FCPA charges stemmed from one of several corrupt deals brokered directly by its individual controlling shareholders, brothers Joesley and Wesley Batista, to obtain government financing to fund the expansion of their business empire. J&F agreed to pay the DOJ and the SEC over US$283 million to resolve charges under the FCPA. The U.S. authorities agreed that half of the $256 criminal penalty could be satisfied by crediting payments that J&F made to Brazilian

[35] U.S. v. J&F Investimentos SA, Docket No. Cr. No. 20-CR-365 (E.D.N.Y. filed October 14, 2020) and J&F Investimentos, S.A. JBS, S.A., Joesley Batista, Wesley Batista, Securities Exchange Act of 1934 Release No. 90170, October 14, 2020; U.S. v. Sargeant Marine Inc., Docket NO. 20-CR-363 (E.D.N.Y. filed September 22, 2020) and U.S. v. Daniel Sargeant, Docket No. 19-CR-00319 (E.D.N.Y. filed December 18, 2019).
[36] U.S. v. Jose Carlos Grubisch, E.D.N.Y. Docket No. 19-CR-102 ((E.D.N.Y. filed February 27, 2019) together with U.S. v. Braskem S.A., Docket No. 16-644 (E.D.N.Y. filed December 21, 2016).
[37] In the Matter of Elbit Imaging Ltd, *supra* note 34.
[38] U.S. v. Charles Quintard Beech III, Docket No. 17-Cr-00006 (S.D. Tex. entered July 9, 2021) (judgment).
[39] U.S. v. Wakil, *supra* note 29; U.S. Department of Justice, Executive Arrested and Charged for Bribery and Money-Laundering Scheme, August 4, 2021.
[40] Nick Mckenzie et al, *The Bribe Factory: World's Biggest Scandal*, THE AGE, March 30, 2016, https://www.theage.com.au/interactive/2016/the-bribe-factory/.
[41] *Vitol, Vitol and Sargeant Marine to form a global leader in asphalt logistics and trading*, 7 December 2015, https://www.vitol.com/vitol-and-sargeant-marine-to-form-a-global-leader-in-asphalt-logistics-and-trading/

authorities under a previous R$10.3 billion (then US$3.2 billion) leniency agreement.[42] (J&F is now seeking to reduce the amount of the fine imposed by the leniency agreement.)[43]

There is some danger that we have understated the amount of CS-led bribery captured in FCPA cases. First, we may have missed some cases that involved companies with controlling shareholders. This concern is most acute with closely held companies because publicly traded companies are legally required to report the existence of controlling shareholders. Second, we have almost certainly undercounted instances in which the controlling shareholder was involved in the corrupt activity. This is in part because we have only classified cases as CS-led bribery when enforcement authorities have alleged direct involvement.[44] Here it is worth keeping in mind that the facts set out in the charging documents of FCPA cases are typically the subject of careful negotiations between the defendants and enforcement agencies. As a consequence, they may omit crucial information, including information about the extent of controlling shareholders' involvement in misconduct.

For example, in September 2022, the DOJ and the SEC released documents that both initiated and resolved enforcement actions against GOL Linhas Aéreas Inteligentes, S.A, a Brazilian airline.[45] According to the documents, the corrupt scheme was implemented by a director of Gol and involved payment of bribes to a Brazilian legislator in exchange for favorable tax treatment. Nowhere was it mentioned that the director who masterminded the scheme was a member of the family that controlled the airline.[46] The DPA mentions that the director "resigned from his position and has had no role at the Company since." Nevertheless, three other members of the controlling family continue to sit on Gol's board of directors, including as chairman and vice chairman.[47]

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[42] U.S. Department of Justice, Press Release, J&F Investimentos S.A. Pleads Guilty and Agrees to Pay Over $256 Million to Resolve Criminal Foreign Bribery Case, Oct. 14, 2020.

[43] *STJ restabelece andamento de processo sobre multa de R$ 10,3 bi da J&F*, ISTOÉ DINHEIRO, Nov. 28, 2022.

[44] For an example of a case in which we decided that the allegations did not involve sufficiently direct involvement on the part of the controlling shareholder see Securities and Exchange Commission v. Michael L. Cohen and Vanya Baros, Docket No. 17-CV-00430 (E.D.N.Y. filed January 26, 2017) together with U.S. v. Och-Ziff Capital Management Group LLC, Docket No. 16-CR-00516-NGG (E.D.N.Y. filed September 29, 2016) and In the Matter of Och-Ziff Capital Management Group LLC, Oz Management LP, Daniel S. Och, and Joel M. Frank, Securities Exchange Act of 1934 Release No. 78989, September 29, 2016, paras. 6 and. 104 (Controlling shareholder of a large investment fund held civilly liable for violation of the FCPA's accounting provisions after personally approving two transactions with a partner in the Democratic Republic of the Congo in which bribes were paid while aware of the high risk of corruption and contrary to the advice of his legal and compliance teams).

[45] In the matter of GOL Linhas Aereas Inteligentes S.A., Securities Exchange Act of 1934 Release No. 95800, September 15, 2022 and U.S. v. GOL Linhas Aereas Inteligentes, S.A, 22-cr-00325 (D. Maryland filed September 9, 2022).

[46] *See*, *e.g.*, Comissão de Valores Mobiliários, Parecer do Comitê de Termo de Compromisso, Processo Administrativo Sancionador CVM SEI 19957.005572/2019-22, July 15, 2022, at 7 and 8 (describing numerous bribery payments made by Henrique Constantino, a board member and member of the controlling family, as presented by an external audit to the U.S. Department of Justice and the SEC). According to the report, there was no evidence of knowledge of the payments by any other board member, officer or employee of the company.

[47] https://ri.voegol.com.br/conteudo_en.asp?idioma=1&conta=44&tipo=53760.

B. CS-led Bribery in Operation Car Wash

To examine the prevalence of different varieties of corruption in Brazil we looked at a set of enforcement actions known as Operation Car Wash. While by no means typical, Car Wash accounts for a substantial portion of Brazilian enforcement actions aimed at corporate bribery in the past decade.

Car Wash began in 2014 when a different investigation into money laundering uncovered a large number of suspect money transfers between business parties and oil company Petrobras.[48] Petrobras, a listed state-owned enterprise, was Latin America's largest company by market capitalization at the time the investigation started.[49] The scheme involved most of Brazil's largest construction companies, including Odebrecht, which colluded to pay bribes to Petrobras officials and to obtain overpriced contracts.[50] It also included kickbacks to politicians and public officials for both private gain and campaign financial purposes. In addition, Odebrecht, and other construction companies involved in Car Wash, paid bribes to public officials in over 12 countries, most of them in Latin America, typically in large and complex infrastructure projects.[51]

Operation Car Wash was led by federal prosecutors but prompted a flurry of other criminal, civil and administrative proceedings against politicians, managers of state-owned companies, corporate executives, controlling shareholders, and intermediaries.[52] The fall-out had profound economic and political consequences for Brazil. The reputational taint and threat of liability hanging over many Brazilian companies led to paralysis of the infrastructure sector and a credit shortage, with knock-on effects for many other sectors. Losses to the Brazilian economy, which was already faltering for other reasons, have been estimated at 2% of the country's GDP in 2014 and 5% in 2015.[53] In the political sphere, the bribery scandals unveiled by Car Wash contributed to the impeachment of President Rousseff (who was not among the accused in the investigations despite chairing the Petrobras board during the relevant period and was impeached on different legal grounds) and the rise to power of Jair Bolsonaro, a candidate with autocratic inclinations who ran on an anticorruption agenda, among other issues. [54]

Car Wash also prompted a host of legal proceedings against Odebrecht outside of Brazil which had their own massive economic and political effects. The suspension and cancellation of Odebrecht's contracts paralyzed infrastructure construction throughout Latin America with concomitant ramifications for employment and economic growth. In Peru, for example, some 60,000 workers were dismissed as of February 2017 as a result of Odebrecht's failure to pay its

[48] For a discussion, *see* Mariana Mota Prado & Marta de Assis Machado, *Using Criminal Law to Fight Corruption: The Potential, Risks, and Limitations of Operation Car Wash* (Lava Jato), 69 AM. J. COMP. L. 834 (2022).
[49] Uol Economia, *Petrobras Volta A Ser Maior Empresa da América Latina em Valor de Mercado* (2014).
[50] Alison Jones & Caio Mário da Silva Pereira Neto, *Combatting Corruption and Collusion in Public Procurement: Lessons from Operation Car Wash*, 71 U. TORONTO L.J. 103 (2020).
[51] Fergus Shiel & Sasha Chavkin, *Bribery Division: What Is Odebrecht? Who Is Involved?*, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, June 25, 2019, https://www.icij.org/investigations/bribery-division/bribery-division-what-is-odebrecht-who-is-involved/ (accessed January 21, 2023).
[52] Jones & Pereira Neto, *supra* note 50.
[53] https://ineep.org.br/os-impactos-economicos-da-operacao-lava-jato-e-o-desmonte-da-petrobras/
[54] Oscar Vilhena Vieira, *Clash of powers: Did Operation Car Wash trigger a constitutional crisis in Brazil?*, 71 U. TORONTO L.J. 174 (2021).

suppliers.[55] The governor of the Central Bank estimated that Car Wash-related delays in two major infrastructure projects would reduce GDP growth by between 0.5 and 0.6 of a percentage point.[56] The political effects were equally significant. In most countries, officials at the very highest levels of government were implicated, including five presidents of Peru as well as former presidents in Bolivia, Ecuador, El Salvador, and Panama.[57]

Our study focuses on the companies investigated for bribery (or whose employees, managers, or controlling shareholders were prosecuted) in connection with Car Wash.[58] There is no database of anticorruption enforcement actions in Brazilian similar to the FCPA Clearinghouse, nor is there an authoritative list of companies investigated in Car Wash. We constructed a list of 42 companies involved in Car Wash based on criminal prosecutions of related individuals and leniency agreements by the Federal Prosecution Office (*Ministério Público*) and the Brazilian Office of the Comptroller General (*Controladoria Geral da União*).[59]

Table 2. Controlling shareholders in Operation Car Wash cases			
Ownership structures represented in case	Total cases		CS-led cases
No controlling shareholder	4		
Controlling shareholder (>20% of voting rights*)	36		
State		1	
Individual/family		35	
Unknown	2		
Total	42		26
Note: We determine controlling shareholder status based on legal proceedings and news articles.			

As described in Table 2, we find that 36 (85%) of these are CS companies and only six (9.5%) are NCS companies. Among CS companies, 35 are owned by family or individuals (97%) and one is a state-owned enterprise indirectly controlled by Singapore's state-owned holding

[55] Roberto De Michele, Joan Oriol Prats Cabrera & Isaías Losada Revol, *Effects of Corruption on Public–Private Partnership Contracts: Consequences of a Zero-tolerance Approach* (2018), at 2, http://dx.doi.org/10.18235/0001355;

[56] *BCR: Odebrecht tendría un impacto negativo de hasta 0,6% en el PBI*, EL COMMERCIO, Sept. 13, 2017 https://elcomercio.pe/ (accessed January 11, 2023).

[57] Camilo Carranza, Seth Robbins & Chris Dalby, InSight Crime, *Major Odebrecht Corruption Cases and Investigations in 2019* (2019), available at https://insightcrime.org/news/analysis/major-latam-odebrecht-corruption-cases-investigations-2019/.

[58] We cover companies whose employees, managers or controlling shareholders paid briberies, but exclude those whose association with bribery schemes was limited to money laundering or other related offenses. We also exclude state-owned enterprises whose officials were accused of having received, but not paid, bribes.

[59] This list is likely not exhaustive but representative of Car Wash cases relating to Petrobras. Moreover, it is worth noting that the boundaries of Car Wash are somewhat porous, given that its initial findings led to other antibribery operations which are often described in the media as part of Car Wash.

company Temasek.[60] In 26 cases (61% of the total or 72% of the cases involving CS companies) there are allegations of controlling shareholders' direct involvement in the bribery scheme in leniency agreements or charging documents. It is worth noting that our coding focuses exclusively on allegations rather than on final resolutions and some proceedings are still ongoing.

Odebrecht provides a paradigmatic case of CS-led bribery. The company had a sophisticated infrastructure for the payment of bribes led by Marcelo Odebrecht, the holding company's CEO and a third-generation member of the controlling family. Odebrecht's massive bribery scheme relied on a "hidden by fully functioning Odebrecht business unit." The so-called Division of Structured Operations, also known in the investigation as the "bribery department," had its own shadow budget and controlled numerous offshore accounts.[61] Marcelo Odebrecht headed this scheme, authorizing payments as well as personally negotiating with many high-level public officials, and was sentenced to 19 years in prison.[62] The investigations and the plea bargaining agreement by Marcelo Odebrecht triggered a bitter intra-familial dispute that ended with Marcelo Odebrecht being bought out by other members of the family, who remain firmly in control of the conglomerate, now renamed as Novonor.[63]

III. Legal Responses to Different Varieties of Corporate Bribery

The dominant legal response to corporate bribery was designed to address agent-led bribery and requires modification to be successful in addressing CS-led bribery. In the first section below we describe the dominant international model to corporate bribery and how it has influenced the laws of other jurisdictions, including many in which CS-led bribery is likely to be prevalent. In the next section we discuss the reasons why the dominant international model seems well-suited to controlling agent-led bribery. We then explain why it is unlikely to be successful in addressing CS-led bribery. Next, we recommend a range of alternative legal responses to CS-led bribery. Finally, we highlight the political obstacles to confronting CS-led bribery.

A. The dominant model of organizational liability for corporate bribery

Recent decades have witnessed considerable convergence across countries in legal responses to corporate bribery.[64] The dominant international model holds organizations liable for bribery committed by their managers, employees, or agents but allows for reduction of sanctions or even elimination of liability for companies that can show they have adopted sufficiently robust compliance programs designed to prevent and detect misconduct. This model was pioneered by U.S. enforcement agencies but much the impetus for its adoption in other countries was provided by the OECD Convention on Combatting Bribery of Foreign Public Officials in International

[60] *See* Appendix.
[61] Alexandra Stevenson & Vinod; Matthew M. Taylor, *The Odebrecht Settlement and the Costs of Corruption, Council on Foreign Relations Blog*, Dec. 27, 2016.
[62] For a broad and detailed account of CS-led bribery by different generations of the Odebrecht family, *see* MALU GASPAR, A ORGANIZAÇÃO: A ODEBRECHT E O ESQUEMA DE CORRUPÇÃO QUE CHOCOU O MUNDO (2020).
[63] Taís Hirata & Ivo Ribeiro, *Novonor, Marcelo Odebrecht close deal*, VALOR INTERNATIONAL, Nov. 7, 2022.
[64] KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY 132-139 (2019); OECD, THE LIABILITY OF LEGAL PERSONS FOR FOREIGN BRIBERY: A STOCKTAKING REPORT (2016).

Business Transactions (the "OECD Convention"), which mandates the imposition of organizational liability for bribery of foreign public officials.[65] The adoption of the OECD Convention spurred a wave of legal reforms in countries that had no history of imposing organizational liability.[66]

The dominant international model has been adopted in many countries where CS companies prevail and CS-led bribery is particularly common. Notably, each of the six largest economies in Latin America (Argentina, Brazil, Chile, Colombia, Mexico, and Peru) has enacted anticorruption laws since 2009, all of which either provided that the adoption of an effective corporate compliance program authorized the elimination or mitigation of liability.[67] Latin American jurisdictions have also gone beyond U.S. practice in not only encouraging the adoption of compliance programs as a shield from liability, but also *mandating* the adoption of compliance programs for companies entering into large contracts with the state (in Argentina and Brazil) or for the exercise of certain business activities (in Colombia).[68] Other jurisdictions where controlling shareholders dominate, such as France and Portugal, have likewise come to mandate the adoption of compliance programs for larger companies.[69]

B. Implications of Organizational Liability for Agent-Led Bribery

The affirmative case for the dominant international model rests on three key assumptions.[70] First, holding individual managers and employees liable for misconduct in corporate settings is difficult and ineffective. In organizational settings it is often difficult to isolate the actions of specific individuals, at least without the help of other people in the organization. Even with the assistance of the organization, there is concern about scapegoating—in other words, that the wrong individuals will be targeted for sanctions.[71] Yet another possibility is that individuals may be influenced by corporate culture and therefore be less responsive to the kinds of sanctions that the legal system imposes.[72] For all these reasons, a regime which relies solely upon individual liability may be incapable of deterring corporate misconduct.

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[65] Art. 2, 37 I.L.M. 4 (1998).
[66] OECD, *supra* note 64.
[67] Dalila Martins Viol, *The Rise of Corporate Compliance Programs as a Public Strategy Against Corruption: Mapping the Spread of Legal Reforms in Latin America*, *in* CORRUPTION AND ANTI-CORRUPTION UPSIDE DOWN: NEW PERSPECTIVES FROM GLOBAL SOUTH (Fernanda Odilla & Konstantinos Tsimonis eds., Palgrave Macmillan forthcoming)
[68] *Id.* at __.
[69] [Loi no. 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (2016); Decreto-lei 109-E/2021, de 9 de dezembro de 2021.]
[70] For the seminal work articulating this account, *see* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Arlen, *supra* note 11 at 159.
[71] *See*, *e.g.*, WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS 137 (2006) (questioning favors granted to corporations in return for scapegoating of subordinate employees). Asaf Eckstein & Gideon Parchomovsky, *The Agent's Problem*, 70 DUKE L.J. 1509, 1537-8 (2021) (arguing that, in response to a recent intensification of enforcement efforts, "corporations are willing to disregard the interests of present and, especially, past directors and officers, treating them as scapegoats who must bear the blame for the company's failure").
[72] Jennifer Arlen & Lewis A. Kornhauser, *Battle for our Souls: A Psychological Justification for Corporate and Individual Liability for Organizational Misconduct*, U. ILL. L. REV. (forthcoming).

A second assumption underlying the dominant international model is that a second-best way of achieving the goals of individual liability for misconduct in organizational settings is to encourage people within organizations to participate in preventing, policing and sanctioning wrongdoing. For these purposes, preventing misconduct involves reducing the incidence of misconduct by altering employees' opportunities, incentives or inclinations to engage in misconduct, without resorting to sanctions. Policing means measures such as monitoring, auditing or investigation that increase the likelihood that misconduct is detected and sanctioned, including through cooperation with and reporting to law enforcement authorities. Sanctions imposed by organizations include measures such as termination or discipline.[73] The hope is that these sorts of private efforts, either alone or in combination with the prospect of legal liability for individuals, will prove to be cost-effective ways of preventing, deterring and punishing misconduct.

A third assumption is that imposing liability on organizations will induce effective prevention, policing and sanctioning. The idea here is that because shareholders ultimately bear the brunt of the burden of sanctions imposed on the organization, the threat of liability gives them an incentive to take steps to aid in preventing and sanctioning wrongdoing. The premise is that actors who engage in misconduct are subject to an internal corporate hierarchy topped by shareholders—shareholders can remove board members, board members can remove executive officers, and executive officers can remove mid-level management and other employees.

Given these three assumptions, proponents of the dominant international model argue that holding the company vicariously liable for the actions of bribepaying employees and agents creates incentives for shareholders to initiate preventive measures. They recognize, however, that the harsh consequences of strict liability need to be adjusted to create appropriate incentives for corporations to engage in internal policing and sanctioning. While increased self-policing might deter employees by increasing the perceived likelihood of being sanctioned, it also increases the organization's risk of being sanctioned. If the second effect outweighs the first then firms will have an incentive to refrain from policing, or even to engage in cover-ups. Regimes that offer reduced sanctions for organizations that adopt effective compliance programs are designed to offset these perverse effects.

One criticism of the dominant model targets the assumption that organizational liability will create sufficient incentives for deterrence. Given that dispersed shareholders in an NCS company are in a poor position to monitor corporate management, it is possible that organizational liability will produce modest benefits, at best, in terms of deterrence while harming innocent stakeholders such as minority shareholders, creditors, employees and trading partners.[74] Interestingly, this criticism often will have less force in a CS company than in an NCS company. Unfettered by collective action problems, controlling shareholders—or at least those with large stakes in the company or who enjoy substantial private benefits of control that vary with the value of the firm—have strong incentives to avoid legal sanctions that reduce firm value.[75]

[73] Arlen & Kraakman, *supra* at 70.

[74] Arlen, *supra* note 11, at 181-183 (arguing that agency costs limit the effectiveness of organizational liability and are "a serious problem for publicly-held firms").

[75] *See* Amore & Marzano, *supra* note 25, at 371 and 392 (suggesting that family firms are less likely to violate antitrust laws because of the relatively high reputational costs of detection).

Consequently, organizational liability should give controlling shareholders relatively strong incentives to prevent or avoid misconduct, including CS-led bribery. Organizational liability also should create relatively strong incentives for controlling shareholders to police and sanction agent-led bribery. As we shall see, however, this last set of incentive effects does not apply to CS-led bribery.

C. Implications of Organizational Liability for CS-Led Bribery

Each of the three assumptions that underpin the dominant international model in relation to agent-led bribery is questionable in relation to CS-led bribery.

First, it may be less challenging to impose individual liability for CS-led bribery than for agent-led bribery. Both individuation and proof of wrongdoing may be less problematic with respect to controlling shareholders than with respect to managers and employees. It should be easy to attribute responsibility to individual controlling shareholders who take matters into their own hands, whether to avoid sharing incriminating information with employees or to make their commitments to corrupt counterparties more credible. In short, all else being equal, NCS companies are more likely to suffer from an "accountability gap" associated with diffuse decision-making power.

Second, given the dominance of controlling shareholders in corporations' internal hierarchies, they are unlikely to be affected by other employees' or agents' efforts at prevention, policing and sanctioning.[76] This is because controlling shareholders practically occupy the apex of the corporate hierarchy. In the words of a Delaware court, a controlling shareholder is an "800-pound gorilla."[77] Controlling shareholders elect and remove directors,[78] who in turn elect and remove corporate officers, who hire and fire corporate employees. Consequently, controlling shareholders are harder to discipline through the corporation's internal power structure. In the absence of government sanctions, controlling shareholders generally may only lose their equity stake and resulting voting power if they agree to sell control in a voluntary transaction.

A third consideration is that even if, for the reasons set out above, organizational liability may induce controlling shareholders to 'prevent' themselves from engaging in misconduct, once they are implicated in wrongdoing not even the prospect of substantial organizational liability is likely to induce controlling shareholders to do anything that will bring sanctions down on their own heads. In other words, the prospect of avoiding or mitigating organizational liability is

[76] For Latin American scholars and practitioners questioning the effectiveness of conventional compliance programs in CS companies, *see* Salomão Filho, *supra* note 11; Guillermo Jorge, *Receiving "Corporate Compliance" in Latin America*, *in* CORPORATE COMPLIANCE ON A GLOBAL SCALE, 134 (Stefano Manacorda & Francesco Centonze eds., 2022); Cynthia Decloedt, *Monitor da Odebrecht: Controlador que praticou corrupção deve ter papel reconhecido em compliance*, TERRA, Aug. 16, 2009 (describing speech by Odebrecht external monitor Otavio Yazbek in event sponsored by J&F).

[77] In re Pure Res., Inc., S'holders Litig., 808 A.2d 421, 436 (Del. Ch. 2002).

[78] Unlike Delaware, many jurisdictions do not even permit mechanisms that restrict shareholders' right to remove directors, such as staggered boards. *See* John Armour, Luca Enriques, Henry Hansmann & Reinier Kraakman, *The Basic Governance Structure: The Interests of Shareholders as a Class*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 55-56 (John Armour, Luca Enriques et al., 2017).

unlikely to induce controlling shareholders to police or sanction CS-led misconduct.[79] In fact, the concern is that controlling shareholders will use organizational liability to deflect attention and sanctions away from their own CS-led bribery. Controlling shareholders may go even further and throw companies under the bus in exchange for their own exoneration, even when this harms innocent stakeholders (including minority shareholders, who help foot the bill). For all these reasons, the affirmative case for imposing organizational liability for CS-led bribery is weaker than for agent-led bribery.

There are also at least two additional objections to organizational liability for CS-led bribery. First, the imposition of organizational liability in addition to individual liability raises concerns about excessive punishment and is in tension with the prohibition of *bis in idem* and double jeopardy.[80] Second, as hinted above, CS-led bribery is particularly prevalent in countries where pecuniary private benefits of control are high, including developing countries. Because developing countries are poorer and have less competitive markets, there is reason to believe that organizational liability—at least insofar as it may lead to insolvency or downsizing—will impose greater costs on innocent stakeholders in the Global South than in wealthier countries.

D. Alternative Responses to CS-led Bribery

For the reasons set out above, preventing, policing and sanctioning CS-led bribery is an urgent task that demands alternatives to organizational liability. Several refinements to current approaches are worth exploring.

1. Prosecuting controlling shareholders

Standard academic accounts of organizational liability presume that imposing individual liability for corporate bribery will be difficult. To the extent that individual liability for bribery is considered, both academics and lawmakers sometimes give priority to imposing liability on officials who receive bribes rather than the individuals who pay them, even if this requires granting leniency to bribe players in order to induce reporting.[81] The analysis set out above challenges these approaches on two grounds. First, establishing the responsibility of individuals may be less difficult and costly in cases of CS-led bribery than in cases of agent-led bribery. Second, a controlling shareholder who engages in CS-led bribery is likely to cause more harm to society than an individual who participates in agent-led bribery. For both these reasons, the net benefits of using individual liability to deter or incapacitate individual controlling shareholders tempted to engage in CS-led bribery may be higher than the net benefits of pursuing individual liability for other forms of corporate misconduct. We therefore recommend prioritizing prosecution of these corrupt kingpins.

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[79] Arlen, *supra* note 11, 152-153 (claiming that theory and evidence from US enforcement suggest that closely held firms do not respond to offers of corporate leniency in exchange for cooperation).
[80] Selvaggi, *supra* note 11, at 154.
[81] Susan Rose-Ackerman & Bonnie K. Palifka, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM, 2ND ED., 217-218 (2016); Kaushik Basu, *Why, for a Class of Bribes, the Act of Giving a Bribe should be Treated as Legal* (Published in: Ministry of Finance Government of India Working Paper No. 1/2011-DEA (March 2011)). See also, Davis, *supra* note 64, 113-116.

2. Refining the sanctions imposed on controlling shareholders

The sanctions imposed on controlling shareholders implicated in CS-led bribery should include but need not be limited to financial penalties and imprisonment. One option is to force the controlling shareholders to give up the reins of control by removing themselves from management functions (without finding strawmen to act on their behalf).[82] A more promising alternative would be to require divestment or even forfeiture of voting shares, or, perhaps, to place them under the control of an independent trustee.[83] A variant on this approach is to impose an equity fine, meaning a penalty that the company satisfies by issuing equity rather than making a monetary payment, which operates to dilute the controlling shareholder's stake enough to dissipate their control.[84] The principal justification for ousting controlling shareholders is incapacitation, in other words, to prevent future misconduct. However, to the extent that shareholders enjoy significant pecuniary and nonpecuniary private benefits of control, as they often do, these sanctions also promise a substantial deterrent effect.

Proceedings against controlling shareholders should be coordinated with the proceedings against the companies they control in order to avoid excessive punishment and violation of the prohibitions of *bis in idem* and double jeopardy.[85] Responding to this concern, the Federal Sentencing Guidelines for Organizations provide for the offset of the fines imposed on closely held corporations by the amounts paid by individuals owning more than 5% of the stock.[86] Similarly, Finnish legislation allows courts not to impose a penalty on the organization of a small entity if the convicted person holds a substantial amount of its shares.[87]

3. Encouraging whistleblowers

Controlling shareholders might be at the apex of the corporate hierarchy, but that does not mean that CS-led bribery is always completely hidden from lower-level employees and agents. One way of empowering those actors is to encourage them to report information about CS-led bribery to enforcement authorities. At a minimum, this will entail protecting whistleblowers against retaliation.

Mandating that firms provide channels for whistleblowing can also be helpful, but the most potent form of encouragement is to offer financial rewards for information. Under U.S. federal law, whistleblowers who provide information about FCPA violations by publicly traded companies are entitled to both protection and rewards.[88] Meanwhile, the EU's Whistleblower Protection Directive requires firms with more than 50 employees to establish channels for

[82] Jorge, *supra* note 76, at 132.
[83] Salomão Filho, *supra* note 11 (defending this solution as lawful and normatively desirable under Brazilian law).
[84] JOHN C. COFFEE, JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT, chapter 5 (2020) (defending the advantages of equity fines as "a penalty that does not fall on the least culpable").
[85] Selvaggi, *supra* note 11, at 154.
[86] *Id.* (citing § 8 C3.4).
[87] *Id.* at 148. Courts have even considered family ties in making such an assessment.
[88] Securities Exchange Act of 1934, s. 21F.

reporting certain forms of misconduct, including procurement-related corruption.[89] Expanded versions of these instruments might be effective ways of combatting CS-led bribery, especially if these are combined with other sanctions proposed here, such as forfeiture or sales of controlling shares.

4. Encouraging litigation by investors

Investors can help to sanction CS-led bribery by initiating litigation against controlling shareholders, typically on the theory that investors' interests in a company are harmed when it suffers either legal or reputational sanctions for CS-led bribery. We emphasize that sanctioning a company and then encouraging it to bring a suit against culpable individuals seems like a second-best alternative to prosecuting the individuals directly.

There are two main procedural mechanisms for litigation against controlling shareholders implicated in CS-led bribery. One is a suit initiated by the company itself.[90] In CS companies, direct suits are more plausible if the controlling shareholder has been ousted. Even if the controlling shareholder remains in place, investors may resort to a second procedure: a shareholder derivative suit against directors and officers (and, in some contexts, controlling shareholders) for breach of fiduciary duty. In the United States, shareholders' derivative suits for a board's failure of oversight – known as *Caremark* claims – have been called "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[91] However, a derivative suit against a fiduciary who has been directly involved in misconduct has much greater prospects for success.

Outside the U.S., many jurisdictions place a host of substantive and procedural hurdles in the way of derivative suits.[92] In particular, many jurisdictions do not authorize, or significantly restrict, shareholder derivative suits against individual controlling shareholders for breach of fiduciary duty. In Brazil, a R$12 billion shareholder derivative suit against JBS's controlling shareholders was controversially extinguished for lack of standing because of a subsequent claim

[89] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

[90] In the NCS context. in the aftermath of its scandal Siemens sued numerous executives and obtained a favorable judgment from a lower court in Germany, in a decision still hailed as laying "the foundation of compliance culture in Germany." TaylorWessing, *Inside ESG & Compliance – the Siemens/Neubürger decision revisited*, Apr. 26, 2022, https://www.taylorwessing.com/en/insights-and-events/insights/2022/04/corporate-compliance-tech-deals-siemens-neubuerger-decision-revisited; Hartmut Berghoff, *"Organised irresponsibility"? The Siemens corruption scandal of the 1990s and 2000s*, 60 BUS. HIST. 423, 431 (2018) ("In civil law suits neglect has been ascertained and all implicated former executive board members have agreed on out-of-court settlements and paid some damages to the firm").

[91] *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

[92] Martin Gelter, *Why do Shareholder Derivative Suits Remain Rare in Continental Europe?*, 37 BROOKLYN J. INT'L L. 843 (2012); André E. Schwartz & Mariana Pargendler, *O Perfil do Contencioso Societário Brasileiro: A Predominância de Ações Anulatórias de Deliberação Assemblear Relativamente a Ações Indenizatórias* [The Profile of the Brazilian System of Corporate Regulation: The Predominance of Claims for Annulment of Shareholder Meetings over Damages Claims], 2021 REVISTA DE DIREITO DAS SOCIEDADES E DOS VALORES MOBILIÁRIOS 443.

filed by the company in an arbitration against its controlling shareholders.[93] The arbitration was settled in December 2022 for R$543 million.[94]

Investors may also sue under securities laws for losses suffered due to disclosure of false or misleading information by public companies implicated in CS-led bribery. Such lawsuits are common in the United States. While many of them are dismissed, the risks can be substantial.[95] Brazil's state-controlled oil giant Petrobras agreed to settle a securities lawsuit for nearly US$3 billion, the fifth largest settlement in U.S. history, for failing to disclose the company's corruption schemes when raising billions of dollars from U.S. investors in 2010.[96] In other jurisdictions, substantive and procedural obstacles make securities lawsuits rarer than in the United States. In Brazil, even the existence of company liability for securities fraud remains highly controversial, with some commentators arguing that securities liability is restricted to directors and officers under the Corporations Law.[97]

The deterrent effects of securities lawsuits are unclear, not only because of known difficulties of organizational liability, enforcement, and insurance, but also because greater boilerplate disclosure can substantially reduce the risk of liability for securities fraud. For instance, following Car Wash, Petrobras now specifically identifies the "heightened" risk of bribery or corruption or its operations as a risk factor in its Annual Report.[98]

E. Obstacles to Combating CS-led Bribery

No one should be under any illusion that it will be easy to combat CS-led bribery. Controlling shareholders who amass substantial wealth and cultivate close relationships with corrupt politicians will, as a consequence, typically have both the economic resources and political clout to resist efforts either to thwart their plans or hold them legally responsible for their actions.[99] Their companies may also grow to such a size that any efforts to sanction the controlling shareholders may be deemed to have substantial negative effects on stakeholders, making them 'too big to jail.'

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[93] Superior Tribunal de Justiça, Conflito de Competência 185.702-DF, Segunda Seção, Rapporteur Justice Marco Aurélio Bellizze, decided on Mar. 4, 2022. Brazil's Securities Commission has subsequently opined that a shareholder's derivative suit against the controlling shareholder should not be extinguished due to the subsequent initiation of a similar lawsuit by the company. Comissão de Valores Mobiliários, Processo Administrativo CVM SEI N° 19957.007423/2021-12, Rapporteur Director João Accioly, decided on Feb. 28, 2023.

[94] JBS S.A., Material Fact, Dec. 22, 2022.

[95] Ropes & Grey Alert, Courts Continue to Dismiss Shareholder Suits Based on FCPA Violations, Apr. 1, 2015 ("the pleading requirements for FCPA-derived securities fraud claims have often proved insurmountable"); Philip Urowski et al. (Shearman & Sterling), Civil Litigation in the Aftermath of FCPA and U.K. Bribery Act Investigations, May 13, 2020 ("Despite the difficulty of meeting the high threshold for pleading securities fraud, class action settlements in such cases are not uncommon").

[96] Stanford Law School, Securities Class Action Clearinghouse, Top Ten by Largest Settlement, https://securities.stanford.edu/top-ten.html (last accessed on Dec. 12, 2022).

[97] José Estevam de Almeida Prado, *Responsabilidade Civil por Divulgação de Informação Falsa ou Enganosa ou Omissão de Informações no Mercado de Capitais Brasileiro* (professional masters dissertation, Fundação Getulio Vargas, 2018) (describing the doctrinal controversy).

[98] Petrobras S.A., Annual Report on Form 20-F for the year ended December 31, 2021 at 39.

[99] Morck & Yeung, *supra* note 8.

These concerns were all manifest in the efforts to sanction the Batista brothers, the controlling shareholders of J&F Investimentos, mentioned above in the section on FCPA enforcement actions. The Batista brothers confessed to corruption but were never imprisoned (although they did spend time in jail for insider trading as they sold JBS shares while nonpublic investigations were pending). While the initial sanctions imposed in Brazil prevented the Batista brothers from holding managerial positions in the companies, in 2021 Brazil's Superior Court of Justice (*Superior Tribunal de Justiça* – STJ) ruled that the sanction was disproportionate in view of the importance of the controlling shareholder to the group and its "considerable social consequences," especially during the COVID-19 pandemic.[100]

As of 2022, the Batista brothers were out of jail and continued to control JBS through a 48.83% stake.[101] Jose Batista Sobrinho, the 88-year-old founder and patriarch, serves on the board of directors, and Wesley Batista is a member of the board of senior executive managers.[102] The brothers were estimated to be worth more than US$7 billion, and their company had expanded beyond its dominant positions in the meat industry and pulp manufacturing into mining.[103]

Impunity for controlling shareholders is not a uniquely Brazilian phenomenon. Consider the "cycle of corruption and pardons" involving Samsung, the giant Korean *chaebol*.[104] In 2017, Samsung heir Lee Jay-yong (known as Jay Y. Lee in the West) was sentenced to five years in prison for bribing South Korea's president in a scandal that contributed to the president's impeachment.[105] The payments were aimed at obtaining the government's support (through the voting of the National Pension Service, Korea's largest institutional investor) for an intragroup merger which, though seemingly unfair to minority shareholders, was designed to strengthen the family's control over the Samsung group while avoiding an inheritance tax.[106] Jay Y. Lee received a presidential pardon in 2022 after serving 18 months in jail. The pardon was justified as "a bid to overcome the economic crisis by revitalizing the economy", and received wide public support.[107] Lee was appointed as Samsung Electronics' executive chairman soon thereafter.[108] The comeback followed a family tradition, as Lee's father had also received presidential pardons in 1997 and 2008 for convictions of bribery and tax evasion.[109]

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[100] Superior Tribunal de Justiça, Sixth Chamber, Appeal in Habeas Corpus 120.261-SP, Rapporteur Justice Rogerio Scheitti Cruz, decided on May 6, 2020, at 7.

[101] JBS Ownership and Corporate, https://ri.jbs.com.br/en/esg-investors/corporate-governance/ownership-and-corporate/ (accessed on Dec. 8, 2022).

[102] JBS Board, Council and Committees https://ri.jbs.com.br/en/esg-investors/corporate-governance/board-council-and-committees/ (accessed on Dec. 8, 2022).

[103] Felipe Marques & Mariana Durao, *Brothers Behind Brazil's $18 Billion Meat Empire Are Getting into Mining*, BLOOMBERG, Apr. 6, 2022.

[104] Kenichi Yamada, *South Korea Grapples with Cycle of Corruption and Pardons*, NIKKEI ASIA, Feb. 17, 2018.

[105] Hamza Shaban & Aaron Gregg, *South Korea President Pardons Samsung Heir for Bribing Predecessor*, WASH. POST Aug. 12, 2022; Kang & Chun, *supra* note 4, at 256.

[106] For a description of the merger, *see* Sang Yop Kang, *Rethinking Self-Dealing and the Fairness Standard: A Law and Economics Framework for Internal Transactions in Corporate Groups*, 11 VA. L. & BUS. REV. 95 (2016). The family's control over Samsung resulted from a small equity stake combined with a circular shareholding structure that augmented its voting power. *Samsung group: money for nothing*, F.T., May 26, 2015.

[107] Shaban & Gregg, *supra* note 105.

[108] Peter Hoskins, *Lee Jae-yong: Samsung appoints convicted heir to top job*, BBC, Oct. 27, 2022.

[109] Shaban & Gregg, *supra* note 105.

Conclusion

The dominant international model of anticorruption policies has largely neglected the involvement of controlling shareholders in corporate bribery. This is a mistake. Controlling shareholders may not only have strong incentives to engage in corporate bribery but may even have a comparative advantage over managers and employees in certain contexts. Cases of CS-led bribery feature prominently in the great corruption scandals of the last decade and have caused significant political and economic harm around the world.

CS-led bribery now accounts for a non-trivial minority of FCPA enforcement actions in recent years, and for most investigations of corporate corruption under Brazil's Operation Car Wash. Nevertheless, the dominant framework to fight corruption was designed with agent-led bribery in mind. We argue that a dedicated focus on controlling shareholders as participants in bribery offers greater deterrence benefits and lower social costs compared to standard prescriptions of organizational liability coupled with a compliance discount, even if there are significant political obstacles. Corporate ownership structures matter beyond corporate governance and affect the anatomy of corruption. Antibribery efforts should take these differences seriously.

Appendix

Table A1. US FCPA Enforcement Actions

Case	CS	Structure	CS-led?
In the Matter of Fresenius Medical Care AG & Co. KGa	CS	Foundation	
In the Matter of Mobile Telesystems PJSC	CS	Institutional	
United States of America v. Cyrus Allen Ahsani and Saman Ahsani	CS	Individual/Family	Y
United States of America v. Frank James Lyon	CS	Individual/Family	Y
In the Matter of Polycom, Inc.	NCS		
In the Matter of Panasonic Corporation	NCS		
In the Matter of Petroleo Brasileiro S.A. – Petrobras	CS	State	
United States of America v. Sociedad Quimica y Minera de Chile	CS	Institutional	
In the Matter of Joohyun Bahn, a/k/a Dennis Bahn	NCS		
In Re Legg Mason, Inc.	NCS		
In Re: Insurance Corporation of Barbados Limited	NCS		
United States of America v. Raul Gorrin Belisario, et al.	NCS		
In the Matter of Credit Suisse Group AG	NCS		
United States of America v. Egbert Yvan Ferdinand Koolman	NCS		
United States of America v. Transport Logistics International, Inc.	NCS		
United States of America v. Embraer S.A.	NCS		
United States of America v. SBM Offshore N.V.	CS	Institutional	
United States of America v. Rolls-Royce PLC	NCS		
In the Matter of Och-Ziff Capital Management Group LLC, OZ Management LP, Daniel S. Och, and Joel M. Frank	CS	Individual/Family	
In the Matter of Telia Company AB	CS	State	
In Re Las Vegas Sands Corp.	CS	Individual/Family	
In the Matter of Biomet, Inc.	NCS		
United States of America v. Charles Hunter Hobson	NCS		
United States of America v. Glencore International A.G.	NCS		
United States of America v. Alvaro Pulido Vargas, et al.	NCS		
United States of America v. Naman Wakil	CS	Individual/Family	Y
United States of America v. Ivan Alexis Guedez	NCS		
United States of America v. Jose Manuel Gonzalez-Testino	NCS		
United States of America v. Matthias Krull	NCS		
United States of America v. Francisco Convit Guruceaga, et al.	NCS		
United States of America v. Juan Carlos Castillo Rincon	NCS		
United States of America v. Fernando Ardila-Rueda	NCS		
United States of America v. Luis Carlos de Leon-Perez, et al.	NCS		
United States of America v. Jose Orlando Camacho	NCS		
United States of America v. Juan Jose Hernandez-Comerma	NCS		
United States of America v. Charles Quintard Beech III	CS	Individual/Family	Y
United States of America v. Natalino D'Amato	NCS		
United States of America v. Jose Luis de Jongh-Atensio	NCS		

United States of America v. Leonardo Santilli	NCS		
United States of America v. Carlos Enrique Urbano Fermin	NCS		
United States of America v. Tulio Anibal Farias-Perez	NCS		
United States of America v. Lennys Rangel	NCS		
United States of America v. Edoardo Orsoni	NCS		
United States of America v. Rafael E. Pinto-Franceschi, et al.	NCS		
In the Matter of Amec Foster Wheeler Limited	NCS		
United States of America v. Arturo Carlos Murillo Prijic	NCS		
United States of America v. Luis Alvarez Villamar	CS	Individual/Family	Y
In the Matter of Deutsche Bank AG	NCS		
United States of America v. Sargeant Marine Inc.	CS	Individual/Family	Y
United States of America v. Vitol Inc.	CS		
In re the Matter of The Goldman Sachs Group, Inc.	NCS		
United States of America v. Beam Suntory Inc.	NCS		
In the Matter of J&F Investimentos, S.A., et al.	CS	Individual/Family	Y
United States of America v. Jose Carlos Grubisch	CS	Individual/Family	Y
In the Matter of Herbalife Nutrition Ltd.	NCS		
United States of America v. Raymond Kohut	NCS		
United States of America v. Margaret Cole, et al.	NCS		
United States of America v. Vitol Inc.	NCS		
In the Matter of Novartis AG	NCS		
Securities and Exchange Commission v. Telefonaktiebolaget LM Ericsson	NCS		
In the Matter of WPP plc	NCS		
United States of America v. Samsung Heavy Industries Co. Ltd.	NCS		
In the Matter of Barclays PLC	NCS		
In the Matter of Westport Fuel Systems, Inc. and Nancy Gougarty	NCS		
In the Matter of Quad/Graphics, Inc.	CS	Institutional	
In the Matter of Juniper Networks, Inc.	NCS		
In the Matter of Deutsche Bank AG	NCS		
In the Matter of Telefonica Brasil S.A.	NCS		
United States of America v. Naeem Riaz Tyab, et al.	NCS		
In the Matter of Centrais Eletricas Brasileiras S.A.	CS	State	
United States of America v. Deck Won Kang	CS	Individual/Family	Y
In the Matter of Vantage Drilling International	CS	Individual/Family	Y
In the Matter of Stryker Corporation	NCS		
In the Matter of United Technologies Corporation	NCS		
In the Matter of Sanofi	NCS		
In the Matter of The Dun & Bradstreet Corporation	NCS		
In the Matter of Kinross Gold Corporation	NCS		
In the Matter of Elbit Imaging Ltd.	CS	Individual/Family	Y
United States of America v. Chi Ping Patrick Ho, et al.	CS	State	
In the Matter of Alere Inc.	NCS		
United States of America v. Joseph Baptiste and Roger Richard Boncy	NCS		

United States of America v. Cary Yan and Gina Zhou	NCS	
In the Matter of Halliburton Company and Jeannot Lorenz	NCS	
In Re: CDM Smith, Inc.	NCS	
In Re: Linde North America Inc. and Linde Gas North America LLC	NCS	
In the Matter of Orthofix International N.V.	NCS	
In the Matter of Cadbury Limited and Mondelez International, Inc.	NCS	
In the Matter of World Acceptance Corporation	CS	Institutional
In the Matter of Alexion Pharmaceuticals, Inc.	NCS	
In the Matter of Eni S.p.A.	NCS	
Securities and Exchange Commission v. Asante K. Berko	NCS	
In the Matter of Cardinal Health, Inc.	NCS	
United States of America v. Airbus SE	NCS	
In the Matter of Credit Suisse Group AG	NCS	
United States of America v. Roberto Heinert	NCS	
In the Matter of TechnipFMC plc.	CS	Institutional
In the Matter of Cognizant Technology Solutions Corporation	NCS	
In the Matter of Microsoft Corporation	NCS	
United States of America v. Alstom S.A.	NCS	
United States of America v. Luis Alfredo Motta Dominguez and Eustiqiuo Jose Lugo Gomez	NCS	
In Re Walmart Inc.	CS	Individual/Family

Table A2. US FCPA enforcement actions involving CS-led bribery

Case	Target of enforcement action					
	Controlling shareholder		Company		Other individuals	
	Criminal	Civil	Criminal	Civil	Criminal	Civil
Cyrus Allen Ahsani et al	✓				✓	
Charles Quintard Beech III	✓				✓	
Elbit Imaging Ltd.				✓		
Jose Carlos Grubisch			✓	✓	✓	
J&F Investimentos, S.A		✓	✓	✓		
Frank James Lyon	✓				✓	
Deck Won Kang	✓					
Jorge Cherrez Miño et al	✓				✓	
Sargeant Marine Inc.	✓		✓		✓	
Vantage Drilling International				✓		
Naman Wakil	✓				✓	

Table A3. Ownership structure and type of corruption of companies involved in Car Wash operation

Companies	Source	CS or NCS	Structure	CS-led?
A.Hak Industrial Services B.V	Criminal Prosecution	CS	CS - Family	No
Aegean Shipping Management	Criminal Prosecution	CS	CS - Family	No
Alumini Engenharia S.A./ Alusa Engenharia S.A.	Criminal Prosecution	CS	CS - Family	Yes
Andrade Gutierrez Engenharia S.A.	Leniency Agreement and Criminal Prosecution	CS	CS - Family	No
Athenian Sea Carriers	Criminal Prosecution	CS	CS - Individual	Yes
Braskem S.A	Leniency Agreement and Criminal Prosecution	CS	CS - Family	Yes
Carioca Christiani Nielsen Engenharia S.A.	Leniency Agreement and Criminal Prosecution	CS	CS - Family	Yes
Companie Beninoise des Hydrocarbures Sarl (CBH)	Criminal Prosecution	CS	CS - Individual	Yes
Construcap	Criminal Prosecution	CS	CS - Family	Yes
Decal do Brasil (Decal Group)	Criminal Prosecution	CS	CS - Individual	Yes
Dorian (Hellas)	Criminal Prosecution	CS	CS - Individual	No
EISA - Estaleiro Ilha S.A. (Dislub Equador Group)	Criminal Prosecution	CS	CS - Family	Yes
Empresa Industrial Técnica S/A	Criminal Prosecution	CS	CS - Individual	Yes
Equador Log S.A. (Grupo Dislub Equador)	Criminal Prosecution	CS	CS - Family	Yes
Galvão Engenharia S.A	Criminal Prosecution	CS	CS - Family	Yes
GDK S.A.	Criminal Prosecution	CS	CS - Individual	Yes

Grupo SOG - Toyo Setal Empreendimentos Ltda.	Leniency Agreement and Criminal Prosecution	CS	CS - Individual	Yes
Grupo Trafigura	Criminal Prosecution	NCS	NCS	No
Jaraguá Equipamentos Industriais Ltda	Criminal Prosecution	CS	CS - Family	Yes
Keppel Fels Brasil S/A	Leniency Agreement	CS	CS - State	No
LBR Engenharia	Criminal Prosecution	CS	CS - Individual	Yes
Mendes Júnior Trading e Engenharia S.A.	Criminal Prosecution	CS	CS - Family	Yes
Meta Manutenção e Instalações Industriais	Criminal Prosecution	CS	CS - Individual	Yes
Mover Participações S.A./Camargo Corrêa S.A	Leniency Agreement and Criminal Prosecution	CS	CS - Family	Yes
MPE Montagens e Projetos Especiais S.A.	Criminal Prosecution	CS	CS - Family	Yes
Multitek Engenharia Ltda	Criminal Prosecution	CS	CS - Individual	Yes
NM Engenharia e Construções Ltda.	Criminal Prosecution	CS	CS - Family	Yes
Noroil Empresa de Navegação	Criminal Prosecution	Unknown	Unknown	Unknown
Nova Engevix S.A/.Engevix S.A.	Leniency Agreement and Criminal Prosecution	CS	CS - Individual	Yes
Novonor/ Odebrecht S.A	Leniency Agreement and Criminal Prosecution	CS	CS - Family	Yes
OAS S.A	Leniency Agreement and Criminal Prosecution	CS	CS - Family	No
Pollydutos, Estre Ambiental, Estaleiro Rio Tietê (Estre Group)	Criminal Prosecution	CS	CS - Family	Yes
Rolls-Royce Brasil Ltda.	Leniency Agreement	CS	CS - Family	No

Samsung Heavy Industries	Leniency Agreement	CS	CS - Family	No
Sanko Sider Comércio, Importação e Exportação de Produtos Siderúrgicos Ltda	Criminal Prosecution	CS	CS - Individual	Yes
Sargeant Marine	Criminal Prosecution	Unknown	Unknown	Unknown
Techint/Confab Industrial S.A	Criminal Prosecution	CS	CS - Family	No
Technip Brasil - Engenharia, Instalações e Apoio Marítimo Ltda e Flexibrás Tubos Flexíveis Ltda	Leniency Agreement	NCS	NCS	No
The Interpublic Group of Companies Inc (Mullen Lowe Brasil Publicidade Ltda e FCB Brasil Publicidade e Comunicação Ltda)	Leniency Agreement	NCS	NCS	No
Tsakos Energy Navigation	Criminal Prosecution	NCS	NCS	No
UTC Engenharia S.A.	Leniency Agreement and Criminal Prosecution	CS	CS - Individual	Yes
Viken Hull	Criminal Prosecution	CS	CS - Family	No

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