20-842(L)

20-1061(CON), 20-1084(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant-Cross-Appellee,

—against—

FREDERIC PIERUCCI, WILLIAM POMPONI,

Defendants,

LAWRENCE HOSKINS,

Defendant-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT DISTRICT OF CONNECTICUT

BRIEF FOR THE INTERNATIONAL ACADEMY OF FINANCIAL CRIME LITIGATORS AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for *Amicus Curiae* states that The International Academy of Financial Crime Litigators has no parent corporation, and no company holds 10 percent or more of its stock.

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THE INTEREST OF THE *AMICUS CURIAE*

The International Academy of Financial Crime Litigators ("the Academy") [1] is a not-for-profit public interest organization established under the laws of France, with its principal seat in Basel, Switzerland. It describes itself as "a collaboration between public- and private-sector litigation professionals and the renowned Basel Institute on Governance" whose "aim [is] to promote worldwide access to solutions in cases of economic crime…." Its stated mission is "to be an independent non-partisan global center of excellence in all aspects of financial crimes by promoting international cooperation, access to justice and due process in the interests of victims and accused." It is not oriented toward criminal defense, but rather is based on "[r]espect for members of the bar and professionals on 'all sides' of economic crime cases." Its membership is designed to "unite academic and litigation professionals who are masters of financial crime defense and prosecution…." These and other elements of its mission statement, a summary of

[1] Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure the Academy certifies that (1) this brief was authored entirely by counsel for the Academy, and not by counsel for any party, in whole or part; (2) no party and no counsel for any party contributed money to fund preparing or submitting this brief; and (3) apart from the Academy and its counsel, no other person contributed money to fund the preparation or submission of this brief.

its activities, and biographies of its members can be found at the Academy's site, https://www.financialcrimelitigators.org/ [2]

The Academy has an interest in this appeal because its outcome will have a significant impact on world-wide efforts to combat corruption, particularly bribery of foreign officials. The key issue in this appeal is the definition of the word "agent" in the phrase "agent of a domestic concern" as it appears in the Foreign Corrupt Practices Act ("FCPA"). The Academy believes that the word "agent," as used in the FCPA and in the precise context of overseas bribery targeted by the FCPA, has an everyday, common-sense meaning that is understood and widely shared by members of the international community whose cooperation and assistance are crucial to successful implementation of the FCPA. In this appeal, the United States Department of Justice ("DoJ" or "Government") proposes a vague and imprecise meaning of the word "agent" that is not only inconsistent with the universal use of that word in the corruption-fighting efforts of the principal trading partners of the United States (and, indeed, by the DoJ itself), but as a practical matter can only be applied in a jury trial (as happened here). This approach, if adopted by the Court, would inhibit cooperative efforts of prosecutors

[2] This brief as amicus curiae is filed by the Academy. The positions taken in this brief do not necessarily represent the opinions of each Fellow of the Academy or of any institutions with which such Fellows are employed or associated. Neither this brief nor the decision to file it should be interpreted to reflect the views of any Fellow of the Academy.

Both parties to this appeal have consented to the filing of this brief.

around the world in their consultative discussions with the DoJ, to which the DoJ is formally obligated by treaty. It would also make it far more difficult for international corporations and the individuals who are employed by them to assess the territorial reach of the FCPA. Finally, by emphasizing the vagueness of an otherwise simple word in a criminal statute, the DoJ approach would render less efficient the operations of criminal justice in the United States by making it virtually impossible for the District Courts to resolve a "threshold" issue (that is, whether the FCPA applies to the defendant at all) by means of a pre-trial "proffer" as this Court has urged in *United States v. Alfonso,* 143 F.3d 772 (2d Cir. 1998).

SUMMARY OF ARGUMENT

When the FCPA was adopted by Congress in 1977, it stated a simple but bold and important principle: paying bribes to foreign officials was wrong. While the criminalization of such inherently overseas conduct has thankfully now become an international norm, at the time it was not: overseas bribe payments were generally tolerated by the laws of economically advanced countries whose corporations and citizens made or arranged such bribes, and in many instances led to entirely legal tax deductions for the bribe payments.[3] For twenty years, however, the FCPA was sparsely enforced because in the absence of international coordination and cooperation, it effectively applied only to United States corporations and citizens. This risked creating unfair competition in situations where a U.S. corporation, for example, might compete for foreign contracts against non-US corporations free from any threat that their "home" country would prosecute either the company or its officers for making a bribe.[4] A tectonic change occurred in 1997 when the Organisation for Economic Co-operation and Development ("OECD") promulgated the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions ("OECD

[3] See Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 Ohio St. L.J. 930, 930 (2012).
[4] This was recognized by Congress as a gap to be addressed by the 1998 amendments to the FCPA. See S. Rep. No. 105-277, at 2 (1998), available at https://www.justice.gov/criminal-fraud/legislative-history ("American businesses have operated at a disadvantage relative to foreign competitors who have continued to pay bribes without fear of penalty.")

Convention"), which was promptly signed and implemented by the major leading economic powers, including the United States. By joining it, all the signatory nations – now numbering 44 – agreed to adopt and then enforce laws essentially similar to the FCPA that criminalized the payment of bribes to foreign officials by each nation's corporations or citizens. The creation of such a "level playing field" led directly to a tremendous increase in the number and effectiveness of FCPA prosecutions in the United States. The DoJ recognized the importance of the OECD Convention and similar multi-lateral agreements by seeking and obtaining from Congress in 1998 critical amendments to the FCPA that recognized the multi-jurisdictional nature of the fight against corruption, and led to the FCPA in essentially the form in effect today. For this historic but practical reason, the OECD Convention, and the views and interests of U.S. trading partners who have joined with the United States in the fight against corruption, are key to effective implementation of the FCPA. (Part I-A)

The 1998 amendments to the FCPA, designed to coordinate its terms with U.S. obligations under the OECD Treaty, introduced the phrase "agent of a domestic concern" as one of several specifically and narrowly designated categories of individuals to whom the FCPA applied. Everyone who works in the area of international corruption knows what an "agent" means in that context: it refers to a "fixer," almost always local to the place where bribery actually occurs,

who is engaged by the corrupting corporation – often under the guise of being a "consultant" – to negotiate with the relevant local officials, and often to be the conduit for a bribe as part of the "consultant's fee" they have received. That understanding of the word "agent" is compelled by the legislative discussion of the FCPA when it was first adopted in 1977; it is widely referenced in formal publications issued by the OECD and elsewhere in the international community; it is used incessantly by the DoJ, including in this case; and in fact it appears in the Government's own brief on this appeal. It simply makes no sense to use a very different meaning of the word "agent" in determining whether the FCPA applies to an "agent of a domestic concern." While it is true that Congress did not formally define the word "agent" as used in the FCPA, there is no reason to believe that it intended to give that word the broad, vague and difficult-to-apply meaning advocated by the DoJ in this appeal. (Part I-B)

The difficulties that the DoJ's proposed meaning would create are particularly grave because it complicates the evaluation of "threshold" issues such as whether the FCPA applies to a particular defendant at all. This risks undermining the effectiveness of international "consultation" to which the DoJ is formally committed by treaty, will complicate efforts of non-US companies and their officers to evaluate whether or not to contest the authority of the DoJ to apply

the FCPA to them, and virtually eliminates the possibility of resolving such cases prior to trial by means of a "proffer," as this Court has urged. (Part II)

For all these reasons, the DoJ's approach does not respect the admonition of the Supreme Court in *Morrison v. National Australia Bank*, 561 U.S. 247 (2010), and its progeny (including this Court's opinions in the first appeal in this case)[5] that rules respecting "territoriality" should be simplified and made precise and easier to apply, but rather cuts in the opposite direction. (Part III)

[5] *United States v. Hoskins,* 902 F.3d 69 (2d Cir. 2018) ("*Hoskins 1*").

ARGUMENT

I. THE WORD "AGENT" AS USED IN THE PHRASE "AGENT OF A DOMESTIC CONCERN" IN THE FCPA HAS A STRAIGHTFORWARD AND SIMPLE MEANING THAT IS WIDELY USED IN THE INTERNATIONAL COMMUNITY

A. Enforcement of the FCPA is critically dependent on the OECD Convention and on international cooperation

Between 1977 when the FCPA was adopted and the year 2000, the DoJ brought only a handful of prosecutions of corporations or individuals under it.[6] Since 2000, the prosecution numbers reported by the DoJ (and calculated by several academic studies)[7] have blossomed, and the DoJ appropriately boasts about its success in enforcing the statute. The reason for this change is apparent: by 2000, the OECD Convention had not only gone into effect, but the trading partners of the United States who had signed the Convention had assimilated laws similar to the FCPA into their domestic criminal codes.[8] As of approximately this date, the DoJ could appropriately pursue U.S companies and citizens, and others who fell

[6] One estimate is that "Prior to 1998,. . . only 30 cases [were opened] in the 20-year period leading up to the OECD Convention[.]" Cleveland et al., *Trends in the International Fight Against Bribery and Corruption*, 90 J. Bus. Ethics 199, 210 (2009).

[7] At least two public databases track the number of cases brought under the FCPA by year. Corporate Prosecution Registry, *https://corporate-prosecution-registry.com/browse/ ;* Foreign Corrupt Practices Act Clearinghouse, http://fcpa.stanford.edu/

[8] Article 1(1) of the OECD Convention obligates each of its signers to "take such measures as may be necessary to establish that it is a criminal offence under its law" to offer or make a bribe of a "foreign public official," and Article 12 provides that all signers "shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention."

within the careful delineation of categories of individuals to which the law applied, knowing that competitors of such targets who were not subject to U.S. prosecution were, at least in theory but increasingly in practice, subject to prosecution by officials in their "home" country.

The DoJ and Congress recognized the fundamental importance of the OECD Convention. As this Court has already observed in *Hoskins 1*, the amendments to the FCPA adopted in 1998 – essentially creating the FCPA in effect today – were designed to "amend[] the FCPA to conform it to the requirements of and to implement the OECD Convention."[9] The DoJ agrees: In the most recent version of its "Resource Guide" for the FCPA drafted with the Securities & Exchange Commission and reissued in July 2020, the DoJ described the 1998 amendments as follows:

> In 1998, the FCPA was amended to conform to the requirements of the Anti-Bribery Convention. These amendments expanded the FCPA's scope to: … apply criminal penalties to foreign nationals employed by or acting as agents of U.S. companies.[10]

[9] *Hoskins 1,* at 90, quoting from S. Rep. No. 105-277, at 2 (1998).
[10] *A Resource Guide for the U.S. Foreign Corrupt Practices Act*, Second Edition (August 2020), available at https://www.justice.gov/criminal-fraud/fcpa-resource-guide , at page 3.

B. The drafters of the FCPA, the OECD, the international community generally, and the Department of Justice itself consistently use the word "agent" to mean something very different from the meaning proposed by the DoJ on this appeal

There is no reason to believe that in adding the phrase "agent of a domestic concern" as part of its coordination with the OECD Congress intended to expand applicability of the FCPA as broadly as the DoJ now contends. It is, and certainly was in 1977 (when the FCPA was first adopted) and 1998 (when the critical language was added to it), well known in the world of international bribery that officers in corporations in economically advanced countries find it difficult or unseemly to identify, negotiate with, and then bribe a local "official" with power to influence or make contractual awards, and often want to disguise or hide their own acts. Rather, the bribing company will often turn to local individuals, invariably called "agents," "intermediaries," or "consultants" to, in essence, "do the dirty work." Often such agents take the formal position of a "consultant," whose "fees" can be carried as such on the company's books, but in fact are used as a conduit to pay a bribe. The evidence that this common-sense meaning of the word "agent" should be used in FCPA prosecutions is overwhelming.

Going back to 1977, the post-Watergate adoption of the FCPA was a reaction to evidence that large American companies had been bribing foreign officials, and chief among the cited examples of this practice was the case of

Lockheed Aircraft Corporation. The opening sentence of an influential article in the New York Times stated the issue as follows:

> From1970 through mid-1975, the Lockheed Aircraft Corporation paid or committed $106-million in agents' commissions in Saudi Arabia alone, according to company documents that have been released by a Senate subcommittee.[11]

When Congress debated the legislation that ultimately became the FCPA, they discussed how the law should deal with "agents." Their discussion reveals that the word had such a clear meaning that no definition was needed. The Senate Committee report summarized the applicability of the law to "agents" by noting:

> And payments to agents, while knowing or having reason to know, that all or a portion of the payment will be offered or given to a foreign government official, foreign political party or candidate for foreign political office for the proscribed purposes are also forbidden.[12]

The parallel House Report, in a section called "Liability of Agents," noted:

> The bill specifically provides that an agent of an issuer, as distinguished from an officer, director or other person policymaking position, shall not be subject to the penalties of the bill until it is shown in a separate proceeding the proceeding against such agent that the issuer itself was in violation of the provisions of the bill. This provision reflects the Committee's concern that in some instances a low level employee or agent of the corporation - perhaps person who is designated to make the payment - might otherwise be made

[11] New York Times, *Lockheed Documents Disclose a $106-Million Saudi Payout*, September 13, 1975. See also, Washington Post, *Lockheed Paid $38 Million in Bribes Abroad,* May 27, 1977 (quoting Lockheed Chairman as relying on "procuring agents" abroad).

[12] Senate Report 95-114 of the Committee on Banking, House and Urban Affairs (May 2, 1977), available at https://www.justice.gov/criminal-fraud/legislative-history . See also *id.* ("The prohibitions against corrupt payments apply in this regard to payments by agents where the corporation paying them knew or had reason to know they would be passed on in whole or in part to a foreign government official for a proscribed purpose.")

> the scapegoat for the corporation. The essential elements of these prosecutions will presumably take place on foreign soil.[13]

As this Court noted in *Hoskins 1,* the then General Counsel of the SEC expressed a concern that applying the new law to "agents" might "create some jurisdictional problems if the agent is wholly situated overseas and has not been in this country," and urged further refinement of the procedures applicable to "the involvement of agents….."[14] The point is that to all concerned at the time of the FCPA's birth, the word "agent" had such a clear meaning that it did not need definition; there is no suggestion that they thought that the word connoted or incorporated a broader, common law meaning.

The international community also focused on such agents or intermediaries as a key part of the corruption challenge. In 1979, the U. N. Committee on an International Agreement on Illicit Payments issued a report of its first and second sessions, in which it noted the importance of targeting "intermediaries," which it defined as someone "who negotiates with or otherwise deals with a public official on behalf of any other enterprise or any other person…."[15] The OECD, which the DoJ has viewed as a significant partner in developing worldwide cooperation in the

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[13] House Rep. 95-640, House Committee on Interstate and Foreign Commerce (September 28, 1977), available at https://www.justice.gov/criminal-fraud/legislative-history

[14] *Hoskins 1* at 88.

[15] Report of the Committee on an International Agreement on Illicit Payments on its First and Second Sessions, May 25, 1979, reproduced in Cambridge University Press, *International Legal Materials,* Vol. 18, No. 4 (July 1979) at pp. 1025-40.

fight against corruption,[16] has been consistent in using the word "agent" in this specific sense. Its Guidelines for Multinational Enterprises, first adopted in 1976 and regularly updated, provides that international companies "should not use third parties such as agents and other intermediaries … for channeling undue pecuniary or other advantages to public officials…."[17] While the OECD Convention itself did not see a need to define the word "agent" in its text, the OECD was obviously mindful of the role played by agent/fixer/intermediaries because shortly after the implementation of the OECD Convention, its Working Group on Bribery in International Business Transactions compiled an extensive report entitled "Typologies on the Role of Intermediaries in International Business Transaction,"[18] which explored in depth the practical and strategic challenges posed by the use of such intermediaries. It notes that "for the purposes of this report an intermediary is defined or described as a person who is put in contact with or in between two or more trading parties,"[19] and first among the examples of such an intermediary it offers the word "agent." A word search of this document confirms that to the OECD, the word "agent" and the word "intermediary" in the

[16] Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 Va. L. Rev. 1611, 1637 (2017). See also House Conference Report No. 100-576 on the Foreign Corrupt Practices Act Amendments of 1988, available at https://www.justice.gov/criminal-fraud/legislative-history .

[17] OECD, *Declaration on International Investment and Multinational Enterprises*. https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0144 at VII(1).

[18] https:/www.oecd.org/daf/anti-bribery/anti-briberyconvention/43879503.pdf.

[19] *Id.* at page 5.

precise sense it was targeting were essentially identical.[20] There is not a single reference in this important document that suggests that anyone connected with this inquiry thought of the word "agent" as referring to an "employee" of a sister subsidiary; rather the Working Group Report clearly understood that the word "agent" meant something very different from an "employee" of a company because they performed completely different roles.[21]

It is highly unlikely that Congress intended a different meaning for the word "agent" when in 1998 it introduced the phrase "agent of a domestic concern" into the FCPA in order to comply with the OECD Convention. To begin, the word had already been used in its specific context in discussion of the original legislation, see page 11, above. As this Court emphasized in *Hoskins 1,* Congress established the "categories of persons directly covered by the statute"[22] with great care; the Court firmly stated that "We determine that the FCPA defines precisely the categories of persons who may be charged for violating its provisions,"[23] heeding the admonition of the drafters of the FCPA that to avoid "jurisdictional problems,"

[20] Among many examples, in referring to a well-known prosecution by the DoJ, the Working Group Report notes that "the company allegedly paid an agent over USD 2 million in consultant fees," *id.* at page 7, and comments that "As noted in Chapter 2, agents often receive excessive compensation that in turn is used to fund bribery." *Id.* at 20. See also pages 5, 8, 9, 10, 11, 12, 14, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 30, 34, in which the word "agent" is used in this sense at least 50 times.

[21] ("[O]ne of the dangers in these cases is that a company's employee or officer may cite this commercial need as a pretext for hiring an agent to bribe foreign officials.") *Id.* at page 18 (emphasis added).

[22] *Hoskins 1* at 97.

[23] *Id. at* 71.

such categories should be applied with "a high degree of specificity in order to be enforceable."[24] Under the 1998 amendments, the FCPA applies to both "employees" and "agents" of a domestic concern. As a matter of logic, it is clear why Congress added the word "agent" as a category distinct from an "employee": As the record in this case demonstrates, and as emphasized by the OECD Working Group, a crucial link in many bribery schemes is the engagement of an "agent" who is expressly not an employee of the bribing company, and thus might escape prosecution if their status as "agent" was not included. See page supra and fn. . This distinction is crucial here: Hoskins was in fact an "employee" – but he was an employee of a non-domestic concern,[25] which is a category that Congress expressly excluded from FCPA coverage. By arguing otherwise, the DoJ fails to recognize the clarity of the distinction between "employee" and "agent," ignores this Court's key holding that the FCPA "defines precisely" the categories of those prosecutable under it, and threatens to include within the coverage of the FCPA a category (foreign employees) that the FCPA was careful to exclude.

Expanding the word "agent of a domestic concern" so that it could apply to individuals like Hoskins would have a vast impact on the extraterritorial reach of

[24] *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearing on S. 305 Before the S. Comm. on Banking, Hous., & Urban Affairs, 95th Cong. 94* (1977) (statement of W. Michael Blumenthal, Secretary of the Treasury).

[25] Hoskins was formally employed by Alstom UK, and apparently was seconded to Alstom SA, the French holding company.

the FCPA. Multinational corporations such as Alstom typically create subsidiaries around the world in order to obtain tax, regulatory, and marketing advantages, but those subsidiaries nonetheless operate together rather than pursue independent agendas. The Third Superseding Indictment on which Hoskins was tried recognizes this: In its paragraph 2, it defines the holding company Alstom S.A. as "Alstom," and then notes, after listing the many subsidiaries involved in this case (including "Alstom Power US," which was the "domestic concern" for purposes of FCPA coverage) that "Reflecting the close relationship between them, Alstom and its subsidiaries, including Alstom Power US, Alstom PROM, and Alstom Indonesia were often referred to by Alstom employees as 'Alstom' without distinction."[26] As an "employee" of a sister subsidiary of Alstom Power US, Hoskins was obviously expected to cooperate with his employer's parent's other subsidiaries, and would have been disciplined or denied advancement by his non-domestic employer if he failed to do so – that is simply how multinational companies work. In this context, then, permitting the DoJ to stitch together a legal theory and a factual basis drawn from nothing more than such cooperation would expand FCPA coverage to virtually all employees, world-wide, of foreign companies if their employees' duties to their own employers include cooperation with a U.S. subsidiary. It is clear that Congress did not intend to do this.

[26] Third Superseding Indictment, *United States v. Hoskins*, 12CR238, EDS 209, filed April 15, 2015, paragraph 3.

The simple, common-sense meaning of the word "agent" in this context is nowhere more apparent than in the DoJ's use of the term, and one need look no further than the record in this case to see this. Both in testimony and especially in the prosecutor's summation, the word "agent" was constantly used to refer to the individuals in Indonesia (identified in the Third Superseding Indictment as "Consultant A" and "Consultant B"[27]) who were engaged by Alstom to arrange for local payments. The prosecutor's summation not only used the word "agent" many times to refer to these local individuals,[28] but was notably specific that such was precisely what the word meant:

> If Alstom Power, Inc., didn't like the deal they were getting, they'd have to go back and renegotiate, and that's what you have an agent -- that's what you have somebody who actually is on the ground in Indonesia who knows the people who can go do that on your behalf.[29]

Even in its brief on this appeal, the DoJ cannot help but revert to this common-sense meaning for the word "agent" that everyone knows was in use.[30]

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[27] See Third Superseding Indictment, Paragraphs 20 and 21.

[28] See, e.g., Transcript of oral argument, November 5, 2019, EDS 601, prosecutor's summation, at page 1328 ("Reza Moenaf again, just as predicted earlier, 'we have a serious agent problem.' The problem, they didn't like the approach that was made and they were concerned that they were just going to get pocket money, that the agent had not shown a willingness to spend money"); *id.* at page 1449 ("The first of those, he was controlled by API,
the selection of the agents." Defense counsel also regularly used the word "agent" in the same sense, see, e.g., *id.* at 1417 ("What do agents do? We hear from witnesses that agents in this case were hired to pay bribes") without objection.

[29] *Id*. at 1448 (emphasis added).

[30] "But because API had decision-making authority about which agent to hire, Pierucci and Rothschild made the decision to hire Sharafi, and Hoskins and Moenaf executed on that

In short, essentially everyone involved in the international fight against corruption, including Congress and the DoJ as well as their international partners, have given the word "agent" a clear, common-sense, and easily applicable meaning in the context of the FCPA. There is no reason to believe that Congress intended a different one in the phrase "agent of a domestic concern."

II. THE MEANING OF THE PHRASE "AGENT OF A DOMESTIC CONCERN" AND THE MANNER OF ITS IMPLEMENTATION PROPOSED BY THE DEPARTMENT OF JUSTICE IN THIS APPEAL WOULD INHIBIT INTERNATIONAL COORDINATION AND DOMESTIC LAW ENFORCEMENT

To her credit, Judge Arterton in her opinion granting Hoskins's post-trial Rule 29 motion attempted to bring much needed precision to the phrase "agent of a domestic concern," requiring that the Government prove that, at a minimum, the principal had and was capable of exercising actual and demonstrable "control" over the "agent." While needlessly far afield from the meaning Congress almost certainly had in mind for the phrase, her analysis at least had the advantage of providing a basis for an objective evaluation based on identifiable criteria.

In contrast, the approach taken by the DoJ on this appeal creates two problems.

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decision." Government Brief at 16. See also *id*. at 38, quoting an Alstom document about responsibility for "making the decision about the agent."

First, its purported application of the word "agent" is so vague and without common-sense limits as to make it extremely difficult to distinguish who is and who is not within its reach. This is apparent from the Government's emphasis that each case involving a possible "agent" is a separate "highly factual" inquiry[31] where the ultimate conclusion depends on the "inferences" it advocates should be drawn from a wide variety of otherwise unconnected data points.[32] Under this approach, virtually any employee of a sister subsidiary who is not otherwise subject to the FCPA but who engages in normal, expected cooperation with a multinational's U.S. subsidiary could later be argued to have become its "agent."

And second, the diverse data points on which the Government relies in support of its argument were virtually all derived from internal communications it obtained from Alstom through subpoenas or other discovery, and thus a determination whether or not Hoskins was an "agent" could be made only upon the completion or near-completion of its investigation. In short, the DoJ could make a determination whether the FCPA applied to Hoskins at all only after a lengthy investigation.[33]

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[31] Government's Brief at 3. See also *id.* at 57, arguing that an agency relationship "is a 'highly factual' question, and turns on a number of factors related to the relationship between the parties, the business, and 'the circumstances under which the business is done,'" quoting from *Cleveland v. Caplaw Enterprises,* 448 F.3d 518, 522 (2d Cir. 2006) (citation omitted).

[32] The word "inference" appears at least 15 times in the Government's Brief.

[33] To be fair, the DoJ in this case probably did not originally intend to rely primarily on its "agent of a domestic concern" argument but rather on its assertion that Hoskins could be brought to U.S.

If this Court were to interpret and implement the meaning and function of the phrase "agent of a domestic concern" in the way the DoJ proposes, the result could frustrate the efforts of virtually all parties to international criminal justice, ultimately including the DoJ itself.

A. Non-U.S. Prosecutors

As noted in Part I, the successful implementation of the FCPA by the DoJ owes much to the OECD Convention, and more broadly to cooperation and coordination with prosecutors in other countries that are key to an effective fight against international corruption. The emphasis on such cooperation was not only implicit in the OECD Convention, but explicit. Article 4(3) of the Convention, called "Jurisdiction" in its English version,[34] recognizes that there may well be situations where "more than one Party [signing nation] has jurisdiction over an alleged offence described in this Convention…." It then mandatorily provides that in such a circumstance, "the Parties involved shall, at the request of one of them,

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justice as an aider-and-abettor or conspirator, theories ultimately rejected by this Court in *Hoskins 1*.

[34] The equally official and authoritative French version uses the word "Compétence," which in civil law systems denotes the principle of limited sovereign territoriality. Unlike in the United States, where the territorial reach of civil and criminal legislation is generally (in the words of the Supreme Court) based on "judge-made rules," *Morrison v. National Australia Bank Ltd*., 561 U.S. 247 (2010), in most European civil-law countries and other countries whose criminal procedures derive from them, the territorial limitations of a court's power are set forth in the relevant criminal code. See Davis, *What the Hoskins Rule 29 Acquittal Reveals About Contesting "Jurisdictional" Issues in American Criminal Justice*, https://wp.nyu.edu/compliance_enforcement/2020/04/10/what-the-hoskins-rule-29-acquittal-reveals-about-contesting-jurisdictional-issues-in-american-criminal-justice/ ; O'Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 Geo. L. J. 1021 (2018).

consult with a view to determining the most appropriate jurisdiction for prosecution." Two conclusions flow from this provision. First, the parties to the Convention (including the United States) committed to "consultation" with their co-signatories in the event that another signatory nation deemed itself competent to investigate a matter (at least if one of the states so requests). Second, and more importantly, the United States committed to the principle that it should defer prosecution to another country if that country is "the most appropriate jurisdiction for prosecution." This provision, of course, is not self-enforcing, and has been interpreted to provide no rights for individuals charged under any signatory nation's laws.[35] But the legal commitment to "consult" is emphatic.

Simply put, it is very difficult to imagine a useful "consultation" between the DoJ and prosecutors of another signatory nation over which country more "appropriately" should pursue an investigation when the DoJ's purported basis for "jurisdiction" over an individual (in the sense of the word "jurisdiction" as used in the Convention) is premised on an assertion that at a future trial, based upon inferences from a wide variety of emails and other types of information that the DoJ hopes to obtain through discovery, it will prevail through advocacy by persuading jurors that, based upon a very loose and imprecise jury instruction, they

[35] *United States v. Jeong*, 624 F.3d 706 (5th Cir. 2010).

can draw an inference that the defendant's connections with a U.S. "concern" make that person its "agent."

B. Future defendants

Judicial opinions interpreting the FCPA are relatively sparse because few corporations can afford the risk of going to trial, and the vast majority elect to engage in some form of plea negotiations. As a result, many of the decisions that do interpret the act, including *Hoskins 1*, involve individual defendants, for whom the risk/benefit analysis may be different. The case of Hoskins is somewhat unusual in that he persisted for over seven years since his indictment not only to defend himself but to insist – correctly, as Judge Arterton has now established – that the FCPA did not apply to him at all. The Court's decision in *Hoskins 1* has already had a marked effect on DoJ implementation of the FCPA by apparently dissuading the DoJ from prosecuting individuals under the FCPA who have no connection with the United States.[36] Ruling in favor of the DoJ on this appeal would have the opposite effect: by making the issue of whether a specific

[36] An example is *United States v. Boustani*, 18Cr681 (WFK), EDNY. Mr. Boustani, a Lebanese national, was indicted in 2018, a few months after the *Hoskins 1* decision. Although the Superseding Indictment, EDS 137 (August 16, 2019), was replete with references to the FCPA as a "predicate crime," Boustani's counsel pointed out in a motion to dismiss that he was not charged under the FCPA, undoubtedly because *Hoskins 1* excluded that possibility. See Amended Motion to Dismiss, EDS 97, at page 9, fn. 2 ("Although the Indictment refers repeatedly to Mr. Boustani's purported payment of bribes, noticeably absent from the Indictment are any charges against Mr. Boustani for Foreign Corrupt Practices Act violations because Mr. Boustani is outside the class of persons to whom the FCPA's proscriptions apply. *United States v. Hoskins,* 902 F.3d 69 (2d Cir. 2018).")

defendant is an "agent of a domestic concern" unnecessarily vague and open for factual advocacy in each separate case, such a ruling would simply encourage the DoJ to broaden the category of individuals with no other link whatsoever to the United States if it can plausibly argue that it expects that the mass of evidence at trial will permit an "inference" sufficient to sustain the hypothesis that the defendant's contacts with a "domestic concern" constituted agency. As a corollary, if the test is as vague and case-specific as the DoJ contends, non-US individual defendants would find it extremely difficult to evaluate whether or not he/she, like Hoskins, has a meritorious defense based on this issue, and would be forced to go to a jury trial to assert it.[37]

[37] The case of Jean Boustani, summarized in the prior footnote, is instructive. In that case, the District Court denied Boustani's motion to dismiss based (among other things) on his argument that the remaining charges of securities fraud and money laundering did not apply to him because he had no connection whatsoever with the United States. In so ruling, the Court noted that it could only determine whether or not the DoJ had "tracked the language" of the respective statutes in drafting the indictment, adding that "Defendant has failed to cite a single case dismissing a criminal indictment based on territoriality grounds." Decision and Order, EDS 231 (October 3, 2020), at page 17. After spending almost a year in jail because he was denied bail by this Court, see Opinion, *United States v. Boustani*, 19-1018, EDS 61 (August 1, 2019), Boustani was acquitted of all charges in December 2019. Although the evidence is of course anecdotal, the press reported that jurors interviewed after the acquittal indicated that they did not see what business the DoJ had in prosecuting conduct having nothing to do with the United States. See Bloomberg, *Salesman Cleared in $2 billion African Scam in Blow to US, https://www.bloomberg.com/news/articles/2019-12-02/privinvest-salesman-is-acquitted-of-defrauding-u-s-investors)" [T]*hree jurors, including the foreman, said in interviews afterward … the panel didn't see how federal prosecutors in Brooklyn had the authority to prosecute crimes that hadn't occurred in their jurisdiction."

C. The U. S. administration of justice

The question whether Hoskins is an "agent of a domestic concern" falls in a broad category of issues that could – somewhat inaccurately[38] – be described as "jurisdictional" in the sense that the issue is unrelated to whether Hoskins engaged in an improper act (it is not a crime to be an agent of a domestic concern) but rather controls whether the FCPA applies to him at all. For reasons peculiar to our procedures, such an issue generally can only be raised as it was here: by proceeding to a jury trial. This Court has recognized the dysfunctionality of proceeding in this fashion, and has implored the DoJ and defendants to explore the use of "proffers" to allow a District Court to dismiss a case before trial if the case should not be in that court at all:

> While the formal consent of both parties would not be required for the district court to undertake a pretrial determination of the sufficiency of the jurisdictional evidence where the government has made a sufficient proffer to permit such a ruling, it bears noting that in some cases the government may actually favor such a pretrial ruling. If the district court questions the sufficiency of the evidence satisfying the jurisdictional element of an offense, the government may prefer a pretrial ruling on the issue since that would permit an immediate appeal from a ruling adverse to the government. In the absence of a pretrial ruling, the government faces the risk that the court may ultimately grant a motion to acquit, pursuant to Federal Rule of Criminal Procedure 29, for failure to satisfy an element of the offense, in which case the government would have no opportunity to appeal.[39]

[38] It is undisputed that the District Court had subject matter jurisdiction of the case under 18 U.S.C. 3231.

[39] *United States v. Alfonso*, 143 F.3d 772, 777 n.7 (2c Dir. 1998).

This analysis squarely applies to the case of Hoskins, who might well have avoided years of litigation over the FCPA claims against him if an appropriate "proffer" of the prosecutor's basis for charging that he was an "agent of a domestic concern" had been made prior to trial. But it is virtually impossible to envision how a creative District Court could encourage a federal prosecutor to make a useful "proffer" if the DoJ is permitted to base its argument that the defendant is an "agent of a domestic concern" on the vague, inferential basis it advocates here. A more concrete definition as suggested in Part I would encourage and facilitate such a proffer, in which case everyone would benefit: the defendant by not having to go through an expensive and agonizing jury trial only to establish later that the case should not have been brought, the court system by winnowing its docket of cases that do not belong there, and the DoJ, which could either appeal a pre-trial ruling as noted in *Alfonso*, or else encourage another prosecutor with a clearer basis to proceed to do so – and, in international cases, respect the clear intent of Article 4(3) of the OECD Convention.

III. THE POSITION ADVOCATED BY THE DOJ DOES NOT RESPECT THE TEACHING OF *MORRISON* AND ITS PROGENY

The Supreme Court's decision in *Morrison,* while restating existing precedent, signaled an important sea-change in the enforcement of American laws. As noted in a subsequent case, the Court continues to emphasize that U. S. law

"does not rule the world."[40] In *United States v. Vilar,* the DoJ attempted to persuade this Court that *Morrison* should systematically not apply to criminal cases where the Executive Branch elects to prosecute individuals and entities based upon their non-domestic conduct, and was squarely rebuffed.[41]

A District Court judge in this Circuit summarized the impact of *Morrison* in the context of civil litigation in words very appropriate here:

> [In *Morrison*] the Supreme Court sought to strike at the complexity, vagueness, inconsistency and unpredictability engendered by the conduct and effect analysis in many cases. [Citation omitted] (noting that the conduct and effect tests "were not easy to administer" and hence that the widespread criticism of them by commentators, governments and courts seemed justified). Instead, as also evident in its majority opinion, the Court manifested an intent to weed the doctrine at its roots and replace it with a new bright-line transactional rule embodying the clarity, simplicity, certainty and consistency that the tests from the Second and other circuits lacked.[42]

Simply put, the DoJ's position here heads in exactly the opposite direction from that suggested by Judge Marrero because it would transform a relatively straightforward interpretation of the simple words "agent of a domestic concern" into an unnecessarily complex, difficult to administer test. This approach does not respect the efforts of the Supreme Court and of this Court to clarify the

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[40] *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016), quoting from *Microsoft Corp. v. AT&T Corp*., 550 U.S. 437, 454 (2007).

[41] "T]he government is incorrect when it asserts that 'the presumption against extraterritoriality for civil statutes . simply does not apply in the criminal context.'" *United States v. Vilar*, 729 F.3d 62 (2d Cir. 2013).

[42] *Cornwall v. Credit Suisse*, 729 F.Supp.2d 620, 624 (S.D.N.Y. 2010) (Marrero, J.)

enforcement of United States law with a respectful eye on its impact elsewhere in the world.

CONCLUSION

The District Court's order of acquittal on Counts 1 through 7 of the Third Superseding Indictment, and its conditional order for a new trial, should be affirmed.

Dated: October 20, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) and 32(g)(1), I hereby certify that the foregoing Brief of the International Academy of Financial Crime Litigators as *Amicus Curiae* Supporting Appellee complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5). According to the word count feature of Microsoft Word, the word-processing system used to prepare the brief, the brief contains 6,9523 words absent those portions excluded by Rule 32(f) of the Federal Rules of Appellate Procedure.

I further certify that the foregoing brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman font, a proportionally spaced typeface.

Dated: October 20, 2020

/s/
Frederick T. Davis