INTERNATIONAL WHITE-COLLAR CRIME AND THE GLOBALIZATION OF INTERNAL INVESTIGATIONS TEN YEARS LATER

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ABSTRACT

Ten years ago, the study of international white-collar crime and the various impacts of the globalization of internal corporate investigations was still in its infancy. Despite the field's relative underdevelopment at the time, the risks created by cross-border investigations were already presenting themselves, leading me to publish an article in 2011 regarding these evolving complexities entitled *International White-Collar Crime and the Globalization of Internal Investigations*. The piece examined four areas in which pitfalls and perils lay in wait for counsel who failed to recognize the difficulties and diverse regulatory and legal challenges presented by the growth of international corporate investigations. Those areas of analysis included (1) determining who should conduct such investigations, (2) analyzing the risks associated with the collection, review, and transfer of data across borders, (3) analyzing considerations when interacting with employees in varying labor law environments, and (4) determining the best course forward regarding self-disclosures and settlements on the global stage.

In the ensuing decade since the publication of the 2011 article, the world has grown more accustomed to international white-collar criminal investigations and prosecutions and counsel have become better prepared to anticipate and address the above-described concerns during cross-border matters. The original challenges described in 2011, however, remain present today and, in addition, new and unique concerns have arisen. This piece will examine the above four areas of concern to consider how each has evolved over

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the last decade, followed by consideration of where the next ten years might lead.

INTRODUCTION

Ten years ago, the study of international white-collar crime and the various impacts of the globalization of internal corporate investigations was still in its infancy. Despite the field's relative underdevelopment at the time, the risks created by cross-border investigations were already presenting themselves, leading me to publish an article in 2011 regarding these evolving complexities entitled *International White-Collar Crime and the Globalization of Internal Investigations*.[1] The piece examined four areas in which pitfalls and perils lay in wait for counsel who failed to recognize the difficulties and diverse regulatory and legal challenges presented by the growth of international corporate investigations. Those areas of analysis included (1) determining who should conduct such investigations, (2) analyzing the risks associated with the collection, review, and transfer of data across borders, (3) analyzing considerations when interacting with employees in varying labor law environments, and (4) determining the best course forward regarding self-disclosures and settlements on the global stage.[2]

In the ensuing decade since the publication of the 2011 article, the world has grown more accustomed to international white-collar criminal investigations and prosecutions and counsel have become better prepared to anticipate and address the above-described concerns during cross-border matters. The original challenges described in 2011, however, remain present today and, in addition, new and unique concerns have arisen. This piece will examine the

1. Lucian E. Dervan, *International White Collar Crime and the Globalization of Internal Investigations*, 39 FORDHAM URB. L.J. 101 (2011) [hereinafter Dervan, *International Internal Investigations*]. Portions of the 2011 article may appear herein and were originally published in that piece. Nothing contained in this article constitutes legal advice.

2. *See id*. In 2012, these four risk areas become the structure for the first American Bar Association Criminal Justice Section conference focused on international internal investigations. The conference, which occurred in Frankfurt, Germany in December 2012, is still held on a bi-annual basis in Germany. The 2012 Frankfurt conference also became the inspiration for the ABA CJS Global White Collar Crime Institute, which occurs bi-annually in various locations around the globe. While the Global White Collar Crime Institute examines issues in addition to international internal investigations, the Institute also regularly includes analysis of the risks posed by cross-border inquiries.

above four areas of concern to consider how each has evolved over the last decade, followed by consideration of where the next ten years might lead.

THE HISTORY AND GLOBALIZATION OF INTERNAL INVESTIGATIONS

Internal corporate investigations are so interwoven into white-collar criminal practice today that it is hard to believe that they remain a relatively recent addition to the American and global legal landscapes. The first major use of such internal investigations in the United States can be traced to the Securities and Exchange Commission's ("SEC") enforcement practices in the 1960s, where the appointment of receivers became a tool for ensuring violating entities would be restored to a "pre-violation, law-abiding condition."[3] Eventually, corporate counsel utilized this enforcement trend to propose that the entities engage in their own internal investigations as part of injunctive relief orders, rather than being constrained by the appointment of an outside receiver.[4] By the next decade, the use of internal investigators hired by the corporation as part of SEC enforcement action resolutions had become the norm, with one court commenting that the new procedures were "a 'desirable and economical practice' that 'allows the company to keep its own house clean and avoid unnecessary governmental supervision.'"[5]

By the late 1970s, particularly after the passage of the Foreign Corrupt Practices Act ("FCPA"), corporations began to recognize the usefulness of conducting internal corporate investigations before the government became involved, rather than just as a part of post-enforcement remediations.[6] By investigating potential

3. *See* Arthur F. Mathews, *Internal Corporate Investigations*, 45 OHIO ST. L. J. 655, 656–57 (1984) ("I first began to observe the development of corporate self-investigations as an outgrowth of the increased pace of the SEC's nationwide enforcement program in the early 1960s.").

4. *See id.* at 658 ("Thus, by the early 1970s, the SEC was gradually learning that an efficacious way to straighten out huge corporate messes brought to surface by some of its major enforcement actions was to restructure boards of directors and cause independent directors or their special counsel to accomplish internal corporate self-investigations, rather than to tie up scarce government resources to do the whole job in each case.").

5. *Id.* at 661 (quoting United States v. Handler, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96, 519, at 94, 024 (C.D. Cal. Aug. 3, 1978)).

6. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1.

misconduct prior to the start of a government inquiry, corporations had the ability to correct any improper behavior and position themselves as pro-active and compliant should the government ever learn of the matter and come knocking.[7] From these early beginnings in the context of SEC inquiries, the modern internal investigation was born and quickly expanded to all manner of misconduct, both civil and criminal.[8] While internal investigations began as domestic inquiries, over time they also started to cross borders and evolved into the international internal investigations that are so prevalent today.

I. SELECTING THE INVESTIGATORS IN INTERNATIONAL MATTERS

As noted in the 2011 piece, "One of the most important initial considerations when launching an internal investigation is determining who will conduct the inquiry."[9] For example, should the investigation be conducted by in-house counsel, an in-house human resources department, or outside counsel? In the criminal context, the retention of outside counsel is typically appropriate because their independence creates greater credibility for the investigative findings and, as attorneys retained by the entity, they are able to shield materials with the attorney-client privilege

7. *See* Mathews, *supra* note 3, at 666 ("As the sensitive foreign payments cases mushroomed in the mid-1970s, the corporate defense bar awoke to the fact that proper corporate maneuvering in advance of, or in the midst of, an SEC enforcement investigation might lead to a less painful resolution of corporate payments . . . .").

8. *See* Sarah H. Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism, and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 869–71 (2003); Kevin H. Michels, *Internal Corporate Investigations and the Truth*, 40 SETON HALL L. REV. 83, 84 (2010); Richard H. Porter, *Voluntary Disclosures to Federal Agencies—Their Impact on the Ability of Corporations to Protect from Discovery Materials Developed During the Course of Internal Investigations*, 39 CATH. U. L. REV. 1007, 1007 (1990) ("In many American corporations, internal investigations are becoming commonplace."). For a discussion of internal corporate investigation practices, see generally Lucian E. Dervan, *Responding to Potential Employee Misconduct in the Age of the Whistleblower: Foreseeing and Avoiding Hidden Dangers*, 3 BLOOMBERG CORP. L. J. 670 (2008) [hereinafter Dervan, *Responding to Potential Employee Misconduct*]; Paul B. Murphy & Lucian E. Dervan, *Watching Your Step: Avoiding the Pitfalls and Perils When Conducting Internal Investigations,* 16 ALAS LOSS PREVENTION J. 2 (2005) [hereinafter Murphy & Dervan, *Watching Your Step*].

9. *See* Dervan, *International Internal Investigations*, *supra* note 1, at 106; *see also* Dervan, *Responding to Potential Employee Misconduct, supra* note 8, at 676 ("The first question that must be answered after an employee reports potential misconduct is who will perform the internal investigation.").

and work product protection.[10] In the cross-border context, however, additional complexities arise related to the structure of the investigatory team and the application of privilege.

In 2003, the European Union ("EU") investigated allegations of anti-competitive conduct by Akzo Nobel Chemicals Ltd. ("Akzo") and Akcros Chemicals Ltd. ("Akcros").[11] As part of this inquiry, the EU Commission raided the Akzo's offices in the United Kingdom and seized various documents, including emails related to antitrust issues between a general manager and Akzo's in-house counsel, who was licensed in the Netherlands.[12] Akzo challenged the seizure as a violation of attorney-client privilege, but this challenge was rejected by the European Court of Justice.[13] This conclusion was based on precedent from 1982 in the case of *AM&S v. Commission*, which established that two elements are required for privilege to attach in the EU.[14]

> First, the communication must have been given for purposes of the client's defense. Second, the communication must have been with an independent lawyer, which would not include in-house counsel.[15]

The Court concluded that because the Akzo emails were between a manager and an in-house attorney, the attorney-client privilege did not apply.[16] In ruling in the matter, the court further elaborated on the reasons for this limitation for the privilege. The court stated, "It follows, both from the in-house lawyer's economic dependence and the close ties with [the lawyer's] employer, that

10. *See* Dervan, *International Internal Investigations*, *supra* note 1, at 106–07; *see also* United States v. Upjohn Co., 449 U.S. 383, 396–97 (1981) (establishing the modern standard by which privilege applies to internal corporate investigations).

11. *See* Case C-550/07 P, Akzo Nobel Chems. Ltd. v. European Comm'n, 5 C.M.L.R. 19, 1191 (2010).

12. *See* Benjamin W. Heineman, Jr., *European Rejection of Attorney-Client Privilege for Inside Lawyers,* HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 2, 2010), https://corpgov.law.harvard.edu/2010/10/02/european-rejection-of-attorney-client-privilege-for-inside-lawyers/ ("At issue were two emails about antitrust issues—obtained in a dawn raid aimed at enforcing EU competition laws—exchanged between a general manager and an in-house lawyer who was a member of the Netherlands bar.").

13. *See id.*

14. *See* Case 155/79, AM & S Eur. Ltd. v. Comm'n of the European Cmtys.*,* 1982 E.C.R. 1575.

15. Laurel S. Terry, *Introductory Note to the Court of Justice of the European Union: The* Akzo Nobel *EU Attorney-Client Privilege Case,* 50 INT'L LEGAL MATERIALS 1, 1–2 (2011).

16. *AM & S Eur. Ltd.*, 1982 E.C.R. at 1614–15.

[the lawyer] does not enjoy a level of professional independence comparable to that of an external lawyer."[17] Importantly, however, the court made clear that privilege varies from jurisdiction to jurisdiction and this particular ruling applied to EU Commission investigations, as opposed to, for example, member state investigations.[18] For counsel engaged in cross-border internal investigations, therefore, the *Akzo* and *AM&S* cases are a reminder that privilege protections vary globally and local expertise is necessary to prevent inadvertently engaging in behavior that may jeopardize this protection for clients.

The complexities of who engages in international internal investigations and the impact of those decisions on privilege application has only grown more challenging in the last decade as enforcement bodies have aggressively tried to undermine privilege protections and new privilege laws and rulings have presented themselves on the global stage. In 2017 in Germany, for example, authorities raided the offices of law firm Jones Day in Munich related to the Volkswagen AG emissions scandal.[19] Authorities claimed that the documents seized were not privileged because Volkswagen, who had hired the law firm, was not the target of the investigations, rather the target was Volkswagen AG's subsidiary, Audi.[20] The ability of prosecutors to review the materials from Jones Day was eventually affirmed by the German Federal Constitutional Court in a 2018 decision illustrating the perilous nature of varying applications of privilege doctrines.[21]

In England, the Serious Fraud Office ("SFO") took a similarly aggressive view towards materials created during internal investigations in the mid-2010s when the office demanded Eurasian Natural Resources Corporation provide the enforcer with materials created and collected during an internal investigation related to alleged financial wrongdoing and corruption.[22] Initially,

17. *Akzo Nobel Chems.*, 5 C.M.L.R. at 1198. ("Therefore, the General Court correctly applied the second condition from legal professional privilege laid down in the judgment in *Australian Mining & Smelting Europe Ltd. v. Commission of the European Communities*.").

18. *See* Terry, *supra* note 16, at 3.

19. *See* Francesca Fulchignoni, *Attorney-Client Privielge Challenges in International Investigations*, 47 LITIGATION 9, 10–11 (2021); Ana Reyes & Matthew Heins, *Jones Day Case Highlights Questions of Atty Privilege Abroad*, Law360 (July 27, 2018).

20. Fulchignoni, *supra* note 19; Reyes & Heins, *supra* note 19.

21. Fulchignoni, *supra* note 19; Reyes & Heins, *supra* note 19.

22. *See* Steven F. Molo, Eric R. Nitz, & Ekta R. Dharia, *An American Lawyer in Queen Elizabeth's Court*, 43 CHAMPION 22, 23 (2019).

the High Court in the United Kingdom found that the requested materials, including attorney notes and memoranda from witness interviews and summaries of attorney conclusions in the matter, were not privileged.[23] Eventually, this result was overturned by the Court of Appeals and the SFO chose not to proceed with the case to the U.K. Supreme Court.[24] The SFO matter illustrates, however, the willingness of enforcers to test even long established precedent regarding privilege protections in efforts to secure materials from internal investigations.

A final example of the constantly changing landscape in the privilege field is the recent decision by the Swiss Federal Supreme Court in June 2021 limiting the application of privilege for lawyers from outside of Switzerland, the EU, or the European Free Trade Association.[25] The Swiss case resulted from a money laundering and bribery investigation that began in 2013.[26] During the investigation, the government raided a Geneva-based company that was a "third-party to the proceedings" and seized documents and data, including materials covered by the attorney-client privilege.[27] Some of the materials in question were communications with attorneys who were not Swiss.[28] In examining the case, the Swiss court distinguished cases in which the attorney represented an accused and cases in which the attorney represented another, such as was the case in this matter.[29]

> First of all, the Swiss Federal Tribunal stated that communications between the accused in Swiss criminal proceedings and their lawyers are absolutely protected by attorney-client privilege and cannot be seized by the Swiss prosecuting authorities. This applies regardless of

23. *See id.* at 24.
24. *See id.* at 28.
25. *See* Severio Lembo, Andrew M. Garbarski, & Abdul Carrupt, *Swiss Federal Tribunal Denies Legal Privilege Protection for Correspondence Between Non-Accused Persons and Non-Swiss/EU/EFTA Lawyers*, Bar & Karrer Briefing (July 2022). The Swiss Federal Tribunal decision is available at https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://22-06-2021-1B_333-2020&lang=de&zoom=&type=show_document (last visited Feb. 23, 2022).
26. *See id.* at 26.
27. *Id.*
28. *Id.*
29. *Id.*

> whether the lawyer in question is assisting the accused in the Swiss criminal proceedings, and irrespective of the country of origin of the lawyer. . . .
>
> Turning to communications between "another person" and their lawyer, art. 264 para. 1 lit. d CrimPC affords protection against seizure of such communications, provided that the lawyer: "is authorized to represent clients before Swiss courts in accordance with the Lawyers Act of 23 June 2000 and is not accused of an offence relating to the same case."
>
> . . . .
>
> As a result, art. 264 para. 1 lit. d CrimPC can only be invoked with regard to communications with:
>
> - Lawyers qualified in Switzerland;
> - Swiss nationals authorized to practised as lawyers in an EU/EFTA State under a title listed in the annex of the Swiss Lawyers Act;
> - EU/EFTA lawyers, i.e. (i) nationals of these States, (ii) authorised to practisepractise in their State of origin under a title listed in the annex of the Swiss Lawyers Act and (iii) who carry out an activity recognised by art. 21 ff (provision of services) or art. 27 ff (representation before courts) of the Swiss Lawyers Act.[30]

In Switzerland, it seems, knowing the rules surrounding privilege and the specific nature of one's case are vital when determining with whom to engage in a cross-border investigatory matter.[31]

As the above examples illustrate, decades on from the *Akzo* case, the bounds of privilege in the international realm continue to be tested and amended. As one looks toward the next decade, it is unlikely that more consistency or less aggressive enforcement

30. *Id.* at 2.

31. For a broad view of privilege globally see *An International Guide to Corporate Internal Investigations*, Mark Beardsworth, Patrick Hanes, Ibtissem Lassoued, Saverio Lembo, and Frances McLeod eds. (American Bar Association 2020); *Legal Professional Privilege Global Guide*, DLA PIPER, https://www.dlapiperintelligence.com/legalprivilege/ (last visited Sept. 30, 2022).

tactics will dominate. Rather, continued uncertainty will likely reign in this space. As a result, counsel must continue to carefully consider how to structure cross-border investigations before embarking on the inquiry. These deliberations should not occur in a vacuum but should involve experts from the jurisdictions associated with the matter to ensure the nuances that can create peril are identified and considered early. While engaging in such an analysis is no guarantee in an environment of evolving laws and norms, a deliberative analysis of how to structure an investigation at the front end holds the possibility of avoiding significant missteps later.

II. COLLECTING, REVIEWING AND TRANSFERRING INVESTIGATORY DOCUMENTS FROM ABROAD

As noted in the 2011 article, the collection of documents and data are key aspects of internal investigations.[32] Two areas of law significant to the collection of information during cross-border investigations can become particularly complex and perilous—data privacy and state secrets regimes.

Data privacy is an area of law that has seen increased focus and exponential advancement in recent decades. In 2011, the focus was on EU directives that protected "personal data" and that limited one's ability to collect and process such information.[33] Over the last decade, more sophisticated data privacy regulations have come into force and added further layers of complexity to the

32. *See* Dervan, *Responding to Potential Employee Misconduct*, *supra* note 8, at 676 ("The first step in any internal investigation is the gathering of the relevant information through collection and review of documents."); Murphy & Dervan, *Watching Your Step*, *supra* note 8, at 6–7 (discussing the importance of document collection).

33. *See* Dervan, *International Internal Investigations*, *supra* note 1, at 113–14; *see also* Miriam Wugmeister, Karin Retzer & Cynthia Rich, *Global Solution for Cross-Border Transfers: Making the Case for Corporate Privacy Rules*, 38 GEO. J. INT'L L. 449, 456 (2007).

> According to the EU Directive, personal information can only be processed when one of the following exceptions is met: consent from the individual; contractual necessity (that is, data may be used if necessary for the performance of the contract with the individual); compliance with (local) legal obligations; or the legitimate interests of the entity collecting the personal information outweigh the privacy interests of the individuals.

Id.

process of collecting, reviewing, and transmitting information during cross-border inquiries.

In 2018, for example, a new data privacy regulation called the General Data Protection Regulation went into effect in Europe.[34] According to the EU:

> The General Data Protection Regulation (GDPR) is the toughest privacy and security law in the world. Though it was drafted and passed by the European Union (EU), it imposes obligations onto organizations anywhere, so long as they target or collect data related to people in the EU. The regulation was put into effect on May 25, 2018. The GDPR will levy harsh fines against those who violate its privacy and security standards, with penalties reaching into the tens of millions of euros.[35]

While many associate such regulations predominately with the use of data related to corporate marketing and advertising practices, they are equally applicable to internal corporate investigations. As a piece from Hogan Lovells makes clear, "[t]he GDPR and the national implementation laws, if applicable, set strict limits for conducting internal investigations. Companies have to deal with a variety of requirements and obligations."[36] One of the obligations contained in the GDPR that is particularly relevant to cross-border enforcement actions and internal corporate investigations is the requirement that transfers of data outside the European Economic Area be consistent with the GDPR requirements.[37] This includes ensuring that appropriate safeguards are "implemented to ensure an adequate protection of

34. *See* Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016R0679-20160504&qid=1532348683434 (last visited Nov. 7, 2022).

35. *What is GDPR, the EU's New Data Protection Law?*, https://gdpr.eu/what-is-gdpr/ (last visited Sept. 30, 2022).

36. Martin Pflueger, *Data Protection in Investigations*, HOGAN LOVELLS, https://guide.hoganlovellsabc.com/data-protection-in-investigations (last visited Sept. 30, 2022).

37. *See id.*

personal data, such as entering into additional agreements with the recipients . . . ."[38]

As one looks to the next decade, it is probable that further regulation of data privacy will lead to increasingly significant obligations related to the collection of information during cross-border investigations. At the same time, corporations and investigating counsel will also likely become more sophisticated regarding data privacy concerns and create better processes to satisfy required protections. What remains unknown is whether, or to what extent, privacy laws will grow to become direct impediments to the ability of entities to conduct thorough and credible inquiries.

While the same impediments could jeopardize government investigations, there seems to be significant movement to protect the ability of enforcers to secure data. In the United States, for example, the passage of the Clarifying Lawful Overseas Use of Data ("CLOUD") Act in March 2018 allowed the United States to enter into executive agreements with other countries to more easily share information.[39] According to the Department of Justice:

> The United States enacted the Clarifying Lawful Overseas Use of Data (CLOUD) Act in March 2018 to speed access to electronic information held by U.S.-based global providers that is critical to our foreign partners' investigations of serious crime, ranging from terrorism and violent crime to sexual exploitation of children and cybercrime.
>
> In recent years, the number of mutual legal assistance requests seeking electronic evidence from the United States has increased dramatically, straining resources and slowing response times. Foreign authorities have relatedly expressed a need for increased speed in obtaining this evidence. In addition, many of the assistance requests the United States receives seek electronic information related to individuals or entities located in other countries, and the only connection of the investigation to the United States is that the evidence

38. *Id.*

39. *Cloud Act Resources*, U.S. DEP'T OF JUST. (last updated Aug. 20, 2021), https://www.justice.gov/dag/cloudact.

> happens to be held by a U.S.-based global provider. The CLOUD Act is designed to permit our foreign partners that have robust protections for privacy and civil liberties to enter into bilateral agreements with the United States to obtain direct access to this electronic evidence, wherever it happens to be located, in order to fight serious crime and terrorism.
>
> The CLOUD Act thus represents a new paradigm: an efficient, privacy and civil liberties-protective approach to ensure effective access to electronic data that lies beyond a requesting country's reach due to the revolution in electronic communications, recent innovations in the way global technology companies configure their systems, and the legacy of 20th century legal frameworks. The CLOUD Act authorizes bilateral agreements between the United States and trusted foreign partners that will make both nations' citizens safer, while at the same time ensuring a high level of protection of those citizens' rights.[40]

Already, the United States has entered into executive agreements with the U.K. and Australia.[41] As the use of such agreements make it easier for governments to acquire and utilize data related to white-collar investigations, it remains to be seen whether entities and their counsel will find their own ways to efficiently address the growing bevy of data privacy regulations. Without such options evolving for defense and investigating counsel as well, one may see a growing dichotomy in which the government gains access to important data even as data privacy regulations become more demanding, but others are increasingly shut out. As such, the manner in which corporations and investigating counsel prepare for and address laws protecting data will be of great significance during the next decade of cross-border investigations.

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40. *Id.*

41. Press Release 21-1252, U.S. Dep't of Just., United States and Australia Enter CLOUD Act Agreement to Facilitate Investigations of Serious Crime (Dec. 15, 2021), https://www.justice.gov/opa/pr/united-states-and-australia-enter-cloud-act-agreement-facilitate-investigations-serious-crime#; Press Release 19-1065, U.S. Dep't of Just., U.S. and UK Sign Landmark Cross-Border Data Access Agreement to Combat Criminals and Terrorists Online (Oct. 3, 2019), https://www.justice.gov/opa/pr/us-and-uk-sign-landmark-cross-border-data-access-agreement-combat-criminals-and-terrorists.

State secrets regimes were also identified in the 2011 article as risk areas for international internal investigations and that remains true today.[42] China, for example, has strong state secrets laws that broadly define such materials to include "matters that relate to state security and national interests."[43] Violations of these types of law also often carry steep penalties. In China, the state secrets laws carry punishments up to death for intentional violations.[44] For individuals engaged in cross-border investigations, therefore, broad state secrets language creates uncertainty when collecting, reviewing, and transferring materials.

The combined risks that emanate from privacy and state secrets laws when engaging in information collection can be seen through several examples from China. Xue Feng, for example, a naturalized American citizen, worked for an American company as a geologist. While in China, he purchased unprotected data containing information about oil and gas in the country.[45] After passing the information back to his employer in the United States, Feng was arrested and charged with violation of the state secrets laws and eventually sentenced to eight years in prison.[46] In another incident in China, two certified fraud investigators, Peter Humphrey, a British citizen, and Yu Yingzeng, an American citizen, were arrested for improperly obtaining private information on individuals while assisting with an internal investigation of potential misconduct for a pharmaceutical company.[47] According to one news outlet, "The case against Humphrey and his wife

42. *See* Dervan, *International Internal Investigations*, *supra* note 1, at 115–17.

43. *State Secrets Protection Law of the People's Republic of China*, CONG.-EXEC. COMM'N ON CHINA, Art. 2, *available at* http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=140200 (last visited Sept. 12, 2022).

44. *See* Sigrid U. Jernudd, Comment, *China, State Secrets, and the Case of Xue Feng: The Implication for International Trade*, 12 CHI. J. INT'L L. 309, 319–20 (2011).

45. *See id.* at 322–23; Ariana E. Cha*, Trial of American Puts Spotlight on the Business of 'State Secrets' in China*, WASH. POST (Mar. 4, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/03/AR2010030303852.html ("When Xue bought the surveys and maps for use in his company's research reports, the information was openly available."); Andrew Jacobs, *China Upholds Conviction of American Geologist*, N.Y. TIMES (Feb. 18, 2011), https://www.nytimes.com/2011/02/19/world/asia/19beijing.html.

46. Jacobs, *supra* note 45.

47. *See* Adam Jourdan, *China Charges GSK-Linked Investigator for Illegally Obtaining Private Information*, REUTERS (July 13, 2014), https://www.reuters.com/article/us-china-gsk-investigators/china-charges-gsk-linked-investigators-for-illegally-obtaining-private-information-idUSKBN0FJ05G20140714.

[Yingzeng] . . . [became] a key piece in a long-running investigation into GSK, whose China executives [had] been charged with orchestrating a widespread network of bribery to promote sales."[48] Humphrey and Yingzeng were eventually sentenced to 30 and 24 months respectively in prison.[49]

The above examples illustrate the continued dangers associated with violating data privacy and state secrets laws a decade after the 2011 international internal investigations article raised these concerns. Today, there is also another growing concern related to national interests for those engaged in cross-border investigations—the possibility of becoming embroiled in geopolitical controversies. The potential that someone might not only fall within the bounds of a broad data privacy or state secret law, but also might become part of a larger international diplomatic controversy, is illustrated by the recent Huawei case. In 2018, China detained Michael Kovrig, a former diplomat, and Michael Spavor, an organizer of business trips to North Korea, both of whom were Canadian citizens.[50] They were charged with espionage and illegal provision of state secrets.[51] According to Peter Humphrey from the GSK case, the Kovrig and Spavor detentions were about more than just state secrets. Humphrey wrote, "[b]oth detentions were seen as an act of diplomatic hostage-taking in revenge for the arrest in Canada on fraud charges of Meng Wanzhou, the chief financial officer of Huawei, a Chinese telecoms technology company with close ties to the CCP regime."[52] According to the *New York Times*, "Mr. Spavor became a warning about the growing risks of operating in China, as tensions with the West rise and Beijing takes an increasingly combative approach to defending its interests."[53] Eventually, Spavor was sentenced to 11

48. *Id.* CSK is a global biopharma company.

49. *See* Peter Humphrey, *'I Was Locked Inside A Steel Cage': Peter Humphrey on His Life Inside a Chinese Prison*, FINANCIAL TIMES (Feb. 15, 2018), https://www.ft.com/content/db8b9e36-1119-11e8-940e-08320fc2a277.

50. Suranjana Tewari, *Michael Spavor: Canadian Jailed for 11 Years in China on Spying Charges*, BBC (Aug. 11, 2021), available at https://www.bbc.com/news/world-asia-china-58168587.

51. *See id.*

52. Peter Humphrey, *The Cruel Fate of Michael Kovrig and Michael Spavor in China*, THE DIPLOMAT (Dec. 10, 2019), https://thediplomat.com/2019/12/the-cruel-fate-of-michael-kovrig-and-michael-spavor-in-china/.

53. Chris Buckley, Dan Bilefsky & Tracy Sherlock, *China Sentences Canadian Businessman to 11 Years in Prison*, N.Y. TIMES (Aug. 10, 2021), https://www.nytimes.com/2021/08/10/world/asia/china-canada-spavor-kovrig.html.

years in prison.[54] Before Kovrig could be sentenced, however, both men were released in a prisoner-swap that saw Meng returned to China at the same time.[55] The Huawaei case is a strong reminder that the complexities of international cross-border work come not just from varying laws and regulations, but also from the inherent risks associated with operating in countries where one might inadvertently become part of a larger geopolitical matter.

III. DEALING WITH EMPLOYEES IN AN INTERNATIONAL CONTEXT

As noted in the 2011 article, there are two defining encounters with employees during cross-border investigations. The first is when employees are interviewed by outside counsel as part of the inquiry's fact-finding mission.[56] The second is when a determination of wrongdoing is made, and the corporation must decide whether and how to discipline employee misconduct.[57] These two encounters continue to present challenges to investigating counsel because this is another area where different laws and regulations place varying restrictions and prohibitions on what conduct is permitted.

In the United States, much of the conversation around employee interviews revolves around the providing of the "Upjohn Warning:"

> The warning typically includes the following elements: the attorney represents the corporation and not the individual employee; the interview is covered by the attorney-client privilege, which belongs to and is controlled by the corporation, not the individual employee; the corporation may decide, in its sole discretion, whether to waive the privilege and disclose

54. Christian Paas-Lang, *Michael Kovrig and Michael Spavor Arrive in Canada After Nearly 3-year Detention in China,* CBC NEWS, (Sept. 25, 2021), https://www.cbc.ca/news/politics/spavor-kovrig-in-canada-1.6189640.

55. *See* Patrick Reilly, *Two Canadians Freed from China After Deal Reached with Huawei Exec in Swap Deal*, N.Y. POST (Sept. 25, 2021), https://nypost.com/2021/09/25/canadians-michael-spavor-and-michael-kovrig-released-from-china-prison/.

56. *See* Dervan, *International Internal Investigations*, *supra* note 1, at 118; *see also* Dervan, *Responding to Potential Employee Misconduct*, *supra* note 8, at 676.

57. *See* Dervan, *International Internal Investigations*, *supra* note 1, at 119.

> information from the interview to third parties, including the government.[58]

Ensuring employees know that counsel does not represent them and that the privilege held by the corporation may be waived is vital to ensuring flexibility should the corporation decide to later reveal the contents of the employee interview to the government or waive privilege as to the matter under investigation.[59] Except where employment contracts or organized labor agreements impose additional obligations, counsel is generally able to operate without limitation when interviewing employees about potential misconduct in the United States. Such, however, is not the case in many other parts of the world.

In many European countries, blocking statutes prohibit corporate investigating counsel from interviewing employees about potential misconduct.[60] In the U.K., for example, authorities expect to be contacted prior to internal investigators interviewing employees who may possess relevant information.[61] While not required by law, the importance of such cooperation is made clear in the cooperation guidelines from the United Kingdom Serious Fraud Office ("U.K. SFO"), which writes, "[t]o avoid prejudice to the investigation, consult in a timely way with the SFO before interviewing potential witnesses or suspects, taking personnel/HR actions or taking other overt steps."[62] In Switzerland, blocking statutes have created legal uncertainty regarding which internal investigatory interviews of employees require prior government approval.[63] In response, a practice has developed of conducting

58. Dervan, *Responding to Potential Employee Misconduct*, *supra* note 8, at 677.

59. Robert M. Radick & Rusty Feldman, *A Warning About 'Upjohn' Warnings: A Word of Caution for Individual Employees,* N.Y.L.J. (June 25, 2021), https://www.maglaw.com/media/publications/articles/2021-06-28-a-warning-about-upjohn-warnings-a-word-of-caution-for-individual-employees/_res/id=Attachments/index=0/NYLJ06282021497826Morvillo.pdf.

60. *See* D. Michael Crites, *Recent Trends in White Collar Crime*, INT'L WHITE COLLAR ENFORCEMENT, 2011 EDITION, 2010 WL 5312199, at *2 (2010) ("[M]any countries have blocking statutes that prohibit counsel from interviewing witnesses without permission from the host country.").

61. Beardsworth et. al, *supra* note 31, at 301–02.

62. *Corporate Co-Operation Guidance*, U.K. SERIOUS FRAUD OFF. (Aug. 2019) https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/corporate-co-operation-guidance/ (last visited Sept. 27, 2022).

63. Valentine Bagnoud, Deborah Hondius & Sandrine Giroud, *Swiss Blocking Statute: Update on Do's and Don'ts under the Threat of Criminal Sanctions,* LALIVE (Dec. 3, 2019), https://www.lalive.law/swiss-blocking-statute-update-on-dos-and-donts-under-the-threat-of-criminal-sanctions/.

some employee interviews outside the country. This procedural work-around has not entirely addressed the issue, however, as it remains unclear whether this really rectifies the blocking statute concerns or whether employees can actually be made to engage in such travels.[64] Further, as was observed in the U.K., Swiss authorities may look with suspicion upon employee interviews conducted before authorities have the opportunity to meet with the subject.[65] And, in the worst-case scenario, such early interactions with employees could lead to allegations of witness tampering by authorities.[66] As a final example of the varying obligations found in different jurisdictions, French ethical obligations require that attorneys "inform the person interviewed that they can be assisted or advised by a counsel when it appears, before or during the interview, that a specific wrongdoing can be attributed to them at the end of the investigation[.]"[67] Further, in France, the conversation between the investigating counsel and the employee is not privileged, as would be the case in the United States pursuant to *Upjohn v. United States*.[68]

Similarly, counsel must be aware of the various differences in approach to employee discipline for either refusing to participate in the internal investigation or in response to the discovery of misconduct. While it is common in the United States for counsel and the corporation to possess broad discretion in disciplining an employee, this is not necessarily the case in other jurisdictions.[69] First, in some countries, employees cannot be forced to cooperate with an internal investigation or be punished for a failure to do so.[70] In Germany, for example, recent draft legislation specifically

64. *See* Beardsworth et al, *supra* note 31, at 203.

65. *See id.*; s*ee also* Crites, *supra* note 60, at *2, *8, *12.

66. *See* Beardsworth et al, *supra* note 31, at 203.

67. *See* Beardsworth et al, *supra* note 31, at 98 (quoting National Internal Regulations of France, art. 8 (translated from French)); *see also* Jennifer Arlen & Samuel Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697 (2020).

68. *See* Beardsworth et al, *supra* note 31, at 99; Upjohn v. United States, 449 U.S. 3838 (1981).

69. *See* Dervan, *International Internal Investigations*, *supra* note 1, at 119.

70. *See id.*; *see also In-House Counsel's Guide to Conducting Internal Investigations*, O'MELVENY, https://www.omm.com/omm_distribution/white_collar_defense/guide%20_to_conducting_internal_investigations_jan_2020.pdf (last visited Sept. 30, 2022) ("In some countries, employees may not be required to cooperate with internal investigations, and cannot be disciplined for their failure to do so."); Arlen & Buell, *supra* note 67, at 735 ("In many other countries, employers cannot use the threat of termination to pressure employees to

incorporates language addressing the right of employees to refuse to answer questions during internal investigations if the answer would "endanger themselves or their relatives."[71] Second, many countries place temporal and procedural restrictions on employee discipline. In France, for example, employees must be disciplined within two months from the time the corporation knows of sanctionable misconduct.[72] In Belgium, the temporal restrictions for disciplining an employee can be limited to a matter of days and the timer may even begin before a formal investigation has begun if credible allegations were received.[73] Similar tight temporal restrictions exist in Austria, France, and Iraq.[74] The procedural complexities of disciplining are further exemplified by the law in the United Arab Emirates. In the UAE, a series of procedural hurdles must be satisfied before discipline may be handed down.[75] These include: providing written notice of the alleged conduct to the employee, providing an opportunity for the employee to comment, investigating defenses or explanations given by the employee, and providing written notice of the penalty, reasons supporting the penalty, and the consequences of continued misconduct.[76] Such disciplinary procedures in the UAE must begin within thirty days of the discovery of the misconduct.[77] A final example of the complex considerations that arise during disciplinary action in cross-border matters is the procedure in the U.K. by which disputes related to employee sanctions may result in proceedings before the Collateral Employment Tribunal. This is a public forum. Thus, consideration must be given to the risk that missteps in disciplining employees for misconduct might open the

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cooperate because employment laws either preclude such threats of impose procedural impediments to employee discipline.").

71. *See* Beardsworth et al, *supra* note 31, 125–26.

72. *See id.* at 90.

73. *See* Donald C. Dowling, Jr., *International HR Best Practice Tips: Conducting Internal Employee Investigation Outside the U.S.*, 19 INT'L HUM. RES. J. 1, 3 (2010) (quoting Carl Bevernage, *Belgium*, INT'L LAB. AND EMP. L. 3–38 (William L. Keller et al. eds., 2009)).

74. *See* Donald C. Dowling, Jr., *How to Conduct an Internal Investigation*, LITTLER, https://www.littler.com/files/international_investigations.pdf (last visited Sept. 30, 2022).

75. *See Disciplinary [sic]Action in the United Arab Emirates,* AL TAMIMI & CO. (Oct. 2013), https://www.tamimi.com/law-update-articles/disciplinary-action-in-the-united-arab-emirates/.

76. *See* Beardsworth et al, *supra* note 31, at 254.

77. *See id.*

internal investigation itself and the subject of the inquiry to public disclosure before this public forum.[78]

Once again, investigating counsel must be aware of the various legal and regulatory landscapes that may be encountered during cross-border investigations. While employee interactions are key aspects in both responding to and addressing potential misconduct, it is important to avoid missteps that might lead to additional legal or ethical exposure for the attorneys engaged in the inquiry and their corporate clients.

IV. SETTLEMENT AFTER INTERNATIONAL INTERNAL INVESTIGATIONS

The final issues discussed in the 2011 article were the varying considerations during disclosures and settlements following cross-border investigations.[79] One significant change in settlement procedures over the past decade has been the global growth in the creation of Deferred Prosecution Agreement ("DPA") and Non-Prosecution Agreement ("NPA") regimes.[80] While DPAs have long been a popular mechanism to resolve corporate criminal investigations in the United States, the last decade has seen a significant increase in their use by other countries.[81]

DPAs in the United States originated as tools to divert individual defendants from the traditional criminal justice system.[82] In the early 1990s, however, the federal government began utilizing this diversion practice with corporations through DPAs and NPAs.[83] Over time, the practice grew in frequency. According to one analysis, from 2000 to 2002 there were only two or three DPAs and NPAs per year.[84] By 2015, the number had reached 102.[85] The significance of this increase was captured in

78. *See id.* at 291.

79. *See id.*; Dervan, *International Internal Investigations*, *supra* note 1, at 122.

80. *See* Peter Spivack & Sujit Raman, *Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159 (2008).

81. *See id.* at 163.

82. *See id.*

83. *See id.* at 163–64.

84. *2021 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements*, GIBSON DUNN (February 03, 2022), https://www.gibsondunn.com/2021-year-end-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements/.

85. *Id.*

2012 by then Assistant Attorney General Lanny Brewer when he stated, "DPAs have become a mainstay of white-collar criminal enforcement."[86] Last year, the same analysis indicated that there were 28 corporate DPA and NPA agreements.[87]

While DPAs and NPAs grew in significance in the United States during the 1990s and 2000s, they received a slow and sparse reception internationally. But that has changed markedly in the last decade. Since the drafting of the 2011 article, Brazil, France, the United Kingdom, Singapore, and Canada have adopted versions of the DPA/NPA model and others are now exploring their use.[88] The adoption of the DPA model in the United Kingdom garnered perhaps the most significant attention during the last ten years. The U.K. adopted the DPA in 2014 as part of the Crime and Courts Act of 2013.[89] According to the U.K. SFO:

> DPAs can be used for fraud, bribery and other economic crime.[90] They apply to organizations, never individuals.
>
> The key features of DPAs are:
>
> - They enable a corporate body to make full reparation for criminal behaviour without the collateral damage of a conviction (for example sanctions or reputational damage that could put the company out of business and destroy the jobs and investments of innocent people).
> - They are concluded under the supervision of a judge, who must be convinced that the DPA is 'in the interests of justice' and that the terms are 'fair, reasonable and proportionate'

86. Lanny A. Breuer, Assistant Att'y Gen., Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association (Sept. 13, 2012), *in* U.S. DEP'T OF JUST. NEWS *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association.

87. *See 2021 Year-End Update*, *supra* note 84.

88. *See* Code Pénal [C. Pen.] [Penal Code], 41-1-2 (Fr.) (Amended 2020); *Brazil: AGU Regulates Civil Non-Prosecution Agreement in Administrative Improbity Cases*, MAYER | BROWN (July 30, 2021), https://www.mayerbrown.com/en/perspectives-events/publications/2021/07/brazil-agu-regulates-civil-nonprosecution-agreement-in-administrative-improbity-cases; *infra*, note 92; *infra* note 99.

89. *Deferred Prosecution Agreements*, U.K. SERIOUS FRAUD OFF., https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements (last visited Oct. 14, 2022).

90. *Id.*

- They avoid lengthy and costly trials
- They are transparent, public events[91]

After the implementation of the DPA, the U.K. SFO created a Code of Practice regarding their implementation.[92] As in the United States, cooperation is a key component of the SFO's decision-making around DPAs:[93]

> Considerable weight may be given to a genuinely proactive approach adopted by P's management team when the offending is brought to their notice, involving within a reasonable time of the offending coming to light reporting P's offending otherwise unknown to the prosecutor and taking remedial actions including, where appropriate, compensating victims. In applying this factor the prosecutor needs to establish whether sufficient information about the operation and conduct of P has been supplied in order to assess whether P has been co-operative. Co-operation will include identifying relevant witnesses, disclosing their accounts and the documents shown to them. Where practicable it will involve making the witnesses available for interview when requested. It will further include providing a report in respect of any internal investigation including source documents.[94]

During the first five years of their existence, the U.K. SFO entered into four DPAs.[95]

Two of the most recent entries into the DPA regime are Canada and Singapore, each of whom introduced the mechanisms in 2018 and neither of whom has yet utilized the settlement tool.[96]

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91. *Id.*

92. *Deferred Prosecution Agreements Code of Practice*, SERIOUS FRAUD OFFICE (2013) https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf.

93. *Id.* at § 2.8.2(i).

94. *Id.*

95. *See Deferred Prosecution Agreements 5 Years On – The Americanisation of UK Corporate Crime Enforcement*, WHITE & CASE (May 10, 2019), https://www.whitecase.com/publications/alert/deferred-prosecution-agreements-5-years-americanisation-uk-corporate-crime.

96. *See* Lawrence E. Ritchie & Sonja Pavic, *Canada's Deferred Prosecution Agreements: Still Waiting for Takeoff*, OSLER (Dec. 11, 2020), https://www.osler.com/en/resources/regulations/2020/canada-s-deferred-prosecution-

In Canada, the process set down for determining DPA eligibility focuses on compliance efforts and public interest.[97] The listed factors for consideration also include whether the entity is willing to assist in the identification of others involved in the misconduct.[98] The system adopted in Singapore is similar to that found in the U.K., including the requirements of court approval and public access.[99] While there is no official guidance issued with respect to the use of DPAs in Singapore, it has been posited that their use will likely be consistent with the U.K.'s, given the similarity in approach.[100]

The next country to adopt DPAs may well be Australia.[101] In 2017, the Australian Attorney-General's Department released a report entitled *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia*.[102] According to the paper, DPAs were seen as a potential mechanism to improve enforcement in the white-collar space:

> While Australia has a well-developed legal and regulatory framework for corporate misconduct, the opaque and sophisticated nature of corporate crime makes it difficult to detect. Often, corporate criminal activity is only identified because 'whistleblowers' come forward, or because the company self-reports. The Australian Government is considering options to facilitate a more effective and efficient response to corporate crime by encouraging greater self-reporting by

agreements-still-waiting-for-takeoff; Zachary S. Brez et. al, S*ingapore Introduces Deferred Prosecution Agreements*, PROGRAM ON CORP. COMPLIANCE AND ENFORCEMENT AT N.Y.U., https://wp.nyu.edu/compliance_enforcement/2018/04/04/singapore-introduces-deferred-prosecution-agreements/ (last visited Oct. 14, 2022).

97. Ritchie & Pavic, *supra* note 96.

98. *Id.*

99. Brez et. al, *supra* note 96.

100. Eunice Chua & Benedict Wei Ci Chan, *Deferred Prosecution Agreements in Singapore: What Is the Appropriate Standard for Judicial Approval?,* INT'L COMMENT. ON EVIDENCE (2020).

101. *See* Liz Campbell, *Revisiting and Re-Situating Deferred Prosecution Agreements in Australia: Lessons from England and Wales*, 43 SYDNEY L. REV. 187 (2021).

102. *See Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia*, AUSTL. GOV'T ATT'Y-GEN.'S DEP'T, (Mar. 2017), https://www.ag.gov.au/sites/default/files/2020-03/A-proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.pdf.

> companies. A key focus of this consideration is a possible deferred prosecution agreement (DPA) scheme.[103]

Legislation was later introduced, though the process of legislative approval has been slow.[104] Nevertheless, it is likely that in the near future Australia will join the growing list of countries adopting some form of DPA or NPA scheme.[105] For counsel conducting cross-border investigations, therefore, the settlement landscape continues to evolve. This shift towards DPAs and NPAs over the last decade has signaled not only the growth of U.S. centered resolution mechanisms, but also the growing cohesion, cooperation, and norm penetration between global enforcement bodies.

V. CONCLUSION

The list of pitfalls and perils counsel may encounter during cross-border investigations is long and complex. This piece has only selected a handful of risks and diverse legal and regulatory approaches to illustrate the vital importance of awareness during international internal investigations. It is unlikely anyone will have the experience and expertise to know all of the intricacies one might face when crossing from one nation to another, but an awareness that there are many dangers is an important aspect of being prepared for these eventualities. Seeking counsel from others with the requisite experience and expertise in each impacted region and country is of vital significance because of the many missteps that may not yet have revealed themselves to the community of practitioners engaged in this work.

In reflecting back on a decade of international white-collar investigations, this piece also brings forward something else of importance—a recognition of the duality and dichotomy that is the global enforcement environment today. In many ways, the world continues to grow smaller. International enforcement bodies are working together more closely in this decade and the procedures

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103. *Id.*

104. *See* Campbell, *supra* note 101, at 188.

105. *See Deferred Prosecution Agreement Scheme Code of Practice*, L. COUNCIL OF AUSTL. (July 12, 2018), https://www.lawcouncil.asn.au/publicassets/99a9a215-b6d5-e811-93fc-005056be13b5/3470%20-%20Deferred%20Prosecution%20Agreement%20Scheme%20Code%20of%20Practice.pdf (advocating for the adoption of the DPA).

used during investigations and to resolve international white-collar cases are growing more uniform and standardized. Simultaneously, however, borders are going back up, nationalism is rising, and national independence is moving ahead of global and regional union. As we peer into the next decade, these competing forces will inevitably influence the current set of competing risks for cross-border investigations and create many new ones.