Charles Duross:

FCPA reform, DoJ trials and the revolving door

Charles 'Chuck' Duross was head of the DoJ's FCPA unit from 2010 until 2014, when he left to join Morrison & Foerster as partner and head of its global anti-corruption practice. Speaking to Tom Webb, Chuck explained why he opposes an FCPA compliance defence, what gets in the way of cross-border foreign bribery enforcement, and how NGOs and development banks influence DoJ policy.

- Duross joined the DoJ's fraud unit in 2006 as a prosecutor, becoming assistant chief of the FCPA unit in 2008 and chief in 2010.
- Under Duross's leadership of the FCPA unit, the DoJ resolved over 40 corporate cases, leading to around US$1.9 billion penalties. Of the top 25 corporate FCPA resolutions ever, two thirds occurred during Duross's tenure.
- The DoJ and SEC's Resource Guide to the US Foreign Corrupt Practices Act was published in 2012 while Duross was head of the DoJ FCPA unit. The document clarifies the agencies' approach to enforcing the legislation.
- Duross is also adjunct professor of law at Georgetown University Law School, where he teaches trial practice.

What matters were you particularly proud to have been involved in during your time at the DoJ?

I'm proud of all of it but I think there are probably a couple of specific matters that stand out in my mind. The first was the *Congressman William Jefferson* case, which I investigated, indicted and tried. For any prosecutor, that level of battle, when it's that epic, that's certainly one that stands out. We went to the Supreme Court twice before we went to trial. Then we went back to the Supreme Court once after trial. Going to the Supreme Court before trial, or even going to appeal before trial, is a pretty rare thing. That at least gives you a sense of the importance of the issues that we were grappling with both in terms of the case itself but also the law surrounding congressmen.

It was both a domestic political corruption case and a foreign bribery case. The congressman was receiving bribes from constituents, to perform a variety of different official acts. And then in addition to domestic corruption there was an FCPA violation, which was the first time in history a member of congress has been charged with that. And there was the money that was famously found in his freezer, US$90,000. It was actually money that was supposed to go to the vice president of Nigeria at the time.

That case went on for many years, and was ultimately tried in the summer of 2009. It was about an eight and a half week trial. The congressman was ultimately convicted on most counts. He was actually acquitted of the FCPA substantive count, but convicted on the conspiracy count, which included as an object violating the FCPA.

The *Alcatel* case was also one that I'm particularly proud of and was heavily involved in. It was bribery by a French telephone company that had later merged with Lucent, so it became Alcatel-Lucent. Alcatel at the time was paying bribes around the world, but they were particularly paying bribes to the president of Costa Rica through a series of intermediaries. It was a very exciting case. The story broke in October 2004 in the Costa Rican press and that began our investigation.

The investigation was going on fairly slowly. Then one of the Alcatel executives, who had been let go after all this became public, was travelling between central America and Europe and was changing planes in Miami. We arrested him at that point and he ended up cooperating. It really broke the case wide open for us. There was conduct well beyond Costa Rica. And ultimately it was one of the top 10 largest FCPA cases we brought.

What are the most pressing issues faced by the FCPA unit?

The most immediate challenge they face is some pending trials that are coming up this year. There's a case involving a former employee of Alstom, William Pomponi, which involves alleged bribery in Indonesia. It's set for trial in Connecticut, which is where one of the Alstom subsidiaries is based. It's set for mid-June.

These FCPA cases are like law school exams – what does a French company with a Connecticut subsidiary allegedly paying bribes in Indonesia through an intermediary in Maryland have to do with the US and how do we bring charges?

There's another case pending trial involving a man named Frederic Cilins. That case involves an alleged attempt to obstruct a grand jury investigation into whether a mining company paid bribes to win lucrative mining rights in Guinea. It's an obstruction of justice case, it's not directly an FCPA case. That's pending trial in March.

Then we recently arrested a couple of other people in a case involving a company that was allegedly paying bribes in Colombia to win business and some of the executives were also accused of defrauding the company through a kickback scheme. They were just arrested recently. A trial date hasn't been set but when you charge individuals some people are potentially going to go to trial, which is entirely their right, and we need to be ready to go forward.

Resource challenges are another issue. They've got very good prosecutors but they've got a lot of cases. It's going to be a challenge managing resources so they can tackle all the cases that are there.

Thinking as an enforcer, are there any parts of the FCPA in need of reform?

The OECD has suggested the facilitating payment exception be eliminated from the statute. The truth is the US is out of step with the rest of the world when it comes to permitting facilitating payments. I don't think there's any reason to suggest or think the exception is going to be removed from the statute anytime soon, but it's an issue that continues to be a focus of

the OECD in its reviews of the US's enforcement regime.

The other proposal the OECD made when it reviewed the US in 2010 concerned the statute of limitations. Currently the statute of limitations in the US is five years. It can be extended by up to three years. At the outer limits it could be up to eight years, with some exceptions – but it's worth bearing in mind the complexity of the cases and the fact they're international in nature, and more difficult to discover and pursue. Maybe something more than five years would be appropriate.

Related components that could be updated, regarding the FCPA. Take the Racketeer Influenced and Corrupt Organizations Act, or RICO, for example. RICO has certain predicate acts. The FCPA's not one of them, so you could add – frankly it's a matter of housekeeping – you could add the FCPA as a predicate act. Also, making the FCPA the basis for a wiretap, currently it's not. It's not a huge issue because there are currently money laundering, and wire fraud, and all sorts of related issues to FCPA violations that don't make it necessary to have that in the law to get a wiretap. Nevertheless it's an improvement that could be made.

How did other anti-corruption players, such as the OECD, UN, and multilateral development banks influence DoJ policy?

I would actually distinguish MDBs from organisations like the OECD or the UN. We certainly continue to have a strong relationship with the MDBs. They've done a lot of innovative work in terms of cross-debarment and increasing their capabilities in terms of investigating and pursuing corruption, fraud, waste and abuse. They're doing a lot of good there. So there's a synergy with what they do and what the FCPA unit does. But I don't think that it influences policy. They're a partner, but they don't necessarily influence policy.

It's different if we turn to something like the OECD. The easiest example is the [DoJ and SEC's 2010] FCPA Resource Guide. It simply wouldn't exist without the OECD. In October 2010 the OECD proposed that we provide better guidance as to both our enforcement priorities, our interpretations of the statute and the like, particularly aimed towards small and medium enterprises. The idea being SMEs are increasingly having an international footprint and may not have the same sort of resources and understanding and sophistication about the risks of corruption as, say, more traditional larger multinationals. The idea was that a small company in the US may very well have a back office in India that, a decade ago, it didn't.

The OECD's recommendation on that, producing more guidance, was something that we took seriously and we said maybe we could do even better. The guide was the ultimate product of that.

What are some of the greatest barriers to crossborder enforcement of foreign bribery laws?

Delays in mutual legal assistance (MLA). The US and other countries around the world have bilateral treaties with each other to exchange evidence and handle extraditions, international prisoner transfers and the like. By definition foreign bribery cases are international in nature, and so obtaining MLA in an efficient and effective manner is fundamental. It's critical.

In order to follow the money you have to be able to gather evidence from abroad. And the delays in doing that are probably the biggest barrier in moving forwards. Even in good countries, the US, UK, Canada, Australia, Germany, countries that are actually quite good and take it very seriously, there are delays. When I was a young prosecutor in Miami years ago, I would get these MLA requests from other countries for, say, bank records. The truth is that I had other cases to work on and put these requests on the back burner. I didn't really appreciate the broader picture and importance of what it was people were asking us to do in terms of international cooperation. I do now.

There's a role that's played, for example by the OECD, in trying to make MLA faster and more effective in the foreign bribery context. There are actually prosecutor meetings. They typically occur twice a year at the OECD. At those meetings prosecutors don't discuss specific cases, but rather cross-cutting issues that are faced by prosecutors in pursuing cases. One of the things we spent a great deal of time talking about was MLA, discussing the best ways to improve the receipt of MLA from different countries. There are a lot of different topics that are discussed, but MLA was certainly a topic. Hopefully it's focused that issue.

I would say that the DoJ is better at MLA and pursuing these cases internationally than at any time before. Things are certainly better today than they were a decade ago.

How do you think bribery and anti-corruption enforcement will evolve worldwide in the next few years? Which jurisdictions are ones to watch?

The big picture response is that enforcement will continue to increase globally. I don't see any reason why in the next five years, 10 years, 20 years, global enforcement of foreign bribery laws is going to subside or backtrack. The standard that was originally set by the FCPA in 1977, when the US was alone in specifically prohibiting foreign bribery, has really become an international standard. The OECD made that happen in the late 1990s. Now you've got 40 members of the OECD Working Group on Bribery, which is focused solely on foreign bribery, there's no turning back. From that perspective I think things are going to continue to increase. What you're going to see is more and more countries having active enforcement regimes.

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We've already seen Germany is a worldwide leader in enforcement. People often forget that the *Siemens* case was begun by the Munich public prosecutor's office, not the US. If you were to look at Canada, it's starting to do more. Norway just brought a significant case involving Yara, charging a number of people. You see countries which you might not otherwise have thought would be in the game starting to charge cases. There's going to be more of that.

You have said you were attracted to Morrison & Foerster's capabilities in Asia. Why is that?

Asia is a very dynamic area, both in terms of economic growth and potential risk. Companies around the world see Asia as an opportunity. So when companies are looking to do business in Asia, they need to recognise some markets are particularly challenging in terms of corruption risk.

The area itself is also beginning to have more local foreign bribery enforcement. For example, Japan and Korea have begun to bring a few cases. I think there's going to be increased pressure on countries like that, particularly major economies like Japan and Korea, to both investigate and prosecute more foreign bribery cases.

Companies need to understand and appreciate the risks and how to prevent them, and that's why Morrison & Foerster's position in Asia is so important. It is not some sort of newcomer. It's had offices in Hong Kong and Tokyo for more than 25 years, with additional long-time offices in Beijing and Shanghai, and the firm recently turned to Singapore to expand its presence in South and South East Asia. And that kind of experience and depth of knowledge of both the practice areas, the language capabilities, all of those things, the boots on the ground, puts the firm in the best position to be able to provide that concrete advice to companies that are trying to do business in Asia.

Are there any circumstances where you would advise a client not to self-report potential FCPA issues?

It's a perennial question: should I disclose or not? As an enforcement official I've always said at conferences and other public venues that it's a challenging issue.

I'm not naïve. As an enforcer I'd say there are a number of different variables in that calculation, and that continues to be the case now that I'm going into private practice. Each and every incident is fact- and circumstance-dependent. There are a number of factors that you have to think about. Likelihood of discovery; is this an isolated incident? Is it pervasive? Is it serious in terms of the conduct itself – are we talking about a couple of hundred dollars or a couple of hundred million dollars? Those are important distinctions and not all the cases are the same. In addition, in terms of likelihood of discovery is there a whistleblower, is there a reporter? What's the likelihood that the enforcement agencies are going to find out about this even if you don't go see them?

The one thing I used to say as an enforcer, which is just as true today now I'm wearing a different hat, is regardless of whether you voluntarily disclose or not, what you want to do is figure out what the problem is, fix it and make sure it doesn't happen again. So if down the road you've chosen not to voluntarily disclose, and the enforcement agencies come knocking, whether it's the SFO, DoJ or SEC, your response isn't: "Well, we found this problem and swept it under the rug, and hoped nobody would find out about it."

You have said you disagree with the establishment of a compliance defence for the FCPA, as is provided for in the UK's Bribery Act. Why is that?

As an initial matter, which is what I've said to people a number of times, is that at the end of the day, whether there's a compliance defence or not, it's a broader question than just relating to the FCPA. Fundamentally, what you're talking about is changing corporate criminal liability in the US. That's a fine discussion to have, and we should have that discussion, but you should recognise it's not just the FCPA. What you're really talking about is fundamentally changing how the US, as a legal system, approaches corporate criminal liability.

In the US the standard is: was the employee acting within the scope of his employment? And did the employee's criminal conduct, at least in part, benefit the company?

In terms of policy from the enforcement side, the risk is that with a compliance programme approach, you're setting up a race to the bottom, where what you're really looking to do is the absolute minimum. Under the current corporate criminal liability standard in the US, not just for the FCPA,

but with any violation, wire fraud, securities fraud – you name it – same standard. It creates an incentive for the company to try to prevent conduct by any employee anywhere in the company at any time from violating the law.

Contrast that, if you will, with a compliance defence. From an enforcer's perspective it gives the wrong incentives. It says to the company: look, you need do no more than establish a bar for an "effective" compliance programme. It may turn out that the CEO of the company is involved in a $100 million bribe scheme, orchestrated from the C-suite. But if you can come into court and somehow establish that there was an effective compliance programme, suddenly you would have a perverse situation in which a company may have benefited from the illegal conduct and would have had involvement at the highest levels within the company, and yet still be able to come to court with the defence that they had a compliance programme that was effective. From an enforcement perspective that's a challenge in terms of the incentives that you put out there. That is the DoJ's position: a compliance defence provides the wrong incentives.

What can other jurisdictions learn from the US's revolving door culture? How can the private bar benefit?

My radar goes up when people say revolving door, because at least in the US there's often a pejorative connotation to the term. I think it's mostly meant to apply to political appointees who come into the government for a couple of years and then leave to go back into private practice.

I at least think of myself as a career professional: I was a prosecutor for a dozen years, and don't really think of it as a revolving door. But I take your point that in the US, there is an exchange between the private bar and government on a not infrequent basis, which is different than many other countries.

There can be value on both sides. On the one hand the government benefits by bringing people in from the private sector. It hears new approaches to issues, appreciation for the enforcement side of things, appreciation of the challenges that the regulated communities face. It can bring renewed energy.

On the government side, having a healthy mix of long-term career professionals and newer folks from private practice can make the enforcement agencies better at their jobs in terms of bringing cases and thinking about issues.

On the flip side, in terms of the private bar, there is a value to law firms and businesses that have the benefit and the insight of folks that have been in government service, in terms of what the regulators are thinking about and what their priorities are. Having that sort of recent government experience gives people insight and a healthy perspective to the private bar, just as it does on the other side, at the government.