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Bad Math: State-Centric Anti-Corruption Enforcement + International Information Sharing Agreements = Conflicting Corporate Incentives

MATT REEDER*

I. Criminal Corporate Liability: The Corrupt Agent and the Foreign Official

Consider a case in which a British agent, hired by the English branch of a United States (U.S.) corporation, bribes an official in Nigeria to facilitate an investment there.¹ This bribe violates the Federal Corrupt Practices Act (FCPA) in the U.S.,² the 2010 Bribery Act in the United Kingdom (U.K.),³

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1. This hypothetical case is loosely based on the facts of the TSKJ/Bonny Island prosecutions, in which a conglomerate of multinational corporations engaged in a scheme to bribe the Nigerian government into awarding contracts to develop liquefied natural gas infrastructure. A British agent of Kellogg, Brown, & Root (KBR)—a U.S. company—participated in part of the scheme. In the actual case, the KBR CEO plead guilty to conspiring to violate the FCPA; this hypothetical omits this fact and assumes that the CEO was unaware of the agent's violation and must decide how to respond. See generally Press Release, U.S. Dep't of Justice, Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty (July 7, 2010), <http://www.justice.gov/opa/pr/snamprogetti-netherlands-bv-resolves-foreign-corrupt-practices-act-investigation-and-agrees-for-factual-background>; see Jay Holtmeier, Fighting Corruption in America and Abroad Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities, 84 *FORDHAM L. REV.* 493, 498 and n. 30, discussing the case.

2. Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 § 1494 (codified at 15 USC § 78dd-1 et seq. (1977)), available at <http://uscode.house.gov/statutes/pl/95/213.pdf>. (The U.S. can assert jurisdiction even though no U.S. person acted, and all acts were performed outside the U.S.); see U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-28.210 (1999) (citing *United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006) (the test to determine if an agent has acted within the scope of his employment is "whether the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated, at least in part, by an intent to benefit the corporation."); *United States v. Automated Medical Laboratories, Inc.*, 770

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and Nigerian Anti-Corruption Laws.⁴ The CEO asks the General Counsel first to determine the sum of the penalties the corporation could face, and second, to give advice on how to minimize the company's exposure to these penalties. If the corporation discloses the violation and helps investigators, it may reduce liability in the U.S. and U.K., but may expose itself to multiple prosecutions, and increased aggregate liability. Should it, therefore, remediate internally, avoid disclosure, and contest criminal charges if necessary? Doing so would be contrary to the policies of the FCPA, the U.K.'s Bribery Law, the United Nations Convention Against Corruption, and the Organisation for Economic Co-operation and Development's (OECD) Anti-Bribery Convention.⁵

I first show in this article that, given the severe penalties and likelihood of detection, many corporations will voluntarily disclose international corrupt acts because states will impose lighter sentences in exchange. But states reward corporations only in exchange for significant disclosures of information, and the international agreements between the U.S., U.K., and Nigeria obligate each state to share such information. Consequently, corporations who voluntarily disclose information expose themselves to greater risk of multiple settlements or prosecutions. Against this backdrop of conflicting incentives to disclose or withhold, and amidst a flurry of conflicting precedents, I turn to the empirical data, which suggest that voluntary disclosure does not help the corporation; further, multi-state investigations are correlated with increased corporate corruption penalties. Finally, I suggest how international policymakers could better align corporate self-reporting incentives and broader international policy goals.

II. The Maximum Penalties are Severe

Corporate controls have failed and the corrupt act is consummated. The CEO must now consider the worst-case scenario, and determine how to mitigate it. The corporation could face monetary penalties and collateral consequences including revoked licenses and loss of eligibility for contracts, loans, or benefits.⁶ Fines could reach 700 percent of the benefit obtained by

F.2d 399, 407 (4th Cir. 1985) (internal citation omitted) (quoting *Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir. 1945) (An actual benefit to the corporation is not prerequisite to liability: benefit is not a "touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact.")).

3. Bribery Act 2010, c. 23 § 6–8 (U.K.), www.legislation.gov.uk/ukpga/2010/23/introduction; see also Lee G. Dunst et al., *Hot off the Press: Resetting the Global Anti-Corruption Thermostat to the UK Bribery Act*, 12 BUS. L. INT'L. 257 (2011) (providing background and discussion about the Act's transnational effect).

4. Criminal Code Act, Laws of the Federation of Nigeria, ch. 77, pt.3, ch.12, § 98A (1990), available at [http://www.nigeria-law.org/Criminal%20Code%20Act-PartIII-IV.htm#Part 3](http://www.nigeria-law.org/Criminal%20Code%20Act-PartIII-IV.htm#Part%203).

5. See Foreign Corrupt Practices Act, *supra* note 2; see Bribery Act, *supra* note 3; see Laws of the Federation of Nigeria, *supra* note 4.

6. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-28.1100 (1999).B; 48 C.F.R. § 9.406-2 (a corporation could be debarred from doing business with the U.S.

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the corrupt payment (200 percent in the U.S.⁷ and 500 percent in Nigeria⁸), plus \$725,000,⁹ plus 400 percent of the harm caused,¹⁰ and require forfeiture of any property that is the subject matter of, or used in, the commission of the offense.¹¹ The sentence in Nigeria of “not less than five times the sum of the value of the gratification which is the subject matter of the offence where such gratification is capable of being valued or is of a pecuniary nature”¹² for bribery of a public official reads as mandatory and does not appear to be subject to reduction.¹³ The company can hope to escape penalty in all three jurisdictions by avoiding detection, or can reduce the U.S. and U.K. penalties according to a number of variables, some of which the corporation controls.

III. The Company Cannot Reasonably Plan to Avoid Detection

The U.S. considers the prosecution of corporate crime a high priority.¹⁴ The average number of companies prosecuted under the FCPA has

Government); additionally, the World Bank has a two-tiered review and debarment process. Export privileges may be curtailed or eliminated. Sanctions System, Overview, WORLD BANK GROUP, (2013), <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,contentMDK:21419040~menuPK:3601079~pagePK:64168445~piPK:64168309~theSitePK:3601046,00.html>; see also 22 U.S.C. § 2778(g)(1), (g)(3), 22 C.F.R. § 120.1; 22 C.F.R. § 127.7.

7. FCPA, 15 U.S.C. § 78ff (allowing for fines of up to \$25M against corporations); see also The Alternative Fines Act, 18 USC § 3571(d) (allowing fines against a company of up to 200% of the benefit obtained by the corrupt payment).

8. Corrupt Practices and Other Related Offences Act (2000) § 20 (Nigeria), <http://www.nigeria-law.org/Corrupt%20Practices%20and%20Other%20Related%20Offences%20Act%202000.htm>; see also the Administration of Criminal Justice Act (2015) Cap. (32), § 319 (Nigeria), <http://www.justice.gov.ng/documents/Criminal%20Justice.pdf>.

9. See 15 U.S.C. § 78u.

10. U.K. SENTENCING COUNCIL, FRAUD, BRIBERY AND MONEY LAUNDERING OFFENCES: DEFINITIVE GUIDELINE, 48-53 (2014). Harm is calculated differently, depending on the type of case. In fraud cases, harm is the “actual or intended gross gain to the offender.” *Id.* at 49. In cases of bribery, harm is either the gross profit from the ill-rewarded contract or the cost avoided by failing to enact appropriate measures to prevent bribery. *Id.* In cases where the actual or intended gain cannot be established, harm is defined as “the amount that the court considers was likely to be achieved in all the circumstances.” *Id.*

11. Corrupt Practices and Other Related Offences Act (2000) § 47 (Nigeria), available at <http://www.nigeria-law.org/Corrupt%20Practices%20and%20Other%20Related%20Offences%20Act%202000.htm>; see also Administration of Criminal Justice Act (2015) Cap. (34), § 333 (Nigeria), available at <http://www.justice.gov.ng/documents/Criminal%20Justice.pdf>.

12. Corrupt Practices and Other Related Offences Act, 2000, § 20 (Nig.).

13. The Nigerian Law Reform Committee recently has developed its Sentencing Guideline on Corruption and Related Offences 2015, which may provide more clarity in the future. See, e.g., U.N., Office on Drugs and Crime, Brussels Liaison Office (2016), <https://www.unodc.org/brussels/en/anti-corruption-in-nigeria.html>.

14. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-28.100 (1999); Memorandum from the Office of the Deputy Attorney General, U.S. Dep’t of Justice, *Individual Accountability for Corporate Wrongdoing to all U.S. Attorneys*, (Sep. 9, 2015), <https://www.justice.gov/opa/record>.

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increased from two per year between 1998 and 2006 to thirteen per year since.¹⁵ The size of the penalties is increasing, too. The ten largest FCPA enforcement actions have occurred since 2008.¹⁶ Since passing the FCPA in 1977 in response to admitted corruption of over 400 companies, the U.S. remains the global leader in anti-corruption enforcement.¹⁷ The U.S. has initiated almost seventy-five percent of all international bribery enforcement actions since 1977.¹⁸ While discovery is not inevitable—corruption costs the global economy about \$2.6 trillion annually in spite of these extraordinary enforcement efforts¹⁹—now is the most difficult time in history, and the U.S. is the most difficult country in the world, to avoid detection after engaging in corruption.

In light of these facts, the CEO should assume that the corrupt act will be discovered and immediately seek to mitigate any likely punishment— independent of a decision of whether to disclose. A good first step will be to examine the company's internal controls. A strong system of internal controls will reduce fines in both the U.K. and U.S.²⁰ Because one element of a strong system of controls is internal remediation, the CEO should undertake immediate compliance process improvements, should initiate adverse administrative action against the British agent, and should repay any ill-gotten gains, if possible.

IV. Voluntary Disclosure May Reduce Penalties

States have emphasized—and given significant attention to—whether corporations choose to voluntarily disclose misconduct and cooperate with

www.justice.gov/dag/file/769036/download (“fighting corporate fraud and other misconduct is a top priority of the Department of Justice.”).

15. Joseph W. Yockey, *Using Form to Counter Corruption: The Promise of the Public Benefit Corporation*, 49 U.C. DAVIS L. REV. 623, 627 (2015).

16. Richard L. Cassin, *Here's our new Top Ten list, with VimpelCom landing in sixth*, FCPA BLOG (Feb. 19, 2016, 9:28 AM), <http://www.fcpablog.com/blog/2016/2/19/heres-our-new-top-ten-list-with-vimpelcom-landing-sixth.html>.

17. FCPA. See also S. REP. NO. 95-114, 3-4, available at <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/senaterpt-95-114.pdf>; H.R. REP. NO. 95-640, 4-5, available at <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/houseprt-95-640.pdf>.

18. Yockey, *supra* note 15 at 627.

19. John Kerry, U.S. Sec'y of State, Remarks at the World Economic Forum, (Jan. 22, 2016), available at <http://www.state.gov/secretary/remarks/2016/01/251663.htm>.

20. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (U.S. Sentencing Comm'n 2015), <http://www.ussc.gov/guidelines-manual/2015/2015-ussc-guidelines-manual> (giving sentencing credit for effective Compliance and Ethics programs); see also Bribery Act 2010, c. 23 §7(2) (U.K.) (making it a defense to prove that a company “had in place adequate procedures designed to prevent persons associated with [the company] from undertaking such conduct.”); see also, SENTENCING COUNCIL, *supra* note 10, at 50 (making efforts to put anti-bribery measures in place a mitigating factor); see also LEGAL GUIDANCE, CORPORATE PROSECUTION ¶32(c)(Crown Prosecution Services) (“The existence of a genuinely proactive and effective corporate compliance programme.”), http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/#a09.

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investigators. Self-reporting and cooperation weigh against prosecution in both the U.S. and U.K.²¹ But voluntary disclosure does not guarantee that officials will waive or defer prosecution, which complicates these policies. U.S. policy states that “prosecution may be appropriate notwithstanding a corporation’s voluntary disclosure.”²² To clarify, in 2012, the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) jointly published “A Resource Guide to the Foreign Corrupt Practices Act.”²³ Unfortunately, the public response to the guide was one of disappointment and confusion.²⁴ U.K. policy is similar to U.S. policy; voluntary disclosure is weighed against other public policy factors, and no one factor is prescribed a particular weight.²⁵ So even if a company discloses its corrupt act, a prosecutor may still seek conviction.

When a company faces prosecution and pleads guilty, or is tried and convicted, U.S. and U.K. sentencing policies recognize cooperation as a mitigating factor. In the U.K., the court reduces a sentence if the “corporation co-operated with [the] investigation, made early admissions and/or voluntarily reported.”²⁶ In the U.S., “self-reporting, cooperation, and acceptance of responsibility” will result in a reduced sentence.²⁷

The DOJ has publicly touted the benefits of such disclosure and cooperation. At a speech in 2014, an assistant attorney general described a case where a cooperating corporation implicated two CEOs and an in-house counsel and thereby avoided corporate prosecution.²⁸ In the Alcoa World

21. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-28.700 (1999); *see also* CORPORATE PROSECUTION, *supra* note 20, at ¶32(a) (“A genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice, involving self-reporting and remedial actions, including the compensation of victims”), http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/#a09.

22. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-28.900.

23. CRIMINAL DIV. OF THE U.S. DEP’T OF JUSTICE AND THE ENF’T DIV. OF THE U.S. SEC. EXCH. COMM’N, *A Resource Guide to the Foreign Corrupt Practices Act* (2012), <https://www.justice.gov/criminal-fraud/fcpa-guidance>.

24. *See* Yockey *supra*, note 15 at n. 42, (citing e.g., Grant Thornton LLP, *New FCPA Guidelines Still Unclear to Many Executives* (2013), <http://www.grantthornton.com/~media/content-page-files/advisory/pdfs/2013/FIDS-2013-FCPA-Guidelines.ashx>; Bruce Carton, *U.S. Chamber of Commerce Pushes for Further FCPA Clarity and Reforms*, COMPLIANCE WK. (Feb. 20, 2013), <http://www.complianceweek.com/blogs/enforcement-action/us-chamber-of-commerce-pushes-for-further-fcpa-clarity-and-reforms#.VbMrcvmpdnk>; Peter J. Henning, *In Bribery Law, the Watchword Is Uncertainty*, N.Y. TIMES (Nov. 15, 2012, 1:29 PM), <http://dealbook.nytimes.com/2012/11/15/in-bribery-law-the-watchword-is-uncertainty/>; Samuel Rubinfeld, Joe Palazzolo & C.M. Matthews, *The Guidance: The FCPA Bar Reacts*, WALL ST. J. (Nov. 14, 2012), <http://blogs.wsj.com/corruption-currents/2012/11/14/the-guidance-the-fcpa-bar-reacts/>.

25. THE CODE FOR CROWN PROSECUTORS, § 4.11 (Crown Prosecution Service 2013), http://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf.

26. U.K. SENTENCING COUNCIL, FRAUD, BRIBERY AND MONEY LAUNDERING OFFENCES: DEFINITIVE GUIDELINE, effective 1 October 2014, 48-53.

27. U.S.S.G. § 8C2.5(g).

28. Leslie R. Caldwell, Assistant Attorney Gen., Speech at American Conference Institute’s 31st International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2014), *available at* <http://tinyurl.com/njfnztr> (referring to the PetroTiger cases), as cited in Grindler, Gary G.

Alumina case, Alcoa avoided a possible \$1 billion fine by cooperating with investigators, pleading guilty to violating the FCPA and paying \$384 million in SEC and DOJ penalties.²⁹ On the other end of the anecdotal spectrum, the DOJ uses the BNP Paribas case as a cautionary tale. There, the company paid an \$8.9 billion settlement, which DOJ claims would have been substantially lower if the corporation had fully cooperated.³⁰ In another case, the DOJ claimed that a company's failure to disclose misconduct resulted in a fine of \$772 million, which was more than triple what the DOJ would otherwise have sought.³¹ The DOJ and SEC guidebook promotes disclosure, too. It contains "background information about cases the Justice Department and the [SEC] decided not to pursue because companies promptly disclosed violations and took remedial action. This information furthers the government's goal of enticing businesses to cooperate by revealing information about violations rather than hoping to escape notice."³²

Thus, despite uncertainty about how heavily the DOJ will weigh a corporation's choice to disclose misconduct in favor of non-prosecution, voluntary disclosure promises benefits for the corporation. But how much, and what type of information must the company share? And how will that information be used?

V. Disclosure Alone is Not Enough; Earning Sentencing Credit Requires Substantial Cooperation

The minimum standard for cooperation in the U.S. is high: "In order for a company to receive *any* consideration for cooperation under this section, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct."³³ This expansive definition can create challenges for a company. There is no requirement to waive either the attorney-client or work-product privilege. But deciding not to disclose a relevant fact because it is subject to a privilege, is, for the corporation, deciding to forfeit sentencing credit.³⁴

and Laura K. Bennett, True Cooperation: DOJ's 'Reshaped Conversation' and its Consequences, in *CRIMINAL JUSTICE*, Summer 2015 at 39.

29. Grindler, True Cooperation, in *CRIMINAL JUSTICE*, *supra* note 28, at 39-40 (discussing the Alcoa case), quoting Leslie R. Caldwell, Assistant Attorney Gen., Remarks at the 22nd Annual Ethics and Compliance Conference (Oct. 1, 2014), *available* at <http://tinyurl.com/q34uoq9>.

30. *Id.* at 40-41.

31. *Id.* at 33 (discussing the Alstom case).

32. Henning, *supra* note 24.

33. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9.28.100; Sally Quillian Yates, Deputy Attorney General of the United States, *Memorandum: Individual Accountability for Corporate Wrongdoing*, Sept. 9, 2015, *available* at <https://www.justice.gov/dag/file/769036/download> ("fighting corporate fraud and other misconduct is a top priority of the Department of Justice.")

34. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-29.720.

In recent speeches, DOJ officials have clarified expectations. Mere information sharing is not enough, the Department considers cooperative only the companies that actively gather evidence against employees and share it with authorities.³⁵ Officials warn of “the severe consequences of ‘guilty pleas and landmark monetary penalties’ when a company is deemed not to have properly cooperated.”³⁶ So great is the pressure of this standard that some corporations have strained the limits of forcing an employee to talk. In at least one case, a prosecutor used DOJ policy in violation of the Sixth Amendment right to counsel and led the corporation—acting as a government agent—to violate an employee’s right against self-incrimination.³⁷ That specific policy has been superseded, but substantial pressures remain.³⁸

The DOJ’s high expectations of cooperation from corporations are not bad *per se*. They do, however, beg the question of whether a company choosing to cooperate to avoid prosecution or failing such avoidance to reduce a criminal penalty, opens itself to other risks. Specifically, if the company begins sharing large quantities of detailed information, how might it be used? Is it possible that the price of avoiding prosecution in one state is a large penalty in another?

VI. International Information Sharing Agreements Create a Risk of Parallel or Successive Prosecutions for the Cooperating Corporation

As of January 1, 2013, there were 247 bilateral agreements in force between the U.S. and the U.K., and thirty-two bilateral treaties in force

35. Grindler, *supra* note 28, at 34 (“In a 2014 speech, DOJ Principal Deputy Assistant Attorney General Marshall L. Miller bluntly emphasized the need for companies to gather evidence against their employees as the critical factor in determining whether they will receive leniency in corporate criminal investigations.”).

36. Leslie R. Caldwell, Assistant Attorney Gen., Remarks at New York University Law School’s Program on Corporate Compliance and Enforcement (April 17, 2015), as cited in Grindler, *supra* note 28, at 37.

37. See Grindler, *supra* note 28, at 33-36 for a thorough discussion of the case law, including *United States v. Stein*, 440 F. Supp. 2d 315 (S.D.N.Y. 2006), where the corporation, though its action, became a government agent and violated an employee’s Fifth Amendment right against self-incrimination.

38. The policy was known as “The Thompson Memorandum” because it was promulgated in 2003 by then-Deputy Attorney General Larry D. Thompson. It was controversial enough that Senator Arlen Specter, a Pennsylvania Republican, filed S. 30, the Attorney-Client Privilege Protection Act, which would have outlawed completely some of the practices the Thompson memo described. Immediately after the Bill was filed in 2006, the Deputy AG at that time, Paul McNulty, issued a superseding memorandum that cancelled the more controversial provisions of the Thompson Memo. For a discussion of the McNulty Memorandum and the reasons it replaced the Thompson Memorandum, see Wilmer Hale, Department of Justice McNulty Memo Curtails Controversial Portions of Thompson Memo—Legislation Introduced in the Senate (Dec. 13, 2006), available at <https://www.wilmerhale.com/pages/publicationsandNewsDetail.aspx?NewsPubId=94117>.

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between Nigeria and the U.S.³⁹ These 279 instruments include both U.S.-Nigeria and U.S.-U.K. mutual legal assistance treaties (MLATs). All three countries are parties to the United Nations Convention Against Corruption (UNCAC), and the U.S. and U.K. are parties to the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention). These instruments do not contemplate how, or whether, a state that initiates an enforcement action should consider, negotiate over, or coordinate regarding an enforcement action in another state.⁴⁰ They do contemplate broad information sharing about suspected corruption. Consequently, inter-state promises to share information undermine domestic incentives for voluntary corporate disclosure of wrongdoing.

A. INFORMATION SHARING

UNCAC Chapter IV sets out a broad scope of international cooperation.⁴¹ The opening paragraph of the chapter discourages states from limiting cooperation to criminal proceedings. Countries agree to "consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption."⁴² Article 46 envisions legal assistance to the broadest degree possible, including "identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes," as well as "identifying, freezing, and tracing proceeds of crime," and "the recovery of assets."⁴³ At the sixth session of the Conference of the State Parties to the United Nations Convention against Corruption held in November 2015, the States Parties adopted a resolution urging "parties that are using settlement and other alternative legal mechanisms to resolve corruption-related cases to work collaboratively with all relevant States parties to enhance international cooperation, information-sharing and recovery of proceeds of crime;" and "to proactively share information without prior request so as to engage all the States parties concerned early in the process, in accordance with article 46, paragraph 4, article 48, paragraph 1 (f), and article 56."⁴⁴ The Convention itself reflects this notion of

39. U.S. DEP'T. ST., *Treaties in Force, A List of Treaties and Other International Agreements of the United States in Force on January 1, 2013*, 214-15, 300-309, <http://www.state.gov/documents/organization/218912.pdf>.

40. U.N. Convention Against Corruption, art. 37, ¶ 5, 2349 U.N.T.S. 27 (2004) [hereinafter UNCAC], requires one State to consider incentivizing cooperation in another State by mutually agreeing on sentence mitigation, and Article 30, titled "Prosecution, adjudication and sanctions," discusses broadly some sentencing principles (i.e. retribution and general deterrence), but both provisions fall short of advocating for collective action.

41. *Id.* at 21-31.

42. *Id.* at 21.

43. *Id.* at 24.

44. United Nations Conventions Against Corruption/Conference of the States Parties to the United Nations Convention Against Corruption Resolution 6/2, paras. 9-10, [hereinafter UNCAC/COSP 6/2] *available at* <http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session6-resolutions.html#ftn7> (echoing the Conference's resolution 5/3 of 29 November 2013).

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proactive information sharing. In Article 38, the parties agree to take measures to encourage their own public authorities, public officials, and investigators to share information “on their own initiative, where there are reasonable grounds to believe that”⁴⁵ either Bribery of National Public Officials, Bribery in the Private Sector, or Money Laundering has been committed. These affirmative requirements force a corporation that discloses misconduct to officials in one state to assume that their disclosures are shared with officials in other states of jurisdiction.

The OECD Convention on Combatting Bribery of Foreign Officials in International Business Transactions is a shorter and more narrowly tailored agreement than the UNCAC. Nonetheless, the overarching information sharing, legal assistance, and universal enforcement policies remain. Like UNCAC, the OECD convention specifically envisions information sharing in criminal and non-criminal matters.⁴⁶ Article 3 requires each party to ensure that “the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable,” and requires *each party* to “consider the imposition of additional civil or administrative sanctions.”⁴⁷ This language suggests that states will independently enforce anti-corruption laws without consideration for penalties levied in other states.⁴⁸

The U.S. and Nigeria entered into a mutual legal assistance treaty (MLAT) in 1989.⁴⁹ The treaty is similar to other MLATs, and—though more detailed—resembles the legal assistance provisions of the UNCAC and the OECD Anti-Bribery Convention. This bilateral treaty covers assistance in criminal proceedings, bail hearings, sentencing hearings, non-criminal proceedings, matters where no criminal prosecution or investigation is pending, and even in cases where the investigation in the requesting state pertains to an act that is legal in the requested state.⁵⁰ Article XI reinforces

45. UNCAC, *supra* note 40, art. 38, at 19.

46. Org. for Econ. Co-operation and Dev. [OECD], *Convention on Combatting Bribery of Foreign Officials in International Business Transactions*, art. 9 (2011).

47. *Id.* art. 3, paras. 3-4.

48. This is not to say that they may not grant such consideration, but that they did not agree in the Convention to do so. Consequently, companies must look to the policy and practice of each country to determine the likelihood of receiving credit for sanctions paid in another country.

49. S. EXEC. REP. 106-24, TECHNICAL ANALYSIS OF THE MUTUAL LEGAL ASSISTANCE TREATY BETWEEN THE UNITED STATES OF AMERICAN AND THE FEDERAL REPUBLIC OF NIGERIA (2000), <https://www.gpo.gov/fdsys/pkg/CRPT-106erpt24/html/CRPT-106erpt24.htm>.

50. *Id.* art. I, the analysis, which was “prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating history,” emphasizes that the parties chose broad terms deliberately so the Treaty would include “other legal measures taken prior to the filing of formal charges in either State and the full range of proceedings in a criminal case, includ[ing] such matters as bail and sentencing hearings” and that proceedings covered by the treaty need not be strictly criminal in nature . . . “[So] the Treaty could be invoked in matters where no criminal

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this broad approach by insuring access to “records of the executive, judicial, and legislative units at the federal, state, and local levels in either country” and allowing each country to share nonpublic government information “to the same extent and under the same conditions” as it would share internally across agencies or departments.⁵¹ Information provided to the U.S. government by a corporation would fall squarely into one or more of these categories, whether or not U.S. prosecutors issued an indictment.

The U.S.-U.K. MLAT was signed in December 2004 and ratified by the U.S. in September of 2008.⁵² Like the U.S.-Nigeria MLAT, the U.S.-U.K. agreement is tailored to facilitate bilateral cooperation in criminal and non-criminal matters, including taking testimony, finding people, conducting searches, seizing evidence, and “identifying, tracing, freezing, seizing, and forfeiting the proceeds and instrumentalities of crime and assistance in related proceedings.”⁵³ The remainder of the document matches the U.S.-Nigeria MLAT closely, including the sweeping language about providing access to records, the use of compulsory judicial process, the seizure of the proceeds or profits of crime, and the collection of criminal fines.⁵⁴ The U.K. agreement goes further than the Nigeria agreement by including requirements for each country, on request, promptly to identify whether a suspect holds a bank account in either country.⁵⁵

For the corporation, the key takeaways are that the terms of these instruments are broad, and they require information sharing when crimes are first suspected: before any enforcement or sentencing decisions are finalized and before negotiations or settlement agreements are complete. Article 49 encourages parties to conduct joint investigations under bilateral or multilateral agreements (but makes no mention of joint enforcement or joint sentencing agreements).⁵⁶

B. SENTENCING PRINCIPLES

Article 37 of the UNCAC requires parties to:

Encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for

prosecution or investigation is pending, such as a civil forfeiture proceeding involving assets acquired through a criminal offense covered by the Treaty.” Further, Article I “permits assistance to be granted even if the conduct which is the subject of a request does not constitute a crime under the laws of the Requested State.”

51. *Id.* art. XI.

52. Mutual Legal Assistance Treaty, U.S.-U.K., Dec. 16, 2004, S. TREATY DOC. 109-13.

53. *Id.* art. 1, para. 2(g).

54. *Id.* art. 8 (“Taking Testimony and Producing Evidence in the Territory of the Requested Party”); *id.* art. 9 (“Records of Government Agencies”); *id.* art. 14 (“Search and Seizure”); *id.* art. 16 (“Assistance in Forfeiture Proceedings”).

55. *Id.* art. 16 bis.

56. UNCAC, *supra* note 40, art. 49.

investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.⁵⁷

Further, parties must consider mitigating the punishment of offenders, or granting immunity to those who provide “substantial cooperation in the investigation or prosecution” of offenses.⁵⁸ Paragraph 5 requires one state to consider providing for the possibility of mitigating punishment for a defendant who cooperated in another state. It does not require or encourage one state to give a defendant consideration for paying a fine, penalty, or settlement in another state.

The U.S.-Nigeria MLAT and the U.S.-U.K. MLAT are silent with respect to sentencing principles, while the OECD Convention offers only broad concepts.⁵⁹

UNCAC focuses on disclosure and cooperation but remains silent regarding sentence mitigation in one state based on cooperation in another. This contrast suggests that states view enforcement as a collective responsibility, but sentencing as a purely sovereign exercise.

C. Parallel or Successive Prosecution⁶⁰

UNCAC Article 47 recognizes the possibility of parallel or successive prosecutions by requiring parties to consider transferring criminal proceedings where “such transfer is considered to be in the interest of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.”⁶¹ Articles 51-59 focus on asset recovery.⁶² The Convention includes provisions that promote the broadest possible cooperation on recovering assets, to include seizing assets in one state for the benefit of an enforcement action in another, and allowing state parties access to civil courts to seek judgments and to bring to bear the power of a judicial enforcement order of a judgment or penalty outstanding in another state.⁶³

The OECD Convention implies coordinated enforcement actions by contemplating a situation where two countries with jurisdiction will agree on

57. *Id.* art. 37.

58. *Id.*

59. OECD, *supra* note 46, at art. 3, para. 2 (“effective, proportionate and dissuasive” penalties for bribery) & art. 8, para. 2 (“effective, proportionate and dissuasive” penalties for record-keeping violations).

60. These prosecutions, particularly when they occur successively in multiple jurisdictions, are called “carbon copy” prosecutions. This term was coined in the summer of 2011 by Andrew S. Boutros at a presentation during which he discussed, among other topics, the case this paper’s hypothetical is based on. See Andrew S. Boutros & T. Markus Funk, “Carbon Copy” Prosecutions: *A Growing Anticorruption Phenomenon in a Shrinking World*, 2012 U. CHI. LEGAL F. 259 (2012).

61. G.A. Res. 58/4, at 39 (Oct. 31, 2003).

62. *Id.* at 42.

63. See generally *id.*

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where prosecution is most appropriate.⁶⁴ But, no such deferral is envisioned with respect to sanctions. Article 3 requires each party to take measures to ensure that “the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable,” and requires *each party* to “consider the imposition of additional civil or administrative sanctions.”⁶⁵

While Article XVII of the U.S.-Nigeria MLAT leverages concurrent jurisdiction to empower each state’s efforts to seize the proceeds or profits of crime committed in the other state, it is silent on coordinating enforcement actions or concurrent prosecutions.⁶⁶ The U.S.-U.K. MLAT is similar.⁶⁷

Despite UNCAC and the OECD Convention’s tacit recognition of both the possibility of parallel or successive prosecutions and the value of a collective approach to enforcement decisions, the absence of any measures in the bilateral treaties should not inspire confidence in our hypothetical CEO. Almost as if to counter the DOJ’s anecdotes encouraging disclosure, equally powerful anecdotes stand to warn of how international information sharing can result in disproportionately large fines against corporations.⁶⁸ The TSKJ/Bonny Island prosecutions (on which this paper’s hypothetical fact pattern is loosely based) may be the most well-known.⁶⁹ In that case, a consortium of multinational corporations facing corruption charges forfeited in fines, restitution, settlements, judgments, and seizures \$1.5 billion in the U.S., \$126 million in Nigeria, about \$10.8 million in the U.K., \$22.7 million to the African Development Bank, and over \$28 million (in property forfeitures and fines) in Italy.⁷⁰ Another well-known set of cases is the Panalpina World Transport cases.⁷¹ There, Panalpina and five of its subsidiaries paid bribes in Nigeria and several other jurisdictions.⁷² Like the TSKJ consortium, the Panalpina corporations paid settlements in both the U.S. and Nigeria (\$230 million in the U.S. and \$18.8 million in Nigeria).⁷³ The specter of parallel or successive prosecutions remains real, and is not limited to Nigeria.⁷⁴

64. OECD, *supra* note 46, art. 4, para. 3.

65. *Id.*

66. Mutual Legal Assistance Treaties with Cyprus, Egypt, France, Greece, Nigeria, Romania, South Africa, Ukraine and The Inter-American Convention On Mutual Assistance in Criminal Matters with Related Protocol, Oct. 4, 2000, S. Exec. Rept. No. 106-24.

67. Treaty Between the United States of America and The United Kingdom of Great Britain and Northern Ireland, U.K.-U.S., Jan. 6, 1994, T.I.A.S. No. 96-1202, 2.

68. See Holtmeier, *supra* note 1, at 498.

69. *Id.*

70. *Id.* at 498-99 (summarizing the case).

71. *Id.* at 498.

72. *Id.* at 499-500.

73. *Id.*

74. John Frangos, *The Risk of Carbon Copy Prosecutions in Thailand*, TILLEKE AND GIBBENS INT’L LTD. (Mar. 9, 2015), <http://www.tilleke.com/resources/risk-carbon-copy-prosecutions-thailand>.

Further complicating the dueling examples above are several cases where prosecutors *have* reduced fines against corporations as a way of recognizing fines paid in other states. In some of these instances, observers and commentators believe that investigators and prosecutors worked together closely from the early stages of the case through negotiating settlements, which—in at least one case involving Siemens—spanned more than five years and resulted in settlements with five countries and the World Bank.⁷⁵

So how can the CEO weigh these disparate sets of individual cases? What does the data say?

VII. The Empirical Data Suggest That Voluntary Disclosure Does Not Reduce Penalties and That International Information Sharing Increases Penalties

In 2014, two authors conducted a quantitative empirical analysis of all FCPA anti-bribery enforcement actions from 2004 to 2011.⁷⁶ In their analysis, they considered a set of hypotheses relating to the correlation between sentencing factors and the severity of enforcement actions.⁷⁷ Ultimately, the study found that the DOJ and the SEC “impose greater aggregate sanctions for home-violation country pairs where the home country has a bilateral cooperation agreement with the SEC, a Mutual Legal Assistance Treaty (MLAT) with the U.S., and stronger local anti-bribery institutions.”⁷⁸ Similarly, “more egregious and extensive FCPA violations correlate with greater penalties.”⁷⁹ These findings are in keeping with the policy notions that in terms of severity, the punishment should fit the crime, and with the idea that information sharing agreements and international cooperation will ease the burden of extraterritorial evidence gathering. But the analysis also found that “voluntary disclosure, as well as cooperation and remediation, are *not* correlated with lower FCPA penalties.”⁸⁰ And, that “at the level of individual FCPA actions, . . . foreign regulators’ activities (investigations as well as sanctions) correlate with significantly higher and not lower sanctions. The DOJ and SEC do not appear to temper their FCPA sanctions to take into account foreign regulators.”⁸¹ The authors recognize that this could be a function of better evidence gathering through cooperation, and that it would be true if parallel investigations occur only in the most egregious cases.⁸² Nonetheless, bilateral or multilateral cooperation agreements—and the strong legal regimes they engender—

75. A full discussion of these cases, including the Siemens case, is found in Holtmeier, *supra* note 1, at 503-07.

76. Stephen J. Choi & Kevin E. Davis, Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act, 11 J. EMPIRICAL LEGAL STUD 409, 410 (2014).

77. *Id.* at 411.

78. *Id.*

79. *Id.* at 426.

80. *Id.* (emphasis added).

81. *Id.* at 440.

82. Choi & Davis, *supra* note 76, at 410.

correlate with “disproportionately large sanctions” from those other countries.⁸³

For our CEO, this is bad news. The U.K., U.S., and Nigeria share bilateral and multilateral cooperation agreements, which are correlated with higher penalties.⁸⁴ Because all three countries, as parties to UNCAC, have committed to unrequested and proactive information sharing about even suspicions of bribery, the company must assume that self-reporting will precipitate involvement by regulators in all three states.⁸⁵ While voluntary disclosure is not correlated with higher penalties, it is not correlated with lower penalties, either.⁸⁶ Worse still, the involvement of foreign regulators, which is guaranteed by corporate disclosure is correlated with “significantly higher” sanctions.⁸⁷ Thus, in light of the empirical evidence, voluntary disclosure seems unwise in this case.

VIII. Conclusion: The Policy Implications of Uncertain Corporate Sentencing Outcomes

For our hypothetical corporation, there is no clear solution. But, for policymakers negotiating international agreements, there is a larger lesson. The combined effects of strong, domestic anti-corruption laws and the information sharing provisions of international agreements create disincentives to corporate self-reporting. Reduced self-reporting is counterproductive to the international anti-corruption effort to promote “integrity, transparency and accountability,” and hinders the goal of prosecuting demand-side corruption and fighting grand corruption.⁸⁸ The solution, then, is to stabilize the international sentencing landscape for corporations; but how? The answer is collective state action, and Resolution 6/2 of the sixth session of the Conference of the State Parties to the United Nations Convention against Corruption held in November 2015 suggests a way forward.⁸⁹

Four specific points stand out in the Conference’s Resolution. In the Preamble, the Resolution refers to the use of settlements and administrative remedies in cases of corruption and calls upon states “to give due consideration to the involvement of the jurisdictions where the bribery schemes originated or where foreign officials were bribed.”⁹⁰ This

83. *Id.*

84. *Id.*

85. UNCAC/COSP 6/2, *supra* note 44, which echoes the Conference’s resolution 5/3 of 29 November 2013 [hereinafter]; *see also* UNCAC, *supra* note 40.

86. Choi & Davis, *supra* note 76, at 440.

87. *Id.*

88. UNCAC, *supra* note 40, art. 5, para. 1.

89. *See* Jay Holtmeier, *supra* note 1, at 498; *see also* UNCAC/COSP 6/2, *supra* note 44. For a general discussion of the concept of collective action and its success in the private sector, *see Collective Action: Innovative Strategies to Prevent Corruption*, (Mark Pieth, ed., Die Deutsche Bibliothek, 2012).

90. UNCAC/COSP 6/2, *supra* note 44.

paragraph—standing alone—does not say whether “consideration” means monetary compensation (as part of the enforcing state’s settlement), additional information (perhaps of the type our hypothetical CEO fears will follow voluntary disclosure), collaboration in reaching settlements, or a collaborative approach to the entire enforcement life-cycle.⁹¹ The remainder of the Resolution offers some clarification.

Paragraph 10 urges states to share information proactively, even in non-criminal resolutions and paragraph 9 urges cooperation while reaching settlements to further the goals of “international cooperation, information-sharing and recovery of proceeds of crime.”⁹² Once a judgment is entered, paragraph 2 asks states to “allow or expand cooperation in the enforcement of foreign confiscation judgments.”⁹³ Paragraph 6 is, perhaps, the most predictive of how the Conference envisions future enforcement actions.⁹⁴ There, the Intergovernmental Working Group on Asset Recovery is directed to, among other things, collect information and analyze factors “that influence the differences between the amounts realized in settlements and other alternative legal mechanisms and the amounts returned to affected States, with a view to considering the feasibility of developing guidelines to facilitate a more coordinated and transparent approach for cooperation among affected States parties and effective return.”⁹⁵

The U.S. has recently signaled a recognition of the need for greater transparency in sentencing in the domestic context. The U.S. DOJ, in September 2015, published a memorandum—now known as the Yates memo—that indicated a preference for prosecuting individuals rather than corporations.⁹⁶ In April 2016, the DOJ published its *FCPA Enforcement Plan and Guidance*, which signaled another step forward.⁹⁷ The *Guidance* sought to increase the behavior-modifying effects of both the threat of sanctions for misconduct and the promise of sentence mitigation for voluntary disclosure.⁹⁸ It promises that the Department will add “additional agents and prosecutors to investigate criminal activity. . . enhance[] cooperation with foreign law enforcement authorities. . . [and] provide[] greater transparency about what [DoJ] require[s] from companies seeking mitigation credit. . . and what sort of credit those companies can receive.”⁹⁹ Reactions

91. U.N. Convention Against Corruption Conference of the States Parties to the United Nations Convention Against Corruption Resolution 6/2, <http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session6-resolutions.html#ftn7>.

92. *Id.* paras. 9, 10.

93. *Id.* para. 2.

94. *Id.* para. 6.

95. *Id.*

96. See U.S. DEP’T OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GEN., *INDIVIDUAL ACCOUNTABILITY FOR CORPORATE WRONGDOING* (2015).

97. See U.S. DEP’T OF JUSTICE CRIMINAL DIVISION, *MEMORANDUM: THE FRAUD SECTION’S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE* (Apr. 5, 2016).

98. *Id.* at 2.

99. *Id.*

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to the *Guidance* were mixed, and more data is needed for a full assessment.¹⁰⁰ Nonetheless, this progress in the U.S. domestic enforcement context only further underscores the need for an international solution.

In order to leverage states' incentives for self-reporting in service of international anti-corruption policy goals, the international community should first agree on a set of anti-corruption sentencing principles, which could be contained in the guidelines that United Nations' Asset Recovery Working Group will craft.¹⁰¹ These principles should answer important questions for corporations. Should restitution be the primary goal of enforcement actions against corporations, or is retribution equally as important? Should penalties be higher against corporations that commit corrupt acts in developing countries, or against companies whose home states have strong anti-corruption laws? Is influencing corporate behavior a higher or lower priority than punishing individual wrongdoers? The answers to these questions—and others—would then shape future bilateral and multilateral instruments, and would encourage the development of specific mechanisms allowing for anti-corruption coordination from the investigative phase through sentencing. These more specific agreements could address questions of whether countries would focus prosecution in one state but share settlements, or whether they would coordinate in negotiating settlements with corporations to require payments in proportion to the harm caused in each state. They could also wrestle with issues of grand corruption

100. Charles Duross, James Kouklos, Amanda Aikman & Lauren Navarro, *DOJ's New FCPA Pilot Program Will Have Only Marginal Impact*, LAW360 (Apr. 8, 2016), <http://www.law360.com/articles/781113/doj-s-new-fcpa-pilot-program-will-have-only-marginal-impact> (“the DOJ’s need to build flexibility into the pilot program limits its ability to provide the greater certainty that the business community wants” . . . “there is not much that is new in the guidance” . . . “the current pilot program will likely only have a marginal overall impact on a given company’s overall approach to voluntary disclosure.”); see also Brian F. Saulnier et al., *The First 90 Days of DOJ's FCPA Pilot Program*, LAW360 (July 11, 2016), <http://www.law360.com/articles/815464/the-first-90-days-of-doj-s-fcpa-pilot-program>. (“Although uncertainties remain that may prevent the pilot program from meaningfully influencing corporate decision-making in the short term, initial observations demonstrate a real commitment to decreasing the length and burden of FCPA investigations and equipping corporate boards with a road map for efficient FCPA compliance programs.”).

101. This approach departs from the fully state-centric system that has operated since the Westphalia Agreement. That is not to say that I advocate for a post-nationalistic system. Instead, I envision an agreement that paves the way for states to create mechanisms that better serve a set of agreed-upon principles. Specifically, the information sharing agreements could serve as tools that would allow states to share or withhold information in proportion to another state’s adherence with or divergence from these same principles. The U.S. government, for its part, has recognized that transnational influences will strain the state system, and specifically envisioned a possible future “in which nation-states are not in charge of setting the international agenda. The dispersion of power and authority away from nation-states has fostered the growth of sub-national and transnational entities including social and political movements. Growing public concerns about environmental degradation and government inaction come together . . . to ‘empower’ a network of political activists to wrest control of the issue out of country-level officials in capitals.” U.S. NATIONAL INTELLIGENCE COUNSEL, NIC 2008-003, *Global Trends 2025: A Transformed World*, 89 (2008) (emphasis added to chs. 6-7).

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and specifically decide whether one state could condition its information sharing on the demand-country's willingness to prosecute its own corrupt officials.

By agreeing on sentencing principles and including specific provisions governing coordination in international instruments, pursuing and enforcing transnational corporate corruption becomes a tool states can use collectively to fulfill their obligations under UNCAC and similar multilateral instruments and to empower them in the global anti-corruption fight.

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