Aligning Emerging Global Strategies to Combat Corporate Corruption: From a Two Thrust Approach to a Two Swords One Thrust Strategy of Compliance, Prosecutorial Discretion, and Sovereign Investor

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Aligning Emerging Global Strategies to Combat Corporate Corruption: From a “Two Thrust Approach” to a “Two Swords One Thrust Strategy” of Compliance, Prosecutorial Discretion, and Sovereign Investor Oversight in China

LARRY CATA BACKER*

I. Introduction

Who cares about corruption? In September 2017, the media reported that parliamentarians at the Council of Europe had been bribed by Azerbaijan to mute criticism of their government within the Council’s human rights organs. Also in September 2017, France’s financial prosecutor announced the commencement of a corruption investigation against the son of the former president of the International Association of Athletics Federations for payments to influence the choice of host cities for the largest global sporting events. At the same time, authorities in Brazil launched a probe into vote buying for the 2016 Olympics, a criminal

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1. See Alvaro Cuervo-Cazurra, Who Cares about Corruption?, 37 J. INT’L BUS. STUD. 807, 807-822 (2006) (arguing that anti-bribery laws abroad may act as a deterrent against engaging in corruption in foreign countries, but that corruption results in relatively higher FDI from countries with high levels of corruption).


In January 2016, the Norwegian Pension Fund Global intensified its efforts to engage in more aggressive anti-corruption investment strategies. In December 2013, Vietnam reported that it had sentenced bankers to death in connection with embezzlement from a state owned bank.

It’s a message to those in this game to be less greedy and that business as usual is getting out of hand,” said Adam McCarty, chief economist with the Hanoi-based consulting firm Mekong Economics. “The message to people in the system is this: Your chances of getting caught are increasing,” McCarty said. “Don’t just rely on big people above you. Because some of these [perpetrators] would’ve had big people above them. And it didn’t help them.

It is noteworthy that Colombia, shortly after the peace settlement ending fifty years of civil war, turned its attention to the control of criminal corruption in response to corruption scandals involving transnational corporations that reached to the office of the president of the republic. “Already seven people have been jailed in the case, including a former senator and an ex-vice minister of transport. The attorney general also asked the Supreme Court of Justice to investigate five other members of congress.

In China, Ding Ning, the chairman of Yucheng Group, was recently sentenced to life in prison for his role in an online lending fraud scheme. In August 2017, “[t]he Supreme People’s Procuratorate said China would

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7. Id.
9. Id.
strictly crack down on any crimes that seriously damaged financial security and that destroyed financial orders."

Corruption, especially bribery, has become a matter of international concern. The United Nations (U.N.) Global Compact, a voluntary initiative between large enterprises under the leadership of the U.N. committed to implement universal sustainability principles and to take steps to support U.N. goals, is built around ten principles. Its tenth principle states that "[b]usinesses should work against corruption in all its forms, including extortion and bribery." The U.N. Global Compact has expressed the view that "[c]orruption is a considerable obstacle to economic and social development around the world. It has negative impacts on sustainable development and particularly affects poor communities."

In that respect, the U.N. Global Compact highlights a "two thrust" attack on corruption. "New and tougher anti-corruption regulations continue to emerge worldwide. All companies need robust anti-corruption measures and practices to protect their reputations and the interests of their stakeholders."

These "two thrusts"—the first consisting of national legislation (criminal and civil) and the second consisting of corporate self-regulation against corruption—have become the foundation of contemporary measures to combat corruption, especially when committed by individuals within the largest public or private enterprises. The extent of national legislation and international efforts to make national legislation coherent is well known. National efforts continue to develop. For example, in 2017, the government of the United Kingdom adopted the Criminal Finances Act of 2017. The Act made provisions in connection with terrorist property and created corporate offenses for cases where a person associated with a corporate body or partnership facilitates a tax evasion offense.

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11. Stella Qiu & Vincent Lee, China's Top Prosecutor to Intensify Crackdown on Financial Crimes, REUTERS (Aug. 22, 2017), https://www.reuters.com/article/china-finance-crime/chinas-top-prosecutor-to-intensify-crackdown-on-financial-crimes-idUSKBN181184 ("This year, high profile regulators who have been caught up in President Xi Jinping's anti-corruption drive include the former head of the insurance regulator, former vice chairman of the securities regulator and former assistant chairman of banking regulator.").


13. Id.


15. Id.


17. See, e.g., id.

18. Criminal Finances Act 2017, c. 22 (U.K.). The Act made provisions in connection with terrorist property and created corporate offenses for cases where a person associated with a corporate body or partnership facilitates a tax evasion offense.
touches virtually every country on earth. The international community has also adopted some soft law instruments with some influence in developing customary standards of conduct and expectations in economic relations. In the United States, the Foreign Corrupt Practices Act (FCPA) has served as a model, variations of which have been adopted elsewhere. The Criminal Law of the People’s Republic of China prohibits “official bribery,” which applies to state officials and state entities, as well as “commercial bribery,” which applies to virtually everyone else. A great number of other states have enacted anti-bribery and corruption laws as well.

Recent reports from the global financial sector have highlighted the way in which this “two thrusts” strategy has also begun to be felt by actors in financial markets, especially by those firms that are in the business of investing in or lending to operating companies worldwide. In one recent case, an American mutual fund manager said in an SEC filing that it sold all shares it held in Petrofac because of an ongoing corruption

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20. See, e.g., G.A. Res. 51/191, Declaration Against Corruption and Bribery in International Commercial Transactions, (Dec. 16, 1996). For a review of how this declaration fits into the broader context of the fight against corruption, see Vlassis, supra note 16.


23. The International Bar Association has created a database with the relevant anti-bribery laws from fifty-six states, as well as international conventions. See National Anti-Bribery Legislation, Int’l B. Assoc. (Dec. 1, 2014), https://www.ibanet.org/LPD/Criminal_Law_ Section/AntiCorruption_Committee/Resources.aspx (“texts of international anti-bribery conventions as well as the anti-bribery legislation of a number of countries [are] accurate as of 1 December 2014”).
investigation by the UK’s Serious Fraud Office. That SFO investigation is focused on Petrofac’s past relationship with Unaoil. Ohio National Fund, Inc. said the “escalating fraud investigation seems to us a thesis changer.”

The U.S. Securities and Exchange Commission (SEC) has noted the priority to which it has given corruption cases under the FCPA; its enforcement actions suggest the preference for civil penalties as punishment for violations of the Act. The complex nature of the extraterritorial effects of anti-corruption measures and the weaknesses of arguments against such efforts have also been noted. Indeed, financial institutions, and most notably, sovereign wealth funds, have begun to more vigorously defend against corruption by building anti-corruption measures and requirements into their investment strategies as well as in their shareholding policies.

Related to these emerging trends is another—the increasing emphasis on monitoring and compliance programs imposed formally and informally on and by enterprises. Governments incentivize this obligation by their willingness to enforce cooperation agreements with enterprises facing corruption probes in order to avoid criminal sanction. These have been


advanced in the United States and in the United Kingdom. What makes this interesting is the way that governments, having created a strong tradition of respecting the autonomy of corporations even when they are subsidiaries, now seek to treat production chains as a single enterprise for purposes of corruption probes. Most interesting among these efforts is the so-called Pilot Program launched by the U.S. Department of Justice in April 2016, which was designed to encourage company self-reporting and cooperation to avoid exercises of prosecutorial discretion to seek criminal penalties against companies or their employees. Additional due diligence efforts may be required under provisions of the U.K.’s Criminal Finances Act of 2017. Under this Act, an enterprise may well incur criminal and civil liability for acts attributable to it occurring within its supply chain if connected with torture involving public officials. In Brazil, the Clean Companies Act includes a leniency provision permitting state prosecutors to enter a “deferred prosecution deal for companies willing to plead guilty and settle corruption charges.” The effect is that the legal relationships among corporate enterprises or between corporations and their clients (with whom there may be no ownership relationship) are now treated as irrelevant for purposes of criminal investigation.

These trends tend to challenge the traditional legal and societal principles for the organization of business and its responsibilities. They also point to a

33. See id. The Press Release explained that the Pilot Program was in part “designed to motivate companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs.” U.S. DEP’T OF JUSTICE, CRIMINAL DIVISION Launches New FCPA Pilot Program, JUSTICE.GOV (April 5, 2016), https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program.
35. Rogers & Todorov, supra note 34 (“if a company is unfortunate enough to identify a Gross Human Rights Abuse with which it is connected, it may wish to consider proactively investigating the allegations. This will help the company beat civil society to the punch, and will demonstrate a good faith effort to mitigate any potential violations.”).
37. Felipe Rocha dos Santos, New Guidance for Brazil Anti-Corruption Settlements, THE FCPA BLOG (Sept. 7, 2017), http://www.fcpablog.com/blog/2017/9/7/felipe-rocha-dos-santos-new-guidance-for-brazil-anti-corrupt.html. The settlements have proven controversial, and have sometimes been blocked by the Brazilian Federal Prosecutor’s Office for excessive leniency. Id.
38. See Lei No. 12,846/13.
new and heightened importance of corruption for both states and financial institutions. The trends suggest some of the ways in which legal systems and the practices of large institutions in global markets have been contributing to changes in the frameworks within which corruption is detected, controlled, and punished. This article first examines two less well known elements of the “two thrusts” approach to corruption that focus on corporate compliance programs. The first is the use of sovereign investing as a tool for the correction of corruption and the supervision of institutional reform to avoid future corruption. The second is the use of prosecutorial discretion to allow legal regimes to manage corporate compliance programs. In the former case, state officials use private power to aid corporate self-regulation; in the latter case, state officials use public authority to devolve supervision to corporate surveillance mechanisms.39

In the next section, the article considers the way in which sovereign wealth funds are emerging as potentially useful instruments of corruption management. The section that follows briefly considers the utility of government policies that favor settlement and cooperation agreements to manage company efforts at corruption self-regulation in the context of sovereign lending practices that aid in anti-corruption efforts. The effect, though little publicized, can be quite potent—a “Two Swords One Thrust” can serve as another effective strategy in governmental and private efforts to combat corruption. The “Two Swords One Thrust” strategy combines the power of state officials to exercise discretion in managing anti-corruption laws and the authority of financial institutions to control the access of enterprises to their investment universe or to exercise their shareholder authority to influence corporate behavior. This article suggests briefly the utility of this strategy for Chinese anti-corruption efforts. Within China, it may be possible to coordinate compliance efforts by the procuratorate with that of the Chinese sovereign wealth funds through the medium of social credit systems currently being developed.

II. One Sword: Prosecutorial Discretion and Compliance Systems

The majesty of domestic legal orders, and to some extent international law embedded in such orders, is tempered by the power vested in state officials to exercise discretion in deciding when and how to apply the law against those subject to its strictures. Though the abuse of prosecutorial discretion is a constant problem in many systems40 and can be a mark of systemic corruption,41 it has never been viewed as corruptive enough to eliminate

39. See JUSTICE MANUAL, supra note 29, § 9-28.000; Bestemmelser om forvaltningen av States pensjonsfond, nr. 123.
discretionary power in the prosecutor. Prosecutorial discretion is usually understood in terms of individual decisions with respect to a specific individual or entity subject to investigation. But many states have permitted the development of rules for the institutionalization of prosecutorial discretion. The efforts to build a cage of regulation around the decision to enforce the law have some benefits. The regulations provide guidance and reduce the likelihood that personal rather than institutional objectives are the primary basis for exercises of discretion. They also provide notice to people and entities subject to the law to permit them to better manage their behavior so they may avoid legal entanglements and violation of law. With respect to this last point, the institutionalization of discretion effectively provides persons and institutions subject to law a safe harbor against prosecution if they agree to follow the rules under which prosecutors are instructed to refrain from bringing legal proceedings.

Some jurisdictions, such as the United States and Brazil, have institutionalized rules for exercising prosecutorial discretion and the safe harbors produced under such rules; they have also developed mechanisms that empower prosecutors to enter into binding agreements to defer prosecution and to impose conditions for the support of the agreement.

Prosecutors not only use [deferred and non-prosecution agreements (D/NPAs)] to sanction firms, they also use them to . . . impose mandates on firms that require them to change their internal governance or business practices. These D/NPA mandates thus enable prosecutors to create and impose new legal duties whose breach can subject the firm to criminal sanction.

The exercise of prosecutorial power in this way has been criticized for expanding the power to effectively impose conduct norms on corporations in derogation of the traditional powers of legislatures to establish these basic rules for liability. Yet it is not necessarily fair to suggest that prosecutors
use their discretion to create new legal standards without guidance. It might be more useful to understand the use of discretionary authority and its institutionalization in policy as a means through which prosecutors can effectively legalize societal norms and aspirations. In this sense, deferred prosecution agreements (DPAs) and, more generally, policies on charging for violations in the face of cooperation and compliance, institutionalize corporate governance principles that reflect emerging customs and patterns of behavior in corporate behavior. For example,

[the U.K.’s deferred prosecution agreement system] is based on the American model but differs significantly from it in the requirement for judicial confirmation that the entry into a DPA in the particular case is in the interests of justice and that the proposed agreement’s terms are fair, reasonable and proportionate. The court’s reasons for its decision must be published, subject always to a power to delay publication where it might affect a fair trial of individuals.47

Brazil follows the same model.48 In the United States, whether such institutional rules for constraining prosecutorial discretion or the D/NPSs produced through them require judicial scrutiny, exceed the administrative authority of prosecutors, or otherwise should be a matter of concern for the appropriate U.S. governmental apparatus is an issue left for others.49 The effectiveness of using discretionary state power to change enterprise behaviors as a means of addressing the issue of corruption appears to change the dynamics of behavior between the state and enterprises. It has moved the relationship from an adversarial one to one grounded in cooperation. It is true that this cooperation is coerced and its parameters are entirely controlled by the state. But to the extent that cooperation—through the development of transparent compliance systems—furthers the governmental policies of suppressing bribery and corruption, it reflects an effective implementation of a political choice among core political values.

What is it that these DPAs provide, and how do institutional rules around prosecutorial discretion contribute to managing the challenge of corruption in economic enterprises? A consideration of the parameters of the U.S. approach is instructive. Since 1999, the U.S. Department of Justice has established guidelines for prosecuting corporations and other business organizations.50 These guidelines provide parameters for federal prosecutors

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47. Milford, supra note 28.
48. See Santos, supra note 37.
and do not create any enforceable rights in parties involved in litigation with the government. The U.S. federal approach is built around the Justice Manual promulgated by the U.S. Department of Justice, specifically the Principles of Federal Prosecution of Business Organizations (PBO). It ought to be noted that while the PBO is meant to provide instructions for binding others, it does not itself bind the government. The purpose of the Manual is to guide the exercise of prosecutorial discretion, but at the same time to base that on the willingness of individuals and enterprises to change their behavior in accordance with the factors used to guide the exercise of discretion.

The PBO starts with an expression of policy—the fundamental principle that the prosecution of corporate crime is a high priority. The object of this policy is the protection of the economic integrity of the U.S. market system “at the expense of the public interest.” To that end, the basic approach is to charge the most serious offense that is consistent with the nature of the wrongdoing. The foundation of the policy is to prosecute individuals rather than the entity on whose behalf they may be acting.

The PBO then produces its own aggregated interpretation of the law of state corporate fiduciary duty (over which it has no authority to tinker with or change, much less interpret). The Department of Justice has chosen to split that duty into two parts: first, a duty to shareholders, who are described as “the corporation’s true owners,” and second, a generalized duty of honest dealing with outsiders through regulatory filings and public statements. Regarding this federal initiative to enforce its own reading of

51. See id. § 1-1.200.
52. Id. § 9-28.000.
53. Id. § 9-28.1500.
54. “Since federal prosecutors have great latitude in making crucial decisions concerning enforcement of a nationwide system of criminal justice, it is desirable, in the interest of the fair and effective administration of justice in the federal system, that all federal prosecutors be guided by a general statement of principles that summarizes appropriate considerations to be weighed, and desirable practices to be followed, in discharging their prosecutorial responsibilities.” Id. § 9-27.110.
55. Id. § 9-28.010.
56. Id.
58. Id. § 9-28.010. There are three reasons advanced for this approach. The first is that it is easier to identify the full extent of enterprise-wrongdoing by following the misbehavior trails of individuals. Id. Second, targeting individuals provides an easy way to intelligence that may produce evidence of misconduct of more highly placed individuals within the company. Id. Third, “we maximize the likelihood that the final resolution will include charges against culpable individuals and not just the corporation.” Id. This is emphasized in § 9-28.1300: “In deciding whether to charge a corporation, prosecutors should consider whether charges against the individuals responsible for the corporation’s malfeasance will adequately satisfy the goals of federal prosecution.” Id. § 9-28.1300.
59. Id. § 9-28.100.
60. Id.
61. Id.
fiduciary duty obligations imposed under state law (along with disclosure obligations and general fraud duties that may be sourced elsewhere), “prosecutors should be mindful of the common cause we share with responsible corporate leaders who seek to promote trust and confidence.”

The object of prosecution, then, is at least in part to ensure cooperation and to develop partnerships with corporate leaders to ensure the integrity of the economic system within which both operate. This is to be achieved by encouraging not just respect for the law but (in cooperation with prosecutors at times) vigorous programs of compliance, evidenced by disclosures to prosecutors and other officials as necessary, and self-regulation.

On this general basis, the PBO builds its core general principle of prosecution: “[c]orporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. . . . Indicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes.” The governance effects of indicting corporations are emphasized in the commentary to this PBO general principle. An indictment is an efficient form of obtaining broad regulatory compliance and self-regulation without the need for intervention of legislative or other administrative bodies. In weighing whether civil or regulatory alternatives are better suited to deal with misconduct, prosecutors must consider the adequacy of those methods to “adequately deter, punish and rehabilitate a corporation that has engaged in wrongful conduct.” In any case, the goals of punishment, deterrence, and rehabilitation are at the center of discretionary decision making by the prosecutor.

Balanced against the quasi-legislative and administrative value of prosecution is that of D/NPAs. From the core general principle, the PBO builds a system of principles for exercising discretion in the prosecution of business entities. The key principle is grounded on the determination, by federal prosecutors, of the legal effect of corporate personality. Because, the PBO insists, a corporate entity is little more than the sum of the actions of

62. Id.
63. Id.
64. JUSTICE MANUAL, supra note 29, § 9-28.200.
65. Id. § 9-28-200(B).
66. Id. (“For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal misconduct that is pervasive throughout a particular industry. . . . In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, . . . there may therefore be a substantial federal interest in indicting a corporation under such circumstances.”). Also, there is an acknowledgment that prosecutors sometimes ought to defer to “civil and regulatory authorities.”).
67. Id. § 9-28.1200.
68. Id. § 1-12.000 (“Department prosecutors and civil attorneys handling white collar matters should timely communicate, coordinate, and cooperate with one another and with agency attorneys to the fullest extent appropriate to the case and permissible by law . . . .”). See also id. § 1-12.100.
individuals, it is the individual rather than the entity to which the prosecutor ought to look in the first instance.\textsuperscript{69}

Beyond the key principle of seeking to punish the individual, the PBO also sets out factors that prosecutors ought to consider in exercising discretion.\textsuperscript{70} These include the nature and seriousness of the offense, the pervasiveness of wrongdoing within the enterprise, the corporation’s prior history of misconduct, the willingness to cooperate with prosecutors, the value of corporate compliance programs, the willingness to timely and voluntarily confess to wrongdoing, the extent of corporate remedial action, the extent of collateral consequences of wrongdoing, the adequacy of remedies, and the adequacy of prosecutions of individuals.\textsuperscript{71} The commentary makes clear that these factors are illustrative rather than exhaustive, and their use is also a matter of discretion.\textsuperscript{72}

A number of the factors to be considered are the subject of further policy. Special provision is made for activities of a multinational corporation, which "necessarily intersects with federal economic, tax, and criminal law enforcement policies."\textsuperscript{73} The pervasiveness of wrongdoing serves as a prosecutorial trigger in effect to deploy prosecution as a means of re-socializing the corporation to better conduct. Thus, the PBO instructs to prosecute even minor misconduct where it indicates a corporate culture that prosecutors deem worthy of changing.\textsuperscript{74} In addition, the PBO adheres to the principle that "a corporation, like a natural person, is expected to learn from its mistakes."\textsuperscript{75} Cooperation also has value as a mitigating factor.\textsuperscript{76} But the nature of cooperation is quite specific—the corporation must identify all individuals tainted with misconduct and provide all facts "relating to" that

\textsuperscript{69} \textit{Id.} § 9-28.210 ("Provable individual culpability should be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation, including a deferred prosecution or non-prosecution agreement, or a civil resolution."). Yet the commentary suggests a preference for sweeping individual and entity liability together where possible, providing an expansive interpretation of legal rules for imputing individual conduct on corporate actors. \textit{Id.} § 9-28.210(B).

\textsuperscript{70} \textit{JUSTICE MANUAL, supra note 29, § 9-28.300.}

\textsuperscript{71} \textit{Id.} Note the effect of the factors on building incentive structures to develop and implement compliance programs satisfactory to the federal prosecution officials and to sacrifice legally protected rights to contest accusation by rewarding confession and disclosure over the more traditional adversarial rights of prosecutorial actions, individual or enterprise. \textit{Id.} § 9-28.300(B). The result is a weakening of the traditional structures of conventional relations between the state and its subjects, while increasing the efficiency of mechanics of enforcement of behavior norms. \textit{See id.}

\textsuperscript{72} \textit{Id.} § 9-28.300(B).

\textsuperscript{73} \textit{Id.} § 9-28.400. The comment advises prosecutors to be cognizant of jurisdictional and prosecution policies of other federal agencies. \textit{Id.} § 9-28.400(B).

\textsuperscript{74} \textit{Id.} § 9-28.500.

\textsuperscript{75} \textit{JUSTICE MANUAL, supra note 29, § 9-28.600(B).}

\textsuperscript{76} \textit{Id.} § 9-28.700. The PBO notes that the "failure to cooperate, in and of itself, does not support or require the filing of charges with respect to a corporation any more than with respect to an individual." \textit{Id.}
misconduct.\textsuperscript{77} The PBO is itself bound by higher law to the extent its provisions are unavoidable, and they appear to be unavoidable in clashes between aggressive efforts to obtain cooperation and the rights of criminal defendants under the U.S. legal system's core principles. Provision is thus made for respect of attorney-client privilege and the attorney work product protection.\textsuperscript{78} But the position is defensive and takes some umbrage at the extensive criticism of its aggressive stance, throwing up its assessment of the importance of its own mandate against the purported efforts of enterprises and individuals to hide behind the law to avoid punishment for misconduct.\textsuperscript{79} This is hardly reassuring, but it evidences the extent to which the government apparatus privileges its own interests in the objective of seeking out and punishing wrongdoing—as it sees it.\textsuperscript{80} This tension is also clear in the PBO's consideration of the way in which cooperation is valued in exercising prosecutorial discretion.\textsuperscript{81} Here, the PBO walks a fine line between pushing hard for information and disclosure and recognition of, to the narrowest extent consistent with law, respect for corporate and individual rights within an adversarial system. One of the most interesting aspects of this section of the PBO is the way that it highlights the great tension between the mechanics and cultures of the modern administrative state—grounded in management and compliance—and the old cultures of common-law-based liberal democracy, grounded in the prerogatives of individuals and bodies corporate against the sovereign into which the individual is not entirely subsumed.\textsuperscript{82}

But just as disclosure, compliance, and cooperation can balance in favor of exercising prosecutorial discretion against litigation and toward D/NPA regimes, obstruction can have the opposite effect.\textsuperscript{83} "Examples of such conduct could include: inappropriate directions to employees or their counsel, such as directions not to be truthful or to conceal relevant facts; making representations or submissions that contain misleading assertions or material omissions; and incomplete or delayed production of records."\textsuperscript{84} There is irony here. While the government expects the corporation to fully disclose all facts related to an investigation, it also expects the corporation's silence with respect to its communication with the government, at least to

\begin{itemize}
\item 77. Id. "The extent of the cooperation credit earned will depend on all the various factors that have traditionally applied in making this assessment (e.g., the timeliness of the cooperation, the diligence, thoroughness and speed of the internal investigation, and the proactive nature of the cooperation)." Id.
\item 78. Id. § 9-28.710.
\item 79. Id.
\item 80. The tension is especially evident in mediating prosecutorial conduct concerning waivers of attorney client privilege or work product protections. See id. § 9-28.750.
\item 81. JUSTICE MANUAL, supra note 29, § 9-28.720.
\item 83. JUSTICE MANUAL, supra note 29, § 9-28.730.
\item 84. Id.
\end{itemize}
the extent that such disclosure can be tied to the misconduct of others. Moreover, offers of cooperation are not to be confused with immunity. Cooperation is a factor in decisions about the exercise of administrative discretion; it is not a guarantee of corporate escape from liability. The PBO spends some time describing corporate compliance programs. Though insufficient in its own right to justify not charging a corporation for criminal conduct, the “Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own.” And, citing a number of judicial opinions to this effect, even if a corporate compliance program was established to prevent the criminal conduct in question, the compliance program alone is insufficient to avoid prosecution. The critical factors in giving credit for compliance programs—or put another way, the principal character of corporate compliance programs for which PBO provides an incentive—are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is encouraging or pressuring employees to engage in misconduct to achieve business objectives. The ability of the compliance program to ferret out wrongdoing in a timely manner is an important consideration. The object is to distinguish what the PBO characterizes as “paper programs” from effective ones, with reference not merely to construction but to staffing and founding as well. Tied to corporate compliance programs is the obligation of voluntary disclosure. Discretion is grounded in effect on corporate compliance programs, the results of which are routinely transmitted to the appropriate state agencies for review and action. This aligns with programs of other administrative agencies that have already constructed formal programs of “self-reporting coupled with remediation and additional criteria.” Yet even in the absence of formal, voluntary disclosure programs, ad hoc voluntary disclosure counts for something, as long as it is timely. A

85. Id. (“for example, where the disclosure of such information could lead to flight by individual subjects, destruction of evidence, or dissipation or concealment of assets.”).
86. Id. § 9-28.740.
87. Id. § 9-28.800.
88. Id.
89. Id. § 9-28.800(B).
90. Justice Manual, supra note 29, § 9-28.800(B). Although there is no formula, the PBO specifies a number of factors, including “the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal misconduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program, and revisions to corporate compliance programs in light of lessons learned.” Id.
91. Id.
92. Id.
93. Id. § 9-28.900.
94. Id.
95. Id.
similar approach applies to weighing the efforts of corporations to provide restitution or otherwise remediate wrongdoing.96 The remediation must be meaningful and may include disciplining individual wrongdoers, making restitution, and reforming compliance mechanisms.97 These efforts touch on the collateral consequences of wrongdoing98—the extent of which a prosecutor may weigh in exercising discretion with respect to charging a crime or resolving a criminal case.99

D/NPAs may be considered in this context “where the collateral consequences of a corporate conviction for innocent third parties would be significant, . . . with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism.”100 And that brings the PBO to the heart of its regulatory sword—the power to enter into plea agreements or D/NPAs.101 The PBO provides a framework for determining the terms of such agreements or pleas.102 Plea agreements ought to include a conscious admission of guilt and further the core principles of punishment, deterrence, and rehabilitation.103

The PBO provides the basis for structuring pleas and D/NPAs in the context of corruption investigations against enterprises. These guidelines are set out in an FCPA Enforcement Pilot Project announced as part of the Department of Justice’s Fraud Section Foreign Corrupt Practices Act Enforcement Plan and Guidance.104 It starts by declaring bribery to pose “a serious systemic criminal problem across the globe [which] harms those who play by the rules, siphons money from communities, and undermines the rule of law.”105 To the ends of reducing this threat, the FCPA Enforcement Plan and Guidance specifies a three-step project for advancing its strategy of combating corruption through bribery.106 First, the government committed to intensifying its investigative and prosecutorial efforts against bribery.107 Second, the government committed to engaging in multilateral efforts to

96. JUSTICE MANUAL, supra note 29, § 9-28.1000(A) (“A prosecutor may also consider other remedial actions, such as improving an existing compliance program or disciplining wrongdoers, in determining whether to charge the corporation and how to resolve corporate criminal cases.”).
97. Id. § 9-28.1000(B).
98. Id. (“Therefore, in evaluating the relevance of collateral consequences, various factors already discussed, such as the perversiveness of the criminal conduct and the adequacy of the corporation’s compliance programs . . . ”).
99. Id. § 9-28.1100(A).
100. Id. § 9-28.1100(B).
101. Id. § 9-28.1500.
102. Id.
103. JUSTICE MANUAL, supra note 29, § 9-28.1500.
105. Id.
106. Id.
107. Id.
combat bribery. The government bragged that “[t]he fruits of this increased international cooperation can be seen in the prosecutions of both individuals and corporations, in cases involving Archer Daniels Midland, Alcoa, Alstom, Dallas Airmotive, Hewlett-Packard, IAP, Marubeni, Vadim Mikerin, Parker Drilling, PetroTiger, Total, and VimpelCom, among many others.”

The most important part of the FCPA Enforcement Plan and Guidance was its third step: the development of a pilot program to “promote greater accountability for individuals and companies that engage in corporate crime by motivating companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, . . . and remediate flaws in their controls and compliance programs.” The object was to transform a number of key factors for determining the exercise of prosecutorial discretion under the Justice Manual PBO into a formal program that produces “credit” that will “affect the type of disposition, the reduction in fine, or the determination of the need for a monitor.” The pilot program was not meant to supplant the PBO and voluntary disclosure.

This Guidance, by contrast, sets forth the circumstances in which an organization can receive additional credit in FCPA matters, above and beyond any fine reduction provided for under the Sentencing Guidelines, and the manner in which that additional credit should be determined, whether it be in the type of disposition, the extent of reduction in fine, or the determination of the need for a monitor.

The three parts of the requirements for compliance with the FCPA pilot program are voluntary self-disclosure, full cooperation, and timely and appropriate remediation. Voluntary self-disclosure does not include legally mandated disclosure. In order to qualify, the disclosure must occur before an imminent threat of disclosure or government investigation; the disclosure must be made within a reasonably prompt time after becoming aware of the offense (the company is burdened with proof of timeliness); and the company must disclose all known relevant facts, including all relevant facts about individuals involved in the wrongdoing. To meet the cooperation requirements, in addition to the cooperation standards under

108. Id.
109. Id.
110. Id.
111. JUSTICE MANUAL, supra note 29, § 9-28.300.
113. Id. (“Nothing in the Guidance is intended to suggest that the government can require business organizations to voluntarily self-disclose, cooperate, or remediate. Companies remain free to reject these options and forego the credit available under the pilot program.”).
114. Id.
115. Id.
116. Id.
117. Id.

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the PBO, the cooperating entity must agree to a fairly comprehensive set of cooperating obligations.118 These include that the company: (1) make timely and complete disclosure; (2) cooperate proactively;119 (3) preserve, collect, and disclose all relevant documents; (4) disclose timely updates of internal investigations; (5) “[w]here requested, de-confliction of an internal investigation with the government investigation”120 (6) provide all relevant facts relevant to potential criminal liability by third party companies; (7) make individuals available for interviews by government officials; (8) disclose all relevant facts gathered during independent investigations; (9) disclose overseas documents and the locations where found and who found them; (10) facilitate the third party production of documents; and (11) where requested, provide translation of non-English language documents.121 Assessment of the value of cooperation is undertaken on a case by case basis.122 Lastly, the remediation requirement poses some challenges.123 To evaluate remediation, it is first necessary to determine whether the company is eligible for cooperation credit.124 Beyond that, the company will have to evidence a number of requirements. It must evidence an effective compliance program.125 The company must also demonstrate appropriate discipline of employees and any additional steps that “demonstrate recognition of the seriousness of the corporation’s misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct.”126

The FCPA Enforcement Plan and Guidance provides substantial incentives for compliance. Companies receive substantial partial credit for full cooperation and appropriate remediation without voluntary self-disclosure.127 Much more credit is given for full cooperation, voluntary self-disclosure, and remediation. If a criminal resolution is warranted, then the company may receive up to a fifty percent reduction off of the bottom end of

118. Id.
119. U.S. DEP’T OF JUSTICE, supra note 104 (“That is, the company must disclose facts that are relevant to the investigation, even when not specifically asked to do so, and must identify opportunities for the government to obtain relevant evidence not in the company’s possession and not otherwise known to the government”).
120. Id.
121. Id.
122. Id. (“Fraud Section should assess the scope, quantity, quality, and timing of cooperation based on the circumstances of each case when assessing how to evaluate a company’s cooperation under this pilot.”).
123. Id.
124. Id.
125. U.S. DEP’T OF JUSTICE, supra note 104. An effective compliance program evidences an established “culture of compliance,” the dedication of adequate resources to compliance, adequate personnel, “the independence of the compliance function,” the use of effective risk assessment, adequate promotion and compensation for compliance employees, appropriate auditing of the compliance function, and adequate internal reporting structures. Id.
126. Id.
127. Id. (“at most a 25% reduction off the bottom of the Sentencing Guidelines fine range”).
the Sentencing Guidelines, and avoid the appointment of a monitor. The Fraud Division can also consider a declination of prosecution. The decision is subject to its own calculus: “this pilot program is intended to encourage companies to disclose FCPA misconduct to permit the prosecution of individuals whose criminal wrongdoing might otherwise never be uncovered by or disclosed to law enforcement.” As of June 29, the Department of Justice had agreed to declinations against seven companies under the pilot program.

In this approach one can discern a new form of national regulatory power. The focus is not on setting standards or on the construction of rules, but on the control of the exercise of administrative discretion around which the parameters of corporate behavior may be managed. This is a very powerful sword, indeed. It moves the focus of regulatory control of corruption from the construction of legal standards to the mechanics of compliance. And the approach centers the investigative and charging authority of prosecutors as the source of governmental power to produce and manage change. It is new in the sense of detaching rule making either from direct action by the legislature, or from formal rule making by administrative agencies within their legislative mandate. It is also new in the sense of the contingency of the approach. The approach focuses on the management of executive discretion, but it is designed as a set of consequences for choices made by the “objects” of regulation.

That contingent character of the approach is perhaps its most interesting feature. The obligations built around these new regulatory approaches are not mandatory. Corporations have the power to reject the incentives toward leniency written into the guidance. Alternatively, they can choose to change their behavior, anticipating that at some point their enterprises will likely be the target of a complaint and an investigation. Either way, the state uses its power over the management of criminal behavior to exercise oversight. And in both cases, it remains the obligation of the state to define the normative

128. Id.
129. Id.
130. Id.
standards around which prosecutorial power is asserted. In the context of corruption, those standards tend to be statutory, though they are informed by custom and practice. Yet, it must be emphasized that the decision to invest more instrumentally in the use of prosecutorial guidance systems—and the institutionalization of discretionary decision making—also challenges the legislative authority of state actors in substantial ways. In the United States, it presents a challenge to the authority of states, rather than to the federal government, to exercise authority over the regulation of corporations and corporate governance. It is true enough that federal legislative authority, in the form of the securities laws, has made substantial inroads. But the use of federal prosecutorial authority represents an effort by the executive authority to undermine the coherence of the legislative authority of states.

Nevertheless, this approach to behavior management also tends to comport with emerging sensibilities in regulatory governance. From a normative standpoint, the approach of the Department of Justice—and to some extent that of the Brazilian and U.K. variations—also comports with the approaches to the organization of governance regimes around issues of the corporate social responsibilities, including human rights responsibilities, of business and the role of the state in facilitating the conformity of business with those responsibilities. For business, there is a focus on cooperation, compliance, disclosure, and remediation in ways that are meant to establish partnerships between the state and business.

III. The Second Sword: The Role of Sovereign Investors Through the Norwegian Model and its Global Implications

The programs of regulation that flow from the use of institutionalized rules for the exercise of prosecutorial discretion set up a baseline of compliance, reporting, and remediation that serves the core objectives of policing and combatting corruption. But, the efforts of the state through its

132. See generally Larry Catá Backer, Theorizing Regulatory Governance Within Its Ecology: The Structure of Management in an Age of Globalization, THE SOC. SCI. RES. NETWORK, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783018 (Last revised Dec. 16, 2016). At its core, it speaks to the management of people and human activity, and the means through which those can be implemented for specific purposes grounded in specific ideologies. Regulatory governance is also intimately tied to projects of good governance, at least in the sense that both discourses focus on a similar palette of means and ends. Yet, at the same time it is meant to embody a set of premises about the efficiency of managing behaviors and compelling compliance with authority. It is a form through which public government can be expressed—expanding the administrative possibilities of democratic government, and the essence of private governance regimes. Id.

mechanics of prosecution have been augmented by the role of the state in markets. The most effective form of this intervention has been through the activities of sovereign wealth funds to manage the conduct of operating enterprises by limiting access to their capital and by exercising shareholder power in the companies in which they invest. This section considers how the Norwegian Pension Fund Global (NPFG), Norway’s sovereign wealth fund, has institutionalized a markets-based program that focuses on corporate anti-corruption efforts.134

The NPFG was created by statute in the Government Pension Fund Act which provides that the NPFG is ultimately administered by the Ministry of Finance.135 The Ministry of Finance has authority to issue guidelines for the management of the NPFG.136 Through its guidelines, the Ministry of Finance has delegated investment authority to the Norges Bank and its instrumentalities.137 The Ministry of Finance has also imposed a set of investment objectives to which the Norges Bank must adhere.138 The Norges Bank is to seek the highest possible returns; it is to avoid investing in companies excluded from the investment universe, from which the Bank may choose the enterprise in which to invest; and it is required to exercise responsible management.139 Responsible management is specifically defined with reference to compliance with Norwegian and international standards.140 These include strong principles against corruption in the investment by the NPFG that are built into the substantive principles of the standards to be applied in making investment decisions.141

The Norges Bank is given authority to make decisions about the exclusion or observation of companies in accordance with the Guidelines for


135. Bestemmelser om forvaltningen av States pensjonsfond, nr. 123.

136. See Mandat for forvaltningen av Statens pensjonsfond utland, 8. Nov. 2010, nr. 1414.

137. Id. at ch. 7 (establishing the relationship between the Norges Bank and the Ministry of Finance).

138. Id. § 1-3.

139. Id.

140. Id. § 2-2. Responsible management principles include: “(1) The Bank shall establish a broad set of principles for the responsible management of the investment portfolio. (2) In designing the principles pursuant to the first paragraph, the Bank shall emphasise the long-term horizon for the management of the investment portfolio and that the investment portfolio shall be broadly diversified across the markets included in the investment universe. (3) The principles shall be based on the considerations of good corporate governance and environmental and social conditions in the investment management, in accordance with internationally recognised principles and standards such as the UN Global Compact, the OECD’s Principles of Corporate Governance and the OECD’s Guidelines for Multinational Enterprises.”

141. Id. § 2-2(1).
observation and exclusion from the NPFG.\textsuperscript{142} The Guidelines for Observation and Exclusion from the Government Pension Fund Global (the Guidelines)\textsuperscript{143} apply to the work of the Council on Ethics for the Government Pension Fund Global (the Council) and Norges Bank (the Bank) on the observation and exclusion of companies from the portfolio of the [NPFG]."\textsuperscript{144} "The [Ethics] Council consists of five members appointed by the Ministry of Finance after receiving a nomination from the [Norges] Bank."\textsuperscript{145} The role of the Ethics Council is to evaluate whether specific NPFG investments are consistent with the Ethics Guidelines.\textsuperscript{146} The Ethics Council may, after investigation, recommend to the Norges Bank that a company be excluded from the NPFG investment universe, that the company be placed under observation, or that no action be taken.\textsuperscript{147} The recommendation is not mandatory, and the ultimate decision is vested in the NPFG administrator, the Norges Bank.\textsuperscript{148}

There are differences between determinations to exclude a company and determinations to put a company under observation.\textsuperscript{149} An excluded company may not be the subject of NPFG investment.\textsuperscript{150} Once a company is excluded, the connection between it and the NPFG is severed. The NPFG will not invest in the excluded company or any of its related entities.\textsuperscript{151} The exclusion decision is publicized,\textsuperscript{152} and may affect the company's reputation and access to capital. In a sense, exclusion negatively impacts the social credit of the excluded company.\textsuperscript{153} The length of the exclusion will vary.\textsuperscript{154} An excluded company may seek to have the exclusion lifted.\textsuperscript{155} To that end, it must seek action from the Ethics Council and the
Norges Bank.\textsuperscript{156} That usually requires a showing that the wrongdoing has been corrected and that systems are in place to better ensure that such wrongdoing will not be repeated.\textsuperscript{157}

In contrast to exclusion, observation parallels the PBO process in some ways. It is grounded on the idea that cooperation, disclosure, remediation, and reform is, in the long run, better for society and the performance of the enterprise.

Being placed under observation by the Council on Ethics signals that a company has come very close to exclusion from the GPFG. The Council will keep a watchful eye on developments in the company’s operations. Should any new violations of ethical norms be uncovered, or the company fails to implement effective measures to reduce the future risk of non-compliance, the condition for recommending its exclusion from the GPFG may be met.\textsuperscript{158}

The burden remains on the company to substantiate compliance, including remediation and the implementation of a compliance system that targets wrongdoing.\textsuperscript{159} Observation permits a measure of supervision by the NPFG. In addition, the NPFG uses its staff to investigate compliance independently and receives reports from the company.\textsuperscript{160} Of course, observation is purely voluntary, in the way that compliance with the requirements of the PBO are voluntary.\textsuperscript{161} But refusals of cooperation can lead to decisions to divest and drop a company from the investment universe of the NPFG.\textsuperscript{162} This divestment is publicized and might have effects on the access of the company to financial markets.\textsuperscript{163} It might also open the company, or contribute, to investigation by governmental regulators depending on the nature of the wrongdoing.

The substantive principles that guide the decisions of the Ethics Council and Norges Bank on exclusion and observation are set out in the Guidelines. They are of two distinct kinds. The first consists of product based grounds for exclusion or observation.\textsuperscript{164} The other consists of specified conduct based grounds for exclusion or observation.\textsuperscript{165} Among these, \textquote{[c]ompanies

\textsuperscript{156} Id.
\textsuperscript{157} Id. ("Excluded companies are encouraged to inform the Council of matters that may cause their exclusion to be revoked").
\textsuperscript{159} Id. ("The Council takes the position that it is up to the company to substantiate that it is working systematically to prevent violations which may lead to exclusion from the fund.").
\textsuperscript{160} Id.
\textsuperscript{161} See JUSTICE MANUAL, supra note 29.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} GUIDELINES, supra note 143, §2 (certain weapons, coal use, and tobacco products, for example.).
\textsuperscript{165} Id. §3.
may be put under observation or be excluded if there is an unacceptable risk that the company contributes to or is responsible for . . . gross corruption.\textsuperscript{166} Corruption is understood to include both active and passive corruption.\textsuperscript{167} More importantly, the normative standards for corruption are drawn from both national and international sources, which are made a key element of assessment of anti-corruption efforts.\textsuperscript{168} The NPFG also relies on a number of soft law guidelines to help refine its approach to the standards it would use to judge anti-corruption efforts in light of corruption wrongdoing.\textsuperscript{169}

The NPFG has not traditionally focused on corruption, even though it was one of the categories of misconduct of sufficient severity to support a determination of divestment and exclusion for the NPFG investment universe. Altogether by 2016, nine cases had been considered, the majority of them since 2015.\textsuperscript{170} Indeed, by 2015, the Ethics Council could report that “the criterion we have devoted the most resources to this year is corruption. This is primarily a consequence of the sectoral studies we have performed.”\textsuperscript{171} The Ethics Council noted an increased focus on corruption as an important element in its monitoring since 2013. “Since 2013, the Council on Ethics has not only assessed companies shown by news monitoring to have comprehensive corruption accusations levelled at them, but has also specifically reviewed companies in countries and sectors where international rankings show that the risk of corruption is presumed to be particularly high.”\textsuperscript{172} Interestingly, there is also reliance on the U.S. Justice and Securities and Exchange Commission’s Resource Guide to the U.S.

\textsuperscript{166} Id. §3(e).
\textsuperscript{167} ANNUAL REPORT 2016, supra note 158, at 19.
\textsuperscript{168} Id. at 23 (The Report identifies a number of national and international regulatory frameworks, including the Foreign Corruption Prevention Act (FCPA) and the UK Bribery Act, as well as The United Nations Global Compact (The Ten Principles), the Asia-Pacific Economic Council (Anti-Corruption Code of Conduct for Business), the International Chamber of Commerce (ICC Rules on Combating Corruption), the World Bank (Integrity Compliance Guidelines), and The World Economic Forum (Partnering Against Corruption-Principles for Countering Bribery).
\textsuperscript{171} ANNUAL REPORT 2016, supra note 158, at 5.
\textsuperscript{172} THE COUNCIL ON ETHICS FOR THE NORWEGIAN GOV’T PENSION FUND – GLOBAL, Annual Report 2015, at 24, available at https://rettsted.regjeringen.no/etikkradet3/files/2017/02/Etikkradet_AR_2015_web-1.pdf; id. at 11 (Companies are “the building and construction, defence [sic], and telecommunications industries as well as the oil and gas sector.”).
Foreign Corrupt Practices Act, and similar guides prepared for compliance under the criminal provisions of U.K. law.

In considering corruption as a basis for sanction (observation or exclusion), the NPFG considers both current behavior and future risk of wrongdoing. Future risk is assessed on the basis of the cooperation of the company to the Ethics Council’s investigation, and initial remediation efforts. In corruption matters the important signal from the company is that it acknowledges wrongdoing and its willingness “both internally and externally . . . to change course.” The NPFG also looks to the vitality of anti-corruption compliance systems and programs. To assess the value of the company compliance system the NPFG looks to international standards, and looks to manifestations of company policies and programs in appropriately drafted and implemented Codes of Conduct, the manifestations of “tones at the top” (expressions from senior managers of the importance of anti-corruption principles), and proof of the effectiveness of the program—manifested by “specific examples of former employees—irrespective of position or role—being sanctioned for non-compliance, as evidence that the same rules apply to everyone.” For these to satisfy the Council, the company must be willing to engage in dialogue with the Council of Ethics and to demonstrate a willingness to modify compliance to assure the NPFG that compliance systems are better able to assure against future risk of corruption wrongdoing. The NPFG can develop conditions and produce conditions to guide the company from observation to full approval status.

175. ANNUAL REPORT 2016, supra note 158, at 20 (“First and foremost, the Council attaches importance to the way in which the company responds to the corruption allegations and whether individuals who knew or should have known what was going on are removed from their positions.”).
176. Id.
177. Id. (“the Council on Ethics places consider-able emphasis on the anti-corruption procedures a company has established and how these are in fact implemented. These measures are brought together in the company’s anti-corruption programme [sic], which normally accounts for an important element of its overall internal control system”).
178. Id.
179. Id. at 21.
180. Id. (“In several companies with which the Council has communicated, face-to-face training is also given to agents and important third parties.”).
181. ANNUAL REPORT 2016, supra note 158, at 21 (“Based on the dialogue that the Council has had with certain companies, an absolute precondition for a good educational programme [sic] is that the company evaluates the extent to which employees feel that the training they have been given enables them to handle the situations they may encounter.”).
diligence with company engagement with third parties including cross border procedures for reporting noncompliance (including anonymous employee reporting), measures for registering and investigating these reports, and developing steps for applying discipline.\textsuperscript{182}

The NPFG has also developed principles for the organization of anti-corruption efforts within the institutional structures of companies. In ways that also echo the PBO and the exercise of prosecutorial discretion, the NPFG explained that

it is considered best practice for multinational companies of a certain size to have an independent compliance department, which is responsible for all regions and divisions, and which has sufficient resources and an adequate budget. The head of this department (the Chief Compliance Officer or equivalent) reports to group management and the board. This compliance function is normally responsible for the overlapping compliance efforts relating to corruption and competition law issues, and there is normally a close collaboration and exchange of information between the Compliance Department and those responsible for other governing bodies. In order for corruption prevention to be effective, the allocation of roles and responsibilities in the Compliance Department should be determined by the Chief Compliance Officer.\textsuperscript{183}

Critical to assessment is voluntary disclosure to supplement the independent assessment of the Ethics Council and its Secretariat. In the absence of substantiation, the NPFG might find it easier to conclude that the risk of future corruption has not been reduced.\textsuperscript{184}

The assessment and review of the NPFG is usually triggered by ongoing corruption investigations undertaken by governments.\textsuperscript{185} In that respect, there is a \textit{de facto} connection between the efforts of governments to punish corruption, and the efforts of sovereign investors, like NPFG, to use their private investor power to drive anti-corruption efforts, including remediation and reform of compliance systems. \textit{But there is no coordination.} The two swords exist, but they are wielded by different parties with different jurisdictions, whose connection is grounded in a convergence of global norms around anti-corruption measures and remediation expected to companies, and more importantly around compliance efforts as part of corporate governance regimes. Indeed, there is little by way of connection between state anti-corruption regimes, even those based on an institutionalized prosecutor discretion management system, much less between those and the sovereign investors who have significant influence in global markets—especially the NPFG and its Chinese counterparts.

\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} Id. at 22.
\textsuperscript{185} Id. at 7.
The arc of NPFG anti-corruption action is nicely illustrated by an early investigation against the German multinational corporation Siemens AG.186 In 2007, the Council on Ethics recommended to exclude the German company Siemens AG due to severe and systematic corruption.187 The Council noted that the “Siemens case is very serious with regard to the numerous and repeated instances of corruption over many years, the large sums involved, and the insecurity associated with the company’s countermeasures.”188 The investigation was triggered well after numerous proceedings had been initiated by governments against Siemens and its officials for bribery and other related offenses. It was no surprise, then, that central to the Ethics Council’s investigation were court documents, including final and enforceable judgments, along with the products of administrative proceedings in a number of jurisdictions.189 These cases involved the governments of Germany, Norway, Singapore, and Italy.190 Additional sources of information, and standards against which misconduct could be judged, included some prominent non-governmental organizations and an investigation commenced by the U.S. Department of Justice.191 Siemens responded to the investigations by initiating projects of cooperation and compliance system building.192

The cooperation was not limited to the states where investigations were located but also important international organizations, including the Organization for Economic Development and Cooperation.193 Those efforts served as the foundation of Siemens’ response to NPFG action—effectively that it should receive credit for its cooperation, voluntary disclosures, and changes in compliance regimes.194 In 2007, that response was insufficient for the Ethics Council, which recommended exclusion.195 Rejecting this assessment, the Ministry of Finance decided to place the company under observation.196 The Ethics Council persisted by a letter the 3rd of September 2008 in which it noted the substantial compliance efforts as well as remediation initiatives undertaken, but still found them insufficient in response to a request by the Finance Ministry to reconsider its

188. Id. at 2.
189. Id. at 5.
190. Id. at 6–13.
191. Id. at 13.
192. Id. at 16.
193. Id. at 14–16.
195. Id. at 20.
recommendation in light of additional information. As part of the observation regime imposed by the Ministry of Finance, the “Council on Ethics and Norges Bank are required to keep Siemens under special observation during this period and report annually to the Ministry of Finance on developments in the company.” In June 2012, the Council on Ethics recommended to the Ministry of Finance that Siemens be removed from the observation list in light of evidence of reform and institutionally firmer compliance. It reviewed the post-2008 response of Siemens to instances of corruption (more specifically in the operations in Kuwait and other places), the robustness of the compliance system, and disclosure and response. The connection between the effects of sovereign investing relationships on compliance and monitoring and its informal connection to national corruption efforts is clear.

Two recent cases from the NPFG suggest both the possibilities for good anti-corruption regimes offered by coordination among government and sovereign investors, and the challenges of the current uncoordinated system. The first involved a Chinese company, ZTE Corporation (ZTE Corp.). The second involved a Brazilian state enterprise, Petrobras. The section ends with a suggestion about the direction and importance of institutional trends.

A. ZTE Corp.

On January 7, 2016, the Norges Bank decided to exclude the Chinese company, ZTE Corporation, one of the world’s five largest producers of telecommunications equipment and network solutions, from the investment

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199. Id.

200. Id. at 2–6.


universe of the GPFG. The company is excluded based on an assessment of the risk of severe corruption and is grounded in a Council on Ethics Recommendation of June 25, 2015. The recommendation reflects the growing importance of corruption in investment decisions. But it may also suggest a distinction in treatment between European companies which in the past have been subject to observation, and the use of shareholder power by the Norwegian sovereign wealth fund (SWF) and this company for which divestment appeared to be the better option.

ZTE Corporation is a privately-operated Chinese state-owned enterprise with substantial private investment in its securities. At least as a formal matter, ZTE is deeply embedded in transnational soft law standards for business conduct. It's website notes that:

In February, 2009, ZTE Corporation has formally become a member of the United Nations Global Compact. ZTE will take this as a new starting point to bring the Global Compact and its Ten Principles into its corporate culture and business concept to make great effort to promote the harmonious development among economy, environment and society, thus committing itself to become the paragon of the Global Corporate Citizenship. . . . ZTE’s CSR strategy is to pro-actively develop, implement and improve CSR compliance throughout ZTE and its supply chain based on industry best practices, continuous learning and improvement efforts. Its objective is to develop into a global CSR leader long-term.

As typical for Chinese corporations, corporate social responsibility (CSR) efforts are built around charity and societal programs that work in parallel with state policy for economic, social, and cultural development. "Active in community programs, ZTE participated in relief efforts related to the 2004 tsunami in Indonesia, the 2008 earthquake in Sichuan, China, and the

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204. Recommendation to Exclude ZTE, supra note 201.

205. Id.


207. Recommendation to Exclude ZTE, supra note 201.


2010 earthquake in Haiti; ZTE also established the ZTE Special Children Care Fund, the largest charity fund in China.\textsuperscript{210}

Traditionally, corruption was not necessarily viewed as the center of CSR responsibilities, touching instead on enterprise obligations to the state and constrained by the ambiguous line between traditional relationships and illegal practices.\textsuperscript{211} But recent changes in Chinese policy\textsuperscript{212} and law\textsuperscript{213} ought to have brought anti-corruption efforts to the forefront of ZTE’s operations. Corruption is now understood as a significant breach of the Chinese Communist Party (CCP) basic line and has become a serious violation of law and administrative practice. Within China itself, the government has been moving swiftly against corporate leaders in large state owned enterprises in the context of the government’s broadening anti-corruption campaigns.\textsuperscript{214} Because most heads of Chinese state-owned enterprises (SOEs) are also members of the Communist Party, discipline in anti-corruption investigations usually starts with CCP disciplinary systems.\textsuperscript{215}

But at their core, these investigations and the anti-corruption standards that they are based are both domestic and based on internal policy. Fu Hualing’s recent work is instructive:\textsuperscript{216}

\begin{itemize}
\item \textsuperscript{215} See, e.g., Anderlini, supra note 214.
\item \textsuperscript{216} See Hualing Fu, Wielding the Sword: President Xi’s New Anti-Corruption Campaign, THE SOC. SCI. RES. NETWORK, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492407 (last updated July 8, 2015); id. at 136–155 (“I ask whether China is developing a sui generis model for anti-corruption enforcement that relies on a different control model . . . To quote Wang, the

\end{itemize}
The Central Commission for Discipline Inspection [(CCDI)] published the criticism in an article on its website yesterday. It is the first of a series on “pushing SOEs to strictly follow party discipline,” as the watchdog continues cracking down on corruption. The CCDI has identified state-owned enterprises as its focus this year. Twenty-six such businesses were visited in the agency’s first round of inspections this year, and another seventeen are currently under inspection. Still, it had never been clear that actions outside of China would produce legal effects within China even with the enactment of anti-bribery laws. And while as an official matter Chinese authorities had not foreclosed that possibility, their actions suggested a focus on internal management, leaving to host states and the international community the obligation to police and discipline enterprises operating outside the national territory. The critical challenge that approach produces, though, and one finally brought to center stage with the Norges Bank decision, is the extent to which China will continue to defer to such international disciplinary mechanisms when they are projected to the internal operations of a Chinese SOE (though derived from their external activities). That is, to what extent will China be open to internationalized disciplinary mechanisms that might affect the scope and framework of CSR related conduct of enterprises with potential effect within China? The decision of the Norges Bank brings that question one step closer to the necessity of resolution.

But the allegations that brought ZTE to the attention of the Norway SWF were not corruption within China but corruption allegations in ZTE’s overseas operations. These countries included Algeria, Kenya, Papua New Guinea, Zambia, and the Philippines. Lesser weight was given to corruption allegations in a number of other states, including Malaysia, Myanmar, Nigeria, and Liberia. This was not ZTE’s first conflict with Norwegian business and investment organs. In 2009, “Norwegian telecommunications giant Telenor banned for six months Chinese company ZTE Corp. from participating in tenders and new business opportunities because of an alleged breach of its code of conduct in a procurement process. (The Telecommunications Industry Association is using the anti-corruption campaign to buy the time that the Party needs to develop sound anti-corruption institutions and tackle corruption at its root").

220. Id. at 10–12.
proceeding,‘ international news agencies reported.”221 It was reported in the financial press that the issue leading to the action was tied to corruption:

[A]n industry source has told Light Reading that ZTE representatives attempted to bribe Telenor officials in the course of a recent business tender. ZTE says the problem was caused by a rogue employee. In a statement emailed to Light Reading and attributed to the vendor’s CEO Yin Yimin, the company noted: “ZTE has a very clear Code of Conduct and, as a listed company, our employees have to adhere to the highest business standards.”222

As has been its habit from the beginning of its operations, the Ethics Council has sought to apply an internationalized standard, interpreted through the lens of Norwegian state policy.223 It chose not to apply the laws of the states in which the corruption allegations were alleged, but rather, as has become customary in the context of managing conduct within transnational production chains outside of the home states of enterprise systems,224 it applied an internationalized governance framework drawn from international and transnational sources.

The UN anti-corruption portal TRACK (Tools and Resources for Anti-Corruption Knowledge), Global Compact: A guide for anti-corruption risk-assessment (2013), and the OECD’s Good Practice Guidance on Internal Controls, Ethics and Compliance (2010), provide useful guidance in these matters. In Business Principles for Countering Bribery, Transparency International (TI) has listed a number of general recommendations for building robust compliance systems.225

But the Ethics Council also sought to legitimize its approach by a passing reference to Chinese state policy and law.226 The Council did not, however, purport to apply Chinese law to the external operations of ZTE. This preference for a single and coherent harmonized international law represents a consistent approach by the Ethics Council and contributes to the construction of a transnational governance legality that is intermeshed with, but autonomous of, the national systems within which portions of transnational actions are taken. It is in this sense that the Ethics Council continues to contribute to the construction of transnational legal orders,

225. RECOMMENDATION TO EXCLUDE ZTE, supra note 201, at 12.
226. Id. at 12–13.
however characterized. ZTE contributed to its own difficulties because, like many other multinational enterprises, and SOEs it underestimates the authority of actions undertaken by hybrid organs like the Ethics Council.

It chose not to respond extensively to Ethics Council inquiries. The Council on Ethics reported, “In September, the Council had a telephone meeting with an employee from ZTE’s Security & Investor Relations Department and an employee from the company’s legal department.” The company also subsequently replied to an email containing follow-up questions. In its replies, the company did not comment on any of the specific corruption allegations, discussing only its internal compliance and anti-corruption systems.

There might well have been good reason for this evasion. ZTE executives might well have been considering the risks of giving any evidence to a foreign organ like the Ethics Council for at least two reasons. First, it is not clear that such participation beyond purely judicial organs might trigger investigation in China for violation of secrets laws. Second, the extent to which ZTE officials provide evidence might be taken into account by the Chinese Central Commission for Discipline Inspection and its investigations of possible corruption in ZTE within China. This later risk would carry substantial adverse consequences for high ZTE officials, and they would likely err on the side of caution. The difficulty, though, is that now that the Norges Bank has acted—and caused embarrassment to an economic organ of the Chinese state—it is as likely to trigger a CCDI investigation. ZTE will suffer double consequences: for failure to comply


229. Id. at 3.


231. Id.

232. Id.

233. Larry Cata Backer, From a “Two Thrust Approach” to a “Two Sword One Thrust Strategy” to Combat Criminal Corruption: Corporate Compliance, Prosecutorial Discretion, and Sovereign Investor Oversight 1, 29 (Coalition for Peace & Ethics, Working Paper No. 9/1, 2017) [hereinafter From a “Two Thrust Approach”].

234. Id.

235. Id.

236. Id.

237. Id.

238. Id.

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with an increasingly coherent internationalized normative order on corruption and the likely internal investigations that may follow in China.\textsuperscript{239}

The extensiveness of the corruption, the ambiguity of corrective measures, and the changes in Chinese policy all contributed to the determination of an unacceptable risk supporting exclusion from the investment universe.\textsuperscript{240} But this determination should raise eyebrows as well.\textsuperscript{241} And it should raise eyebrows precisely because the determination is potentially inconsistent with the approach to bribery and corruption—and the role of the Norwegian Global Pension Fund—in the case of Siemens, a company whose predilection for bribery as a sound business strategy was also the subject of extensive consideration by Norges Bank, the Norway Finance Ministry, and the Ethics Council.\textsuperscript{242} On the other hand, it mirrored the action taken with a Chinese SOE—China Railway Group Ltd.\textsuperscript{243} In that context, I noted:

The most interesting part of the recommendations was the recognition by the Ethics Council of the Chinese government’s recent anti-corruption campaigns. Indeed, the corruption allegations arose out of the Chinese government’s investigation of a disastrous accident that occurred on its high speed rail lines in 2011. The Chinese government’s efforts to deal with the corruption that may have contributed to the accident were noted with approval, but those efforts did little to aid CRG in avoiding exclusion. More interesting still was that evidence relied on by the Council included “information relating to legal rulings and internal disciplinary processes in the Communist Party published in the Chinese Press.” This might have raised eyebrows in the West, because the Council specifically referenced the Chinese Communist Party’s system of shuanggui, a practice that has been criticized in the West.\textsuperscript{244}

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\textsuperscript{239}. \textit{Id.}

\textsuperscript{240}. \textit{Recommendation to Exclude ZTE, supra note 201, at 15–17.}

\textsuperscript{241}. \textit{From a “Two Thrust Approach”, supra note 233, at 31.}

\textsuperscript{242}. \textit{Id.}


But, exclusion may reflect a pragmatic determination.\textsuperscript{245} That pragmatism might be grounded in an assessment of the willingness of the enterprise to respond favorably to observation status and to the exercise of shareholder rights by an instrumentality of the Norwegian Crown.\textsuperscript{246} It appears clear that Siemens was amenable to that exercise of private shareholder activism—but unlikely that a Chinese SOE or a Chinese hybrid entity, like ZTE, would be as compliant.\textsuperscript{247} That suggests not so much discrimination on the basis of enterprise origin as a hard headed assessment of corporate willingness to cooperate.\textsuperscript{248} \textit{But this trend bears watching.}\textsuperscript{249} One wonders, however, why this approach makes any sense in the case of corruption. This would have presented an opportunity for Norges Bank to robustly exercise its shareholder power in ways that are directly tied to the long term maximization of the value of the enterprise in which investment is made.

In effect, Siemens permitted the Norwegian state to become an important monitor and standard setter for the scope, content, and operation of its monitoring and surveillance regimes. This marks a substantial departure from the traditional arrangement in which corporations, subject to the legal constraints of the state of incorporation—at least with respect to its internal organization, operation, and management—now subjects those core organizational features to regulation by a foreign state through interventions in private markets. What once was the province of the state through law has now become the province of the state through market interactions producing governance principals with the functional effect of law.\textsuperscript{250} And it might have permitted the Norwegian State, through the Norges Bank to reach deeply into the conduct of production chains in those developing states where legal and governance internationalization is most clearly targeted.\textsuperscript{251} And it might have been used to align Chinese approaches to corruption to the international standards with which it is, in some respect, quite similar.\textsuperscript{252} But all of these opportunities were lost by the determination to take the traditional approach, to retreat from a more positive exercise of investor power and greater fidelity to the project of legal internationalism.

\textsuperscript{245} From a “Two Thrust Approach”, supra note 233, at 31.
\textsuperscript{246} Id.
\textsuperscript{247} Id.
\textsuperscript{248} Id.
\textsuperscript{249} Id.
\textsuperscript{251} From a “Two Thrust Approach”, supra note 233, at 32.
\textsuperscript{252} Id.
within production chains that much of the effort of the Ethics Council is directed.\(^253\)

### B. Petrobras

Norges Bank has decided to place Petroleo Brasileiro SA (“Petrobras”)\(^254\) under observation because of the risk of severe corruption.\(^255\) Petrobras is one of the largest state owned petroleum TNCs in Latin America\(^256\) and one that is deeply embedded in corruption investigations\(^257\) (including the write off of over $2 billion in bribe payments that reached all the way to the office of the President of the Republic).\(^258\) The decision is based on the recommendation submitted by the Council on Ethics for the Government Pension Fund Global.\(^259\)

The decision stands in stark contrast to the January 7, 2016, decision by Norges Bank to exclude the Chinese company ZTE Corporation,\(^260\) one of the world’s five largest producers of telecommunications equipment and network solutions, based on an assessment of the risk of severe corruption.\(^261\) The two decisions together may help begin to make coherent whatever rules may be emerging about the obligations of the NPFG in matters of corruption under internationalized standards that it invokes. Especially important may be emerging rules for determining when corruption may

\(^{253}\) Id.


\(^{261}\) Corruption and Investment, supra note 228, at 1.

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trigger greater use of shareholder rights and when it triggers a decision to exclude from investment. To the extent that these decisions do not add clarity, they will serve the developing international consensus on the corporate responsibility to avoid corruption and the consequential obligation of investors to police the conduct of the enterprises in which they invest.

Petrobras represented the second opportunity for the Ethics Council and Norges Bank to speak to the issue of corruption and to further refine an articulation of a set of principles under which a financial institution (or even an institutional investor) might comply with its responsibility to respect human rights (Guiding Principles for Business and Human Rights) as applied through its investor code of ethics (the Pension Fund Global’s Ethical Guidelines). It is emerging that, at least under the Organization for Economic Cooperation and Development’s (OECD) framework Guidelines for Multinational Enterprises, financial institutions assume at least some minimal level of responsibility for the human rights detrimental conduct of clients. And corruption has been identified as falling within that responsibility both within international soft law and under the Pension Fund Global’s Ethical Guidelines.

But the application of those responsibilities to specific instances has not yet produced a coherent jurisprudence. Much less has it started to develop a set of decisions that might provide guidance to enterprises about the standards applied by Ethics Council and Bank to issues of corruption that could result in no action, in observation status, or in exclusion from investment. In the most recent case, on January 7, 2016, Norges Bank decided to exclude the Chinese company ZTE Corporation, one of the world’s five largest producers of telecommunications equipment and network solutions, from the investment universe of the GPFG. The company is excluded based on an assessment of the risk of severe corruption. But, in the Petrobras decision, the Council and the Bank chose observation rather than exclusion.

One of the more important aspects of the Ethics Council determination is its discussion (and further construction) of the nature of the internationalized standards of corporate responsibility to eliminate

264. GUIDELINES, supra note 143.
266. GUIDELINES, supra note 143, at 2.
267. Corruption and Investment, supra note 228, at 1.
268. Id.
269. RECOMMENDATION TO PUT A COMPANY IN THE GOVERNMENT PENSION FUND GLOBAL UNDER OBSERVATION: PETROLEO BRASILEIRO SA, supra note 256, at 17.
corruption. The touchstone, again, is not the law of the home jurisdiction—Brazil—but an internationalized normative set of soft law and guidelines that are treated as setting a regulatory baseline against which corporate conduct is to be judged. Footnote thirty-three is particularly important as a window on the nature of the regulatory structures within which the jurisprudence of the Ethics Guidelines is developed. In a way, it suggests the way in which transnational institutions have begun to treat as irrelevant the jurisdictional and legalist borders that once were central to the integrity and application of law systems. In its place, one sees the construction of a transnational legal order that draws, without much distinction, among the laws of states, international conventional law, transnational normative standards and guidelines and quasi regulatory tool kits (the cookbooks of legal, regulatory managerialism) in crafting an interpretive international law of corruption that it then applies. The touchstone here, like that in traditional European Court of Human Rights “margin of appreciation” jurisprudence, is to determine a consensus position, which is then applied in context. Conversely, this approach would appear to provide a wider margin of discretion in the absence of consensus—and that margin might then look more closely either on the internal governance framework of the enterprise or the law of the domestic legal order in which this internal corporate governance framework is implemented.

More important, perhaps, is that the object is not necessarily to eliminate corruption but to reduce it to what will be deemed to acceptable standards. That produces two quite important approaches to Ethics Council judgements. The first is an emphasis on formalism. Like the Delaware courts development of a monitoring duty of care for corporate boards, the Ethics Council places strong emphasis is on the formal construction of systems that are deemed minimally robust. That robustness is judged against the international standards, not the laws of the home state or the state in which corruption is alleged. The second is an emphasis on implementation.

The key requirements in international standards for corporate compliance and anti-corruption systems relevant to this case are that the company conducts a comprehensive assessment of corruption risks in its business operations, that the company has zero tolerance for corruption, that all employees are equipped with tools to avoid

270. Id. at 7–9.
271. Id. at 8 n.33.
272. Id.
274. See Incoherence or Discretion, supra note 254.
becoming involved in corruption, and that relevant processes and procedures are continuously developed and improved.275

The Ethics Council, then, does not look to actual elimination but rather to the willingness of the enterprise to devise and apply anti-corruption systems.276 The assessment of the willingness of an enterprise to embrace these twin standards, and an assessment of an enterprise’s willingness to apply them, might suggest the difference in treatment between Petrobras and ZTE Corp.277

But equally important might be the way in which the exercise of discretion played a role in the difference in decision between Petrobras and ZTE Corp.278 In both cases, the companies operated in places with either weak governance or a higher propensity to tolerate corruption.279 Applying international normative standards, that context then places “special requirements on the company to have in place robust systems and implement anti-corruption measures.”280 In Petrobras, the Ethics Council determined that its 2013 corruption system overhaul plus international public and private pressure—states and markets—would have a significant effect on the company’s willingness to enforce its new system.281 In ZTE, neither a sufficiently robust system nor a perceived internal or external disciplinary structure was deemed sufficient.282 Petrobras, then, was judged more willing to engage in anti-corruption work sensitive to the international standards the Ethics Council embraced; ZTE Corp. was not. Note that the difference was not one of compliance—both companies faced a similar degree of temptation, but rather it was based on a sense of likelihood of movement in the right direction.

Surprisingly absent from the discussion in either cases was the degree to which participation in the internal governance of either Petrobras or ZTE by the Pension Fund Global might contribute toward reform, and thus make the case stronger for observation. The Ethics Council, inexplicably, treats observation as a sort of passive act. It is a state of watching—and if the company thereafter fails—of action in the form of exclusion recommendations. Yet that substantially ignores the value of observation, a
value that was more clearly specified in Siemens. The object of observation is hardly just to watch. It is meant to provide the Pension Fund Global an opportunity to engage, to participate in the internal governance of the enterprise, and to help it reach decisions in its operations that are compatible with the requirements of the Ethics Guidelines, and therefore with international consensus standards (or, effectively, law). To fail to acknowledge this represents either an omission, or a retreat from the principles of using private shareholder power. And, indeed, as an investor, and as ZTE might make clear—the Pension Fund Global has a responsibility under the very internationalized standards it applies, to comply with them itself. In this case, it would require specifying in more detail the sorts of obligations (responsibilities) the Pension Fund Global must undertake under international standards to ensure that its observation of Petrobras is itself compatible with those standards.

What else might account for the difference between Petrobras and ZTE that induced Council and Bank to exclude the Chinese company and place the Brazilian company under observation? At one level, one might consider whether the difference is based on unconscious presumptions about the amenability to corruption and to correction of the states in which these companies are headquartered. One could read the determinations as suggesting a presumption that Chinese companies have little prospect for correction and a strong incentive toward corruption, while Brazilian companies may have similar incentives toward corruption but might be more amenable to correction. But this would be amount to a jurisprudence of prejudice rather than of law and hardly to be tolerated by a state institution. On the other hand, it might well indicate a difference in the sort of relations between investors and state-owned enterprises that itself might inform decisions about the utility of exercising shareholder power. One understands better the value of shareholder power in Petrobras than perhaps in ZTE Corp., and that might have played into the decision. For Chinese SOEs and related entities, that may be an important consideration as they seek financing from investors even more deeply tied to global standards of assessment of investment propriety, grounded in consensus norms that these companies might otherwise reject.

Perhaps it was the level of information available to the Ethics Council and the level of cooperation afforded. Petrobras appeared more willing to engage the Ethics Council, and in any case, more information was available to the Council and Bank about a very public scandal touching on a crown jewel of Brazilian state enterprises. In contrast, ZTE Corp. did little to help its own case, and its corruption appeared far more systemic. But that is to some extent conjecture. Still, an indication of cooperation might provide a sufficient basis to choose observation rather than exclusion if only for practical reasons—the enterprise would be easier to monitor and its progress easier to assess than with an enterprise that appeared unwilling to cooperate even against a state sector investor shareholder. Yet Petrobras is not Siemens, and the level of cooperation might be understood as hardly
satisfactory. It would do the Ethics Council well to develop better and more evenly applied standards for measuring cooperation and the consequences for choosing among remedies and approaches when confronted with a significant breach of its Ethics Guidelines.283

C. SHARPENING THE SWORD: INSTITUTIONAL TRENDS—SOVEREIGN INVESTING AND ITS INSTITUTIONAL CHARACTER

The NPFG’s latest decisions, ones that seek to broaden its institutional role in the development of robust anti-corruption compliance programs among companies in which it has an ownership interest, are unremarkable in and of themselves. What draws attention is what appears to be a difference in the approach of the Ethics Council, on the one hand, and Norges Bank, on the other, with respect to the use of investment power to institutionalize corporate governance behaviors. The differences between the Ethics Council and Norges Bank now appear with greater clarity as the cultures within the Ethics Council—with a focus on the Ethics guidelines and normative objectives—and the cultures within Norges Bank, with a greater emphasis on more pragmatic approaches to objectives, appear to diverge.284 But, the divergences do not suggest fundamental differences, but rather differences in approaches to the leveraging of Norwegian power through investment within a context in which that political agenda must also generate profits to the Norwegian Kingdom.285

This is most apparent in the context of corruption—an area of increasing concern to the Pension Fund Global.286 The Ethics Council went out of its way to provide a public explanation of its actions—and the institutional cultures that produced them, in contradistinction to the work of the Norges Bank to which it reports.287 The emphasis was on the constraints imposed by the nature of the Ethics Council’s work.288 These highlighted a substantial rift in the utility of approaches that might be available to sovereign investors in the anti-corruption area. On the one hand, the Ethics Council was constrained by the law that vested it with authority to make one of three decisions: no action, observation, or exclusion. The Norges Bank, on the other hand, as administrator of the NPFG had a broader discretion—akin to the administrative discretion of prosecutors under PBO—to exercise a broader range of administrative power, including the power to exercise shareholder rights for public policy ends.

283. See Incoherence or Discretion, supra note 254, at 3.
285. Id. at 1–2.
286. Id.
287. Id.
288. Id.
This is reflected in the decisions rendered in 2016. In two cases, the Ethics Council recommended exclusion from the NPFG investment universe; the Norges Bank rejected the recommendation in favor of the more flexible discipline of observation. In another two cases, the Ethics Council recommended the more formal penalty of observation. In both cases, the Norges Bank opted for the more discretionary power to exercise shareholder power and influence over the companies to get them to engage in appropriate reform. The Ethics Council noted that although the Council perceives the exercise of shareholder rights and observation to be extremely similar measures, it cannot recommend the exercise of shareholder rights. This is primarily because NBIM is responsible for the exercise of shareholder rights, while the Council on Ethics is responsible for observation.

What emerges is a sense that the Ethics Council continues to develop a culture of formalist compliance built around the Ethics Guidelines. Their approach is more regulatory and bounded by the techniques of the administrator and the legislator. There is little flexibility, no sense of the value, or utility of discretionary action. These naturally follow from the structures of their mandate and the character of their activities—quasi-judicial and administrative. The Ethics Council is deeply embedded in the public law cultures of the state. The Norges Bank, on the other hand, is more administrative and functional. It is grounded in contextual flexibility and in the informal use of power to attain objectives. The Norges Bank is much more deeply embedded within the private law cultures of the


293. See RESPONSIBLE INVESTMENT, supra note 292, at 87.
enterprise. This makes for an interesting contrast between an institution that functions within the borders of politics and law, and another that functions within the constraints of economics and markets.294

This is particularly apparent in the quite distinct approaches of the Ethics Council and Norges Bank with respect to Eni S.p.A.295 and Saipem S.p.A.,296 both of which the Ethics Council recommended formal observation. This recommendation was essentially institutional and political—it was grounded on the role of the Pension Fund Global as a regulatory actor demanding oversight over conduct. Instead, Norges Bank chose the mechanics of private shareholding to move toward what one can expect to be a similar objective.297 The Ethics Council put the best face on it that it could—noting that there was little functional difference between observation and exercise of shareholder power. And yet that functional similarity does little to hide the substantial formal difference between a regulatory approach grounded in normative political frameworks, and a managerial approach grounded in normative economic frameworks. From the perspective of the construction of regulatory frameworks for conduct, the consequences could be quite substantial. The former constructs corruption as a political issue with legal effects disciplined by the institutions of state; the latter constructs corruption as an economic issue with compliance effects disciplined by the market.298

IV. Conclusion: From “Two Thrusts” to “Two Swords, One Thrust” Approaches and their Value to Chinese Anti-Corruption Efforts

What can China learn from these emerging trends in the area of the criminalization of corruption and of international efforts to manage corporate compliance programs that enhance a more effective system of public-private cooperation in combatting corruption, especially bribery? Corruption has become an important element of both national and transnational governance. It is particularly complicated because coherence among all of the participants in global production chains are necessary in order to ensure that the production chain itself remains free of corruption. But that, in turn, requires both coherence in approach to corruption (how it manifests) and a willingness to privatize corruption enforcement across border. Alternatively, and less efficiently, dominant states might seek to project their own anti-corruption regimes outward through their control (to

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295. See RECOMMENDATION TO PLACE ENI SPA ON OBSERVATION, supra note 291, at 14.
296. Id. at 18.
298. See Incoherence or Discretion, supra note 254, for a general discussion.
the extent of such control in any case) of apex enterprises in production chains, especially through legal and prosecutorial actions. As an additional option, dominant states and their investment instruments (like the Norwegian Pension Fund Global) might seek to project an internationalized conception of anti-corruption law and standards outward. In either case, projection of anti-corruption standards may be done directly, through law, or indirectly, through the encouragement of societally (privatized) mechanisms for corruption control, through markets critical to the functioning of relevant production chains.

The effect, as has become evident in this article, is the development of what can best be understood as another manifestation of a “Two Thrust Approach” in a specific context—the exercise of prosecutorial discretion to develop robust compliance systems, enhance cooperation, and encourage remediation and the exercise of discretion in the management of sovereign investments through SWFs to the same ends. But these two thrusts are uncoordinated, and they do not enhance the productive value of the other. Indeed, their great weakness appears to be that jurisdictions capable of exercising the sovereign investment thrust are not, at the same time, the most valuable for implementing the governmental criminal prosecution thrust. At the same time, the natural coordination of both approaches suggests the value of coordination. Both “thrusts” focus on corporate cooperation, voluntary disclosure, remediation, and most importantly, robust compliance programs to ensure the development of anti-corruption cultures within the enterprise and of vigorous systems for policing corruption. Together they provide a great incentive—declarations (formal exercise of discretion to close an investigation without charges)299 and exercise of shareholder power by sovereign investors or observation—to avoid criminal investigation and to reform corporate internal governance to reduce the likelihood of criminal activity.300

What that suggests is a natural alignment in states, like China, that have significant prosecutorial as well as sovereign investment capacities. Aligning the basic policy of both the U.S. Justice Department’s pilot program and the NPPG of voluntary disclosure, cooperation, remediation, and disgorgement,301 it is possible to develop a two-prong and coherent approach to policing corruption. The object would not be to copy and amalgamate, but rather to draw on the regulatory approaches to craft a coordinated dual thrust policy compatible with local law and political principles. That policy would achieve the objectives of the criminal law—to punish wrongdoers and


301. See Cassin, supra note 299.
deter the commission of offenses. But it would also meet the political and societal objectives of fostering changes in consensus about the character of corporate governance. Those objectives are grounded in robust compliance but also in a cooperative relationship between the state and enterprises.

China might well be able to profit from turning a “Two Thrust Approach” into a “Two Sword One Thrust” strategy. That would require the development of a capacity to use the Chinese sovereign wealth funds proactively in a coordinated effort to ensure the development of compliance, disclosure, and cooperation systems that would be policed both from the criminal side, through the usual state officials, and from the financial side, through the power of sovereign investors to flex their muscles. At the same time, it would require a distinct approach to the criminal prosecution of corruption—one that still focuses on appropriate punishment but also sees the value in arrangements that advance the important goal of prevention. And, indeed, it would seem that such an effort, the creation of a socialist form of deferred prosecution and cooperation agreement, would be quite useful in advancing socialist modernization through law. There are, of course, conceptual and implementation challenges that must be addressed. But the basic concept—the ability to coordinate economic and police power to effect substantial advances in corporate governance with respect to corruption and to broaden the base for enforcement of anti-corruption rules—is an opportunity that would be worth seizing.

Indeed, China is well positioned to seize the opportunity. Within China it may be possible to coordinate compliance efforts by the procuratorate with that of the Chinese sovereign wealth funds through the medium of social credit systems currently being developed. The parameters for developing rating systems for corporate compliance in the area of corporate social responsibility is already well advanced in the West. Indeed, “Western versions of social credit—of providing ratings grounded in targeted data harvesting, proprietary algorithms, and coordinated incentives and punishments—has become an important regulatory element in the societal field.” It requires converting the system of exercising discretion, based on the factors specified in Section II of this article and the factors for determining compliance with sovereign investing compliance requirements discussed in

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Part III of this article, into the components of a rating system of corporate compliance. Data can be required from enterprises that can support rating, and the algorithms for transforming data into rating can then follow, based on the assessment by the relative worth of each factor. The compliance social credit rating, then, can be used by both the procuratorate and sovereign investors to make determinations. That can substantially reduce both the possibility of abuses of discretion in individual cases and can regularize the process of discretionary decision-making. Thus for example, different social credit rating thresholds can lead to different enforcement strategies within the procuratorate (as well as different sentencing guidelines), and it can also produce incentives that may reduce the cost of accessing financial markets.

These are, of course, preliminary observations. Each requires substantial study. In the end, some may not prove suitable. Yet what clearly emerges is that in these cases, especially with respect to policy coordination and the management of anti-corruption systems, there may be more efficient ways for government, in partnership with private actors, to order their regulatory approaches. It is also possible that such new approaches can remain faithful to the rule of law and core principles of political organization without limiting the forms of regulation to ancient forms more suitable for a different age. In this new historical stage, it may be necessary to change with the times and to adjust the forms of law to the contemporary customs and practices of a society.