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From a "Two Thrust Approach" to a "Two Sword One Thrust Strategy" to Combat Criminal Corruption: Corporate Compliance, Prosecutorial Discretion, and Sovereign Investor Oversight

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ABSTRACT: The commitment of governments, international organizations and enterprises to combatting corruption appears to have intensified in recent years. The efforts of these institutions appear centered on a "Two Thrust Approach," consisting of the simultaneous application of the development and enforcement of public legal regimes and the implementation and operation of private compliance systems. This system does not produce regulatory coherence between the law making by the government and the compliance systems created by business are not coordinated well. However, recent regulatory and compliance trends suggest the emergence of a "Two Swords, On Thrust Strategy" as a supplemental approach to the enforcement of anti-corruption rules and norms. 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. The essay examines the possibility of developing this strategy. To that end, the essay first considers the emerging efforts to institutionalize rules for the exercise of prosecutorial discretion in criminal investigations to compel corporate governance reform. It then considers the "second sword", the use of market power by sovereign investors to influence compliance oriented corporate governance reform that parallels those advanced by prosecutors. The essay ends by suggesting the utility of this strategy for Chinese anti-corruption efforts by considering the possibility of coordinating the work of the procuratorate with the financial power of Chinese sovereign wealth finds in the exercise of their shareholder power and their power to limit access to investment markets. The Chinese language version of this essay will appear in the *Jilin University Journal*, social science edition 吉林大学学报社科版 (forthcoming 2017).

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I. Introduction

Who cares about corruption?[2] In September 2017 news media reported that parliamentarians at the Council of Europe had been bribed by Azerbaijan to mute criticism of their government within this human rights organs of the Council of Europe.[3] 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.[4] At the same time, authorities in Brazil launched a probe into vote buying for the 2016 Olympics, a criminal offense.[5] In August, 2017, Vietnam reported that it had sentenced bankers to death in connection with the embezzlement from a state owned bank.[6]

> "'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.'"[7]

It is noteworthy that Columbia, 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

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[2] See, Alvaro Cuervo-Cazurra, Who Cares About Corruption, 37(6) Journal of International Business Studies 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).

[3] See, "Azerbaijan revelations spark 'great concern' at Council of Europe: News of country's $2.9bn lobbying and money-laundering scheme could herald shake-up at rights body," The Guardian Sept. 5, 2017, available https://www.theguardian.com/world/2017/sep/05/azerbaijan-revelations-could-herald-shake-up-at-council-of-europe?CMP=share_btn_fb ("The details of the payments came as an independent panel began confidential hearings into alleged corruption at [the Parliamentary Assembly of the Council of Europe]Pace in Strasbourg, one of the world's oldest human rights bodies." Id.).

[4] See, French prosecutor pins corruption in IAAF on son of ex-president, France 24 Sept. 5, 2017, available http://www.france24.com/en/20170905-france-french-prosecutor-pins-corruption-iaaf-son-ex-president?ref=fb.

[5] See, "Brazil police launch raid to probe vote-buying for 2016 Olympics," France 24 (Sept. 5, 2017), available http://www.france24.com/en/20170905-brazil-police-launch-raid-probe-vote-buying-2016-olympics?ref=fb.

[6] See, "Vietnam is Sentencing Corrupt Bankers To DEATH, by firing squad," Underground Journalist (Aug. 7, 2017), available http://undergroundjournalist.org/2017/08/07/vietnam-sentencing-corrupt-bankers-death-firing-squad/ ("In March, a 57-year-old former regional boss from Vietnam Development Bank, another government-run bank, was sentenced to death over a $93-million swindling job"),

[7] Ibid.

corporations that reached to the office of the president of the republic.[8] "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."[9] 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.[10] In August, 2017, "The Supreme People's Procuratorate said China would strictly crack down on any crimes that seriously damaged financial security and that destroyed financial orders."[11]

Corruption, and especially bribery, has become a matter of international concern. The UN Global Compact, a voluntary initiative between large enterprises under the leadership of the United Nations built around commitments to implement universal sustainability principles and to take steps to support UN goals, is built around ten principles.[12] Its 10th Principle states that "Businesses should work against corruption in all its forms, including extortion and bribery." The U.N. Global Compact has expressed the view that "Corruption is a considerable obstacle to economic and social development around the world. It has negative impacts on sustainable development and particularly affects poor communities."[13] 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."[14]

These "two thrusts"—the first consisting of national legislation (criminal and civil) and the second consisting of corporate self-regulation against corruption—has 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

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[8] Juan Manuel Bedoya-Palacio, "Columbia Enters the Age of Enforcement," The FCPA Blog (Aug. 31, 2017), available http://www.fcpablog.com/blog/2017/8/31/juan-manuel-bedoya-palacio-colombia-enters-the-era-of-enforc.html

[9] Ibid.

[10] See, "Ding Ning: China's biggest Ponzi scheme mastermind sentenced to life in prison," The Independent (12 Sept. 2017), available http://www.independent.co.uk/news/business/news/china-ponzi-scheme-ding-ning-yucheng-group-prison-sentence-ezubo-beijing-a7941811.html.

[11] "China's top prosecutor to intensify crackdown on financial crimes," Reuters, available https://www.reuters.com/article/china-finance-crime/chinas-top-prosecutor-to-intensify-crackdown-on-financial-crimes-idUSL4N1L841V ("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." Ibid)

[12] The Ten Principles of the UN Global Compact, available https://www.unglobalcompact.org/what-is-gc/mission/principles. The ten principles are derived from: the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption. Ibid.

[13] U.N. Global Compact, Anti-Corruption, available https://www.unglobalcompact.org/what-is-gc/our-work/governance/anti-corruption.

[14] Ibid.

coherent, is well known.[15] National efforts continue to develop. For example in 2017 the government of the United Kingdom adopted the U.K. Criminal Finances Act.[16] In addition, the range of international agreements respecting corruption touches virtually every country on earth.[17] The international community has also adopted some soft law instruments with some influence in developing customary standards of conduct and expectations in economic relations.[18] In the United States, the Foreign Corrupt Practices Act has served as a model, variations of which have been adopted elsewhere.[19] In China, The PRC Criminal Law prohibits "official bribery", which applies to state officials and state entities, as well as

[15] See, e.g., Dimitri Vlassis, The United Nations Convention Against Corruption Origins And Negotiation Process, in United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), Annual Report For 2004 and Resource Material Series No. 66 (available http://www.unafei.or.jp/english/pdf/PDF_rms/no66/H_p126-p131.pdf.

[16] U.K. Criminal Finances Act of 2017, ch. 22, available http://www.legislation.gov.uk/ukpga/2017/22/pdfs/ukpga_20170022_en.pdf. The Act make provision in connection with terrorist property; create corporate offences for cases where a person associated with a body corporate or partnership facilitates the commission by another person of a tax evasion offence

[17] See, e.g., African Union Convention on Preventing and Combating Corruption, adopted in Algiers, Algeria, 14th of July 1999, and entered into force on 6th of December 2002; Civil Law Convention on Corruption, adopted in Strasbourg, France, 4th of November 1999, and entered into force 1st of November 2003 (also open to non-member states); Criminal Law Convention on Corruption, adopted in Strasbourg, France on 27th of January 1999, and entered into force 1st of July 2002 (open to non-member states; an Additional Protocol to the Criminal Law Convention on Corruption (adopted in Strasbourg, France on the 15th of May 2003, and entered into force on 1st of February 2005) provides that adhering states embed in their national criminal law the criminalization of active and passive bribery in both the public and private sectors, including bribery of members of foreign and domestic parliamentary assemblies and of officials of international organizations); Inter-American Convention Against Corruption, adopted in Caracas, Venezuela, in March 1996 (The Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption(MESICIC) is crafted in the form of an intergovernmental organization); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed on the 17th of December 1997 and entered into force on the 15th of February 1999 (open to all OECD countries and some non-member countries); United Nations Convention against Corruption, entered into force on the 14th of December 2005 by resolution 58/4.; United Nations Convention against Transnational Organized Crime and the Protocols, entered into force on the 29th of September 2003, by resolution 55/25).

[18] See, e.g., United Nations Declaration Against Corruption and Bribery in International Commercial Transactions, adopted on December 1996. For a review of how this declaration fits into the broader context of the fight against corruption, see, e.g., Vlassis, The United Nations Convention Against Corruption Origins And Negotiation Process, supra.

[19] Foreign Corrupt Practices Act of 1977 (FCPA) (15 U.S.C. § 78dd-1, et seq.). See, D. Michael Crites, "The Foreign Corrupt Practices Act at Thirty-Five: A Practitioner's Guide," 73 Ohio St. L.J. 1049 (2012).

"commercial bribery", which applies to virtually everyone else.[20] A great number of other states have enacted anti-bribery and corruption law. As well.[21]

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 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 today that it sold all shares it held in Petrofac because of an ongoing corruption 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."[22]

The U.S. S.E.C. has noted the priority to which it has given corruption cases under the FCPA; it enforcement actions suggest the preference for civil penalties as punishment for violations of the act.[23] The complex nature of extra territorial effects of anti-corruption measures and the weaknesses of

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[20] Discussed in China: Bribery and Corruption 2017, Global Legal Insights, available https://www.globallegalinsights.com/practice-areas/bribery-and-corruption/global-legal-insights---bribery-and-corruption/china. See, Ron Cheng, "Why US Companies Should be Paying Attention to China's New Anti-Corruption Laws, Forbes (July 27, 2016), available https://www.forbes.com/sites/roncheng/2016/07/27/why-us-companies-should-be-paying-attention-to-chinas-new-anti-corruption-laws/#6905e4a41db1.

[21] The International Bar Association has created a data base with the relevant anti-bribery laws from fifty-six (56) states, as well as international conventions. See, International Bar Association, Anti-Corruption Committee - anti-bribery conventions and legislation, available 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. . . . accurate as of 1 December 2014")

[22] Richard L. Cassin, Fund dumps Petrofac shares on SFO probe concerns, The FCPA Blog (8 Sept. 2017), available http://www.fcpablog.com/blog/2017/9/8/fund-dumps-petrofac-shares-on-sfo-probe-concerns.html. Petrofac designs, builds, operates, and maintains oil and gas facilities worldwide. Petrofac, Our Story, available https://www.petrofac.com/en-gb/about-us/our-story/. Unaoil provides "industrial solutions to the energy sector in the Middle East, Central Asia and Africa. These include green and brownfield Engineering and Construction, Workforce Solutions, Operations and Maintenance, and the provision of niche equipment and products, such as production chemicals." Unaoil, Chairman's Message, available http://www.unaoil.com/about/chairman-s-message/. On 19 July 2016 the U.K. Serious Frauds Office (SFO) issued a Press Release in which they announced that the SFO "conducting a criminal investigation into the activities of Unaoil, its officers, its employees and its agents in connection with suspected offences of bribery, corruption and money laundering." SFO Press Release 19 July 2016 available https://www.sfo.gov.uk/2016/07/19/unaoil-investigation/. See generally SFO Unaoil Investigation, available https://www.sfo.gov.uk/cases/unaoil/.

[23] U.S. Securities and Exchange Commission, "SEC Enforcement Actions: FCPA Cases," available https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (listing companies and amounts of civil penalties from 2017 back to 1978).

arguments against such efforts have also been noted.[24] 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.[25] This obligation is given great incentives by the willingness of governments to enforce cooperation agreements with enterprises facing corruption probes in order to avoid criminal sanction.[26] These have been advanced in the United States,[27] and in the United Kingdom.[28] 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. Justice Department in April 2016[29] designed to encourage company self-reporting and cooperation in order to avoid exercises of prosecutorial discretion to seek criminal penalties against companies or their employees.[30] Additional due diligence efforts may be required under provisions of the U.K. Criminal Finances Act of 2017.[31]

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[24] See, Larry Catá Backer, "Soft Extra Territorialism and Anti-Corruption Campaigns: On the Perverse Folly of Corrupt States," Law at the End of the Day, (Sept. 15, 2006), available http://lcbackerblog.blogspot.com/2006/09/soft-extra-territorialism-and-anti.html.

[25] See, Alun Milford on Deferred Prosecution Agreements, Remarks delivered at the Cambridge Symposium on Economic Crime 2017, Jesus College, Cambridge, available https://www.sfo.gov.uk/2017/09/05/alun-milford-on-deferred-prosecution-agreements/.

[26] On U.S., Canadian, and U.K. government's view of what constitutes an effective compliance program, see, U.S. at http://www.justice.gov/criminal/fraud/fcpa/guide.pdf, Canada, available at http://www.international.gc.ca/crime/corruption.aspx, and U.K., available at http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

[27] See, U.S. Department of Justice Criminal Division Fraud Section, Evaluation of Corporate Compliance Programs (Feb. 2017), available https://www.justice.gov/criminal-fraud/page/file/937501/download. See generally, United States Department of Justice, 9-28.000 - Principles of Federal Prosecution Of Business Organizations, available https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.

[28] See, e.g., U.K. Bribery Act 2010, c. 23, § 7.

[29] See, See, United States Department of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance, April 5, 2016, available https://www.justice.gov/criminal-fraud/file/838416/download;

[30] See, See, United States Department of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance, supra. 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. Dept. of Justice Press Release, Criminal Division Launches New FCPA Pilot Program (April 5, 2016), available https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program.

[31] See U.K. Criminal Finances Act of 2017, supra., see also Richard J. Rogers and Sasho Todorov, Compliance Alert: Due Diligence Under the U.K.'s Critical Finances Act of 2017, The FCPA Blog (Sept. 7, 2017), available http://www.fcpablog.com/blog/2017/9/7/compliance-alert-due-diligence-under-the-uks-criminal-financ.html.

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.[32] In Brazil, the Clean Companies Act[33] includes a leniency provision permitting state prosecutors to enter in a "deferred prosecution deal for companies willing to plead guilty and settle corruption charges."[34] 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. It also points to a 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 also been contributing to changes in the frameworks within which corruption is detected, controlled and punished. This short essay 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 one the use of prosecutorial discretion to use legal regimes to manage corporate compliance programs. In the former case state officials use private power to aid corporate self-regulation; in the second case state officials use public authority to devolve supervision to corporate surveillance mechanisms. In the next section the essay 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. The essay 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.

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[32] Rogers and Todorov, supra. ("if a company is unfortunate enough to identity 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.").

[33] Clean Companies Act or CCA (Law No. 12,846/13).

[34] Felipe Rocha dos Santos, New Guidance for Brazil Anti-Corruption Settlements, The FCPA Blog (Sept. 7, 2017), available 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. Ibid.

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 systems,[35] and can be a mark of systemic corruption,[36] it has never been viewed as corruptive enough to eliminate discretionary power in the prosecutor.[37] 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. These efforts to put a cage of regulation around the decision to enforce the law have some benefits. It provides guidance and reduces the likelihood that personal rather than institutional objectives are the primary basis for exercises of discretion. It also provides notice to people and entities subject to law to permit them to better manage their behavior to 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.

In some jurisdictions—the United States and Brazil, for example, the institutionalization of rules for exercising prosecutorial discretion, and the safe harbors produced under such rules, 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.[38] "Prosecutors not only use [deferred and no 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."[39] The exercise of prosecutorial power in this way has been criticized for

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[35] See, Donald A. Daugherty, "The Separation of Powers and Abuses in Prosecutorial Discretion," 79 J. Crim. L. & Criminology 953
(1988-1989)

[36] See, Elizabeth Price Foley, "Allowing Some Illegal Immigrants to Stay Abuses Prosecutorial Discretion," New York Times (Sept. 6, 2016, available https://www.nytimes.com/roomfordebate/2014/11/18/constitutional-limits-of-presidential-action-on-immigration-12/allowing-some-illegal-immigrants-to-stay-abuses-prosecutorial-discretion?mcubz=0 ("But would it be prosecutorial discretion if the president instructed U.S. attorneys to prosecute only heroin cases, and ignore other drugs prohibited by federal law, such as cocaine, P.C.P. or methamphetamine? . . . Most people would think such acts . . . would . . . constitute a rewriting of the law and violate the president's constitutional duty."). See generally Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor (Oxford, 2009)

[37] See, e.g., Bennett L. Gershman, "A Moral Standard for the Prosecutor's Exercise of the Charging Discretion," 20(3) Fordham Urban Law Journal 513 (1992); American Bar Association, Criminal Justice Standards For The Prosecution Function (4th Ed.), available https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html.

[38] See Jennifer Arlen, "Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements," 8(1) Journal of Legal Analysis 191-234 (2016) (criticizing this trend as in violation of rule of law principles).

[39] Ibid., p. 192.

expanding prosecutorial power to effectively impose conduct norms on corporations in derogation of the traditional powers of legislatures to establish these basic rules for liability.[40] 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 effective legalize societal norms and aspirations. In this sense, prosecutor deferred prosecution agreements and more generally policies on charging for violations in the face of cooperation and compliance, institutionalizes corporate governance principles that reflect emerging customs and patterns of behavior in corporate behavior.

The U.K. deferred prosecution agreement system "regime 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."[41] Brazil follows the same model.[42] Whether to not such institutional rules for constraining prosecutorial discretion or the D/NPSs that are produced thorough them require judicial scrutiny, or whether they exceed the administrative authority of prosecutors or otherwise should be a matter of concern for the appropriate operation of the governmental apparatus within the U.S. constitutional order is an issue left for others.[43] Its effectiveness as a means of addressing the issue of corruption through the use of discretionary state power to change enterprise behaviors 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 enough 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.

Just what is it that these deferred prosecution agreements 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 perhaps instructive. Since 1999, the U.S. Department of Justice has established guidelines for prosecuting corporations and other business organizations. These guidelines provide parameters for federal prosecutors and do not create any

[40] See, e.g., Jennifer Arlen, and Reinier Kraakman, "Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes," 72 N. Y. Univ. L. Rev. 687 (1997); Richard Epstein, "Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions, " in Prosecutor in the Boardroom: Using Criminal Law to Regulate Corporate Conduct, (Anthony Barkow & Rachel Barkow, eds., New York, NY: New York University Press., 2011).

[41] Milford, supra.

[42] See, Santos, supra.

[43] See, e.g., Miriam Baer, "Governing Corporate Governance, 50 Boston Coll. L. Rev. 949 (2009; Laurence Cunningham, "Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform," 66 Florida L. Rev. 1 (2014); David M. Uhlmann, "Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability," 72 Md. L. Rev. 1295 (2013).

enforceable rights in parties involved in litigation with the government.[44] The U.S. federal approach is built around the U.S. Justice Department's U.S. Attorney Manual and specifically 9-28.000–Principles of Federal Prosecution of Business Organizations (PBO).[45] It ought to be noted that while the PBO is meant to provide instructions for binding others, it does not itself bind the government.[46] 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.[47]

The PBO starts with an expression of policy–the fundamental principle that the prosecution of corporate crime is a high priority.[48] 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."[49] To that end the basic approach is to charge the most serious offense that is consistent with the nature of the wrongdoing.[50] The foundation of the policy is to prosecute individuals rather than the entity on whose behalf they may be acting. [51]

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[44] See, "Corporate Prosecution Principles Resource Page," Federal Evidence Review, accessed by September 13, 2017, http://federalevidence.com/corporate-prosecution-principles#aug2008.

[45] U.S. Justice Department, U.S. Attorney Manual, Title 9 (Criminal)-28.000–Principles of Federal Prosecution of Business Organizations, available https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.

[46] "These Principles provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice." § 9-28.1500.

[47] As set out in the DoJ comment:

> 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."

9-27.110 Principles Of Federal Prosecution.

[48] Ibid., §9-28.010.

[49] Ibid.

[50] Ibid., § 9-28.1400.

[51] Ibid. 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. Second, targeting individuals provides an easy way to intelligence that may produce evidence of misconduct of more highly placed individuals within the company. Third, "we maximize the likelihood that the final resolution will include charges against culpable individuals and not just the corporation." Ibid. 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.").

PBO then produces its own aggregated interpretation of the law of state corporate fiduciary duty (over which it has no authority to tinker or change, much less interpret). They have chosen to split that duty in two parts; first a duty to shareholders who are described as "the corporation's true owners,"[52] and the second a generalized duty of honest dealing with outsiders through regulatory filings and public statements.[53] Critical in this governmental obligation, at the federal level, to enforce its own reading of the obligations of fiduciary duty 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."[54] The object of prosecution, then at least in part is 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 also (in cooperation with prosecutors at times) vigorous programs of compliance (evidenced by disclosures to prosecutors and other officials as necessary, and self-regulation.[55]

On this general basis, the PBO builds its core general principle of prosecution: "Corporations 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."[56] The governance effects of indicting corporations are emphasized in the commentary to this PBO general principle. Indictment is an efficient form of obtaining broad regulatory compliance and self-regulation without the need for the intervention of legislative or other administrative bodies.[57] 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

[52] Ibid., §9-28.100
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] Ibid., §9-28.200(A).
[57] Ibid., §9-28.200(B) Commentary. The Commentary explains:

> 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.

There is as well an acknowledgement that sometimes prosecutors ought to defer to "civil and regulatory authorities. Ibid., citing USAM 9-28.1200 (Civil or Regulatory Alternatives), available http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.1100.

wrongful conduct.[58] In any case, the goals of "the goals of punishment, deterrence and rehabilitation" are at the center of discretionary decision making by the prosecutor.[59]

Balanced against the quasi-legislative and administrative value of prosecution are those of D/NPAs. From this general principle the PBO then 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. Berceuse, the PBO insists, a corporate entity is little more than the sum of the actions of individuals, then it is to the individual rather than the entity to which the prosecutor ought to look in the first instance.[60]

Beyond the key principle of seeking to punish the individual, PBO also sets out a set of factors that prosecutors ought to consider in exercising discretion.[61] These include the nature of the offense and its seriousness, 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.[62] The Commentary makes clear that these factors are illustrative rather than exhaustive, and their use is also a matter of discretion.[63] A number of the factors to be considered are then the subject of further policy. Special provision is made for activities of multinational corporation, which "necessarily intersects with federal economic, tax, and criminal law enforcement policies."[64] 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 instruction to prosecute even minor misconduct where it indicates a corporate culture that prosecutors deem worthy of changing.[65] In addition,

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[58] U.S. Justice Department, U.S. Attorney Manual, supra, § 9-28.1200(A).

[59] Ibid., § 9-28.1200(B) ("criminal prosecutors handling corporate investigations should maintain early and regular communication with their civil counterparts and regulatory attorneys, to the extent permitted by law, and even if it is not certain whether the end result will be a civil or criminal disposition").

[60] Ibid., §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.

[61] Ibid., §9-28.300(A).

[62] Ibid. 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 objects of prosecutorial action, individual or enterprise. 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.

[63] Ibid., §9-28.300(B).

[64] Ibid., §9-28.400(A). The management of jurisdictional and prosecution policies of other federal agencies is suggested in the Comment Ibid., §9-28.400(B).

[65] Ibid., §9-28.500(A).

the PBO adheres to the principle that "a corporation, like a natural person, is expected to learn from its mistakes."[66] Cooperation also has a value, as a mitigating factor.[67] But the nature of cooperation is quite specific—the corporation must identify *all* individuals tainted with misconduct and provide *all* facts "relating to" that misconduct.[68] 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.[69] 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.[70] 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.[71] This tension is also clear in the PBO's consideration of the way in which *cooperation* is valued in exercising prosecutorial discretion.[72] Here the PBO walks a fine line between pushing hard for information and disclosure and recognition of, to the narrowest extent consistent with law, of respect for corporate and individual rights within an adversarial system. And, indeed, one of the most interesting aspects of this section of the PBO is the w3ay 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.[73]

But just as disclosure, compliance and cooperation can balance in favor if exercising prosecutorial discretion against litigation and toward D/NPA regimes, obstruction can have the opposite effect.[74] "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."[75] And there is an irony here. While the government expects the corporation to disclose fully all facts related

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[66] Ibid., §9-28.600(B) Comment.
[67] Ibid., §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." Ibid.
[68] Ibid., §9-28.700(A). "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)." Ibid.
[69] Ibid., §9-28.710.
[70] Ibid.
[71] The tension is especially evident in mediating prosecutorial conduct concerning waivers of attorney client privilege or work product protections. See, ibid., § 9-28.750.
[72] Ibid., §9-28.720.
[73] Discussed in more theoretical terms in Larry Catá Backer, "Reifying Law - Government, Law and the Rule of Law in Governance Systems," 26 Penn St. Int'l L. Rev. 521 (2008).
[74] U.S. Justice Department, U.S. Attorney Manual, supra, § 9-28.730.
[75] Ibid.

to an investigation, it also expects the corporation's silence with respect to its communication with the government, at least to the extent that such disclosure can be tied to the misconduct of others.[76] 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.[77]

PBO spends some time describing corporate compliance programs.[78] 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."[79] 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.[80] The critical factor 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 enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives."[81] The ability of the compliance program to ferret out wrongdoing in a timely manner is an important consideration.[82] The object is to distinguish between what the PBO characterizes as "paper programs" from effective ones, with reference not merely to construction but to staffing and founding as well.[83] 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.[84] This aligns with programs of other administrative agencies that have already constructed formal programs of "self-reporting coupled with remediation and additional criteria."[85] Yet even in the absence of formal voluntary disclosure programs, ad hoc voluntary disclosure counts for something, as long as it is timely.[86] A similar approach applies to

[76] Ibid. ("for example, where the disclosure of such information could lead to flight by individual subjects, destruction of evidence, or dissipation or concealment of assets.").
[77] Ibid., § 9-28.740.
[78] Ibid., § 9-28.800.
[79] Ibid., § 9-28.800(A).
[80] Ibid., § 9-28.800(B).
[81] Ibid. Although there is no formula, the PBO specifies a number of factors. These include "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." Ibid.
[82] Ibid.
[83] Ibid.
[84] Ibid., § 9-28.900.
[85] Ibid.
[86] Ibid.

weighing the efforts of corporations to provide restitution or otherwise remediate wrongdoing.[87] The remediation must be meaningful and may include disciplining individual wrongdoers and making restitution and reforming compliance mechanisms.[88] These efforts touch on the collateral consequences of wrongdoing[89]—the extent of which a prosecutor may weigh in exercising discretion with respect to charging a crime or resolving a criminal case.[90] 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."[91] And that brings PBO to the heart of its regulatory sword—the power to enter into plea agreements or D/NPAs.[92] The PBO provides a framework for determining the terms of such agreements or pleas. Plea agreements ought to include a conscious admission of guilt and further the core principles of punishment, deterrence, and rehabilitation.[93]

The PBO provides the basis for structuring plea and D/NPA 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.[94] 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 form communities, and undermines the rule of law."[95] To the ends of reducing this threat, the *FCPA Enforcement Plan and Guidance* specifies a three step project for advancing its strategy of combatting corruption through bribery. First, the government committed to intensifying its investigative and prosecutorial efforts against bribery. Second, the government committed to engaging in multilateral efforts to combat bribery. The government bragged that "The 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 Air motive, Hewlett-Packard, IAP, Marubeni, Vadim Mikerin, Parker Drilling, PetroTiger, Total, and VimpelCom, among many others."[96]

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[87] Ibid., § 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.").
[88] Ibid., § 9-28.1000(B).
[89] Ibid., § 9-28.1100(B) Comment ("Therefore, in evaluating the relevance of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs,").
[90] Ibid., § 9-28.1100(A).
[91] Ibid., § 9-28.1100(B).
[92] Ibid., §9-28.1500.
[93] Ibid.
[94] United States Department of Justice, Criminal Division, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" (5 April 2016), available https://www.justice.gov/criminal-fraud/file/838416/download. .
[95] Ibid.
[96] Ibid.

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."[97] The object was to transform a number of key factors for determining the exercise of prosecutorial discretion under the U.S. Attorney Manual PBO[98] 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."[99] The pilot program was not meant to supplant the PBO, and voluntary.[100] "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."[101]

The three parts of the requirements for compliance with the FCPA pilot program requirements 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 burdened with proof of timeliness); and the company discloses all known relevant facts including all relevant facts about individuals involved in the wrongdoing.[102] To meet the cooperation requirements, in addition to the cooperation standards under the PNO, the cooperating entity must agree to a fairly comprehensive set of cooperating obligations. These include that the company (1) must make timely and complete disclosure, (2) the cooperation must be proactive,[103] (3) must preserve, collect and disclose all relevant documents, (4) must disclose timely updates of internal investigations, (5) "Where requested, de-confliction of an internal investigation with the government investigation,"[104] (6 must provide all relevant facts relevant to potential criminal liability by third party companies, (7) must make individuals available for interviews by government officials, (8) must disclose all relevant facts gathered during independent investigations, (9)

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[97] Ibid.
[98] U.S. Justice Department, U.S. Attorney Manual, Title 9 (Criminal)-28.000—Principles of Federal Prosecution of Business Organizations, available https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.
[99] FCPA Enforcement Plan and Guidance, supra.(referencing the PBO and the United States Sentencing Guidelines as the basis of the guidance in the Pilot Program).
[100] Ibid. ("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.").
[101] Ibid.
[102] Ibid.
[103] Ibid ("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").
[104] Ibid.

must disclose overseas documents and the locations where found and who found them, (10) must facilitate the third party production of documents and (11) where requested provide translation of non-English language documents.[105] Assessment of the value of cooperation is undertaker on a case by case basis.[106] Lastly, the remediation requirement poses some challenge. To evaluate remediation, it is first necessary to determine whether the company is eligible for cooperation credit. Beyond that, the company will have to evidence a number of requirements. It must evidence an effective compliance program.[107] 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."[108]

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.[109] 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 50% reduction off of the bottom end of the Sentencing Guidelines, and avoid the appointment of a monitor. But the Fraud Division can also consider a declination of prosecution.[110] The decision is subject to its own calculus: "his 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."[111] As of June 29, the Department of Justice had agreed to declinations against seven companies under the pilot program.[112]

In this approach one can discern a new form of national regulatory power. The focus is not on the setting of standards nor 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 it centers the investigative and charging authority of prosecutors as the source of governmental power to produce and manage change. But the obligations are

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[105] Ibid.
[106] Ibid. ("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.").
[107] Ibid. 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.
[108] Ibid.
[109] Ibid., ("at most a 25% reduction off the bottom of the Sentencing Guidelines fine range").
[110] Ibid.
[111] Ibid.
[112] See, In re: Nortek, Inc.; In re: Akamai Technologies, Inc.; In re: Johnson Controls, Inc.; In re: HMT LLC; In re: NCH Corporation; In re: Linde North America Inc.; In re: CDM Smith, Inc.. See generally DoJ, Declinations, available https://www.justice.gov/criminal-fraud/pilot-program/declinations.

not mandatory. Corporations have the power to reject the incentives toward leniency written into the guidance; or 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 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 of 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.[113] From a normative standpoint, the approach of the Department of Justice (and to some extent that of the Brazilian and U.K. variations), also comport 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. [114] For business, that focuses on cooperation, compliance, disclosure and remediation, in ways that are meant to establish partnerships between the state and business.

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[113] Discussed in Larry Catá Backer, "Theorizing Regulatory Governance Within Its Ecology: The Structure of Management in an Age of Globalization "(December 2016). Available at SSRN: https://ssrn.com/abstract=2783018.

> 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.

[114] See, U.N. Guiding Principles for Business and Human Rights (N.Y and Geneva, 2011) (endorsed by the People's Republic of China), available http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. See generally, Larry Catá Backer, "Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All," 38(2) Fordham International Law Journal 457 (2015).

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 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 rower in the companies in which they invest. This section considers how the Norwegian Pension Fund Global (NPFG), its sovereign wealth fund, has institutionalized a markets based program that focuses on corporate anti-corruption efforts.[115]

The NPFG was created by statute in the Government Pension Fund Act.[116] The Act provides that the NPFG is ultimately administered by the Ministry of Finance. The Ministry of Finance has authority to issue guidelines for the Management of the NPFG.[117] Through its guidelines, the Ministry of Finance has delegated investment authority to the Norges Bank and its instrumentalities.[118] The Ministry of Finance has also imposed a set of investment objectives to which the Norges Bank must adhere.[119] The Norges Bank is to seek the highest possible returns; it is to avoid investing in companies excluded from the investment universe form which the Bank may choose enterprise in which to invest; and the Norges Bank is required to exercise responsible management. Responsible management is specifically defined with reference to compliance with Norwegian and international standards.[120] These include strong principles

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[115] For more detailed discussion of the NPFG and its operation, see, Larry Catá Backer, "Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets," 29(1) American University International Law Review 1-121 (2013); Larry Catá Backer, "Sovereign Wealth Funds as Regulatory Chameleons: The Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investment," 41(2) Georgetown Journal Of International Law 425-500 (2010).

[116] Provisions on the management of the Government Pension Fund (As of 8 October 2012), available https://www.regjeringen.no/contentassets/9d68c55c272c41e99f0bf45d24397d8c/governmentpensionfundact.pdf.

[117] See, Management Mandate for the Government Pension Fund Global, Adopted by the Ministry of Finance on 8 November 2010 pursuant to section 2, second paragraph, and section 7 of Act no. 123 of 21 December 2005 relating to the Government Pension Fund. Amendments: Amended by decision no. 1792 of 21 Dec. 2010, no. 901 of 5 Sept. 2011, no. 689 of 27 June 2012, no. 943 of 4 Oct. 2012, no. 1338 of 18 Dec. 2012, no. 383 of 15 April 2013, no. 401 of 25 March 2014, no. 1783 of 18 Dec. 2014, no. 15of 7 Jan. 2015, no. 773 of 26 June 2015, no. 1367 of 30 Nov. 2015, no. 78 of 1 Feb. 2016, no. 1036 of 5 Sept. 2016, no. 116 of 30 Sept. 2016, no. 1781of 20 Dec. 2016. Available https://www.regjeringen.no/contentassets/9d68c55c272c41e99f0bf45d24397d8c/gpfg_mandate_20122016.pdf.

[118] The relationship between the Norges Bank and the Ministry of Finance is established in Ibid., Chp. 7.

[119] Ibid., Section 1-3 The management objective.

[120] Ibid., Section 2-2 Responsible management principles. These include:

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.

The Norges Bank is given authority to make decisions about the exclusion or observation of companies in accordance with the Guidelines for observation and exclusion from the NPFG.[121] The Guidelines for observation and exclusion from the Government Pension Fund Global (the "Guidelines")[122] "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.[123] The Ethics Council "consists of five members appointed by the Ministry of Finance after receiving a nomination from the Norges Bank."[124] The role of the Ethics Council is to evaluate whether specific NPFG investments are consist with the Ethics Guidelines.[125] The Ethics Council may, after investigation, recommend to the Norges Bank that a company be excluded from the NPFG investment universe, or that the company be placed under observation, or that no action be taken. The recommendation is not mandatory and the ultimate decision is vested in the NPFG administrator, the Norges Bank.

There are differences between determinations to exclude a company or to put a company under observation. An excluded company may not be the subject of NPFG investment. Once a company is excluded, the connection between it and the NPFG ae severed. The NPFG will not invest in the excluded company or any of its related entities. The exclusion decision is publicized and may affect the company's reputation (and access to capital). In a sense, exclusion negatively impacts the social credit of the excluded company.[126] The length of the exclusion will vary. An excluded company may seek to have the exclusion

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(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.

[121] Ibid., §2-5.

[122] Guidelines for observation and exclusion from the Government Pension Fund Global, Adopted 18 December 2014 by the Ministry of Finance pursuant to the Royal Decree of 19 November 2004 and section 2, second paragraph, and section 7 of Act no. 123 of 21December 2005 relating to the Government Pension Fund. Amended 21 December 2015 and 1 February 2016. Available https://www.regjeringen.no/contentassets/7c9a364d2d1c474f8220965065695a4a/guidelines_observation_exclusion2016.pdf.

[123] Ibid., § 1(1).

[124] Ibid., §4(1).

[125] Ibid., § 5.

[126] Social credit is understood here in its more general sense as ranking and reputation. But it can also be understood in its more formal sense as the ratings, subject to incentive and penalty currently being developed in

lifted. To that end, it must seek action from the Ethics Council and the Norges Bank. That usually requires a showing that the wrongdoing has been corrected and that systems are in place to better ensure to that such wrongdoing will not be repeated.[127]

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.[128]

The burden remains on the company to substantiate compliance, including remediation and the implementation of a compliance system that targets wrongdoing.[129] 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.[130] Of course, observation is purely voluntary, in the way that compliance with the requirements of the PBO are voluntary.[131] But refusals of cooperation can lead to decisions to divest and drop a company from the investment universe of the NPFG. This divestment is publicized and might have effects on the access of the company to financial markets. 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.[132] The other consists of specified conduct based

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China. See State Council Notice concerning Issuance of the Planning Outline for the Construction of a Social Credit System (2014-2020) (社会信用体系建设规划纲要).

[127] See, Ethics Council, Procedures for the reinclusion of companies, available http://etikkradet.no/en/procedures-for-the-reinclusion-of-companies/ ("Excluded companies are encouraged to inform the Council of matters that may cause their exclusion to be revoked").

[128] Council on Ethics for the Norwegian Government Pension Fund Global Annual Report 2016, at p. 13, available https://nettsteder.regjeringen.no/etikkradet-2017/files/2017/03/Etikkraadet_annual_report_2016_web.pdf.

[129] Ibid. ("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.")

[130] Ibid.

[131] See discussion above at text and notes 75-90.

[132] Guidelines, supra., § 2 (certain weapons, coal use, and tobacco products, for example).

grounds for exclusion or observation.[133] Among these, "Companies may be put under observation or be excluded if there is an unacceptable risk that the company contributes to or is responsible for . . . (e) gross corruption."[134] Corruption is understood to include both active and passive corruption.[135] 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.[136] 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.[137]

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.[138] 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."[139] 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 when allegations of wide-spread corruption are picked up by its news monitoring activities, but has also reviewed companies in countries and sectors where the risk of corruption is presumed to be particularly high, according to international indexes."[140] Interestingly, there is also reliance on the U.S. Justice and

[133] Ibid., §3.
[134] Ibid., §3(e).
[135] Council on Ethics Annual Report 2015, supra, at. 19.
[136] Ibid., p. 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).
[137] Ibid., including the UN's anti-corruption portal TRACK (Tools and Resources for Anti-Corruption Knowledge), available at http://www.track.unodc.org/Pages/home.aspx, Global Compact: A guide for anti-corruption risk-assessment (2013), available at https://www.unglobalcompact.org/resources/411 and The OECD's Good Practice Guidance on Internal Controls, Ethics and Compliance (2010), available at http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44884389.pdf.
[138] For a listing of the cases with links to original sources, see Ethics Council, Gross Corruption, available http://etikkradet.no/en/gross-corruption-2/.
[139] Johan H. Andresen, The Chair's Report, in Council on Ethics for the Norwegian Government Pension Fund Global Annual Report 2016, at p. 5, available https://nettsteder.regjeringen.no/etikkradet-2017/files/2017/03/Etikkraadet_annual_report_2016_web.pdf.
[140] Council on Ethics Annual Report 2015, supra, at. 20 ("companies are the building and construction, oil and gas, defence and telecommunications industries.").

Securities and Exchange Commission's Resource Guide to the U.S. Foreign Corrupt Practices Act,[141] and similar guides prepared for compliance under the criminal provisions of U.K. law.[142]

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.[143] In corruption matters the important signal from the company is that it acknowledges wrongdoing and its willingness "both internally and externally a willingness to change course."[144] The NPFG also looks to the vitality of anti-corruption compliance systems and programs.[145] To assess the value of the company compliance system the NPFG looks to international standards,[146] 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 form 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."[147] 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.[148] The NPFG can develop conditions produce conditions to guide the company from observation to full approval status.[149] NPFG has also suggested programs of integrity due diligence with company engagement with third parties, for cross border procedures for reporting noncompliance (including anonymous employee reporting), for measures for registering and investigating these reports, and for developing steps for applying discipline.[150]

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[141] See, Dept. of Justice and S.E.C., A Resource Guide to the U.S. Foreign Corrupt Practices Act
, it is available at http://www.justice.gov/criminal/fraud/fcpa/guide.pdf. Also cited was the U.S. Dept. of Commerce, Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies, available http://ita.doc.gov/goodgovernance/business_ethics/manual.asp.

[142] U.K. Ministry of Justice, The Bribery Act 2010, available at http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

[143] Council on Ethics Annual Report 2015, supra, 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.").

[144] Ibid.

[145] Ibid. ("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, which normally accounts for an important element of its overall internal control system").

[146] Ibid.

[147] Ibid., 20-21.

[148] Ibid. 21 ("n several companies with which the Council has communicated, face-to-face training is also given to agents and important third parties.").

[149] Ibid., 21 ("Based on the dialogue that the Council has had with certain companies, an absolute precondition for a good educational programme 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.").

[150] Ibid.

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.[151]

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.[152]

The assessment and review of the NPFG is usually triggered by *ongoing corruption investigations* undertaken by governments.[153] In that respect there is a *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. *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.

The arc of NPFG anti-corruption action is nicely illustrated by an early investigation against the German multinational corporation Siemens AG.[154] In 2007, The Council on Ethics recommended to exclude the German company Siemens AG due to severe and systematic corruption.[155] The Council noted

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[151] Ibid., 21-22
[152] Ibid., 22.
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[154] For more information on the company , see, e.g., https://www.siemens.com/global/en/home.html.
[155] See Council of Ethics, Recommendation Siemens AG (15 Nov. 2007), available http://etikkradet.no/files/2017/05/Recommendation-on-Siemens-2007.pdf.

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."[156] The investigation was triggered well after numerous proceedings had been initiated by governments against Siemens and its officials for bribery and other related offences. 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.[157] These cases involved the governments of Germany, Norway, Singapore, and Italy.[158] 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.[159] Siemens responded to the investigations by initiating projects of cooperation and compliance system building. 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.[160] Those efforts served as the foundation of Siemen's response to NPFG action—effectively that it should receive credit for its cooperation, voluntary disclosures and changes in compliance regimes.[161] In 2007, that response for insufficient for the Ethics Council which recommended exclusion.[162] Rejecting this assessment the Ministry of Finance decided to place the company under observation.[163] 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 recommendation in light of additional information.[164] 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."[165] 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.[166] 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

[156] Ibid., 2.
[157] Ibid., 5.
[158] Ibid., pp. 5-9. It also included the product of research generate by then ongoing trials in Germany and Norway. Ibid., 9-13.
[159] Ibid., 13.
[160] Ibid., 14-16.
[161] Ibid., 16-17.
[162] Ibid., 20.
[163] See, NPFG, Siemens AG, available http://etikkradet.no/en/siemens-ag-english/.
[164] Council of Ethics, Letter of 2 Sept. 2008, available http://etikkradet.no/files/2017/05/Svarbrev-til-Finansdepartementet_ENG-2008.pdf.
[165] Ethics Council, Recommendation to remove Siemens AG from the watch list of the Norwegian Government Pension Fund Global, 15 June 2012, available http://etikkradet.no/files/2017/05/Siemens-2012_eng.pdf, p. 1.
[166] Recommendation to Remove Siemens, supra.

response.[167] 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 form 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 Corp.[168] The second involved a Brazilian state enterprise, Petrobras.[169] The section ends with a suggestion about the direction and importance of institutional trends.

A. ZTE Corp.[170]

On 7 January 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 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 24 June 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 the use of shareholder power by the Norwegian SWF and this company for which divestment appeared to be the better option.[171]

ZTE Corp 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 pointing 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,

[167] Ibid., 2-6.
[168] Council on Ethics, Recommendation to exclude ZTE Corp. from the Government Pension Fund Global (24 June 2015) available http://etikkradet.no/files/2017/05/ENG-Tilr%C3%A5dning-ZTE-24.-juni-2015-ENGELSK-amended-Nov.-2016.pdf.
[169] Council on Ethics, Recommendation to put a company in the Government Pension Fund Global under observation: Petroleo Brasileiro SA (21 Dec. 2015), available http://etikkradet.no/files/2017/05/Recommendation-Petrobras-21-December-2015.pdf.
[170] Further discussion at . http://lcbackerblog.blogspot.com/2016/01/corruption-and-investment-chinese.html.
[171] Please find a brief analysis below. Please find Norges Bank's decision here.

> continuous learning and improvement efforts. Its objective is to develop into a global CSR leader long-term.[172]

As typical for Chinese corporations, CSR efforts are built around charity and societal programs that work in parallel with state policy for economic, social and cultural development.[173] "Active in community programs, ZTE participated in relief efforts related to the 2004 tsunami in Indonesia, the 2008 earthquake in Sichuan, China, and the 2010 earthquake in Haiti. ZTE also established the ZTE Special Children Care Fund, the largest charity fund in China."[174]

Traditionally, corruption was not necessarily viewed as at 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.[175] But recent changes in Chinese policy[176] and law[177] 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 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

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[172] See ZTE Company Responsibility, available http://wwwen.zte.com.cn/en/about/corporate_citizenship/.

[173] See, "China's Corporate Social Responsibility With National Characteristics: Coherence and Dissonance With the Global Business and Human Rights Project," in Human Rights and Business: Moving Forward, Looking Back 530-558 (Jena Martin and Karen Erica Bravo, eds., Cambridge University Press, 2015)); Larry Catá Backer, "Realizing Socio-Economic Rights Under Emerging Global Regulatory Frameworks: The Potential Impact of Privatization and the Role of Companies in China and India," 45(4) The George Washington International Law Review 615-680 (2013).

[174] ZTE Corp., Company Overview, available http://wwwen.zte.com.cn/en/about/corporate_information/.

[175] See, e.g., Lin, Li-Wen, "Corporate Social Responsibility in China: Window Dressing or Structural Change?," Berkeley Journal of International Law, 28(1) (2010); available https://ssrn.com/abstract=1419667; Larry Catá Backer, Corporate Social Responsibility with Chinese Characteristics, Part I, Law at the End of the Day (9 Nov. 2011), available http://lcbackerblog.blogspot.com/2011/11/corporate-social-responsibility-with.html; Larry Catá Backer, "Corporate Social Responsibility With Chinese Characteristics--Part II," Law at the End of the Day, available http://lcbackerblog.blogspot.com/2012/07/corporate-social-responsibility-with.html.

[176] Larry Catá Backer, "Corporate Social Responsibility With Chinese Characteristics Part 3: Wang Maoling on CSR and the Communist Party Line in China--构建和谐社会必须强化企业的社会责任," Law at the End of the Day (29 March 2013), available http://lcbackerblog.blogspot.com/2013/03/corporate-social-responsibility-with.html.

[177] "Update on anti-bribery and anti-corruption regulations and enforcement in China," Lexology (21 May 2015), available https://www.lexology.com/library/detail.aspx?g=ecfa940f-2f7a-4857-944b-3aba6b7e44cb; Larry Catá Backer,"Zhang Lei on China's Criminal Law and Anti-Corruption Strategies," Law at the End of the Day 1 Jan. 2016), available http://lcbackerblog.blogspot.com/2016/01/zhang-lei-on-chinas-criminal-law-and.html.

anti-corruption campaigns.[178] Because most heads of Chinese SOEs are also members of the Communist Party, discipline in anti-corruption investigations usually starts with CCP disciplinary systems.[179]

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.[180]

> The Central Commission for Discipline Inspection 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 17 are currently under inspection.[181]

Still, it had never been clear that actions outside of China would produce legal effects within China[182] (e.g., here) 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

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[178] See, "China corruption purge snares 115 SOE 'tigers'," available https://www.ft.com/content/ad997d5c-fd3c-11e4-9e96-00144feabdc0#axzz3wZZJgce1; Shannon Tiezzi, "China's State-Owned Companies Sweat as 'Graft-Busters' Converge: China's anti-corruption body announced a major probe in SOEs in the first half of 2015," The Diplomat (13 Feb. 2015), available http://thediplomat.com/2015/02/chinas-state-owned-companies-sweat-as-graft-busters-converge/; Gordon Orr, "5 Ways China's State-Owned Enterprises Are Adapting to the Downturn," Blog, Gordon's View (McKinsey / Co.)(13 Oct. 2015), available http://mckinseychina.com/5-ways-chinas-state-owned-enterprises-are-adapting-to-the-downturn/.

[179] See, e.g., See, "China corruption purge snares 115 SOE 'tigers'," available https://www.ft.com/content/ad997d5c-fd3c-11e4-9e96-00144feabdc0#axzz3wZZJgce1

[180] See, Hualing, Fu, "Wielding the Sword: President Xi's New Anti-Corruption Campaign," in Greed, corruption, and the modern state (Susan Rose-Ackerman and Paul Felipe Lagunes (eds), Edward Elgar, 2015). Available at SSRN: https://ssrn.com/abstract=2492407 ("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 Party 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").

[181] Nectar Gan, and Keira Lu Huang, "China's state-owned enterprises slammed for 'entrapping' officials into corruption," South China Morning Post (13 July, 2015), available http://www.scmp.com/news/china/policies-politics/article/1838514/chinas-state-owned-enterprises-slammed-entrapping.

[182] See, e.g., Larry Catá Backer, "Chinese SOEs in Latin America--CSR and Culture" Law at the End of the Day (May 20, 2013), available http://lcbackerblog.blogspot.com/2013/05/chinese-soes-in-latin-america-csr-and.html.

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, Philippines.[183] Lesser weight was given to corruption allegations in a number of other states, including Malaysia, Myanmar, Nigeria, and Liberia (Ibid., pp. 10-12). 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 proceeding,' international news agencies reported."[184] It was reported in the financial press that the issue leading to the action was tied to corruption: "an 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."[185]

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.[186] 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,[187] 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.[188]

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[183] Ethics Council Recommendation ZTE Corp., supra, pp. 6-10.
[184] Carmela Fonbuena, "Norway's telco giant bans ZTE for 6 months,"ABS /CBN News (21 Oct. 2008), available http://news.abs-cbn.com/business/10/21/08/norways-telco-giant-bans-zte-6-months.
[185] Ray Le Maistre, "Telenor Bans ZTE From New Deals," Light Reading (Oct. 13, 2008), available http://www.lightreading.com/mobile/telenor-bans-zte-from-new-deals/d/d-id/662089#discuss.
[186] See, Larry Catá Backer, Backer, Larry Catá. "Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets." 29 American University International Law Review 1-122 (2013).
[187] See, Larry Catá Backer, "Regulating Multinational Corporations – Trends, Challenges and Opportunities," 22(1) Brown Journal of World Affairs 153-173 (Fall/Winter 2015).
[188] Ethics Council Recommendation ZTE, supra., pp. 12

But the Ethics Council also sought to legitimate its approach by a passing reference to Chinese state policy and law.[189] 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, however characterized.[190]

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.

> 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.[191]

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 official 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, then--for failure to comply with an increasingly coherent internationalized normative order on corruption, and the likely internal investigations that may follow in China.

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

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[189] Ibid., pp. 12-13.
[190] See, Larry Catá Backer, "Are Supply Chains Transnational Legal Orders?: What We Can Learn From the Rana Plaza Factory Building Collapse," 1(1) University of California Irvine Journal of International, Transnational, and Comparative Law 11-66 (2016); Larry Catá Backer, "The Emerging Normative Structures of Transnational Law: Non-State Enterprises in Polycentric Asymmetric Global Orders," 31(1) Brigham Young University Journal of Public Law 1-52 (2016).
[191] Ethics Council Recommendation ZTE, supra, pp. 13-14.

investment universe.[192] But this determination should raise eyebrows as well. 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. On the other hand it mirrored the action taken with a Chinese SOE--China Railway Group Ltd.[193] 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 (Recommendation pp. 8-10). 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." (Recommendation pp. 1). This might have raised eyebrows in the West, because the Council specifically referenced the Chinese Communist Party's system of shuanggui (Recommendation pp. 9), a practice that has been criticized in the West.[194]

But exclusion may reflect a pragmatic determination. 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. 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. That suggests not so much discrimination on the basis of enterprise origin as a hard headed assessment of corporate willingness to cooperate. *But this trend bears watching*.

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[192] Ibid., pp. 15-16.

[193] Ethics Council, Recommendation to exclude China Railway Group Ltd. from the investment universe of the Government Pension Fund Global (GPFG) (10 October 2014), available http://etikkradet.no/files/2017/02/Recommendation-CRG-10-October-2014.pdf.

[194] Larry Catá Backer, "Change Comes to the Norwegian Sovereign Wealth Fund Global," Law at the End of the Day (Jan. 30, 2015), available http://lcbackerblog.blogspot.com/2015/01/change-comes-to-norwegian-sovereign.html. For a discussion of the broader constitutional issue, see Larry Catá Backer and Keren Wang, The Emerging Structures of Socialist Constitutionalism With Chinese Characteristics: Extra-Judicial Detention (Laojiao and Shuanggui) and the Chinese Constitutional Order, Pacific Rim Law & Policy Journal 23(2):251-341 (2014) Chinese language version 白轲 王可任 著，依宪治国与从严治党格局下党内反腐惩戒制度的法治考察，中国法律评论 China Law Review 207-234 (2015 年第 4 期(总第 8 期)) (available http://www.chinalawreview.com.cn/article/20151117170703.html).

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.[195]

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. 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. 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 within production chains that much of the effort of the Ethics Council is directed.

C. Petrobras.[196]

Norges Bank has decided to place Petroleo Brasileiro SA (Petrobras)[197] under observation because of the risk of severe corruption.[198] Petrobras is one of the largest state owned petroleum TNCs in Latin America[199] and one that is deeply embedded in corruption investigations[200] (including the write off

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[195] (Backer, Larry Catá, "Governance Without Government: An Overview and Application of Interactions Between Law-State and Governance-Corporate Systems," in Beyond Territoriality: Transnational Legal Authority in an Age of Globalization 87-123 (Günther Handl, Joachim Zekoll, Peer Zumbansen, editors, Leiden, Netherlands & Boston, MA: Martinus Nijhoff, 2012)

[196] First discussed in Larry Catá Backer, Law at the End of the Day, available http://lcbackerblog.blogspot.com/2016/02/incoherence-in-corruption-and.html.

[197] The official company website may be accessed at http://lcbackerblog.blogspot.com/2016/01/should-financial-institutions-have.html.

[198] Council on Ethics, Recommendation to put a company in the Government Pension Fund Global under observation: Petroleo Brasileiro SA, supra.

[199] See Petrobras, Capital Ownership, available http://www.investidorpetrobras.com.br/en/corporate-governance/capital-ownership.

[200] See, e.g., "Corruption in Brazil; The big oily: The Petrobras scandal explained," The Economist (30 Dec. 2014), available https://www.economist.com/news/americas/21637437-petrobras-scandal-explained-big-oily; Paul Kiernan, "Brazil's Petrobras Reports Nearly $17 Billion in Asset and Corruption Charges: State-run oil company

of over $2 billion in bribe payments that reached all the way to the office of the President of the Republic (here).[201] The decision is based on the recommendation submitted by the Council on Ethics for the Government Pension Fund Global.

The decision stands in stark contrast to the 7 January 2016 decision by Norges Bank to exclude the Chinese company ZTE Corporation,[202] one of the world's five largest producers of telecommunications equipment and network solutions, based on an assessment of the risk of severe corruption. 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 trigger greater use of shareholder rights and when it triggers a decision to exclude form investment. To the extent that these decisions do not add clarity, they ill 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 Find Global's Ethical Guidelines). It is emerging that, at least under the OECD's framework Guidelines for Multinational Enterprises, financial institutions assume at least some minimal level of responsibility for the human rights detrimental conduct of clients.[203] 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 7 January 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

writes off $2.1 billion of alleged bribe payments," The Wall Street Journal (April 22, 2015) available https://www.wsj.com/articles/brazils-petrobras-reports-nearly-17-billion-impairment-on-assets-corruption-1429744336.

[201] See, Michelle Mark, "Brazilian President Dilma Rousseff Cleared in Petrobras Corruption Scanda," International Business Times (20 Oct. 2015), available http://www.ibtimes.com/brazilian-president-dilma-rousseff-cleared-petrobras-corruption-scandal-2146773.

[202] Discussed above Section II.A.

[203] See, Larry Catá Backer, Should Financial Institutions Have Obligations to Manage the Human Rights Impacts of their Clients?: "Final Statement Friends of the Earth Europe and Friends of the Earth Netherlands/Milieudefensie – Rabobank," Law at the End of the Day (January 2016), available http://lcbackerblog.blogspot.com/2016/01/should-financial-institutions-have.html.

investment universe of the GPFG. The company is excluded based on an assessment of the risk of severe corruption (see here). 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 corruption.[204] 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 33 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.[205] 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 becoming

[204] Council on Ethics, Recommendation to put a company in the Government Pension Fund Global under observation: Petroleo Brasileiro SA, supra.
[205] Larry Catá Backer, "Inscribing Judicial Preferences into Our Basic Law: The Political Jurisprudence of European Margins of Appreciation As Constitutional Jurisprudence in the U.S.," 7 Tulsa Comparative & International Law Journal 327-373 (2000), available http://www.backerinlaw.com/Site/wp-content/uploads/2012/07/7TulsaJCompIntlL3272000-Inscribing-Judicial-Pref..pdf.

> involved in corruption, and that relevant processes and procedures are continuously developed and improved.[206]

The Ethics Council, then, does not look to actual elimination but rather to the willingness of the enterprise to device and apply anti-corruption systems. 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.

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. In both cases the companies operated in places with either weak governance or a higher propensity to tolerate corruption. Applying international normative standards, that context then places "special requirements on the company to have in place robust systems and implement anti-corruption measures" (generally discussed e.g. here). 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. In ZTE neither a sufficiently robust system nor a perceived internal or external disciplinary structure was deemed sufficient. 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 to "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 therefor 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.

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[206] Council on Ethics, Recommendation to put a company in the Government Pension Fund Global under observation: Petroleo Brasileiro SA, supra. See also OECD, Anti-Corruption Ethics and Compliance Handbook for Business (2013), available https://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf.

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 ask whether the difference is based on unconscious presumptions about the amenability to corruption, and to correction, inherent in Chinese companies (little prospect for correction) against Brazilian companies (better prospects). But this would be 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 ever 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 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.

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. But the divergences do not suggest fundamental differences, more 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.

This is most apparent in the context of corruption--an area of increasing concern to the Pension Fund--Global. 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. The emphasis was on the constraints imposed by the nature of the Ethics Council's work. 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.

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.[207] 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.[208] 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,[209] while the Council on Ethics is responsible for observation.[210]

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

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[207] See, PetroChina Co Ltd and Leonardo SpA. See, Ethics Council, Recommendation to exclude PetroChina Co Ltd from the GPFG (8 Dec. 2016), available https://nettsteder.regjeringen.no/etikkradet-2017/files/2017/05/PetroChina-Tilr%C3%A5dning-ENG-2016.pdf; Ethics Council, Recommendation to exclude Leonardo SpA from the GPFG (Dec. 2016), available https://nettsteder.regjeringen.no/etikkradet-2017/files/2017/05/Leonardo-Tilr%C3%A5dning-ENG-2016.pdf.

[208] See, Eni SpA and Saipem SpA. See, Ethics Council, Recommendation to place Eni SpA under observation (20 Dec. 2016), available https://nettsteder.regjeringen.no/etikkradet-2017/files/2017/05/Eni-Tilr%C3%A5dning-ENG-2016.pdf; Ethics Council, Recommendation to place Saipem SpA under observation (20 Dec. 2016), available https://nettsteder.regjeringen.no/etikkradet-2017/files/2017/05/Saipem-Tilr%C3%A5dning-ENG-2016-.pdf.

[209] NBIM, Responsibility, "We are an Active Owner," available https://www.nbim.no/en/responsibility/ ("Our tools for active ownership are dialogue with companies, investors, regulators and other standard setters, voting at shareholder meetings and filing shareholder proposals."). See also Norges Bank, Responsible Investment: Government Pension Fund Global 2016, available https://www.nbim.no/contentassets/2c3377d07c5a4c4fbd442b345e7cfd67/government-pension-fund-global---responsible-investment-2016.pdf , pp. 32-68.

[210] Ibid., p. 76.

grounded in 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 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 (as a general trend discussed here).

This is particularly apparent in the quite distinct approaches of the Ethics Council and Norges Bank with respect to Eni SpA[211] and Saipem SpA,[212] with respect to 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.[213] 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 later constructs corruption as an economic issue with compliance effects disciplined by the market.

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, and 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 turns, requires both coherence in approach to corruption (how does it manifest) 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 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)

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[211] Ethics Council, Recommendation to place Eni SpA under observation (20 Dec. 2016), available https://nettsteder.regjeringen.no/etikkradet-2017/files/2017/05/Eni-Tilr%C3%A5dning-ENG-2016.pdf.
[212] Ethics Council, Recommendation to place Saipem SpA under observation (20 Dec. 2016), available https://nettsteder.regjeringen.no/etikkradet-2017/files/2017/05/Saipem-Tilr%C3%A5dning-ENG-2016-.pdf.
[213] For Eni SpA, see http://etikkradet.no/en/eni-spa-2/. For Saipem SpA, see http://etikkradet.no/en/saipem-spa-2/.

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 essay 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—declinations (formal exercise of discretion to close an investigation without charges), [214] and exercise of shareholder power by sovereign investors or observation—both to avoid criminal investigation and to reform corporate internal governance to reduce the likelihood of criminal activity.

What that suggests is a natural alignment in states, like China, that have significant prosecutorial as well as sovereign investment capacities. Grounded in the basic policy of both U.S. Justice Department's pilot program and the NPFG of *voluntary disclosure, cooperation, remediation and disgorgement*, it is possible to develop a two prong and coherent approach to policing corruption. That policy would achieve the objectives of the criminal law—to punish wrongdoers and 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[215] 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 On 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 persecution of corruption—one that still focuses

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[214] See, U.S: Department of Justice, Declinations, available https://www.justice.gov/criminal-fraud/pilot-program/declinations; see also Richard L. Cassin, "Hey, Declinations WITHOUT Disgorgement Are Still Popular, too," in The FCPA Blog (8 Sept. 2017), available https://www.fcpablog/blog/2017/9/8/hey-declinations-without-disgorgement-are-still-popular-too.html.

[215] See, Andrew Brady Spalding, "Restoring Pre-Existing Compliance Through the FCPA Pilot Program," 48 University of Toledo Law Review 2017) available https://ssrn.com/abstract=3029452.

on appropriate punishment, but that 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.[216] 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.[217] It requires converting the system of exercising discretion based on the factors specified in Section II of this essay, and the factors for determining compliance with sovereign investing compliance requirements discussed in Part III of this essay, 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 also 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 customs and practices of a society.

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[216] See, EcoVadis, First Annual CSR Performance Index (2017), discussed in Larry Catá Backer, "Social Credit in the West: Non-State Rating Systems for CSR Compliance," Law at the End of the Day (16 Sept. 2017), available http://lcbackerblog.blogspot.com/2017/09/social-credit-in-west-non-state-rating.html#more.

[217] See, e.g., "Credit ratings: how Fitch, Moody's and S&P rate each country," DataBlog, The Guradian (2010 and updated), available https://www.theguardian.com/news/datablog/2010/apr/30/credit-ratings-country-fitch-moodys-standard.