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Holding to Account: How Publishing Facts about Foreign Corruption Creates Accountability

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Key messages

- When courts or prosecutors disclose facts from cases of foreign corruption over which they have jurisdiction, they can help other anticorruption actors do their jobs more effectively. There are a range of cases in which greater transparency:
  - Provided government agencies with the initial evidence and outside pressure needed to take action against wrongdoers.
  - Allowed businesses to make decisions sensitive to corruption risks, for instance when: carrying out due diligence; choosing partners, deals and acquisition targets; assessing the risks of working in a particular country or sector; and reporting wrongdoing to regulators and law enforcement.
  - Helped civil society actors, the press, and victims of corruption identify those who benefited from and enabled it, and seek redress for harm.
- Transparency in foreign corruption cases remains selective and uneven. A handful of countries issue most of the available information. Going forward, government agencies in possession of the facts should strongly consider disclosing, as far as privacy, data protection, and judicial procedure rules allow, the names of all proven beneficiaries and enablers of corruption. They should also describe the deals, sectors, corruption schemes and jurisdictions involved. Transparency should extend to legal actions beyond foreign bribery—for instance, civil asset forfeitures and seizures, money laundering convictions and proceeds of criminal offenses.
- Representatives from government, industry, civil society and the press should together discuss how disclosure practices in foreign corruption cases could be harmonized across jurisdictions.

INTRODUCTION

The complex, secretive nature of foreign corruption calls for a collaborative, all-hands-on-deck approach. Corrupt actors go to great lengths to hide their wrongdoing, using layers of legal entities, transactions, secrecy jurisdictions and middlemen. No one response can detect and prevent every bad act, and different anticorruption actors have their own unique interests, mandates and abilities. In many cases, they may struggle even to learn the facts of what went wrong.

Prosecuting a corruption crime generates reams of valuable information. This can include the names of bribe takers and payers; the industries, countries and public institutions involved; how the proceeds of crime changed hands; and who facilitated or turned a blind eye. Who should get to see this information?

Thought leaders on anticorruption, from Transparency International (TI) to the Organization for Economic Cooperation and Development's Working Group

on Bribery (OECD WGB), have long endorsed greater transparency in foreign corruption cases.[1] They argue, for example, that access to information raises awareness, gives guidance to anticorruption practitioners, encourages cooperation with prosecutors and boosts confidence in law enforcement. Conversely, opacity in corruption cases can weaken the deterrent value of prosecutions, open doors for prosecutorial misconduct and thwart efforts to make victims whole. These concerns are particularly keen in cases that settle via tools like deferred prosecution agreements (DPAs) or plea bargains.[2]

Many governments share evidence from corruption cases confidentially, through formal legal instruments and close working relationships.[3] But how does public disclosure of facts from corruption cases, whether by courts or other law enforcement bodies, aid the broader fight against corruption? Put differently: At a time when enforcement of anticorruption laws remains low in many countries, could more transparency help anticorruption efforts by regulators, companies, the media, civil society and others?

To answer this question, we analyzed materials from foreign corruption cases that have arisen since the inception of laws banning foreign bribery.[4] During the past four years, we also conducted over two dozen interviews with experts from government, the private sector, civil society and the press.[5] From this work, we found instances in which other anticorruption actors used published facts from court cases to do their jobs more effectively. Most of the information came from foreign bribery cases, but we noticed similar effects from other types of civil and criminal actions as well, such as civil cases pursued against stolen assets under the U.S. Kleptocracy Asset Recovery Initiative.[6] Although we undertook this research as part of the Natural Resource Governance Institute's (NRGI's) programming aimed at reducing corruption risks in the oil, gas and mining sectors, we did not limit ourselves to cases in the extractive industries. Accordingly, our findings and recommendations apply broadly to corruption in other sectors.

CURRENT COUNTRY PRACTICES

Many jurisdictions have shown real commitment to investigating large, complex corruption cases, assigning meaningful penalties to powerful actors, and seeking to improve the behavior of companies and individuals. Transparency across all this activity remains uneven and selective, however. In a 2018 survey of 42 countries, TI found that 37 disclosed either no or "only partial" information on foreign bribery enforcement. According to that survey, in many jurisdictions, court decisions are only available through a subscription (as in Israel), for "a restricted audience such as judges and lawyers" (as in Italy), or when requested in person at a court

1 See e.g., Transparency International, *Exporting Corruption – Progress Report 2018* (2019); OECD WGB, Resolving Foreign Bribery Cases with Non-Trial Resolutions (2019). The OECD WGB overseas the main treaty geared specifically toward ending foreign bribery, called the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention). The convention entered into force in 1999.

2 See e.g., U.K. Crown Prosecution Service, "Deferred prosecution agreements: Government response," 23 October 2012; Transparency International, *Can justice be achieved through settlements?* (2015). Although some countries, such as the United Kingdom, require court approval of DPAs, the facts leading to the court approval may not be readily available to the public.

3 For an overview, see OECD, *Typology on Mutual Legal Assistance in Foreign Bribery Cases* (2010).

4 See OECD, "Foreign Bribery Factsheet," 2014.

5 Given the sensitive nature of our interviews, we do not name the individual interviewees in this report.

6 For the purposes of this brief, we define "corruption" broadly, as "the use of entrusted public power for personal gain." See Transparency International, "What is Corruption?" 2018; OECD, "The Rationale for Fighting Corruption," 2014.

(as in Sweden).[7] Only a small subset of countries—including the United States, the United Kingdom, the Netherlands and Brazil—have relatively consistent practices of making case information available on centralized government websites or public databases. This leaves third-party sites, OECD WGB reports and media stories as the best sources of information for many cases.[8]

Disclosures of information on foreign bribery enforcement from cases that end in settlements are especially patchy.

Disclosures from cases that end in settlements are especially patchy. The OECD WGB found that in over half of settled foreign bribery actions across 32 countries, the government did not even publish a press release.[9] Some countries—for instance, Belgium—refuse to put out any information about settlements, while others release facts only when "the decision has public interest" (as in Norway) or when the person requesting the facts can demonstrate a personal interest (as in Switzerland).[10] Finland was the only jurisdiction we found that requires public confessions in the context of settlements—specifically, plea bargains.[11]

As part of our research, we examined six countries with relatively active anti-bribery enforcement records: Germany, Italy, Norway, Switzerland, the United Kingdom and the United States.[12] Each of these countries takes a different approach to transparency (Figure 1), with two—the U.S. and the U.K.—accounting for the bulk of disclosures. Both of these jurisdictions regularly publish press releases and court documents that include the following detailed facts about concluded cases:

The United States and the United Kingdom are responsible for the bulk of disclosures of information on foreign bribery enforcement.

- The names of the companies or individuals who were bribe givers or otherwise engaged in corruption
- Information that could help identify the bribe takers or beneficiaries of the corruption, such as the government bodies which they served and their dates of service[13]
- The value of the bribes or other proceeds of corruption involved
- The country where the bribery or other corruption occurred
- The industries and types of business deals involved
- The mechanism of the corruption scheme, including how funds were obtained, transferred and concealed
- The locations of bank accounts and shell companies used

However, even between these two countries, discrepancies exist. The U.S. documents tend to be easier to locate online, since both U.S. enforcement agencies, the Securities and Exchange Commission (SEC) and the Department of Justice

7 Transparency International (2019), op. cit.
8 For examples of such third-party databases, see the World Bank's Stolen Asset Recovery Initiative (StAR), the FCPA Blog, and Transparency International's Compendium.
9 OECD (2019), op. cit., at 153.
10 Ibid., at 154–155; OECD WGB, *Phase 3 Report on Implementing the OECD Anti-bribery Convention in Belgium*, October 2013, at 35; OECD WGB, *Phase 4 Report: Switzerland*, March 2018, at 53.
11 See OECD WGB, *Phase 4 Report: Finland*, March 2017, at 36.
12 We collected our data on publication of case facts in the target countries from OECD country reports, privately maintained enforcement databases such as the TRACE Compendium and the Stanford Law School Foreign Corrupt Practices Act Clearinghouse, anticorruption practitioner news sites such as the FCPA Blog, and the websites of the relevant enforcement authorities in the six countries. We did not place any date restrictions on these searches, and we did not count data published on non-government websites or leaked to outside actors as having been disclosed by the relevant government.
13 Countries almost never publish the names of bribe takers, preferring instead to describe them anonymously—e.g., by only mentioning their positions in government or the agencies that employed them. The OECD WGB found that even anonymized information on bribe takers was available for only half of the published settlements it surveyed. OECD WGB (2019), op. cit.

(DOJ), maintain comprehensive case databases that deal solely with foreign bribery cases.[14] In addition, since 2016, the DOJ has issued information about cases that it decides not to prosecute, in the form of declinations.[15]

The U.K. Serious Fraud Office (SFO) provides information on its website about many of the cases it prosecutes; however, a user must sift through a bit more material, since the relevant webpage includes all cases under its jurisdiction, not just corruption cases that arise under the Bribery Act of 2010.[16] Even when case information is published, the published information may not include links to the relevant judgments, which requires interested parties to search elsewhere for detailed facts. In addition, the SFO sometimes delays providing facts about cases—for example, when it has concluded a prosecution against the company but is still investigating or prosecuting individuals involved.[17] Finally, the SFO does not post any information on cases prosecuted by the Crown Prosecution Service (CPS) or the Crown Office and Procurator Fiscal Service (COPFS), which also have the authority to try corruption offenses—in England/Wales and Scotland, respectively. In fact, the CPS brought the first prosecution under the Bribery Act. Neither CPS nor COPFS regularly publishes case information. [18]

Figure 1. Published facts from foreign corruption cases in six countries (as of September 2019)

Country	Number of foreign corruption cases found	Number of cases with some officially published facts[18]
Germany	11	0
Italy	6	0
Norway	7	7
Switzerland	10	4
United Kingdom	27	24
United States	267	267

Norway and Switzerland are somewhat less reliable in their disclosure of foreign bribery cases, and the individual prosecutor may have the responsibility for choosing to issue a press release or publish other case documents. Norway consistently issues press releases regarding corruption cases, but they may be difficult to find on the website after longer periods. Individuals who do not read Norwegian may find them especially difficult to locate.[19] Switzerland's Office of Attorney General (OAG) only issued press releases in some of the foreign

14 The U.S. Department of Justice and the U.S. Securities and Exchange Commission each maintain a database of all enforcement actions since enactment of the Foreign Corrupt Practices Act (FCPA). See U.S. DOJ, "Related Enforcement Actions," last updated 22 February 2019; U.S. SEC, "SEC Enforcement Actions: FCPA Cases," modified 2 August 2019.

15 DOJ, "Declinations, 26 September 2019.

16 SFO, "Our Cases," 2019. The SFO notes that it will withhold information from the public domain if disclosing it may harm an ongoing investigation. Ibid.

17 For example, the SFO concluded a DPA with Sarclad Ltd. in 2016, but it did not disclose the name of the company until early 2019, when the individuals involved in the case were acquitted. SFO, "Sarclad Ltd.," modified 3 September 2019.

18 Facts could be provided in the form of a press release, complaint, settlement agreement or other document explaining what the case was about. The detail provided varies between jurisdictions and among individual cases.

19 See Økokrim, "Nyheter" ["News"], last visited 24 August 2019. For a recent press release related to a corruption case, see Økokrim, "Tre års strafferabatt i korrupsjonssak" ["Three Years' Penalty Discount in Corruption Case"], 10 July 2019.

corruption cases we found, and the language of releases depends on the local office prosecuting the case.[20] These two jurisdictions are still ahead of Germany and Italy, however, for which we could find no officially published summaries of case facts.

Even in more transparent jurisdictions, the depth of what governments disclose varies widely. For example, the U.S., DOJ issued over 120 pages of detailed information related to the Foreign Corrupt Practices Act (FCPA) case brought against the hedge fund Och-Ziff.[21] Around the same time, the DOJ released roughly the same volume of paper from its settlement with defendant SBM Offshore, an oilfield services company.[22] Both entities admitted to bribing officials in several countries, and both cases ended in deferred prosecution agreements with the companies paying multimillion dollar fines. Despite these similarities, as Figure 2 below shows, the facts disclosed in each case varied significantly.

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Fact	SBM Offshore	Och-Ziff
Identities of bribe givers (that is, bribe-paying company executives)	Some, but not all	None, though several company officials and one middleman were identified and convicted in related proceedings
Identities of bribe takers (that is, officials involved)	Identified at a high level of generality—e.g., "at least three Petrobras officials," with no further detail	Includes titles, nationalities and dates of service, making the individuals more easily identifiable
Description of business obtained through bribery	Mostly described in a phrase or sentence—e.g., "one or more projects with Petrobras"	Includes lengthy descriptions of multiple transactions, including company names, locations, players and key contract terms
Jurisdictions of bank accounts involved	Some named	Named more consistently than in SBM

Figure 2. Comparison of information disclosed in the Och-Ziff and SBM Offshore FCPA cases

Similar inconsistencies occur in the U.K. and Norway.[23]

A range of factors could explain these variations. Interviewees in the United States told us that defendants and prosecutors often negotiate how much factual information will be disclosed in an FCPA case.[24] Individual prosecutors also have different preferences when it comes to transparency, and cases with more developed evidence tend to be reported at greater length.[25] Data protection and privacy laws limit disclosure in E.U. jurisdictions, and the European countries that do publish corruption case documents tend to anonymize them first.[26]

Courts and prosecutors across countries have significant discretion to choose which facts reach the public.

Even acknowledging these bureaucratic customs and legal constraints, our research finds that courts and prosecutors across countries have significant discretion to choose which facts reach the public. We hope the findings in the rest of this brief convince more of them to allow more information into the light.

20 See OAG, "Press Releases," last visited 24 August 2019. For a recent press release related to a corruption case, see OAG, "Petrobras – Odebrecht Affair: Around CHF 365 million refunded to Brazil," 4 April 2019.
21 See the documents linked to DOJ, "Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay $213 Million Criminal Fine," 29 September 2016.
22 See the documents linked at DOJ, "United States v. Sociedad Química y Minera de Chile," updated 24 January 2017.
23 In relation to the United Kingdom, see OECD WGB, *Phase 4 Report: United Kingdom* (March 2017), at 59–60. With respect to Norway, compare Økokrim's Klaveness and Norconsult press releases. See Økokrim, "Millionforelegg for bestikkelser" ["Millions in Settlement for Bribery"], 15 May 2014; "Bot til Norconsult for grov korrupsjon i Tanzania" ["Fine for Norconsult's Gross Corruption in Tanzania"], 16 October 2012.
24 Interviews with U.S. defense attorneys and former prosecutors (2015–2018).
25 Ibid.
26 See e.g., European Case Law Identifier, *On-line Publication of Court Decisions in the EU* (2017).

HOW DISCLOSURE LEADS TO ACCOUNTABILITY FOR CORRUPTION

Disclosing facts from foreign corruption cases leads to positive outcomes in three key ways—by spurring government action, by guiding business activity, and by supporting victims and non-governmental oversight actors.

1. Disclosure spurs government action

The release of information about the investigation and prosecution of a foreign bribery case by enforcement authorities can lead to actions against other wrongdoers involved in illicit conduct:

- **Disclosure lays an evidentiary foundation for related investigations and sanctions in the same jurisdiction.** In the wake of enforcement actions under the U.S. FCPA, for instance, the U.S. Department of State has used facts from published case documents to justify denying visas to foreign bribe recipients. One State official told us, "We're not a fact-finding body, so we have to rely on others. Court case materials are very important when we put together the dossiers to support travel bans."[27]

  Similarly, the U.S. Department of the Treasury has used FCPA filings to support sanctions under the Magnitsky Act.[28] The Senate Permanent Subcommittee on Investigations also leaned heavily on FCPA case documents in its 2010 investigation of corrupt money flows into the U.S.[29]

  Facts regarding concluded foreign bribery cases may also have a bearing on other government decisions. For example, many jurisdictions limit the ability of a company to obtain other government benefits—such as government procurement contracts, export financing or inclusion in a sovereign wealth fund—if it has engaged in corruption.

- **Disclosure provides information and impetus for legal action in other jurisdictions.** Putting facts from corruption cases in the public domain helps foreign governments take up a case or cooperate, which is often critically important given the comple and cross-border nature of most grand corruption. Cooperation between jurisdictions in the investigation and prosecution of foreign bribery cases is increasingly common. However, governments can only exchange facts directly via mutual legal assistance (MLA) if the right relationships and legal instruments are in place. Formal MLA procedures are sometimes cumbersome.[30] In addition, they require a jurisdiction to formally

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27 2017 interview with U.S. Department of State official (discussing the cases of former Nigerian Vice President Atiku Abubakar [implicated in the *Siemens and William Jefferson* cases] and other unnamed officials).

28 Global Magnitsky Human Rights Accountability Act, 22 U.S.C. § 2656. Most notably, in June 2018, the U.S. Department of Treasury (Treasury) announced the imposition of Magnitsky sanctions on 14 entities affiliated with Israeli mining figure Dan Gertler, who has been described (anonymously) as a conduit for bribe payments to senior Congolese officials in a related FCPA enforcement action against Och-Ziff Capital Management Group. Treasury, "Treasury Sanctions Fourteen Entities Affiliated with Corrupt Businessman Dan Gertler under Global Magnitsky," press release, 15 June 2018; see also ibid., "New Executive Order Implements Global Magnitsky Human Rights Accountability Act, Provides for Treasury Sanctions Against Malign Actors Worldwide," press release, 21 December 2017. In a 2018 interview, a Treasury official said the department relied heavily on facts in the Och-Ziff court filings to sanction Gertler.

29 *Keeping Foreign Corruption Out of the United States: Four Case Histories*, Hearing before the Senate Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs, vol. 1, S. Hrg. 111–540; Senate Hearing 111–540, 4 February 2010; 2016 interview with staff member of Senate Permanent Subcommittee on Investigations.

30 The US CLOUD Act, P.L. 115–141, 2018, and the EU's draft e-Evidence Regulation, COM (2018) 225 final, both have the intent of making it easier for governments to access data stored in foreign jurisdictions.

file a request, which is practically impossible if the jurisdiction is unaware of the proceeding.

Anticorruption police in two West African countries reported that they have relied on published U.S. court filings to start bribery and money laundering cases.

A recent 2018 OECD study finds the flow of information about a case from a bribe giver's country to a bribe recipient's country can be slow and sporadic.[31] When formal information-sharing mechanisms are not available, a country may greatly benefit from information posted online to understand the implications within its own borders.[32] This is especially true in some less developed countries where corruption takes place. For example, anticorruption police in two West African countries told us they have relied on published U.S. court filings to start bribery and money laundering cases.[33]

Even when MLA is an option, having the facts of a case available online can put pressure on other jurisdictions to act. Switzerland, for example, has recently opened several criminal investigations based on allegations from FCPA cases that proceeds of bribery were laundered through Swiss banks.[34]

Taking a case public can create a wave of legal action across many jurisdictions.

Sometimes, taking a case public can create a wave of legal action across many jurisdictions. For example, disclosures from the U.S. TSKJ–Halliburton FCPA case spurred law enforcement agencies in Italy, Switzerland, the United Kingdom, and Nigeria to engage in investigations that in some cases led to criminal convictions, settlements or asset seizures.[35] "Once the U.S. released its findings, the other countries started pulling different threads and getting involved themselves," recalled one non-governmental organization (NGO) investigator who followed the case closely.[36]

International cooperation is a critical part of any foreign bribery enforcement action. Countries often collaborate at initial stages of an investigation to hold defendants to account, since it would fly in the face of the bedrock legal principle of *ne bis in idem* (double jeopardy) for a single defendant to face a string of prosecutions in different jurisdictions for the same action. However, providing appropriate information may help enforcement bodies pursue defendants that were not brought into earlier actions—for example, facilitators that helped hide illicit funds or government officials involved in the underlying bribery.

In each of the above examples, initial enforcement led to further efforts to hold wrongdoers accountable only because officials from other countries had access to facts about the case—or because the public accessed such facts and then pressured law enforcement to take action.

2. Disclosure positively influences private sector behavior

Disclosure of information from foreign corruption cases may also deter wrongdoing by helping the business community understand the corruption risks others have faced in similar situations. Armed with this information, businesses can exercise greater caution and make more informed decisions, for example, when

31 OECD, *Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End?* (2018), at 7.
32 See ibid. (discussing the importance of media as a source of information).
33 2014–2018 interviews with Nigerian and Ghanaian officials.
34 Interview with Swiss NGO staff, 2018. For examples involving Brazilian and Kazakh cases, see Will Connors, "Swiss Authorities Open Investigation into Brazil's Odebrecht," *The Wall Street Journal*, 22 July 2015; AFP, "Uzbek President's Daughter Faces Swiss Money-laundering Investigation," *The Guardian*, 12 March 2014.
35 See e.g., Complaint, SEC v. ENI, no. 4:10-cv-2414 (S.D. Tex., 10 July 2010); Reuters, "UPDATE 1—Italy Court Upholds Saipem Fine and Seizure Order in Nigeria Case," 19 February 2015.
36 2015 interview.

participating in a tender process, partnering with a certain company or government entity, or offering professional services to third parties.

The schemes and political dynamics behind corruption cases are often complex and opaque and evolve over time. Yet the players are not endlessly creative: clear, general patterns of suspect behavior do exist, making it possible to pick out common warning signs of corrupt behavior. For example, NRGI has analyzed facts from dozens of past corruption cases to create a list of 12 common red flags companies should be concerned with when seeking licenses or contract awards in the extractives sector license.[37] Companies often use information about concluded cases to identify corruption risks in their own businesses and take appropriate action.

- **Disclosure encourages businesses to take additional due diligence steps in certain types of transactions.** Disclosures about foreign corruption places pressure on businesses to vet their potential partners, deals and investment locations more thoughtfully. "Concern over FCPA and U.K. Bribery Act liability is the number one reason companies hire us to do heightened due diligence on their targets," an executive at a London-based risk advisory firm explained, adding, "Their lawyers and compliance people read the settlements from the old cases and say, 'We don't want this to be us.' And it's not just the fear of all the fines and legal fees that motivates: if you ask them, the reputational costs matter just as much."[38]

  Disclosure can also educate investors, giving them relevant information for making decisions about whether to buy shares. In some cases, disclosures can help companies, banks, international financial institutions and equity investors weigh the risks of investing at all in deals that may be prone to corruption risks. According to an in-house counsel for a U.S. oil services company, his firm decided not to pursue business opportunities in one sub-Saharan African country based partly on its reading of FCPA case documents dealing with another transaction in the country. He explained, "The picture there convinced us we wouldn't be able to do business within the law and our own standards, so we backed out."[39]

- **Disclosure provides a warning to similarly situated companies.** Disclosures can serve as a warning signal to other companies in a particular sector. An investigation or prosecution of one company in a particular sector can highlight the current priorities of law enforcement, suggesting which companies should be ramping up their anticorruption programs and what kinds of risks they should guard against. For instance, disclosure of the U.S. Security and Exchange Commission's (SEC's) 2015 settlement with Bank of New York Mellon helped reinforce the message of U.S. enforcement authorities that entities doing business with sovereign wealth funds must actively guard against corruption.[40] This also alerted banks and other financial service providers that had not traditionally been the focus of anti-bribery enforcement efforts that they should adopt anticorruption measures. The very detailed disclosures that accompanied the DOJ's agreement with the hedge fund Och-Ziff brought this point further home.[41]

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37 Aaron Sayne, Alexandra Gillies and Andrew Watkins, *Twelve Red Flags: Corruption Risks in the Award of Extractive Sector Licenses and Contracts* (New York: NRGI, 2017).
38 2018 interview.
39 2017 interview.
40 Cease and Desist Order, SEC v. The Bank of New York Mellon Corporation, Release No. 75720 (18 August 2015).
41 See Plea Agreement, U.S. v. OZ Africa Management GP, LLC, Cr 16-515 (NGG), E.D.N.Y. (29 September 2016).

- **Disclosure helps businesses choose whether to offer services.** Disclosure can help service providers screen high-risk actors out of their client pools. A risk management officer at a European bank noted, for example, that her bank had closed several accounts controlled by individuals and companies implicated in foreign bribery case documents.[42] Similarly, a London-based lawyer claimed his firm declined to negotiate a commercial transaction on behalf of an individual named as a facilitator in an FCPA settlement.[43]
- **Disclosure helps businesses report more effectively to regulators and law enforcement.** On this point, the bank risk management officer described a number of instances in which her office chose to send suspicious transaction reports to relevant financial regulators either because account holder names turned up in FCPA filings, or because a transaction's underlying facts closely resembled facts observed in foreign bribery cases.[44]

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3. Disclosure supports oversight actors and victims of corruption

Civil society groups, NGOs, the media and even victims of corruption can help hold perpetuators of corruption to account by pressuring government agencies to take action. For example, a news report may bring facts about an incident of foreign bribery to light, or an NGO report may spur legislative changes. Victims of corruption may bring civil suits for damages, thereby shedding light on the damaging influence of corruption on society. However, all of these actions require knowledge of the facts.

Unfortunately, access to information is one of the biggest hurdles oversight actors face when trying to hold wrongdoers accountable for corruption. Prosecutors, police and court staff often cannot share facts about corruption cases directly with these groups, due to official restrictions or concerns about compromising their own work. But when they do disclose such information, they make it easier for NGOs, journalists, activists, analysts and others to join them in fighting corruption.

- **Disclosure helps oversight actors identify bribe recipients.** When court filings name the beneficiaries of corruption, this allows oversight actors to hold them to account. For example, civil society groups can engage in a public campaign to keep a bribe recipient from getting reelected, and journalists can investigate private companies that may have indirectly benefitted from the wrongdoing.

  Even when court filings do not name the beneficiaries of corruption, oversight actors can take up the trail if the individuals are described in sufficient detail. Bloomberg reporters, for example, used facts in U.S. settlement documents to identify the senior Congolese officials who took bribes from the hedge fund Och-Ziff.[45] Likewise, Global Witness identified the anonymized beneficiaries of the "Kazakhgate" bribery scandal, and journalists in Kazakhstan and the U.S. also extensively covered the case following disclosures in the United States.[46]
- **Disclosure helps oversight actors identify facilitators and other implicated parties.** Some disclosures by enforcement authorities name the banks, brokers, law firms or other service providers that enable the corruption involved. This allows oversight actors to draw on them when seeking answers—a critical step, since international enablers are necessary actors in most grand

42 2016 interview.
43 2015 interview.
44 2016 interview.
45 Franz Wild and Keri Geiger, "Diamond Magnate at the Heart of Och-Ziff's Africa Ambitions," Bloomberg, 30 September 2016.
46 Global Witness, *Time for Transparency*, 24 March 2004.

corruption schemes but face legal sanction relatively rarely. One journalist recounted, for instance, how details from a U.S. asset forfeiture complaint helped her search U.K. property records and uncover the name of real estate broker involved in several questionable real estate purchases linked to politicians.[47]

- **Disclosure helps oversight actors sift through large data stores.** Disclosures such as the Panama Papers and Paradise Papers have created a platform for collaboration between oversight actors and enforcement authorities, leading to numerous anticorruption enforcement actions.[48] However, the sheer volume and complexity of information disclosed in this way can make it hard to sift. The same goes for the growing quantities of publicly available data, such as payment data reported by European oil, gas and mining companies. Information from prior enforcement actions can help oversight actors to search these materials in a more targeted manner. For example, a journalist noted that he and his colleagues were able to cross-reference names and facts from disclosures related to the U.S. Bonny Island–TSKJ FCPA case with Swiss bank records to identify accounts affiliated with a convicted middleman, his family members, and several Nigerian officials implicated in the alleged bribery scheme.[49]
- **Disclosure helps oversight actors review the due diligence that went into investment decisions with high corruption risks.** For example, NGOs have used court filings to evaluate the propriety of a US$ 355 million International Finance Corporation investment in a Nigerian oil company.[50]
- **Disclosure helps oversight actors effectively intervene in ongoing cases.** When NGOs and other civil society actors are aware of an enforcement action, they are better positioned to advocate for those affected by the corruption, particularly when enforcement authorities may not have the resources to do so. For example, in one case arising in the United Kingdom, an NGO was able to work with civil society in the country where the bribery occurred to prepare and submit a community impact statement.[51] Although the U.K. courts did not accept the statement, U.K. officials ultimately decided to send compensation back to the country where the underlying bribery happened, where it was used to buy ambulances.[52] In another case, an NGO was able to provide direct evidence and expert witness testimony in a U.K. asset-freezing case.[53]
- **Disclosure helps those harmed by corruption to bring shareholder suits.** Corporate shareholders may be motivated to seek accountability when they become victims of foreign corruption. In this vein, a staff member at a U.S. law firm confirmed that one oil company's shareholders—and he himself, as their counsel—relied heavily on U.S. disclosures and subsequent press reporting to bring suit against the oil company when its share prices fell after it was accused of FCPA violations.[54]

When NGOs and other civil society actors are aware of an enforcement action, they are better positioned to advocate for those affected by the corruption.

47 2018 interview.
48 See International Consortium of Investigative Journalists, "The Panama Papers: Exposing the Rogue Offshore Finance Industry" and "Paradise Papers: Secrets of the Global Elite," last visited 24 August 2019.
49 2018 interview with NGO representative. The U.S. enforcement action against TSKJ, a joint venture in Nigeria, involved the Italian company Eni (and its former Dutch subsidiary Snamprogetti), the French company Technip, and the U.S. company Kellogg Brown & Root, as well as several individual defendants.
50 Nicholas Hildyard, *The World Bank, Red Flags and the Looting of Nigeria's Oil Revenues* (London: Corner House, 2018).
51 2018 interview with NGO representative.
52 2018 interview.
53 2018 interview with NGO representative.
54 2016 interview.

Importantly, while the research supporting this paper focuses on transparency in six OECD countries, these jurisdictions are not the only ones making helpful disclosures in foreign corruption cases. As part of the official response to Brazil's "Operation Car Wash" scandal, for example, Brazilian courts chose to upload nearly all court filings from the case into an online database.[55] This database allows NGOs and the press to understand what law enforcement activity has happened in countries that have been less transparent. As one representative of an NGO explained, "It's absolutely tremendous. If you have the time and patience, you can go through the database and you can get all this information."[56] For example, a team of Public Eye and Global Witness investigators used information from the database to prepare a report on how international trading companies partnered extensively with parties implicated in the scandal.[57]

DISCLOSURE AS A CATALYST FOR WIDESPREAD ACCOUNTABILITY: THE 1MDB CASE

In June 2017, following an earlier investigation in Malaysia as well as detailed press coverage, U.S. DOJ prosecutors filed a civil asset forfeiture action against over US$ 1 billion in assets allegedly misappropriated from the state-owned fund 1Malaysia Development Berhad (1MDB). At the same time, the department released the case's 251-page complaint, which gave an exhaustive account of the schemes' mechanics and named a number of the international companies, banks, and lawyers that played enabling roles.[58]

A wide range of actors in Malaysia used the DOJ complaint to hold the government of President Najib Razak accountable. For example, legislators in Kuala Lumpur called for snap elections on the back of the DOJ's revelations.[59] Local civil society organizations demanded that the entire cabinet resign, wrote detailed reports explaining the U.S. allegations, organized social media campaigns and in-person protests, and even created a board game using facts from the complaint.[60] Meanwhile, the DOJ disclosures fed active coverage of the scandal in the Malaysian press, helping journalists build a credible, high-profile counter-narrative to the cover-up story offered by the Najib government.[61] It is difficult to say how much this activity contributed to President Najib's 2018 election loss and eventual prosecution by his successor, but his role in the 1MDB scandal certainly became a central campaign issue.[62]

55 See "Lavajota," last visited 24 August 2019 (in Portuguese); see also Fabiano Angelico, "Brazil: Open Data Just Made Investigating Corruption Easier," Transparency International, 12 May 2017.
56 2018 interview.
57 Global Witness and Public Eye, "Friends in Low Places," 9 November 2018.
58 Verified Complaint for Forfeiture in Rem, United States v. Certain Rights to and Interests in the Viceroy Hotel Group, CV 17-4438 (C.D. Cal., 15 June 2017); see also DOJ, "U.S. Seeks to Recover Approximately $540 Million Obtained From Corruption Involving Malaysian Sovereign Wealth Fund," press release, 15 June 2017.
59 "Guan Eng: I Will Go to Jail Anyway," *Star Online*, 23 July 2016.
60 Rahimy Rahim and Teoh Xiu Jong, "Ambiga Slammed for Asking Cabinet to Resign over U.S. Action," *Star Online*, 24 July 2016; AFP, "Leading Protest Group to Stage Seven-week Roadshow and Rally to Demand Resignation of Malaysia's Prime Minister," *South China Morning Post*, 14 September 2016; Rozanna Latiff and Praveen Menon, "Malaysian Protesters March against Prime Minister Najib," *Reuters*, 18 November 2016; C4 Center, "Kleptopoly: The Board Game," June 2018.
61 See e.g., "1MDB scandal: FAQs on Malaysia's troubled investment fund," *Straits Times*, 22 July 2016; James Sivalingam, "Rahman Dahlan Explains Why DOJ Didn't Name 'Malaysian Official 1,'" *New Straits Times*, 1 September 2016.
62 See, e.g., Phar Kim Beng, "Why Are Foreign Leaders Snubbing Najib Ahead of Malaysia's Election?" *South China Morning Post*, 30 March 2018; AFP, "Tough Re-election Ahead for Malaysian Prime Minister Najib Razak as He Announces Dissolution of Parliament," *Japan Times*, 6 April 2018; Hannah Beech and Austin Ramzy, "Malaysia's Ex-leader, Najib Razak, Is Charged in Corruption Inquiry," *The New York Times*, 3 July 2018.

Oversight actors outside of Malaysia also used the DOJ materials. Global Witness, the *Financial Times*, and the *Washington Post*, for instance, put out reports that used facts from the DOJ complaint to explain how international actors had enabled the 1MDB corruption—and how foreign regulators had failed to check them.[63] Specifically, the reports described and criticized the roles played by banks, financial advisory firms, auditors and U.S. law firms. Other governments around the world have opened investigations of those enabling the corruption, and a number of the financial institutions and executives involved have already faced penalties.[64] For example, in 2018, Indonesian and U.S. law enforcement cooperated to seize a key facilitator's yacht.[65] Multiple investigations and enforcement actions in the U.S. and elsewhere remain open.

In light of the many anticorruption actors who worked to uncover and redress the wrongdoing involved, we do not wish to exaggerate the importance of the U.S. disclosures in the 1MDB case. To some extent, the case's dramatic details and huge price tag alone must have kept the public interested. Nonetheless, it is reasonable to assume that more than one of the positive responses above would not have happened had the DOJ not published allegations that detailed the roles of the scheme's architects as well as its many enablers.

RECOMMENDATIONS AND CONCLUSION

Our examination of how transparency in anticorruption law enforcement can lead to positive enforcement and deterrence effects suggests that—at a minimum—government agencies in possession of information should strongly consider disclosing at least the following:

- The identities of any legal and natural persons sanctioned in a case, including the companies or individuals that paid bribes or otherwise engaged in corruption
- The identities of bribe takers and other beneficiaries of corruption, including the country, sector and government body where bribe takers were serving at the time of the bribery
- The identities of enablers and other third parties involved in the case, such as banks, brokers or agents
- The nature of the deals for which any bribes were offered or given, including the mechanisms used to move or conceal the proceeds of the illicit conduct (for example, cash payments or fraudulent contracts)
- Other jurisdictions involved in the bribery scheme, such as the locations of accounts, third-party companies, or assets acquired with illicit proceeds

To the extent possible, all of the information should be published for free and in machine-readable format on the website of the relevant enforcement authority rather than scattered across multiple sites. Governments should consider disclosing information from types of corruption cases beyond bribery—those involving civil asset forfeitures and seizures, money laundering and proceeds of crime offenses, for instance.

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63 Global Witness, The Real Wolves of Wall Street, London, March 2018; Martin Arnold, "FCA urged to be tougher on RBS and StanChart over 1MDB," *Financial Times*, 11 March 2018; Shamim Adam, Laurence Arnold and Yudith Ho, "The Story of Malaysia's 1MDB, the Scandal That Shook the World of Finance," *The Washington Post*, 17 December 2018.

64 Shamim Adam, Yudith Ho and Cedric Sam, "How Malaysia's 1MDB Fund Scandal Reaches around the World," *Bloomberg*, 2 August 2018; "Switzerland Investigating 6 for Suspected Bribery of Foreign Officials in 1MDB Probe," *Straits Times*, 10 July 2018.

65 Fransiska Nangoy, "Indonesia Seizes Luxury Yacht Linked to 1MDB Probe," *Reuters*, 28 February 2018.

We recognize that privacy and data protection laws in some jurisdictions may require that some information be anonymized or kept confidential, at least in respect of individual defendants. Rules and practices about things such as sealing evidence, gag orders, grand jury secrecy or maintaining the presumption of innocence could also prohibit some disclosures, especially in the earlier stages of a criminal trial. Nonetheless, our consultations for this research suggest that existing legal and bureaucratic frameworks could, in some cases, allow much more to reach the public domain, in particular, more specific information about companies that engage in corrupt conduct.

Representatives of government, industry, civil society and the press should come together to discuss how far disclosure practices in foreign corruption cases could be harmonized across jurisdictions. They also need to review their options for sharing information more effectively outside formal legal channels. The OECD WGB would be one appropriate forum for this.

Because fighting foreign corruption effectively calls for a collaborative, all-hands-on-deck approach, governments should make court case information public whenever they can. Doing so could make the difference between robust accountability and continued impunity and harm.

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