

Positive Effects of Publishing Foreign Corruption Case Materials

Melanie D. Reed and Aaron Sayne
Discussion DRAFT for OECD Working Group on Bribery
December 2018

Introduction

The enforcement of anti-bribery and other financial crimes laws is one of the most active fronts in the global fight against corruption. A number of OECD countries have shown real commitment to investigating large, complex cases, assigning meaningful penalties to powerful actors and seeking to influence the behavior of companies and individuals.

Since the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions entered into force in 1999, state members of the OECD's Working Group on Bribery (WGB) have explored new ways of working together to combat foreign corruption.¹ Some of this cooperation occurs through formal legal instruments and close working relationships, but we wondered how the mere publication of information about corruption cases by courts and law enforcement bodies might enhance anti-corruption effects, including efforts by other oversight actors, such as regulators, company lawyers, the media, and civil society. Put differently, what **positive spillover effects** does the disclosure of corruption case materials have?

To explore this question, we have analyzed foreign corruption case materials and conducted over two dozen interviews over the last several years. Our ongoing research primarily examines disclosure of foreign bribery cases, mainly in the extractive industries, but we have observed similar positive effects in other types of foreign corruption cases, both civil and criminal.²

This document summarizes several observations from our research and aims to elicit feedback. The final section lists the planned next steps, including the publication of further findings and recommendations in 2019. This project on disclosure forms part of the anti-corruption program of the Natural Resource Governance Institute (NRGI)¹ that aims to reduce corruption risks in the oil, gas and mining sector. However, the findings and recommendations of this specific project are not specific to the extractives sector.

¹ NRGI is an international, independent non-profit organization that promotes the transparent, accountable and effective management of oil, gas and mineral resources for the public good. To that end, we offer technical assistance and capacity building on request to a range of stakeholders in and outside of resource-rich governments. More information on our work is available at www.resourcegovernance.org.

Disclosure of enforcement actions creates positive spillover effects

Our research to date has found that disclosing facts from foreign corruption cases can lead to accountability and positive outcomes in three key ways:

One: Disclosure spurs government action

The release of information about the investigation and prosecution of a foreign bribery case by enforcement authorities can lead to related actions against wrongdoers in the following ways:

- **Disclosure lays an evidentiary foundation for related investigations and sanctions in the same jurisdiction.** In the wake of enforcement actions under the US Foreign Corrupt Practices Act (FCPA), for instance, the US Department of State has used facts from published case documents to justify denying visas to foreign bribe recipients. One official noted: “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.”³ Similarly, the US Department of the Treasury has sanctioned parties implicated in FCPA filings under the Magnitsky Act.⁴ On the legislative side, the Senate Permanent Subcommittee on Investigations leaned heavily on FCPA case documents in its 2010 investigation of corrupt money flows into the US.⁵
- **Disclosure provides information and impetus for legal action in other jurisdictions.** Having facts from corruption cases in the public domain can also help other governments take up a case or cooperate—a critical plus, given the complexity and cross-border reach of most grand corruption. Governments sometimes exchange facts directly via mutual legal assistance (MLA), but only if the right relationships and legal instruments are in place. In other cases, officials in another country can only access whatever the first mover puts online. This is especially true in the host countries where the corruption took place. For example, anti-corruption police in two West African countries told us they had relied on published US court filings to start bribery and money laundering cases.⁶ And 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.⁷ Sometimes, taking a case public can create a wave of legal action across many jurisdictions, as when disclosures from the TSKJ-Halliburton FCPA case spurred criminal convictions, settlements, asset seizures and/or government investigations in Italy, Switzerland, the UK and Nigeria.⁸ “Once the US released its findings, the other countries started pulling different threads and getting involved themselves,” recalled one NGO investigator who followed the case closely.⁹

In each of the above examples, the initial enforcement led to further efforts to hold wrongdoers accountable only because other officials and/or the broader public were able to access factual information from the case. As the next sections will show, however, officials are not the only parties that benefit when governments publish corruption case facts.

Two: Disclosure influences private sector behavior

Disclosure of information from foreign corruption cases may also help deter wrongdoing by helping the business community understand the corruption risks others have faced in similar situations. Armed with this information, they can exercise greater caution and make more informed decisions, for example, when 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 can be complex and opaque; they also 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. At NRGI, for example, we analyzed facts from several dozen past corruption cases to create a list of twelve common red flags in extractives sector license and contract awards.¹⁰ Using case disclosures to spot potential corruption risks can have the following positive effects for companies:

- **Disclosure helps businesses avoid certain types of corruption risks.** Foreign corruption case disclosures can educate, and place pressure on, investors to vet their potential partners, deals and investment locations more thoughtfully. “Concern over FCPA and UK 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 confirmed, 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.”¹¹

Case documents also indicate which companies should be ramping up their anti-corruption precautions, and what kinds of risks they should guard against. The disclosure of the 2015 SEC settlement agreement with the bank BNY Mellon, for example, helped reinforce DOJ’s message that entities doing business with sovereign wealth funds must actively guard against corruption.¹² It also helped inform banks and other financial service providers that they need to adopt anti-corruption measures, whereas they had not traditionally been the focus of anti-bribery enforcement actions. The very detailed disclosures that accompanied the DOJ’s agreement with the hedge fund Och Ziff further brought this point home.¹³

In some cases, disclosures can help companies, banks, IFIs or equity investors weigh the risks of investing at all in corruption-prone deals. According to an in-house counsel for a US oil services company, his firm decided not to pursue business opportunities in one Sub-Saharan African country based partly on their reading of FCPA case documents from 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.”¹⁴

- **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.¹⁵ 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.¹⁶
- **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.¹⁷

Three: Disclosure supports oversight actors, researchers, and victims of corruption

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 disclose facts from foreign corruption cases, they make it easier for NGOs, journalists, activists, analysts, and others to join them in fighting corruption.

- **Disclosure helps oversight actors identify bribe recipients.** 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 US settlement documents to identify the senior Congolese officials who took bribes from the hedge fund Och-Ziff.¹⁸ Likewise, legwork by Global Witness identified the anonymized beneficiaries of the “Kazakhgate” bribery scandal, while journalists in Kazakhstan and the US also extensively covered the case following disclosures in the States.¹⁹
- **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 corruption schemes but face legal sanction relatively rarely. One journalist recounted, for instance, how details from a US asset forfeiture complaint helped her search UK property records and uncover the name of real estate broker involved in several questionable real estate purchases linked to politicians.²⁰
- **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 anti-corruption enforcement actions. 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 US 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.²¹
- **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 \$355 million International Finance Corporation investment in a Nigerian oil company.²²
- **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.²³ UK officials ultimately decided to send compensation back to the country where the underlying bribery happened; the NGO believed the funds may have been used to benefit the community impacted.²⁴ In another case, an NGO was able to provide direct evidence and expert witness testimony in a UK asset freezing case.²⁵

- **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 US law firm confirmed that one oil company’s shareholders—and he himself, as their counsel—relied heavily on US disclosures and subsequent press reporting to bring suit against the oil company when its share prices fell after it was accused of FCPA violations.²⁶

It is important to note that while NRG’s research to date has focused on transparency in selected 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.²⁷ This database can help NGOs and the press understand what law enforcement activity has happened in OECD countries that have been less transparent. As one representative of an NGO has 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.”²⁸ For example, a team of Public Eye and Global Witness investigators was able to use information from this database to issue a report on how international trading companies partnered extensively with parties implicated in the scandal.²⁹

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, US DOJ prosecutors filed a civil asset forfeiture action against over US\$ 1 billion in assets allegedly misappropriated from state-owned 1 Malaysia Development Berhad (1MDB). At the same time, the Department released the case’s 251-page complaint, which gave an exhaustive account of the mechanics of the schemes and named a number of the international companies, banks, and lawyers that played enabling roles.³⁰

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.³¹ Local CSOs demanded that the entire cabinet resign, wrote detailed reports explaining the US allegations, organized social media campaigns and in-person protests, and even built a board game using facts from the complaint.³² 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.³³ 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.³⁴

Oversight actors outside of Malaysia also used the DOJ materials. Global Witness and the *Financial Times*,³⁵ for instance, put out reports that used facts from the DOJ complaint to explain how international actors enabled the 1MDB corruption—and how foreign regulators failed to check them. Specifically, the reports described and criticized the roles played by banks, financial advisory firms, auditors and US law firms. Meanwhile, other governments around the world have opened investigations of enablers, and a number of the financial institutions and executives involved have already faced penalties.³⁶ For example, in the summer of 2018, Indonesian and US law enforcement cooperated to seize a key facilitator’s yacht.³⁷ Multiple investigations and enforcement actions in the US and elsewhere remain open.

We do not wish to exaggerate the importance of the US 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.

Additional research and consultations planned

NRGI’s research on this topic is ongoing. Related questions we are exploring include the following:

- What rules and practices govern disclosure in different jurisdictions?
- What are the main obstacles to disclosure?
- How does a lack of disclosure complicate or frustrate work by oversight actors?
- What additional disclosures would be most helpful to oversight actors?
- What additional disclosures might governments in the different jurisdictions accept?

Our ongoing research focuses on cases from six jurisdictions with relatively active anti-bribery enforcement records: Germany, Italy, Norway, Switzerland, the United Kingdom, and the United States. Each of these countries takes a slightly different approach to the disclosure of information related to foreign bribery cases. We would welcome inputs from readers on any of these topics. We expect to release more research results and recommendations in 2019.

¹ OECD, *Typology on Mutual Legal Assistance in Foreign Bribery Cases* (Paris: OECD 2010), <http://www.oecd.org/daf/anti-bribery/TypologyMLA2012.pdf>.

² For the purposes of our research, we are defining corruption broadly, as “the use of entrusted public power for personal gain.” Transparency International, “What Is Corruption?” (2018), <https://www.transparency.org/what-is-corruption>.

³ 2017 interview with US 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).

⁴ Global Magnitsky Human Rights Accountability Act, 22 U.S.C. § 2656. Most notably, in June 2018, the US 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 (June 15, 2018), <https://home.treasury.gov/news/press-releases/sm0417>; see also Treasury, “New Executive Order Implements Global Magnitsky Human Rights Accountability Act, Provides for Treasury Sanctions Against Malign Actors Worldwide,” press release (Dec. 21, 2017), <https://home.treasury.gov/news/press-releases/sm0243>; Times of Israel & AP, “US Sanctions Israeli Mining Mogul Gertler over Congo Deals,” Times of Israel (Dec. 22, 2017), <https://www.timesofisrael.com/us-sanctions-israeli-mining-mogul-gertler-over-congo-deals/>. In a 2018 interview, a Treasury official said the Department relied heavily on facts in the Och-Ziff court filings to sanction Gertler.

⁵ *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 (Feb. 4, 2010), <https://www.hsdl.org/?abstract&did=5621>; 2016 interview with staff member of Senate Permanent Subcommittee on Investigations.

⁶ 2014–2018 interviews with Nigerian and Ghanaian officials.

⁷ For examples involving Brazilian and Kazakh cases, see Will Connors, “Swiss Authorities Open Investigation into Brazil’s Odebrecht,” *Wall Street Journal* (July 22, 2015), <http://www.wsj.com/articles/swiss-authorities-open-investigation-into-brazils-odebrecht-1437605540>; AFP, “Uzbek President’s Daughter Faces Swiss Money-laundering

Investigation,” *Guardian* (Mar. 12, 2014), <https://www.theguardian.com/world/2014/mar/12/uzbek-president-daughter-money-laundering-investigation-switzerland>.

⁸ See e.g., Complaint, SEC v. ENI, no. 4:10-cv-2414 (S.D. Tex. July 10, 2010), <https://www.sec.gov/litigation/complaints/2010/comp-pr2010-119.pdf>; *Reuters*, “UPDATE 1—Italy Court Upholds Saipem Fine and Seizure Order in Nigeria Case” (Feb. 19, 2015), <http://www.reuters.com/article/2015/02/19/saipem-nigeria-probe-idUSL5N0VT47M20150219>.

⁹ 2015 interview.

¹⁰ Aaron Sayne, Alexandra Gillies, & Andrew Watkins, *Twelve Red Flags: Corruption Risks in the Award of Extractive Sector Licenses and Contracts* (New York: Natural Resource Governance Institute 2017), <https://resourcegovernance.org/sites/default/files/documents/corruption-risks-in-the-award-of-extractive-sector-licenses-and-contracts.pdf>.

¹¹ 2018 interview.

¹² Cease and Desist Order, SEC v. The Bank of New York Mellon Corporation, Release No.75720 (August 18, 2015).

¹³ See e.g., Plea Agreement, US v. OZ Africa Management GP, LLC, Cr 16-515 (NGG) (E.D. NY September 29, 2016).

¹⁴ 2017 interview.

¹⁵ 2016 interview.

¹⁶ 2015 interview.

¹⁷ 2016 interview.

¹⁸ Franz Wild & Keri Geiger, “Diamond Magnate at the Heart of Och-Ziff’s Africa Ambitions,” *Bloomberg* (Sept. 30, 2016), <https://www.bloomberg.com/news/articles/2016-09-30/the-diamond-magnate-at-the-heart-of-och-ziff-s-africa-ambitions>.

¹⁹ Global Witness, “Time for Transparency.”

²⁰ 2018 interview.

²¹ 2018 interview with NGO representative. The US 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 US company Kellogg Brown & Root, as well as several individual defendants.

²² Nicholas Hildyard, “The World Bank, Red Flags and the Looting of Nigeria’s Oil Revenues,” *The Corner House* (Oct. 20, 2018), <http://www.thecornerhouse.org.uk/resource/world-bank-red-flags-and-looting-nigerias-oil-revenues>.

²³ 2018 interview with NGO representative.

²⁴ 2018 interview.

²⁵ 2018 interview with NGO representative.

²⁶ 2016 interview.

²⁷ The database is available at <https://jota.info/lavajota/> (in Portuguese). See also Fabiano Angelico, “Brazil: Open Data Just Made Investigating Corruption Easier,” Transparency International (May 12, 2017).

²⁸ 2018 interview.

²⁹ Global Witness & Public Eye, “Friends in Low Places” (Nov. 9, 2018),

<https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/friends-low-places/>.

³⁰ 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. June 15, 2017); see also DOJ, “U.S. Seeks to Recover Approximately \$540 Million Obtained From Corruption Involving Malaysian Sovereign Wealth Fund,” press release (June 15, 2017), <https://www.justice.gov/opa/pr/us-seeks-recover-approximately-540-million-obtained-corruption-involving-malaysian-sovereign>.

³¹ “Guan Eng: I Will Go to Jail Anyway,” *Star Online* (July 23, 2016),

<https://www.thestar.com.my/videos/2016/07/23/guan-eng-i-will-go-to-jail-anyway/>.

³² Rahimy Rahim & Teoh Xiu Jong, “Ambiga Slammed for Asking Cabinet to Resign over US Action,” *Star Online* (July 24, 2016), <https://www.thestar.com.my/news/nation/2016/07/24/ambiga-slammed-for-asking-cabinet-to-resign-over-us-action/>; AFP, “Leading Protest Group to Stage Seven-week Roadshow and Rally to Demand Resignation of Malaysia’s Prime Minister,” *South China Morning Post* (Sept. 14, 2016),

<https://www.scmp.com/news/asia/southeast-asia/article/2019323/leading-protest-group-stage-seven-week-roadshow-and-rally>; Rozanna Latiff & Praveen Menon, “Malaysian Protesters March against Prime Minister Najib,” *Reuters* (Nov. 18, 2016), <https://www.c4center.org/sites/default/files/1MDB%20Report%20-%20FINAL.pdf>; C4 Center, “Kleptopoly: The Board Game” (June 2018), <https://c4center.org/kleptopoly>.

³³ See e.g., “1MDB scandal: FAQs on Malaysia’s troubled investment fund,” *Straits Times* (July 22, 2016), <https://www.straitstimes.com/asia/se-asia/1mdb-scandal-a-quick-look-at-what-its-all-about>; James Sivalingam, “Rahman Dahlan Explains Why DOJ Didn’t Name ‘Malaysian Official 1,’” *New Straits Times* (Sept. 1, 2016), <https://www.nst.com.my/news/2016/09/170016/rahman-dahlan-explains-why-doj-didnt-name-malaysian-official-1>

³⁴ See, e.g., Phar Kim Beng, “Why Are Foreign Leaders Snubbing Najib Ahead of Malaysia’s Election?” *South China Morning Post* (Mar. 30, 2018), <https://www.scmp.com/week-asia/politics/article/2139529/why-are-foreign-leaders-snubbing-najib-ahead-malaysias-election>; AFP & Jiji, “Tough Re-election Ahead for Malaysian Prime Minister Najib Razak as He Announces Dissolution of Parliament,” *Japan Times* (Apr. 6, 2018), https://www.japantimes.co.jp/news/2018/04/06/asia-pacific/politics-diplomacy-asia-pacific/tough-re-election-ahead-malaysian-prime-minister-najib-razak-announces-dissolution-parliament/#.W_fjMi17FAY; Hannah Beech & Austin Ramzy, “Malaysia’s Ex-leader, Najib Razak, Is Charged in Corruption Inquiry,” *New York Times* (July 3, 2018), <https://www.nytimes.com/2018/07/03/world/asia/najib-razak-arrested-malaysia.html>.

³⁵ Global Witness, “The Real Wolves of Wall Street” (Mar. 2018), <https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/real-wolves-of-wall-street/>; Martin Arnold, “FCA urged to be tougher on RBS and StanChart over 1MDB,” *Financial Times* (Mar. 11, 2018), <https://www.ft.com/content/f4ec7648-23cf-11e8-add1-0e8958b189ea>.

³⁶ Shamim Adam, Yudith Ho, & Cedric Sam, “How Malaysia’s 1MDB Fund Scandal Reaches around the World,” *Bloomberg* (Aug. 2, 2018), <https://www.bloomberg.com/graphics/2018-malaysia-1mdb/>; “Switzerland Investigating 6 for Suspected Bribery of Foreign Officials in 1MDB Probe,” *Straits Times* (July 10, 2018), <https://www.straitstimes.com/asia/se-asia/switzerland-investigates-6-for-suspected-bribery-of-foreign-officials-in-1mdb-probe>.

³⁷ Fransiska Nangoy, “Indonesia Seizes Luxury Yacht Linked to 1MDB Probe,” *Reuters* (Feb. 28, 2018), <https://www.reuters.com/article/us-malaysia-scandal-1mdb-indonesia/indonesia-seizes-luxury-yacht-linked-to-1mdb-probe-idUSKCN1GC155>.