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A Political Economy Approach to Reforming the Foreign Corrupt Practices Act

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A Political Economy Approach to Reforming the Foreign Corrupt Practices Act

*By Matthew C. Turk**

Abstract: Prohibitions against transnational bribery suffer from a paradoxical problem of simultaneous over- and under-enforcement. On the “supply-side,” U.S. enforcement against bribery through the Foreign Corrupt Practices Act (FCPA) is increasingly over-aggressive, while enforcement by other developed economies is nearly non-existent. On the “demand-side,” governments of developing economies where bribes take place often have neither an interest in nor the capacity to rein in their corrupt officials. In light of these shortcomings, this Article proposes reforming the FCPA as follows. First, the SEC should cease paying profits disgorged by corporate defendants into the U.S. Treasury. Second, disgorgements should instead be transferred to the Host country where bribery took place, conditional on the Host government’s cooperation with the FCPA investigation. And third, if cooperation is not forthcoming, disgorgement proceeds should be transferred to the Organisation for Economic Co-operation and Development (OECD) Working Group—an international organization designed to facilitate the enforcement of the OECD Convention on Combating Bribery. Reforming FCPA enforcement in this manner would re-allocate the proceeds from anti-bribery regulation on a global scale so as to properly align the incentives of the parties involved and provide greater access to the information required for effective enforcement.

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I. INTRODUCTION

Over the past decade, the Foreign Corrupt Practices Act (FCPA or Act)¹ has been one of the fastest changing areas of federal criminal and business law. Passed in 1977, the Act lay in abeyance until undergoing an

¹ The central feature of the FCPA is its prohibition on the payment of bribes to foreign public officials in order to obtain business. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff (2011)..

astounding enforcement boom in recent years.² The dollar values at stake have become impressive: FCPA enforcement in 2010, for example, resulted in approximately \$1.4 billion in combined corporate fines and penalties.³ During this same period, international concern with transnational bribery has risen as well, situating the FCPA as the focal point and driving force of an increasingly complex international anti-bribery regime.⁴

The boom in FCPA enforcement has given rise to calls for reform in Congress as well as in a growing body of scholarly literature. This commentary is largely divided into opposing perspectives, focusing primarily on either under- or over-enforcement. Research from an internationalist, pro-regulatory perspective argues that aggressive anti-bribery enforcement is justified on moral⁵ or economic grounds, and that the Securities and Exchange Commission (SEC) and Department of Justice (DOJ) (together, Enforcement Agencies) should sustain or even increase their efforts.⁶ Scholarship of a more critical “pro-business” bent argues that

² See generally Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT’L L. J. 89 (2010) (providing an overview of the emergence of more active FCPA enforcement); Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489 (2011) (same).

³ Peter Millar, *Proactive Fraud Detection: The Truth is in the Transactions*, BUS. FIN. (Mar. 7, 2011), <http://businessfinancemag.com/article/proactive-fraud-detection-truth-transactions-0307>.

⁴ See *infra* Part II.C.

⁵ See Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. LEG. STUD. S141, S146, S160 (2002) (“True value actors . . . treat bribery and corruption as moral wrongs, not as consequential goals that can be traded off against other interests . . . For [these] actors . . . [b]ribery and corruption came to be viewed as wrong in and of themselves, as a matter of principle.”); Marie M. Dalton, *Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act*, 2 N.Y.U.J.L. & BUS. 583, 592–93 (2006) (“[M]orally based anti-bribery laws criminalize payments on the basis of their classification as bribes, regardless of their economic impact or considerations of efficiency. Under the moral approach, such payments are universally proscribed due to their inherent unethical nature.”); Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 CORNELL INT’L L.J. 689 (2000).

⁶ See Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT’L L. 129 (2010) (advocating for more vigorous enforcement); Rebecca Koch, *The Foreign Corrupt Practices Act: It’s Time to Cut Back the Grease and Add Some Guidance*, 28 B.C. INT’L & COMP. L. REV. 379 (2005) (advocating for a more restrictive and precise definition of what constitutes an acceptable “grease payment” under the Act); Philip Segal, *Coming Clean on Dirty Dealing: Time for a Fact-Based Evaluation of the Foreign Corrupt Practices Act*, 18 FLA. J. INT’L L. 169, 170 (2006) (“This Article contends that from the standpoint of anyone who would wish to deter bribery abroad, the FCPA has been greatly under-enforced since it was enacted.”); Courtney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439 (2010) (defending the rise in FCPA enforcements); Sandy A. Azer, *Strengthening the*

FCPA enforcement should be scaled back, because out-of-court settlements with suspect legal bases and skyrocketing penalties offend traditional rule-of-law values and deter legitimate forms of corporate investment.⁷

Rather than advocate for either side of the severely bifurcated literature outlined above, this Article argues that the current model of enforcement against transnational bribery takes the paradoxical form of simultaneous under- and over-enforcement. On the “supply-side,”⁸ U.S. enforcement of the FCPA is increasingly over-aggressive.⁹ At the same time, enforcement by the United States’ co-parties to a major treaty serving a similar function, the Organisation for Economic Co-operation and Development (OECD) *Convention on Combating Bribery* (OECD Convention),¹⁰ is nearly non-

Foreign Corrupt Practices Act Through a Private Right of Action (Aug. 25, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1664040> (advocating for an additional private right of action for FCPA violations).

⁷ See Dalton, *supra* note 5 (advocating for a de minimis exception to FCPA violations); Tara Elliott, *Risky Business: The Alien Tort Claims Act and the Foreign Corrupt Practices Act Expand the Reach of U.S. Courts in a Global Economy*, 62 RUTGERS L. REV. 211 (2010) (arguing that the jurisdictional reach of the FCPA should be scaled back); Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907 (2010); Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351 (2010); Westbrook, *supra* note 2, at 560–65 (arguing that uncertain enforcement “takes a toll” on businesses’ efforts to comply with the statute); Daniel Patrick Ashe, Comment, *The Lengthening Anti-Bribery Lasso of the United States: Recent Extra-Territorial Application of the U.S. Foreign Corrupt Practices Act*, 73 FORDHAM L. REV. 2897 (2005); Nathan Vardi, *The Bribery Racket: How the Crackdown on Payoffs Hurts Business and Enriches Washington, D.C. Insiders*, FORBES (May 28, 2010), <http://www.forbes.com/global/2010/0607/companies-payoffs-washington-extortion-mendelsohn-bribery-racket.html>; Andrew Weissmann & Alexandra Smith, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, U.S. CHAMBER INST. FOR LEGAL REFORM (2010), <http://www.instituteforlegalreform.com/restoring-balance-proposed-amendments-to-the-foreign-corrupt-practices-act.html>; see *infra* Part III.A.

⁸ Investing corporations provide a “supply” of illicit payments that public officials in Host countries “demand” in return for illegal favors within the Host jurisdiction.

⁹ “A [recent] Dow Jones survey found that 51% of companies have delayed, and 14% have cancelled, business ventures abroad due to uncertainty over FCPA enforcement.” Joseph Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 824 (2011). In response to concerns over the unpredictability of FCPA enforcement, the Enforcement Agencies recently issued a lengthy “guidance,” but this document has been met with tepid reviews. See U.S. DEP’T OF JUSTICE CRIMINAL DIV. & U.S. SEC. & EXCH. COMM’N ENFORCEMENT DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>; see also, e.g., Joe Palazzolo & Christopher M. Matthews, *U.S. Attempts to Clarify Antibribery Law*, WALL ST. J. (Nov. 14, 2012, 6:59 PM), <http://online.wsj.com/article/SB10001424127887324735104578118850181434228.html> (quoting Steven Tyrrell: “[The Guidance] does little to fill in the gray areas . . . [and is] more of a scrapbook of past DOJ and SEC successes than a guide book for companies who care about playing by the rules.”).

¹⁰ Organisation for Economic Co-operation and Development, *Convention on*

existent. On the demand-side, “Host countries,” where bribery takes place, often have neither an interest in nor the capacity to rein in their corrupt officials, as is required by the United Nations *Convention Against Corruption* (UNCAC).¹¹

This Article applies a political economy framework to analyze enforcement of the FCPA and the broader international anti-bribery regime with which it is intertwined. The supply- and demand-side issues described above are at root “political economy” problems, in the sense that they follow from strategies that the relevant actors rationally pursue based on their basic political-economic posture in relation to bribery enforcement, rather than from defects in the legal instruments at issue.¹² As a result, these problems cannot be effectively addressed by the more “legalistic” solutions proposed, which commonly call for modifying statutory definitions or signing new, bolder treaties.¹³

Specifically, the underlying political economy problems that lead to both under- and over-enforcement are threefold. First, the U.S. Enforcement Agencies use the FCPA as a vehicle for public and private

Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. No. 105-43 (1998) [hereinafter OECD Convention]. The OECD Convention, commonly known as the OECD Anti-Bribery Convention, has been ratified by forty countries: all thirty-four advanced economies that are members of the OECD and six non-member countries. ORG. FOR ECON. CO-OPERATION & DEV., CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS: RATIFICATION STATUS AS OF 20 NOVEMBER 2012 (2012), <http://www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf>.

¹¹ The UNCAC covers most of the world’s population and has over 158 signatory states, including the United States. See United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/422 (Dec. 9, 2003), reprinted in 43 I.L.M. 37. In contrast to the OECD Convention, which includes a relatively small group of capital exporting states, the UNCAC’s nearly universal membership covers developing economies, which experience the most severe problems with public sector corruption.

¹² See Lewis Kornhauser, *The Economic Analysis of Law*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/legal-econanalysis/> (last updated Aug. 12, 2011) (providing a taxonomy of the various modes of “political economy” analysis of the law). There are a few, early examples of political economy analyses of the FCPA, although these are from largely before the recent enforcement boom. See, e.g., Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT’L L. 665, 679 (2004); Kevin E. Davis, *Self-Interest and Altruism in the Deterrence of Transnational Bribery* (Univ. of S. Cal. Law Sch. Research Paper Series, Olin Working Paper No. 99-22, 1999), available at <http://ssrn.com/abstract=209608>.

¹³ On June 14, 2011, the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security held a hearing on potential amendments to the FCPA. *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 47 (2011). Testimony included proposals to re-write sections defining “foreign official” and “willfulness.” See *id.* (statement of Michael B. Mukasey, U.S. Chamber Institute for Legal Reform; statement of Shana-Tara Regon, National Association of Criminal Defense Lawyers; statement of George J. Terwilliger III).

rent-seeking. Second, compliance with the OECD Convention creates a prisoner's dilemma-type collective action problem for OECD member states. And third, Host countries often face severe resource constraints in domestic enforcement and have an incentive to free-ride off U.S. enforcement efforts. This Article proposes a three-part reform that uses the narrow mechanism of the SEC disgorgement remedy¹⁴ to address a diverse but interrelated set of incentive structures that drive the political economy dynamics identified above. First, the SEC should cease providing the proceeds from disgorgement to the U.S. Treasury. Second, disgorged profits should be transferred to the Host country where the illicit payment took place, conditional on the Host country's cooperation with the Enforcement Agencies' investigation. Finally, if cooperation is not forthcoming, disgorgement proceeds should be transferred to the OECD Working Group on Bribery in International Business Transactions (OECD Working Group or Working Group).¹⁵

In contrast to the legalistic proposals aired in the literature and at recent congressional hearings, this Article suggests reforming disgorgement practices in a manner that would not directly ratchet the total level of anti-corruption enforcement in a particular direction. Instead, this Article's proposal would re-allocate the proceeds from FCPA enforcement on a global scale to properly align the incentives of the parties involved and provide greater access to the information required for effective enforcement.

First, diverting disgorgement revenue from government coffers would reduce the overly aggressive aspects of FCPA enforcement by mitigating distortions that the so-called "FCPA racket"¹⁶ has on policy decisions.¹⁷ At the same time, transferring disgorgements to cooperative Host countries

¹⁴ First used in the FCPA context in 2004, disgorgement is an equitable remedy rather than a punitive fine. Disgorgement requires a liable party to forfeit the amount of "ill-gotten gain" acquired through its wrongful action. *See* SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 102 (2d Cir. 1978) ("Unlike damages, [disgorgement] is a method of forcing a defendant to give up the amount by which he was unjustly enriched."); SEC v. ABB Ltd., No. 1:04-cv-01141 (D.D.C. 2004). Despite its recent vintage and circuitous statutory basis, corporate disgorgement vastly exceeded the amount of actual penal fines levied by the SEC in 2008, 2009, and 2010, with 2010's astounding \$529 million in disgorgement constituting ninety-six percent of the SEC's FCPA "revenue" for the year. Mike Koehler, *SEC Enforcement of the FCPA—2010 Year in Review*, FCPA PROFESSOR (Jan. 11, 2011), <http://fcpaprofessor.blogspot.com/2011/01/sec-enforcement-of-fcpa-2010-year-in.html>.

¹⁵ *See* OECD Convention, *supra* note 10, art. 3.

¹⁶ *See* Vardi, *supra* note 7; *infra* Part III.A (arguing that FCPA enforcement has, to an extent, become a booming cottage industry within the Executive Branch that vests all parties involved—government prosecutors, private law firms, and the Executive Branch generally—with a self-interest in continuously expanding the enforcement regime).

¹⁷ *See generally infra* Part III (discussing the proposal to divert disgorgement revenue from the U.S. government).

would improve the efficiency of FCPA investigations by giving foreign governments, with valuable access to information, a financial stake in successfully resolving investigations.¹⁸ Lastly, re-allocating disgorged funds to the OECD Working Group in instances of Host country intransigence would address supply-side under-enforcement by leveraging the OECD Working Group's information-gathering and monitoring capabilities, thereby allowing capital-exporting countries to better self-police compliance with the OECD Convention.¹⁹

More broadly, this Article can be understood as an attempt to make progress in an increasingly common genre of public policy dilemmas facing the United States. In a fully integrated global economy, the United States can no longer take a purely unilateral approach to the regulation of business, trade, or the environment if it hopes to be effective.²⁰ Because opportunities for regulatory arbitrage abound,²¹ a primary consideration in addressing the cross-border regulatory problems of a globalized economy is how to construct a policy that is more strategic in its orientation than traditional domestic regulation. That is, analysis and reform of new transnational regulation cannot be reduced to an unconditional question of "more" or "less" enforcement; rather, it must take account of the interests and capacities of the various public and private actors involved on an international scale. This will require unorthodox ideas and solutions such as the re-allocation of proceeds from the SEC's disgorgement remedy

¹⁸ Transfers would also help spur more general efforts by Host countries to combat the demand-side of corruption. *See generally infra* Part IV.A (discussing the proposal to transfer funds to Host countries).

¹⁹ In addition, transfers to the OECD Working Group would provide a mechanism for side-payments to OECD member states that would not otherwise be inclined to comply with the OECD Convention. *See infra* notes 314–316 and accompanying paragraph (explaining the role of side-payments in bargaining theory).

²⁰ *See, e.g.,* DANIEL K. TARULLO, *BANKING ON BASEL: THE FUTURE OF INTERNATIONAL FINANCIAL REGULATION* (2008) (providing a critique of Basel II's international coordination of financial firms' capital requirements); Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903 (1998) (proposing a competition-based approach to international securities regulation); Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142 (2001) (suggesting a common antitrust regime consolidated through the World Trade Organization); Andrew Brady Spalding, *The Irony of International Business Law*, 59 UCLA L. REV. 354 (2011) (describing the interplay between strict U.S. regulations and lax Chinese regulations); Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, (Harvard Project on Int'l Climate Agreements, Disc. Paper No. 2010-33, Jan. 2010) (analyzing the costs and benefits of overlapping international carbon reduction policies).

²¹ "Regulatory Arbitrage" is defined as the process of designing transactions or business practices "specifically to reduce costs or capture profit opportunities created by differential regulation or laws." Frank Partnoy, *Financial Derivatives and the Costs of Regulatory Arbitrage*, 22 J. CORP. L. 211, 227 (1997); *see generally* Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227 (2010).

recommended in this Article.²²

This Article proceeds as follows. Part II provides background on the FCPA, a critical overview of the legal basis for the SEC's disgorgement practices, and an analysis of the trend towards more active transnational anti-bribery enforcement. Part III argues that diverting disgorgement revenue from the U.S. government would reduce the incentive for over-enforcement of the FCPA and mitigate concerns about the development of an "FCPA racket." Part IV explains the proposal to transfer disgorged profits to Host countries and the OECD Working Group in order to reduce the incentive that foreign jurisdictions have to under-invest in anti-bribery enforcement. Part V provides brief concluding comments.

II. STATUTORY STRUCTURE AND ENFORCEMENT OF THE FCPA

This Part provides context for the arguments developed in Parts III and IV of this Article. Subpart A reviews the FCPA's statutory history and substantive provisions. Subpart B describes the statutory basis and underlying equitable principles of disgorgement and argues that they are consistent with this Article's proposal to transfer disgorgement proceeds outside of the U.S. Treasury. Subpart C reviews the domestic and international expansion of anti-bribery enforcement over the past two decades and argues that the most plausible explanations for this trend reflect the concerns with over- and under-enforcement that this Article's proposal seeks to address.

A. Statutory Background

The FCPA was passed in 1977, largely as a response to the uproar generated by corporate bribery practices revealed during investigations into the Watergate scandal.²³ The legislative history indicates that the purpose of the statute was to discourage unethical conduct by U.S. businesses and ensure the efficiency of international markets.²⁴ The DOJ provided a more

²² Shifting disgorgement proceeds to third parties is actually not as radical of a policy as it may seem at first glance, as the SEC already has a statutory mechanism for establishing a fund to transfer disgorged profits to third parties through the Sarbanes-Oxley "Fair Funds" provisions. Sarbanes-Oxley Act of 2002 § 308, 15 U.S.C. § 7246 (2011); *see also infra* Part II.B (arguing that the equitable and legal principles underlying the disgorgement remedy cut in favor of transferring forfeited profits to the non-U.S. third parties identified in this proposal).

²³ *See* STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 1 (2005); Bixby, *supra* note 2, at 92.

²⁴ *See* H.R. REP. NO. 95-640, at 4 (1977) ("[Bribery] rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards."); *Foreign and Corporate Bribes: Hearings Before the S. Comm. on Banking, Housing, & Urban Affairs*, 94th Cong. 76 (1976) ("Bribery corrodes the confidence that must exist between buyer and

recent articulation of the Act's purpose: "Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system."²⁵ The FCPA is enforced by the SEC, which can only bring civil penalties, and the DOJ, which is responsible for certain civil suits and all criminal prosecutions.²⁶ However, the SEC and DOJ often enforce the Act through joint investigations and settlement negotiations.²⁷

The substantive prohibitions of the Act come in two forms: anti-bribery provisions and books-and-records provisions. The anti-bribery provisions define a prohibited act as comprising the following elements:

- (1) a payment, offer, or promise of;
- (2) anything of value;
- (3) to any foreign official or any other person while knowing that all or part of the payment will be passed along to a foreign official;
- (4) with corrupt intent;
- (5) for the purpose of influencing an official act or decision of the person;
- (6) to assist in obtaining or retaining business for or with or directing business to, any person.²⁸

Books-and-records provisions concern the keeping of corporate accounting records that conceal illicit payments. They require an issuer to "make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transaction and dispositions of the assets of

seller if domestic and international commerce is to flourish."). Amid domestic outcry, there was also the foreign policy goal—as evidenced by the statements of lawmakers during deliberations on the Act—to secure a positive reputation for U.S. corporations overseas in order to maintain Cold War alliances. See Spalding, *supra* note 7, at 378–90 (arguing this point through a detailed review of the legislative record).

²⁵ *The Lay Person's Guide to the Foreign Corrupt Practices Act Antibribery Provisions*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> (last visited Nov. 5, 2012) [hereinafter *Lay Person's Guide*].

²⁶ See U.S. DEP'T OF JUSTICE CRIMINAL DIV. & U.S. SEC. & EXCH. COMM'N ENFORCEMENT DIV., *supra* note 9, at 4–5.

²⁷ See David C. Weiss, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 478 (2009) ("The agencies often work together to bring parallel criminal and civil proceedings against the same party. In investigations involving issuers over which both agencies have jurisdiction, informal cooperation—rather than formal policy—determines the agency that will actually conduct the investigation.") (citing Paul V. Gerlach & George B. Parizek, *The SEC's Enforcement of the Foreign Corrupt Practices Act*, in 3 FOREIGN CORRUPT PRACTICES REPORTER 14-1, 14-3 (West 2d ed. 2008)).

²⁸ See 15 U.S.C. § 78dd-1(a) (2011).

the issuer.”²⁹

The FCPA has an extremely broad jurisdictional reach. The jurisdictional hook of the Act covers three types of actors who make illicit payments in foreign jurisdictions: (i) “issuers”;³⁰ (ii) “domestic concerns”;³¹ and (iii) “any person” that has contact with U.S. territory in furtherance of the illegal bribe.³² A sufficiently liberal interpretation of the “any person” provision has allowed the Enforcement Agencies to reach “both foreign business entities as well as foreign nationals, for the bribery of public officials in their own country, as well as those of other foreign nations.”³³

Although the FCPA was not vigorously enforced during its first decade, corporate lobbying pressure mounted against the perceived severity of the Act and its detrimental effect on the international competitiveness of U.S. corporations, and resulted in the FCPA being amended in 1988 (1988 Amendments).³⁴ The 1988 Amendments, part of the Omnibus Trade and Competitiveness Act of 1988,³⁵ altered the FCPA by tinkering with the

²⁹ *Id.* § 78m(b)(2)(A). While the anti-bribery provisions require a specific intent to make a corrupt payment, a books-and-records violation is subject to strict liability, with the qualification that criminal liability can only attach to persons “knowingly” violating the provision. *Id.* § 78m(b)(5) (“No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).”); see also H.R. REP. NO. 100-576, at 916, 919–21 (1988) (Conf. Rep.), reprinted in 1988 U.S.C.C.A.N. 1547, 1952–54 (suggesting that a “head in the sand” approach would violate the accounting provisions).

³⁰ The term “issuers” includes companies that offer registered securities in the United States or that are required to file periodic reports with the SEC, as well as their officers, directors, employees, agents, or stockholders acting on their behalf. 15 U.S.C. § 78m(b)(2)(A).

³¹ See *id.* § 78dd-2.

³² See *id.* § 78dd-3. These jurisdictional provisions were added by the 1998 Amendments to the FCPA. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, sec. 2(c)(1), § 78dd-1(g), sec. 2(d), § 78dd-3, sec. 3(d)(1), § 78dd-2(i), 112 Stat. 3302, 3303–04, 3305 (amended 1998) (§§ 78dd-1(g) (for issuers), 78dd-2(i) (for domestic concerns), 78dd-3 (for any persons)).

³³ See Bixby, *supra* note 2, at 101 (summarizing the provision similarly by arguing that “[t]his change suggests that the FCPA can reach foreign agents and employees of domestic concerns, as well as U.S. nationals living anywhere in the world who have very little contact with the United States”); Ashe, *supra* note 7, at 2898 (citing as an example: ABB Ltd., Accounting and Auditing Enforcement Act Release No. 2049, 83 SEC Docket 849 (July 6, 2004)).

³⁴ Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 243 (1997) (“Critics contended that U.S. businesses shunned legitimate transactions, the legality of which was difficult to assess under the statute’s ambiguous language.”).

³⁵ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, secs. 5001–5003, §§ 103(a)–104, 102 Stat. 1107, 1415–25 (amending 15 U.S.C. §§ 78m(b), 78dd-1, 78dd-2, 78ff (1988)).

knowledge requirement,³⁶ creating two affirmative defenses, and adding an express “facilitating payments” exception.³⁷ In addition, the 1988 Amendments exhorted the U.S. government to pursue an international anti-bribery treaty in order to “level the playing field” for U.S. corporations who saw themselves as singled out for policing under the Act while foreign corporations in other developed countries bribed with impunity.³⁸ The last round of FCPA amendments was the International Anti-Bribery and Fair Competition Act of 1998 (1998 Amendments), which brought the Act into greater conformity with the 1997 OECD Convention’s requirements.³⁹ Specifically, the 1998 Amendments expanded the FCPA’s jurisdiction to cover foreign corporations or natural persons by inserting the aforementioned language that makes the anti-bribery provisions applicable to “any person” that has territorial contact with the United States in furtherance of a bribe, whether or not they are a U.S. issuer or domestic concern.⁴⁰ Incorporating a capacity to apply the FCPA’s prohibitions to foreign corporations or natural persons was consistent with the United States’ goal in pushing for the OECD Convention⁴¹ to “even the playing

³⁶ The knowledge requirement was (arguably) narrowed from a “reason to know” or negligence standard to a requirement of actual knowledge that the payment was a bribe to a foreign official or willful blindness as to that fact. *See* 15 U.S.C. § 78dd-1(f)(2)(A). This amendment was not much of a restriction in practice, because, as attorney Deming notes, “the ‘reason to know’ standard was never applied by the Justice Department” and the actual knowledge requirement as amended “continued to be expansive.” DEMING, *supra* note 23, at 31–32.

³⁷ Congress created affirmative defenses for any payments that are prohibited but would be legal under the “local laws” of the foreign jurisdiction and also for “reasonable and *bona fide*” business expenditures “directly related to . . . the promotion, demonstration, or explanation of products or services. *See* 15 U.S.C. §§ 78dd-1(c)(1) to -3(c)(1) (the “local law” defense); *id.* §§ 78dd-1(c)(2)(A) to -2(c)(2)(A) (the “promotional expenses” defense). Like the new knowledge standard, these new affirmative defenses have done little to relax the FCPA’s bite in practice and have never been successfully invoked in court. *See generally* Kyle P. Sheahan, *I’m Not Going to Disneyland: Illusory Affirmative Defenses Under the Foreign Corrupt Practices Act*, 28 WIS. INT’L L.J. 464 (2010). “Facilitating payments,” also known as “grease payments,” are made to “secure or accelerate performance of a nondiscretionary act that an official is already obligated to perform.” 15 U.S.C. § 78dd-1(b); DEMING, *supra* note 23, at 15.

³⁸ *See* H.R. REP. NO. 100-576, at 924 (1988) (Confr. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1957; Tarullo, *supra* note 12, at 674–75 (citing the “level playing field” concern as one of the legislative purposes behind the 1988 Amendments).

³⁹ International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. §§ 78dd-1 to -3, 78ff (2011)).

⁴⁰ *See* 15 U.S.C. § 78dd-1(g) (for issuers); *id.* § 78dd-2(i) (for domestic concerns); OECD Convention, *supra* note 10, art. 4.1 (“Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.”); *supra* note 30 and accompanying text.

⁴¹ John Gibeaut, *Battling Bribery Abroad*, A.B.A. J., Mar. 18, 2007, at 50–51 (“As the

field” for U.S. businesses operating abroad.⁴²

B. Legal Basis and Equitable Principles of Disgorgement Remedy

Disgorgement is a civil remedy with roots in the traditional equitable remedies of restitution and recoupment.⁴³ Imposition of the disgorgement remedy requires corporations subject to FCPA liability to forfeit the amount of “ill-gotten gain” arising from the bribery at issue. Use of the disgorgement remedy is a recent but growing practice on the part of the SEC. In fact, the SEC never sought disgorgement in the FCPA’s first twenty-seven years, until the *ABB Ltd.* settlement in 2004.⁴⁴ Since 2004, the SEC has sought disgorgement “in virtually every” case it has brought,⁴⁵ collecting over \$1 billion in disgorgement and related prejudgment interest in more than sixty FCPA proceedings.⁴⁶ In 2010, ninety-six percent of the proceeds from SEC FCPA settlements consisted of disgorgement and prejudgment interest, a total amounting to approximately \$500 million.⁴⁷

The SEC’s legal basis for requiring disgorgement in connection with FCPA violations is complicated and “achieved through interrelated statutes

United States ramped up the FCPA in 1998, it also persuaded the 30 industrialized nations belonging to the Organisation for Economic Cooperation and Development to sign a treaty agreeing to adopt similar laws.”); Spalding, *supra* note 7, at 391–92 (discussing U.S. interests in the OECD Convention).

⁴² Presidential Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2290, 2290 (Nov. 10, 1998) (“U.S. companies have had to compete on an uneven playing field, resulting in losses of international contracts estimated at \$30 billion per year.”) [hereinafter Presidential Statement].

⁴³ Disgorgement is therefore technically not a “penalty” and is not intended to punish the defendant. *See SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978) (“Unlike damages, [disgorgement] is a method of forcing a defendant to give up the amount by which he was unjustly enriched.”); Elizabeth S. Stong, *Basics of the SEC’s Disgorgement Remedy*, 43 PRAC. LAW. 67, 69 (1997).

⁴⁴ *See* Consent of Defendant, *SEC v. ABB Ltd.*, No. 1:04-cv-01141 (D.D.C. Nov. 30, 2004), [available at](http://fcpa.shearman.com/files/d80/d80f39308746a9feec133667a06bb452.pdf?i=9c0b79cfc7dfb7164daa6be68ea8f5a6) <http://fcpa.shearman.com/files/d80/d80f39308746a9feec133667a06bb452.pdf?i=9c0b79cfc7dfb7164daa6be68ea8f5a6>.

⁴⁵ Philip Urofsky & Danforth Newcomb, *Recent Trends and Patterns in FCPA Enforcement*, FCPA DIGEST (Shearman & Sterling LLP, New York, New York, N.Y.), Oct. 1, 2009, at x, <http://www.shearman.com/files/upload/LT-100209-FCPA-Digest-Recent-Trends-and-Patterns-in-FCPA-Enforcement.pdf>.

⁴⁶ Paul R. Berger et al., *Do FCPA Remedies Follow FCPA Wrongs?*, FCPA UPDATE (Debevoise & Plimpton LLP, New York, N.Y.), Aug. 2011, at 2, <http://www.debevoise.com/files/Publication/9d56da80-1da1-4e29-bc27-4288643df3cc/Presentation/PublicationAttachment/ea922c2f-78d8-46ea-ad2d-69638418a04e/FCPAUpdateAugust2011.pdf>.

⁴⁷ The breakdown is as follows: \$529,967,294 in total settlements; \$20,182,000 in civil penalties; \$509,785,294 in disgorgement and prejudgment interest. *See* Koehler, *supra* note 14.

showing no clear congressional intent that disgorgement apply to FCPA prosecutions.⁴⁸ The SEC's fining authority under the FCPA was added in the 1988 Amendments and is provided in § 32(c) of the Securities Exchange Act of 1934 (1934 Act),⁴⁹ but this section only allows for fines of up to \$600,000 per violation by an issuer. Instead of relying on § 32(c), the SEC resorts to its general civil fining authority under § 21(d)(3) of the 1934 Act⁵⁰ in combination with the 1990 Penny Stock Reform Act, which amended the 1934 Act to grant the SEC statutory authority to impose disgorgement.⁵¹ While not explicitly disallowed by the FCPA, the "lack of any statement that disgorgement should be part of the SEC's enforcement arsenal, and the rarity of the remedy at the time that Congress passed the FCPA and its amendments"⁵² have led some to question the propriety of the remedy.⁵³ As with many aspects of the FCPA, the exact contours of the SEC's disgorgement authority have never been tested in court.⁵⁴

The passage of Sarbanes-Oxley (SOX)⁵⁵ in 2002 provided important modifications to the SEC's remedial authority, including a "Fair Funds for Investors" provision that allows the agency to decide whether to contribute proceeds from disgorgement to the U.S. Treasury or to a special fund for

⁴⁸ Weiss, *supra* note 27, at 499.

⁴⁹ Securities Exchange Act of 1934, § 32(c), 15 U.S.C. § 78ff(c) (2006).

⁵⁰ Weiss, *supra* note 27, at 497.

⁵¹ Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, secs. 202–203, §§ 21B–21C, 104 Stat. 931, 937, 939 (codified as amended at 15 U.S.C. §§ 78u-2(e), 78u-3(e) (2011)); Weiss, *supra* note 26, at 485. Previously the SEC's ability to demand disgorgement rested entirely on caselaw. *See* SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 102 (2d Cir. 1978).

⁵² Weiss, *supra* note 27, at 497 ("Neither the reports of the House or Senate floor discussion of the FCPA or its subsequent amendments, nor the 1981 follow-up report from the U.S. General Accounting Office on corporate bribery and the FCPA, mention disgorgement as a remedy.") (citing H.R. 3815, 95th Cong., 123 CONG. REC. 36,303–08 (1977); S. 305, 95th Cong., 123 CONG. REC. 13,816–23 (1977); H.R. REP. No. 95-831 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 4121; H.R. REP. No. 95-640 (1977); S. REP. No. 95-114 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098; ; U.S. GOV'T ACCOUNTABILITY OFFICE, AFMD-81-34, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS (1981)).

⁵³ *See* James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1237 n.13 (2006) ("The propriety and legality of [FCPA disgorgements] have not been tested in the courts. Whether Congress intended the equitable disgorgement remedy to subsume the FCPA's express fining provisions is the issue.")

⁵⁴ Weiss, *supra* note 27, at 486.

⁵⁵ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.); *see also* 18 U.S.C. § 981(i) (2011) (amended 2012) (providing for civil or criminal forfeiture of property and transfer to eligible foreign countries that participated in the seizure of that property).

investors.⁵⁶ In theory, the SEC has the legal authority to transfer disgorgement proceeds into a fund for shareholders of the corporation charged with violating the FCPA, but this has not happened in practice. And rightly so: it is difficult to see how shareholders are “victimized” by corporate bribes that procure business overseas and increase corporate profits.⁵⁷ Returning the profits from bribes to shareholders of bribing companies merely reinstates the original “unjust enrichment.”⁵⁸ But the policy option created by the Fair Funds provision does reflect an implicit understanding that the disposition of disgorgement can serve a compensatory function, with the “victim” as the appropriate recipient.

The equitable principles underlying disgorgement also cut in favor of the compensatory policy animating the Fair Funds provision. Disgorgement is a sub-class of restitutionary remedies in which the wrongdoer is “restored” to its original position before receiving the ill-gotten benefit.⁵⁹ Most narrowly understood, then, it does not matter who is the recipient of disgorged funds. However, in cases where there is no other compensatory mechanism available, it seems only natural that the party that has suffered harm be the recipient. This policy is reflected in the original Restatement of Restitution itself, which provides that “a person who has been unjustly enriched at the expense of another is required to make restitution to the other.”⁶⁰

The most plausible party harmed by FCPA bribes is the Host country, which has seen its legal system undermined and its public officials corrupted through the illicit payments.⁶¹ In fact, the U.K. has already begun

⁵⁶ See Sarbanes-Oxley Act § 308.

⁵⁷ See Verity Winship, *Fair Funds and The Compensation Conundrum*, 60 FL. L. REV. 1103, 1123–37 (2008) (arguing that investor compensation through the Fair Funds mechanism only makes sense under narrow circumstances inapplicable to the FCPA).

⁵⁸ See *id.* at 1118 (“The passage of the Sarbanes-Oxley Act of 2002 brought a new twist, changing the disposition of the money penalties so that the penalties began to serve the dual purpose of deterring potential violators of the securities laws and compensating harmed investors.”).

⁵⁹ Another way to conceptualize disgorgement is as the mirror-image of expectation damages in contract law: “[D]isgorgement places the promisor in the position that she would have been in had the contract had been performed. Accordingly, perfect disgorgement would make the promisor indifferent between performing, on the one hand, and paying damages, on the other.” Melvin A. Eisenberg, *The Disgorgement Interest in Contract Law*, 105 MICH. L. REV. 559, 561 (2006).

⁶⁰ RESTATEMENT (FIRST) OF RESTITUTION § 1 (1937).

⁶¹ This has been recognized by a recent U.N. report on transnational bribery. See U.N. High Comm’r for Human Rights, *Comprehensive Study on the Negative Impact of the Non-repatriation of Funds of Illicit Origin to the Countries of Origin on the Enjoyment of Human Rights, in Particular Economic, Social and Cultural Rights: Ann. Rep. of the U.N. High Comm’r for Human Rights*, ¶ 59, U.N. Doc. A/HRC/19/42 (Dec. 14, 2011) (“[D]isgorgement of profits is a remedial measure that forces a defendant to ‘return’ the profits of crime to the

to embrace this position under its recently-enacted Bribery Act by requiring corporate defendant Mabey & Johnson Ltd. to disgorge £123,000 to the jurisdiction where the underlying violations occurred in order to “compensate [the] victims.”⁶² Another candidate for compensation is the capital-exporting OECD countries whose companies are forced to compete in an international marketplace distorted by corruption. FCPA expert Mike Koehler makes the point in a straightforward fashion:

I do not know what the exact answer [concerning the recipient of disgorgement] should be, but I am comfortable in my conclusion that the best answer is not \$703 million (USD) solely to the U.S. Treasury because a French, Dutch, and Italian company allegedly bribed Nigerian officials—something that actually happened over a 10-day period earlier this summer.⁶³

Koehler’s common sense intuition is consistent with the equitable basis of the SEC’s FCPA disgorgement authority, and informs this Article’s proposal to transfer disgorgement to Host countries or the OECD Working Group.

In summary, both the theory and practice surrounding the SEC’s use of disgorgement reinforce this Article’s proposal for several reasons. First, the SEC’s legal basis for requiring disgorgement, while likely sound on a technical level,⁶⁴ is nonetheless convoluted and has no real historical pedigree in the FCPA context. Calls for departure from the status quo, therefore, would not upset any settled or long-standing legal practice. In addition, neither the Fair Funds mechanism provided by SOX, nor the equitable principles underlying the disgorgement remedy require the U.S.

State, an objective aligned with the purposes of returning assets at the country of origin.”)

⁶² See U.K. Bribery Act, c. 23, § 19 (2010); Mike Koehler, A Conversation with Richard Alderman- Director of the United Kingdom Serious Fraud Office, Oct. 4, 2010 (unpublished responses to questions), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1687299 (noting Mr. Alderman remarks on the *Mabey & Johnson* settlement: “The SFO [Serious Fraud Office, the U.K.’s Bribery Act enforcement agency,] has been looking for ways in which to compensate victims in countries in respect of which U.K. corporates have committed offences. This is a difficult area because, while the victims will have suffered as a result of poor infrastructure etc., they have no claim to compensation in a way that victims of fraud have.”); Richard L. Cassin, *Breakthrough in Britain*, FCPA BLOG (Sept. 29, 2009, 8:02 PM), <http://www.fcpablog.com/blog/2009/9/30/breakthrough-in-britain.html> (discussing the *Mabey & Johnson* settlement).

⁶³ See Mike Koehler, Professor, Butler Univ., Opening Remarks at the World Bribery & Corruption Compliance Forum 2010, at 4 (Sept. 14–15, 2010) (transcript available at <http://www.scribd.com/doc/37367261/World-Bribery-and-Corruption-Compliance-Forum-Opening-Remarks-of-Professor-Mike-Koehler>).

⁶⁴ See *supra* note 51 and accompanying text (citing powers granted to SEC by the Penny Stock Reform Act amendment).

Treasury to be the ultimate recipient of disgorgement revenue. Instead, both the Fair Funds provisions and disgorgement's equitable principles cut in favor of transferring disgorged profits to harmed third parties, including Host countries or OECD Convention members. A final point, discussed in more detail below, is that disgorgements pursuant to FCPA settlements are not only escalating in size, but are also often imposed in an arbitrary or disproportionate manner.⁶⁵ These trends reflect certain conflicts of interest at work in the enforcement process that could be mitigated by transferring disgorgement from the SEC to third parties.⁶⁶

C. Increase in Anti-Bribery Efforts

The rise of FCPA enforcement over the past decade is the most striking feature of the Act, which has undergone only modest textual change since 1977, and no change at all since 1998. The increase in FCPA enforcement has also paralleled the enactment of anti-bribery statutes and treaties by other international actors. These trends present various puzzles that require explanation to fully understand the contours of current transnational anti-bribery efforts.

In addition to positive analysis, this subpart argues that the best explanations for enforcement trends underline concerns that support this Article's main arguments. For one, the expansion of anti-bribery efforts at the international level means U.S. policy on foreign bribery should be strategic and international in scope, taking into account the interests and capacities of other international parties FCPA enforcement will inevitably become intertwined with.⁶⁷ The rapid expansion of FCPA enforcement over a short timeframe also raises the concern that enforcement strategies have been unbalanced and overly aggressive—the “over-enforcement” problem Part III of this Article seeks to address. At the same time, the proliferation of international agreements concerning corruption—and the extent to which they have been embraced by both advanced and developing economies—reflects a collective recognition that corruption is a serious global problem, and animates the proposals for improving deterrence laid out in Part IV.

1. *The Trend Towards More Enforcement*

FCPA enforcement in recent years has expanded across almost every conceivable dimension, including: (a) the number of investigations initiated and cases settled; (b) the size of penalties imposed; and (c) the scope of

⁶⁵ See *infra* Part III.B for a critique of the SEC's methods for calculating disgorgement.

⁶⁶ See *infra* Part III.A (describing the rent-seeking dynamic within the Enforcement Agencies).

⁶⁷ See *supra* notes 20–21 and accompanying text.

jurisdictional and substantive legal theories put forward by the Enforcement Agencies. These trends stand to continue or even accelerate, as both the SEC and DOJ have announced new and ambitious plans for institutionalizing a robust FCPA enforcement regime.⁶⁸ These plans have been accompanied by similar efforts on an international scale.

From 1977 to 2003, the Enforcement Agencies pursued an estimated total of sixty cases, or slightly more than two FCPA cases per year.⁶⁹ After 2004, however, the number of both SEC and DOJ enforcement actions rose for six consecutive years, culminating in 2010 when the SEC and DOJ pursued twenty-six and forty-eight actions, respectively.⁷⁰ Table 1 below illustrates the steadiness of this trend⁷¹:

2004		2005		2006		2007	
DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC
3	2	5	7	8	7	20	18
2008		2009		2010		2011	
DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC
13	20	14	26	48	26	25	23

The size of penalties per enforcement action has followed the same rising trajectory as the number of actions.⁷² The Enforcement Agencies set records for the amount of total penalties levied each year from 2007 to 2010,⁷³ with the ten largest dollar penalties from this period,⁷⁴ eight of which resulted from settlements reached in 2010.⁷⁵ Activity slowed down

⁶⁸ See, e.g., *infra* notes 87–90 and accompanying text.

⁶⁹ See Bixby, *supra* note 2, at 103 (noting that between the FCPA’s enactment in 1977 and amendment in 1998, the DOJ brought a total of twenty-five criminal prosecutions); Westbrook, *supra* note 2, at 522, n. 171 (providing a similar estimate).

⁷⁰ 2011 Year-End FCPA Update, GIBSON DUNN (Jan. 3, 2012), <http://www.gibsondunn.com/publications/Documents/2011YearEndFCPAUpdate.pdf>.

⁷¹ Table 1 is adapted from Gibson Dunn’s 2011 Year-End FCPA Update. See *id.*

⁷² See Bixby, *supra* note 2, at 109 (“[N]ot only by the numbers of cases, but also by the amount of fines, fees, and penalties levied against the defendants”).

⁷³ Westbrook, *supra* note 2, at 555–56.

⁷⁴ Weissman & Smith, *supra* note 7, at 2.

⁷⁵ 2010 Year-End FCPA Update, GIBSON DUNN (Jan. 3, 2011), <http://www.gibsondunn.com/publications/Documents/2010YearEndFCPAUpdate.pdf>. The two largest payouts by 2010 were the settlements with Siemens in 2008 (\$800 million) and KBR/Halliburton in 2007 (\$579 million), with several settlements of equally staggering magnitude reached in 2010. *Id.* The largest 2010 settlements include: BAE Systems PLC (\$400 million); Snamprogetti/ENI (\$365 million); Technip (\$338 million); Daimier AG (\$185 million); and Alcatel-Lucent (\$137.4 million). *Id.*

only slightly during 2011, in which the Enforcement Agencies “collected approximately \$652 million.”⁷⁶ This general upward trend applies with equal strength to the disgorgement remedy, as detailed in the previous subpart.⁷⁷

The jurisdictional reach of the FCPA has also expanded over the past dozen years to include parties, such as foreign entities and individuals, who were not previously subjected to active enforcement under the statute.⁷⁸ While enforcement actions against individuals were relatively unheard of before 2006, the Enforcement Agencies pursued charges against ten individual defendants in that year and against fifteen individuals in 2007.⁷⁹ FCPA enforcement has also been increasingly directed at foreign corporations. The first criminal action against a non-U.S. party was in 2006 against Statoil ASA for payments to Iranian officials.⁸⁰ But non-U.S. defendants have become more common since then: nine of the ten largest FCPA settlements ever were imposed on non-U.S. corporations over 2010 and 2011,⁸¹ and *every* enforcement action instituted in the first quarter of 2010 and *every* investigation initiated in 2011 was against a foreign corporation.⁸²

The reach of the FCPA during the recent enforcement boom has been aided in large part by the aggressive legal theories of the Enforcement Agencies concerning key statutory language. For example, the DOJ has stated that—because foreign businesses that receive bribes are often state-owned enterprises—its interpretation of what constitutes a “foreign official” is broad enough so that “nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product in a foreign

⁷⁶ Mike Koehler, *2011 Foreign Corrupt Practices Act Year in Review*, 7 WHITE COLLAR CRIME REP., Jan. 27, 2012, at 80, 82, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1992616.

⁷⁷ See *supra* Part II.B.

⁷⁸ See generally Ashe, *supra* note 7.

⁷⁹ Bixby, *supra* note 2, at 111. This trend has not let up, with sixteen individual defendants in 2008 and forty-two individual defendants in 2009, a year one major law firm’s FCPA publication referred to as “the year of the individual.” *Cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977*, FCPA DIGEST (Shearman & Sterling, LLP, New York, N.Y.), Mar. 2010, at ii, <http://www.shearman.com/files/upload/FCPA-Digest-Spring-2010.pdf> [hereinafter *Cases and Review Releases*].

⁸⁰ See *In re Statoil, ASA*, Exchange Act Release No. 54599, 2006 WL 2933839 (Oct. 13, 2006).

⁸¹ Paul R. Berger et al., *The FCPA in 2011: The Year of the Trial Shapes FCPA Enforcement*, FCPA UPDATE (Debevoise & Plimpton LLP, New York, N.Y.), Jan. 2012, at 8; Richard L. Cassin, *In New Top Ten, Eight Are Foreign*, FCPA BLOG (Nov. 5, 2010), <http://fcpublog.squarespace.com/blog/2010/11/5/in-new-top-ten-eight-are-foreign.html> (listing the top ten settlements reached in FCPA cases).

⁸² Berger et al., *supra* note 81; *Cases and Review Releases*, *supra* note 79, at v.

country will involve a ‘foreign official’ within the meaning of the FCPA.”⁸³ Other examples include a large but amorphous interpretation of what it means to “obtain or retain business,”⁸⁴ as well a generous approach to the condition that “anything of value” may constitute a bribe, which was construed in one case to include campaign t-shirts.⁸⁵ In practice, the anti-bribery provisions’ “actual knowledge” or “willful” blindness requirements have been applied on a constructive knowledge or “has reason to know” basis.⁸⁶ And, recent cases under § 20(a) of the 1934 Act have used a “control person” theory to create a strict liability standard for parent

⁸³ Lanny A. Breuer, Assistant Att’y Gen., Dep’t of Justice, Prepared Keynote Address to the 10th Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum (Nov. 12, 2009) (transcript available at www.ehcca.com/presentations/pharmacongress10/breuer_2.pdf). The OECD Convention’s definition pales in comparison. See OECD Convention, *supra* note 10, art. I(4)(a) (“[F]oreign public official’ is defined as ‘any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation.’”).

⁸⁴ See Koehler, *supra* note 7, at 971–77 (detailing a long list of questionable applications of this phrase and arguing that “[d]espite *Kay*’s [United States v. *Kay*, 359 F.3d 738, 740 (5th Cir. 2004)] equivocal holding, there has since been an explosion in FCPA enforcement actions where the improper payments are alleged not to obtain or retain any particular business, but rather, involve customs duties and tax payments, or payments alleged to have assisted the payer in securing foreign government licenses, permits, and certifications.”); Westbrook, *supra* note 2, at 540–41 (same). To take one example, the *Dow Chemical* settlement alleged payments through a fifth tier subsidiary, to Indian government officials to register several agro-chemical products slated for marketing in time for India’s growing season. Complaint ¶ 2, SEC v. Dow Chemical Co., No. 07-CV-336 (D.D.C. 2007), available at <http://fcpa.shearman.com/?s=matter&mode=form&id=133>.

⁸⁵ See SEC Sues the Titan Corporation for Payments to Election Campaign of Benin President, Litigation Release No. 19107, 2005 WL 474238 (Mar. 1, 2005). Other cases have involved fairly underwhelming sums at issue. The Westinghouse settlement, for example, included an allegation of twelve monthly payments of \$31.50 to India’s Central Board of Excise and Customs. Press Release, Dep’t of Justice, Westinghouse Air Brake Technologies Corporation Agrees to Pay \$300,000 Penalty to Resolve Foreign Bribery Violations in India (Feb. 14, 2008), <http://fcpa.shearman.com/files/540/5405cace013845d322fad7e7ff94c379.pdf?i=a0512bf1215d0370409344896331a3e4>; Shearman & Sterling LLP, *U.S. v. Westinghouse Air Brake Technologies Corporation*, FCPA.SHEARMAN.COM, <http://fcpa.shearman.com/?s=matter&mode=form&id=93> (last visited Jan. 1, 2013).

⁸⁶ See Kenneth Winer & Gregory Husisian, *The ‘Knowledge’ Requirement of the FCPA Anti-Bribery Provisions: Effectuating or Frustrating Congressional Intent?*, WHITE-COLLAR CRIME REP., Oct. 2009, at 3, available at <http://www.foley.com/files/Publication/a1d4aa39-1324-4018-bd8a-1cbddfc15e02/Presentation/PublicationAttachment/7e8b814e-446b-411d-8722-1e747b29b303/FCPAWinerHusisian2009.pdf> (“The DOJ and SEC . . . now interpret the knowledge requirement so broadly that they have effectively eviscerated the 1988 statutory changes.”).

companies of subsidiaries that violate the books-and-records provisions.⁸⁷

The Enforcement Agencies' recent actions and public statements indicate an intent to institutionalize FCPA enforcement on a permanent basis at its current or even greater levels of activity. The new, institutionalized phase of FCPA enforcement is epitomized by DOJ Director Breuer's statement that "FCPA enforcement is stronger than it's ever been—and getting stronger We are in the new era of FCPA enforcement; and we are here to stay."⁸⁸ Accordingly, the DOJ is committing more resources to FCPA enforcement, including a new Federal Bureau of Investigation (FBI) unit consisting of eight full-time, dedicated FBI investigators.⁸⁹ The SEC has followed suit. In August 2009, an SEC reorganization created a specialized unit tasked only with FCPA prosecutions,⁹⁰ which SEC Division of Enforcement Director Robert Khuzami announced would "focus on new and proactive approaches to identifying violations."⁹¹

Finally, international attention on anti-bribery enforcement, while initially non-existent, gained momentum in the mid-1990s. The surge in international anti-bribery activity was principally manifested in the signing of new multilateral agreements and the enactment of domestic legislation prohibiting transnational bribery. In 1996, the Organization of American States adopted the *Inter-American Convention Against Corruption*,⁹² with the OECD Convention following in 1997. And in 2003, the flurry of international anti-bribery agreements continued with the signing of the UNCAC⁹³ and the African Union's *Convention on Preventing and Combating Corruption*,⁹⁴ both modeled around the FCPA and OECD Convention.⁹⁵ Important recent developments include the passage of the

⁸⁷ See Koehler, *supra* note 7, at 977–81; Westbrook, *supra* note 2, at 548; Shearman & Sterling LLP, *SEC v. Nature's Sunshine Products Inc., Douglas Faggioloi, and Craig D. Huff*, FCPA.SHEARMAN.COM, <http://fcpa.shearman.com/?mode=form&id=230> (last visited Mar. 8, 2013).

⁸⁸ See Lanny A. Breuer, Assistant Att'y Gen., Dep't of Justice, Remarks at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010) (transcript available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>).

⁸⁹ See Westbrook, *supra* note 2, at 559.

⁹⁰ See Robert Khuzami, Dir., Div. of Enforcement, Sec. & Exch. Comm'n, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009) (transcript available at <http://www.sec.gov/news/speech/2009/spch080509rk.htm>).

⁹¹ *Id.*

⁹² Inter-American Convention Against Corruption, Mar. 29, 1996, S. Treaty Doc. No. 105-39 (entered into force in the United States Oct. 29, 2000).

⁹³ G.A. Res. 58/4, *supra* note 11.

⁹⁴ African Union, Convention on Preventing and Combating Corruption art. 4, July 11, 2003, 43 I.L.M. 5.

⁹⁵ See DEMING, *supra* note 23, at 115–16 ("[M]any of the concepts and measures reflected in the OECD Convention . . . have been incorporated into the U.N. Convention.");

2010 U.K. Bribery Act⁹⁶ and amendments to China's criminal code in 2011, which added a provision prohibiting bribery of foreign officials.⁹⁷

2. Explaining Recent Trends

What is the explanation for the tremendous surge in anti-bribery enforcement in the United States and, to a somewhat lesser extent, internationally? It is important to venture an explanation, because understanding why enforcement has increased in recent years casts light on the role disgorgement has played in the process and on how altering disgorgement rules may affect the behavior of the parties involved. There are a number of competing but in some ways complementary hypotheses, none of which can conclusively be considered the one underlying cause.⁹⁸

The first narrative is that, beginning in the 1990s, various interested parties gained a new appreciation for the harm caused by corporate bribery.⁹⁹ Developing countries with high levels of bribery, once thought to simply have a different commercial culture, began to lobby on their own behalf for stricter international anti-bribery enforcement, making claims about the “cultural imperialism” of foreign anti-bribery efforts lose credibility.¹⁰⁰ “Values” groups committed to the idea that bribery is wrong in and of itself—Transparency International (TI) being the most prominent—organized and became effective lobbyists at the international and domestic levels.¹⁰¹ Finally, a series of bribery scandals in Europe

Westbrook, *supra* note 2, at 512 (noting that the U.N. and African Union treaties contain provisions similar to those of the FCPA).

⁹⁶ See *Bribery Act 2010—An Introduction*, PwC, <http://www.pwc.co.uk/forensic-services/issues/bribery-act-2010-an-introduction.jhtml> (last visited Feb. 16, 2013).

⁹⁷ See Darryl S. Lew, *China's New Anti-Corruption Law Goes into Effect May 1, 2011*, CLIENT ALERT: GLOBAL WHITE COLLAR PRAC. (White & Case, D.C.), Apr. 19, 2011, http://www.whitecase.com/files/Publication/49f8553b-00b9-4573-bf24-741b0614e08c/Presentation/PublicationAttachment/d0253a48-813b-42cd-81d5-7d9e241e2dd4/Alert_Chinas_New_Anti-Corruption_Law_Goes_into_Effect_May_1_2011.pdf.

⁹⁸ This Part discusses leading theories, but is not necessarily exhaustive. Perhaps the most modest, default explanation is that the FCPA trend is simply a subset of the more general increase in federal, white collar, and global criminal law enforcement. See Ellen S. Podger, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 325 (1997).

⁹⁹ See generally Abbott & Snidal, *supra* note 5.

¹⁰⁰ See *id.* at S159 (“Beginning in the 1980s, however, some development experts, as well as officials and NGOs in developing countries, began to change their views A turning point was the World Bank’s 1989 Africa Long Term Perspectives Study, in which development experts called for a rethinking of policy. A few years later, Southern development groups ‘hijacked’ an OECD conference, demanding action against corruption at an event designed to divert calls for change.”); Tarullo, *supra* note 12.

¹⁰¹ See Abbott & Snidal, *supra* note 5, at S165–66. The normative case for anti-bribery

roused public sentiment and framed bribery as a problem afflicting the developed world as well, making agreement to the 1997 OECD Convention possible.¹⁰² In sum, enforcement has arguably increased because of the increased awareness of bribery as a problem.

A second line of argument focuses on the rational self-interest of individuals and organizations involved in anti-bribery enforcement, rather than changes in preferences or values. As previously noted, the Enforcement Agencies have used inventive legal theories to stretch the jurisdictional bounds of the FCPA to its limits to target *foreign* companies instead of domestic ones.¹⁰³ This prosecutorial strategy flips the collective action problem raised by the OECD Convention on its head.¹⁰⁴ Not only does enforcement generate positive revenue for the U.S. government, it also advantages domestic U.S. corporations that are less heavily investigated or punished relative to their foreign competitors.¹⁰⁵ A state-based explanation is buttressed by a public choice analysis at the intra-state level, which shows that public officials within the Executive Branch can use “enthusiastic enforcement” as a means for agency aggrandizement and lucrative exit opportunities in white collar practices of private firms.¹⁰⁶

enforcement was also bolstered by a shift in the economic literature, which began to coalesce around the conclusion that bribery had economically and politically corrosive effects, rather than representing a socially efficient method for circumventing dysfunctional legal systems. *See infra* note 208–12 and accompanying paragraph.

¹⁰² *See* S. EXEC. REP. NO. 105-19, at 55 (1998) (noting the prominence of then-recent European bribery scandals in building support for the treaty).

¹⁰³ A recent statistical study finds that monetary penalties against foreign companies exceed those levied on U.S. companies, even when controlling for other relevant factors such as the size of the bribe. Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act 24–25* (N.Y. Univ. Law & Econ. Research, Working Paper No. 12-15, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116487. Nine of the ten largest FCPA penalties have been imposed on non-U.S. corporations. Berger et al., *supra* note 81. Every investigation initiated in 2010 was against a foreign corporation. *See Cases and Review Releases, supra* note 79.

¹⁰⁴ Commentators have noted that the OECD Convention threatens to create a collective action problem for member states: reduced bribery in international markets is a non-excludable global public good that makes foreign markets more profitable for any state capable of competing in them, and therefore rational states should be expected to underinvest in its provision. *See* SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* (1999); Tarullo, *supra* note 12, at 681–83 (arguing that the OECD Convention locks its members in a multi-player prisoner’s dilemma); *see also infra* Part IV.B.i.

¹⁰⁵ *But see* Davis, *supra* note 12, at 13–20 (suggesting that a rational state may in some cases unilaterally prosecute foreign bribery of its own nationals by selectively targeting only those forms of bribery—which he refers to as “superfluous bribes”—that waste corporate resources and fail a cost-benefit analysis).

¹⁰⁶ *See infra* Part III.

A third explanation combines elements of the previous two and focuses on the connection between the rise of FCPA enforcement and the passage of SOX in 2002.¹⁰⁷ SOX came in the wake of the Enron and WorldCom accounting scandals, and like the FCPA, was itself a response to increasing public concern over corporate malfeasance.¹⁰⁸ SOX's requirements for more transparent corporate accounting provide fertile ground for uncovering books-and-records violations of the FCPA.¹⁰⁹ In addition, the substantial increase in SEC funding and staffing that SOX demanded has provided the SEC with the resources to more actively enforce other statutes under its mandate.¹¹⁰ The idea that SOX was a tipping point for FCPA enforcement complements the theories mentioned above: it represents both an increased awareness and concern over the issue of white collar crime, as well as a means for agency aggrandizement and rent-seeking by various private and public actors.¹¹¹

The proposals concerning disgorgement practices presented in this Article are closely related to the overlapping explanations of increasing FCPA enforcement outlined above. If part of the rise in enforcement is a result of rent-seekers using large FCPA penalties to construct a mini-industry within the Executive Branch, then reducing the "profitability" of this industry by removing disgorgement revenue will reduce the Enforcement Agencies' incentive to resort to questionable prosecutorial tactics and overzealous investigations that disregard rule-of-law values and pose a threat of over-deterrence. If, at the same time, a factor behind the upward trend in enforcement is an increased awareness of the problem of foreign bribery, then it is important to develop an alternative policy that allocates disgorgement funds in a way that makes anti-bribery efforts more effective. This Article's proposal seeks to address both these issues simultaneously.

¹⁰⁷ See Sarbanes-Oxley Act of 2002 § 308, 15 U.S.C. § 7246 (2011).

¹⁰⁸ While only loosely related to accounting fraud or structural issues of corporate governance, a renewed call for prosecution of U.S. companies engaging in bribery overseas arguably taps into the same general mood animating the passage of SOX, as well as the broader trend of federalization and expansion of the prosecution of white collar crime. See generally Dan M. Kahan, *Reallocating Interpretive Criminal-lawmaking Power Within the Executive Branch*, 61 L. & CONTEMP. PROBS. 47 (1998); Podger, *supra* note 98.

¹⁰⁹ See 18 U.S.C. § 1350 (2011) (providing SOX's heightened reporting requirements); Westbrook, *supra* note 2, at 515–16; Yockey, *supra* note 9, at 794 (“[SOX] prompted an increasing number of firms to voluntarily disclose potential FCPA violations, which are considered ‘material’ events under SOX.”); Laura E. Kress, Note, *How the Sarbanes-Oxley Act Has Knocked the “SOX” Off the DOJ and SEC and Kept the FCPA on Its Feet*, 10 U. PITT. J. TECH. L. & POL’Y 2, 3–5 (2009).

¹¹⁰ See Bixby, *supra* note 2, at 104.

¹¹¹ See Frank Easterbrook, *When Does Competition Improve Regulation?*, 52 EMORY L.J. 1297, 1305 (2003) (suggesting that the passage of SOX itself was an exercise in rent-seeking by the accounting industry).

III. CORRECTING FOR OVER-ENFORCEMENT: DIVERTING DISGORGEMENT REVENUE FROM THE SEC

A leading source of inefficiency in current efforts to address transnational bribery is over-enforcement of the FCPA, or more precisely, enforcement of the statute in an unbalanced manner that is deleterious to rule-of-law values and economic growth.¹¹² Subpart A provides a public choice analysis of FCPA enforcement and explains how rent-seeking behavior by government officials and private lawyers contributes to over-zealous enforcement. Subpart B identifies how the rent-seeking dynamic and its attendant over-enforcement lead to bad outcomes, including arbitrary and disproportionate penalties, prosecutorial tactics that are inconsistent with rule-of-law values, and deterrence of otherwise desirable foreign investment. Subpart C argues that this Article's proposed policy of transferring the SEC's disgorgement revenue from the U.S. Treasury to third parties would reduce the pathologies of the current enforcement regime.

A. Agency Costs and Rent Seeking in FCPA Enforcement

"Rent-seeking" is an economic concept from the public choice literature,¹¹³ most commonly referring to private efforts to produce public interventions that allow for monopoly or non-competitive profits.¹¹⁴ But the term has also been adapted to describe public officials' use of the government's monopoly over law enforcement to appropriate private gains.¹¹⁵ The FCPA enforcement regime in its present form creates

¹¹² See *supra* note 7.

¹¹³ Public choice theory applies economic principles to the political process. That is to say, a public choice analysis proceeds from the economic assumption that private actors maximize self-interest, and applies this assumption to individuals working in the public sector. See generally GORDON TULLOCK & JAMES BUCHANAN, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATION OF CONSTITUTIONAL DEMOCRACY* (1962); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371 (1983); Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279, 279 (1984) ("[Public choice] long ago put public interest theories of politics to rest. These theories have correctly been viewed as normative wishing rather than explanations of real-world phenomena. They have been replaced by models of political behavior that are consistent with the rest of microeconomics.").

¹¹⁴ See Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974) (providing the first use of the term "rent-seeking"); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967) (providing an early seminal treatment of the dynamics that came to be known as rent-seeking).

¹¹⁵ See Nuno Garoupa & Daniel Klerman, *Optimal Law Enforcement with a Rent-Seeking Government*, 4 AM. L. & ECON. REV. 116, 117 (2002) ("We . . . analyz[e] a government motivated partially or entirely by rent seeking. This view of the government is quite common in public choice scholarship. A rent-seeking government designs enforcement and punishment with the goal of appropriating the rents of the criminal market."); see also Gary

incentives for public officials to opportunistically push for ever-greater enforcement at several levels of the federal government hierarchy. As a result, the enforcement policies currently pursued involve a substantial amount of rent-seeking by public officials and private lawyers.

Recognizing that public officials are not purely motivated by public interest¹¹⁶ means that “agency costs” exist when there is a conflict between private interests of public officials and the public interest.¹¹⁷ Econometric studies, as well as legal scholarship relying on a more anecdotal approach, both conclude that agency costs lead to rent-seeking in public law enforcement and lead prosecutorial decision-making away from the social optimum.¹¹⁸ Bureaucracies as a whole have also been modeled with self-interested objective functions of budget maximization or personnel maximization.¹¹⁹

In pursuing FCPA violations, the Enforcement Agencies are far from

S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974); David Friedman, *Why Not Hang Them All: The Virtues of Inefficient Punishment*, 107 J. POL. ECON. S259 (1999); Keith N. Hylton & Vikramaditya Khanna, *A Public Choice Theory of Criminal Procedure*, 15 SUPREME CT. ECON. REV. 61 (2007).

¹¹⁶ A public choice analysis remains relevant even when the preferences of public actors are often public-regarding. See Geoffrey Brennan & James Buchanan, *The Normative Purpose of Economic ‘Science’: Rediscovery of an Eighteenth Century Method*, 1 INT’L REV. L. & ECON. 155, 160 (1981) (“[T]he only assumption required . . . is the assumption that some individuals behave in their narrowly defined private interest at least some of the time.”).

¹¹⁷ See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976) (“[I]t is generally impossible for the principal or the agent at zero cost to ensure that the agent will make optimal decisions from the principal’s viewpoint. In most agency relationships the principal and the agent will incur positive monitoring and bonding costs (non-pecuniary as well as pecuniary), and in addition there will be some divergence between the agent’s decisions and those decisions which would maximize the welfare of the principal.”).

¹¹⁸ See, e.g., Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys*, 7 AM. L. ECON. REV. 379 (2005) (using an econometric model to argue that career-motivated DOJ attorneys try to maximize the sentencing length in the cases they bring); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1987 (1992) (providing a legalistic account: “The real parties in interest (the public and the defendant) are represented by agents (the prosecutor and the defense attorney) whose goals are far from congruent with those of their principals. There is, accordingly, a potential for conflicts of interest or, in the language of economics, a problem of agency costs”); Edward L. Glaeser, Daniel P. Kessler, & Anne Morrison Piehl, *What Do Prosecutors Maximize? An Analysis of Drug Offenders and Concurrent Jurisdiction* (Nat’l Bureau of Econ. Research, Working Paper No. 6602, 1998) (providing an econometric analysis showing that federal prosecutors’ private incentive to use cases as a vehicle for human capital development causes a disproportionate number of dangerous criminals to be held in state prisons less equipped to deal with them than federal prisons).

¹¹⁹ See DENNIS C. MUELLER, PUBLIC CHOICE III 362–68 (2002).

immune to agency costs. Like all law enforcement officials, DOJ and SEC attorneys gain a reputation for efficacy by bringing actions and obtaining large corporate settlements.¹²⁰ In addition, attorneys and accountants in the Enforcement Agencies are in a position to create a demand for legal and accounting services which they are uniquely positioned to supply upon leaving the government and joining private firms,¹²¹ contributing to what has been called a “cottage industry” of FCPA experts.¹²² Corporations charged with white collar offenses now routinely engage outside counsel to perform elaborate and costly internal investigations,¹²³ effectively using these firms as “branch office[s] of the prosecutor.”¹²⁴ The increasing tendency to resort to settlements with non-prosecution agreements, the waiver of attorney-client privilege, the installation of corporate monitors, and the emphasis on corporate cooperation in investigations are all characteristics of a process in which prosecutions have become a joint public-private undertaking.¹²⁵

Enforcement Agency attorneys can and do take advantage of this “revolving door” with private law firms.¹²⁶ Mark Mendelsohn, head of the

¹²⁰ *See id.*

¹²¹ *See Vardi, supra* note 7 (quoting Joseph Covington, head of white collar defense at Jenner & Block: “This is good business for law firms . . . and Justice Department lawyers who create the marketplace and then get yourself a job.”).

¹²² Yockey, *supra* note 9, at 793 (“[T]he rise in FCPA enforcement has produced a cottage industry of FCPA experts, including lawyers, accountants, and consultants at prestigious firms, which DOJ and SEC personnel often join after leaving their federal jobs for considerably higher compensation.”).

¹²³ Debevoise and Deloitte’s internal investigation of Siemens reportedly generated fees of \$850 million, while Skadden Arps’ investigation of Daimler cost at least \$500 million. Vardi, *supra* note 7.

¹²⁴ *See generally* Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C.L. REV. 23 (2011); David S. Hilzenrath, *Justice Department, SEC Investigations Often Rely on Companies’ Internal Probes*, WASH. POST., May 22, 2011. This is not to say that encouraging internal investigations is unwise from a public policy perspective. *See* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: an Analysis of Corporate Liability Regimes*, 72 N.Y.U.L. REV. 687 (1997) (discussing how incentivizing companies to monitor, investigate, and report employee wrongdoing may be an efficient enforcement regime).

¹²⁵ *See* First, *supra* note 124, at 46–48. The DOJ’s “Holder Memorandum” and “Thompson Memorandum” also provide detailed guidance for the forms of cooperation the agency expects and encourages from defendant corporations. Memorandum from Eric Holder, Deputy Att’y Gen., to All Component Heads and United States Att’ys (June 16, 1999) (on file with Dep’t of Justice); Memorandum from Larry Thompson, Deputy Att’y Gen., to All Component Heads and United States Att’ys (Jan. 20, 2003) (on file with Dep’t of Justice).

¹²⁶ *See generally* Mike Koehler & Ethan S. Burger, *Recent High-Level Department of Justice Departure Raises Recurring Questions that Require Prompt Action*, ACJS TODAY, Dec. 2010, at 1 (discussing how more and more attorneys are leaving governmental positions where they enforced the law for private sector jobs where they defend clients against those

DOJ's FCPA department during the rise in enforcement, left to join the law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP for \$2.5 million a year, an amount that the Wall Street Journal described as a "significant sum, particularly for a lawyer arriving at the firm without a ready list of clients."¹²⁷ Perhaps the most eyebrow-raising example occurred when William Jacobson, Assistant Chief at the DOJ in 2007 when oil company Weatherford International disclosed a bribery problem, left to become partner at Fulbright & Jaworski (the firm handling Weatherford's internal investigation), and eventually became Weatherford's general counsel in 2008.¹²⁸ Enforcement Agency officials also routinely leave government to consult as compliance monitors, a service costing one FCPA defendant a projected \$52 million over four years.¹²⁹ To be sure, the Enforcement Agencies have ethics rules designed to prevent conflicts of interest, such as a one-year "cooling-off" period for DOJ attorneys before they may appear before the DOJ representing defendants.¹³⁰ But these rules serve only to prevent the most egregious conflict of interest scenarios, and do little to alter the fact that, to the extent that Enforcement Agency officials can maintain the FCPA's trajectory as a "sizzling hot practice area," their services will be in high demand among private firms.¹³¹

FCPA enforcement also provides opportunities for rent-seeking at the bureaucracy and Executive Branch levels. Recent initiatives by the SEC and DOJ to increase and entrench organizational resources dedicated to FCPA enforcement are consistent with public choice models of a personnel-maximizing and/or budget-maximizing bureaucracy.¹³² Leaders in the Executive Branch also benefit by establishing popular "tough on corporate crime" bona fides¹³³ as well as by tapping FCPA disgorgements and

same laws). The SEC also regularly experiences high-level departures to law and accounting firms, as reflected by the sixty-six former SEC employees who filed 168 letters in 2008–2009 disclosing clients they planned to represent before the SEC. Tom McGinty, *Staffer One Day, Opponent the Next*, WALL ST. J., Apr. 5, 2010, at C1.

¹²⁷ Nathan Koppel, *Top U.S. Bribery Prosecutor to Join Paul Weiss*, WALL ST. J. (Apr. 14, 2010), <http://online.wsj.com/article/SB10001424052702303695604575182174285804354.html>.

¹²⁸ Vardi, *supra* note 7, at 2.

¹²⁹ *Id.* As of 2010, seven of the thirteen FCPA monitors were former DOJ employees. *Id.*

¹³⁰ See Koehler & Burger, *supra* note 126, at 4.

¹³¹ The DOJ stated that it had roughly 150 ongoing FCPA investigations at the end of 2010. Richard L. Cassin, *The 2011 Watch List*, FCPA BLOG (Dec. 29, 2010, 8:02 AM), <http://www.fcablog.com/blog/2010/12/29/the-2011-watch-list.html>.

¹³² See MUELLER, *supra* note 119, at 362–68; *supra* notes 90–91 and accompanying text (citing remarks made by SEC officials about "institutionalizing" the SEC's newly expanded enforcement apparatus).

¹³³ White collar crime is subject to the same one-way ratchet as other areas of criminal law, in which it is popular with the electorate to continuously escalate penalties and to

penalties as an important source of revenue.¹³⁴

Perhaps most importantly, Enforcement Agencies and Executive Branch leaders face an incentive to expand the FCPA's jurisdictional reach in order to prosecute and collect revenue from non-U.S. corporations while leaving U.S. companies unscathed and at a competitive advantage.¹³⁵ In fact, as discussed before, nine of the ten biggest FCPA settlements have been with foreign corporations.¹³⁶ In 2010, ninety percent of the dollar value of FCPA fines and penalties were imposed on foreign corporations.¹³⁷ A recent study of FCPA penalties finds a statistically significant difference between monetary penalties imposed on foreign corporations compared to U.S. companies, even when controlling for the magnitude of the bribe and market capitalization of the defendant.¹³⁸ These are confusing figures for a statute that purports to ensure the integrity of U.S. businesses.¹³⁹

To be clear, the Enforcement Agencies are not "self-funding" in the sense that they channel FCPA penalties directly into their budgets; fines are paid into the U.S. Treasury. But there is plenty of evidence that the Enforcement Agencies use the magnitude of FCPA penalties to leverage increases in funding in a manner that fits the model of a budget- or personnel-maximizing bureaucracy.¹⁴⁰ As the DOJ's former Assistant Chief for FCPA enforcement recently admitted: "the government sees a profitable program, and it's going to ride that horse until it can't ride it anymore."¹⁴¹ And in the DOJ Civil Division's 2013 budget justification,

cultivate a reputation as being "tough" on corporate crime. See Kahan, *supra* note 108, at 50. This is especially true in a post-Enron and post-financial crisis era in which corporate corruption is perceived to be closely linked to negative movements in the business cycle. See, e.g., GEORGE AKERLOF & ROBERT SHILLER, ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM 26-41, 38 (2009) ("[T]he business cycle is connected to fluctuations in personal commitment to principles of good behavior and to fluctuations in predatory activity.").

¹³⁴ Cf. Terry M. Moe, *The Positive Theory of Public Bureaucracy*, in PERSPECTIVES ON PUBLIC CHOICE 455, 477-78 (Dennis C. Mueller ed., 1997) (highlighting the influence of presidential preferences in bureaucratic decision making from a theoretical perspective).

¹³⁵ See *supra* note 103 and accompanying text.

¹³⁶ Berger et al., *supra* note 81.

¹³⁷ Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. TOL. L. REV. 99, 105 (2011).

¹³⁸ See Choi & Davis, *supra* note 103, at 24.

¹³⁹ The DOJ has stated: "Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system." *Lay Person's Guide*, *supra* note 25.

¹⁴⁰ See Moe, *supra* note 134 (providing an overview of rational choice models of bureaucratic decision-making); WILLIAM A. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).

¹⁴¹ See Joseph Rosenbloom, *Here Come the Payoff Police*, AM. LAW. (May 17, 2011), http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202457704533&Here_Come_the_Payoff_Police (quoting William Jacobson, former Assistant Chief at the DOJ).

the Division unselfconsciously declared itself the “profit center of the U.S. Treasury.”¹⁴² The SEC has also historically lobbied for and justified funding demands by reference to the amount of revenue it brings in.¹⁴³ The frankness with which the Enforcement Agencies refer to themselves as “profit centers” mainly reflects the fact that use of the FCPA as a vehicle for rent-seeking is an open secret. As Perlis and Chais pointed out: “While [several] causes have increased investigations, governments will keep pursuing corrupt business practices for one very simple reason—it’s lucrative.”¹⁴⁴

Lastly, and most simply, revenue collected through FCPA enforcement in general, and the disgorgement remedy in particular, is substantial: in 2010, FCPA enforcement resulted in approximately \$1.8 billion in combined corporate fines and penalties.¹⁴⁵ In that same year, ninety-six

¹⁴² See CIVIL DIV., DEP’T OF JUST., FY 2013 BUDGET AND PERFORMANCE PLANS 23 (2012), available at <http://www.justice.gov/jmd/2013justification/pdf/fy13-civ-justification.pdf> (“Few profit centers can boast of a [comparable] return on investment”); CRIMINAL DIV., DEP’T OF JUSTICE, FY 2011 PRESIDENT’S BUDGET 20–22 (2010), available at <http://www.justice.gov/jmd/2011justification/pdf/fy11-crm-justification.pdf> (requesting more FCPA staff while noting that “the [Criminal] Division’s FCPA prosecutions have resulted in fines and penalties totaling more than \$1 billion”).

¹⁴³ See *Oversight of the U.S. Securities and Exchange Commission’s Operations, Activities, Challenges, and FY 2012 Budget Request: Hearing Before the Subcomm. on Capital Mkts., Ins. & Gov’t Sponsored Enters. of the H. Comm. on Fin. Servs.*, 112th Cong. 51 (2011) (“It is important to note that the SEC’s FY 2012 funding request will be fully offset by matching collections of fees on securities transactions.”); *Hearing on the FY 2012 Funding for the CFTC and SEC: Hearing Before the Subcomm. on Fin. Servs. & Gen. Gov’t of the S. Comm. on Appropriations*, 112th Cong. (2011) (statement of Mary Schapiro, Chairman, U.S. Sec. & Exch. Comm’n) (noting that “multi-million dollar [FCPA] settlements” were part of a FY 2010 in which “disgorgements are up 20 percent, while the amount of monetary penalties has almost tripled”); see also Joel Seligman, *Self-Funding For the Securities and Exchange Commission*, 28 NOVA. L. REV. 233, 241 (2004) (describing the SEC’s push during the 1990’s to align its budget more closely with its “revenue”); Cyrus Sanati, *For S.E.C., Self-Financing Remains but a Dream*, DEALBOOK (June 25, 2010, 6:56 PM), <http://dealbook.nytimes.com/2010/06/25/for-s-e-c-self-financing-remains-but-a-dream/> (explaining the SEC’s partial success in obtaining “match funding” which would link the SEC budget to the amount of transaction fees the agency collects).

¹⁴⁴ Michael F. Perlis & Wrenn E. Chais, *Investigating the FCPA*, FORBES (Dec. 8, 2009, 1:06 PM), <http://www.forbes.com/2009/12/08/foreign-corrupt-practices-act-opinions-contributors-michael-perlis-wrenn-chais.html>; see also *Justice’s Bribery Racket*, WALL ST. J. (Feb. 17, 2012), <http://online.wsj.com/article/SB10001424052970203711104577199412696071528.html> (“Justice may not mind these embarrassing [litigation] failures, considering the cash its prosecutions are bringing in. The government saw a \$1.8 billion windfall in FCPA-related fines and penalties from Justice and the Securities and Exchange Commission in 2010 and another \$508.6 million in 2011.”); Mike Koehler, *Is the FCPA a Government Cash Cow?*, FCPA PROFESSOR (May 21, 2010), <http://www.fcpaprofessor.com/is-the-fcpa-a-government-cash-cow> (agreeing with the logic of the Perlis & Chais quote).

¹⁴⁵ See Koehler, *supra* note 137, at 100.

percent of the FCPA penalties levied by the SEC consisted of disgorgement,¹⁴⁶ with disgorgement revenue approaching fifty percent of the entire operating budget of the SEC.¹⁴⁷ These eyebrow raising figures, reinforced by the revolving door dynamic, create the impression that the FCPA enforcement regime is essentially functioning as a for-profit industry within the Executive Branch.¹⁴⁸

The FCPA is not an undesirable statute per se, and this Article will argue that deterring foreign bribery is a worthy and important public policy.¹⁴⁹ However, it is a question of balance, and because agency costs are endemic to the current FCPA regime, government actors responsible for enforcing the FCPA face opportunities to realize private benefits from increasing enforcement efforts above the socially optimal level.¹⁵⁰

B. Adverse Consequences of the Agency Cost Problem

The rent-seeking dynamic described above, in which every member of the FCPA enforcement apparatus benefits from expanding FCPA enforcement, has had several harmful consequences. The recent boom in enforcement has been characterized by aggressive and often unjustifiable statutory interpretations, lack of judicial review, and arbitrary and disproportionate penalties. The SEC's disgorgement policies are arguably the most prominent illustration of this dysfunction. These haphazard and opportunistic enforcement practices have not only threatened procedural regularity and "rule of law" values, but have also resulted in over-deterrence. Corporations have pulled back on investments in areas where there is uncertainty over the scope and magnitude of potential FCPA penalties, thus foregoing otherwise legitimate and productive foreign

¹⁴⁶ See Koehler, *supra* note 14.

¹⁴⁷ The SEC's enacted budget for 2010 was \$1.114 billion, a year in which disgorgement revenue was \$509 million. See *id.*

¹⁴⁸ The magnitude of penalties is even more striking when compared to levels from the recent past. In 2000, there was one FCPA enforcement action (by the SEC) with a total fine amount of \$300,000. Koehler, *supra* note 137, at 104.

¹⁴⁹ See *infra* Part IV.A.

¹⁵⁰ See *infra* Part III.B. (providing economic and legal bases for the over-enforcement premise). It is likely impossible to exactly specify the optimal level of FCPA enforcement on a global scale—taking into account supply- and demand-side enforcement by the United States, other OECD states, and Host countries—in any meaningful or rigorous way. On the other hand, it is widely acknowledged in literature that the socially optimal level of corruption is above zero, and that therefore resources expended on completely eliminating bribery—foreign or domestic—may be wasteful from a social welfare perspective. See Susan Rose-Ackerman, *The Political Economy of Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY 31, 33 (Kimberly Anne-Elliott ed., 1997) ("In seeking realistic reform it is important to realize that, like all illegal activity, the efficient level of bribery is not zero. Bribery is costly to control. Reforms must consider the marginal costs as well as the marginal benefits of anticorruption strategies.").

investments. In addition to harming investing corporations, over-deterrence can also function as a form of de facto “sanctions” that cut off developing economies’ access to foreign capital.

1. Rule of Law

The Enforcement Agencies’ aggressive approach in recent years has been largely inconsistent with traditional “rule of law” values that emphasize the need to clearly define prohibited behavior, treat similar cases similarly, and apply a separation of powers structure in which different bodies define, administer, and review the law.¹⁵¹ A major source of this problem is the Enforcement Agencies’ interpretations of the FCPA, as investigations have pursued legal theories that push ambiguous portions of the statutory language to their breaking point.¹⁵² Enforcement Agency positions as to what the relevant jurisdictional and knowledge requirements are,¹⁵³ who is considered a “foreign official” or “control person,”¹⁵⁴ what constitutes a satisfactory compliance program,¹⁵⁵ and which payments are considered a “bribe”¹⁵⁶ are highly questionable or unclear at best. The penalties assessed under these theories also appear arbitrary, as similar cases have produced substantially different results.¹⁵⁷

The SEC’s disgorgement practices provide a prominent example of the Enforcement Agencies’ weak statutory interpretations. In particular, there is widespread criticism of the SEC requiring disgorgement in cases involving books-and-records violations¹⁵⁸ where no underlying act of

¹⁵¹ See Richard H. Fallon, Jr., “*The Rule of Law*” As a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 7–8 (1997) (providing a similar, five-element definition that reflects the principles that “Rule of Law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions,” and “should guarantee against at least some types of official arbitrariness”).

¹⁵² See generally Koehler, *supra* note 7.

¹⁵³ See Paul R. Berger, Erin W. Sheehy & Kenya K. Davis, *Is That a Bribe?*, 26 INT’L FIN. L. REV. 76 (2006); Ashe, *supra* note 7, at 2927–30.

¹⁵⁴ See Koehler, *supra* note 7, at 977.

¹⁵⁵ See Westbrook, *supra* note 2, at 489–99, 560–61; see generally Bruce Hinchey, *Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements*, 40 PUBL. CONT. L. J. 393 (2011).

¹⁵⁶ See Berger, Sheehy & Davis, *supra* note 153. The FCPA’s definition of a bribe as “anything of value” to “obtain or retain business” has not been conservatively applied. See *supra* notes 84–85 and accompanying text.

¹⁵⁷ See Koehler, *supra* note 7, at 984.

¹⁵⁸ As of August 2011, there had been seventeen such cases since 2007, in which the SEC has collected over \$123 million in disgorgement and prejudgment interest. Berger et al., *supra* note 46, at 2. See, for example, the *ITT* case, where no anti-bribery violations were charged, but final judgment was entered ordering ITT to pay “disgorgement of \$1,041,112 together with prejudgment interest thereon of \$387,538.11” and a \$250,000 civil penalty. SEC v. ITT Corp., No. 1:09-CV-00272, 2009 WL 330269, ¶ 1 (D.D.C. Feb. 11, 2009),

bribery is charged.¹⁵⁹ It is difficult to see a justification for this practice that is consistent with legal principles underlying disgorgement.¹⁶⁰ Recall that disgorgement is an equitable remedy requiring a liable party to forfeit any ill-gotten gains from the actions giving rise to liability.¹⁶¹ But if no bribe has been charged, it is senseless—and more importantly, legally incorrect—to claw-back profits from hypothetical transactions that have not been subject to any legal challenge. Indeed, cases dealing with disgorgement under the securities laws reject the SEC’s approach in the FCPA context.¹⁶² The case law also specifically disapproves of the use of disgorgement remedies as a punitive measure, which is its only conceivable function where no liability for illegal payments is asserted.¹⁶³

When disgorgement is imposed in cases in which anti-bribery charges *are* present, the practice still remains problematic—particularly considering the escalating size of disgorgement settlements—in part because of the inherent difficulty in calculating the amount of illicit profits. The SEC’s transparency has been unimpressive on this point, as one commentator explains: “the SEC settlement announcements often describe the size of the bribe and the disgorgement from the violating company without mentioning the benefit that the company actually received from the bribe—perhaps because accurate calculation of such a benefit would be impossible.”¹⁶⁴ The opacity of SEC disclosures does little to mask the inconsistency of disgorgements required across seemingly similar cases, which has been widely noted.¹⁶⁵

Furthermore, regardless of the unique factual difficulties raised in the

available at <http://www.sec.gov/litigation/complaints/2009/comp20896.pdf>.

¹⁵⁹ See Koehler, *supra* note 7, at 983–85; Weiss, *supra* note 27, at 479; *Recent Trends and Patterns in FCPA Enforcement*, *supra* note 45, at 4.

¹⁶⁰ See Weiss, *supra* note 27, at 492; Berger et al., *supra* note 46, at 3 (“In the context of a violation of the FCPA’s books and records or internal controls provisions, however, the required causal connection between the wrong and any alleged ill-gotten gain is inherently much more tenuous, if it can be said to exist at all.”); *Recent Trends and Patterns in FCPA Enforcement*, *supra* note 45, at 5.

¹⁶¹ See *supra* Part II.B.

¹⁶² See, e.g., SEC v. First City Fin. Corp. Ltd., 890 F.2d 1215, 1230–31 (D.D.C. 1989) (applying the 1934 Act).

¹⁶³ See *id.*; Koehler, *supra* note 7, at 983.

¹⁶⁴ Weiss, *supra* note 27, at 507 (citing SEC v. Titan Corp., No. 05-0411, 2005 WL 474238, at *2 (D.D.C. Mar. 1, 2005)); SEC v. ABB Ltd., No. 1:04CV1141(RBW), 2004 WL 1514888, at *3 (D.D.C. July 6, 2004).

¹⁶⁵ See Sasha Kalb & Marc Alain Bohn, *Disgorgement: The Devil You Don’t Know*, CORPORATECOMPLIANCEINSIGHTS.COM (Apr. 12, 2010) <http://www.corporatecomplianceinsights.com/disgorgement-fcpa-how-applied-calculated/> (“Establishing any reasonable measure of predictability when it comes to disgorgement, however, has proven challenging.”); see also Koehler, *supra* note 7, at 984–86 (comparing the *Lucent* and *UTStarcom* cases and concluding “same facts, different results”).

FCPA context, the SEC is currently applying an overly simplistic analytical framework that tends to produce incorrect and overestimated disgorgement amounts. The SEC typically calibrates FCPA disgorgements by making a rough estimate of the “paper profits” from a particular project subject to bribery.¹⁶⁶ A more rigorous methodology—and one typically used in analogous areas such as stock-drops related to securities fraud¹⁶⁷—would be to estimate the difference between the defendant corporation’s actual profit and the likely profit in a “but-for” world where no bribe was offered.¹⁶⁸ Such an analysis requires considering the “incremental probability of winning generated by the bribe and the opportunity cost of the project won,” both of which tend to produce a lower disgorgement number.¹⁶⁹ Thus, contrary to SEC practice, if a bribe generates less than 100% of the profit from a particular project, the entirety of the profit should not be considered an “ill-gotten gain.”

Judicial review of the various enforcement strategies detailed above is rare. Accordingly, there is a lack of relevant “FCPA case law” because cases are almost uniformly settled through out-of-court resolution vehicles such as non-prosecution agreements.¹⁷⁰ The result is that disgorgement impositions that courts routinely reject in other contexts—as well as theories of jurisdiction and liability that stretch the FCPA to its limits—are allowed to stand.¹⁷¹

In addition to a limited body of judicial opinions interpreting the FCPA, administrative guidance has been minimal, further contributing to

¹⁶⁶ See Kalb & Bohn, *supra* note 165.

¹⁶⁷ Elaine Buckberg & Frederick C. Dunbar, *Disgorgement: Punitive Demands and Remedial Offers*, 63 BUS. LAW. 347, 352 (2008) (“[A]lthough few courts have discussed the concept of netting [finding the net but-for benefit] in the disgorgement context, the principle is routinely invoked to calculate damages for securities fraud and, logically, the same principle should apply to disgorgement.”).

¹⁶⁸ Dr. Patrick Conroy & Dr. Graeme Hunter, *Economic Analysis of Damages Under the Foreign Corrupt Practices Act*, NERA ECON. CONSULTING, May 5, 2011, at 5, http://www.nera.com/nera-files/PUB_Foreign_Corrupt_Practices_0511.pdf.

¹⁶⁹ *Id.* at 1–2; see also Kevin E. Davis, *Civil Remedies for Corruption in Government Contracting: Zero Tolerance Versus Proportional Liability* 36–42 (N.Y. Univ. Sch. of Law Inst. Int’l Law & Justice, Working Paper No. 2009/4, 2009), available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1184&context=nyu_lewp (providing an argument for further reducing penalties for bribery in proportion to the defendant corporation’s monitoring efforts and value added from follow-on investment in the underlying bribe-related project).

¹⁷⁰ See Koehler, *supra* note 7, at 929–46 (describing the prevalence of non-prosecution agreements and deferred-prosecution agreements in FCPA settlements). There is one exception to the pattern of FCPA cases decided outside of court: cases against individuals tend to end up in court much more often. See, e.g., *United States v. Kay*, 359 F.3d 738, 740 (5th Cir. 2004).

¹⁷¹ See Yockey, *supra* note 9, at 836.

the uncertainty over how the Act will be interpreted and enforced.¹⁷² The recently issued “FCPA Guidance” sought to fill this interpretive gap and had the potential to be a positive step towards clarifying the law.¹⁷³ However, the Guidance is primarily a catalogue of previous enforcement decisions that gave rise to the current confusion, rather than a clear articulation of how the Enforcement Agencies intend to approach interpretative grey areas going forward.¹⁷⁴

One clear constant, congruent with the rent-seeking model discussed above, arises out of all this procedural inconsistency and legal chaos: FCPA penalties, in the form of disgorgement and otherwise, are high and continue to rise.¹⁷⁵

2. Economic Harm

The current state of FCPA enforcement does not simply offend well-regarded procedural principles.¹⁷⁶ It also results in a practical harm: over-deterrence of foreign investment. To be sure, the premise of the Act is to deter foreign investments facilitated by bribery, and such deterrence should not be regarded as dysfunctional. However, overzealous application of the

¹⁷² Until November 2012, Enforcement Agency guidance was limited to the marginally-helpful Opinion Procedure Release process. See Doty, *supra* note 53, at 1233–42 (arguing that agency guidance was limited, especially compared to other statutory regimes); Westbrook, *supra* note 2, at 497, 566–74 (same).

¹⁷³ See U.S. DEP’T OF JUSTICE CRIMINAL DIV. & U.S. SEC. & EXCH. COMM’N ENFORCEMENT DIV., *supra* note 9.

¹⁷⁴ See Matt Kelly, *FCPA Guidance Released*, COMPLIANCE WEEK (Nov. 14, 2012), <http://www.complianceweek.com/fcpa-guidance-released/article/268299/> (quoting attorney Erich Schwartz: “This voluminous Resource Guide is clearly a substantial effort to organize the government’s thinking on a variety of issues that are important in understanding how to comply with the FCPA. It is not, however, a clear roadmap for compliance The guide largely avoids announcing new policy.”); Mike Koehler, *Guidance Roundup*, FCPA PROFESSOR (Nov. 16, 2012, 12:08 AM), <http://www.fcpaprofessor.com/guidance-roundup> (reviewing reactions to the guidance and concluding that “the consensus . . . appears to be that the guidance offers little in terms of actual new substance and that FCPA reform issues remain. It appears that the only contrary publicly stated position is a press release from a variety of civil society organizations”).

¹⁷⁵ See Koehler, *supra* note 137, at 99 (“[M]uch of the largeness of FCPA enforcement in 2010 was the result of bold enforcement theories that seemingly conflict with congressional intent in enacting the FCPA [E]nforcement in 2010 was more than just big and bold: it was also bizarre. Among other things, FCPA enforcement suffers from several inherent contradictions.”).

¹⁷⁶ The negative practical consequences of procedural irregularities in applying the FCPA are important, as rule-of-law based critiques can often descend to aestheticism or nostalgia for the pre-administrative state. See Fallon, *supra* note 151, at 2–3 (“[M]any invocations of the Rule of Law are smug or hortatory. . . . [T]he modern American legal system departs significantly from the provisional account of the Rule of Law . . . and it is strongly arguable that no plausible legal system could avoid departing from it in some respects.”).

Act comes at a unjustifiable cost to U.S. corporations and the domestic economy, as well as foreign jurisdictions where bribery takes place, which are often developing countries.¹⁷⁷

Aggressive and haphazard enforcement of the FCPA has led to over-deterrence of foreign investment, because corporations facing substantial uncertainty over when and how the statute applies will forego otherwise legitimate investments to avoid the risk of prosecution.¹⁷⁸ A recent Dow Jones survey found that fifty-one percent of companies delayed, and fourteen percent cancelled, business ventures abroad due to uncertainty over FCPA enforcement.¹⁷⁹ The U.S. Chamber of Commerce has also called for reform, arguing that the main problem for businesses is lack of clarity and certainty: “the solution to this problem is not to do away with the FCPA and permit American companies to engage in bribery alongside their foreign competitors. Rather, the FCPA should be modified to make clear what is and what is not a violation.”¹⁸⁰

Added to the cost of foregoing international business opportunities are monitoring and internal compliance costs, which may tip the balance of profitable investment projects from positive to negative,¹⁸¹ and may also create an environment where “agents and employees will become overly risk-averse and thus deterred from taking actions that would otherwise benefit their firms.”¹⁸² Finally, empirical studies generally show that the

¹⁷⁷ See Dalton, *supra* note 5, at 615–16 (“Between 2003 and 2004 alone, the United States exported \$392.6 billion in foreign direct investment worldwide Even if efficient conduct proscribed under the Act is only a small percentage of foreign investment, given the considerable degree of investment being outwardly exported to foreign countries, the price imposed by the over-inclusive Act may be significant.”).

¹⁷⁸ Weiss, *supra* note 27, at 505 (citing George Bittlingmayer, *Regulatory Uncertainty and Investment: Evidence from Antitrust Enforcement*, 20 CATO J. 295, 320–22 (2001)) (“Regulatory uncertainty has been quantitatively shown to be particularly harmful to investment in other contexts—for example, antitrust—and, while no quantitative study is available for foreign bribery, the likely result is similarly undesirable.”); Yockey, *supra* note 9, at 824–25; see also John Bray, *International Business Attitudes Toward Corruption*, in GLOBAL CORRUPTION REPORT 316, 316 (2004).

¹⁷⁹ See Westbrook, *supra* note 2, at 498; Yockey, *supra* note 9, at 824.

¹⁸⁰ Weissmann & Smith, *supra* note 7, at 6.

¹⁸¹ See Miriam Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1036 (2008) (“Because the current corporate criminal liability standard is so broad and the collateral consequences of a criminal indictment are so devastating, entities will attempt to avoid formal charges *ex ante* by investing in ‘compliance’ products intended to impress prosecutors in the future, even if these programs are more costly than effective. Risk averse corporate managers may further attempt to avoid entity-based criminal liability by declining beneficial investments simply because they seem too risky.”); Koehler, *supra* note 7, at 1001 (“The facade of FCPA enforcement also contributes to overcompliance by prompting risk-averse companies to reflexively launch expensive and time-consuming internal investigations when the alleged conduct at issue may not even violate the FCPA.”).

¹⁸² Baer, *supra* note 181, at 1036; Yockey, *supra* note 9, at 824.

FCPA diverts investment from countries with endemic corruption,¹⁸³ but endemic corruption is present in a large swath of the global economy.¹⁸⁴ Clearer guidance along with more consistent and proportionate penalties could facilitate some degree of legitimate investment in these countries.¹⁸⁵

The over-deterrence of foreign investment that follows from aggressive enforcement of the FCPA also deprives foreign jurisdictions—often low income or developing countries—of valuable foreign capital. FCPA scholar Andrew Spalding has argued that overly broad enforcement of the FCPA functions a form of de facto “sanctions” against emerging economies.¹⁸⁶ The sanctions argument follows from the above-mentioned empirical research showing that FCPA enforcement results in the withdrawal of foreign direct investment (FDI) from high-corruption developing economies.¹⁸⁷ The harm caused by the withdrawal of foreign capital is compounded by the fact that it also changes the composition of FDI in emerging economies, with “corrupt countries receiv[ing] less of their FDI from less-corrupt countries and more of their FDI from more-corrupt countries.”¹⁸⁸

The perverse incentives that encourage government officials to

¹⁸³ See Alvaro Cuervo-Cazurra, *The Effectiveness of Laws Against Bribery Abroad*, 39 J. INT’L BUS. STUD. 634 (2008); Spalding, *supra* note 7, at 372–73; Anna D’Souza, *The OECD Anti-Bribery Convention: Changing the Currents of Trade* 3 (Cal. Ctr. for Population Research, Working Paper Series No. 2009-06, 2009), available at <http://escholarship.org/uc/item/1m87n6hm>.

¹⁸⁴ Weissman & Smith, *supra* note 7, at 6 (“The statute should take into account the realities that confront businesses that operate in countries with endemic corruption (e.g., Russia, which is consistently ranked by Transparency International as among the most corrupt in the world) or in countries where many companies are state-owned (e.g., China).”).

¹⁸⁵ See Spalding, *supra* note 7, at 401–03 (“There are numerous reforms to the text and enforcement of antibribery legislation that would advance the policy of reducing bribery without scaring companies away from emerging markets. . . . Mo[st] fundamentally, we should reevaluate the underlying theories of liability by which the government holds corporations accountable for FCPA violations.”).

¹⁸⁶ See generally *id.*; cf. Tyler Cowen, *One of the Best Ways to Help Haiti: Modify FCPA*, MARGINAL REVOLUTION (Mar. 15, 2010, 9:24 AM), <http://marginalrevolution.com/marginalrevolution/2010/03/one-of-the-best-ways-to-help-haiti.html> (“As it stands right now, U.S. businesses are unwilling to take on this legal risk and the result is similar to an embargo. You can’t do business in Haiti without paying bribes.”).

¹⁸⁷ Spalding, *supra* note 7, at 373–74.

¹⁸⁸ See *id.* at 373 (citing Cuervo-Cazurra, *supra* note 183, at 635); Alvaro Cuervo-Cazurra, *Who Cares About Corruption?*, 37 J. INT’L BUS. STUD. 807, 807 (2006). The substitution of high-corruption foreign capital for low-corruption capital is significant because FDI-exporting firms with a culture and history of unethical business practices can have the effect of locking in and normalizing corrupt business practices among firms and government officials in the Host country receiving the FDI. See ROSE-ACKERMAN, *supra* note 104, at 99–102.

constantly ratchet-up FCPA enforcement are probably not the sole cause of the procedural problems and harmful consequences described in this subpart. But it is difficult to see how they are not a significant contributing factor. Executive Branch officials who benefit from more enforcement are expected to pursue investigations pursuant to both strong and weak legal theories, to invite ambiguity into the statute rather than remove it, to target foreign corporations that are at best tangentially subject to the statute's jurisdiction, to pursue the largest penalties possible, and to over-estimate corporate profits for purposes of disgorgement.¹⁸⁹ Such practices will lead to an over-deterrence of otherwise legitimate foreign investment and impose an unjustifiable cost upon businesses investing in developing countries.

C. Transferring Disgorgement Would Reduce Rent Seeking

Diverting disgorgement revenue currently flowing into U.S. Treasury coffers via the SEC would alter the dysfunctional incentives embedded in the current enforcement regime and encourage more proportionate and consistent outcomes. To the extent that FCPA enforcement abuses are a product of a public-private cottage industry springing up around the FCPA, making that industry less "profitable" will reduce the return on prosecutorial and bureaucratic overreach, therefore reducing "investment" in over-enforcement.

The benefits of transferring disgorgement sums follow from a basic insight of microeconomics, as applied by the public choice literature. All else equal, as available rents increase, investment in capturing those rents by rent-seekers increase as well.¹⁹⁰ In other words, "as rents become a more important governmental objective, more resources are invested in detection and punishment [of crimes that produce rents]."¹⁹¹

This Article's proposal strikes at the converse of the relationship described above: when the supply of available rents is reduced, a reduction of investment in wasteful rent-seeking activities will follow. This same connection has been identified by economic analyses of criminal procedure

¹⁸⁹ Nothing less follows from a public choice analysis relying on the minimalist assumption that at least some individuals in the public sector place some weight on their private self-interest some of the time. See Brennan & Buchanan, *supra* note 116, at 160.

¹⁹⁰ In the related context of competition among private actors for a monopoly rent, investment in rent-seeking can be modeled mathematically as follows: $I = [(n-1)/n^2] * r(R)$, where I represents the investment of a risk-neutral rent-seeker; n , the number of rent-seekers; and R , available rents; the magnitude of r determines whether returns on rent-seeking investment are diminishing or increasing. See MUELLER, *supra* note 119, at 336, 335-47 (deriving this equation and providing extensions). Note that the basic relationship between I and R remains unchanged over varying values of r : what is important is that I as a function of R is increasing. See *id.* at 336.

¹⁹¹ See Garoupa & Klerman, *supra* note 115, at 128.

in the context of rent-seeking law enforcement. Following an earlier analysis by David Friedman,¹⁹² Hylton and Khanna argue:

[One] way to constrain the costs associated with abuses of prosecutorial or punishment authority is to put restrictions on the size of penalties or the process by which they are levied [O]ur analysis suggests that penalty restrictions increase the cost of punishment to the state, dampening incentives for wealth extraction.¹⁹³

When dealing with the fining authority of government agencies investigating corporations, this analysis can be applied equally across penalties whether they are nominally labeled “civil” or “criminal.”¹⁹⁴

The framework outlined above may be somewhat abstract, but the analysis it represents is easily illustrated by reference to the literature concerning private expenditures on political influence, or campaign finance. When the wealth transferred from one group to another through legislation or other government action represents the pool of available rents, campaign contributions—whether legal or otherwise—can be understood as rent-seeking investments by interest groups.¹⁹⁵ Perhaps unsurprisingly then, empirical work in this area finds the same positive correlation between the investment in rent-seeking (amount of campaign contributions and lobbying) and available rents (roughly approximated as the size of government budgets).¹⁹⁶ This relationship is robust across government entities, whether at the state or federal level.¹⁹⁷

The same basic dynamic applies to the FCPA. Recall the discussion in Part III.A *supra*, including the Enforcement Agency official’s statement that when “the government sees a profitable program[,] . . . it’s going to

¹⁹² Friedman, *supra* note 115.

¹⁹³ Hylton & Khanna, *supra* note 115, at 24–25.

¹⁹⁴ See Friedman, *supra* note 115, at S263 (defending the choice to not distinguish between civil and criminal penalties when the two are functionally equivalent); Hylton & Khanna, *supra* note 115, at 116 (“The analysis here could be applied to other current topics, including the extension of criminal procedural protections to civil suits brought by government agencies.”).

¹⁹⁵ See Fred S. McChesney, “Pay to Play” *Politics Examined, with Lessons for Campaign-Finance Reform*, 6 INDEP. REV. 345, 349 (2002) (describing “[t]he orthodox story [of] rent creation” as “referring to private-donor money as buying ‘access and influence for their interests,’ . . . where rent refers to returns obtained through the political process rather than through private-market exchanges”).

¹⁹⁶ See Franklin G. Mixon, Jr. & James B. Wilkinson, *Maintaining the Status Quo: Federal Government Budget Deficits and Defensive Rent-Seeking*, 26 J. ECON. STUD. 5, 5 (1999) (“Evidence from a Parks regression technique suggests that total rent-seeking is positively related to the amount of federal spending, as others have shown.”).

¹⁹⁷ See John R. Lott, Jr., *A Simple Explanation for Why Campaign Expenditures Are Increasing: The Government Is Getting Bigger*, 43 J.L. & ECON. 359 (2000).

ride that horse until it can't ride it anymore.”¹⁹⁸ A straightforward implication of basic microeconomic principles predicts that reducing the profitability of the “FCPA horse” should result in the government riding it less often. In other words, a reduction in the private return to government actors by withdrawing disgorgement revenue should deflate the so-called “FCPA racket” and have a natural tendency to rein in some of the more aggressive and unjustified enforcement practices described in Part III.B above.

A reduction in available rents would tip the Executive Branch's cost-benefit analysis into net negative territory for legally “adventurous” cases because they are more costly to pursue.¹⁹⁹ For example, the logic of two and a half-year sting operations in Africa—in which U.S. government operatives offer fictitious “bribes” to Host country officials—may be dimmed when the potential revenue at stake is drastically reduced.²⁰⁰ Pursuing cases via expansive statutory interpretations and creative legal theories is also more costly than the pursuit of straightforward cases, because the former have a greater chance of being challenged with resource-intensive litigation in court and carry a lower probability of victory at trial, which in turn lowers settlement value.²⁰¹ The Enforcement Agencies' mixed litigation outcomes in 2011, where negative judicial scrutiny was previously unheard of, underline the increasing costliness to prosecutors of over-extending the Act.²⁰² Removing disgorgement would also mean fewer SEC staff devoted to the FCPA in the long run,²⁰³ putting pressure on the agency to pursue the “lower-hanging fruit” of FCPA investigations that have clearer factual and legal bases.

Withdrawal of disgorgement revenue from the SEC would of course

¹⁹⁸ See Rosenbloom, *supra* note 141 (quoting William Jacobson, former Assistant Chief at the DOJ).

¹⁹⁹ Of course, the standard caveat of economic analysis applies to this claim as well: an economic model will provide a prediction about a behavioral tendency and not a narrative, psychological claim about how enforcement officials literally calculate their self-interest.

²⁰⁰ See Berger et al., *supra* note 81, at 6–7 (describing the “SHOT Show” cases, in which FBI agents posed as representatives of Gabon's Ministry of Defense).

²⁰¹ Indeed, economic models of criminal enforcement predict that “mixed” governments that at least partially pursue self-interest along with the public interest are more likely to expand the set of acts defined as illegal. See Garoupa & Klerman, *supra* note 115, at 118 (“[I]f offenders have sufficient wealth, a rent-seeking government will define more acts as illegal.”).

²⁰² See Koehler, *supra* note 76 (detailing the Enforcement Agencies' setbacks in a variety of litigations as a result of increased judicial scrutiny in 2011).

²⁰³ The SEC has historically lobbied for and justified funding demands by referencing the amount of revenue it produces. See Seligman, *supra* note 143 (describing the SEC's push during the 1990's to align its budget more closely with its “revenue”); Sanati, *supra* note 143 (explaining the SEC's partial success in obtaining “match funding,” which would link the SEC budget to the amount of transaction fees the agency collects).

have a significant, direct impact on the agency's disgorgement practices. If any disgorgement remedy imposed would thereafter be transferred to third parties outside of the U.S. government, most of the SEC's abuses in imposing the remedy would cease to have any justification. For one, it is difficult to imagine that the controversial and legally untenable practice of requiring disgorgement in cases with only books-and-records charges and no finding of underlying bribery would be in the agency's interest once the government is no longer in a position to receive the proceeds from such settlements.²⁰⁴ Also, the incentive to inflate disgorgement amounts would be greatly reduced if any money collected would be transferred to third parties. As a result, the SEC would be less likely to put forward unrealistically high disgorgement calculations based on faulty theories of causation.²⁰⁵

This Part's proposal and accompanying analysis works indirectly and on the margin, and does not purport to be a cure-all. However, the disgorgement proposal is superior to other top-down reform measures considered at recent congressional hearings regarding the FCPA that seek to directly modify or constrain prosecutorial behavior.²⁰⁶ These alternative measures in no way reduce the benefits the U.S. government and its officials realize from over-enforcement, and would only channel investigative zeal down new and creative paths that are equally undesirable. Attempting to close particular legal "doors" available to prosecutors ignores the FCPA's multi-faceted expansion over the past decade, which shows that the Act can be over-extended along any number of dimensions.²⁰⁷

IV. CORRECTING FOR UNDER-ENFORCEMENT: ENCOURAGING ANTI-CORRUPTION EFFORTS BY FOREIGN JURISDICTIONS

Transnational commercial bribery is a serious problem that imposes real costs on U.S. corporations and the Host countries in which they

²⁰⁴ See *supra* note 160 and accompanying text; *supra* Part II.

²⁰⁵ See *supra* note 165 and accompanying text. A reduction of total penalties imposed under the FCPA through reduced disgorgements would also have mitigated the "revolving door" issue discussed in Part III.A: as the costs of FCPA compliance for U.S. companies is reduced, the demand for lawyers and accountants in currently thriving FCPA compliance groups should be reduced in turn.

²⁰⁶ See *supra* note 13 and accompanying text (citing to hearing testimony from June, 2011 recommending rephrasing statutory provisions concerning "foreign official" and "willfulness"); Weissmann & Smith, *supra* note 7, at 7 (suggesting various statutory modifications, including: "[1] adding a compliance defense; [2] limiting a company's liability for the prior actions of a company it has acquired; [3] adding a 'willfulness' requirement for corporate criminal liability; [4] limiting a company's liability for acts of a subsidiary; and [5] defining a 'foreign official' under the statute").

²⁰⁷ See *supra* Part II.C.i.

invest.²⁰⁸ This was not always recognized. Initially, the social science literature contained mixed views on whether bribery was efficient, or instead a detriment to political and economic development.²⁰⁹ The current consensus, however, is that competition for the favors of bribe-takers dissipates social wealth more often than not, in a dynamic that applies to bribing entities just as much as the countries where bribes take place. A micro-level analysis reveals that resources are wasted in markets where bribery takes place because of the transaction costs associated with secrecy and the distortions created by government officials who actively seek to broaden the market for bribes.²¹⁰ Cross-country studies that take a macro-level approach also indicate that endemic corruption impedes foreign investment, economic growth, and political development.²¹¹ The latter

²⁰⁸ See *The Costs of Corruption*, WORLD BANK (Apr. 8, 2004), <http://go.worldbank.org/LJA29GHA80> (estimating that more than \$1 trillion is paid in bribes each year, calculated using 2001–02 economic data, which “compares with an estimated size of the world economy at that time of just over US\$30 trillion . . . and does not include embezzlement of public funds or theft of public assets”). In 2002 the African Union estimated the direct and indirect costs of corruption at \$148 billion, which at that time amounted to twenty-five percent of the continent’s GDP. African Development Bank Group, Proceedings of the Regional Learning Workshop on Combating Corruption in Africa (Jan. 27–30, 2003) (on file with author). There is, of course, considerable room to question how these numbers can be accurately measured and how to interpret their relationship to the actual economic cost imposed.

²⁰⁹ See SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 69 (1968) (“In terms of economic growth, the only thing worse than a society with a rigid, over-centralized, dishonest bureaucracy is one with a rigid, over-centralized, honest bureaucracy.”); Abbott & Snidal, *supra* note 5, at S158 (“Until recently, the dominant view was that some forms of corruption are necessary, even beneficial, aspects of development Corruption occurs because traditional norms are ineffective in dealing with the rise of new groups and behaviors, while more appropriate norms have yet to emerge.”); Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 J. ECON. LIT. 1320, 1322–24 (1997) (“Economists have shown that, in the second-best world when there are pre-existing policy induced distortions, additional distortions in the form of black-marketeering, smuggling, etc., may actually improve welfare even when some resources have to be spent in such activities.”).

²¹⁰ See MUELLER, *supra* note 119, at 334 (treating rent-seeking expenditures as a form of bribery and identifying three forms of wasteful expenditures the bribe entails: (1) expenditures of bribe-givers competing for government favors; (2) efforts of officials to obtain bribes; and (3) third party distortions induced by actions of bribe givers and takers); ROSE-ACKERMAN, *supra* note 104, at 12, 25; M.S. Alam, *Some Economic Costs of Corruption in LDCs*, 27 J. DEV. STUD. 89 (1990); Bardhan, *supra* note 209, at 1322–24 (“One does not have to take a moralistic position on corruption to see that some of these arguments above in favor of the efficiency effects of corruption are fraught with general problems, even though in individual instances some redeeming features of corruption may be present.”); Andrei Schleifer & Robert W. Vishny, *Corruption*, 108 Q.J. ECON. 599, 611–15 (1993) (“[T]he illegality of corruption and the need for secrecy make it much more distortionary and costly than its sister activity, taxation.”).

²¹¹ JOHANN GRAF LAMBSDORFF, *THE INSTITUTIONAL ECONOMICS OF CORRUPTION AND*

research finds some confirmation in the fact that developing countries themselves have been among groups most vocally clamoring for efforts to combat corruption.²¹² Thus, despite the critique of FCPA enforcement practices outlined in Part III, there remains a need to build robust and effective anti-corruption enforcement, rather than simply trying to curtail it.

Slow progress in the international enforcement of transnational bribery is not due to legalistic shortcomings in the quality or number of legal instruments addressing the issue. As discussed in Part II.B, anti-bribery treaties have proliferated over the past fifteen years, and the OECD Convention contains similar substantive provisions to those of the FCPA.²¹³ Nevertheless, the three “major conclusions” of Transparency International’s *Progress Report 2011* on the enforcement of the OECD Convention were: (1) “there has been no progress since TI’s 2010 progress report in the number of countries with active enforcement”; (2) “the Convention has not yet reached the point at which the prohibition of foreign bribery is consistently enforced”; and (3) “reviews conducted by TI experts indicate that the principal cause of lagging enforcement is lack of political commitment by government leaders.”²¹⁴

As the TI report suggests in its allusion to political commitment, the problem of under-enforcement stems from two underlying political economy dynamics that affect the cost-benefit calculations of the actors involved: (1) Host countries have an incentive to free-ride off of U.S. investments in corruption control, and otherwise face high capacity constraints when dealing with the local, demand-side of corruption; and (2) compliance with the OECD Convention has not occurred because of the prisoner’s dilemma that makes collective enforcement by member states difficult to implement.

This Part discusses the Article’s proposal to remedy these structural barriers to more robust enforcement of transnational anti-bribery measures. Subpart A describes the proposal to transfer disgorged profits to the Host

REFORM 71–79, 100–07 (2007); NAT’L BUREAU OF ECON. RESEARCH, CORRUPTION AND REFORM: LESSONS FROM AMERICA’S ECONOMIC HISTORY (Edward L. Glaeser & Claudia Goldin eds., 2008); Paolo Mauro, *Corruption and Growth*, 110 Q.J. ECON. 681 (1995); Mitchell Seligson, *The Measurement and Impact of Corruption Victimization: Survey Evidence from Latin America*, 34 WORLD DEV. 381 (2006); Shang-Jin Wei, *How Taxing is Corruption on International Investors?* 82 REV. ECON. & STAT. 1 (2000).

²¹² See Abbott & Snidal, *supra* note 5, at S159–S160; Inter-American Convention Against Corruption, *supra* note 92.

²¹³ See *supra* notes 92 and accompanying paragraph (identifying anti-bribery treaties agreed to by the OECD, United Nations, Organization of American States, and African Union).

²¹⁴ TRANSPARENCY INT’L, PROGRESS REPORT 2011: ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION 5 (2011), available at http://files.transparency.org/content/download/102/411/file/2011_OECDreport_EN.pdf.

country where the bribe has taken place, conditional on the Host country's assistance in the FCPA investigation. Subpart B explains the recommendation to direct disgorged profits to the OECD Working Group when cooperation on the part of the Host country is not forthcoming. While withholding disgorgement from the SEC should be expected to reduce the level of resources dedicated to enforcement by U.S. Enforcement Agencies,²¹⁵ transferring the proceeds to these third parties can nonetheless make international anti-bribery efforts more effective overall and address the problem of under-enforcement.

A. Disgorgement to Host Countries

Host countries play a critical role in transnational anti-bribery enforcement. Obtaining their cooperation would therefore make enforcement considerably more effective. While the vast majority of these states are parties to multiple and overlapping international conventions that require affirmative efforts to combat corruption,²¹⁶ active enforcement assistance on the part of Host countries is not always forthcoming.²¹⁷ The jurisdictions where bribery takes place often have developing economies and resource-constrained governments with a low capacity for policing corruption.²¹⁸ Host countries may also rationally under-invest in bribery

²¹⁵ See *supra* Part III.C.

²¹⁶ The UNCAC, which includes 158 member states, requires member states to “develop and implement or maintain effective, coordinated anticorruption policies” and “afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by [the] Convention.” See G.A. Res. 58/4, *supra* note 11, arts. 5, 46. The Inter-American Convention Against Corruption, which covers thirty-four states in South, Central, and North America, places similar legal obligations on its members. See Inter-American Convention Against Corruption, *supra* note 92, art. III ¶¶ 9, 10 (“State Parties agree to . . . create, maintain and strengthen . . . oversight bodies with a view to implementing modern mechanisms for preventing, detecting, punishing and eradicating corrupt acts [and] [d]eterrents to the bribery of domestic and foreign government officials.”); *id.* art. VIII (requiring prohibition and punishment of transnational bribery); *id.* art. XIV (requiring mutual assistance and cooperation among members). The African Union Convention on Preventing and Combating Corruption, which includes forty-three African countries, contains similar provisions. See African Union, *supra* note 94, art. 7 (committing members to disciplining and investigating acts of corruption by public officials); *id.* art. 18 (“Parties shall provide each other with the greatest possible technical cooperation and assistance . . . to prevent, detect, investigate and punish acts of corruption.”).

²¹⁷ In TI's 2011 review of 183 countries, the vast majority of which have been party to the UNCAC for nearly a decade, sixty countries were rated “highly corrupt” and an additional forty-three were rated “corrupt.” See TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2011 (2011), available at http://files.transparency.org/content/download/101/407/file/2011_CPI_EN.pdf.

²¹⁸ According to TI's 2011 Corruption Perceptions Index, the world's ten most corrupt states, in order of increasing corruption (ranking from 172–82 out of 182) are: Venezuela,

enforcement by free-riding off of U.S. and other advanced economies' efforts to control the supply-side of bribes.

Conditionally transferring disgorgement to Host countries would enable FCPA investigations to more efficiently uncover the underlying wrongful acts by making Host countries stakeholders in the investigation with an incentive to see it through as successfully as possible.²¹⁹ The revenue generated by disgorgements could also be a valuable source of funds for countries with otherwise limited resources and capacity to pursue corruption investigations, and contribute to restricting the demand-side of the corruption problem. Conditioning the transfer of disgorgement revenue would not be a wholly novel policy approach, as the United States along with the international organizations in which it plays a leading role already condition fund transfers to foreign countries in other contexts.²²⁰ The strictness of conditionality could also be calibrated based on the importance of obtaining Host country cooperation weighed against the value of leveraging the OECD Working Group to increase the enforcement efforts of other capital exporting economies.

1. The Critical Role of Host Countries in Corruption Investigations

Host countries play a critical role in corruption investigations and the deterrence of transnational bribery more generally. They are responsible for policing the demand-side of bribe-making²²¹ and are also well-positioned to supply valuable information to parties investigating the supply of bribes in the Host jurisdiction. FCPA investigations are costly endeavors that could greatly benefit from achieving more efficient access to information.²²² The investigations require U.S. Enforcement Agencies, and the private law firms they enlist, to uncover secret payments that take place

Haiti, Iraq, Sudan, Turkmenistan, Uzbekistan, Afghanistan, Myanmar, North Korea, and Somalia. *Id.* By one measure, these countries are ranked 71, 157, 116, 135, 84, 121, 156, 151, n/a, and 172, respectively, in (purchasing power parity adjusted) gross domestic product per capita. *GDP Per Capita PPP: Country List*, TRADING ECON., <http://www.tradingeconomics.com/country-list/gdp-per-capita-ppp> (last visited Jan. 4, 2013).

²¹⁹ Conditionality is a crucial feature of this proposal, because it would give Host countries an incentive to cooperate in this investigation, rather than provide a windfall to jurisdictions where bribery takes place.

²²⁰ See *infra* notes 258–60 and accompanying text.

²²¹ The FCPA and OECD Convention apply only to bribe-giving persons or entities, and do not impose penalties on public officials who are the recipients of bribes. See G.A. Res. 58/4, *supra* note 11, art. 5 (obligating member states to implement anti-corruption policies in their jurisdictions).

²²² A portion of the cost is reflected in the millions of dollars in fees charged by private law firms that begin to conduct “internal investigations” of clients who have received inquiries from the Enforcement Agencies. See First, *supra* note 124 (providing examples of multi-million dollar FCPA investigations).

in foreign jurisdictions, often coordinated among multiple actors.²²³

Investigations are further complicated by the fact that the harm from bribery is an intangible market distortion without a discrete “victim” in the Host country, as might be the case for other forms of international business malfeasance, such as fraud or environmental harms.²²⁴ Finally, even when a payment is identified, whether it constitutes a “bribe” is a fact-intensive question that turns on the parties’ intentions and subsequent actions.²²⁵

Host country assistance is valuable, because the characteristics of FCPA investigations described above put information at a premium, and Host countries are often situated as the lowest-cost providers of relevant information.²²⁶ FCPA violations by definition involve a “public official” of the Host country’s government.²²⁷ Because many Host countries have “mixed economies” without clear distinctions between public- and privately-owned enterprises, disentangling the nature of a particular individual’s connection to the government can be a complicated matter requiring information primarily in the government’s hands.²²⁸ The requirement that a “foreign official” be involved also means that the vast majority of investigations require uncovering actions taken within the territory of the Host country. As a consequence, the cooperation of Host countries is constantly solicited, with the SEC making hundreds of requests to foreign authorities for enforcement assistance, and vice versa, each year, including 1,264 requests in FY 2011.²²⁹ Thus, one commentator has

²²³ One recent example is the *Tenaris* case, which involved a European-based global energy materials manufacturer, investigated for alleged bribes in Uzbekistan and the Caspian Sea region, after the company was tipped by a customer dealing with a Tenaris agent outside of Uzbekistan. See Press Release, U.S. Sec. & Exch. Comm’n, *Tenaris to Pay \$5.4 Million in SEC’s First-Ever Deferred Prosecution Agreement* (May 17, 2011), http://www.sec.gov/news/press/2011/2011-112.htm?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+sec%2F+gHO+%28SEC.gov+Updates%3A+Press+Releases%29; *The SEC Uses an FCPA Case for Its First-Ever Deferred Prosecution Agreement*, GIBSON DUNN (May 19, 2011) <http://www.gibsondunn.com/publications/pages/SECUsesFCPACaseForFirst-EverDeferredProsecutionAgreement.aspx>.

²²⁴ In a typical bid-rigging case, for example, the public harm only appears in the form of higher government expenditures resulting from the acceptance of otherwise uncompetitive bids, and harm to competitors who lose the bid and may not know that the loss was due to a bribe.

²²⁵ The FCPA defines a bribe vaguely to include “anything of value.” 15 U.S.C. § 78dd-1 (2011); see also Berger, Sheehy & Davis, *supra* note 153 (explaining the definitional ambiguity).

²²⁶ See Ashe, *supra* note 7, at 2916.

²²⁷ 15 U.S.C. § 78dd-1(a).

²²⁸ See Joel M. Cohen, Michael P. Holland & Adam P. Wolf, *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1250 (2008).

²²⁹ See SEC. & EXCH. COMM’N, IN BRIEF FY 2013 CONGRESSIONAL JUSTIFICATION 30 (2012), <http://www.sec.gov/about/secfy13congbudgjust.pdf> (showing requests for FY 2007

summed up the scope of the problem well: “Gathering the evidence necessary to carry out an investigation abroad is exceedingly difficult. Indeed, if the United States was unable to elicit cooperation from local agencies and officials, ‘[s]ecuring . . . proof [of official bribery] in a foreign country would be practically impossible.’”²³⁰

Because FCPA investigations almost necessarily require coordination among law enforcement agencies and local officials in Host countries, the U.S. government has invested in a variety of programs and initiatives to further this end.²³¹ For example, the SEC has entered into over thirty “bilateral information-sharing agreements” with regulators in other countries,²³² some of which have been invoked in the FCPA context.²³³ Mutual legal assistance treaties are another more binding mechanism serving a similar function, of which fifty-six were newly signed in 2008.²³⁴ These treaties are “intend[ed] to facilitate extradition of individuals charged with transnational crimes and the sharing of information needed to investigate and prosecute those crimes”²³⁵ and will almost surely be used in the FCPA context.²³⁶ Multilateral anti-bribery treaties to which the United States is a party also uniformly contain major provisions on investigative

to FY2011); Gregory S. Bruch, Recent SEC Foreign Payments Cases and the Road Ahead Under the New SEC Leadership, for the A.B.A. Center for Continuing Legal Educ., Nat’l Inst. (Mar. 21–22, 2002), *available at* WL N02FCPB ABA-LGLED B-151 .

²³⁰ Ashe, *supra* note 7, at 2916 (quoting NEIL H. JACOBY ET AL., BRIBERY AND EXTORTION IN WORLD BUSINESS: A STUDY OF CORPORATE POLITICAL PAYMENTS ABROAD 218 (1977)).

²³¹ *See id.* at 2916–17 (providing an overview of U.S. efforts to coordinate with Host countries).

²³² *See id.* at 2917 (explaining that the bilateral information-sharing agreements generally “require: (1) the exchange, upon request, of information contained in the files of the foreign regulator; (2) the taking of testimony under oath by the foreign regulator on behalf of the SEC; (3) inspections of regulated persons by the foreign regulator; and (4) the sharing with the SEC of the information and reports generated by those inspections”); ANNETTE L. NAZARETH & PAUL F. ROYE, THE SEC SPEAKS IN 2004, at 543, 552 (2004).

²³³ *See generally* Bruch, *supra* note 229; DEVON ENERGY CORP., FOREIGN CORRUPT PRACTICES ACT POLICIES AND PROCEDURES 14 (2009), *available at* <http://www.dvn.com/CorporateGovernance/Documents/Foreign%20Corrupt%20Practices%20Act.PDF> (publicly available corporate compliance document noting in reference to bilateral agreements that “the international movement against official corruption has spawned new cooperation mechanisms between U.S. enforcement officials and their foreign counterparts, which significantly increase the risk of investigation and prosecution”).

²³⁴ Press Release, Dep’t of Justice, U.S./EU Agreements on Mutual Legal Assistance and Extradition Enter into Force (Feb. 2, 2010), *available at* <http://www.justice.gov/opa/pr/2010/February/10-opa-108.html>.

²³⁵ Joseph P. Covington et al., *New Mutual Legal Assistance Treaties Facilitate International Cooperation in FCPA Investigations*, JENNER & BLOCK (Sept. 20, 2010), <http://www.lexology.com/library/detail.aspx?g=46ee0d77-9133-44fc-8486-3a61c16d97b3>.

²³⁶ *Id.*

assistance and information sharing.²³⁷ Also, in 2008, the FBI created an International Corruption Unit to “oversee the increasing number of corruption and fraud investigations with an international nexus requiring extensive coordination with FBI field offices, legal attaché offices, U.S. federal agencies, and the law enforcement agencies of Host countries.”²³⁸ The Executive Branch’s vigorous investment in these agreements and programs underscores how critical a cooperative relationship with Host countries is for successful foreign anti-bribery investigations.

Host countries often have the best access to critical information relating to international corruption investigations. Accordingly, the U.S. government has already taken a costly and multi-pronged approach to securing the cooperation of Host countries. As Part IV.B argues *infra*, this Article’s proposal to transfer disgorgement remedies would complement efforts already in place and provide Host countries with both the resources and incentives to comply.

2. *Host Country Incentives and More Effective Enforcement*

The potential to receive disgorged profits resulting from an FCPA investigation would give Host countries a financial stake in the success of investigations and a stronger incentive to discover and produce information to U.S. Enforcement Agencies. It would also provide resources to Host countries, allowing them to prioritize corruption enforcement and make more general efforts to control the demand-side of corruption. Lastly, the proposal would facilitate a more local approach that leverages the efficiencies of domestic enforcement while mitigating concerns that FCPA enforcement amounts to an act of cultural imperialism or functions as a de facto sanction against lower-income countries.

Ideally, a foreign government will be public-regarding and concerned with the corruption of its domestic officials. But even under this best-case scenario, under-enforcement of anti-bribery prohibitions should be expected to occur because of the free-rider problem.²³⁹ The opportunity for Host countries to free-ride is a result of the bilateral nature of bribery; as game theorist Kaushik Basu explains: “once a bribe is given, the bribe giver and the bribe taker become partners in crime. It is in their joint interest to keep

²³⁷ G.A. Res. 58/4, *supra* note 11, art. 43, 43 I.L.M. at 30 (providing requirements concerning “international cooperation”); OECD Convention, *supra* note 10, art. 9, 37 I.L.M. at 10 (providing requirements concerning “Mutual Legal Assistance”).

²³⁸ See Bridget M. Rhode & Steve Ganis, *Foreign Corrupt Practices ACT (FCPA) Alert: The DoJ’s FCPA Crackdown on the Pharmaceutical and Medical Devices Industry*, MINTZ LEVIN (Sept. 2010), <http://www.mintz.com/newsletter/2010/Advisories/0665-0910-NAT-WC/web.html>.

²³⁹ See generally *The Free Rider Problem*, STAN. ENCYCLOPEDIA PHIL. (May 21, 2003), <http://plato.stanford.edu/entries/free-rider/>.

this fact hidden from the authorities and to be fugitives from the law, because, if caught, both expect to be punished.”²⁴⁰ The bilateral bribe relationship means that virtually any U.S. Enforcement Agency investigation into the supply-side of bribes will also uncover information about the demand-side misbehavior of foreign public officials. Thus, U.S. investigative activity carries a non-excludable benefit, or positive externality,²⁴¹ for Host countries that have a preference for deterring bribery and regard corruption control as a public good. A conscientious foreign government that seeks to discipline its bureaucracy will therefore have an incentive to free-ride off of the enforcement investment by the United States in “FBI field offices[and] . . . legal attaché offices,”²⁴² and the like. Importantly, this dynamic will not be limited to the context of a particular investigation and would also apply over time to induce a more general under-investment in domestic institutions capable of policing the demand-side of bribery.²⁴³

While transferring disgorgement still constitutes an investment on the part of the United States, its conditionality can reduce free-riding. Conditionality means that supply-side investigations in foreign countries would carry a benefit from which the Host country could be excluded if it did not cooperate: withdrawal of disgorged profits would then be a cost of non-cooperation that the Host country “internalizes.”²⁴⁴ Proceeding from the assumption that states at least some of the time rationally respond to the

²⁴⁰ Kaushik Basu, Why, For a Class of Bribes, the Act of *Giving* a Bribe Should Be Treated as Legal 5 (Mar. 2011) (unpublished manuscript), available at http://finmin.nic.in/WorkingPaper/Act_Giving_Bribe_Legal.pdf.

²⁴¹ See generally Tyler Cowen, *Public Goods and Externalities*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS (David R. Henderson ed., 1st ed. 1993), available at <http://www.econlib.org/library/Enc1/PublicGoodsandExternalities.html> (“Externalities occur when one person’s actions affect another person’s well-being and the relevant costs and benefits are not reflected in market prices. . . . Note that the free-rider problem and positive externalities are two sides of the same coin.”); Ronald Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357 (1974) (providing a seminal treatment of the free-rider problem by examining the excludability of lighthouse services in England).

²⁴² See Rhode & Ganis, *supra* note 238.

²⁴³ See Kevin E. Davis, *Does the Globalization of Anti-Corruption Law Help Developing Countries?* 16 (N.Y. Univ. Law & Econ. Research, Working Paper No. 09-52, 2009), available at <http://ssrn.com/abstract=1520553> (“Suppose that victims of corruption could rely on foreign police forces, prosecutors, lawyers, and courts to investigate, prosecute and adjudicate complaints of bribery and to levy criminal or civil sanctions. In that case, why would those victims invest any effort in complaining about or pressing for the improvement of local courts, and so on?”).

²⁴⁴ See Cowen, *supra* note 241 (providing a roughly analogous example in the private sector context: “If the research and development activities of one firm benefit other firms in the same industry, these firms may pool their resources and agree to a joint project (antitrust regulations permitting). Each firm will pay part of the cost, and the contributing firms will share the benefits. In this context economists say that the externalities are ‘internalized.’”).

costs and benefits of various policies, it is likely that providing Host countries a financial stake in the success of investigations would induce cooperation more readily than signing any number of “bilateral information sharing agreements” would.²⁴⁵ At the same time, conditionality would complement legal agreements already in place, which could serve as guidance as to which forms of Host country assistance are expected and considered to constitute “cooperation” for purposes of receiving disgorged profits.²⁴⁶

A policy of conditionally transferring disgorgement may also help fund the efforts of Host countries—which often have limited resources or capacity to prioritize anti-corruption programs and investigations—to constrain the demand-side of bribery more generally.²⁴⁷ Transfer of proceeds could conceivably be accompanied by a further condition that they are spent on corruption reform. Even if such a level of micromanagement is undesirable, or might not be realistically enforced, such transfers may increase attention to corruption in two ways. One mechanism is through a governmental “wealth effect,”²⁴⁸ in which an increased government budget leads to increased expenditures on “normal” public goods across the board,²⁴⁹ including corruption control. Second, one would expect transfers in some cases to be channeled disproportionately towards demand-side corruption control, because a successful investigation and the accompanying disgorgement revenue could increase the status and influence of leaders favoring investigative cooperation and provide momentum for more general reform of the Host country’s bureaucracy.²⁵⁰

²⁴⁵ To be precise, a perfectly rational government would be willing to spend no more on investigative assistance than the present-discounted value of any ill-gotten profits multiplied by the probability of receiving such profits from the United States. *See supra* note 233 and accompanying text (describing the proliferation of bilateral information sharing agreements).

²⁴⁶ *See infra* note 307 and accompanying text (explaining the analogous “definitional” role of legal instruments in the treaty context).

²⁴⁷ *See generally* Joarder Mohammad Abdul Munim, *Fiscal Capacity and Multiple-Equilibria of Corruption: Cross-Country Evidence*, 24 J. INT’L DEV. 34 (2012) (finding evidence of a positive relationship between a state’s “revenue capacity” and its ability to control corruption).

²⁴⁸ “Wealth effect” is an economic term that refers to an increase in spending that accompanies an increase in perceived wealth. *See* Michael R. Darby, *Wealth Effect*, in THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 883–85 (1987).

²⁴⁹ A “normal good” is any good with a positive income elasticity of demand, or in other words, any good for which, given constant prices, demand increases when income increases and falls when income decreases. Corruption-free government, like public safety or environmental quality, is almost certainly a normal public good in the sense that jurisdictions with higher incomes demand more investment in reducing corruption. *See, e.g.*, TRANSPARENCY INT’L, *supra* note 217 (showing a clear correlation between national income and levels of corruption).

²⁵⁰ *See* ROSE-ACKERMAN, *supra* note 104, at 199–212 (describing a set of conditions

Even a modest increase in resources expended on demand-side corruption control may produce substantial results. The more realistic models of corruption take into account historical attitudes towards corruption and predict that different social expectations about the incidence of corruption can “generate multiple equilibria whereby organizations or societies with the same institutional characteristics can experience very different corruption levels.”²⁵¹ An important implication of the multiple equilibria feature of corruption is that a mere temporary increase in domestic enforcement efforts can have a lasting effect on corruption levels, as a one-time “cleanup campaign” can shift the expectations of government officials and tip a bureaucracy from a high-corruption equilibrium to a low-corruption equilibrium.²⁵² Furthermore, a low-corruption equilibrium may be stable even after reducing enforcement resources.²⁵³ Confirmation of these principles in actual “big push” anti-corruption campaigns has been found in diverse settings, such as the Italian judiciary, public hospitals in Argentina, and Hong Kong soon after the establishment of its Independent Commission Against Corruption.²⁵⁴

In addition to facilitating direct enforcement efforts, disgorgement transfers could also supply a source of funds for the somewhat unseemly but often very necessary process of compensating the “losers” from domestic anti-corruption policies.²⁵⁵ One example of compensation is “civil service reform where salaries and working conditions are improved in

under which democratic and autocratic leaders may find pro-reform positions to be in their personal interest).

²⁵¹ Toke S. Aidt, *Economic Analysis of Corruption: A Survey*, 113 *ECON. J.* F632, F647 (2003).

²⁵² See Mark Kleiman & Beau Kilmer, *The Dynamics of Deterrence*, 106 *PROCEEDINGS NAT'L ACAD. SCI. U.S.* 14230, 14230 (2009) (“If potential offenders are sufficiently deterrable, increasing the conditional probability of punishment (given violation) can reduce the amount of punishment actually inflicted, by “tipping” a situation from its high-violation equilibrium to its low-violation equilibrium.”), available at <http://www.pnas.org/content/106/34/14230.full.pdf+html>; Francis T. Lui, *A Dynamic Model of Corruption Deterrence*, 31 *J. PUB. ECON.* 215, 232 (1986).

²⁵³ ROSE-ACKERMAN, *supra* note 104, at 56 (“Once a new low corruption equilibrium has been established, it can be maintained with reduced enforcement resources.”); see also Olivier Cadot, *Corruption as a Gamble*, 33 *J. PUB. ECON.* 223 (1987).

²⁵⁴ Rafael Di Tella & Ernesto Schargrotsky, *The Role of Wages and Auditing During a Crackdown on Corruption in the City of Buenos Aires*, 46 *J.L. & ECON.* 269 (2003) (detailing the Argentine experience in the 1990s); Max J. Skidmore, *Promise and Peril in Combating Corruption: Hong Kong's ICAC*, 547 *ANNALS AM. ACAD. POL. & SOC. SCI.* 118 (1996) (covering Hong Kong); Antonio Acconcia & Claudia Cantabene, *A Big Push to Deter Corruption: Evidence from Italy* (Ctr. for Studies in Econs. & Fin., Working Paper No. 159, 2008) (covering Italy).

²⁵⁵ See ROSE-ACKERMAN, *supra* note 104, at 219–22 (arguing that side-payments to corrupt officials exiting the bureaucracy are often required to “sustain reform”).

return for officials forgoing bribery receipts.”²⁵⁶ Such a side-payment may be effective in high-bribery countries where tolerating bribery is often considered a part of remuneration for an otherwise under-paid bureaucracy. Another mechanism could take the form of “golden handshakes,” with which support for shrinking a predatory public sector is won through a one-time windfall offered to exiting civil servants.²⁵⁷

Understood most broadly, transferring revenue to the Host country would imply a more local approach to anti-bribery enforcement.²⁵⁸ The proposal would thereby meet several “powerful objections to the idea of relying on foreign legal institutions to perform roles that might, at least in principle, be played by domestic ones.”²⁵⁹ For reasons concerning access to information described in Part IV.A.i, it is likely that deploying local resources would often be more efficient than deploying foreign resources.²⁶⁰ Development of domestic anti-corruption institutions also facilitates a process of “learning-by-doing” and reduces the potential that “foreign institutions will serve as substitutes for displaced domestic institutions that may, even if only over time, offer equal or even superior performance.”²⁶¹

A final advantage of this proposal and its local approach is that incorporating Host countries as financial partners in bribery investigations would in part meet the critique that foreign anti-bribery efforts are indifferent or hostile to Host country interests.²⁶² Criticisms of this sort often argue that the imposition of Western definitions of bribery constitutes an act of “cultural imperialism.”²⁶³ Another strain of commentary focuses

²⁵⁶ *Id.* at 219.

²⁵⁷ *Id.*

²⁵⁸ Cf. F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945) (emphasizing the efficiency gains from using local knowledge to allocate resources through the price mechanism).

²⁵⁹ Davis, *supra* note 243 at 3. Davis, a law and development scholar, develops three categories of objections: (1) foreign institutions may have motivations that are *indifferent* or hostile to the Host country’s welfare; (2) foreign institutions may provide solutions *incompatible* with local institutions and norms; and (3) foreign interventions may substitute for or *displace* domestic efforts that may prove superior over time. *Id.* at 3–4.

²⁶⁰ This argument tracks Davis’s “incompatibility” category of objections. *See id.* at 13–15.

²⁶¹ *Id.* at 4. For a condensed version of Davis’s “institutional displacement” objection, see *id.* at 15–17.

²⁶² *See id.* at 11–13 (outlining the “indifference” objection).

²⁶³ *See, e.g.,* Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT’L L. 419 (1999); *but see* ROSE-ACKERMAN, *supra* note 104, at 177 (arguing that this view is condescending: “many scholars from developing countries argue that this fashionable [cultural imperialism] critique is based on a mischaracterization of local practices. They make it clear that traditions of gift giving do not translate into widespread acceptance of corrupt practices. Citizen surveys and expression of public outrage suggests that widespread tolerance of corruption is not common.”).

on the sanction-like effect of FCPA enforcement and the economic harm it may impose on Host countries.²⁶⁴ Making Host countries financial and enforcement co-partners in corruption investigations would reduce the perception that efforts to eliminate corruption are acts of cultural or economic hegemony.

3. *Potential Criticisms and Summary*

Allocating disgorgement proceeds to the Host country instead of the U.S. Treasury via the SEC is a simple proposal that becomes more complicated and vulnerable to criticism at the implementation phase. However, conditioning the transfer of disgorgement revenue would not be a wholly novel policy approach. The United States modified its traditional foreign aid policy in 2002 with the Millennium Challenge Account, a program intended to screen out countries likely to waste foreign funds while channeling aid to those nations who will use the assistance for the benefit of their populations.²⁶⁵ This Article's proposal merely consists of an application of this general approach to the specific context of anti-bribery enforcement.²⁶⁶ And in fact, the SEC is already statutorily authorized to set up a "fund" to transfer disgorgement proceeds to third parties through the Fair Funds provisions of SOX.²⁶⁷ The disgorgement policy put forward here would apply this basic mechanism to set up a fund for Host countries that likely suffer more harm from FCPA violations than investors in corporations guilty of foreign bribery,²⁶⁸ an approach the U.K. has experimented with under its recent Bribery Act.²⁶⁹

An obvious concern is that some of the Host countries where FCPA investigations take place are ruled by "kleptocratic" governments that have no interest in deterring corruption and function primarily to extract resources from the general population.²⁷⁰ Kleptocracies, as well as countries with antagonistic diplomatic relationships with the United

²⁶⁴ See Spalding, *supra* note 7.

²⁶⁵ See generally Margaret Dennis, *A New Approach to Foreign Aid: A Case Study of the Millennium Challenge Account* (Inst. for Int'l Law & Justice, Emerging Scholars Paper No. 12, 2008), available at <http://www.iilj.org/publications/documents/Dennis.ESP12-08.pdf>.

²⁶⁶ 2010 was the SEC's highest "grossing" year for disgorgement, yielded roughly \$500 million in settlements. See *supra* notes 47, 72–75, and accompanying text.

²⁶⁷ See Sarbanes-Oxley Act of 2002 § 308, 15 U.S.C. § 7246 (2011); see also Money Laundering Control Act of 1986 § 1366(a), 18 U.S.C. § 981(i) (2011) (amended 2012) (providing for civil or criminal forfeiture of property and transfer to eligible foreign countries that participated in the seizure of that property).

²⁶⁸ See *supra* notes 61, 63 and accompanying paragraph.

²⁶⁹ See *supra* note 62 and accompanying text.

²⁷⁰ See ROSE-ACKERMAN, *supra* note 104, at 114 (distinguishing between "kleptocracies where corruption is organized at the top of government and other states where bribery is the province of a large number of low-level officials").

States,²⁷¹ could be identified²⁷² and made ineligible for disgorgement funds. Making these countries ineligible need not eviscerate the policy. In the past, many Host countries subject to FCPA investigations have been middle-income nations with relatively non-parasitic governments that do not rise to the level of kleptocracy.²⁷³

Another concern is the sheer magnitude of transfers that could be implicated. In 2010, the SEC's highest "grossing" year for disgorgement, settlements yielded roughly \$500 million, an inarguably large amount of money.²⁷⁴ However, this number pales in comparison to the total amount of U.S. Agency for International Development funds disbursed that same year, which totaled around \$43 billion.²⁷⁵ The amount actually transferred to Host countries should be expected to be less than the \$500 million figure, because: (1) 2010 was a "banner" year for the SEC;²⁷⁶ (2) removing the money from the U.S. coffers should discourage the SEC's increasingly inflated disgorgement calculations;²⁷⁷ and (3) not all Host countries will be cooperative or otherwise eligible for disgorgement transfers.

Conditionally granting disgorgement proceeds to cooperative Host countries with functioning governments would make foreign anti-bribery enforcement more effective. Free-riding off U.S. investments in anti-bribery investigations could be reduced as Host countries with unique access to investigation-relevant information are incentivized to become partners in the investigation. The proceeds from successful investigations

²⁷¹ See U.S. AGENCY FOR INT'L DEV., EFFECTS OF U.S. FOREIGN ASSISTANCE ON DEMOCRACY BUILDING: RESULTS OF A CROSS-NATIONAL QUANTITATIVE STUDY 14, 19–22, 30–32 (2006), available at http://pdf.usaid.gov/pdf_docs/Pnade694.pdf (providing tables of countries with incomes making them "eligible" for U.S. Agency for International Development funds, but receiving none).

²⁷² An easy starting point for identifying kleptocracies could be by reference to the lowest rankings on Transparency International's Corruption Perception Index. See TRANSPARENCY INT'L, *supra* note 217.

²⁷³ See, e.g., Diageo plc, Exchange Act Release No. 64,978 (July 27, 2011), available at <http://fcpa.shearman.com/?s=matter&mode=form&id=31a9b4d349230e5ee7b20283a081f9e2> (noting that the SEC alleged that the international beverage distributor Diageo made prohibited payments to public officials in India, Thailand, and South Korea). Certainly South Korea is a relatively wealthy and well-functioning democracy that cannot fairly be described as a "kleptocracy." See generally James Mintz Grp., *Where The Bribes Are*, FCPA MAP, <http://www.fcmap.com> (tracking global incidence of FCPA penalties) (last visited Jan. 2, 2013).

²⁷⁴ See *supra* note 47 (providing the dollar breakdown of the 2010 SEC settlements).

²⁷⁵ See U.S. AGENCY FOR INT'L DEV., EXECUTIVE BUDGET SUMMARY, FUNCTION 150 & OTHER INTERNATIONAL PROGRAMS, FISCAL YEAR 2012, at 2 (2011), available at <http://transition.usaid.gov/performance/cbj/156214.pdf>.

²⁷⁶ See Koehler, *supra* note 137 (describing 2010 as the FCPA's "biggest" and "boldest" to date). 2011 saw only a slight drop off in FCPA penalties compared to 2010. See Berger et al., *supra* note 81.

²⁷⁷ See *supra* note 168 and accompanying paragraph.

could also be a springboard for more general efforts by the Host government to begin curbing the demand-side of bribery. Host countries taking a greater role in the enforcement effort would also help quell concerns that anti-bribery enforcement is a form of Western cultural imperialism or de facto sanctions. Finally, the stringency of the “cooperation” threshold could be calibrated to reflect the appropriate tradeoff between the importance of Host country assistance and the value derived from transferring more resources to international organizations tasked with coordinating the enforcement of supply-side states.

B. Disgorgement to International Organizations

The under-enforcement problem does not only, or even primarily, afflict Host countries responsible for policing the demand-side of corruption. Almost all of the world’s capital-exporting advanced economies are members of the OECD and parties to the OECD Convention, a treaty patterned largely after the FCPA that requires members to prosecute legal persons responsible for supplying bribes to foreign jurisdictions.²⁷⁸ With the exception of the United States, and the U.K. since 2011, compliance with the OECD Convention has been tepid at best.²⁷⁹ Lackluster enforcement of the supply-side of bribery by OECD members is not due to a defect in the language or provisions of the OECD Convention. Instead, structural features of the treaty create a collective action problem in which each member state has the incentive to strategically under-enforce foreign bribery by its nationals.

The final part of this Article’s proposal is to transfer proceeds from FCPA disgorgement to the OECD Working Group—the entity that was established to monitor the implementation of the OECD Convention²⁸⁰—when cooperation by a Host country is not forthcoming. The collective action problem created by the treaty makes effective enforcement critically depend on member states’ ability to monitor one another’s compliance. In the specific context of international business corruption, international organizations such as the Working Group can be particularly useful in facilitating international anti-bribery efforts and making the OECD

²⁷⁸ OECD Convention, *supra* note 10, art. 2 (“Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.”); *see also* Westbrook, *supra* note 2, at 511 (“The OECD Convention requires signatory countries to enact measures that are substantively similar to the prohibitions in the FCPA . . .”).

²⁷⁹ *See infra* note 288 and accompanying paragraph.

²⁸⁰ *See* OECD Convention, *supra* note 10, art. 12 (“Monitoring and Follow-Up: The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference . . .”).

Convention more effective because of their monitoring and information aggregating functions. This approach—which enables states to more efficiently self-police compliance with their treaty commitments—is likely to be more successful than various proposals to create more treaties, strengthen treaty language, or empower international organizations with a more direct, prosecutorial role for which they are ill-suited.

1. The Failure of Multilateral Enforcement

While the U.S. government has unilaterally ratcheted up its anti-bribery enforcement through investigations under the FCPA, it has also aggressively lobbied on the international level for a multilateral approach to anti-corruption.²⁸¹ The importance of a multilateral approach is often expressed as the need for an “even playing field” among multinational corporations: if only U.S. corporations are subject to anti-bribery laws, they will be disadvantaged in foreign markets when competing against companies that are not so constrained.²⁸² A lack of multilateralism not only comes at a cost to the U.S. economy, but also makes efforts to reduce corruption generally less efficacious. This is because the unilateral withdrawal of U.S. corporate investment from jurisdictions where bribery takes place will only induce corporations from capital-exporting countries that less actively enforce bribery to move in to fill the economic void.²⁸³

The United States has largely been successful in its effort at forging international *agreements* to combat foreign bribery;²⁸⁴ multilateral *enforcement*, on the other hand, has lagged considerably behind the signing of international conventions.²⁸⁵ In 2009, Transparency International

²⁸¹ See Ashe, *supra* note 7, at 2908 (“[W]ithout an international agreement in place, U.S. interests were suffering significantly despite the 1988 amendments, especially in emerging markets. U.S. efforts to get the international community on board continued through the 1990s.”); see also H.R. REP. NO. 100-576 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547 (legislative comment to 1988 Amendments exhorting the U.S. government to pursue an international anti-bribery convention).

²⁸² See Presidential Statement, *supra* note 42 (“U.S. companies have had to compete on an uneven playing field, resulting in losses of international contracts estimated at \$30 billion per year.”); Tarullo, *supra* note 12, at 674 (“U.S. business interests argued for substantial modification or repeal of the FCPA so as to create a ‘level playing field’ in international markets.”).

²⁸³ See Spalding, *supra* note 7, at 397; James R. Hines, *Forbidden Payment: Foreign Bribery and American Business After 1977*, at 19–20 (Nat’l Bureau of Econ. Research, Working Paper No. 5266, 1995) (finding that the FCPA encouraged “ownership substitution” in the 1970s between U.S. investors—the only investors subject to anti-bribery legislation at the time—and foreign investors).

²⁸⁴ See *supra* notes 92–95 (listing the handful of anti-bribery treaties that have proliferated in recent years).

²⁸⁵ See Tarullo, *supra* note 12, at 666, 682–83 (“The wave of international arrangements raises the question of why, after many barren years, anti-corruption initiatives bore so much

reported that only three of the thirty-seven non-U.S. parties to the OECD Convention (Germany, Norway, Switzerland) had actively enforced their anti-corruption laws, while twenty-one had seen little or no enforcement.²⁸⁶ Even this estimate may over-state the total amount of activity, however, as the patches of enforcement that have occurred are primarily from an outlier case involving the U.N. oil-for-food scandal.²⁸⁷ Progress has not been substantial since TI's 2009 report, and its 2011 report concluded that "there has been no progress since TI's 2010 progress report in the number of countries with active enforcement."²⁸⁸

The disjunction between readily joining anti-bribery treaties and subsequently not complying with them reflects a rational calculation on the part of OECD member states.²⁸⁹ Simply agreeing to join anti-corruption conventions is relatively costless if it is not accompanied by a genuine commitment to invest in compliance.²⁹⁰ In addition, ratification may carry certain non-trivial "expressive" benefits that follow from taking positions consistent with values encouraged by the international community.²⁹¹ For this reason, states often sign treaties, including the OECD Convention, in order to signal cooperation, while simultaneously having little or no intention to comply.²⁹²

fruit so quickly. The ineffectiveness of the arrangements raises the question of why the apparent commitment of state and non-state actors to combat corruption dissipated after the international agreements were signed.").

²⁸⁶ FRITZ HEIMANN & GILLIAN DELL, *TRANSPARENCY INT'L, PROGRESS REPORT 2009: ENFORCEMENT OF THE OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS* 8 (2009).

²⁸⁷ *Id.* at 4 ("Many of the cases and investigations mentioned in . . . this report relate to the Oil-for-Food Programme that was established by the United Nations (UN) Security Council in 1995 and began operation at the end of 1996.").

²⁸⁸ *TRANSPARENCY INT'L, supra* note 214.

²⁸⁹ See Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935, 2002 (2002) ("[C]ountries will comply with treaties only when doing so enhances their interests, whether those interests are defined in terms of geopolitical power, reputation, or domestic impact.").

²⁹⁰ *Id.* at 2006 ("And where there is little enforcement, the costs of [treaty] membership are also small, as countries with policies that do not adhere to the requirements of the treaty are unlikely to be penalized.").

²⁹¹ See *id.* at 2005 ("In this sense [of expressing agreement with the basic values of the treaty], the ratification of a treaty functions much as a roll-call vote in the U.S. Congress or a speech in favor of the temperance movement, as a pleasing statement not necessarily intended to have any real effect on outcomes.").

²⁹² Marco Celentani, Juan-Jose Ganuza & Jose-Luis Peydro, *Combating Corruption in International Business Transactions*, 71 *ECONOMICA* 417, 418 (2004) ("[R]ecent evidence on the OECD Convention clarifies that a country that signs a convention may in the end choose not to enforce it. This in turn implies that the meaningful decision is not whether to *sign* the Convention or not, but rather whether or not to enforce it."); Hathaway, *supra* note 289, at 2006 (providing a statistical study that finds a weak but positive correlation between signing

The incentive structure facing signatory states changes once the question becomes expending resources to actually comply with the treaty. At the compliance stage, international efforts to enforce anti-bribery rules through the OECD Convention have not materialized, because the Convention is subject to the same collective action problems that plague many other multilateral agreements. Specifically, Daniel Tarullo and others²⁹³ have modeled members of international anti-bribery conventions as facing a multi-player prisoner's dilemma. The prisoner's dilemma dynamic²⁹⁴ means that each state's dominant strategy²⁹⁵ is to shirk on deterring the bribery of its domestic corporations while at the same time reaping the benefits of any enforcement by other members against their own companies.²⁹⁶

The basic prisoner's dilemma analysis²⁹⁷ is on the whole persuasive, but incomplete in that it cannot explain the United States' increasing willingness to pursue FCPA enforcement.²⁹⁸ The explanation is likely not that the United States is uniquely harmed by its nationals' bribery. Instead, the United States is probably an outlier because of its ability to unilaterally "even the playing field" by regularly investigating *foreign* companies and funding its prosecutorial efforts through penalties disproportionately levied

human rights treaties and *committing* human right abuses, and concluding, "Where there is little monitoring, noncompliance is not likely to be exposed. Therefore, the countries that join the treaty will enjoy the expressive benefits of joining the treaty, regardless of whether they actually comply with the treaty's requirements."

²⁹³ See generally Davis, *supra* note 12, at 27 ("[Policing bribery] creates a form of prisoners' dilemma for payor states: it may be possible for them to maximize their collective welfare by penalising some forms of transnational bribery; however, it may not be in the best interests of any individual state to act unilaterally because of the adverse competitive implications."); Tarullo, *supra* note 12, at 666; COMM. ON INT'L BUS. TRANSACTIONS, N.Y. CITY BAR, THE FCPA AND ITS IMPACT ON INTERNATIONAL BUSINESS TRANSACTIONS 14–16 (2011).

²⁹⁴ See DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW 33–34 (Harvard Univ. Press paperback ed. 1998) (providing a narrative explanation of the prisoner's dilemma game); ROGER B. MYERSON, GAME THEORY: ANALYSIS OF CONFLICT 97 (1997) (providing a more mathematical explication).

²⁹⁵ In game theory, a "dominant strategy" is any course of action which makes an actor better off than alternative strategies, regardless of the actions of any other participants in the game. See BAIRD, *supra* note 294, at 11–12.

²⁹⁶ See COMM. ON INT'L BUS. TRANSACTIONS, *supra* note 293; Davis, *supra* note 12, at 27; Tarullo, *supra* note 12, at 666.

²⁹⁷ See generally Davis, *supra* note 12, at 41–43; Tarullo, *supra* note 12.

²⁹⁸ Tarullo's analysis awkwardly treats the United States' commitment to enforcement alternatively as a given, or as a result of mid-1970s scandals and the push for an OECD Convention in the 1990s. See Tarullo, *supra* note 12, at 668–80. But this repeats the mistake of conflating the incentives to sign anti-bribery laws with the incentives to actually enforce them.

on non-U.S. entities.²⁹⁹ However, the singular position of the United States, and now possibly the U.K.,³⁰⁰ does not alter the strategic incentives of the vast majority of OECD member states. Thus, the essential non-compliance by member states other than the United States remains a core problem with the OECD Convention, preventing it from being effective.

2. Enforcing Collective Action

The prisoner's dilemma dynamic is a general problem that impedes collective enforcement of the OECD Convention as well as many other ambitious treaty agreements³⁰¹ that attempt to govern the provision of international public goods.³⁰² Collective action problems on the international level can be extremely difficult to solve, because the international system is essentially anarchic,³⁰³ in that there is no central world-governmental authority in a position to punish states for failure to

²⁹⁹ Recall that ninety percent of the dollar value of FCPA penalties in 2010 were imposed on non-U.S. companies. *See supra* note 137 and accompanying text. Recall also that nine of the ten largest FCPA penalties ever have been imposed against non-U.S. corporations, and that every investigation initiated in 2011 was against a foreign corporation. *See Berger et al., supra* note 81.

³⁰⁰ The unilateralism calculus may apply to the U.K. after passage of its 2010 Bribery Act as “[t]he jurisdictional reach of the Act extends beyond the UK, and Serious Fraud Office (SFO) officials who will be prosecuting violations of the Act have signaled their intention to assert broad jurisdiction” Roger M. Witten et al., *Preparing for Doing Business Under the UK Bribery Act*, WILMER HALE (Oct. 6, 2010), <http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9614>; *see also* U.K. Bribery Act, c. 23, § 19 (2010).

³⁰¹ *See* JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 87 (2005) (arguing that international agreements concerning “true international public goods such as the protection of fisheries, the reduction of atmospheric pollution, and peace . . . are multilateral prisoner’s dilemmas, not coordination games”); ANDREW GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 29–33 (2008).

³⁰² A corruption-free global marketplace is an “international public good” in the sense that “payers and nonpayers receive its benefits, and one person’s consumption does not necessarily reduce the benefits still available to others from the same unit of the good.” Todd Sandler, *Financing International Public Goods*, in *INTERNATIONAL PUBLIC GOODS: INCENTIVES, MEASUREMENT, AND FINANCING* 81, 81 (Marco Ferroni & Ashoka Mody eds., 2002).

³⁰³ *See* Andrew Moravcsik & Frank Schimmelfennig, *Liberal Intergovernmentalism*, in *EUROPEAN INTEGRATION THEORY* 67, 68 (Antje Wiener & Thomas Diez eds., 2d ed. 2009) (arguing in the European context that “[t]he EU, like other international institutions, can profitably be studied by treating states as the critical actors in the context of anarchy”); Robert Hudec, *“Transcending the Ostensible”: Some Reflections on the Nature of Litigation Between Governments*, 72 *MINN. L. REV.* 211, 212 (1988) (“[I]nternational legal arrangements have relatively more in common with the law of primitive societies studied by anthropologists, in which litigation is still emerging as a rather tenuous alternative to dispute resolution by force.”).

comply with their international legal obligations.³⁰⁴ As a consequence, states participating in multilateral treaty regimes are forced to engage in a decentralized process of mutual-policing by imposing costs or providing benefits to other member states in order to change the positive payoff associated with free-riding on treaty commitments.³⁰⁵

A prerequisite of this decentralized enforcement process is overcoming the informational and monitoring problem of determining when the actions of a member state constitute non-compliance.³⁰⁶ A treaty agreement itself serves the vital *definitional* role of laying out an abstract legal standard for what constitutes compliance on the part of signatories.³⁰⁷ However, it leaves unanswered the often more complex factual question of which particular real-world acts of treaty members fall within the legal rule, which is a question that can only be answered through investment in collecting information on state behavior.³⁰⁸

Monitoring compliance with international anti-corruption conventions is more difficult than monitoring compliance is for most international economic agreements. In the case of breaches of free trade agreements, for example, it is not overly difficult for states to identify when their exports are subject to tariffs or other trade barriers by treaty partners.³⁰⁹ Compare instances of under-enforcement of the OECD Convention's anti-bribery provisions, where the relevant activity involves secretive transactions and turns on complicated facts, and where treaty members must be expected to

³⁰⁴ See ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* 7 (2009) ("At the international level, no world government exists, and so no entity has the power to tax and regulate states, or the individuals who live in them, in order to ensure that collective goods are produced.").

³⁰⁵ GOLDSMITH & POSNER, *supra* note 301, at 86 ("To solve collective action problems, players must be able to monitor each other and commit to punishing any player who free-rides, and that includes any player who fails to punish another player who free-rides."). Whether this is through material threats and promises or moral suasion, the underlying analysis remains the same. See Tarullo, *supra* note 12, at 690–91.

³⁰⁶ GOLDSMITH & POSNER, *supra* note 301.

³⁰⁷ *Id.* at 85 ("In repeated prisoner's dilemmas, when the [international treaty] agreement sets out clearly what counts as a cooperative action, unintended defections are reduced, and it becomes more difficult for a state to engage in opportunism and then deny that the action violated the requirements of a cooperative game.").

³⁰⁸ *Id.* at 86.

³⁰⁹ See Chad P. Bown, *Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged?* 1 (World Bank, Policy Research Working Paper No. 3540, 2005), available at http://econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=469372&piPK=64165421&menuPK=64166093&entityID=000012009_20050317142750 ("That such a large share of the WTO dispute settlement caseload involves challenges to antidumping, countervailing duties and safeguards is perhaps not surprising, given the relative transparency of these policies . . .").

exercise a degree of prosecutorial discretion.³¹⁰ For these reasons, and because of the necessary role of monitoring in enforcing compliance with multilateral treaties, it is accurate to say that “[t]he most obvious shortcoming of current institutional arrangements under the OECD Convention is the absence of information flows about specific instances of bribery.”³¹¹

Once investment in monitoring is sufficient to identify acts of compliance and non-compliance, there remains the problem of inducing non-enforcing treaty partners to perform by ensuring that the benefits of compliance exceed its cost. One mechanism through which monitoring can change states’ cost-benefit calculus is the production of “reputational effects.”³¹² Monitoring disseminates information about a state’s propensity to comply with its international commitments, and thereby affects its reputation for compliance. A reputation for compliance can be a valuable asset, because states with reputations for cheating on commitments will have their promises discounted and will not be able to credibly commit to future cooperative endeavors.³¹³ Thus, monitoring of state behavior encourages compliance by creating a cost to non-compliance that would not otherwise exist.

A more direct vehicle for re-aligning the cost-benefit considerations of treaty partners is the delivery of “side-payments,” which increase the benefits of compliance. In bargaining theory, “once the value-maximizing agreement is identified, parties that prefer the status quo (or some alternative agreement) can be compensated with a transfer or cash or something else”³¹⁴ in order to secure performance under the agreement. Such transfers are referred to as side-payments, and can be used to “[i]ncrease the payoff for a government’s prosecuting overseas bribery by

³¹⁰ See generally Tarullo, *supra* note 12, at 689 (“Bribery takes place in the shadows. It may never be visible to anyone but the immediate actors. Where there are hints of bribery, investigations backed with some form of compulsory process may be necessary to establish the case that a signatory is obliged to take action. Finally, even if there is information available . . . [i]t may not be an easy matter to distinguish instances of good faith non-prosecution from instances where prosecutors have ignored overseas commercial bribery in order to boost the competitive position of their country’s firms.”).

³¹¹ Tarullo, *supra* note 12, at 695.

³¹² See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1861–64 (2002) (discussing reputational sanctions as an enforcement mechanism); see generally Rachel Brewster, *Unpacking the State’s Reputation*, 50 HARV. INT’L L.J. 231 (2009) (providing an overview of the strengths and weaknesses of reputation as an analytical tool in international legal scholarship).

³¹³ See GUZMAN, *supra* note 301, at 34–35.

³¹⁴ *Id.* at 166; see also Roman M. Sheremeta & Erik O. Kimbrough, *Side-Payments and the Costs of Conflict* (Feb. 3, 2012) (unpublished manuscript) (on file with Maastricht University School of Business’s Department of Economics), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1999090.

credibly promising rewards to that government,”³¹⁵ which Tarullo identifies as one of “three broad strategies that might be pursued alone or in combination to induce other governments to enforce their anti-bribery laws.”³¹⁶

Rationalist theories of international law and international relations view international organizations as most successful when functioning as information-producing institutions.³¹⁷ The information produced by international organizations can be used by states to monitor the compliance of counterparties to those agreements. International organizations can also serve as mechanisms for states to transfer side-payments to treaty partners for whom the benefits of compliance would not otherwise exceed the costs. As the next subpart will show, the OECD Working Group is an international organization well-positioned to perform both roles.

3. OECD Working Group’s Role in Improving Enforcement

While other, analogous international organizations could also be considered,³¹⁸ the OECD Working Group is a natural candidate for receiving disgorgement funds, as it was specifically designed to address the collective action problem described above.³¹⁹ Funding the Working Group would also be broadly consistent with the foreign policy prerogatives of the United States, as the Working Group is the product of a treaty that was modeled after the FCPA and which came into being largely through U.S.

³¹⁵ See Tarullo, *supra* note 12, at 690–91.

³¹⁶ *Id.*

³¹⁷ See ROBERT KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 17, 92 (1984) (“The policy implications of the book stem most directly from my emphasis on the value of information produced and distributed by international regimes From the perspective of market-failure theories, the informational functions of regimes are the most important of all.”); Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171, 179–80 (2008) (“This observation—that tribunals serve to provide information—guides the analysis that follows. The goal here is to develop a theory capable of explaining how information can influence state behavior and encourage compliance with international law.”).

³¹⁸ The closest alternative would be the Conference of States Parties (CoSP) established under the UNCAC. See G.A. Res. 58/4, *supra* note 11, art. 63.1 (“A Conference of the States Parties to the Convention is hereby established to improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation.”).

³¹⁹ See WORKING GRP. ON BRIBERY IN INT’L BUS. TRANSACTIONS, ORG. FOR ECON. CO-OPERATION & DEV., 2007 ANNUAL REPORT 11 (2008), available at <http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/40896091.pdf> (“The Working Group’s most important role is to support country-level implementation of the OECD anti-bribery instruments. The monitoring process aims to ensure that all Parties have in place a sound system to fight foreign bribery that complies with the Convention’s high standards.”).

initiative.³²⁰ Furthermore, the United States plays a leading role in the Working Group's parent organization, the OECD, and could expect to retain significant influence over the programs and priorities to which disgorged funds are directed.³²¹

The core function of the Working Group is to gather the information necessary to monitor and evaluate member states' compliance with the OECD Convention.³²² This involves country visits by experts from peer governments and meetings with local prosecutors and representatives from the private sector and civil society.³²³ Reviews also "probe OECD states to determine whether their governments have legal loopholes (such as short statutes of limitations), whether they provide sufficient resources for enforcement, and whether local corporations have adequate compliance programs."³²⁴

The Working Group evaluates each member state and develops individual country reports through a three phase process: Phase 1 evaluates the adequacy of a country's legislation to implement the Convention;³²⁵ Phase 2 assesses whether a country is applying this legislation effectively;³²⁶ and Phase 3 focuses on enforcement of the Convention, the

³²⁰ Indira Carr & Opi Outhwaite, *The OECD Anti-Bribery Convention Ten Years On*, 5 MANCHESTER J. INT'L ECON. L. 3, 6 (2008) ("The prime mover for the OECD to take steps to combat corruption of foreign public officials was pressure applied by the United States (US)."); see also Abbott & Snidal, *supra* note 5, at S161-62; cf. Ashe, *supra* note 7, at 2908-09 (explaining other factors that bolstered U.S. efforts).

³²¹ For example, the United States contributed nearly twenty-two percent of the OECD's general 2012 budget, the largest amount among member states by a wide margin. *Member Countries' Budget Contributions for 2012*, ORG. ECON. CO-OPERATION & DEV., <http://www.oecd.org/about/budget/membercountriesbudgetcontributionsfor2012.htm> (last visited Jan. 3, 2013).

³²² See OECD Convention, *supra* note 10, art. 12 ("Monitoring and Follow-Up: The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. [T]his shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference.").

³²³ Ben W. Heineman, Jr. & Fritz Heimann, *The Long War Against Corruption*, FOREIGN AFF., May/June 2006, at 75, 80.

³²⁴ *Id.*

³²⁵ *Phase 1 Country Monitoring of the OECD Anti-Bribery Convention*, ORG. ECON. CO-OPERATION & DEV., http://www.oecd.org/document/21/0,3746,en_2649_34859_2022613_1_1_1_1,00.html (last visited Jan. 2, 2013) ("The principal objective of Phase 1 is to evaluate whether the legal texts through which participants implement the OECD Anti-Bribery Convention meet the standard set by the Convention.").

³²⁶ *Phase 2 Country Monitoring of the OECD Anti-Bribery Convention*, ORG. ECON. CO-OPERATION & DEV., http://www.oecd.org/document/27/0,3746,en_2649_34859_2022939_1_1_1_1,00.html (last visited Jan. 2, 2013).

2009 Anti-Bribery Recommendation, and outstanding recommendations from Phase 2.³²⁷ To date, these efforts are incomplete but nonetheless substantial: over two-thirds of all OECD parties have been reviewed.³²⁸ Also, this review has not been without teeth, as the Working Group “has demonstrated its credibility by criticizing the [C]onvention’s inadequate implementation in major countries such as France, Japan, Italy, and the United Kingdom.”³²⁹ Transferring disgorged profits to the Working Group would provide the resources necessary for it to pursue its current monitoring activities in a deeper and more complete manner.

With more funding, the current functions of the Working Group could also be expanded or made more robust. Noting the limitations of the backgrounds of current Working Group officials,³³⁰ Tarullo proposes establishing a sub-group of prosecutors within the Working Group, with its role outlined as follows:

The direct objectives of an OECD committee of prosecutors would be to ensure: first, efficient exchanges of information pertaining to specific instances of bribery and, second, good faith investigation by the home-country prosecutors of companies implicated by such information . . . Relationships might [also] be initiated with legal authorities in host countries so as to facilitate the collection of evidence.³³¹

The OECD has not yet created a standing committee of prosecutors, but it has taken initial steps to coordinate with prosecutors, private sector and civil society groups, and other international anti-corruption organizations.³³² These efforts could be formalized and deepened.

Another possibility is to use disgorgement funds to establish inflows of information from untapped sources, such as TI and competing multinational

³²⁷ *Phase 3 Country Monitoring of the OECD Anti-Bribery Convention*, ORG. ECON. CO-OPERATION & DEV., http://www.oecd.org/document/31/0,3746,en_2649_34859_44684959_1_1_1_1,00.html (last visited Nov. 17, 2012) (“The Working Group on Bribery adopted a post-Phase 2 assessment mechanism in December 2009, to act as a permanent cycle of peer review, involving systematic on-site visits as a shorter and more focused assessment mechanism than for Phase 2.”).

³²⁸ Heineman, Jr. & Heimann, *supra* note 323.

³²⁹ *Id.*

³³⁰ See Tarullo, *supra* note 12, at 697 (“There is reason to doubt that the officials from economics, foreign, and finance ministries who sit as national representatives on the OECD Working Group on Bribery in International Business Transactions are particularly well-informed concerning specific instances of bribery.”).

³³¹ *Id.* at 701.

³³² See WORKING GRP. ON BRIBERY IN INT’L BUS. TRANSACTIONS, *supra* note 319, at 30–42.

companies,³³³ thereby enabling the Working Group to function as a “clearinghouse” for allegations concerning transnational bribery.³³⁴ Other helpful institutional innovations could be imagined that would be consistent with the underlying principle of reducing the monitoring costs for OECD member states.³³⁵

The OECD Working Group could also increase the reputational effects of its monitoring efforts by applying more resources to rigorously verify and publicize the degree of compliance of its members.³³⁶ Other proposals exist that would complement the reputation effect of heightened publicity of non-compliance, such as the idea to “tier” membership into levels indicating each member’s progress in complying with the treaty.³³⁷

Transfers to the OECD Working Group may also serve as an effective compliance tool by allowing side-payments to other member states. The Working Group is well-situated to deliver side-payments, because it is embedded within the larger OECD, an institution used to coordinate a variety of international policies.³³⁸ International organizations that span multiple issue areas, such as the OECD, are good for side-payments, because the “clustering of issues under a regime facilitates side-payments among these issues: more potential *quids* are available for the *quo*.”³³⁹ While the strategic positions of particular OECD treaty members is difficult to specify in advance, channeling side-payments through the OECD Working Group is one available “carrot” that could tip the cost-benefit analysis for member states otherwise disinclined to comply with

³³³ See Tarullo, *supra* note 12, at 701 (“Simply by establishing some kind of international ‘tipster’s line’ with an email address and a postal box at the OECD, the committee may obtain information from a variety of heretofore untapped sources.”).

³³⁴ See ROSE-ACKERMAN, *supra* note 104, at 190 (suggesting that the International Monetary Fund and/or World Bank take such an initiative).

³³⁵ See Cheng Wenhao & Umme Aiman Ahmad, *Implementing International Law to Fight Business Bribery*, 5 AFR. J. BUS. MGMT. 12392, 12397–98 (2011) (describing initiatives to generate greater awareness and scrutiny of corruption); *A New Push on Corruption, in OECD YEARBOOK 2011: BETTER POLICIES FOR BETTER LIVES* 61 (2011), available at <http://issuu.com/oecdobserver/docs/oecdyearbook2011> (discussing OECD initiatives to raise awareness of corruption and strengthen regulation).

³³⁶ See Andrew Tyler, Note, *Enforcing Enforcement: Is the OECD Anti-Bribery Convention’s Peer Review Effective?*, 43 GEO. WASH. INT’L L. REV. 137, 156 (2011) (“The final and most important tool the [Working Group] has, and one it has not fully used yet, is the ‘shame game’-the use of all the Convention’s influence to publicly pressure a non-complying country into compliance through public statements and press releases designed to ignite both international and domestic pressure to bring about a change of policy.”).

³³⁷ Wenhao & Ahmad, *supra* note 335, at 12399.

³³⁸ See *Topics*, ORG. ECON. CO-OPERATION & DEV., <http://www.oecd.org> (follow “Topics” hyperlink) (listing a welter of global issues the OECD works on, including the economy, finance, environment, innovation, and so on) (last visited Jan. 2, 2013).

³³⁹ KEOHANE, *supra* note 317, at 91.

enforcement obligations.³⁴⁰

The idea to bolster the resources and capacity of the OECD Working Group is a more effective way to remedy international under-enforcement than pursuing more legalistic initiatives. One set of proposals likely to be less efficacious contemplates establishing an international tribunal dedicated to hearing and resolving claims arising out of contracts procured through bribes.³⁴¹ However, most international tribunals charged with adjudicating criminal conduct have been met with mixed success,³⁴² and those tasked with purely contractual disputes would face serious jurisdictional and enforceability problems.³⁴³ The one exceptionally successful international court is the Dispute Settlement Body (DSB) of the World Trade Organization (WTO),³⁴⁴ but it provides a poor analogue for what would be required of a bribery-based court.³⁴⁵

Another recommendation is to create a private right of action under the FCPA.³⁴⁶ But a private right of action may suffer from emboldening competitors to sue one another after each unsuccessful bidding contest, and could encourage the same sort of anti-competitive abuses that are common with competitor-initiated antitrust claims.³⁴⁷ The private litigation proposal is also susceptible to general criticisms that often apply to claims that “more litigation is the answer” to complicated global problems.³⁴⁸ A more prudent

³⁴⁰ See Tarullo, *supra* note 12.

³⁴¹ See ROSE-ACKERMAN, *supra* note 104, at 193–96.

³⁴² The International Criminal Court, for one, has yet to impose a single sentence. See Tim Lister, ‘*International Justice Works*’—*But Maybe Not That Well*, CNN (May 28, 2011, 8:06 AM), <http://www.cnn.com/2011/POLITICS/05/28/obama.icc/index.html>. Criminal tribunals for war crimes in Yugoslavia and Rwanda have also been under-productive. See POSNER, *supra* note 304, at 196 (“[T]he ICTY [Yugoslavia] and ICTR [Rwanda] had a joint two-year budget of \$545 million in 2006–2007, more than one-eighth of the UN’s entire budget [T]hrough July 2008 the ICTY and the ICTR have convicted only a few dozen defendants.”).

³⁴³ See ROSE-ACKERMAN, *supra* note 104, at 195.

³⁴⁴ The DSB is governed by rules set out in the WTO Dispute Settlement Understanding (DSU). Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, annex 2, 1869 U.N.T.S. 401.

³⁴⁵ The WTO DSB reviews alleged breaches of treaty obligations between states, and not criminal claims against individual persons or corporations based on domestic statutes. See *id.* art. 1, app. 1; Guzman, *supra* note 317, at 225 (“Among international tribunals, the WTO’s Appellate Body (AB) is arguably the most like domestic courts.”).

³⁴⁶ Sandy A. Azer, *Strengthening the Foreign Corrupt Practices Act Through a Private Right of Action*, at 12–16 (Aug. 2010) (unpublished working paper) (on file with the Social Science Research Network) (advocating for an additional, private right of action for FCPA violations).

³⁴⁷ See generally William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405 (1985).

³⁴⁸ See POSNER, *supra* note 304, at 207–25, 225 (“[R]egulation by litigation has its

approach would be to channel competitor complaints through the OECD Working Group “clearinghouse” and allow member states to evaluate and respond to allegations of bribery as they deem appropriate in light of OECD Convention requirements.

In contrast to the aforementioned suggestions, this Article’s approach plays more to the comparative institutional advantage of international organizations. As international relations scholar Robert Keohane puts it: “[I]nternational regimes are valuable to governments not because they enforce binding rules on others (they do not), but because they render it possible for governments to enter into mutually beneficial agreements with one another. They *empower* governments rather than shackling them.”³⁴⁹ Creating a more robust OECD monitoring mechanism would empower member states to mutually police one another’s compliance with treaty obligations *already in place* that require the prosecution of nationals engaged in foreign bribery.

This Part has provided a two-pronged proposal for reducing the problem of under-enforcement of prohibitions on transnational bribery. On the demand-side, transferring disgorged profits to Host countries cooperative with the underlying investigation would incentivize information sharing and provide resources to further reform domestic anti-corruption. On the supply-side, transferring disgorgement revenue to the OECD Working Group would enhance its ability to monitor transnational bribery, a critical step in facilitating the mutual-policing required to overcome collective action problems. As with the analysis of over-enforcement in Part III, the solutions proposed here focus on modifying the sub-optimal incentives facing key actors responsible for anti-bribery enforcement.

V. CONCLUSION

Transnational bribery is a serious global problem that suffers from both over-enforcement and under-enforcement. The rise in FCPA enforcement has led to the Act being applied in an extremely broad manner that deters legitimate foreign investment and offends procedural rule-of-law principles. Meanwhile, bribery is practically unenforced by other capital-exporting members of the OECD and lower-income countries where corrupt transactions most often take place.

Scholarship on the FCPA alternately decries the Act’s over-zealous enforcement or defends the hard line that, because bribery is undesirable, prosecutions pursuant to the FCPA or other international agreements should be encouraged and even increased. Each side takes an overly legalistic

defenders, but whatever its merits in the form of domestic litigation in the United States, the idea that it can be extended so as to address international concerns is most implausible”).

³⁴⁹ KEOHANE, *supra* note 317, at 13.

approach by proposing slightly more restrictive statutory definitions on the one hand, or broader provisions and bolder international agreements on the other. Discussion at recent congressional hearings concerning possible amendments to the FCPA has taken the same form.

However, enforcement of transnational anti-bribery measures is dysfunctional because of underlying political economy problems facing the relevant governments and their bureaucracies, not because of defectively drafted legal instruments. To more appropriately align the incentives of domestic and international actors responsible for deterring bribery, this Article proposes that the SEC divert disgorgement revenue from the U.S. Treasury to Host countries where bribery takes place and the OECD Working Group. Transferring disgorged profits in this manner would tend to reduce the rent-seeking opportunities that lead U.S. Enforcement Agencies to pursue unbalanced over-enforcement. At the same time, it would reverse the free-riding calculus facing Host countries responsible for the demand-side of bribery, and OECD member states on the supply-side, both of which are currently overly reliant on U.S. enforcement efforts.

The policy proposed in this Article is intended to provide a creative, global approach to dealing with the important problem of transnational bribery and developing world corruption. It can also be understood as an attempt to solve an increasingly common form of regulatory dilemma—concerning business, trade, and the environment—for which the United States can no longer hope to be effective by taking a unilateral approach. Globalization of the economy increases the number of state and private actors relevant to any particular policy area and multiplies opportunities for regulatory arbitrage. Finding solutions to the new breed of cross-border regulatory problems therefore requires imagining strategic, multilateral policies that are attentive to the interests and capacities of the various international actors involved.