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The Foreign Corrupt Practices Act, Sec Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence

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STUDENT NOTE

THE FOREIGN CORRUPT PRACTICES ACT, SEC DISGORGEMENT OF PROFITS, AND THE EVOLVING INTERNATIONAL BRIBERY REGIME: WEIGHING PROPORTIONALITY, RETRIBUTION, AND DETERRENCE

*David C. Weiss**

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*Corruption charges. Corruption? Corruption ain't nothing more than government intrusion into market efficiencies in the form of regulation. That's Milton Friedman. He got a goddam Nobel Prize. We have laws against it precisely so we can get away with it. Corruption is our protection. Corruption is what keeps us safe and warm. Corruption is why you and I are here in the white-hot center of things instead of fighting for scraps of meat out there in the streets. Corruption is how we win.*¹

—Danny Davis, director of a U.S. oil and gas firm in the film *Syriana*, reacting to charges arising from his involvement in securing oil field concessions in Kazakhstan

For every Danny Davis—or James Giffen, the real life “oil consigliere” on whom Davis was based—there are scores of multinational corporations that comply with the law.² Although many commentators may find it unsurprising that some multinational firms vigorously pursue corruptly influenced contracts—or are at least complacent in accepting such contracts³—another view holds that such an account is too cynical.⁴ These optimists claim that corruption is inefficient⁵ and argue that moral signals from the countries that have prohibited corruption by statute can

1. SYRIANA (Warner Bros. Pictures 2005), available at <http://pdl.warnerbros.com/wbmovies/syriana/site/med/Syriana-Screenplay.pdf>.

2. See ROBERT BAER, SEE NO EVIL: THE TRUE STORY OF A GROUND SOLDIER IN THE CIA'S WAR ON TERRORISM (2002); see also Pamela Karten Bookman, *Solving the Extraterritoriality Problem: Lessons from the Honest Service Statute*, 92 VA. L. REV. 749, 754–72 (2006) (detailing Giffen's activities and arrest for violations of the U.S. Foreign Corrupt Practices Act (FCPA)); Joshua Chaffin, *US Businessman Charged Over Mobil Oil Deal*, FIN. TIMES, Apr. 1, 2003, at 1.

3. See, e.g., Ethan S. Burger & Mary S. Holland, *Why the Private Sector is Likely to Lead the Next Stage in the Global Fight Against Corruption*, 30 FORDHAM INT'L L.J. 43 (2006); Paul D. Carrington, *Law and Transnational Corruption: The Need for Lincoln's Law Abroad*, 70 LAW & CONTEMP. PROBS. 109, 121, 127–29 (2007); 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 (2006) (claiming that levels of international bribery are likely much higher than FCPA investigations indicate); *Keeping A Close Watch*, BUS. & FIN. (Ire.), Aug. 10, 2006, available at <http://docs.newsbank.com/s/InfoWeb/aggdocs/AWNB/11390FCB5CB/CBC38/0D1A2AB84F2D3D40>; Reena SenGupta, *Trouble at Home for Overseas Bribes*, FIN. TIMES, Feb. 2, 2006, at 12.

4. José Armando Fanjul, Comment, *Corporate Corruption in Latin America: Acceptance, Bribery, Compliance, Denial, Economics, and the Foreign Corrupt Practices Act*, 26 PENN ST. INT'L L. REV. 735, 758 (2008); see Roger C. Cramton, *Counseling Organizational Clients “Within the Bounds of the Law,”* 34 HOFSTRA L. REV. 1043, 1058 (2006); The FCPA Blog: News and Views About the United States Foreign Corrupt Practices Act, That's Milton Friedman? (Aug. 22, 2008), <http://fcpablog.blogspot.com/2008/08/thats-milton-friedman.html>.

5. See, e.g., Ben W. Heineman, Jr. & Fritz Heimann, *The Long War Against Corruption*, FOREIGN AFF., May/June 2006, at 75–76.

also motivate firms.⁶ Under such a view, most multinational corporations should endeavor to comply with the law.⁷

A recent, dramatic increase in prosecutions under the Foreign Corrupt Practices Act (FCPA),⁸ however, may call into question whether most companies seeking government contracts overseas are, in fact, good corporate citizens. Against this backdrop of a rise in foreign bribery prosecutions in the United States, the global community is also taking an increased interest in criminalizing and prosecuting both domestic and foreign bribery. While many States have passed legislation to combat bribery pursuant to international agreements, an increase in foreign bribery enforcement need not be predicated on underlying statutory changes. The United States provides one such example. Although commentators disagree as to what factors have driven the expansion in foreign bribery enforcement,⁹ the U.S. Securities and Exchange Commission (SEC) has demonstrated that, regardless of the underlying cause of the increase, it clearly retains broad prosecutorial power and discretion in FCPA enforcement against both domestic and foreign corporations.

As the number of countries with statutes penalizing foreign bribery increases, and as those statutes often include provisions conferring extra-territorial jurisdiction, corporate officers increasingly face the risk of multiple sovereigns seeking penalties based on the same alleged corporate wrongdoing. In the United States, many questions regarding the FCPA remain unanswered due to the statute's vague language¹⁰ as well as a lack of judicial review resulting from irregular enforcement and an enforcement strategy focused on inducing settlements.¹¹

6. See, e.g., Carrington, *supra* note 3, at 120 (taking a skeptical view of business but conceding that "such laws [as the FCPA] imply a moral judgment, and businessmen are not immune to moral suasion").

7. *Id.*

8. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified and amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd(1)-(3), 78ff (2000)), amended by Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415 (1988) (codified at 15 U.S.C. §§ 78dd(1)-(3), 78ff (2000)), and International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at 15 U.S.C. §§ 78dd(1)-(3), 78ff (2000)).

9. See *infra* notes 70-76 and accompanying text.

10. See, e.g., Steven R. Salbu, *Information Technology in the War Against International Bribery and Corruption: The Next Frontier of Institutional Reform*, 38 HARV. J. ON LEGIS. 67, 89 n.161 (2001); Daniel Pines, Comment, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 195 (1994); Jennifer Dawn Taylor, Comment, *The Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption*, 61 LA. L. REV. 861, 871 (2001).

11. See STUART H. DEMING, *THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS* 6 (2005).

Cause for particular concern is the SEC's increasing use of the remedy of disgorgement of profits in FCPA settlements. Disgorgement, a penalty through which the SEC requires a corporation to forfeit any profits arising from illegal activity, has long been a remedy in the SEC's more typical securities fraud actions. However, the SEC's importation of disgorgement into the FCPA context in the wake of Sarbanes-Oxley (SOX),¹² despite the fact that Congress did not explicitly consider the increased use of the remedy for foreign bribery, raises significant questions.

Consider, for example, the case of Titan Corp., a San Diego-based defense contractor. Titan Corp.'s bribery charges arose from its payments of more than \$3.5 million to an intermediary in Benin for "consulting services," through which Titan Corp. then funneled more than \$2 million of those monies into Benin's presidential election to support then-President Mathieu Kérékou.¹³ Titan Corp. was seeking to curry favor with Benin's government to assist the company in its development of a telecommunications project in Benin and to obtain the Benin government's consent to an increase in the percentage of Titan Corp.'s project management fees for that project.¹⁴ In settling its FCPA liability with the SEC and the U.S. Department of Justice (DOJ), Titan Corp. agreed to pay a then record-setting \$28.5 million penalty, of which \$15.5 million represented disgorgement of profits and prejudgment interest.¹⁵ Because the disgorgement is agreed on through settlement, it is often impossible to examine how the SEC calculates the profits that it will disgorge in an individual case, but there are clearly extreme complexities and uncertainties in calculating such disgorgement based on, for example, an attempt to influence a foreign presidential election. Barring a smoking gun memo obtained from the foreign government describing a *quid pro quo*, how could the SEC ever prove that the payment of a certain amount resulted in a specific benefit based on the influence or perceived influence on a presidential election? What if President Kérékou had lost but Titan Corp. had still received the contract? Instead, Kérékou won by more than eighteen percent of the vote.¹⁶ Does the expected value of the bribe change depending on the closeness of the election? Should all Titan Corp. contracts in Benin have incurred FCPA disgorgement liability as

12. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C. (2000 & Supp. IV 2004)).

13. Sec. & Exch. Comm'n v. Titan Corp., SEC Litigation Release No. 19,107, 84 SEC Docket 3413 (Mar. 1, 2005).

14. *Id.*

15. *Id.* at 1.

16. African Elections Database, Election in Benin, http://africanelections.tripod.com/bj.html#2001_Presidential_Election (last visited Jan. 3, 2008).

long as Kérékou remained president? Unlike the typical securities fraud case, in which more certain disgorgement and profit calculations are possible,¹⁷ disgorgement is ill-suited to the foreign bribery context, in which some disgorgement calculations must necessarily resemble speculation or, at best, rough estimates.

This Note uses examples such as Titan Corp. to support the argument that there are reasons to question the United States' increasing reliance on disgorgement to enforce the FCPA. Despite obvious deterrence benefits, the SEC's quest for disgorgement of ill-gotten gains raises significant questions regarding extraterritoriality, proportionality, and evidentiary uncertainty. This Note looks to the history of the FCPA and both international anti-bribery agreements and foreign statutes implementing those agreements in arguing that U.S. and foreign regulators need to create a more certain, predictable enforcement climate as the number of foreign bribery enforcement actions continue to explode. Part I describes the FCPA, the U.S. statutory framework for combating foreign bribery, and details the international agreements that have become critical to international enforcement of a ban on foreign bribery in the preceding decade. Part II acknowledges the DOJ's and the SEC's increasing enforcement of the FCPA. It argues that commentators have failed to discuss one of the most marked changes in enforcement: the increasing importance of disgorgement in FCPA settlements. Indeed, this Note claims that such disgorgement now exceeds penalties sought under express, statutory fining authority. Part III emphasizes normative questions regarding such a shift in enforcement policy, arguing that neither retributivist nor utilitarian theories underlying disgorgement justify the kind of enforcement that is now occurring. It argues that, although the SEC has statutory authority to seek such disgorgement, it is questionable whether Congress foresaw the degree to which the SEC would emphasize disgorgement in FCPA enforcement. Finally, it examines issues of extraterritorial enforcement, proportionality, evidentiary difficulty, and prosecutorial discretion in claiming that the FCPA is a unique and potentially problematic context for disgorgement. It suggests that these problems related to disgorgement have the potential to result in retarding foreign direct investment in some emerging economies, rendering corporate growth more inefficient, and reducing effective competition.

17. One way, grossly simplified, to calculate disgorgement of profit is as follows: on Date X, Investor A has inside information that she uses to purchase a stock; Investor A sells the stock for a profit on Date Y; disgorgement from Investor A equals the difference of the stock prices on Dates X and Y. *See, e.g.,* Sec. & Exch. Reg. Comm'n v. Fischbach Corp., 133 F.3d 170, 173 (2d Cir. 1997); *W. Auto Supply Co. v. Gamble-Skogmo, Inc.*, 348 F.2d 736, 742-43 (8th Cir. 1965).

I. THE INTERNATIONAL FRAMEWORK FOR CORRUPTION AND FOREIGN BRIBERY: THE FOREIGN CORRUPT PRACTICES ACT AND THE INTERNATIONAL AGREEMENTS

In order to properly understand the role of disgorgement in the prosecution of foreign bribery cases, a background in both the U.S. statutory scheme and the international framework for criminalizing foreign bribery is necessary. Part I.A outlines the provisions of the FCPA and the penalties that the DOJ and the SEC can seek under the Act. Part II.B then describes the emerging international bribery norms and discusses the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention)¹⁸ and the U.N. Convention Against Corruption (UNCAC)¹⁹ which, in turn, form the backbone of many States' domestic anti-bribery legislation.

A. The U.S. Approach to the Bribing of Foreign Officials: The Foreign Corrupt Practices Act

It was not until 1977, in the turmoil surrounding Watergate, that Congress passed the FCPA as an amendment to the 1934 Securities Exchange Act.²⁰ While investigating Watergate and the related disclosures of the early 1970s, Congress discovered multiple incidents of illegal campaign contributions and money laundering through foreign countries.²¹ These discoveries led the SEC to initiate a voluntary disclosure program for foreign bribery, which uncovered more than 450 companies that had collectively made more than \$300 million in questionable foreign payments.²² The FCPA's focus on the parties that provided the payments—the supply-side actors of foreign bribery—was essentially

18. Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43, *reprinted in* 37 I.L.M. 1 (1998) [hereinafter OECD Convention].

19. Convention Against Corruption, G.A. Res. 58/422, Annex, U.N. Doc. A/58/422/Annex (Oct. 7, 2003), *reprinted in* 43 I.L.M. 37 (2004) [hereinafter UNCAC].

20. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified and amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)–(h), 78dd(1)–(3), 78ff (2000)), *amended by* Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415 (1988) (codified at 15 U.S.C. §§ 78dd(1)–(3), 78ff (2000)), and International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at 15 U.S.C. §§ 78dd(1)–(3), 78ff (2000)).

21. See Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. 593, 595 (2002).

22. *Id.*; see also Henry H. Rossbacher & Tracy W. Young, *The Foreign Corrupt Practices Act Within the American Response to Domestic Corruption*, 15 DICK. J. INT'L L. 509, 518 (1997) (claiming more than \$400 million in questionable foreign payments).

the first effort in the world to criminalize extraterritorial actions and foreign payments that large, multinational corporations paid to foreign officials.²³

Amended twice since its initial passage, the current FCPA is not identical to the original legislation,²⁴ although it does largely rely on the two-pronged approach to combat foreign corruption laid out in 1977. This approach first criminalizes bribery of foreign officials and, second, establishes accounting and record-keeping requirements.²⁵ The FCPA bribery prohibition begins: "It shall be unlawful . . . to . . . corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization giving anything of value."²⁶ The jurisdictional reach as to territory is explicitly universal, applying both to actions through the mail or other means of interstate commerce in the United States,²⁷ as well as to conduct that takes place exclusively in foreign countries without implicating interstate commerce.²⁸ The FCPA's record-keeping standards require,

23. Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT'L L. & COM. REG. 83, 87 (2007). The U.S. Securities and Exchange Commission (SEC) report indicated that such household names as Boeing, Lockheed Martin, and Gulf Oil had disclosed such payments. SEC, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (May 12, 1976), reprinted in Sec. Reg. & L. Rep. (BNA), No. 353 Special Supp. (May 19, 1976).

24. See Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified and amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd(1)-(3), 78ff (2000)), amended by Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415 (1988) (codified at 15 U.S.C. §§ 78dd(1)-(3), 78ff (2000)), and International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at 15 U.S.C. §§ 78dd(1)-(3), 78ff (2000)).

25. Compare *id.*, with International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at 15 U.S.C. §§ 78dd(1)-(3), 78ff (2000)). The bribery prohibition applies to "persons." 15 U.S.C. §§ 78dd(1)-(3). The record-keeping requirements apply only to "issuers," *id.* §§ 78m, 78dd-1, which the FCPA does not define. However, "it is clear from the usage that it refers to juridical persons or companies that have a class of securities registered pursuant to the amended Securities and Exchange Act of 1934." Thomas R. Snider & Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis*, 40 CORNELL INT'L L.J. 691, 701 (2007).

26. 15 U.S.C. § 78dd-1(a). For these offers to be unlawful, they need to be, first, made by an issuer or person; second, made to any "foreign official," "foreign political party or official thereof," or "any person" if the offeror knows that any portion of the offer will end up with a foreign official or foreign political party; third, made for the purpose of "influencing any act or decision" of the foreign official in his official capacity, inducing any action in violation of "the lawful duty of such foreign official," inducing a person to use her influence to affect an action from a foreign government, or "securing any improper advantage"; and, finally, made in an effort to assist in "obtaining or retaining business for or with, or directing business to, any person." *Id.* As to this general rule, the FCPA creates an exception for, *inter alia*, "facilitating" payments. 15 U.S.C. § 78dd-1(b). A discussion of these "facilitating payments" is beyond the scope of this Note, and will not be addressed.

27. 15 U.S.C. § 78dd-1(a).

28. See *id.* § 78dd-1(g).

inter alia, that issuers maintain their records in a detailed, accurate manner,²⁹ and that issuers must maintain a “system of internal accounting controls sufficient to provide reasonable assurances that” they will comply with regulations covering accounting standards and authorizations for expenditures.³⁰

In terms of enforcement, the DOJ and the SEC jointly prosecute the FCPA, with the SEC focusing on civil violations related to issuers and the DOJ concentrating on criminal violations.³¹ Historically, the SEC engaged in civil enforcement of the accounting and record-keeping provisions and was less active in enforcement of the bribery provisions,³² although this inactivity began to change in the late 1990s,³³ particularly following the Enron scandal.³⁴ The agencies often work together to bring parallel criminal and civil proceedings against the same party.³⁵ 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.³⁶

In addition to the criminal penalties that the DOJ may bring against a party,³⁷ the SEC retains a great deal of discretion in deciding which civil enforcement actions to bring against issuers as well as the appropriate level and type of penalties—fines, injunctions, or both—to seek in an action.³⁸ The SEC will often follow a “zero tolerance” policy in the case of companies that violate both the bribery and record-keeping provisions, but it has shown more willingness to work with companies that implement prompt and effective remedial measures.³⁹ The SEC may also obtain—and increasingly seeks—disgorgement of profits, which is discussed in detail below.⁴⁰ Finally, the SEC is increasing its use of settlements to resolve civil liabilities in conjunction with the DOJ’s corresponding increased use of deferred prosecution agreements (DPAs)

29. *Id.* § 78m(b)(2).

30. *Id.* § 78m(2).

31. DEMING, *supra* note 11, at 41. The U.S. Department of Justice (DOJ) also handles civil enforcement not related to issuers. *Id.*

32. *Id.*

33. For a discussion of why the enforcement strategy may have changed, see *infra* notes 70–76 and accompanying text.

34. DEMING, *supra* note 11, at 41.

35. *Id.* at 42.

36. See Paul V. Gerlach & George B. Parizek, *The SEC’s Enforcement of the Foreign Corrupt Practices Act*, in 3 FOREIGN CORRUPT PRACTICES ACT REPORTER 14–1, 14–3 (West, 2d ed. 2008).

37. See 15 U.S.C. §§ 78dd–2(g)–3(e), 78ff(a), 78ff(c)(1)(A)–(2)(A). Criminal fines can also be significantly higher under alternative sentencing provisions, equaling twice the criminal’s gross gain. See DEMING, *supra* note 11, at 43 (citing 18 U.S.C. § 3571(d)).

38. DEMING, *supra* note 11, at 44; see 15 U.S.C. §§ 78u, 78u–3.

39. DEMING, *supra* note 11, at 44.

40. See discussion *infra* Part II.A.

and non-prosecution agreements (NPAs), through which the DOJ and the SEC obtain structural reform settlements as part of agreements not to pursue civil penalties or criminal charges.⁴¹

B. *International Approaches to the Bribing of Foreign Officials*

Although U.S. Secretary of Commerce Elliot Richardson called for an international treaty on foreign bribery in 1976,⁴² the United States was alone in administering an enforcement regime against such bribery throughout the 1970s and 1980s.⁴³ In 1988, however, a series of amendments to the FCPA⁴⁴ spawned renewed interest in foreign corruption and bribery, and international activity on these fronts increased.⁴⁵ For the purposes of this Note, the two key agreements that have affected implementing legislation criminalizing foreign bribery are the 1997 OECD Convention⁴⁶ and the UNCAC, which the States Parties adopted in 2003 and which entered into force in December 2005.⁴⁷

The United States had pushed for the OECD Convention since the passage of the FCPA in 1977,⁴⁸ a strategy vindicated by the powerful effect that the OECD Convention has had on foreign legislation criminalizing foreign bribery. The OECD Convention broadly echoes the prohibitions of the FCPA, requiring the domestic criminalization of

41. See Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 860, 886, 890 (2007).

42. *Foreign Payments Disclosure: Hearings Before the Subcomm. on Consumer Protection & Finance of the Comm. on Interstate & Foreign Commerce*, 94th Cong., 2d. Sess., at 40, 46 (1976) (report of Richardson Task Force).

43. See Lucinda A. Low et al., *The Inter-American Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act*, 38 VA. J. INT'L L. 243, 245 (1998).

44. See Foreign Corrupt Practices Act Amendments of 1988 (part of Omnibus Competitiveness Act of 1988), Pub. L. No. 100-418, 102 Stat. 1107, 1415 (1988).

45. DEMING, *supra* note 11, at 93.

46. OECD Convention, *supra* note 18.

47. UNCAC, *supra* note 19. At the time that this Note went to press, 140 States had signed the Convention, and 116 had ratified it. See U.N. Office on Drug & Crimes, United Nations Convention Against Corruption, Signatories to the United Nations Convention Against Corruption, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited Feb. 20, 2009). Other international agreements on foreign bribery include regional instruments by the Organization of American States and the African Union. See African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5 (2004); Organization of American States [OAS], Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724 (1996).

48. From the calls for an international agreement on bribery in the 1970s, see *supra* note 43 and accompanying text, to the 1988 statement by the U.S. Congress encouraging the President to pursue such an agreement with the Organisation for Economic Co-operation and Development (OECD), Foreign Corrupt Practices Act Amendments of 1988, 5003(d), Pub. L. No. 100-418, 102 Stat. 1415 (1988), (codified at 15 U.S.C. § 78dd (2000)), U.S. policymakers have often stated such a goal. But, European resistance was more entrenched than political will within any U.S. presidential administration. See Schroth, *supra* note 21, at 610.

bribery, attempted bribery, or conspiracy to commit bribery, as well as including accounting provisions similar to those in the FCPA.⁴⁹ The OECD Convention also lays out broad requirements of domestic implementing legislation, which include that “bribery of a foreign public official shall be punishable by effective, *proportionate* and dissuasive criminal penalties.”⁵⁰ Each implementing State must also “take such measures as may be necessary to provide that the bribe *and the proceeds of the bribery* of a foreign official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.”⁵¹ Whether and how retribution and deterrence goals for this international bribery regime are actually reached is a difficult question, however, because the OECD Convention requires implementing legislation, which OECD Member States have only recently begun to pass.⁵²

The increasing coalescence around agreements criminalizing foreign bribery contributed to the enactment of the most comprehensive corruption treaty in the world: the UNCAC.⁵³ The UNCAC specifically, and in detail, addresses private sector transnational bribery. It requires each State Party to adopt legislation criminalizing the intentional offering or giving of a bribe to both national and foreign public officials as well as the solicitation or acceptance of a bribe by a national official.⁵⁴ The UNCAC also provides more detail as to punishment and enforcement than any of the other international corruption and bribery instruments, including requirements as to domestic enforcement and international

49. OECD Convention, *supra* note 18, art. 8.

50. *Id.* art. 3, para. 1 (emphasis added).

51. *Id.* art. 3, para. 3 (emphasis added). The official Commentaries clarify paragraph three of Article 3 in the following way:

21. The “proceeds” of bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.

22. The term “confiscation” includes forfeiture where applicable and means the permanent deprivation of property by order of a court or other competent authority. This paragraph is without prejudice to the rights of victims.

OECD, *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD Doc. DAF/FE/IME/BR(97) 20, at 9 (Nov. 21, 1997).

52. See, e.g., Corruption of Foreign Public Officials Act, 1998 S.C., ch. 34 (Can.); see also Kenneth W. Abbott & Duncan Snidal, *Value and Interests: International Legalization in the Fight Against Corruption*, 31 J. LEGAL STUD. 141, 143–44 (2002); *infra* Part II.B.

53. Kenneth B. Reisenfeld, *Policy on Convention Against Corruption*, 2005 A.B.A. SEC. INT’L L. REP. 2 (2005), available at http://www.abanet.org/intlaw/policy/crime/extradition/conventioncorruption08_05.pdf (last visited Feb. 23, 2009).

54. See UNCAC, *supra* note 19, arts. 15–16.

cooperation.⁵⁵ The Convention requires that each State Party, “to the greatest extent possible,” take measures to achieve disgorgement of the profits from illegal bribery and other forms of corruption.⁵⁶ While the UNCAC requires international cooperation “as appropriate,”⁵⁷ it essentially approves of universal jurisdiction for each State Party over offences that are covered by that party’s domestic law.⁵⁸

II. THE EVOLVING ENFORCEMENT AGAINST INTERNATIONAL BRIBERY

While any U.S. statute may be subject to occasional waxing and waning enforcement, the recent changes in FCPA enforcement are quantifiable and significant. The changes represent a dramatic shift in the way in which the DOJ and the SEC enforce the FCPA. In addition, the changes in foreign statutes and foreign enforcement have occurred simultaneously with the shift in U.S. enforcement. When considered alongside the SEC’s increased enforcement,⁵⁹ these foreign actions raise important questions about the goals and structure of a patchwork of national statutes and international agreements meant to combat the same conduct: international bribery.

Part II.A argues that the SEC’s pursuit of disgorgement in FCPA prosecutions represents a fundamental shift in U.S. enforcement policy. Part II.B then details an under-documented issue in foreign bribery enforcement:⁶⁰ foreign implementing legislation and the even more recent foreign enforcement actions that have arisen under those statutes, and without which the foreign statutes would be ineffective. It claims that, while foreign enforcement is in its relative infancy, the recent growth in the number of these actions is a trend that will continue and that may eventually create a risk of redundant enforcement.⁶¹

55. Snider & Kidane, *supra* note 25, at 706–07, 709.

56. It defines such proceeds as, “(a) [p]roceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds; (b) [p]roperty, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.” UNCAC, *supra* note 19, art. 31(1). The provisions covering domestic enforcement also address prosecutorial discretion, requiring that prosecutions “take into account the gravity of that offence.” *Id.* art. 30(1); *see also id.* art. 31(3).

57. *See id.* art. 42(5)–(6).

58. *Id.* art. 42(7).

59. *See* discussion *infra* Part II.A.

60. *See, e.g.,* Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1450 (2008).

61. Burger & Holland, *supra* note 3, at 52.

A. *The Unprecedented Enforcement of the FCPA and the SEC's Increased Efforts to Disgorge*

The level of FCPA enforcement has increased significantly in recent years. Traditionally both the DOJ and the SEC engaged in minimal enforcement of the FCPA.⁶² Indeed, from 1978 to 2000, the SEC and the DOJ averaged approximately three FCPA prosecutions per year,⁶³ and the rare case that went to trial typically resulted in minimal penalties.⁶⁴ The average number of investigations for 2003 to 2009, however, was approximately twenty per year and trending upwards.⁶⁵ Furthermore, the enforcement climate was characterized by a “frenetic pace” of enforcement.⁶⁶ In addition to an increase in the number of FCPA investigations, the typical form of resolution has also changed. Across all DOJ investigations—not just those under the FCPA—the number of settlements between defendants and the DOJ has grown substantially since 2002.⁶⁷ These settlements are typically memorialized as non-prosecution agreements or deferred prosecution agreements, depending on whether the DOJ is permanently agreeing not to prosecute or is doing so contingent on future good behavior. From 2002 through 2005 the number of NPAs and DPAs exceeded the total number that the DOJ entered into in the ten years previous,⁶⁸ and FCPA enforcement has been no exception.⁶⁹

62. *Id.* at 44.

63. *See* Huskins, *supra* note 60, at 1449 (citing Eugene R. Erbstoesser, John H. Struc & John W.F. Chesley, *The FCPA and Analogous Foreign Anti-Bribery Laws—Overview, Recent Developments, and Acquisition Due Diligence*, 2 CAP. MARKETS L.J. 381, 386 (2007)).

64. *Id.* Commentators noted the lack of enforcement during this period. *See, e.g.*, Carington, *supra* note 3, at 116.

65. *See* SHEARMAN & STERLING LLP, RECENT TRENDS AND PATTERNS IN FCPA ENFORCEMENT (as of February 13, 2008) 2 (2008), http://www.shearman.com/files/upload/FCPA_Trends.pdf (last visited Feb. 20, 2009) [hereinafter SHEARMAN & STERLING FCPA TRENDS 2008]. In addition, the level of notices and publications from law firms regarding FCPA compliance was exceptionally high during 2007 and 2008. *See, e.g.*, Timothy L. Dickinson, *The Foreign Corrupt Practices Act: Implementing a Compliance Program in the Real World*, 1665 PRACTISING L. INST. 249 (2008); Colleen P. Mahoney, *Foreign Private Issuers and the U.S. Foreign Corrupt Practices Act*, 1601 PRACTISING L. INST. 773 (2007).

66. Gibson, Dunn & Crutcher LLP, 2008 Mid-Year FCPA Update, (July 07, 2008), <http://www.gibsondunn.com/Publications/Pages/2008Mid-YearFCPAUpdate.aspx> [hereinafter Gibson, Dunn 2008 Mid-Year FCPA Update]; SHEARMAN & STERLING FCPA TRENDS 2008, *supra* note 65, at 2; *see also* Bookman, *supra* note 2, at 753.

67. *See* Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 1–3 (2006).

68. *Id.* Since 2002, the total number of these agreements that the DOJ has entered into has continued to increase. *See* Erik Paulsen, Note, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1435–36 (2007).

69. *See* DANFORTH NEWCOMB & PHILIP UROFSKY, SHEARMAN & STERLING LLP, FCPA DIGEST OF CASES AND REVIEW RELEASES RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977 (as of February 13, 2008) 2 (2008), available at http://www.shearman.com/files/upload/FCPA_Digest.pdf. The DOJ and the SEC have also increasingly relied on corporate monitors as a term of non-prosecution agreements

While no detailed, quantitative study has attempted to explain the reasons for the increase in FCPA enforcement, a number of commentators have pointed to various factors, although it is likely that the reason for the rise in enforcement is a combination of statutory, political, and international events. Some observers claim that the increase in FCPA enforcement was triggered by the scandals surrounding Enron and WorldCom in 2001 and 2002, which did not involve foreign bribery but increased government scrutiny of corporate behavior in general.⁷⁰ A related view focuses on the corporations' self-reporting, claiming that, particularly in the wake of increased government scrutiny of corporate accounting following the passage of SOX,⁷¹ firms have brought violations to the attention of the DOJ and the SEC in the hope that such conduct will gain leniency from regulators.⁷² Under this view, SOX and the heightened awareness of compliance and penalties for non-compliance have motivated corporations to make voluntary disclosures. A second explanation of increased enforcement claims that the commissioners and professional staff of the modern SEC simply emphasize different enforcement priorities and are willing to settle cases as part of DPAs. That is, "the SEC is a very different agency today than it was even in the recent past."⁷³ A related, partial explanation is that enforcement resources have increased.⁷⁴ A third potential reason for increased enforcement is the DOJ's and the SEC's increased self-awareness of prosecutorial goals, directives, and policy in the wake of recent DOJ memoranda regarding factors to be weighed in deciding whether to charge corporations with criminal acts.⁷⁵ Finally, a potential fourth factor

(NPAs) or deferred prosecution agreements (DPAs) to ensure ongoing compliance. See Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar*, 105 MICH. L. REV. 1713 (2007).

70. See, e.g., DEMING, *supra* note 11, at 41.

71. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C. (2000 & Supp. IV 2004)).

72. Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components and U.S. Att'ys (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speeches/mcnulty_memo.pdf [hereinafter McNulty Memo]; Huskins, *supra* note 60, at 1449.

73. Gregory S. Bruch, A.B.A. Ctr. for Continuing Legal Educ., Nat'l Inst., *Recent SEC Foreign Payment Cases and the Road Ahead Under the New SEC Leadership* (Mar. 21-22, 2002).

74. See William F. Pendergast & Nisa Gosselink-Ulep, Paul, Hastings, Janofsky & Walker LLP, *The Foreign Corrupt Practices Act 2008: Coping with Heightened Enforcement Risks*, 1665 PRACTISING L. INST. 113, 156 (2008).

75. See generally Khanna & Dickinson, *supra* note 69 (discussing the increased use of corporate monitors). One such memorandum, "Federal Prosecution of Corporations," which subsequently became known as the "Holder Memo," set out eight factors for federal prosecutors to consider in deciding whether to bring a case against a corporation. Memorandum from Eric Holder, Jr., Deputy Att'y Gen., U.S. Dep't of Justice, to All Component Heads and U.S. Att'ys (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/docs/reports/>

is that the global community's acceptance of international agreements against bribery has enabled increased aggressiveness on the part of U.S. enforcement agencies for reasons of both cultural sensitivity and cooperation.⁷⁶

These changes in the enforcement environment have brought about not only a marked increase in prosecutions, but also a corresponding increase in the value of settlements arising from FCPA violations. Part of the increase arises simply from the larger number of FCPA investigations,⁷⁷ but the average penalty in each case is also increasing,⁷⁸ with penalties in many recent cases reaching tens of millions of dollars.⁷⁹

The SEC's increasing activity on the anti-bribery front and the SEC's rapidly expanding use of the remedy of disgorgement of profits are significant factors in this trend. In the FCPA's first decade, the SEC initiated only three anti-bribery cases under the Act.⁸⁰ During this period, the SEC typically focused on the accounting and record-keeping provisions of the Act, not seeking disgorgement of profits, and leaving enforcement of anti-bribery provisions to the DOJ.⁸¹ Although the SEC's minimal enforcement of the anti-bribery provisions of the FCPA began to change toward the end of the 1990s,⁸² it was not until 2004 that the SEC first required disgorgement of profits as a result of the payment of a foreign bribe.⁸³ That "the practice appears to have become standard

1999/chargingcorps.html [hereinafter Holder Memo]; Khanna & Dickinson, *supra* note 69, at 1719. The "Thompson Memo," the "McNulty Memo," and the "Filip Memo" have updated the Holder Memo, supporting the idea that increased self-awareness of decisions to prosecute corporations may be a factor in the increased level of prosecution. See McNulty Memo, *supra* note 72; Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Components and U.S. Att'ys (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter Thompson Memo]; Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, *Principles of Federal Prosecution of Business Organizations* (Aug. 28, 2008), available at <http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf> [hereinafter Filip Memo].

76. See, e.g., Thomas McVey & Carole Basri, *International Business Risks Increase*, N.Y. L.J., May 10, 1999, at S3. In support of this theory is the claim of Peter Clark, former Deputy Chief of the Fraud Section of the DOJ, that the OECD's language on international cooperation would result in a "new era of prosecution." *Id.*

77. See *supra* note 66 and accompanying text.

78. See NEWCOMB & UROFSKY, *supra* note 69, at 5.

79. See *infra* notes 90-96 and accompanying text.

80. See Huskins, *supra* note 60, at 1449.

81. See *supra* note 33 and accompanying text.

82. See DEMING, *supra* note 11, at 41.

83. See Gibson, Dunn & Crutcher LLP, 2006 Year-End FCPA Update, (Feb. 7, 2007), <http://www.gibsondunn.com/publications/pages/2006YearEndFCPAUpdate.aspx> [hereinafter Gibson, Dunn 2006 Year-End FCPA Update]; see also JEFFREY P. BIALOS & GREGORY HUSAIN, *THE FOREIGN CORRUPT PRACTICES ACT 49-57 (1997)* (detailing enforcement under the FCPA but neglecting to discuss disgorgement).

fare”⁸⁴ has greatly contributed to the marked increase in total penalties in FCPA enforcement cases.

The SEC can support its pursuit of disgorgement under broad equitable principles or statutory authorization. Disgorgement is an equitable concept that has existed in Exchange Act jurisprudence for decades. The first case using the word “disgorgement” for violations of Rule 10b-5 stated: “[I]t is simple equity that a wrongdoer should disgorge his fraudulent enrichment.”⁸⁵ While disgorgement can serve deterrence purposes, it is intended not to compensate the wronged party or to serve as a complete stand-in for the deterrent effects of fining, but to recover the benefits of a wrongful act.⁸⁶ Although a longstanding equitable tool, disgorgement was used relatively sparingly by the SEC until the passage of SOX, which is also, now, a part of the Exchange Act.⁸⁷ In addition, the SEC is statutorily authorized to seek disgorgement of ill-gotten gains

84. Gibson, Dunn 2006 Year-End FCPA Update, *supra* note 83. This trend has been noticed but not discussed by commentators. *See, e.g.*, Krever, *supra* note 23, at 96. The number of academic articles that mention FCPA disgorgement without any discussion is revealing. *See* John Hatchard, *Recent Developments in Combating the Bribery of Foreign Public Officials: A Cause for Optimism?*, 85 U. DET. MERCY L. REV. 1, 27 (2007); Huskins, *supra* note 60, at 1449; *Justice and SEC Settle Cases Involving U.S. and Foreign Corporate Kickbacks Under UN Oil-for-Food Program*, 102 AM. J. INT’L L. 352 (2008); Mike Koehler, *A Malady in Search of a Cure—The Increase in FCPA Enforcement Actions Against Health-Care Companies*, 38 U. MEM. L. REV. 261, 280 (2008); Mike Koehler, *The Unique FCPA Compliance Challenges of Doing Business in China*, 25 WIS. INT’L L.J. 397, 414 (2007); Krever, *supra* note 23, at 95; Ned Sebelius, *Twenty-Third Survey of White Collar Crime, Foreign Corrupt Practices Act*, 45 AM. CRIM. L. REV. 579, 598 (2008); Peter Spivack & Sujit Raman, *Regulating the “New Regulators”: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, app. (2008). *But 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 (2007) (citing 15 U.S.C. § 78ff(c) (2000)). While some publications of the defense bar have given slightly more attention to disgorgement, as recently as 2007, they failed to discuss the degree to which the use of disgorgement has increased, the propriety of the punishment, and how such disgorgement fits into an increasingly internationalized foreign bribery enforcement regime. *See, e.g.*, Edward J. Fishman & Jeffrey B. Maletta, K&L Gates, *FCPA Enforcement Activity and Severity of Penalties Relating to Business Activities in China Likely to Increase Dramatically As Global Trade with China Surges to Record Levels* (Feb. 2007), <http://www.klgates.com/newsstand/Detail.aspx?publication=3580> (last visited Feb. 20, 2009); Gibson, Dunn 2008 Mid-Year FCPA Update, *supra* note 66; Gibson, Dunn 2006 Year-End FCPA Update, *supra* note 83; Nina Gross & Edward Rial, *The Foreign Corrupt Practices Act 2008: Coping with Heightened Enforcement Risks*, 1665 PRACTISING L. INST. 309, 312 (2008); NEWCOMB & UROFSKY, *supra* note 69, at 5–6, 10; William Pendergast, Matthew R. Fowler & Jennifer D. Riddle, Paul, Hastings, Janofsky & Walker LLP, *Some Comments About Recent and Future FCPA Enforcement*, 1588 PRACTISING L. INST. 165, 177 (2007); Pendergast & Gosselink-Ulep, *supra* note 74; SHEARMAN & STERLING FCPA TRENDS 2008, *supra* note 65, at 5, 10.

85. *Janigan v. Taylor*, 344 F.2d 781, 786 (1st Cir. 1965) (citations omitted).

86. *See* Sec. & Exch. Reg. Comm’n v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 102 (2d Cir. 1978).

87. Elaine Buckberg & Frederick C. Dunbar, *Disgorgement: Punitive Damages and Remedial Offers*, 63 BUS. LAW. 347 (2008).

pursuant to the Penny Stock Reform Act of 1990,⁸⁸ although, in practice, the FCPA has recently been the statute that the SEC typically invokes when it seeks to disgorge profits. Because the SEC's enforcement of the FCPA derives from the fact that the record-keeping prong of that statute amended the Exchange Act,⁸⁹ the SEC has used the full range of remedies available in securities actions in enforcing the FCPA despite the fact that Congress explicitly provided for fining remedies in the FCPA itself. As one commentator noted, "The propriety and legality of this remedy have not been tested in the courts."⁹⁰

While the SEC eschewed disgorgement of profits for the first twenty-seven years of FCPA enforcement, it has garnered an impressive list of disgorgement in the last five years. After first disgorging the profits of a corporation charged with foreign bribery in 2004,⁹¹ the SEC quickly ramped up this form of enforcement in March 2005 with its action, discussed above, against Titan Corp.⁹² The years 2006 and 2007 saw record-setting enforcement actions and penalties garnered by the SEC, and 2007 was the first year in which disgorgement actually eclipsed all other types of penalties against corporations for violations of the anti-bribery provisions of the FCPA.⁹³ In 2008, disgorgement continued to be

88. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, §§ 202(a), 203, 104 Stat. 931 (codified at 15 U.S.C. §§ 78u-2(e), 78u-3(e) (2000)).

89. DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 2-2 (2006).

90. See Doty, *supra* note 84, at 1235 n.13.

91. In 2004, ABB Vetco Gray, Inc., agreed to \$5.9 million in disgorgement and pre-judgment interest—in a total \$16.4 million settlement—as part of a DPA. Sec. & Exch. Comm'n v. ABB Ltd., SEC Litigation Release No. 18,775, 83 SEC Docket 849 (July 6, 2004).

92. See *supra* notes 13-17 and accompanying text. In addition to Titan Corp., in 2005, Diagnostics Products Corp. agreed to approximately \$2.8 million in disgorgement as part of a \$4.8 million DPA settlement, *In re Diagnostic Prods. Corp.*, SEC Administrative Proceeding File No. 3-11933 (May 20, 2005), and DPC (Tianjin) Co. Ltd. agreed to \$2.8 million in disgorgement as part of a \$4.8 million DPA settlement, *NEWCOMB & UROFSKY*, *supra* note 69, at 42.

93. In 2006, the SEC increased the number of disgorgement enforcement actions by sixty percent. In that year, Schnitzer Steel Industries, Inc., agreed to \$7.7 million in disgorgement as part of a \$15.2 million DPA settlement, *In re Schnitzer Steel Indus., Inc.*, SEC Administrative Proceeding File No. 3-12456 (Oct. 16, 2006), and Statoil ASA agreed to \$10.5 million in disgorgement as part of a \$21 million DPA settlement. Press Release, U.S. Sec. & Exch. Comm'n, SEC Sanctions Statoil for Bribes to Iranian Government Official (Oct. 13, 2006). The SEC more than doubled the number of enforcement actions in 2007. See Gibson, Dunn 2008 Mid-Year FCPA Update, *supra* note 66. In a settlement that eclipsed the value of the Titan settlement, Baker Hughes Inc. agreed to \$23 million in disgorgement as part of a NPA settlement of more than \$44 million arising out of its illegal payments to two agents in efforts to win oil field contracts in Kazakhstan and other countries. Sec. & Exch. Comm'n v. Baker Hughes Inc. & Roy Fearnley, SEC Litigation Release No. 20,094, 90 SEC Docket 1369 (Apr. 26, 2007). Other large disgorgement payments arose from illegal payments made in relation to the U.N. Oil-for-Food program in Iraq. See, e.g., Sec. & Exch. Comm'n v. Chevron

the dominant form of SEC penalty for FCPA violations, as the SEC shattered all previous penalty levels, enforcing more than \$381 million in disgorgement.⁹⁴ This exponential increase in disgorgement was due largely to Siemens AG's agreement to pay more than \$800 million in U.S. penalties—part of the more than \$1.6 billion worldwide settlement—to close an investigation arising from its “unprecedented” failure to supervise its officers and employees at many levels and throughout the world.⁹⁵ While Siemens is a new high-water mark and a clear outlier from previous settlements—indeed it eclipses all other FCPA settlements in history, combined—it is likely that settlements similarly dwarfing the pre-Siemens record will arise in the near future.⁹⁶ These SEC settlements of FCPA cases leave no doubt that disgorgement of profits is a new and critical trend in the U.S. foreign bribery enforcement regime.⁹⁷

Corp., SEC Litigation Release No. 20,363, 91 SEC Docket 2696 (Nov. 14, 2007) (Chevron's agreement to \$25 million in disgorgement as part of a total \$30 million DPA settlement); Sec. & Exch. Comm'n v. El Paso Corp., SEC Litigation Release No. 19,991, 89 SEC Docket 3020 (Feb. 7, 2007) (El Paso Corp.'s agreement to approximately \$5.5 million in disgorgement as part of a total NPA settlement of more than \$7.7 million); Sec. & Exch. Comm'n v. York Int'l Corp., SEC Litigation Release No. 20319, 91 SEC Docket 2139 (Oct. 1, 2007) (York International's agreement to \$10 million in disgorgement as a part of a total \$22 million DPA settlement).

94. See, e.g., Sec. & Exch. Comm'n v. Fiat S.P.A. & CNH Global N.V., SEC Litigation Release No. 20,835 (Dec. 22, 2008) (Fiat S.p.A. and CNH Global N.V. agreed to approximately \$7.2 million in disgorgement as part of a total DPA settlement of approximately \$17.8 million); Sec. & Exch. Comm'n v. Siemens AG, SEC Litigation Release No. 20,829 (Dec. 15, 2008) (Siemens AG agreed to approximately \$350 million in disgorgement as part of a total U.S. settlement of approximately \$800 million); *In re Faro Techs., Inc.*, SEC Administrative Proceeding File No. 3-13059 (June 5, 2008) (Faro Technologies, Inc., agreed to approximately \$1.8 million in disgorgement as part of a total NPA settlement of approximately \$2.9 million); Sec. & Exch. Comm'n v. Willbros Group, Inc., et al., SEC Litigation Release No. 20,571, 93 SEC Docket 723 (May 14, 2008) (Willbros Group, Inc. agreed to approximately \$10.3 million in disgorgement as part of a DPA settlement of approximately \$32.3 million); Sec. & Exch. Comm'n v. AB Volvo, SEC Litigation Release No. 20,504, 92 SEC Docket 2804 (Mar. 20, 2008) (AB Volvo agreed to approximately \$8.6 million in disgorgement as part of a total DPA settlement of approximately \$19.6 million); Sec. & Exch. Comm'n v. Flowserve Corp., SEC Litigation Release No. 20,461, 92 SEC Docket 1999 (Feb. 21, 2008) (Flowserve Corp. agreed to approximately \$3.2 million in disgorgement as part of a DPA settlement of approximately \$10.5 million); *In re Westinghouse Air Brake Techs. Corp.*, SEC Administrative Proceeding File No. 3-12957 (Feb. 14, 2008) (Westinghouse Air Brake Technologies Corp. agreed to approximately \$289,000 in disgorgement as part of a \$675,000 DPA settlement).

95. See Press Release, DOJ, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008); Sec. & Exch. Comm'n v. Siemens AG, SEC Litigation Release No. 20,829 (Dec. 15, 2008).

96. Gibson, Dunn & Crutcher LLP, 2008 Year-End FCPA Update (Jan. 5, 2009), <http://www.gibsondunn.com/Publications/Pages/2008Year-EndFCPAUpdate.aspx> [hereinafter Gibson, Dunn 2008 Year-End FCPA Update].

97. Some corporate counsels are finally recommending that “the disgorgement of profits[] should get the attention of most general counsel and chief compliance officers.” *Why The*

This change in the United States has taken place against the backdrop of SOX, but without a change in statutory authority specifically addressed to foreign bribery cases. Yet, the increase in U.S. enforcement arises at the same time that other sovereigns are becoming increasingly active in the foreign bribery arena, raising questions about which penalties are statutorily authorized and normatively preferable for foreign bribery cases. Such normative analysis must necessarily include consideration of the evolving prohibition of international bribery pursuant to the international conventions discussed above.⁹⁸

B. Foreign Enforcement

The decade beginning in 2000 has marked the first period in history that many States have operated under ratified international agreements to control corruption and transnational bribery. The challenge in analyzing implementing legislation passed under the UNCAC and the OECD Convention, however, is that, while these statutes purport to implement the same agreements, the divergence in the legislative approaches to such implementation is significant. While some foreign statutes track the FCPA quite closely,⁹⁹ others do not. The Hungarian Criminal Code, for example, prohibits bribery of a foreign official and establishes penal sanctions for such bribery pursuant to the OECD Convention; however, the bribing party is not subject to punishment if she feared unlawful disadvantage for refusing to offer the bribe.¹⁰⁰ Such a loophole allows the precise conduct that the FCPA was designed to prohibit.

A canvass of the existing foreign statutes under the OECD Convention reveals that codification of laws against foreign bribery is a relatively new and widespread trend in response to the international agreements discussed above. A first wave of States enacting such legislation, including Canada and Germany, passed implementing legislation shortly following the entry into force of the OECD Convention.¹⁰¹ In

Foreign Corrupt Practices Act Is High on Everyone's Radar Screen, METRO. CORP. COUNS., Dec. 2007, at 19.

98. See discussion *supra* Part I.B.

99. See, e.g., Corruption of Foreign Public Officials Act, 1998 S.C., ch. 34 (Can.).

100. BüntetőTörvénykönyv [BTK] [Penal Code], Title VIII, § 258B, para. 3 (Hung.), translated in 3 FOREIGN CORRUPT PRACTICES ACT REPORTER app. E-51, E-53 (West, 2d ed. 2008).

101. See Corruption of Foreign Public Officials Act, 1998 S.C., ch. 34 (Can.). For a general explanation of Canada's analogue to the FCPA, see Dep't of Justice, *The Corruption of Foreign Public Officials Act A Guide* (1999) (Can.), available at <http://www.justice.gc.ca/eng/dept-min/pub/cfpoa-lcape/index.html> (last visited Feb. 20, 2009); see also OECD, Directorate for Fin., Fiscal & Enter. Aff., Germany: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 5, para. 7 (June 4, 2003), available at <http://www.oecd.org/dataoecd/>

2000 and 2001, thirteen countries, including France and Japan,¹⁰² passed

52/9/2958732.pdf [hereinafter OECD, Germany: Phase 2 Report]. The other States in this first wave included the Czech Republic, Finland, Greece, Hungary, Iceland, Korea, Mexico, Norway, Slovakia, and Sweden. See OECD, Directorate for Fin., Fiscal & Enter. Aff., Czech Republic: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 8, para. 14 (Oct. 27, 2006), available at <http://www.oecd.org/dataoecd/3/59/37727436.pdf> [hereinafter OECD, Czech Republic: Phase 2 Report]; OECD, Finland Review of Implementation of the Convention and 1997 Recommendation, at 1, available at <http://www.oecd.org/dataoecd/14/20/2386203.pdf> [hereinafter OECD, Finland Review of Implementation]; OECD, Directorate for Fin., Fiscal & Enter. Aff., Greece: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 7, para. 13 (Apr. 26, 2005), available at <http://www.oecd.org/dataoecd/5/13/35140946.pdf> [hereinafter OECD, Greece: Phase 2 Report]; OECD, Directorate for Fin., Fiscal & Enter. Aff., Hungary: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 4, para. 1 (May 6, 2005), available at <http://www.oecd.org/dataoecd/39/34/34918600.pdf> [hereinafter OECD, Hungary: Phase 2 Report]; OECD, Directorate for Fin., Fiscal & Enter. Aff., Iceland: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 4, para. 1 (Feb. 24, 2003), available at <http://www.oecd.org/dataoecd/12/8/2498248.pdf> [hereinafter OECD, Iceland: Phase 2 Report]; OECD, Directorate for Fin., Fiscal & Enter. Aff., Korea: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 7, para. 12 (Nov. 5, 2004), available at <http://www.oecd.org/dataoecd/17/13/33910834.pdf> [hereinafter OECD, Korea: Phase 2 Report]; OECD, Directorate for Fin., Fiscal & Enter. Aff., Mexico: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 3, para. 1 (Sept. 2, 2004), available at <http://www.oecd.org/dataoecd/5/31/33746033.pdf> [hereinafter OECD, Mexico: Phase 2 Report]; OECD, Directorate for Fin., Fiscal & Enter. Aff., Norway: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 6, para. 12 (Apr. 12, 2004), available at <http://www.oecd.org/dataoecd/3/28/31568595.pdf> [hereinafter OECD, Norway: Phase 2 Report]; OECD, Directorate for Fin., Fiscal & Enter. Aff., Slovak Republic: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 7, para. 11 (Nov. 9, 2005), available at <http://www.oecd.org/dataoecd/28/15/35778308.pdf> [hereinafter OECD, Slovak Republic: Phase 2 Report]; OECD, Directorate for Fin., Fiscal & Enter. Aff., Sweden: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 7 n.1 (Sept. 21, 2005), available at <http://www.oecd.org/dataoecd/20/8/35394676.pdf> [hereinafter OECD, Sweden: Phase 2 Report].

102. OECD, Directorate for Fin., Fiscal & Enter. Aff., France: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in

legislation implementing the OECD Convention and explicitly prohibiting foreign bribery.¹⁰³ In addition, the attacks of September 11, 2001,

International Business Transactions, at 5, para. 1 (Jan. 22, 2004), *available at* <http://www.oecd.org/dataoecd/36/36/26242055.pdf> [hereinafter OECD, France: Phase 2 Report]; OECD, Directorate for Fin., Fiscal & Enter. Aff., Japan: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 8–9, para. 24 (Mar. 7, 2005), *available at* <http://www.oecd.org/dataoecd/34/7/34554382.pdf> [hereinafter OECD, Japan: Phase 2 Report].

103. The States included Denmark, Ireland, Italy, Luxembourg, the Netherlands, New Zealand, Poland, Portugal, Spain, and Switzerland. *See e.g.*, OECD, France: Phase 2 Report, *supra* note 102, at 5, para. 1; OECD, Directorate for Fin., Fiscal & Enter. Aff., Ireland: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 7, para. 23 (Mar. 14, 2007), *available at* <http://www.oecd.org/dataoecd/27/45/38322693.pdf> [hereinafter OECD, Ireland: Phase 2 Report]; OECD, Directorate for Fin., Fiscal & Enter. Aff., Italy: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 7, para. 14 (Nov. 29, 2004), *available at* <http://www.oecd.org/dataoecd/0/50/33995536.pdf> [hereinafter OECD, Italy: Phase 2 Report]; OECD, Directorate for Fin., Fiscal & Enter. Aff., Luxembourg: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 5, para. 8 (May 28, 2004), *available at* <http://www.oecd.org/dataoecd/55/4/32017636.pdf> [hereinafter OECD, Luxembourg: Phase 2 Report]; OECD, Directorate for Fin., Fiscal & Enter. Aff., The Netherlands: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 10, para. 22 (June 15, 2006), *available at* <http://www.oecd.org/dataoecd/14/49/36993012.pdf> [hereinafter OECD, The Netherlands: Phase 2 Report]; OECD, Directorate for Fin., Fiscal & Enter. Aff., New Zealand: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 9, para. 11 (Oct. 27, 2006), *available at* <http://www.oecd.org/dataoecd/57/38/37658136.pdf> [hereinafter OECD, New Zealand: Phase 2 Report]; OECD, Directorate for Fin., Fiscal & Enter. Aff., Poland: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, at 8, para. 8 (Jan. 18, 2007), *available at* <http://www.oecd.org/dataoecd/3/54/38030514.pdf> [hereinafter OECD, Poland: Phase 2 Report]; OECD, Directorate for Fin., Fiscal & Enter. Aff., Portugal: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, at 8, para. 13 (Mar. 14, 2007), *available at* <http://www.oecd.org/dataoecd/28/24/38320110.pdf> [hereinafter OECD, Portugal: Phase 2 Report]; OECD, Directorate for Fin., Fiscal & Enter. Aff., Spain: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 11, para. 28 (Mar. 24, 2006), *available at* <http://www.oecd.org/dataoecd/28/35/36392481.pdf> [hereinafter OECD, Spain: Phase 2 Report]; OECD, Directorate for Fin., Fiscal & Enter. Aff., Switzerland: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in

spurred the United Kingdom to pass the Anti-Terrorism, Crime, and Security Act of 2001,¹⁰⁴ which included implementation of the OECD Convention.¹⁰⁵ Also, in 2001, Slovenia became the first non-OECD State to accede to the Convention.¹⁰⁶ Brazil, Chile, and Turkey implemented the Convention through penal code amendments in 2002 and 2003.¹⁰⁷ In 2005, Bulgaria implemented the OECD's recommendations and brought corporations under the reach of its foreign bribery law for the first time.¹⁰⁸ Several States that ratified the OECD Convention more recently have yet to fully implement its requirements in their own laws but are currently working to do so.¹⁰⁹

International Business Transactions, at 5, para. 6 (Dec. 24, 2004), *available at* <http://www.oecd.org/dataoecd/43/16/34350161.pdf> [hereinafter OECD, Switzerland: Phase 2 Report]. The OECD noted, however, that Spain's implementing legislation was inconsistent with the Convention.

104. Anti-Terrorism, Crime and Security Act of 2001, 2001, c. 24 (U.K.).

105. See OECD, Directorate for Fin., Fiscal & Enter. Aff., United Kingdom: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 8, para. 20 (Mar. 17, 2005), *available at* <http://www.oecd.org/dataoecd/62/32/34599062.pdf> [hereinafter OECD, United Kingdom: Phase 2 Report].

106. OECD, Directorate for Fin., Fiscal & Enter. Aff., Slovenia: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, at 7, para. 9 (June 21, 2007), *available at* <http://www.oecd.org/dataoecd/14/59/38883195.pdf> [hereinafter OECD, Slovenia: Phase 2 Report]. It had passed legislation prohibiting foreign bribery before its accession in 1999, and amended that legislation to comply with the Convention in 2004. *Id.*

107. OECD, Directorate for Fin., Fiscal & Enter. Aff., Brazil: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 7, para. 10 (Dec. 7, 2007), <http://www.oecd.org/dataoecd/61/30/39801089.pdf> [hereinafter OECD, Brazil: Phase 2 Report]; OECD, Directorate for Fin., Fiscal & Enter. Aff., Chile: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, at 7, para. 11 (Oct. 11, 2007), *available at* <http://www.oecd.org/dataoecd/38/10/39540391.pdf> [hereinafter OECD, Chile: Phase 2 Report]; OECD, Directorate for Fin., Fiscal & Enter. Aff., Turkey: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, at 8, para. 15 (Dec. 7, 2007), *available at* <http://www.oecd.org/dataoecd/13/46/39862163.pdf> [hereinafter OECD, Turkey: Phase 2 Report].

108. OECD, Directorate for Fin., Fiscal & Enter. Aff., Bulgaria: Phase 2 Follow-Up Report on the Implementation of the Phase 2 Recommendations on the Application of the Convention and the 1997 Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions, at 3, 14 (Jan. 26, 2006), *available at* <http://www.oecd.org/dataoecd/35/60/36101867.pdf> [hereinafter OECD, Bulgaria: Phase 2 Follow-Up Report].

109. See, e.g., OECD, Directorate for Fin., Fiscal & Enter. Aff., Estonia: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in

An examination of these implementing laws reveals that typically, but not always, implementing legislation provides that the violator is subject to a disgorgement-like loss of any profits of the illegal activity. The result of these statutes is that multinational firms may be subject to disgorgement-like penalties in dozens of jurisdictions for the same conduct and the same resulting profits. The penal codes of at least twenty-one countries include provisions for “forfeiture” or “confiscation” of the proceeds of a crime or base the amount of a fine on such proceeds.¹¹⁰ Among countries that authorize confiscation of the proceeds of a bribe, at least five include this as a mandatory penalty resulting from conviction.¹¹¹ Although a majority of States include disgorgement or confiscation in their laws, the statutes in a minority of countries—Chile and Greece, for example—do not, typically because they do not extend any liability for violations of laws prohibiting foreign bribery to corporations and other legal persons.¹¹² Moreover, some States, such as France, which authorizes confiscation of the proceeds of a crime, in practice rarely impose such a penalty because, in the words of one French magistrate, it “is not a part of French legal ‘culture.’”¹¹³

A complicating factor in describing the statutes on foreign bribery is the degree to which these statutes apply extraterritorially. The FCPA has wide extraterritorial application because jurisdiction can be based on traditional territorial underpinnings or on a nationality theory of jurisdiction. Typically, jurisdiction for U.S. courts over parties accused of

International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 9, para. 10 (June 20, 2008), available at <http://www.oecd.org/dataoecd/60/57/40953976.pdf> [hereinafter OECD, Estonia: Phase 2 Report].

110. Other States, such as Argentina, for example, are in the process of amending their laws to apply such forfeiture or disgorgement provisions. OECD, Directorate for Fin., Fiscal & Enter. Aff., Argentina: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 47–51 (June 20, 2008), available at <http://www.oecd.org/dataoecd/35/28/40975295.pdf> [hereinafter OECD, Argentina: Phase 2 Report]. Countries such as Bulgaria have amended their penal codes to incorporate corporate liability for foreign bribery following recommendations from the OECD. See OECD, Bulgaria: Phase 2 Follow-Up Report, *supra* note 108, at 3.

111. See OECD, Brazil: Phase 2 Report, *supra* note 107, at 56; OECD, Italy: Phase 2 Report, *supra* note 103, at 47–48; OECD, Norway: Phase 2 Report, *supra* note 101, at 46; OECD, Poland: Phase 2 Report, *supra* note 103, at 59; OECD, Slovenia: Phase 2 Report, *supra* note 106, at 62, para. 177.

112. See, e.g., OECD, Chile: Phase 2 Report, *supra* note 107, at 39, 45, para. 185; OECD, Greece: Phase 2 Report, *supra* note 101, at 40.

113. OECD, France: Phase 2 Report, *supra* note 102, at 57; see also OECD, Japan: Phase 2 Report, *supra* note 102, at 51, para. 186 (stating that it is “unclear” to the OECD whether Japan’s confiscation provisions cover the confiscation of proceeds relating to the bribery of a foreign official).

foreign bribery will be construed very broadly.¹¹⁴ This creates significant opportunities for jurisdictional overlap. Belgium, for example, prohibits foreign bribery under a universal jurisdiction statute that applies to “any person” “who is neither a Belgian national nor has their principle place of residence in Belgium.”¹¹⁵ Brazilian authorities have asserted that an offense need only to have “touched” Brazilian territory for jurisdiction to be valid.¹¹⁶ Under this interpretation “a telephone call, fax, or email emanating from Brazil would be sufficient to establish jurisdiction over an offence of foreign bribery which mostly takes place elsewhere.”¹¹⁷ At least seventeen other States similarly employ broad jurisdiction that could result in an individual or firm facing foreign bribery charges and being subject to prosecutions in multiple jurisdictions for the same underlying conduct.¹¹⁸ On the other hand, Canada, for example, does not

114. DEMING, *supra* note 11, at 7–10.

115. OECD, Directorate for Fin., Fiscal & Enter. Aff., Belgium: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 33 (July 21, 2005), available at <http://www.oecd.org/dataoecd/59/8/35461651.pdf> [hereinafter OECD, Belgium: Phase 2 Report] (noting, however, that the OECD believes that there are practical difficulties to Belgium bringing a case with tenuous jurisdictional linkages).

116. OECD, Brazil: Phase 2 Report, *supra* note 107, at 44–45 (cautioning, however, that Brazil’s statutory scheme does not yet apply to legal persons).

117. *Id.*

118. OECD, Czech Republic: Phase 2 Report, *supra* note 101, at 35 (stating that Czech territorial and nationality jurisdiction extends to an act performed outside of Czech borders that “violates or threatens an interest” in the Czech Republic as well as to Czech nationals regardless of where the crime is committed); OECD, France: Phase 2 Report, *supra* note 102, at 44 (“The scope of French criminal law is extensive . . . which makes it possible in certain circumstances to prosecute offences committed outside French territory.”); OECD, Hungary: Phase 2 Report, *supra* note 101, at 53 (describing Hungary’s jurisdiction as nearly as broad as possible and perhaps as universal); OECD, Iceland: Phase 2 Report, *supra* note 101, at 30–31 (stating that Iceland employs universal jurisdiction for the bribery of foreign officials); OECD, Ireland: Phase 2 Report, *supra* note 103, at 41 (noting that Ireland does not provide as broad a jurisdictional reach as some nations but that it does specifically provide for extraterritorial jurisdiction for foreign bribery offenses, which is “atypical” in Irish law); OECD, Japan: Phase 2 Report, *supra* note 102, at 46; OECD, Luxembourg: Phase 2 Report, *supra* note 103, at 33–34; OECD, Mexico Review of Implementation of the Convention and 1997 Recommendation, at 11–13, <http://www.oecd.org/dataoecd/15/30/2388858.pdf> (last visited Mar. 4, 2008) [hereinafter Mexico Review of Implementation]; OECD, New Zealand: Phase 2 Report, *supra* note 103, at 47–48 (noting that New Zealand territorial jurisdiction is more narrow than the United Kingdom’s, but that, on balance, New Zealand has a broad jurisdictional grant, including over legal persons); OECD, Norway: Phase 2 Report, *supra* note 101, at 43–44 (“Compared to the [OECD] Convention, which only requires jurisdiction based on active nationality and territoriality, the Norwegian jurisdiction is more far reaching.”); OECD, Portugal: Phase 2 Report, *supra* note 103, at 50–51; OECD, Slovak Republic: Phase 2 Report, *supra* note 101, at 32–33; OECD, Slovenia: Phase 2 Report, *supra* note 106, at 49; OECD, Spain: Phase 2 Report, *supra* note 103, at 31 (noting, however, that Spain was in the process of updating liability as to legal persons); OECD, Sweden: Phase 2 Report, *supra* note 101, at 51; OECD, Switzerland: Phase 2 Report, *supra* note 103, at 35–36 (noting, however, that a

provide for nationality jurisdiction in its prohibition on foreign bribery.¹¹⁹ Instead, it grounds jurisdiction territorially—exercising jurisdiction only over acts that occurred in Canada—resulting in a narrower application of its foreign bribery statute than many other OECD Member States.¹²⁰ Finally, some States employ a dual criminality requirement for a finding of nationality jurisdiction, insisting that the conduct in question be a crime in the place where it occurred and that the party against whom sanctions are to be imposed is a national of the imposing State.¹²¹ Despite these exceptions, the majority of States that have criminalized foreign bribery provide for broad jurisdiction under both territorial and nationality theories, and there is a trend toward a broad conception of jurisdiction.¹²²

While the foreign anti-bribery statutes are themselves relatively new, it is only in the last three or four years that multinational firms have needed to pay attention to enforcement actions brought by foreign governments, which are an even more recent and faster accelerating trend. In addition to foreign statutes, it is important to examine the actual foreign enforcement levels, as an unenforced statute has limited relevance for global foreign bribery enforcement. Some of the best data comes from Transparency International (TI), a global network of non-governmental organizations (NGOs) funded by bilateral donors, foundations, and the

loophole for limited territorial jurisdiction may exist); OECD, United Kingdom: Phase 2 Report, *supra* note 105, at 66–67.

119. OECD, Directorate for Fin., Fiscal & Enter. Aff., Canada: Phase 2 Follow-Up Report on the Implementation of the Phase 2 Recommendations on the Application of the Convention and the 1997 Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions, at 5, para. 9 (June 21, 2006), available at <http://www.oecd.org/dataoecd/5/6/36984779.pdf> [hereinafter OECD, Canada: Phase 2 Follow-Up Report].

120. *Id.* Likewise, Denmark does not provide for nationality jurisdiction for corporations and other legal persons. OECD, Directorate for Fin., Fiscal & Enter. Aff., Denmark: Phase 2 Follow-Up Report on the Implementation of the Phase 2 Recommendations, at 4, para. 9 (July 29, 2008), available at <http://www.oecd.org/dataoecd/4/56/41073747.pdf> [hereinafter OECD, Denmark: Phase 2 Follow-Up Report]; see also OECD, Chile: Phase 2 Report, *supra* note 107, at 38–39 (describing Chile as retaining territorial jurisdiction but noting that it is unclear whether nationality jurisdiction exists and that Chile has not yet adopted jurisdiction over legal persons); OECD, Greece: Phase 2 Report, *supra* note 101, at 28–29, 35 (noting that Greece provides for territorial jurisdiction and nationality jurisdiction only in response to a complaint by the government of the country in which the crime was committed and that the “effective seat” theory is used for jurisdiction for legal persons).

121. See, e.g., OECD, Estonia: Phase 2 Report, *supra* note 109, at 42–43 (stating that whether Estonia could establish universal jurisdiction is debatable, but noting that nationality jurisdiction is not valid over legal persons in Estonia).

122. See *supra* notes 114–118 and accompanying text. But see OECD, Korea: Phase 2 Report, *supra* note 101, at 37–38 (stating that it is unclear to the OECD whether territorial or nationality jurisdiction could be applied against a corporation in a foreign bribery case, despite claims from Korean officials that jurisdiction could be proper).

private sector.¹²³ In its first OECD Convention Progress Report in 2004, TI stated that there were only four States that had brought more than one enforcement action under legislation passed pursuant to the OECD Convention.¹²⁴ As of 2008, however, enforcement actions abroad had become more commonplace, and TI's 2008 Progress Report showed "significant enforcement in sixteen countries," which was an increase over the previous year.¹²⁵ The 2008 TI Report identified 147 foreign bribery cases and at least 198 foreign bribery investigations, by governments *not including* the United States in 2008.¹²⁶ Other sources likewise indicate a rise in both the number and significance of foreign investigations and prosecutions.¹²⁷ Commentators have noted a number of major prosecutions in Australia, France, Germany, and other OECD Member States.¹²⁸

Such investigations are, however, not limited to Western States,¹²⁹ nor to States often considered major strategic allies of the United States.¹³⁰ Bolivia, for example, has expressed its desire and intention to prosecute, among others, former Enron executives and executives of the Bolivian state oil company due to "irregularities" in contracts relating to a pipeline between Bolivia and Brazil.¹³¹ China has attempted to crack down on corruption in the purchasing of large hospital equipment and also has named IBM and Hitachi in the sentencing of the former head of the China Construction Bank to fifteen years in prison for accepting bribes

123. See HOUSE OF COMMONS, SELECT COMMITTEE ON INTERNATIONAL DEVELOPMENT, FOURTH REPORT MINUTES OF EVIDENCE, 2000-1, H.C. 39-1, available at <http://www.publications.parliament.uk/pa/cm200001/cmselect/cmintdev/39/0111411.htm>.

124. FRITZ HEIMANN, GILLIAN DELL, AGNES SNG-SACHSENROEDER & NICOLE WHITTIER, TRANSPARENCY INT'L, PROGRESS REPORT 2005 1 (Mar. 7, 2005), available at http://www.transparency.org/content/download/2577/14887/file/TI_Prog_Rep_OECD.pdf.

125. FRITZ HEIMANN & GILLIAN DELL, TRANSPARENCY INT'L, PROGRESS REPORT 2008 8 (June 24, 2008), <http://www.transparency.org/content/download/33627/516718.pdf> (noting also that that "[f]ocusing on G-7 countries, enforcement has increased substantially").

126. *Id.* at 7. Transparency International calculated that, in 2008, the United States brought 103 foreign bribery cases and conducted sixty-nine foreign bribery investigations. *Id.*

127. See, e.g., Gibson, Dunn 2008 Year-End FCPA Update, *supra* note 96 (describing the "[i]nternationalization of foreign anti-corruption enforcement" as one of the most important foreign bribery enforcement trends in 2008).

128. A number of commentators anecdotally have reported on foreign enforcement actions abroad, although none have attempted to discuss the foreign statutes in detail. See, e.g., Margaret Ayres, John Davis, Nicole Healy & Alexandra Wrage, *Developments in U.S. and International Efforts to Prevent Corruption*, 41 INT'L LAW. 597, 604-08 (2007); Kathleen M. Hamann et al., *Developments in U.S. and International Efforts to Prevent Corruption*, 40 INT'L LAW. 417, 423-27 (2006).

129. For example, in 2005, Indonesia investigated whether Monsanto had made improper payments to Indonesian environmental and agricultural officials. *KPK Continues Monsanto Probe*, JAKARTA POST, Jan. 19, 2005, at 4.

130. See Ayres et al., *supra* note 128, at 604-08.

131. See *Bolivia Wants to Prosecute Business Executives and Former Government Officials over Pipeline Deal*, GLOBAL INSIGHT, June 26, 2006.

from those, and other, companies.¹³² Finally, even in States that have not yet successfully prosecuted a case of foreign bribery, progress toward that goal continues, and firms should be increasingly aware of foreign bribery investigations and prosecutions across dozens of transnational jurisdictions.¹³³ This is a new reality in compliance management for multinational corporations, and one to which they must adjust quickly as foreign enforcement and prosecutions catch up with the relatively new foreign legislative regimes.

III. DISGORGEMENT OF PROFITS: STATUTORY AUTHORIZATION, NORMATIVE CONCERNS, AND INTERNATIONAL LESSONS AND COMPLICATIONS

This Part argues that there are a number of reasons why, in the FCPA context, the justification for disgorgement of profits is questionable and the practicalities complicated. Part III.A asserts that disgorgement is a statutorily authorized form of penalty, although perhaps not one envisioned by Congress. Part III.B discusses issues of extraterritorial effect and redundant jurisdiction, and Part III.C claims that both utilitarian and retributivist theories underlying disgorgement are not completely supported in the FCPA context because of problems of disproportionality and evidentiary difficulty. Part III.D then argues that concerns over excessive prosecutorial discretion further counsel against disgorgement in the FCPA enforcement context.

A. The Securities and Exchange Commission Is Statutorily Empowered to Seek Disgorgement

The history surrounding the passage of the FCPA indicates that it is unclear whether Congress intended that the SEC pursue disgorgement in FCPA enforcement. This fact alone should at least give pause to question the normative function of disgorgement. The primary purpose for the adoption of the FCPA was the elimination of corrupt business practices,

132. David Barboza, *IBM, NCR and Hitachi Cited in Bribery Verdict*, INT'L HERALD TRIB., Dec. 1, 2006, at Finance 10; Mure Dickie, *Beijing in Campaign to Stop Medical Kickbacks*, FIN. TIMES (London), July 21, 2006, at 5.

133. See, e.g., OECD, Directorate for Fin., Fiscal & Enter. Aff., Finland: Phase 2 Follow-Up Report on the Implementation of the Phase 2 Recommendations on the Application of the Convention and the 1997 Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions, at 3–5 (Feb. 23, 2006), available at <http://www.oecd.org/dataoecd/50/13/36373405.pdf> [hereinafter OECD, Finland: Phase 2 Follow-Up Report].

particularly foreign bribery.¹³⁴ The focus of the SEC's accounting and record-keeping provisions, and one of the reasons that those sections—unlike the anti-bribery provisions—were passed as amendments to the Exchange Act,¹³⁵ was Congress's recognition that a primary method for concealing such activity was through SEC-regulated record keeping.¹³⁶ The SEC's use of fines long reflected what seems apparent from consideration of the FCPA: SEC fines exist to protect investors and to punish and deter corporate malfeasance. Fines imposed for bribery are not part of the SEC's general fining authority under § 21(d)(3) of the Exchange Act; they are instead separately provided for by § 32(c),¹³⁷ which Congress added to the Exchange Act as part of the 1988 FCPA amendments.¹³⁸ However, illegal payments will almost certainly implicate other violations of the securities laws, which *are* subject to the SEC's general fining authority pursuant to § 21(d)(3). As a result, bribes typically have resulted in fines under § 21(d)(3) that are much higher than the relatively small fines authorized by § 32(c) (*i.e.*, \$600,000 per violation by an issuer).¹³⁹ Neither the reports of the House or Senate¹⁴⁰ floor discussion of the FCPA or its subsequent amendments,¹⁴¹ nor the 1981 follow-up report from the U.S. General Accounting Office on corporate bribery and the FCPA, mention disgorgement as a remedy.¹⁴² 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,¹⁴³ are reasons that some commentators have cited in questioning the propriety of the penalty.¹⁴⁴

134. See 15 U.S.C. §§ 78dd-1, 78dd-2 (1988). *But see* Kathleen A. Lacey & Barbara Crutchfield George, *Expansion of SEC Authority into Internal Corporate Governance: The Accounting Provisions of the Foreign Corrupt Practices Act (A Twentieth Anniversary Review)*, 7 J. TRANSNAT'L L. & POL'Y 119, 153 (1998) (claiming that the FCPA was the broadest application of federal law to corporate boards since the passage of the Exchange Act itself (citing ROBERA S. KARMEL, REGULATION BY PROSECUTION 42 (1982))).

135. 15 U.S.C. § 78m(b)(2) (1988).

136. See 15 U.S.C. § 78m(b)(2)(A) (1988).

137. Gerlach & Parizek, *supra* note 36, at 14-4.

138. HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, 10A INT'L CAP. MARKETS & SEC. REG. § 22:7; see 15 U.S.C.A. § 78dd-2(g) (West 2009).

139. Gerlach & Parizek, *supra* note 36, at 14-4.

140. See S. REP. No. 95-114 (1977); H.R. REP. No. 95-640 (1977); H.R. REP. No. 95-831 (1977) (Conf. Rep.).

141. The FCPA passed the House on the suspension calendar, H.R. RES. 3815, 95th Cong., 123 CONG. REC. 36,303-08 (1977), and the Senate by unanimous consent, S. RES. 305, 95th Cong., 123 CONG. REC. 13,818-23 (1977), with no discussion of the penalties for violating the Act.

142. U.S. Gen. Acct. Office, Report to the Congress: Impact of Foreign Corrupt Practices Act on U.S. Business (1981).

143. See *supra* notes 81-85 and accompanying text.

144. See, *e.g.*, Doty, *supra* note 84, at 1235.

The most recent change to the way in which the SEC enforces the FCPA—and a critical development to consider—is SOX, which affects virtually all of the SEC's prosecutions, including those under the FCPA. When assessing penalties, the SEC draws on SOX to provide great latitude in determining the types of penalties it enforces. While SOX did not amend the FCPA itself, it did amend both civil and criminal securities laws relating to compliance, internal controls, and penalties for violations of the Exchange Act.¹⁴⁵ Since the enactment of SOX, the SEC has possessed the power to designate how a particular penalty that it assesses will be classified.¹⁴⁶ In the "Fair Funds for Investors" provision of SOX,¹⁴⁷ Congress granted the SEC the discretion to earmark monies collected as civil penalties in a particular action to either the U.S. Department of the Treasury or to a fund benefiting the victims of the conduct that resulted in that SEC action, typically shareholders.¹⁴⁸ This discretion, however, resulted in ambiguities as to how the SEC would choose to classify penalties.

In 2006, the SEC issued a policy statement, similar in tone, purpose, and content to the Holder and Thompson memos,¹⁴⁹ describing its decision-making process in the imposition of civil penalties on corporations.¹⁵⁰ The SEC penalty statement clarifies that the factors that go into the SEC's determination as to whether penalties will be enforced as monetary penalties earmarked for the Treasury, or considered disgorgement, in which case the SEC has the discretion to distribute the funds as "Fair Funds" under SOX or to send the funds to the Treasury, is "whether the issuer's violation has provided an improper benefit to the shareholders, or conversely whether the violation has resulted in harm to the shareholders."¹⁵¹ Thus, in FCPA disgorgement, while corporations pay the Treasury, it remains conceptually strange that the SEC uses a theory of punishment based on compensating shareholders when the shareholders likely benefited from the bribery.

145. Matt A. Vega, *Sarbanes-Oxley & the Culture of Bribery: Expanding the Territorial Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. (forthcoming 2009).

146. 15 U.S.C. § 7246(b).

147. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 308(a), 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C. (2000 & Supp. IV 2004)).

148. Marvin E. Sprouse III, *A Collision of Fairness: Sarbanes-Oxley and §510(b) of the Bankruptcy Code*, AM. BANKR. INST. J., Oct. 2005, at 8.

149. See Holder Memo, *supra* note 75; Thompson Memo, *supra* note 75.

150. See Press Release, U.S. Sec. & Exch. Comm'n, Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 4, 2006), available at <http://www.sec.gov/news/press/2006-4.htm>.

151. *Id.*

The legislative history of SOX shows no indication that Congress was considering a change in the type of enforcement or the theories of punishment under which a firm could be liable for foreign bribery. SOX was passed in the wake of the Enron and WorldCom scandals when the focus was on corporate governance of transnational corporations generally, but not as it related to foreign bribery, an area in which the SEC still exercised very little enforcement authority in 2002.¹⁵²

Although Congress never explicitly considered the relevance and desirability of disgorgement in the FCPA context, this Note does not argue that disgorgement is statutorily impermissible nor even undesirable. The OECD Convention requires a forfeiture remedy,¹⁵³ and disgorgement is clearly authorized by statute without a limitation as to the FCPA.¹⁵⁴ For some analysts, this statutory authorization would be the end of the inquiry, even if achieved through interrelated statutes showing no clear congressional intent that disgorgement apply to FCPA prosecutions. In addition, lacking any congressional statement to the contrary, there may be no reason why SOX should not drive the SEC's prosecutorial decisions in the FCPA realm. This Note, however, does question whether Congress's silence on the issue should provide the normative justification for the rapid expansion of disgorgement and concludes that it should not. It does not question the deterrent value of properly calibrated disgorgement, but rather doubts that such calibration is possible or likely given the jurisdictional and evidentiary problems discussed below.

B. Extraterritoriality and the Effect on Theories of Punishment

Until the 1998 amendments to the FCPA, the extraterritorial application of the Act was limited, and the FCPA "reflected Congress's sensitivity to 'possible conflicts with principles of international law and comity that could result from the assertion of U.S. jurisdiction over foreign nationals outside the territorial United States.'"¹⁵⁵ At least one commentator has noted that "'the enlargement' of the extraterritorial effect of the [FCPA's] antibribery provisions may prove to be the most significant and challenging foray by the United States into the regulation

152. See discussion *supra* Part II.A.

153. OECD Convention, *supra* note 18, art. 3(3).

154. Penny Stock Reform Act of 1990, Pub. L. No. 101-429, §§ 202(a), 203 (codified at 15 U.S.C. §§ 78u-2(e), 78u-3(e) (2000)).

155. Daniel Patrick Ashe, Comment, *The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the U.S. Foreign Corrupt Practices Act*, 73 *FORDHAM L. REV.* 2897, 2917 (2005) (citing H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed Its Grasp?*, 26 *N.C. J. INT'L L. & COM. REG.* 239, 293 (2001)).

of international business” because “nearly any contact with the United States ‘will subject a foreign national to prosecution in a U.S. court.’”¹⁵⁶

Apart from criticisms that the extraterritorial reach of the FCPA exceeds U.S. jurisdictional power,¹⁵⁷ or that the FCPA is culturally intrusive,¹⁵⁸ the extraterritorial reach of the Act has the potential to create inefficient over-enforcement problems as many States adopt similarly extraterritorial anti-bribery legislation of their own. When a national regulator brings an enforcement action against a multinational firm in one jurisdiction, this attention may induce action on the part of national regulators in other jurisdictions.¹⁵⁹ Even for corporations that enter into, for example, a DPA with the DOJ and the SEC while working to genuinely reform their foreign bribery compliance, “[t]hese companies may still face additional sanctions or enforcement actions from other federal or state agencies, as well as from foreign governments.”¹⁶⁰ This concern is aggravated by language in the OECD Convention stating that the assumptions of territorial jurisdiction in the OECD are to be “interpreted broadly so that an extensive physical connection to the bribery act is not required.”¹⁶¹ This is a much broader conception of territorial jurisdiction than is typically recognized in international law,¹⁶² and this possibility for jurisdictional redundancies is a key difference in comparing the propriety of disgorgement in the FCPA context with its use in contexts in which the United States is more likely to be the only national regulator.

These problems of overlapping jurisdiction under numerous extraterritorial statutes are exacerbated by the responsibility of issuers for subsidiaries. In its original form, the FCPA was “silent on the issue of the legal responsibility of an issuer for compliance by subsidiaries with either of the accounting requirements.”¹⁶³ The 1988 amendments to the FCPA, however, created potential liability for issuers for the actions of their subsidiaries, particularly if the issuer holds a majority interest in a domestic or foreign subsidiary.¹⁶⁴ While, in theory, a U.S. parent firm

156. *Id.*

157. See Brown, *supra* note 155, at 293 n.203.

158. Stephen R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 275 (1997); see Stephen R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT’L L. 419, 430–33, 447 (1999).

159. See *Lords Says SFO Saudi Move Lawful*, BBC NEWS, July 30, 2008, <http://news.bbc.co.uk/2/hi/business/7532714.stm>; see also Huskins, *supra* note 60, at 1450.

160. Kathleen M. Hamann et al., *Developments in U.S. and International Efforts to Prevent Corruption*, 40 INT’L LAW. 417, 418 (2006).

161. OECD Convention, *supra* note 18, annex, at 25.

162. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

163. S. REP. NO. 100–85, at 43 (1987).

164. See 15 U.S.C. § 78m(b)(6).

could avoid liability for the actions of a foreign subsidiary if it did not participate in the bribery and had no knowledge of it, in practice, the U.S. parent firm usually risks FCPA liability for bribery schemes conducted by foreign subsidiaries. This parent responsibility may be appropriate in many cases, but can create further redundancies or penalize undeterrable conduct in others.¹⁶⁵ Thus, as multinational corporations hold majority interests in more and more foreign subsidiaries, they run the risk of further FCPA liability. In addition, the existence of those foreign subsidiaries is likely to attract the attention of increasingly diverse foreign regulators that may or may not focus on prosecutorial cooperation with the United States or other foreign regulators.

Admittedly, the problems of overlapping jurisdiction and liability for subsidiaries are not dispositive in favor of requiring a new approach by the SEC to disgorgement. International agreements on mutual legal assistance (MLA) are at least cognizant of this potential overlap in regulatory authority for the same wrongdoing,¹⁶⁶ although an international, multilateral method for resolving this issue of jurisdictional overlap is lacking. The UNCAC, for example, includes permissive language that when one national regulator discovers that another is bringing an enforcement action, "State Parties shall, as appropriate, consult one another with a view to coordinating actions."¹⁶⁷ Yet, in the following subsection, the UNCAC states that "this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law."¹⁶⁸ For the corporate compliance officer, there is some reassurance from the 2006 Statoil settlement, in which the \$3.5 million that Statoil had already paid to the Norwegian National Authority for Investigation and Prosecution of Economic Crime was deducted from its U.S. settlement of \$22 million.¹⁶⁹ Yet, even if a corporation could know that it would only be subject to the enforcement actions of one sovereign's agencies—or know that its payments to one sovereign would be credited against those enforced by another—there is no predictability unless the corporation has a means to know which

165. Christopher F. Dugan & Vladimir Lechtman, *The FCPA in Russia and Other Former Communist Countries*, 91 AM. J. INT'L L. 378, 381–82 (1997); see also Sec. & Exch. Reg. Comm'n v. Schering-Plough Corp., No. 1:04CV00945, 2004 WL 2057340, at *para. 11 (D.D.C. June 9, 2004).

166. See, e.g., OECD, Directorate for Fin., Fiscal & Enter. Aff., Australia: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, at 54 (Jan. 4, 2006), available at <http://www.oecd.org/dataoecd/57/42/35937659.pdf> [hereinafter OECD, Australia: Phase 2 Report].

167. UNCAC, *supra* note 19, art. 42(5)–(6).

168. *Id.* art. 42(6).

169. See Press Release, U.S. Sec. & Exch. Comm'n, SEC Sanctions Statoil for Bribes to Iranian Government Official (Oct. 13, 2006); NEWCOMB & UROFSKY, *supra* note 69, at 35.

sovereigns it may be subject to and to what degree they will cooperate. For example, while arguing that the DOJ takes settlements with foreign regulators into account in its own FCPA enforcement, the DOJ's Deputy Chief of the Fraud Section, Mark Mendelsohn, also conceded that the United States does not recognize the concept of "international double jeopardy."¹⁷⁰

While minimizing uncertainty may not be required in a fairness or due process sense, it should at least be a normative goal. While reducing bribery is clearly important, overdetering bribery could lead firms to underinvest in foreign infrastructure projects, which would have negative consequences both for firms and for foreign nations, particularly those developing nations that require foreign capital for major projects. There are clear areas in which the current legal regime creates uncertainty without providing a benefit on the other side of the ledger—besides lawmakers and regulators avoiding the opportunity cost of lawmaking and regulating. Brazil, for example, had entered into bilateral MLA treaties with five other States as of December 2007.¹⁷¹ For countries with which Brazil has not enacted such a treaty, MLA will typically be provided on an ad hoc, reciprocal basis, but it remains unclear, perhaps because of the lack of formal guidelines, whether Brazil will provide MLA in any given case.¹⁷² This uncertainty is common in examining the international foreign bribery regime, and more formality—and, thus, more certainty for firms facing multinational jurisdiction and investigation—would create a greater incentive for foreign investment without necessarily hindering regulators' bribery enforcement efforts or facilitating firms' avoidance of such enforcement.¹⁷³ To the extent that the regulatory scheme owes some level of consistency and predictability to the parties that it seeks to regulate, the international foreign bribery regime's ad hoc nature and its potential liability for multiple disgorgement

170. Gibson, Dunn 2008 Year-End FCPA Update, *supra* note 96.

171. OECD, Brazil: Phase 2 Report, *supra* note 107, at 39.

172. *Id.* at 40. The report notes that,

since Brazil currently has only five treaties with Parties to the Convention, in the absence of practical examples where Brazil has provided assistance to Parties to the OECD Convention . . . how effectively the principle of reciprocity is applied is a significant factor in determining how well Brazil applies Article 9 of the Convention[, which addresses mutual legal assistance].

Id.

173. The OECD has also called for increased formality in mutual legal assistance (MLA) agreements to ensure more structured, effective, and immediate cooperation among multilateral regulatory authorities. See OECD, Belgium: Phase 2 Report, *supra* note 115, at 29.

actions fail to deliver predictability, particularly to multinational corporations.¹⁷⁴

Despite MLA and informal cooperative agreements, the concerns of overlapping jurisdiction and responsibility for subsidiaries are not merely hypothetical exercises. Other commentators have noted that U.S. firms will continue to face increased scrutiny from multiple foreign regulators, often without constitutional safeguards.¹⁷⁵ Indeed, there are an increasing number of examples of multiple, transnational regulatory authorities investigating the same corporation for the same conduct.¹⁷⁶ The Halliburton-TSKJ investigation, for example, arose out of allegations that TSKJ, a Halliburton subsidiary, engaged in bribery in Nigeria as part of its efforts to win contracts to build and expand a liquefied natural gas project in that country.¹⁷⁷ Nigeria has a reputation as one of the world's hotbeds of corruption,¹⁷⁸ and some companies have gone so far as to cease doing business there entirely in order to avoid the corruption liability.¹⁷⁹ Authorities that have investigated Halliburton regarding the TSKJ contracts include the DOJ,¹⁸⁰ the SEC,¹⁸¹ Nigeria's national assembly and its Economic and Financial Crimes Commission,¹⁸² the United Kingdom's Serious Frauds Office,¹⁸³ and the French magistrate who initially opened the investigation.¹⁸⁴

It is likely that many of the investigating regulatory bodies will work together,¹⁸⁵ but the SEC only maintains memoranda of understanding

174. See Doty, *supra* note 84, at 1235; see also Gibson, Dunn 2008 Year-End FCPA Update, *supra* note 96 (describing the wide discretion of the DOJ as to whether to credit foreign penalty payments against FCPA liability).

175. See, e.g., Sebelius, *supra* note 84, at 604.

176. See, e.g., *infra* notes 192–195 and accompanying text.

177. See Ken Silverstein, *Investigation Widens in Nigeria Oil Case Involving Halliburton*, L.A. TIMES, Oct. 13, 2004, at 6.

178. Transparency International's most recent Corruption Perceptions index ranked Nigeria 147th out of 179 countries surveyed. See Transparency Int'l, Corruption Perceptions Index 2007, http://www.transparency.org/policy_research/surveys_indices/cpi/2007 (last visited Feb. 20, 2009).

179. See Press Release, Panalpina, Panalpina Reports Dynamic Growth in the First Half Year (July 30, 2008), available at http://www.panalpina.com/www/global/en/media_news/news/news_archiv_2/08_07_30.html.

180. Halliburton Co., Annual Report (Form 10-K) (Feb. 22, 2008).

181. *Id.*

182. Nick Snow, DOJ, SEC Probe Bonny Island Partners for Violations, 104 OIL & GAS J. 26, 26–27 (Nov. 13, 2006).

183. *Id.*

184. Barbara Crutchfield George & Kathleen A. Lacey, *Investigation of Halliburton Co./TSKJ's Nigerian Business Practices: Model for Analysis of the Current Anti-Corruption Environment on Foreign Corrupt Practices Act Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 503, 504–05 (2006).

185. Following the discovery of the alleged bribes, the French regulatory body informed the appropriate U.S. authorities regarding the magistrate's pending investigation. *Id.* at 508.

with securities regulators in approximately thirty other States.¹⁸⁶ Moreover, international anti-bribery agreements—which are subscribed to and implemented by many more than thirty States—provide little in the way of specifics as to what they require in terms of transnational regulatory cooperation. As a consequence, there is no requirement that only one regulator impose disgorgement despite the fact that such penalties should be based on a specific sum that the violating party gained through the improper activity.¹⁸⁷ This is further complicated by the fact that it is not clear what “disgorgement” in the FCPA context really means since it is often impossible to know the distinct benefit that a firm derived from any given bribe.

Returning to the problem of overlapping regulators, in the Halliburton-TSKJ investigation, the office of the Attorney General of Nigeria sought the transfer of sums of money held in Swiss bank accounts, and it has subsequently pushed for Nigerian courts to determine the legal ownership of those funds.¹⁸⁸ While this type of case may well be handled through the cooperation for which the UNCAC strives,¹⁸⁹ when there are large sums of money at stake and increasingly disparate foreign regulatory authorities involved, there are no guarantees that such comity and cooperation shall govern multiple States’ regulatory authorities.¹⁹⁰ Put another way, it is one thing for a regulator to inform an interested State that it is investigating a firm, but it is quite another for that regulator to refrain from seeking fines within its grasp merely because of comity toward foreign regulators.

Halliburton-TSKJ is not the only example of the overlapping extra-territorial reach of transnational regulators raising concerns about redundant disgorgement remedies. The August 2008 raid by Argentine authorities of a Siemens office in Buenos Aires in connection with a

186. See Gerlach & Parizek, *supra* note 36.

187. But see McVey & Basri, *supra* note 76 (stating that the OECD Convention “provides for coordination among prosecutors in anti-bribery enforcement among the OECD member countries”).

188. See George & Lacey, *supra* note 184, at 509 (citing Halliburton Co., Quarterly Report (Form 10-Q), at 16 (Oct. 31, 2005)).

189. See *supra* notes 57–58 and accompanying text.

190. Even a seemingly cooperative State such as New Zealand, for example, is statutorily empowered to refuse a request for assistance from a foreign State if, in the opinion of the New Zealand Attorney General, “the request relates to the prosecution or punishment of a person in respect of conduct that occurred . . . outside the foreign country and similar conduct occurring outside New Zealand in similar circumstances would not have constituted an offence against New Zealand law.” Mutual Assistance in Criminal Matters Act 1992, § 27, para. 2(b), 1992 S.R. No. 86 (N.Z.). Because New Zealand law on bribery of foreign officials takes a relatively narrow scope, New Zealand could potentially decide not to assist foreign countries with bribery investigations if the bribery did not take place in New Zealand or involve a New Zealand citizen. See Crimes Act 1961, § 6, 1961 S.R. No. 43 (N.Z.).

bribery investigation of the scandal-plagued firm raised further such evidence.¹⁹¹ As of September 2008, the United States, Greece, Italy, China, Hungary, Indonesia, and Norway had initiated investigations into whether Siemens violated domestic anti-corruption laws.¹⁹² While it appears that at least U.S. and German regulators did, in fact, closely cooperate in handing down the largest foreign bribery penalties ever against Siemens,¹⁹³ such cooperation is not required by any international or bilateral agreements. China and Argentina have occasionally refused to cooperate in the prevailing international regulatory scheme,¹⁹⁴ and States such as Bolivia may be motivated to prosecute corporations not by a desire to deter corporate wrongdoing but by a desire to bring punitive actions against firms identifiable with a particular State.¹⁹⁵

Thus, informal agreements on the issue of international regulatory cooperation do exist, but it is not clear that they can provide the predictability and consistent calculation of penalties that are normatively desirable to avoid overdetering investment in foreign projects. While it would not be undesirable if corruption and bribery disappeared entirely, overdeterrence and the resulting reduction in investment are harmful from an efficiency standpoint. Furthermore, punishing at levels greater than the resulting gain is not supported by the equitable principles underlying disgorgement. For example, the companies that have left Nigeria because of a determination that they had to offer improper payments in order to remain competitive,¹⁹⁶ may have been less likely to forego beneficial investment in a more certain regulatory climate. Like any regulatory policy, the primary concern with regulation is decreasing beneficial private activity and distorting market incentives. Regulatory uncertainty has been quantitatively shown to be particularly harmful to investment in other contexts—for example, antitrust¹⁹⁷—and, while no quantitative study is available for foreign bribery, the likely result is similarly undesirable.

191. *Authorities Search Siemens Offices in Argentina*, DEUTSCHE WELLE, Aug. 16, 2008, <http://www.dw-world.de/dw/article/0,2144,3569115,00.html> (last visited Feb. 20, 2009).

192. *See* The FCPA Blog: Trouble for Siemens in South America, <http://fcpcbog.blogspot.com/2008/08/trouble-for-siemens-in-south-america.html> (last visited Feb. 20, 2008).

193. *See supra* notes 95–96 and accompanying text.

194. *See, e.g.*, Charity L. Goodman, Comment, *Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 U. PA. J. INT'L ECON. L. 449, 453 (2007) (noting that Argentine officials publicly acknowledged their inability to pay International Centre for Settlement of Investment Disputes (ICSID) judgments and that this resulting failure to participate in the international arbitration scheme set up by the United States calls the entire system into question).

195. *See supra* note 131 and accompanying text.

196. *See supra* note 179 and accompanying text.

197. *See, e.g.*, George Bittlingmayer, *Regulatory Uncertainty and Investment: Evidence from Antitrust Enforcement*, 20 CATO J. 295, 320–22 (2001).

C. *Theories of Punishment: Ambiguities of Proportionality and Retributivist, Evidentiary Uncertainties*

The justification for criminal punishment, in general, rests on either utilitarian or retributivist grounds.¹⁹⁸ Under either theory, application in the FCPA context raises questions regarding the propriety of the SEC's rapid increase in reliance on disgorgement as part of its enforcement structure. Part III.C.1 claims that, to the extent that the rationale for disgorgement in FCPA cases is based on deterrence, the use of disgorgement raises issues of both efficacy and proportionality. Part III.C.2 then asserts that, to the extent that SEC disgorgement operates under a retributivist rationale, there are reasons to be concerned that the punishment calculation is often speculative and, thus, that the justification for a specific amount of retribution is more likely to be flawed in the FCPA context than in the typical securities case, in which case an estimate of the profits to be recouped is likely to be close to the actual, improper gain of the guilty party.

1. (Dis)proportionality in FCPA Cases and Disgorgement Settlements

Theoretically, though not necessarily in practice, disgorgement of profits can provide perfect deterrence by depriving corporations of the entirety of the incentive for engaging in illegal bribing.¹⁹⁹ A perfectly deterrent punishment scheme would set the level of punishment at the level of the expected gains of participating in the criminal behavior.²⁰⁰ However, utilitarian rationales for punishment include principles of proportionality,²⁰¹ and punishment schemes fail a utilitarian test when the punishment exceeds, or threatens to exceed, the offense.²⁰² Put another way, deterrence requires that a punishment be proportionate to the harm—allowing for some multiplier based on the likelihood of being caught. Punishments that are not proportionate are not justified under this utilitarian theory.²⁰³ In addition, because corporate officers' incentives may introduce a disconnect between theoretical deterrence on a corporation and the way that the corporation will actually act, deterrence

198. See JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, *CRIMINAL LAW: CASES AND MATERIALS* 27–30 (5th ed. 2004). This is not to discount the rehabilitative justification for criminal punishment, although this claim is less often raised in justifying punishment of corporations.

199. See OECD, *The Netherlands: Phase 2 Report*, *supra* note 103, at 64.

200. This scheme ignores, of course, the nuances introduced by a calculation of, for example, reputational harm, difficulty in recruiting future corporate leaders, the likelihood of being caught, and long-term regulatory scrutiny.

201. KAPLAN, WEISBERG & BINDER, *supra* note 198, at 76.

202. See JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 322–24, 338 (C.K. Ogden ed., 1931).

203. See *id.*

can be particularly ineffective for punishing corporations.²⁰⁴ While this argument is not unique to the FCPA context, it is a particular cause for concern if the disgorgement that the SEC seeks under the FCPA is based entirely on a principle of deterrence.²⁰⁵

Proportionality is, however, a principle for setting punishment that can cut in favor of both larger and smaller fines and other penalties; it is not merely an argument of multinational firms and the defense bar, but also of astute regulators and doctrinal sticklers. Considerations of proportionality can lead to calls for higher penalties or stricter bribery statutes in some cases. As of June 2008, Argentina, for example, was still working to enact foreign bribery restrictions as to legal persons.²⁰⁶ Argentina's proposed draft penal code amendments include corporate liability and specify that fines for corporations should be set according to the magnitude of the harm caused and the corporation's assets.²⁰⁷ The OECD's 2008 review of Argentina was concerned with the proportionality of the proposed penal code reforms, noting that "basing the fines principally on the harm actually caused may not sufficiently sanction companies that offer large bribes. In some cases where substantial bribery is discovered, there may not be much harm actually caused."²⁰⁸ Proportionality is thus a normative value that supports fair practice in creating criminal sanctions, and it is a concern—in either direction—when a statute's application leads to criminal liability that is disproportionate either to the criminal's benefits from the criminal conduct or to the magnitude of the criminal's wrongdoing—in this case measured by the amount of the bribe. While disgorgement is supposed to be measured by the illicit gain to the malfeasant, in the FCPA context, such a punishment does not respect the general criminal punishment principle of proportionality to the wrongdoing, which is the actual size of the bribe. In other words, the size of the bribe, which is the measure of wrongdoing, may end up correlating to the illicit gain, but it may not. This disconnect may explain why 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.²⁰⁹

204. See John C. Coffee, Jr., *Making Punishment Fit the Corporation: The Problems of Finding an Optimal Criminal Sanction*, 1 NORTH. ILL. L. REV. 1, 6–10 (1980).

205. See discussion *infra* Part III.C.2.

206. OECD, Argentina: Phase 2 Report, *supra* note 110, at 47–49, 52.

207. *Id.* at 52.

208. *Id.*

209. See, e.g., Sec. & Exch. Comm'n v. Titan Corp., SEC Litigation Release No. 19,107, 84 SEC Docket 3413 (Mar. 1, 2005); Sec. & Exch. Comm'n v. ABB Ltd., SEC Litigation Release No. 18,775, 83 SEC Docket 849 (July 6, 2004).

This normative conclusion is advanced by the descriptive evidence of proportionality that other States recognize and value in their approaches to combating foreign bribery and criminal sanctions more generally. For example, in discussing disgorgement-like forfeiture, the German criminal code addresses specific concerns of proportionality. The law prohibits confiscation “disproportionate to the gravity of the offence committed and to the culpability of the perpetrator”²¹⁰ Therefore, Germany discusses disgorgement in the same way as does the SEC but focuses on the size of the bribe rather than the profit gained by the firm.

The SEC’s recent reliance on disgorgement in FCPA cases has failed the proportionality test because there is no clear relationship between the amount that a firm pays in a bribe, the provable gain from that bribe, and the resulting disgorgement payment.²¹¹ The SEC would likely respond that the size of disgorgement should be based on the benefit to the firm. And, indeed, it should. This is exactly why disgorgement is ill-suited for foreign bribery. In the bribery context, the SEC often calls attention to the size of the bribe paid but uses a theory of punishment that should be based on the benefit received. The likely explanation for this behavior is that the SEC cannot usually talk about the benefit received because, unlike securities fraud cases, it is often undeterminable. In order for a sentencing regime to properly respect utilitarianism and proportionality, evidence in U.S. criminal law,²¹² foreign criminal law,²¹³ and criminal theory in general,²¹⁴ supports the claim that some kind of correlative relationship should exist between these variables. While the FCPA disgorgement cases are basically all DPAs and NPAs, settlements are

210. Strafgesetzbuch [StGB] [Penal Code], § 74b, para. 1 (F.R.G.), translated in 3 FOREIGN CORRUPT PRACTICES ACT REPORTER, *supra* note 36, at app. E-38, E-43. But, while the Icelandic Penal Code requires consideration of “the damage caused by the offense” and the “importance of the interests affected,” there is no explicit proportionality requirement. Icelandic General Penal Code, Law No. 19/1940, § 70 (Ice.). Concern that fines are disproportionate to the harm of the size of the bribe are evident in a number of other States’ criminal statutes as well. See, e.g., Law No. 300, art. 11, Sept. 29, 2000, Gazz. Uff. No. 250, Supp. Ord. 176/L (Oct. 25, 2000) (Italy), translated in 3 FOREIGN CORRUPT PRACTICES ACT REPORTER, *supra* note 36, app. E-82, E-84–E-85 (stating that Italy’s disgorgement-like confiscation authorizes confiscation of “the proceeds or the price of the offence, even by means of a confiscation amounting to an equivalent value”).

211. NEWCOMB & UROFSKY, *supra* note 69. The SEC could argue in response that the size of the bribe is not as important as the benefits that the bribing firm receives. The response, *infra* Part III.C.2, is that calculating the benefit that a firm received specifically as a result of a bribe is often difficult—sometimes impossible—and typically involves an unacceptable level of speculation.

212. See *Ewing v. California*, 538 U.S. 11, 20 (2003) (describing the Eighth Amendment’s “narrow proportionality principle” as applied to individual sentencing).

213. See *supra* notes 206, 208–209 and accompanying text.

214. See *supra* notes 202–203 and accompanying text.

informed by the background potential for liability, and the proportionality concern is thus applicable.

2. Evidentiary Difficulties in Foreign Bribery Cases

Another reason to be hesitant about the use of disgorgement as the leading theory of punishment in foreign bribery cases is the difficulty of estimating profits that arise directly from a bribe. In describing a problem with the U.S. Sentencing Guidelines in 1998, Justice Stephen Breyer alluded to the problem of “false precision,” whereby the moral foundation on which a sentencing regime rests can be undermined by attaching specific numerical values to indefinite factors.²¹⁵ While difficulty in calculating penalties exists in many criminal sentencing regimes, and is particularly prevalent in normative discussions regarding the SEC’s broad disgorgement power,²¹⁶ these concerns are even more powerful with respect to disgorgement in a foreign bribery context.

The FCPA is, indeed, not the only type of enforcement action for which commentators have questioned disgorgement on the basis of how the profits to be disgorged are calculated. Others have questioned the SEC’s use of disgorgement in the setting of disgorging executive compensation under SOX,²¹⁷ as well as disgorgement as applied to a non-profitting tipper in tipper-tippee insider trading cases.²¹⁸ In their recent article on the SEC’s use of disgorgement against executives under SOX, Elaine Buckberg and Frederick Dunbar argued that “in settled SEC enforcement actions, where parties disgorge funds as a result of a negotiated settlement between the SEC and the party charged, the SEC has often exceeded the limits of established jurisprudence and economic reasoning in calculating the amount to be disgorged.”²¹⁹

It is also often difficult for a prosecutor to demonstrate—or a defendant-corporation to refute if the burden is on the defense—the actual link between an improper payment and specific profits that a firm generates as a result of that payment.²²⁰ Unlike a typical SEC disgorgement case related to securities trading, in which the SEC is able to base disgorgement on the price of a security at two distinct points in time and set the disgorgement on the unjust enrichment of that change in a securities

215. Stephen Breyer, Assoc. Justice, U.S. Sup. Ct., Address at University of Nebraska College of Law: Federal Sentencing Guidelines Revisited (Nov. 18, 1998), *reprinted in* 11 *FED. SENT’G REP.* 180 (1999).

216. See Buckberg & Dunbar, *supra* note 87 (describing ways to solve the problem of disgorgement calculation in executive pay cases).

217. *Id.* at 349.

218. See John K. Robinson, Note, *A Reconsideration of the Disgorgement Remedy in Tipper-Tippee Insider Trading Cases*, 62 *GEO. WASH. L. REV.* 432 (1994).

219. Buckberg & Dunbar, *supra* note 87, at 349.

220. See, e.g., OECD, Argentina: Phase 2 Report, *supra* note 110, at 53.

price between those two temporal points,²²¹ there is no such clear metric in calculating the part of a contract that was gained because of an improper payment. Nor is it often even possible to know whether a particular firm would have received a contract even without the bribe due to the limited number of large, multinational firms that compete for some of the contracts for which FCPA disgorgement has been assessed.

This Note is not original in observing the particular difficulty of parsing profit earned from a foreign bribe from related profit that may have been earned lawfully. Authorities in Finland have reported to the OECD that one reason that confiscation of proceeds of a foreign bribe have never been ordered in Finland is that “it is ‘too difficult to assess the surplus.’”²²² Such reasoning also lay behind Japan’s resistance to pass a statute allowing confiscation of the proceeds of bribery.²²³

A final difficulty for corporations facing an SEC investigation is the standard of review under which U.S. courts have often analyzed disgorgement of profits.²²⁴ U.S. courts have typically held that the SEC is entitled to disgorgement on a showing of a “reasonable approximation” of a defendant’s ill-gotten profit.²²⁵ Such a standard creates a considerable burden on a corporate defendant and increases the SEC’s leverage in any settlement negotiation, a particular problem because the SEC has a tendency to exceed court-approved limits for disgorgement and has the

221. See, e.g., Sec. & Exch. Reg. Comm’n v. Wolfson, No. 06-4130, 2007 WL 2807741, at *3 (10th Cir. Sept. 25, 2007) (characterizing the SEC’s disgorgement as “evidence submitted” that showed “actual losses” based on defendant’s participation in a stock price manipulation scheme); Sec. & Exch. Reg. Comm’n v. Maxxon, 465 F.3d 1174, 1178 n.8 (10th Cir. 2006) (noting that disgorgement was based on a specific share price on a specific date); Sec. & Exch. Reg. Comm’n v. Happ, 392 F.3d 12, 31–32 (1st Cir. 2004) (characterizing as proper a disgorgement calculation in an insider-trading case as the difference between the value of defendant’s stock when sold, which was after defendant learned of the company’s financial difficulties, and the value of the same number of shares on the day after a press release, approximately three weeks later, revealing the company’s quarterly losses and leading to the drop in stock price); Sec. & Exch. Reg. Comm’n v. AbsoluteFuture.com, 393 F.3d 94, 96 (2d Cir. 2004) (discussing disgorgement in the context of a specific amount of funds that were illegally transferred).

222. OECD, Finland: Phase 2 Follow-Up Report, *supra* note 133, at 23.

223. But see OECD, Japan: Phase 2 Report, *supra* note 102, at 50–51 (noting that Japan passed legislation in 2004 that did allow for confiscation).

224. This is in addition to the already large shadow that the Arthur Andersen prosecution casts on any company seeking to negotiate fiercely against the SEC. See *infra* notes 232–234 and accompanying text.

225. See *Coxon v. Sec. & Exch. Reg. Comm’n*, No. 03-73732, 2005 U.S. App. LEXIS 13186, at *2 (9th Cir. June 29, 2005); Sec. & Exch. Reg. Comm’n v. Calvo, 378 F.3d 1211, 1217 (11th Cir. 2004).

leverage of a criminal indictment if the prosecuted party does not settle.²²⁶

*D. The Need for Formal Instruments: Uncertainty Created
by Prosecutorial Discretion*

The SEC's and the DOJ's current enforcement stance on the FCPA is governed by the same agency policies that govern other prosecutions of corporations, and normative questions about the role of prosecutorial discretion in FCPA cases are related to those questions in other corporate compliance settings. In an effort to create a predictable enforcement climate, the long-term efficacy of a DOJ or an SEC guideline is only as good as a future administration's willingness to continue along the same path as its predecessor. For example, over a period of only seven years, the Holder, Thompson, and McNulty Memos defined and redefined considerations to be taken into account when prosecuting corporations.²²⁷ At a Senate Judiciary Committee hearing in July 2008, Attorney General Michael Mukasey surprised the Committee by revealing that the DOJ was again considering "real significant proposed changes" to the McNulty Memo.²²⁸ Less than two months later, the Filip Memo changed the DOJ's enforcement priorities.²²⁹ Such uncertainty, with questionable regulatory and public interest benefits, can be undesirable and inefficient for corporate strategy, whereas predictability allows corporate decision-makers to better manage risk, making companies more competitive.²³⁰

Further exacerbating this problem is the degree of discretion that the DOJ and SEC guidelines can leave in the hands of U.S. attorneys. Normal hesitations with excessive prosecutorial discretion are frequently overcome in securities contexts, for example, but may be uniquely salient in the FCPA context.²³¹ In the more general DOJ and SEC enforcement context, it was essentially one indictment, and the reputational

226. See *infra* notes 232–234 and accompanying text (describing the collapse of Arthur Andersen and illustrating the leverage that the SEC and the DOJ hold in settlement negotiations in the wake of that collapse).

227. See WSJ.com, Posting of Peter Lattman to LawBlog, <http://blogs.wsj.com/law/2006/12/13/the-holder-memo/> (Dec. 13, 2006).

228. Pedro Ruz Gutierrez, *AG Mukasey Hints at Revision of McNulty Memo*, BLT: BLOG OF LEGALTIMES, July 10, 2008, available at <http://www.law.com/jsp/article.jsp?id=1202422864034&crss=newswire>.

229. See Filip Memo, *supra* note 75.

230. Similar concerns regarding regulatory predictability have led to calls for legislation in areas in which DOJ guidelines have been seen as acquiring too much importance. See, e.g., White Collar Crime Prof Blog, Dec. 1, 2006, http://lawprofessors.typepad.com/whitecollarcrime_blog/2006/12/attorneyclient_.html (last visited Feb. 20, 2009) (suggesting that legislation, not additional DOJ guidelines, was "the best way to proceed" in regards to waiver of the attorney-client privilege in white-collar prosecutions).

231. See *infra* notes 236–237 and accompanying text.

damage associated with it, that caused the collapse of Arthur Andersen.²³² Following the collapse of the \$9 billion firm,²³³ there was broad-based concern that, for many firms, a criminal indictment equaled a corporate death sentence. These concerns and the resulting policy-making process led to the Holder Memo and its effort to provide U.S. attorneys with guidance as to how to deal with corporate criminal conduct.²³⁴ Two of the concerns that the Holder Memo sought to address, and a current issue with the disgorgement that the SEC is now seeking in FCPA prosecutions, are the level at which individual prosecutors should be making these discretionary decisions and which type of penalties and sanctions incentivize and result in which kind of behavior.²³⁵

Such a generalized concern may not raise red flags sufficient to question prosecutorial discretion in a securities context. However, concerns about leverage in settlement negotiations and the power of an individual prosecutor are particularly salient for the FCPA. This is because an FCPA indictment, alone, can also carry the legal consequences of the immediate suspension of export licensing privileges for defense items or the suspension of the ability to receive U.S. military procurement contracts.²³⁶ For example, in the early 1990s, the Harris Corporation was indicted for alleged payments to Colombian officials in exchange for government contracts. It was immediately suspended from receiving export licenses for defense products and from participating in defense procurement contracts. The trial court, however, dismissed the case at the close of the government's case, without even requiring the Harris Corporation to mount a defense.²³⁷ Such consequences may not be a component of disgorgement itself, but they may explain why firms have not always aggressively disputed a type of punishment that does not fit in the foreign bribery context.

While it may be too early to either legislate or establish more agency-directed FCPA disgorgement guidelines, this is an issue to which regulators, corporations, and corporate counsel should be attuned. As described by Professor Roberta Karmel, the SEC frequently makes new

232. See Jeffrey S. Kinsler, *Arthur Andersen and the Temple of Doom*, 37 Sw. U. L. REV. 97, 104 (2008).

233. *Id.* at 99.

234. See Holder Memo, *supra* note 75.

235. This should not be confused with a claim that more central control is needed over decisions to prosecute in individual cases, which runs the risk of more nefarious influence from executive branch appointees motivated by partisan or political goals rather than by achieving justice in an individual case. Rather, the claim is merely that general policy decisions and a single set of theories on the structure of penalties increases regulatory predictability for regulated parties.

236. See 48 C.F.R. § 9.406-2 (1993); ZARIN, *supra* note 89, § 1-9.

237. ZARIN, *supra* note 89, § 1-1.

law through actual enforcement cases rather than through rulemaking.²³⁸ While sometimes these efforts are blessed by the courts and Congress, in other cases SEC enforcement actions develop what amounts to law, which is then rejected by the other branches of government.²³⁹ The SEC has developed the “law” of disgorgement with neither the input, contemplation, nor blessing of Congress,²⁴⁰ and it is for this reason that one should ask normative questions about the role of disgorgement in the future enforcement of the prohibition on foreign bribery. As one commentator has noted, “Consistency and predictability are not matters of grace granted to corporate citizens at the government’s pleasure; the government *owes* consistency and predictability to public corporations that are attempting to accomplish complex tasks in difficult foreign venues, and to management and directors who want to . . . [comply] in these circumstances.”²⁴¹ The OECD has likewise recommended that the United States “[m]ake a clear public statement, in light of the OECD Convention, identifying the criteria applied in determining the priorities both of the Department of Justice and of the Securities and Exchange Commission in prosecuting FCPA cases.”²⁴² This problem is not limited to the United States, as other States that engage in foreign bribery prosecutions similarly lack adequate guidelines to direct and inform prosecutorial discretion,²⁴³ and commentators have pointed to the wide latitude that foreign prosecutors may enjoy, particularly as to their decision whether to prosecute a corporation.²⁴⁴

238. See Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer as Prosecutor*, 61 LAW & CONTEMP. PROBS. 33, 33–35 (1998). In fact, a prominent example of the SEC making new law through enforcement subsequently codified by Congress is the SEC’s sensitive payment enforcement cases, which led to the enactment of the FCPA. *Id.* at 34.

239. *Id.*

240. See discussion *supra* Part II.A.

241. See Doty, *supra* note 84, at 1235.

242. OECD, Directorate for Fin., Fiscal & Enter. Aff., United States: Phase 2 Follow-Up Report on the Implementation of the Phase 2 Recommendations on the Application of the Convention and the 1997 Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions, at 12 (June 1, 2005), available at <http://www.oecd.org/dataoecd/7/35/35109576.pdf> [hereinafter OECD, United States: Phase 2 Follow-Up Report].

243. See, e.g., OECD, Directorate for Fin., Fiscal & Enter. Aff., Germany: Phase 2 Follow-Up Report on the Implementation of the Phase 2 Recommendations on the Application of the Convention and the 1997 Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions, at 4, para. 6 (Dec. 8, 2005), available at <http://www.oecd.org/dataoecd/8/44/35927070.pdf> [hereinafter OECD, Germany: Phase 2 Follow-Up Report] (“[German p]ublic prosecutors have not been provided with any specific guidelines for exercising prosecutorial discretion for legal persons.”).

244. See, e.g., OECD, Finland: Phase 2 Follow-Up Report, *supra* note 133, at 19; OECD, Germany: Phase 2 Report, *supra* note 101, at 32 (“The German authorities state that a decision of a prosecutor not to prosecute the legal person is not appealable. . . . [and i]t

IV. CONCLUSION

Enforcement of the FCPA has reached an all-time high in recent years. While many authorities have noted this trend, none have discussed the fact that the most marked change in enforcement is the SEC's increased interest in foreign bribery enforcement and its ability to obtain increasingly large disgorgement through settlements. Although disgorgement may be a theoretically justified form of punishment, on-the-ground complications of multinational regulators, overlapping jurisdiction, evidentiary difficulties in bribery cases, and a lack of proportionality call into question the SEC's enforcement choice, particularly in the absence of a clear statement that Congress contemplated such significant disgorgement in its passage or amendment of the FCPA or SOX. Relatively new foreign statutes passed pursuant to international agreements also create significant opportunities for foreign regulators to seek disgorgement. This international consensus belies the normative pull of disgorging ill-gotten gains, but exacerbates the issues facing disgorgement of profits in FCPA cases. The recent Siemens case demonstrates that aggressive FCPA enforcement is not going away. Congressional action is one potential solution for fixing the doctrinal questions in FCPA enforcement; however, more formal and long-term SEC statements addressing prosecutorial discretion as well as more specific, formal agreements with foreign regulators may provide the necessary regulatory certainty without requiring such extensive political coalescence.

appears that there are no specific guidelines for exercising prosecutorial discretion of legal persons, including those for bribery offences."); OECD, Japan: Phase 2 Report, *supra* note 102, at 48-49.