

# NOTES

## DETECTING GLOBAL BRIBERY: WHERE PUBLIC AND PRIVATE ENFORCEMENT COLLIDE

*Rashna Bhojwani\**

*The international community has become increasingly concerned with deterring global bribery. While the Foreign Corrupt Practices Act of 1977 (FCPA) serves as the dominant public enforcement mechanism, international arbitration tribunals function as the primary private enforcement mechanism, refusing to enforce contracts that were obtained by paying bribes. Although both enforcement mechanisms share the goal of deterring bribery, the overlap between them may frustrate that goal. Specifically, this overlap occurs in situations where private companies doing business abroad pay bribes in order to obtain contracts with foreign governments or individuals. U.S. enforcement agencies may charge these private companies with violations of the FCPA, yielding an extensive government investigation into the companies' conduct and possibly a settlement agreement. However, an FCPA settlement enables foreign contracting parties to obtain concrete evidence of bribery with which to void their contracts in the case of an alleged breach. The leverage to the foreign contracting parties at the expense of the FCPA-violating companies constitutes an additional penalty for the violators. This Note argues that the overlap between the enforcement schemes frustrates the goals of the FCPA in two ways: First, FCPA-violating companies experience higher penalties than public enforcement agencies otherwise expect, which reduces the companies' incentives to voluntarily disclose their misconduct, and second, FCPA violations increase the payoffs to foreign contracting parties who are also bribe receivers. To reduce the extent to which these private consequences interfere with the FCPA's goal of deterring global bribery, this Note proposes a two-pronged solution. The Department of Justice should offset the heightened penalties imposed on violating companies due to private multijurisdictional enforcement, and arbitral tribunals should take a tempered approach to voiding contracts obtained by bribery.*

### INTRODUCTION

“[C]orruption crushes the potential benefits of free market forces. The honest business person goes broke, the rules of a healthy economic system become twisted, and companies addicted to paying bribes become rotten. . . . [P]rospects for economic progress, so vital to social development, are ruined.”<sup>1</sup>

---

\* J.D. Candidate 2012, Columbia Law School.

1. Jeremy Pope, *Corruption in Africa: The Role for Transparency International (TI)*, 20 *Commonwealth L. Bull.* 1468, 1470 (1994).

While corruption has always been a global problem,<sup>2</sup> the international community has only recently attempted to identify and implement global solutions. For the most part, these solutions take two different approaches: public and private. In the public sphere,<sup>3</sup> the Foreign Corrupt Practices Act of 1977 (FCPA)<sup>4</sup> is the primary vehicle for enforcing anti-bribery norms. As the first domestic law to criminalize foreign bribery,<sup>5</sup> the FCPA inspired the Organization for Economic Cooperation and Development (OECD) Convention, a “major antibribery treaty” that requires thirty-six ratifying states to enact domestic legislation criminalizing foreign bribery.<sup>6</sup> Therefore the FCPA has gained international significance and it remains the “primary tool used by U.S. regulators to prosecute . . . foreign public bribery.”<sup>7</sup> Alternatively, in the realm of private litigation,<sup>8</sup> international arbitration tribunals have refused to enforce contracts that were obtained by paying bribes.<sup>9</sup> Both of these instruments target the supply side of bribery<sup>10</sup>: Rather than penalizing foreign officials who receive bribes, they penalize companies or individuals who pay bribes.<sup>11</sup> Therefore, in addition to their common goal of curbing bribery, they also share similar means of achieving that goal. Despite these basic

---

2. See Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* 288 (2006) (explaining “corruption does a great deal of harm”); Kimberly Ann Elliott, *Corruption as an International Policy Problem: Overview and Recommendations*, in *Corruption and the Global Economy* 175, 192 (Inst. for Int’l Econ. ed., 1997) (noting link between “illiteracy and corruption” and describing how corruption “facilitat[es] capital flight”); Dieter Zinnbauer, *Transparency Int’l, Spotlight: Corruption as an Obstacle to Achieving the Millennium Development Goals*, *Anti-Corruption Res. News* (Transparency Int’l, Berlin), Oct. 2010, at 2, 2–3 (asserting “corruption has a demonstrable negative impact on [Millennium Development Goals] achievement”).

3. See *infra* Part I.A (describing FCPA as public enforcement mechanism).

4. 15 U.S.C. §§ 78m(b), 78dd-1 to -3, 78ff (2006).

5. See Evan P. Lestelle, Comment, *The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction*, 83 *Tul. L. Rev.* 527, 530 (2008) (“At the time of its enactment in 1977, the FCPA was the first domestic legislation in the world to criminalize foreign public bribery . . .”).

6. *Id.* at 543.

7. *Id.* at 530.

8. See *infra* Part I.B (discussing arbitration as private multijurisdictional enforcement of antibribery norms).

9. See, e.g., *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 188 (Oct. 4, 2006), 46 *I.L.M.* 339, 371 (2007) (concluding claimant could not maintain any of its breach of contract claims “as a matter of [international public order] and public policy”).

10. See Lestelle, *supra* note 5, at 529 (referring to United States as “dominating the ‘supply-side’ of foreign public bribery”); see also Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 *Fla. L. Rev.* 351, 360 (2010) (referring to FCPA’s “exclusive focus on the supply of bribes”).

11. See 15 U.S.C. § 78dd-1 (2006) (rendering it unlawful to pay bribes to foreign officials); *World Duty Free*, ICSID Case No. ARB/00/7, ¶ 181, 46 *I.L.M.* at 369–70 (emphasizing tribunal’s refusal to enforce party’s contract if party *paid* bribe to obtain it).

similarities, however, the intersection between these two enforcement regimes creates unintended problems.<sup>12</sup>

Specifically, private multijurisdictional enforcement—arbitration tribunals’ practice of refusing to enforce contracts obtained by bribery—is a collateral consequence to violating the FCPA. The overlap between the public and private enforcement of antibribery rules is manifested in situations where private companies doing business abroad pay bribes in order to obtain contracts with foreign governments or individuals (foreign contracting parties). Under domestic public law, U.S. enforcement agencies may charge these private companies with violations of the FCPA, yielding an extensive government investigation into the company’s conduct. In turn, this leads to the filing of charging documents and possibly a settlement. This public law enforcement has ramifications that U.S. enforcement agencies have failed to contemplate.<sup>13</sup> Specifically, U.S. enforcement agencies may have charged the FCPA-violating company with precise bribe payments that were used to obtain foreign contracts that remain in existence. Whereas proof of bribery may otherwise have been difficult to acquire for private arbitration proceedings, an FCPA settlement enables foreign contracting parties to obtain concrete evidence of bribery with which to void their contracts in the case of an alleged breach.<sup>14</sup> Therefore, for the FCPA-violating company, the specter of losing foreign contracts obtained through bribe payments due to private enforcement serves as a collateral consequence of violating the FCPA. Without the overlap between public and private enforcement, the FCPA-violating company would only face the penalties imposed by the Department of Justice (DOJ).

This collateral consequence from private enforcement did not always exist. Rather, the global community has only recently decided to take an aggressive approach toward bribery, both publicly and privately. The number of FCPA enforcement actions has risen drastically since 2007,<sup>15</sup> and *World Duty Free*—the landmark arbitration case in which the tribunal voided a contract obtained by bribery—was only decided in 2006.<sup>16</sup> Therefore, while there is much literature on public<sup>17</sup> or private enforcement,<sup>18</sup> there is little scholarship that describes the interplay between the

---

12. See *infra* Part II (describing problems caused by interaction of FCPA enforcement and arbitration proceedings).

13. See *infra* Part II (describing unintended consequences of FCPA regime).

14. See *infra* Part II.A (describing utility of FCPA settlement in arbitration proceeding).

15. See *infra* note 60 and accompanying text (providing statistics on increase in number of FCPA enforcement actions in recent years); see also Lestelle, *supra* note 5, at 528 (acknowledging “trend of aggressive enforcement of the antibribery provisions of the FCPA by U.S. regulators”).

16. See *infra* Part I.B (describing doctrinal issues that resulted in lack of private enforcement until *World Duty Free* decision).

17. See *infra* Part I.A (citing various sources that discuss public enforcement).

18. See *infra* Part I.B (discussing various sources regarding private enforcement).

two types of enforcement. This Note fills that gap, arguing that the unintended overlap between the public and private enforcement schemes frustrates the FCPA's ability to deter bribery in two ways: (1) FCPA-violating companies experience higher penalties than public enforcement agencies expect, which reduces the companies' incentives to voluntarily disclose their misconduct,<sup>19</sup> especially for smaller and mid-sized companies, and (2) through private consequences, FCPA violations increase the payoffs to foreign contracting parties who are also bribe receivers.<sup>20</sup> This Note proposes a two-pronged solution to reduce the extent to which these private consequences hinder the FCPA's goal of deterring bribery. Specifically, the DOJ should deduct the private enforcement penalties from violating-companies' FCPA settlements, and arbitral tribunals should take a tempered approach to voiding contracts obtained by bribery.<sup>21</sup> These measures would limit the additional costs of private enforcement that may be created when a company violates the FCPA, thereby alleviating the problem that this Note identifies.

This Note proceeds in three parts. Part I provides background on domestic public enforcement and international private enforcement of antibribery norms. Part II.A explains that the overlap between the two regimes creates private multijurisdictional consequences that serve as additional penalties for FCPA violations. Part II.B suggests that these additional penalties are problematic because they frustrate the FCPA's goal of deterring global bribery through two mechanisms: 1) diminished incentives to voluntarily disclose misconduct, and 2) increased payoffs to bribe receivers. Part III presents measures that both public and private enforcers should adopt in order to reduce the additional cost that results from the overlap between the two types of enforcement.

## I. PUBLIC AND PRIVATE ANTI-CORRUPTION ENFORCEMENT

Part I provides background about the key concepts in this Note. Part I.A explains that one of the goals of public law enforcement in the United States is to reduce or deter global bribery. Parts I.A.1, I.A.2, and I.A.3 describe how the FCPA's basic framework, penalty structure, and enforcement strategies contribute to accomplishing that goal, respectively. Part I.B provides an overview of private multijurisdictional enforcement, explaining how arbitral tribunals have recently taken a stance against corruption.

---

19. See *infra* Part II.B.1 (outlining voluntary disclosure problem).

20. See *infra* Part II.B.2 (describing problem of increasing payoffs to bribe receivers).

21. See *infra* Part III (advancing two-pronged solution).

A. *Public Law Enforcement: The FCPA*

Although the international community's willingness to fight corruption through national legislation is relatively new,<sup>22</sup> the United States has long used the FCPA to prosecute individuals and corporations that pay bribes in their business dealings abroad. The FCPA is a U.S. statute that prohibits corporations and individuals with U.S. ties from paying bribes to foreign government officials.<sup>23</sup> Congress originally passed the statute as an amendment to the Securities and Exchange Act of 1934 in response to the Watergate scandal. The scandal led the Securities and Exchange Commission (SEC) to conduct money-laundering investigations, which revealed that "several hundred U.S. multinational corporations . . . had made bribe payments totaling hundreds of millions of dollars to foreign officials."<sup>24</sup> In order to encourage corporations to behave ethically in their dealings overseas and prevent such embarrassments to U.S. foreign policy, Congress enacted the FCPA in 1977.<sup>25</sup>

Although the FCPA was enacted in response to a particular event, the statute more broadly aims to curb corruption by reducing corporations' willingness to pay bribes.<sup>26</sup> Consistent with this goal, Congress amended the FCPA twice since its initial passage, once in 1988 and again in 1998.<sup>27</sup> These amendments expanded the statute's goals by providing

22. While most countries had national legislation prohibiting bribery, few countries had statutes that applied extraterritorially. A. Timothy Martin, *International Arbitration and Corruption: An Evolving Standard I*, available at [http://www.timmartin.ca/fileadmin/user\\_upload/pdfs/Corruption\\_and\\_Intn\\_1\\_Arbitration\\_Apr2003\\_.pdf](http://www.timmartin.ca/fileadmin/user_upload/pdfs/Corruption_and_Intn_1_Arbitration_Apr2003_.pdf) (on file with the *Columbia Law Review*) (last visited Oct. 31, 2011); see Theodore H. Moran, *Ctr. for Global Dev., Combating Corruption Payments in Foreign Investment Concessions: Closing the Loopholes, Extending the Tools 1* (2008), available at [www.cgdev.org/files/15197\\_file\\_CombatingCorruption.pdf](http://www.cgdev.org/files/15197_file_CombatingCorruption.pdf) (on file with the *Columbia Law Review*) ("Prior to 1997, bribes had been so common . . . that many developed countries routinely allowed them to be deducted as an ordinary expense of doing business."). Because the FCPA placed "U.S. business at a competitive disadvantage[,] . . . the [United States] pressed for parallel legislation from its trading partners," which resulted in the adoption of the United Nations (UN) Convention Against Corruption and the Organization of Economic Cooperation Convention. Bernardo M. Cremades & David J.A. Cairns, *Corruption, International Public Policy and the Duties of Arbitrators*, *Disp. Resol. J.*, Nov. 2003 to Jan. 2004, at 76, 79. Due to these conventions, many countries now have national laws prohibiting corrupt payments to national officials that allow prosecution of bribes paid extraterritorially. *Id.*

23. *Foreign Corrupt Practices Act of 1977*, 15 U.S.C. §§ 78m(b), 78dd-1 to -3, 78ff (2006); Lestelle, *supra* note 5, at 530.

24. Lestelle, *supra* note 5, at 530.

25. *Foreign Corrupt Practices Act of 1977*, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m(b), 78dd-1 to -3, 78ff); Lestelle, *supra* note 5, at 530.

26. See *infra* notes 210–212 and accompanying text (identifying FCPA's goal as reducing contribution of U.S. companies toward practice of bribery and explaining its supply-side approach).

27. *Omnibus Trade and Competitive Act of 1988*, Pub. L. No. 100-418, §§ 5001–5003, 102 Stat. 1107, 1415–25 (codified as amended at 15 U.S.C. §§ 78m(b), 78dd-1 to -2, 78ff); *International Anti-Bribery and Fair Competition Act of 1998*, Pub. L. No. 105-366, 112 Stat. 302 (codified as amended at 15 U.S.C. §§ 78dd-1 to -3, 78ff); see also Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private*

its enforcers with additional latitude to reach foreign corporations,<sup>28</sup> thereby enabling them to realistically tackle the statute's broader goal of deterring global bribery.<sup>29</sup>

Part I.A.1 provides an overview of the FCPA's structure in order to illustrate the DOJ's expansive power to charge corporations or individuals with FCPA violations. Part I.A.2 explains the process of calculating fines for those violations in order to demonstrate the severity of FCPA violations for those corporations or individuals that are charged. Moreover, Part I.A.2 identifies the nuances of the penalty process to demonstrate that the relevant factors for penalties vary based on the size of the violating corporation. Finally, Part I.A.3 discusses the recent upswing in FCPA enforcement to emphasize the DOJ's current commitment toward reducing bribery.

1. *FCPA Framework.* — In order to accomplish its goal, the FCPA takes an expansive approach toward the concept of bribery. The statute is structured to encompass a broad range of conduct, including direct acts of bribery as well as indirect acts of bribery that merely indicate that actual bribe payments occurred. In line with this approach, the statute contains two sections: antibribery provisions and accounting provisions. The antibribery provisions prohibit all U.S. issuers, individuals, and "domestic concerns" from paying, offering, or promising anything of value to a foreign official for the purpose of "obtaining or retaining business."<sup>30</sup> The FCPA's accounting provisions require companies covered by the provisions to keep accurate books and records and to "maintain . . . system[s] of internal accounting controls."<sup>31</sup> Therefore, even if the enforcement agencies cannot find direct evidence of bribe payments, they may charge

---

Whistleblower Suits to Overseas Employees, 46 Harv. J. on Legis. 425, 436 (2009) (discussing amendments).

28. Before 1998, foreign companies were not subject to FCPA jurisdiction unless they qualified as "issuers" under the Act. The 1998 amendments "expanded the FCPA to assert territorial jurisdiction over foreign companies and nationals." U.S. Dep't of Justice, Lay-Persons Guide 3 [hereinafter Lay-Persons Guide], available at <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> (on file with the *Columbia Law Review*) (last visited Sep. 21, 2011); see also S. Rep. No. 105-277, at 4-5 (1998) (detailing 1998 amendment's expansion of jurisdiction to foreign companies and nationals).

29. See Moran, *supra* note 22, at 1 (referring to United States as "notable exception" in enacting and enforcing antibribery legislation); Justin F. Marceau, A Little Less Conversation, A Little More Action, 12 Fordham J. Corp. & Fin. L. 285, 286 (2007) ("From its inception, the FCPA was a bold . . . piece of legislation in that it criminalized conduct that Congress itself deemed unethical . . ."); Lestelle, *supra* note 5, at 530 & n.13 ("Commentators have hailed the . . . FCPA as the genesis of efforts against foreign public bribery . . .").

30. 15 U.S.C. § 78dd-1 to -3.

31. Id. § 78m(b)(2)(A)-(B). Issuers must "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that," *inter alia*, "(i) transactions are executed in accordance with management's . . . authorization; (ii) transactions are recorded . . . to permit preparation of financial statements [and] . . . maintain accountability for assets; [and] (iii) access to assets is permitted only in accordance with management's . . . authorization." Id. § 78m(b)(2)(B).

companies that hide potential bribe payments under the books and records provisions. Moreover, the FCPA is both a criminal and civil statute. Thus, even if the enforcement agencies cannot meet the higher standard of proof required for criminal charges, they can charge companies with civil violations.<sup>32</sup> In short, the statute is tailored to give its enforcers wide scope to deter bribery; it covers a variety of conduct and permits its enforcers to prove that conduct using various standards of proof.

2. *FCPA Penalties.* — The penalties for violating the FCPA and the method for calculating those penalties also aim to deter companies from paying bribes in their overseas dealings.<sup>33</sup> To offset the high rewards that accrue from paying bribes,<sup>34</sup> the DOJ imposes severe penalties on violating companies. Under the statute, companies that violate the antibribery provisions face fines of up to \$2 million,<sup>35</sup> but the DOJ routinely surpasses these statutory maximums.<sup>36</sup> The penalties for criminal violations of the accounting provisions are even harsher than those for violations of the antibribery provisions, exposing companies to fines of up to \$25 million.<sup>37</sup> In addition, the SEC may seek up to \$500,000 in civil fines for violating issuers.<sup>38</sup> Of even more cause for concern for violating companies, the SEC has recently sought “disgorgement of ill-gotten profits in FCPA prosecutions.”<sup>39</sup>

Various nonmonetary penalties also ensue from FCPA violations. Companies may face debarment within the United States or in other foreign countries, which prevents them from doing business with the federal government in countries where they are debarred.<sup>40</sup> Similarly, development banks that finance large government projects abroad, such as the

---

32. See Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 *Ind. L. Rev.* 389, 395 (2010) [hereinafter Koehler, *Decade of Resurgence*] (“[A] prosecutor’s ability to satisfy the higher burden of proof required for a criminal conviction . . . may determine whether an FCPA violation is pursued with criminal charges or merely civil charges.”).

33. See U.S. Sentencing Guidelines Manual ch.8, introductory cmt. (2010) (explaining “guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct”).

34. See Moira Allen, *Here Comes the Bribe*, *Entrepreneur*, Oct. 2000, at 48, 48 (explaining “bribes are expected in many countries”); see also 15 U.S.C. § 78dd-1(a)(1)(A)(iii) (prohibiting paying a foreign official to “secur[e] [an] improper advantage” (emphasis added)).

35. 15 U.S.C. § 78dd-3(e)(1)(A).

36. The DOJ achieves this “by invoking the Alternative Fines Act, which authorizes fines of up to twice the greater of the defendant’s gain or the victim’s loss from a criminal offence.” Eugene R. Erbstoesser et al., *The FCPA and Analogous Foreign Anti-Bribery Laws—Overview, Recent Developments, and Acquisition Due Diligence*, 2 *Capital Markets L.J.* 381, 385–86 (2007).

37. *Id.* at 386.

38. *Id.*

39. *Id.*

40. *Lay-Persons Guide*, *supra* note 28, at 5–6.

World Bank, might debar a violating company.<sup>41</sup> Finally, companies may face negative publicity due to the public nature of FCPA investigations and settlements that require disclosure of unethical conduct.<sup>42</sup> Therefore violating companies' exposure to liability can be reasonably characterized as extreme.

The method of calculating penalties demonstrates the DOJ's commitment to deterring U.S.-linked companies from paying bribes in their overseas dealings. To determine the penalties for a violating company, the DOJ relies on the Federal Sentencing Guidelines. This requires calculating an offense level, a base fine, and a culpability score<sup>43</sup> before applying a multiplier to arrive at the final fine range.<sup>44</sup> In calculating the culpability score, organizations begin with five points,<sup>45</sup> and points are added and subtracted from the culpability score based on aggravating and mitigating factors, respectively.<sup>46</sup> While there are multiple aggravating factors, including involvement in criminal activity,<sup>47</sup> prior history of the organization,<sup>48</sup> and violation of an order,<sup>49</sup> there are only two mitigating factors: (1) the existence of an effective compliance and ethics program<sup>50</sup> and (2) self-reporting, cooperation, or acceptance of responsibility.<sup>51</sup> However, if high-level officials in the company were involved in the misconduct, the company cannot receive the benefit of mitigation factor (1).<sup>52</sup>

This calculation method also takes into account the size of the violating company to ensure that larger companies are adequately deterred. Accordingly, the guidelines generally have a slightly different impact on small and mid-sized firms than they do on larger firms. Smaller firms usually receive a lower culpability score than larger firms because the guidelines add fewer points to small firms' culpability scores from involvement in criminal activity (an aggravating factor) than to large firms' scores for

---

41. See, e.g., World Bank, Guidelines Procurement Under IBRD Loans and IDA Credits § 1.14(d) (2010) (declaring firm or individual who engages in corrupt practices "ineligible . . . to be awarded a Bank-financed contract").

42. David B. Smith et al., An Investigation of the Information Content of Foreign Sensitive Payment Disclosures, 6 *J. Acct. & Econ.* 153, 154 (1984) (concluding disclosures of bribe payments are associated with "a negative market reaction").

43. See U.S. Sentencing Guidelines Manual § 8C2.3–2.5 (2010) (mandating calculation of offense level, culpability level, and base fine to determine penalties and enumerating factors that affect this calculation).

44. See *id.* §§ 8C2.6–2.7 (determining multipliers and setting fine range).

45. See *id.* § 8C2.5(a) ("Start with 5 points . . .").

46. See *id.* § 8C2.5(b)–(g) (instructing companies to "apply subsections (b) through (g) [(aggravating and mitigating factors)]" to determine final score).

47. *Id.* § 8C2.5(b).

48. *Id.* § 8C2.5(c).

49. *Id.* § 8C2.5(d).

50. *Id.* § 8C2.5(f).

51. *Id.* § 8C2.5(g).

52. *Id.* § 8C2.5(f).

the same aggravating conduct.<sup>53</sup> Unfortunately, this benefit may be offset because smaller firms are more likely to have senior officials engaged in the misconduct,<sup>54</sup> which reduces their ability to mitigate by instituting a compliance regime.<sup>55</sup>

Finally, the Guidelines' focus on self-policing and voluntary disclosure as a mitigating factor<sup>56</sup> also reflects the DOJ's goal of reducing U.S. corporations' contribution to bribery. Encouraging self-reporting enables the DOJ to focus its resources on detecting misconduct that goes unreported,<sup>57</sup> which increases their efficiency in enforcing the statute. How-

53. See *id.* § 8C2.5 (explaining that for each aggravating factor, fewer points are added to culpability score if firm is smaller in size).

54. See Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 Fla. St. U. L. Rev. 571, 614 & n.149 (2005) (“[M]any small organizations sentenced under the Guidelines are ineligible for sentence mitigation, due to top-management knowledge of or participation in the misconduct.”).

55. U.S. Sentencing Guidelines Manual § 8C2.5(f)(3)(A).

56. Even if senior officials are involved in the misconduct, the companies may still receive mitigation from cooperating or voluntarily disclosing. *Id.* § 8C2.5(g); see Memorandum from Larry D. Thompson, Deputy Att’y Gen., to Heads of Dep’t Components and U.S. Att’y’s (Jan. 20, 2003) [hereinafter *Thompson Memorandum*], available at [http://www.justice.gov/dag/cftf/corporate\\_guidelines.htm](http://www.justice.gov/dag/cftf/corporate_guidelines.htm) (on file with the *Columbia Law Review*) (noting “voluntary disclosure of wrongdoing” is factor to be considered when deciding about charges). For example, in a recent address, Lanny Breuer, Assistant Attorney General, asserted that the DOJ both “encourage[d] and appropriately reward[ed]” voluntary disclosures. Lanny Breuer, Assistant Att’y Gen. Criminal Div., Address to the 22nd National Forum on the Foreign Corrupt Practices Act 3 (Nov. 17, 2009) [hereinafter *Breuer Address*], available at <http://online.wsj.com/public/resources/documents/111709breuerremarks.pdf> (on file with the *Columbia Law Review*). But see *Thompson Memorandum*, *supra* (“In determining whether to charge a corporation, that corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government’s investigation *may* be relevant factors.” (emphasis added)). For further discussion of the impact of voluntary disclosure on penalties, see generally Lucinda A. Low et al., *The Uncertain Calculus of FCPA Voluntary Disclosures 11–20* (Mar. 27–28, 2007) (unpublished manuscript), available at <http://apps.americanbar.org/intlaw/spring07/World%20Bank%20Anticorruption%20Programs/Low%20-%20The%20Uncertain%20Calculus%20of%20FCPA%20Voluntary%20Disclosures.pdf> (on file with the *Columbia Law Review*) (examining application of voluntary disclosure benefits to various cases).

57. See *Foreign Corrupt Practices Act Assessment: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 38 (2011) (statement of George Terwilliger, Partner, White & Case, LLP) (advocating for adoption of FCPA safe-harbor provision that “shield[s] from criminal liability companies that operate demonstrably robust compliance programs and that self-report any misconduct that arises”); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. Rev. 687, 707 (1997) (“From the government’s perspective, reporting not only ensures that detected misconduct is sanctioned, but also increases the probability and reduces the costs of detection.”); Shawn M. Wright & Jennifer Peru Gary, *United States: Possible Amendments to the FCPA Considered During Recent House Judiciary Subcommittee Hearing*, Mondaq (June 29, 2011), <http://www.mondaq.com/unitedstates/x/137008/White+Collar+Crime+Fraud/Possible+Amendments+To+The+FCPA+Considered+During+Recent+House> (on file with the *Columbia Law Review*) (discussing subcommittee member’s focus on

ever, despite these mitigation provisions for voluntary disclosure, the costs of violating the FCPA remain high, illustrating the DOJ's strong commitment to reducing bribery.

3. *Increased FCPA Enforcement.* — In line with this strong commitment, the DOJ has augmented its enforcement of the FCPA,<sup>58</sup> by increasing both the magnitude of penalties and the number of corporations charged with violations.<sup>59</sup> The last three years have seen the largest increase: While there were only five, twelve, and fifteen formal proceedings in 2004, 2005, and 2006, respectively, there were thirty-eight in 2007, thirty-three in 2008, and forty in 2009.<sup>60</sup> The penalties imposed have also increased exponentially in recent years.<sup>61</sup> Of significance is the *Siemens* case in 2008, which culminated in a settlement of over \$1.6 billion—the largest FCPA settlement to date.<sup>62</sup> Whereas aggressive enforcement of public law might otherwise result in close judicial scrutiny, the nature of FCPA enforcement does not lend itself to such review.<sup>63</sup> This does not mean that companies escape unscathed. Rather, companies charged with violating the FCPA generally resolve their enforcement actions through

---

“encourag[ing] companies to . . . engage in voluntary disclosure” in order to “save both the government and the companies from conducting cost-intensive investigations”). See generally Louis Kaplow & Steven Shavell, *Optimal Law Enforcement with Self-Reporting of Behavior*, 102 J. Pol. Econ., 583, 602–03 (1994) (“[I]n many contexts significant enforcement resources . . . are saved by inducing people to come forward with information about their conduct.”).

58. When the FCPA was first enacted, its enforcement was merely “sporadic.” Spalding, *supra* note 10, at 353; see also Vega, *supra* note 27, at 434 (“Between 1978 and 2000, the SEC and the DOJ together averaged only three FCPA prosecutions per year. The few cases that went to trial resulted in minimal or no penalties.”).

59. See Priya Cheria Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 Stan. L. Rev. 1447, 1449 (2008) (providing statistics to demonstrate higher frequency of FCPA settlements).

60. Vega, *supra* note 27, at 435 (providing total number of FCPA enforcement actions for 2007 and 2008); Robert C. Blume et al., 2010 Mid-Year FCPA Update, Gibson, Dunn & Crutcher LLP (July 8, 2010), <http://www.gibsondunn.com/Publications/Pages/2010Mid-YearFCPAUpdate.aspx> (on file with the *Columbia Law Review*) (providing table and graph to illustrate increasing FCPA enforcement in recent years).

61. The U.S. Treasury, rather than the SEC or DOJ, receives the money that companies pay for their violations. *FCPA Fines: Where Does All the Money Go?*, TRACEblog (Feb. 13, 2009, 1:54 PM), <http://traceblog.org/2009/02/13/fcpa-fines-where-does-all-the-money-go/> (on file with the *Columbia Law Review*).

62. Vega, *supra* note 27, at 435–36; see also Press Release, U.S. Dep’t of Justice, *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) [hereinafter *Siemens Press Release*], available at <http://www.usdoj.gov/opa/pr/2008/December/08-crm-1105.html> (on file with the *Columbia Law Review*) (noting “combined U.S. penalties” in *Siemens* case represent “the largest monetary sanction ever imposed in an FCPA case”).

63. See Koehler, *Decade of Resurgence*, *supra* note 32, at 410 (“[J]udicial scrutiny is essentially non-existent in the FCPA context given the frequency in which FCPA enforcement actions are resolved through NPAs, DPAs, pleas, or SEC settlements.”).

nonprosecution agreements, deferred prosecution agreements,<sup>64</sup> or other agreements with the SEC, in which they agree to pay massive fines and institute comprehensive compliance programs. The DOJ's emphasis on FCPA compliance suggests that this trend of increased enforcement will continue.<sup>65</sup>

## B. *Private Law Enforcement: International Arbitration and World Duty Free*

As public law enforcement increasingly confronts corrupt business practices, private law has followed suit. Previously, international arbitration tribunals hesitated to entertain defenses of bribery, let alone to void contracts on those grounds.<sup>66</sup> However, recent arbitral decisions reflect a willingness to tackle corruption through voiding contracts on the basis of public policy.<sup>67</sup> Part I.B describes the jurisprudence underlying this new-found authority. Part I.B.1 establishes the distinctive principles of arbitration and provides an overview of arbitral institutions. Part I.B.2 describes how these principles have guided arbitration doctrine on voiding corruption-based contracts in order to explain the recent increase in private enforcement.

1. *International Commercial Arbitration: Basic Framework.* — International arbitration is an alternative to the domestic judicial system in which parties from different countries may resolve their disputes.<sup>68</sup> It is a consensual process—the parties must agree to use arbitration as the dispute resolution method<sup>69</sup>—in which “a non-governmental decision-maker . . .

64. Under a nonprosecution agreement, the DOJ agrees not to prosecute for the violations, whereas under a deferred prosecution agreement, the DOJ promises not to prosecute contingent on “future good behavior.” David C. Weiss, Note, The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence, 30 Mich. J. Int'l L. 471, 482 (2009).

65. In 2009, Mark Mendelsohn, former Deputy Chief of the Fraud Section in DOJ's Criminal Division, confirmed that the DOJ had at least 130 ongoing FCPA investigations. Robert C. Blume et al., 2009 Year-End FCPA Update, Gibson, Dunn & Crutcher LLP (Jan. 4, 2010), <http://www.gibsondunn.com/Publications/Pages/2009Year-EndFCPAUpdate.aspx> (on file with the *Columbia Law Review*).

66. See Moran, *supra* note 22, at 7–8 (distinguishing between tribunals' past hesitancy to deal with corruption and their current willingness to do so). To demonstrate that tribunals were apprehensive in entertaining claims of corruption, Moran emphasizes the 2000 decision of the *Metalclad v. Mexico* tribunal, where, “despite rampant rumors of corruption and pleadings about corrupt practices, the [t]ribunal simply chose not to address the issue of corruption.” *Id.*

67. See *infra* Part I.B.2 (discussing recent decisions voiding contracts on grounds of corruption).

68. See Alan Redfern et al., *Law and Practice of International Commercial Arbitration* 1 (4th ed. 2004) (“It is a private method of dispute resolution, chosen by the parties themselves as an effective way of putting an end to disputes between them . . .”).

69. The arbitration tribunal's jurisdiction is derived from the parties' agreement to arbitrate. *Id.* at 9.

produces a legally-binding and enforceable ruling.”<sup>70</sup> Such a process enables parties to alleviate the inconvenience and uncertainty associated with transnational litigation.<sup>71</sup> Therefore, if parties from different jurisdictions form a contract, they most likely will include an arbitration clause stating that any disputes will be resolved by arbitration.<sup>72</sup> Alternatively, bilateral investment treaties (BITs) can protect investors in foreign jurisdictions. BITs are agreements between states that often contain provisions enabling foreign investors to compel international arbitration for specific disputes, even if there is no arbitration clause “in the contract(s) giving rise to the dispute.”<sup>73</sup> Usually, these arbitration provisions in BITs or clauses in contracts will also include a reference to a specific arbitration institution that will supervise the arbitration proceeding.<sup>74</sup>

Institutional arbitrations create procedural rules that apply to proceedings that occur under its auspices.<sup>75</sup> There are a number of such institutions, including the International Chamber of Commerce (ICC),<sup>76</sup> the American Arbitration Association (AAA),<sup>77</sup> and the International Centre for Settlement of Investment Disputes (ICSID).<sup>78</sup> While the ICC is the leading arbitral institution for commercial disputes,<sup>79</sup> ICSID<sup>80</sup> is a

70. Gary B. Born, *International Commercial Arbitration: Commentary and Materials* 2 (2d ed. 2001). The parties may choose their arbitrators or specify a third party that will choose their arbitrator. If they choose for a particular institution to govern their arbitration, discussed *infra* text accompanying notes 74–82, the institution might appoint the arbitrators. See Redfern et al., *supra* note 68, at 9–10 (discussing choice of arbitrators). Arbitral awards are enforced by a system of international and domestic conventions and rules. For a discussion of these rules, see generally *id.* at 10–11.

71. See Born, *supra* note 70, at 2–3 (“[I]nternational arbitration is frequently regarded as a means of mitigating the peculiar uncertainties of transnational litigation.”); Donald Francis Donovan & Alexander K.A. Greenawalt, *Mitsubishi After Twenty Years: Mandatory Rules Before Courts and International Arbitrators*, in *Pervasive Problems in International Arbitration* 11, 12–13 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006) (explaining arbitration is “more attractive than exposure to the multiplicity of legal regimes . . . that might otherwise be brought to bear on disputes arising out of an international transaction”).

72. See generally Paul D. Friedland, *Arbitration Clauses for International Contracts* 7–35 (2d ed. 2007) (describing pros and cons of choosing arbitration over litigation in context of international contracts).

73. Born, *supra* note 70, at 26.

74. See *id.* at 4 (“International commercial arbitration frequently occurs pursuant to institutional arbitration rules, which are often incorporated by reference into parties’ arbitration agreements.”).

75. *Id.* at 11.

76. See generally *id.* at 13–15 (referring to ICC as “world’s leading international commercial arbitration institution”).

77. See generally *id.* at 16–17 (providing background information on AAA and explaining its status as “leading U.S. arbitral institution”).

78. See generally *id.* at 17 (explaining ICSID’s focus).

79. *Id.* at 13.

80. ICSID was established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature Aug. 27, 1965, 17 U.S.T. 1270 [hereinafter ICSID Convention].

specialized tribunal that has jurisdiction over “‘investment disputes’ between states and foreign investors”<sup>81</sup> when the parties agree that it will govern.<sup>82</sup>

2. *Tribunals’ Authority to Consider Corruption on the Merits.* — Although the consensual nature of arbitration benefits parties to transnational disputes, it also creates doctrinal complications. As a result, tribunals’ authority to refuse to enforce contracts obtained by bribe payments has not always been clear-cut. Part I.B.2(a) explains that although tribunals only recently utilized their authority to consider corruption, this authority is rooted in a longstanding doctrine entitled separability. Part I.B.2(b) describes two grounds upon which tribunals can refuse to enforce contracts tainted by corruption: BIT language and transnational public policy. Together, these sections provide the doctrinal background for the recent increase in private enforcement.

a. *Separability Doctrine.* — While courts can easily reach the question of corruption, the presence of potential bribery may jeopardize arbitral tribunals’ jurisdiction over the case. Because arbitration is a consensual process,<sup>83</sup> the tribunal’s authority is based on the parties’ agreement to arbitrate, which is part of the underlying contract at issue in the case.<sup>84</sup> If it becomes apparent that the underlying contract might be void because it was obtained by corruption, the tribunal may not have authority to hear the case to decide if the contract is void in the first place.<sup>85</sup> Due to this dilemma, tribunals adhere to the separability doctrine, which stands for the proposition: “[A]n arbitration agreement is presumptively distinct and independent from the parties’ underlying contract, and is supported by the separate consideration of the parties’ exchange of promises to arbitrate.”<sup>86</sup>

The doctrine of separability allows tribunals to consider the potential validity of the underlying contract to determine if it is void, rather than being forced to decline jurisdiction immediately upon a mere suspicion of corruption.<sup>87</sup> For example, in the arbitration proceeding *Methanex*

81. Born, *supra* note 70, at 17.

82. ICSID Convention, *supra* note 80, art. 25(1).

83. See Born, *supra* note 70, at 2 (stating “international arbitration is a consensual means of dispute resolution”).

84. Henry P. de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 *Tul. L. Rev.* 42, 42 (1982) (“The arbitral process . . . is based on contract.”).

85. See Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* 43 (2004) (describing “question of verifying whether the nullity of the main contract is amenable to leading the Arbitrator to declare that the related arbitration agreement is also infected by such nullity” which would remove Arbitrator’s jurisdiction to rule on any substantive issue).

86. Born, *supra* note 70, at 6.

87. See Sayed, *supra* note 85, at 44 (noting separability “leads to [the conclusion] that the arbitration agreement *may* remain valid even though the underlying contract is null and void”). Note, though, there is one exception to this rule. In ICC Case No. 1110 (1963), 21 *Y.B. Comm. Arb.* 47 (Fr. 1963), Judge Lagergren declined jurisdiction over the case by

*Corp. v. United States*, the tribunal acknowledged that it had the authority to make findings of fact regarding allegations of corruption,<sup>88</sup> “even though such allegations had not been proven in associated criminal trials.”<sup>89</sup> Although the tribunal ultimately ruled against a finding of corruption in the case, “the arbitrators made clear that the presumption that an investor can rely upon arbitrators to enforce a contract obtained via corrupt actions is not justified.”<sup>90</sup> As illustrated in *Methanex*, tribunals now routinely reach the merits of contract cases involving bribery. If they find sufficient evidence of corruption, they either decline jurisdiction or declare the claims inadmissible. This doctrine enables tribunals to take bold stances against corruption.

b. *Refusal to Enforce Contracts Based on BIT Language and Transnational Public Policy*. — However, tribunals cannot void contracts based on corruption unless they have specific reasons for doing so. Using the doctrine of separability, tribunals have refused to enforce contracts tainted by corruption on two grounds: BIT language and transnational public policy. The former is exemplified in the landmark case of *Inceysa v. El Salvador*,<sup>91</sup> where the tribunal declined jurisdiction over the case upon its factual finding of corruption. In its reasoning, the tribunal referred to both the governing Convention and BIT, concluding that neither allowed the tribunal to maintain jurisdiction. First, the ICSID Convention that governed *Inceysa* provides a prerequisite for jurisdiction because it states that the dispute must “aris[e] directly out of an investment.”<sup>92</sup> While the Convention is silent on the definition of investment, the “context, object, and purpose of the . . . ICSID Convention [demonstrate] that only legal investments will enjoy [its] protection.”<sup>93</sup> Accordingly, the tribunal grounded its lack of jurisdiction on this language in the ICSID Convention, concluding that “*Inceysa* [could not] enjoy the rights

---

his own motion, so he did not reach the merits. The case was unique because the parties acknowledged that bribery had occurred in relation to the contract at issue but they asked the tribunal to disregard it. Therefore, to ensure that he did not give effect to a potentially illegal contract, Judge Lagergren concluded that the contract violated “public decency and morality,” and that corruption issues should be “reserved for the ordinary Courts.” Sayed, *supra* note 85, at 61, 63.

88. See *Methanex Corp. v. United States*, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345, 1430–37 (NAFTA Arb. Trib. 2005) (describing tribunal’s methodology of “connecting the dots” of evidence to determine if they could issue finding of corruption).

89. Moran, *supra* note 22, at 8.

90. *Id.*

91. *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, ¶¶ 248–252 (Aug. 2, 2006), [http://italaw.com/documents/Inceysa\\_Vallisoletana\\_en\\_001.pdf](http://italaw.com/documents/Inceysa_Vallisoletana_en_001.pdf) (on file with the *Columbia Law Review*).

92. ICSID Convention, *supra* note 80, art. 25(1).

93. Richard Kreindler, Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine, *in* *Between East and West: Essays in Honour of Ulf Franke* 309, 313 (Kaj Hober, Annette Magnusson & Marie Ohrstrom eds., 2010). For a full explanation of the implicit requirement that the investment be legal, see *id.* at 313–14.

granted by said Investment Law because its ‘investment’ [did] not meet the condition of legality.”<sup>94</sup> Similarly, Inceysa’s attempt to rely on the governing El Salvador-Spain BIT for jurisdiction fell short,<sup>95</sup> as the tribunal concluded that Inceysa’s “investment [did not] meet the conditions of legality necessary” to receive that protection.<sup>96</sup>

While the *Inceysa* tribunal confronted the problem of corruption, it limited its conclusion to specific language in the governing Convention and BIT. Unlike *Inceysa*, the *World Duty Free* tribunal<sup>97</sup> did not base its conclusion on the governing Convention and BIT, which vary from case to case. Rather, the *World Duty Free* tribunal created a general rule that bribe payments are unacceptable under transnational public policy. Accordingly, the tribunal nullified, on these public policy grounds, a contract that had been obtained by paying a bribe.<sup>98</sup> The tribunal’s nullification based on transnational public policy reflects a belief that corruption is not only contrary to the laws of specific countries but also unacceptable on a global scale.<sup>99</sup> In establishing this, the *World Duty Free* tribunal eliminated the need to search for jurisdictional prerequisites to void contracts for corruption as the *Inceysa* tribunal did.

Although several tribunals had pontificated about the belief that corruption was contrary to transnational public policy, the *World Duty Free* tribunal was the first to actually void the contract at issue on those grounds.<sup>100</sup> This was perhaps due to the unique facts of the case. The claimant in the case, Mr. Ali, representing World Duty Free, had contracted with the Kenyan government to construct and exclusively run duty-free complexes at the Nairobi and Mombassa airports. Mr. Ali al-

94. *Inceysa*, ICSID Case No. ARB/03/26, ¶ 332.

95. *Ioannis Kardassopoulos v. Georgia* adhered to this reasoning, emphasizing that protection of investments under a BIT “does not extend . . . to an investor making an investment in breach of the local laws of the host State.” ICSID Case No. ARB/05/18, Decision on Jurisdiction, ¶¶ 144, at 182 (July 6, 2007), [http://www.encharter.org/fileadmin/user\\_upload/document/Kardassopoulos.pdf](http://www.encharter.org/fileadmin/user_upload/document/Kardassopoulos.pdf) (on file with the *Columbia Law Review*).

96. *Inceysa*, ICSID Case No. ARB/03/26, ¶ 335.

97. *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006), 46 I.L.M. 339 (2007).

98. See *id.* ¶ 188, 46 I.L.M. at 371 (concluding claimant could not enforce its contract because it was contrary to international public policy); Moran, *supra* note 22, at 8 (acknowledging *World Duty Free* decision “expanded the reasoning of the *Inceysa* Tribunal . . . to a broader policy and public international law context”).

99. See *World Duty Free*, ICSID Case No. ARB/00/7, ¶¶ 138–157, 46 I.L.M. at 360–63 (explaining corruption is contrary to international public policy rather than merely domestic public policy); Sayed, *supra* note 85, at 289–310 (referring to overall “consensus” that “corruption is condemned and that its prohibition makes part of transnational public policy”).

100. See *Himpurna Cal. Energy Ltd. v. PT. (Pesero) Perusahaan Listrik Negara*, Final Award, ¶ 117 (May 4, 1999), 25 Y.B. Comm. Arb. 13, 43 (2000) (rejecting allegations that contract was void on grounds of illegality); *European Gas Turbines S.A. v. Westman Int’l Ltd.*, ¶¶ 6, 21 (Sept. 30, 1993), 20 Y.B. Comm. Arb. 198, 202, 205 (C.A. Paris 1995) (acknowledging bribery is contrary to international ethics but failing to nullify contract).

leged that the Kenyan government had breached the contract.<sup>101</sup> The case involved particularly egregious evidence of corruption, as Mr. Ali testified that he paid a \$2 million “personal donation” in cash to President Moi of Kenya in order to obtain the contract that he was alleging Kenya had breached.<sup>102</sup> Despite the fact that President Moi controlled the government of Kenya when he received the bribe, Kenya used the public policy defense to rebut Mr. Ali’s claims. That is, Kenya argued that the contract at issue was obtained by Mr. Ali’s bribe payment, and because bribery is contrary to international public policy, the arbitral tribunal should not enforce the contract.<sup>103</sup> Having reviewed national court decisions and international conventions,<sup>104</sup> the tribunal ruled in favor of Kenya:

[B]ribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contract obtained by corruption cannot be upheld by this Arbitral Tribunal.<sup>105</sup>

The ramifications of *World Duty Free* go beyond setting an anticorruption precedent for tribunals considering similar issues. Arbitration tribunals may now serve as a private enforcement tool to combat foreign bribery by refusing to award damages to those who pay bribes in order to obtain contracts. Therefore the *World Duty Free* decision reflects the newfound power of private arbitration as a tool in the battle against bribery.<sup>106</sup>

## II. PUBLIC AND PRIVATE ENFORCEMENT SCHEMES OVERLAP

As public and private enforcement increase in power and scope, they are beginning to overlap. Part II focuses on this overlap, explaining that the FCPA scheme fails to take into account private multijurisdictional enforcement—the practice of arbitration tribunals refusing to enforce contracts that were obtained by bribery.<sup>107</sup> Part II.A asserts that the public enforcement scheme spawns collateral litigation in the form of private arbitration proceedings to void a contract. Part II.B argues that, in turn, these private consequences frustrate the goal of the public enforcement scheme in two ways: (1) They reduce small and mid-sized companies’ incentives to voluntarily disclose misconduct, and (2) they increase payoffs to bribe receivers. Given that the overlap between public and private en-

---

101. *World Duty Free*, ICSID Case No. ARB/00/7, ¶¶ 62–93, 46 I.L.M. at 349–53 (describing claimant’s allegations, respondent’s reply, and claimant’s response).

102. *Id.* ¶ 66, 46 I.L.M. at 349.

103. *Id.* ¶¶ 105–109, 46 I.L.M. at 354.

104. *Id.* ¶¶ 138–157, 46 I.L.M. at 360–63 (providing overview of arbitration cases that considered voiding contracts for corruption).

105. *Id.* ¶ 157, 46 I.L.M. at 363.

106. See Moran, *supra* note 22, at 7 (“Investor-state arbitration may constitute a powerful additional vehicle for combating corrupt payments.”).

107. See *supra* Part I.B (discussing private enforcement of anticorruption norms).

forcement hinders the goal of the FCPA, Part III proposes a two-pronged solution that reduces this overlap.

*A. Public Enforcement Creates Private Effects*

Part II.A argues that FCPA violations yield collateral consequences beyond those contemplated by the DOJ or SEC in the form of private multijurisdictional consequences. This Part explains that FCPA violations may serve as the basis for asserting the public policy defense to a violating company's breach of contract claim in an international arbitration proceeding. This potential assertion of the public policy defense redistributes leverage from the violating company to the foreign party with whom the violating company contracted, which essentially constitutes an additional penalty for violating the FCPA.

An FCPA-violating company may face consequences for its conduct beyond those contemplated or directly imposed by the DOJ.<sup>108</sup> The DOJ recognizes that FCPA violations may give rise to private actions within the United States such as private civil Racketeer Influenced and Corrupt Organizations (RICO) Act claims, section 10(b) claims for securities fraud, or even state law bribery claims.<sup>109</sup> In practice, though, very few private actors successfully bring domestic suits based on violations of the FCPA.<sup>110</sup> However, while the DOJ acknowledges the possibility of private domestic suits, it does not consider the possibility of private actions

---

108. See *supra* Part I.A.2 (enumerating consequences of violating FCPA).

109. Under RICO, a competitor may allege the company engaged in unlawful conduct by using bribery to procure a foreign contract. 18 U.S.C. §§ 1961–1968 (2006); see, e.g., *Kensington Int'l Ltd. v. Société Nationale des Pétroles du Congo*, No. 05 Civ. 5101(LAP), 2006 WL 846351, at \*1 (S.D.N.Y. Mar. 31, 2006) (concluding on appeal plaintiffs stated valid RICO claim), *rev'd in part sub nom. Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147 (2d Cir. 2007). Similarly, commercial bribery often violates state tort law. See, e.g., *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 958–59 (Cal. 2003) (holding defendant liable for interfering with prospective economic advantage based in part on acts of bribery). Finally, shareholders in the violating company may bring a section 10(b) suit on the grounds that the company failed to disclose the potential FCPA liability it faced. 15 U.S.C. § 78j(b) (2006); see, e.g., *In re Immucor Inc. Sec. Litig.*, No. 1:05-CV-2276-WSD, 2006 WL 3000133, at \*2, \*21 (N.D. Ga. Oct. 4, 2006) (denying motion to dismiss in section 10(b) suit based on company's failure to disclose improper payments made to Italian officials).

110. See Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 *Mich. J. Int'l L.* 129, 134–35 (2010) (“As with criminal prosecutions, private claims in American courts for damages allegedly resulting from violations of the [FCPA] have been few.”); Vega, *supra* note 27, at 430, 464–74 (explaining why existing private rights of action are largely useless). In fact, only three section 10(b) suits based on FCPA violations have survived motions to dismiss or summary judgment motions. *Id.* at 474 n.337; see also Jason E. Prince, *A Rose by Any Other Name? Foreign Corrupt Practices Act-Inspired Civil Actions*, 52 *Advocate*, Mar.–Apr. 2009, at 22–23, 25 n.22 (citing as examples *In re Natures Sunshine Prods. Sec. Litig.*, 486 F. Supp. 2d 1301 (D. Utah 2007); *Immucor*, 2006 WL 3000133).

outside U.S. borders.<sup>111</sup> Yet in reality, some FCPA-violating companies do face these foreign private actions. Specifically, these private multijurisdictional consequences occur when an FCPA-violating company has contracted with a foreign government or a foreign company<sup>112</sup> and when the FCPA violation pertains to bribe payments underlying the specific foreign contract. Due to the difficulties associated with bringing suit in a foreign country, such contracts are usually governed by arbitration clauses. Therefore, if the foreign party breaches the contract, the FCPA-violating company will initiate an international arbitration proceeding against the breaching foreign party.<sup>113</sup> Based on *World Duty Free* and its precursors, foreign parties who have contracted with the FCPA-violating company may defend against a breach of contract claim by arguing that the contract is void because it was obtained by paying bribes to foreign officials.<sup>114</sup>

The intersection between public and private enforcement occurs due to the proof of bribery that is required in these breach of contract arbitration proceedings. In order to use the public policy defense (as Kenya did in *World Duty Free*) or the jurisdictional defense (as El Salvador did in *Inceysa*), the foreign contracting party must prove to the tribunal that the contract was obtained due to the FCPA-violating company's bribe payment(s).<sup>115</sup> It is at this point that the FCPA settlement gains significance. Arbitration tribunals will naturally shy away from refusing to en-

111. See Lay-Persons Guide, *supra* note 28, at 6 (enumerating consequences faced by companies who violate FCPA but failing to list private multijurisdictional consequences); see also Low et al., *supra* note 56, at 10 (asserting “[r]isk of action by other governments [and] multilateral entities” is factor for firms to consider when deciding whether to disclose but failing to acknowledge possibility that governments might take action in their capacity as private parties to contracts).

112. If the contract is between two *domestic* parties, it will most likely be governed by domestic laws. Although contracts obtained by corruption are also forbidden under domestic law, see, e.g., *S.T. Grand, Inc. v. City of New York*, 298 N.E.2d 105, 108 (N.Y. 1973) (holding “criminal conviction . . . of appellant’s bribery” establishes illegality of contract as matter of law), domestic private actors are unlikely to take action based on an FCPA violation because such violations deal with bribery of *foreign* officials.

113. See de Vries, *supra* note 84, at 59 (“In [cases involving a multinational company and a host state], ‘internationalized’ arbitration . . . may be the only effective remedy for protection of the investor.”). This is because “the host state has the advantage of territorial sovereignty over local assets.” *Id.* In addition, “[c]ourt action in the investor’s country may be barred by doctrines of sovereign immunity.” *Id.*

114. See *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶¶ 105–123 (Oct. 4, 2006), 46 I.L.M. 339, 354–56 (2007) (explaining Kenya’s argument that contract is void because it was obtained by bribe payment); see also *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, ¶¶ 248–252 (Aug. 2, 2006), [http://italaw.com/documents/Inceysa\\_Vallisoletana\\_en\\_001.pdf](http://italaw.com/documents/Inceysa_Vallisoletana_en_001.pdf) (on file with the *Columbia Law Review*) (agreeing with El Salvador’s argument that “Inceysa’s investment is not protected by the BIT because it is contrary to international public policy” due to its procurement via bribe payments).

115. *World Duty Free*, ICSID Case No. ARB/00/7, ¶¶ 147–157, 46 I.L.M. at 361–63 (outlining requirement that contract be obtained by corruption in order to violate transnational public policy).

force contracts because arbitrators are tasked with protecting parties' contractual remedies in cross-border transactions. In view of this, tribunals require proof of bribery under high evidentiary standards, making it difficult for a party to prove that a contract was obtained by bribery.<sup>116</sup> Some tribunals use a "clear and convincing evidence" standard,<sup>117</sup> which requires proof of "[t]he briber's corrupt intent, [the foreign official's] agreement to be bribed, [and] . . . [the foreign official's] receipt of payments."<sup>118</sup> Investment arbitration tribunals follow this high standard. For example, in *African Holding Co. v. Democratic Republic of Congo*, the tribunal required "irrefutable evidence,"<sup>119</sup> suggesting that government investigations of the corrupt conduct would satisfy the high standard.<sup>120</sup> Other tribunals have accepted circumstantial evidence of bribery,<sup>121</sup> examining factors including: the prevalence of corruption in the region, the speed with which the contract was awarded, and excessively high commissions for the intermediary who obtained the contract.<sup>122</sup> But even in these cases where tribunals accepted circumstantial evidence, arbitrators insisted on identifying a range of factors indicating corruption before refusing to enforce a contract.<sup>123</sup> Although there is no universal standard of proof that arbitral tribunals apply to determine if bribery exists,<sup>124</sup> tribunals generally agree that the standard is high, especially for investment

116. Martin, *supra* note 22, at 8 ("These heightened standards of proof naturally place a very significant hurdle to overcome for bribery to be found by a tribunal.").

117. See, e.g., *Westinghouse Int'l Projects Co. (U.S.) v. Nat'l Power Co. (Phil.)*, ICC Case No. 6401/BGD, Preliminary Award on Issues of Jurisdiction and Contract Validity (Dec. 19, 1991), 7 *Mealey's Int'l L. Rep.* B-1, B-21 (1992) (identifying "clear and convincing evidence" as standard of proof).

118. Sayed, *supra* note 85, at 107.

119. Noradèle Radjai, *Where There's Smoke, There's Fire? Proving Illegality in International Arbitration*, *Arb. Newsl. (Int'l Bar Ass'n, London)*, Mar. 2010, at 139, 141 (citing *African Holding Co. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award, ¶ 52 (July 29, 2008), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC776\\_Fr&caseId=C66](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC776_Fr&caseId=C66) (on file with the *Columbia Law Review*)).

120. *Id.* at 141; see also *African Holding Co.*, ICSID Case No. ARB/05/21, ¶¶ 52–54 (asserting criminal proceeding against company or individual accused of bribery is one way to satisfy standard of irrefutable proof).

121. See Case No. 6497 of 1994, Final Award, ¶ 4, *Collection of ICC Arbitral Awards* 232, 234 (1996–2000) (finding "[t]he 'alleging Party' may bring some relevant evidence for its allegations, without these elements being really conclusive").

122. Radjai, *supra* note 119, at 141 (enumerating factors that lead to finding of corruption).

123. *Id.* at 141–42 ("[I]n all of the cases where a finding of corruption was made on the basis of circumstantial evidence, the tribunal relied upon a number of factors rather than any single indication. It is the convergence of these indicators that resulted in the arbitral tribunals making a finding of corruption.").

124. See *id.* at 141 ("[T]here has been no universal evidentiary standard that has been applied by arbitral tribunals in addressing allegations of illegality.").

claims.<sup>125</sup> Moreover, the burden of proof is usually on the party alleging that the contract is void for bribery.<sup>126</sup>

Due to these stringent evidentiary requirements, even parties that are generally aware that a contract may have been obtained by bribery rarely successfully assert the bribery defense to a breach of contract claim.<sup>127</sup> However, when a company violates the FCPA and settles with the DOJ or SEC, the agency usually generates a complaint, a deferred or nonprosecution agreement, a statement of offense detailing the violations to which the company has admitted,<sup>128</sup> sentencing memorandums, and press releases.<sup>129</sup> These charging documents and plea agreements provide concrete evidence that a contract was obtained by bribery to the foreign breaching party that wishes to assert the public policy defense.<sup>130</sup> In fact, the very existence of an FCPA investigation may serve as required

---

125. See *supra* text accompanying notes 116–119 (noting investment tribunals apply high standard of proof).

126. See Martin, *supra* note 22, at 6 (“Most of the reported arbitral decisions state that the burden of proof is on the party alleging the corruption.”).

127. Sayed, *supra* note 85, at 106 (“The setting of a high standard of proof often leads arbitrators to conclude that the facts do not suggest any intent or act of corruption.”).

128. For examples of these statements of offense or nonprosecution agreements, see Statement of Offense, *United States v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367-RJL (D.D.C. Dec. 15, 2008), available at <http://www.usdoj.gov/opa/documents/siemens-ag-stmt-offense.pdf> (on file with the *Columbia Law Review*); Nonprosecution Agreement between U.S. Dep’t of Justice and UTStarcom Inc. (Dec. 31, 2009), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/utstarcom-inc/12-31-09utstarcom-agree.pdf> (on file with the *Columbia Law Review*).

129. See FCPA and Related Enforcement Actions, U.S. Dep’t of Justice, <http://www.justice.gov/criminal/fraud/fcpa/cases/2010.html> (on file with the *Columbia Law Review*) (last visited Oct. 8, 2011) (listing all FCPA enforcement actions and accompanying charging documents, plea agreements, and press releases). For examples of press releases and sentencing memoranda relating to enforcement actions, see generally Department’s Sentencing Memorandum, *United States v. Siemens Aktiengesellschaft* (No. 1:08-cr-00367-RJL), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-12-08-siemensvenez-sent.pdf> (on file with the *Columbia Law Review*); Press Release, U.S. Dep’t of Justice, *UTStarcom Inc. Agrees to Pay \$1.5 Million Penalty for Acts of Foreign Bribery in China* (Dec. 31, 2009), available at <http://www.justice.gov/opa/pr/2009/December/09-crm-1390.html> (on file with the *Columbia Law Review*).

130. For example, in the *Siemens* cases, discussed *infra* notes 142–147, the Statement of Offense “outline[d] a series of payments paid in relation to [a contract which the Argentinian government had breached]. . . . According to Lucinda Low, a Partner at Steptoe Johnson in Washington [D.C.], the Statement of Offence presented ‘enormous challenges’ for Siemens’s claim at [their arbitration proceeding in] ICSID.” Luke Eric Peterson, *Siemens, and Its Argentine Subsidiary, Plead Guilty to Certain Breaches of Foreign Corrupt-Practices Act (FCPA) in Deal that Brings US Bribery Investigation to a Close; Implications for ICSID Arbitration with Argentina Remain Unclear, as Information Emerges of Secret Commercial Arbitration over Allegedly Illicit Payment*, *Investment Arb. Rep.*, Dec. 17, 2008, § 6 [hereinafter Peterson, *Siemens Pleads Guilty*] (explaining Argentina is seeking revision of Siemens’s arbitral award due to Siemens’s recent FCPA violations).

evidence.<sup>131</sup> More frequently, the charging documents or the plea agreements will contain company admissions of paying bribes or concealing potential bribery in their books and records.<sup>132</sup> These statements—admissions in court documents—function similarly to Mr. Ali’s confession to bribe payments in *World Duty Free*<sup>133</sup> in establishing that bribe payments occurred. The concept of public enforcement aiding private enforcement efforts is not novel. In securities fraud cases, private actions also benefit from the SEC’s public enforcement actions.<sup>134</sup> In transnational cases where contingency fee lawyers are unavailable and evidence of bribery is sparse, these benefits are likely even more pronounced. Therefore a settlement under the FCPA may be determinative in enabling a foreign contracting party to successfully assert the bribery defense in a private action.

Arguably, the FCPA violation will not wholly fulfill the tribunal’s evidentiary requirements. The violation or the company’s admissions may not exactly pertain to the specific conduct required to establish bribery payments in regard to a particular contract.<sup>135</sup> The standard of proof re-

---

131. See *African Holding Co. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award, ¶¶ 52–53 (July 29, 2008), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC776\\_Fr&caseId=C66](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC776_Fr&caseId=C66) (on file with the *Columbia Law Review*) (noting evidence of criminal proceeding or investigation against those accused of bribery serves as required evidence for tribunal to find corruption).

132. See, e.g., Plea Agreement at 5–6, *United States v. ABB, Inc.*, No. H-10-664 (S.D. Tex. Sept. 29, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/abb/09-29-10abbinc-plea.pdf> (on file with the *Columbia Law Review*) (describing corrupt payments to intermediaries).

133. See *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 130 (Oct. 4, 2006), 46 I.L.M. 339, 357–59 (2007) (providing Mr. Ali’s testimony that he paid bribe to President Moi).

134. See James D. Cox & Randall S. Thomas with the assistance of Dana Kiku, SEC Enforcement Heuristics: An Empirical Inquiry, 53 *Duke L.J.* 737, 766–77 (2003) (concluding, based on empirical evidence, that private actions with parallel SEC enforcement actions settle more quickly than those without parallel SEC suits). In particular, SEC enforcement means that “more information is . . . available to the private class action lawyers,” which improves “their (as well as the defense counsel’s) assessment of the suit’s likelihood of success.” *Id.* at 767. Moreover, SEC enforcement “creates a climate in which defendants wish to put the ‘whole matter’ behind them,” leading to a speedier settlement. *Id.*

135. In some cases, the party seeking to avoid their obligations under the contract attempts to argue that the contract is illegal under a particular statute. For example, in ICC Arbitration Case No. 9333, a case in which Swiss law applied, the Respondent argued that the FCPA was a mandatory foreign law, and that specific commission payments under the contract would violate the Act. The arbitrator ruled that the FCPA was not applicable because Swiss law governed the case. Case No. 9333 of 1998, *Collection of ICC Arbitral Awards* 575, 575–77 (2000–2007). This Note does not purport to argue that the FCPA is a mandatory foreign law and that an arbitral tribunal will consider any violation significant. Rather, this Note contends that an FCPA violation pertaining to the contract at issue in an arbitration proceeding may serve as significant evidence that bribery actually occurred. Even in cases where the party seeking to avoid their obligations is arguing that the contract is void due to bribe payments, an FCPA settlement where a company admits to paying

quired for the FCPA violation may be more lenient than that required by the tribunal.<sup>136</sup> Or, the company may only have pleaded guilty to violating the civil books and records provisions of the FCPA rather than the criminal antibribery provisions.<sup>137</sup> However, while an FCPA violation may not be sufficient evidence of bribery, it will significantly contribute to such evidence.<sup>138</sup> Regardless of the tribunal's specific requirements—which will vary by case and jurisdiction<sup>139</sup>—the foreign contracting party will benefit from an extensive U.S. government investigation regarding the company's conduct of paying bribes or concealing bribery in their accounts.<sup>140</sup> Therefore FCPA violations give actors in other jurisdictions<sup>141</sup> the opportunity to gain an advantage against the FCPA-violating company.

---

bribes or concealing bribes on their books and records may not be adequate to fulfill the tribunal's high standard of proof for bribery. For instance, the company may have admitted to conveying money to a government intermediary, but there may be no evidence that the government intermediary received the money as a bribe. In such a case, the FCPA violation may be insufficient to establish that bribes were paid to obtain the contract at issue.

136. The books and records FCPA violations need only be proven by a preponderance of the evidence, whereas the tribunal might apply a clear and convincing evidence standard for bribe payments. See *supra* Part I.A.1 (discussing FCPA's varying standards of proof for different types of violations); *supra* text accompanying notes 116–119 (noting some investment tribunals apply high standards of proof).

137. See Plea Agreement at 1–2, *United States v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367-RJL (D.D.C. Dec. 15, 2008), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-15-08siemensakt-plea.pdf> (on file with the *Columbia Law Review*) (asserting Siemens “plead[s] guilty to a two-count information charging violations of the internal controls and books and records provisions of the [FCPA]”); Plea Agreement at 2, *United States v. Siemens S.A. (Arg.)*, No. 08-CR-368-RJL (D.D.C. Dec. 12, 2008) [hereinafter *Siemens Argentina Plea Agreement*], available at <http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-15-08siemensargen-plea.pdf> (on file with the *Columbia Law Review*) (stating Siemens S.A. pleads guilty to conspiracy to violate books and records provisions of the FCPA).

138. See Stuart H. Deming, *The Foreign Corrupt Practices Act and the New International Norms* 3 (2d ed. 2010) (arguing FCPA “impacts on . . . arbitral proceedings”). Also, despite the fact that Siemens S.A. (Argentina) only pleaded guilty to books and records violations, see *supra* note 137, the statement of offense was sufficient for Argentina to reopen proceedings, see *infra* note 146 and accompanying text (discussing ability to request revision of award).

139. See *supra* text accompanying notes 117–125 (discussing range of evidentiary requirements across jurisdictions).

140. See *Low*, *supra* note 56, at 11 (asserting disclosure could trigger “far-ranging investigation”); see also Kevin M. McDonald et al., *Crossing the (Border) Line: The Adverse Consequences of FCPA Enforcement Against Foreign Companies Acting on Foreign Soil*, *Class Action Litig. Rep.*, July 23, 2010, at 2 (referring to “extraordinary exposure” in FCPA proceedings, including “hundreds of millions of dollars in investigation costs”).

141. It is unlikely that domestic private actors who have contracted with the company will seek to have their contracts voided for corruption because the FCPA is targeted at those paying bribes in their business dealings abroad, rather than in the United States. Those who have paid bribes in their business dealings domestically will face a number of other domestic suits.

These benefits for foreign parties are not merely speculative. Rather, the public and private enforcement schemes have overlapped in precisely this way in the dual Siemens cases: the *Siemens A.G.* FCPA settlement and the *Siemens A.G. v. Argentine Republic* ICSID arbitration proceeding.<sup>142</sup> In the arbitration case, Siemens A.G. (the parent company of an Argentinean subsidiary) brought an arbitration proceeding against the Argentinean government because it terminated Siemens's contract for a national identity card project.<sup>143</sup> This resulted in an award of \$217,838,429 for Siemens.<sup>144</sup> Due to the effect of public law, however, this award was short-lived. In 2008, a joint FCPA-German investigation "revealed that Siemens had bribed Argentine officials to win the contract that underlay [the dispute in the ICSID case]."<sup>145</sup> Because the arbitration proceeding had already ended, the Argentinean government attempted to revise the award.<sup>146</sup> Subsequently, as part of the FCPA settlement in 2009, "Siemens agreed to renounce its rights under the arbitral award."<sup>147</sup> Although the precise role of the FCPA settlement is unclear,<sup>148</sup> the settlement at least provided Argentina with leverage to reopen proceedings.<sup>149</sup> Thus, *Siemens* demonstrates the impact of public enforcement of anticorruption norms on private multijurisdictional proceedings.

---

142. The Siemens case involved a contract made in 1998 between the Argentine Republic and Siemens's Argentinian subsidiary, SITS. Specifically, SITS agreed to create a system of "migration control and personal identification" for the Argentinian government. In May 2001, following various incidents, the Argentinian government terminated the contract. In response, Siemens launched ICSID proceedings under the Argentina-Germany BIT, claiming that Argentina's actions amounted to an expropriation of its investment. *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶¶ 23–27 (Aug. 3, 2004), 12 ICSID Rep. 174, 178–79 (2007).

143. *Id.* ¶¶ 26–27, 12 ICSID. Rep. at 179.

144. Paul B. Stephan & Julie A. Roin, *International Business and Economics: Law and Policy* 589, 590 n.1 (4th ed. 2010); see also *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, ¶ 403 (Feb. 6, 2007), 14 ICSID Rep. 518, 602 (2009) (concluding Argentine Republic was required to pay separate sums of \$208,440,540, \$9,178,000, and \$219,889 to Siemens).

145. Stephan & Roin, *supra* note 144, at 590 n.1.

146. See ICSID Convention, *supra* note 80, art. 51 ("Either party may request revision of the award . . . on the ground of discovery of some fact of such a nature as decisively to affect the award . . . ."); see also Damon Vis-Dunbar, *Argentina Takes the Offensive as Siemens Admits to Corruption*, *Investment Treaty News*, Jan. 2009, at 2 ("Argentina is attempting to have the award revised . . . .").

147. Stephan & Roin, *supra* note 144, at 590 n.1.

148. Whether Siemens declined to participate due to the strength of Argentina's new claims or due to the time and expense of arbitrating for another few years is unknown. Luke Eric Peterson, *Siemens Waives Rights Under Arbitral Award Against Argentina; Company's Belated Corruption Confessions Had Led Argentina to Seek Revision of 2007 Ruling*, *Investment Arb. Rep.*, Sept. 2, 2009, § 10 [hereinafter Peterson, *Siemens Waives Rights*].

149. See *id.* (explaining Argentina applied for annulment of arbitral award based on Siemens's guilty plea to FCPA violations). In fact, a partner at Steptoe Johnson asserted that the FCPA statement of offence "present[ed] 'enormous challenges' for Siemens's claim at ICSID." Peterson, *Siemens Pleads Guilty*, *supra* note 130.

That is, the public FCPA enforcement action against Siemens created an additional private cost of approximately \$2 million for the FCPA-violating company.

The overlap between public and private proceedings is by no means limited to the precise scenario outlined in the Siemens case. Rather, the FCPA settlement essentially provides the foreign contracting party with a defense to a breach of contract claim by the violating company.<sup>150</sup> This creates two fundamental scenarios in which the FCPA settlement and arbitration proceedings overlap. In the first scenario, disclosure of the FCPA violation occurs *before* the foreign contracting party has breached the contract. Under this first scenario, there are numerous possibilities regarding the significance of the FCPA settlement. The foreign contracting party may decide to breach the contract,<sup>151</sup> secure in the knowledge that they can successfully defend against a breach of contract claim by using the FCPA violation to prove the contract was obtained by bribery.<sup>152</sup> Or the foreign contracting party may use the option to breach as leverage with which to renegotiate their contract on more favorable terms.<sup>153</sup> Alternatively, in the second fundamental scenario, disclosure of the FCPA violation occurs *after* the foreign contracting party has breached the contract.<sup>154</sup> In this scenario, the FCPA violation merely

---

150. See Deming, *supra* note 138, at 686–87 (noting “FCPA can . . . serve as a basis for not enforcing a contract” and explaining “an individual or entity may be precluded from recovering on a contract where the individual or entity may have violated the anti-bribery provisions of the FCPA”).

151. Within this scenario, the FCPA violation may either alert the foreign contracting party to underlying bribery or provide the foreign contracting party with significant proof of bribery of which it was already aware. If the foreign contracting party was only generally aware that bribes were paid but had little evidence, it may not have been worthwhile to arbitrate the issue due to the high costs associated with doing so. Cf. Robert H. Smit & Tyler B. Robinson, *Cost Awards in International Commercial Arbitration: Proposed Guidelines for Promoting Time and Cost Efficiency*, 20 *Am. Rev. Int’l Arb.* 267, 267 (2009) (“Arbitration costs . . . are on the rise in international commercial arbitration and a growing source of user disaffection.”).

152. See Kevin E. Davis, *Civil Remedies for Corruption in Government Contracting: Zero Tolerance Versus Proportional Liability* 5–6, 21–25 (N.Y. Univ. Sch. of Law, Inst. for Int’l Law & Justice Working Paper No. 2009/4, 2009), available at <http://papers.ssrn.com/abstract=1393326> (on file with the *Columbia Law Review*) (describing various forms of relief afforded to party asserting bribery defense and stating that tribunals allow party asserting public policy defense to avoid their obligations under contract by refusing to hear case).

153. This leverage to renegotiate is especially important in the natural resource industry, in which the value of a contract can fluctuate drastically based on changes in commodity prices. See Michael J. Brennan & Eduardo S. Schwartz, *Evaluating Natural Resource Investments*, 58 *J. Bus.* 135, 136 (1985) (“[P]rice uncertainty . . . is of paramount importance in many natural resource industries, where price swings of 25%–40% per year are not uncommon.”).

154. See, e.g., Peterson, *Siemens Pleads Guilty*, *supra* note 130 (explaining Argentina is seeking revision of Siemens’s arbitral award due to Siemens’s recent FCPA violations).

reduces the liability of the foreign contracting party who has already decided to breach.<sup>155</sup>

Arguably, foreign contracting parties will not exploit these options due to the negative publicity they will receive from exposing their own officials' receipt of bribery. Most likely, however, the foreign contracting party will dissociate itself as an institution from the corrupt agent who received the bribe, reducing the negative exposure.<sup>156</sup> As a result, the potential negative publicity will likely not prove to be a significant hurdle for foreign contracting parties.

Therefore public enforcement of the FCPA provides leverage to foreign contracting parties at the expense of FCPA-violating companies. The risk that these private multijurisdictional consequences will come to fruition constitutes an additional penalty for the violating company. While the DOJ considers the immediate consequences and private domestic consequences of an FCPA violation, the agency fails to consider the higher penalties levied on the company from private multijurisdictional enforcement.<sup>157</sup>

### B. *Implications: Private Enforcement Influences Public Enforcement*

In turn, the higher penalties accrued due to private multijurisdictional enforcement affect the public enforcement scheme. Part II.B advances the general argument that these higher penalties frustrate the FCPA's goal of deterring bribery abroad in two ways. Part II.B.1 explains that the higher penalties increase the cost of voluntary disclosure under the FCPA regime. In cases involving small or mid-sized companies such as subsidiaries, this may affect a company's incentives to disclose its misconduct, thereby reducing the DOJ's ability to expose bribe payments and adequately deter bribery. Part II.B.2 demonstrates that these higher penalties are qualitatively different from other penalties, leading them to produce undesirable distributional consequences that also reduce the DOJ's ability to curb foreign bribery.

1. *Reduced Incentives for Voluntary Disclosure.* — Higher penalties from private multijurisdictional enforcement may influence companies' incentives to voluntarily disclose their violations of the FCPA. Despite the ab-

---

155. If the FCPA-violating company has already initiated a breach of contract arbitration proceeding, the foreign contracting party may raise the public policy defense. See *supra* text accompanying notes 142–149 (discussing *Siemens* cases). Or, if the arbitral tribunal has already awarded the company damages for breach of contract, the foreign party may choose to reopen proceedings to avoid paying the award.

156. In fact, the public policy defense is premised on the fact that the party raising the defense was unaware of the bribe when it occurred. The *World Duty Free* tribunal explained that because the payment was “covert” and “would not be a bribe” otherwise, “receipt [of the bribe] is not legally to be imputed to Kenya itself.” *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 169 (Oct. 4, 2006), 46 I.L.M. 339, 367 (2007).

157. Cf. Vega, *supra* note 27, at 458 (“[I]t seems likely that private international law will continue to significantly affect public anti-bribery policies.”).

sence of a mandatory disclosure regime under the FCPA,<sup>158</sup> the Sentencing Guidelines that steer FCPA penalties were specifically designed to “provide incentives for organizations to . . . report[] criminal conduct.”<sup>159</sup> Moreover, the enforcement agencies clearly attempt to encourage violating companies to disclose,<sup>160</sup> exemplified by their promises of a “real, tangible benefit” for companies that self-report.<sup>161</sup> In fact, recently, there has been a “substantial upswing” in the number of voluntary disclosures.<sup>162</sup>

For companies that have violated the FCPA, therefore, the option of voluntary disclosure is far from trivial.<sup>163</sup> Companies in this position will generally weigh the expected costs and benefits of disclosure.<sup>164</sup> The benefits from disclosure include “definitively resolv[ing] FCPA exposure”<sup>165</sup> and the possibility of rewards for disclosure in the form of reduced penalties.<sup>166</sup> On the other hand, to determine the costs of disclosure, compa-

---

158. See Low et al., *supra* note 56, at 2 (“Nothing in the FCPA mandates disclosure of violations.”). However, many companies do voluntarily disclose their FCPA violations for various reasons. See *infra* text accompanying notes 164–176 (discussing motivations to voluntarily disclose). In fact, the FCPA is partly a result of the SEC’s voluntary disclosure scheme in the 1970s. Low et al., *supra* note 56, at 2 n.4.

159. U.S. Sentencing Guidelines Manual § 8C2.4 cmt. background (2010).

160. The DOJ has continually declared that companies will benefit from voluntary disclosure in various memoranda and public addresses. See, e.g., Breuer Address, *supra* note 56, at 3 (asserting DOJ “reward[ed]” voluntary disclosures); Alice Fisher, Assistant Att’y Gen. Criminal Div., Address at the American Bar Association National Institute on the Foreign Corrupt Practices Act 6 (Oct. 16, 2006) [hereinafter Fisher Address], available at <http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf> (on file with the *Columbia Law Review*) (referring to “self-reporting” as something companies “should be doing”); Thompson Memorandum, *supra* note 56 (asserting “voluntary disclosure of wrongdoing” is considered favorably when evaluating sentencing).

161. Fisher Address, *supra* note 160, at 6.

162. Low et al., *supra* note 56, at 2; Marie Leone, Coming Clean About Bribery, CFO.com (Apr. 3, 2006), <http://www.cfo.com/printable/article.cfm/6764209> (on file with the *Columbia Law Review*) (“The handful of companies that have recently stepped forward amounts to a ‘boom’ in deliberate disclosures, according to Mark Mendelsohn, [former] deputy chief of DOJ’s Fraud Section.”).

163. Although some companies are legally obliged to disclose their violations under federal or local laws, see Low et al., *supra* note 56, at 6–8 (discussing factors that limit company’s discretion to disclose), many others retain discretion in deciding whether to disclose their misconduct. See Mark R. Vernazza & Helen Mueller, The Long(er) Arm of the Foreign Corrupt Practices Act: The FCPA’s Broad Reach and What Companies Can Do to Escape It 2 (2008) (“[T]he decision of what to report and when remains a vexing question for companies.”).

164. See Arlen & Kraakman, *supra* note 57, at 729 (emphasizing firms’ expected costs and benefits determine whether they will self-report after discovering misconduct); Leone, *supra* note 162 (explaining that voluntary disclosures are “usually made on a one-off basis depending on business, legal, and reputational-risk considerations”).

165. Low et al., *supra* note 56, at 9.

166. See Mike Koehler, The Façade of FCPA Enforcement, 41 *Geo. J. Int’l L.* 907, 926 (2010) (asserting avoidance of harsh penalties is one “key factor motivating . . . risk-based decision” to voluntarily disclose); Robert W. Tarun & Peter P. Tomczak, An Introductory Essay: Proposal for a United States Department of Justice Foreign Corrupt Practices Act

nies will likely consider the following factors: risk of adverse publicity,<sup>167</sup> risk of an extensive investigation unrelated to the subject matter of the disclosure,<sup>168</sup> and the risk of action by other governments and multilateral entities.<sup>169</sup> To be precise, the disclosing company must factor in the risk that governments of countries where bribes were paid will investigate and prosecute,<sup>170</sup> as well as the risk that multilateral entities such as the World Bank will take punitive measures against them.<sup>171</sup>

While these factors are helpful to assess the costs and benefits of the decision to disclose, Professors Arlen and Kraakman compare the outcome of nondisclosure with the outcome of disclosure, both of which are based on the cost-benefit calculus described above.<sup>172</sup> This comparison

Leniency Policy, 47 Am. Crim. L. Rev. 153, 192 (2010) (contending benefit of self-reporting is possibility of receiving penalties that have been mitigated due to voluntary disclosure).

However, there is much scholarly debate regarding the *actual* benefits of disclosure. See generally Bruce Hinchey, Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements, 40 Pub. Cont. L.J. 393, 396–99 (2011) (providing overview of scholarly debate regarding benefits of voluntary disclosure and expressing skepticism about benefits). Despite this debate, however, a company deciding whether to disclose will certainly factor in the possibility of receiving mitigated sanctions from disclosing. Arlen & Kraakman, *supra* note 57, at 729 (emphasizing firms' *expected* costs and benefits determine whether they will self-report after discovering misconduct); Low et al., *supra* note 56, at 1 (“[I]t is fair to say that most companies make disclosures in the *expectation* that any penalties will be substantially mitigated . . . .” (emphasis added)).

167. When companies disclose that they have (potentially) violated the FCPA, investors often react negatively. Some studies have concluded that disclosing an FCPA violation leads the company's stock price to decrease by 4.99% on average. Jonathan M. Karpoff et al., *Bribery: Business as Usual?* 15 (Nov. 18, 2009) (unpublished manuscript) (on file with the *Columbia Law Review*).

168. Low et al., *supra* note 56, at 8–11 (enumerating factors companies should consider before disclosing, including risk of broad investigation).

169. *Id.* at 10–11.

170. Unlike multijurisdictional private arbitration proceedings, the DOJ takes account of multijurisdictional *public* enforcement. If a company has been prosecuted in their state of incorporation for the same conduct that the DOJ is punishing under the FCPA, the DOJ may offset the penalties paid under the FCPA by the amount paid to their home country. *U.S. v. Statoil ASA* (case summary), Shearman & Sterling LLP [hereinafter *Statoil*], <http://fcpa.shearman.com/?s=matter&mode=form&id=40> (on file with the *Columbia Law Review*) (last visited Oct. 8, 2011).

171. See *supra* Part I.A.2 (discussing penalties for violating FCPA).

172. See Arlen & Kraakman, *supra* note 57, at 729, 747 (providing model to determine when mitigation provisions would induce self-reporting); Tarun & Tomczak, *supra* note 166, at 192 (explaining Arlen and Kraakman's model entails “calculus in weighing expected outcomes” of self-reporting). Arlen and Kraakman's basic model may be illustrated by a simple numerical example. Assume the following: A company faces \$100 of penalties if they do not disclose and the violation is independently detected; the company faces \$80 of penalties if they do disclose (\$20 mitigation, 20% reduction); its chance of detection absent disclosure is 50%. Under these assumptions, the net cost of disclosure equals the penalties faced from disclosure, which equals \$80. Net cost of nondisclosure equals [penalties faced absent disclosure \* percentage chance of detection absent disclosure] + [penalties faced absent disclosure without detection \* percentage chance of nondetection] which equals \$50. Here, the expected costs of disclosure

yields a more helpful analytical framework, summarized as follows: In comparing expected outcomes, companies need only consider the following two variables: “(i) the chance of the misconduct being independently detected by law enforcement<sup>173</sup> . . . and (ii) the percentage reduction of the unmitigated sanction through self-reporting.”<sup>174</sup> As described, the violating company will consider the likelihood that the DOJ or SEC will independently discover the potential violation.<sup>175</sup> All else being equal, an increase in either the chance of independent detection or the percentage reduction of the sanction through self-reporting increases the company’s incentive to disclose.<sup>176</sup>

This analytical framework illustrates how the risk of incurring additional penalties from private multijurisdictional enforcement reduces a company’s incentive to disclose. Specifically, the risk of private multijurisdictional consequences increases the expected penalties that the violating company will face, regardless of whether the company reports its misconduct.<sup>177</sup> However, to the extent that private multijurisdictional consequences are not contemplated by the DOJ, they are different from other FCPA penalties. If the DOJ rewards voluntary disclosure through reducing penalties, these private multijurisdictional consequences will be excluded from that reduction.<sup>178</sup> It is for this reason that the risk of private multijurisdictional consequences increases the costs of disclosure (penalties that may be faced)<sup>179</sup> without also increasing its benefits (possibility

outweigh the expected costs of nondisclosure, so the company should not disclose. Based on these formulas, increasing the chance of detection *or* increasing the percentage reduction in penalties from disclosure decreases the costs of disclosure relative to nondisclosure, making a company more likely to disclose.

173. Due to the recent increase in FCPA enforcement and the improvement in whistleblower protections in the Sarbanes-Oxley Act, it is “more likely that FCPA violations will be reported to the government.” Low et al., *supra* note 56, at 9.

174. Tarun & Tomczak, *supra* note 166, at 192 (citing Arlen & Kraakman, *supra* note 57, at 747).

175. See Low et al., *supra* note 56, at 9 (listing probability that DOJ or SEC will “independent[ly] discover[] . . . the violation” as one factor that companies consider).

176. See Tarun & Tomczak, *supra* note 166, at 192 (“[I]n order to induce self-reporting by corporations, all else equal, reduced perceptions as to the likelihood of independent detection by law enforcement absent corporate self-reporting must be counteracted by increased mitigation.”).

177. See Low et al., *supra* note 56, at 1 (“[I]t is fair to say that most companies make disclosures in the *expectation* that any penalties will be substantially mitigated . . . .” (emphasis added)); *supra* Part II.A (discussing how public enforcement encourages companies to disclose); *supra* text accompanying notes 172–175 (emphasizing that firms’ *expectations* govern decision to disclose).

178. Cf. Tarun & Tomczak, *supra* note 166, at 207 (acknowledging specific penalties—“those that are not subject to mitigation”—may be imposed on corporation regardless of whether it self-reports misconduct).

179. See Arlen & Kraakman, *supra* note 57, at 729 (“A firm that reports a wrong will automatically face residual liability . . .”).

of reduced penalties from the DOJ).<sup>180</sup> Put another way, under Arlen and Kraakman's model, the likelihood of detection remains the same while the possibility of mitigating penalties decreases.<sup>181</sup> This alters the risk calculus for firms deciding whether to disclose, increasing the risk-to-reward ratio, thereby tilting firms toward nondisclosure.<sup>182</sup>

Arguably, the increased cost of disclosure resulting from the risk of private multijurisdictional enforcement is trivial relative to other costs of disclosure because companies face such severe penalties under the FCPA regardless.<sup>183</sup> According to this possible objection, under Arlen and Kraakman's model, the value of potentially mitigating private multijurisdictional penalties through disclosing is negligible, and therefore does not affect the disclosure decision. However, this objection fails to distinguish between the various categories of disclosing companies. The additional penalties from private multijurisdictional enforcement (weighted by the risk that these penalties will come to fruition) as a percentage of the company's total penalties determine whether the penalty influences the decision to disclose.<sup>184</sup> If the lost value of the contract is a higher percentage of the company's total penalties under the FCPA, the private consequences are more likely to reduce the company's incentives to disclose because voluntary disclosure will mitigate a lower percentage of its penalties.<sup>185</sup> Therefore, while these additional penalties may prove inconsequential to large firms, they may prove dispositive for small or medium-

---

180. See Tarun & Tomczak, *supra* note 166, at 192 (contending benefit of self-reporting is possibility of receiving penalties that have been mitigated due to voluntary disclosure).

181. See Arlen & Kraakman, *supra* note 57, at 729 (“[T]o ensure that the firm reports, its expected liability if it does not report detected wrongdoing must equal or exceed its residual liability if it does report.”).

182. Tarun & Tomczak, *supra* note 166, at 210 (arguing “the potential unavailability of a mitigated sanction” and “the relatively large sanctions that will be imposed [despite voluntary reporting]” are “factors [that] point towards a decision not to self-report”); cf. Davis, *supra* note 152, at 33 (contending *World Duty Free* tribunal's refusal to enforce contract in light of bribe-payer's disclosure—termed zero-tolerance approach to bribery—“gives firms an overriding incentive to invest in prevention as opposed to self-policing and reporting”).

183. See *supra* Part I.A.2 (discussing severity of FCPA penalties).

184. See Tarun & Tomczak, *supra* note 166, at 206–07 (contending, all else equal, “the size of the mitigated sanction relative to that of the unmitigated sanction” influences company's decision to voluntarily disclose misconduct).

185. See *supra* text accompanying notes 172–176 (outlining Arlen and Kraakman's voluntary disclosure model).

sized enterprises (SMEs)—firms with fewer than 500 employees<sup>186</sup>—and foreign subsidiaries that depend on a few large foreign contracts.<sup>187</sup>

Although it may appear as if *any* type of FCPA penalty will be more harmful to an SME than a large firm by virtue of its size, smaller firms usually receive a lower culpability score than large firms do, precisely to ensure that they are not disproportionately impacted.<sup>188</sup> However, because the Guidelines do not directly impose private multijurisdictional consequences, the lower culpability score for smaller firms<sup>189</sup> does not yield any reduction in the risk or magnitude of these consequences for smaller firms.<sup>190</sup> Moreover, many smaller firms are concentrated in the natural resource sector—a sector in which corruption is rampant and a few large contracts will be vital to their survival.<sup>191</sup> Consequently, these multijurisdictional consequences particularly impact SMEs' incentives to

186. The Small Business Administration provides the definitions of a small business. A small business is defined by the number of employees it has or its annual receipts, but each of these figures varies by industry. Generally, a small business is defined as one with fewer than 500 employees for most manufacturing and mining industries, 100 or fewer employees for all wholesale trade industries, and \$6 million per year in sales receipts for most retail and service industries. 13 C.F.R. §§ 121.101–121.201 (2011) (defining “small business” and outlining specific size requirements in terms of annual receipts and number of employees for various industries); Richard Schaffer et al., *International Business Law and Its Environment* 8 (2008) (referring to small and medium-sized businesses as those with “fewer than 500 employees”).

187. See Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 *Stan. L. Rev.* 1487, 1515 (1996) (acknowledging “a penalty that is devastatingly large to a small firm may be inconsequential to a large one”); cf. Lisa Harriman Randall, Note, *Multilateralization of the Foreign Corrupt Practices Act*, 6 *Minn. J. Global Trade* 657, 667 n.43 (1997) (acknowledging “a set amount [as a penalty] poses a greater deterrent for a small firm than for a large one”).

188. See U.S. Sentencing Guidelines Manual § 8C2.5(a)–(b) (2010) (requiring smaller additions to culpability score as firm size by number of employees decreases); Cindy Alexander et al., *Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms*, 42 *J.L. & Econ.* 393, 396 & n.7 (1999) (noting 5,000-employee firm faces multiple at least twice as large as that faced by 10-employee firm).

189. The Sentencing Guidelines, of which the culpability score is an integral part, are mostly used to determine the violating corporation's fines, potential disgorgement, and access to probation. Although the Sentencing Guidelines briefly mention other potential penalties, they do not discuss collateral consequences at all. See generally U.S. Sentencing Guidelines Manual ch. 8 (setting forth all potential penalties, including factors allowing departure from set fine ranges, but nowhere addressing collateral consequences).

190. See *supra* notes 177–182 and accompanying text (explaining voluntary disclosure does not reduce private multijurisdictional consequences).

191. See Carrington, *supra* note 110, at 130–31 (“A large share of [bribes] was undoubtedly paid to officials of weak governments by [foreign] firms that extract and export natural resources for sale in the developed world.”); David G. Ebner, *Smaller Exploration Companies on the International Frontier*, 37 *Nat. Resources J.* 707, 708 (1997) (arguing “many smaller [companies] are beginning to look overseas” for natural resource opportunities due to geological factors); Press Release, U.S. Dep't of Justice, *Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More than \$156 Million in Criminal Penalties* (Nov. 4, 2010), available at <http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html> (on file with the *Columbia Law Review*) (noting FCPA violations of small companies).

voluntarily disclose an FCPA violation. For example, Siemens S.A. (Siemens's Argentinean subsidiary) paid \$500,400 in civil penalties and fines for their violations of the FCPA,<sup>192</sup> but the FCPA settlement yielded multijurisdictional consequences which cost it its \$217 million award for its national identity card contract.<sup>193</sup> The private consequence considerably exceeded its other penalties under the FCPA. While large firms like Siemens (a parent company) may remain unaffected by the possibility of paying an extra \$200 million in light of their billion dollar settlement, for smaller firms that depend on a few large contracts, these private consequences are far from trivial.

While this appears to apply to only a few marginal cases, its implications might be greater than they appear at first glance. First, there are a variety of SMEs operating abroad.<sup>194</sup> In adopting the 1988 Amendments to the FCPA, Congress discussed the potential effects of the amendment on SMEs, thereby revealing that they specifically intended for SMEs to fall within the FCPA's purview.<sup>195</sup> More importantly, the DOJ and SEC have charged SMEs with FCPA violations, conclusively demonstrating that SMEs are not out of the DOJ or SEC's reach.<sup>196</sup> In fact, on January 18, 2010, the DOJ arrested and indicted twenty-two individuals for violations

---

192. Siemens Argentina Plea Agreement, *supra* note 137, at 3.

193. See Peterson, Siemens Pleads Guilty, *supra* note 130 ("The tribunal ordered that Argentina should pay some \$217 Million (US) in compensation, and release a \$20 Million Performance Bond.").

194. Schaffer et al., *supra* note 186, at 8 ("Today, more and more small U.S. companies are entering export markets . . ."); Int'l Trade Admin., Small & Medium-Sized Exporting Companies: Statistical Overview, 2009, <http://www.trade.gov/mas/ian/smeoutlook/index.asp> (last updated Apr. 20, 2011, 11:48 AM) (on file with the *Columbia Law Review*) ("A total of 269,269 SMEs exported from the United States in 2009, accounting for 97.6 percent of all U.S. exporters.").

195. See Roberta Romano, Does the Sarbanes-Oxley Act Have a Future?, 26 *Yale J. on Reg.* 229, 291 n.234 (2009) ("[T]he bill brings some much needed clarification to the operation of the [FCPA]. This clarification is essential if companies, particularly small businesses, are to behave competitively, but legally, in foreign markets." (citing 134 Cong. Rec. 20,024 (1988) (statement of Sen. Sanford))).

196. See Matthew J. Kovacich, Note, Backyard Business Going Global: The Consequences of Increased Enforcement of the Foreign Corrupt Practices Act ("FCPA") on Minnesota and Wisconsin, 32 *Hamline L. Rev.* 529, 531 (2009) (noting "DOJ and SEC . . . have not hesitated to bring actions against [SMEs]"). For examples of prosecutions of smaller companies, see Deferred Prosecution Agreement at 5, 9, *United States v. Tidewater Marine Int'l Inc.*, No. 10-770 (S.D. Tex. Nov. 4, 2010), available at <http://www.justice.gov/opa/documents/tidewater-dpa.pdf> (on file with the *Columbia Law Review*) (noting Tidewater is oil and gas exploration company with fewer than 500 employees); Deferred Prosecution Agreement at 8, *United States v. Shell Nigeria Exploration & Prod. Co.*, No. 10-767 (S.D. Tex. Nov. 4, 2010), available at <http://www.justice.gov/opa/documents/shell-dpa.pdf> (on file with the *Columbia Law Review*) (noting SNEPCO, subsidiary of Shell, is oil and gas exploration company with fewer than 200 employees); Plea Agreement at 9, *United States v. Baker Hughes Servs. Int'l Inc.*, No. H-07-129 (S.D. Tex. Apr. 11, 2007), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/baker-hughs/04-11-07bakerhughes-plea.pdf> (on file with the *Columbia Law Review*) (noting Baker Hughes is oil and gas exploration company with fewer than 200 employees).

of the FCPA, most of whom were executives or employees of SMEs.<sup>197</sup> Commentators have hailed these arrests as reflections of the DOJ's escalating focus on SMEs.<sup>198</sup> Thus, the problem of SMEs' reduced incentives to disclose due to multijurisdictional penalties is very real.

Second, large firms' FCPA violations are often derived from the conduct of their smaller foreign subsidiaries,<sup>199</sup> many of which are SMEs. This means that the problem of reduced incentives for SMEs to voluntarily disclose is rather pervasive. However, under agency theory, it may be argued that the larger parent company's incentives to voluntarily disclose misconduct will control<sup>200</sup> rather than the SME subsidiary's incentives that may counsel against voluntary disclosure.<sup>201</sup> Even if these subsidiary firms do not make their own decisions regarding voluntary disclosure to the government, they can certainly decide not to disclose FCPA violations to their parent firm.<sup>202</sup> Although parents have an incentive to monitor

197. Press Release, U.S. Dep't of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), available at <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html> (on file with the *Columbia Law Review*); see also Christopher M. Matthews, DOJ Going After Smaller Companies for FCPA Violations, Main Justice (Jan. 28, 2010), [http://www.fairfaxgroup.us/docs/news/01\\_28\\_10\\_main\\_justice.pdf](http://www.fairfaxgroup.us/docs/news/01_28_10_main_justice.pdf) (on file with the *Columbia Law Review*) ("With some notable exceptions, . . . almost all of the companies [indicted] are relatively small.").

198. See Jeffrey Cramer, The FCPA Game Has Changed: Trends in Enforcement, Main Justice (Apr. 23, 2010, 4:06 PM), <http://www.mainjustice.com/2010/04/23/commentary-the-fcpa-game-has-changed-trends-in-enforcement/> (on file with the *Columbia Law Review*) ("[T]he DOJ and SEC are expected to look more at small and mid-sized firms which do business overseas."); Matthews, supra note 197 (arguing arrests served as "an indication that [the DOJ is] beginning to refocus their priorities" on smaller firms).

199. The SEC will prosecute parent companies for "the alleged bribery of foreign officials by their subsidiaries. . . . [I]t may be inferred from *Schering-Plough* that when a questionable payment involving a subsidiary arises, the SEC's position is that the parent company is likely liable . . . ." 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 101, 116 (2006); see also Weiss, supra note 64, at 500–01 (explaining "in practice, the U.S. parent firm usually risks FCPA liability for bribery schemes conducted by foreign subsidiaries"). See generally Complaint at 4, SEC v. Schering-Plough Corp., No. 04CV00945 (D.D.C. June 8, 2004) (referring to Schering-Plough's "inadequate" policies "for detecting possible FCPA violations by its foreign subsidiaries").

200. See Sharon Watson O'Donnell, Managing Foreign Subsidiaries: Agents of Headquarters, or an Interdependent Network?, 21 Strategic Mgmt. J. 525, 526 (2000) (explaining agency theory argument that parent-principal can use monitoring to limit self-interested behavior of foreign subsidiary-agent).

201. See supra notes 183–187 and accompanying text (explaining SMEs are particularly susceptible to reduced incentives to disclose due to collateral consequence of private enforcement).

202. See O'Donnell, supra note 200, at 526 (acknowledging "problem of inducing an 'agent' [(subsidiary)] to behave as if he were maximizing the 'principal's' [(parent's)] welfare"); David Cray, Control and Coordination in Multinational Corporations, J. Int'l Bus. Stud., Autumn 1984, at 85, 85 (arguing large organizations are "subject to divisive

subsidiaries to prevent incurring liability on their behalf,<sup>203</sup> monitoring is far from perfect.<sup>204</sup> Therefore the reduced incentives to disclose that SME subsidiaries experience may filter through to the parent firm through the subsidiary's nondisclosure to the parent, leading to a much broader problem than otherwise envisioned. The extent of this effect will most likely depend on how independent the subsidiary is from the parent in terms of its decisionmaking.<sup>205</sup> If the parent closely controls the subsidiary, the subsidiary might find it difficult to withhold the information, whereas if it is highly independent, it is more likely to decide not to disclose to the parent in order to protect its own business.<sup>206</sup> Consequently, SME subsidiaries are also subject to these reduced incentives to disclose, albeit to a varying degree depending on their level of autonomy. Ultimately, the DOJ's failure to consider the possibility of multijurisdictional private enforcement of anticorruption norms leads to perverse incentives for firms who are deciding whether to disclose under the FCPA regime, either indirectly—from subsidiary to parent—or directly.

For the perverse incentives argument to hold, an additional hurdle needs to be overcome. This Note's argument is based on the assumption that the FCPA settlement relates to conduct underlying contracts that could be voided in arbitration proceedings. If firms are aware that they risk arbitration proceedings based on foreign contracts, they may request that the DOJ or SEC exclude conduct pertaining to those contracts from the statement of offense or other public documents. Firms may choose not to plead guilty to that particular conduct in exchange for pleading guilty to other conduct that does not implicate specific foreign contracts.<sup>207</sup> Even if this bargain occurs, though, the firm's request for spe-

---

tendencies in the form of . . . competing functional goals, and differential demands from the environment that lead subunits [(such as subsidiaries)] to pursue their own strategies" and emphasizing these problems are more pronounced for multinational corporations with foreign subsidiaries).

203. See Yadong Luo, *Corporate Governance and Accountability in Multinational Enterprises: Concepts and Agenda*, 11 *J. Int'l Mgmt.* 1, 14 (2005) (explaining that monitoring foreign subsidiaries' behavior is "major aspect of governance").

204. See O'Donnell, *supra* note 200, at 526 (acknowledging "absence of proximity makes it difficult for [parents] to supervise directly the behavior of foreign subsidiary managers").

205. Subsidiary independence or autonomy "is defined as the degree to which the foreign subsidiary . . . has strategic and operational decision-making authority." *Id.* at 528; see also Richard E. Caves, *Multinational Enterprise and Economic Analysis* 80 (John Pencavel ed., 3d ed. 2007) (providing overview of various theories regarding independence of subsidiaries and explaining categorization of multinational enterprises as "close" or "open," depending on the intensity of the parent's supervision of its subsidiaries").

206. See O'Donnell, *supra* note 200, at 528 (contending that, as subsidiary autonomy increases, "direct monitoring of agent behavior" becomes "more difficult").

207. During the plea negotiation process, "parties . . . achieve their respective objectives through a process of give-and-take that may affect the language of the agreements, the nature and amount of the penalties imposed, and the charges to which a company will agree to plead guilty or otherwise accept responsibility." *BAE Settles*

cific conduct to be removed from the statement of offense comes at a price. The DOJ receives an additional bargaining chip and can make requests in exchange for excluding such conduct. Thus, the overall higher costs for the violating company persist, whether they are manifested in the form of increased leverage for the foreign contracting party or as increased leverage for the DOJ.<sup>208</sup>

If the DOJ decides not to utilize its additional bargaining chip or utilizes it in a harmless way, SMEs will still experience perverse incentives regarding disclosure. The contention that firms will bargain to exclude foreign contract-related conduct from their plea bargains assumes that firms have other conduct they can offer to include instead. For large firms with multiple violations, this exchange will not be a difficult task because they have more chips with which to bargain. On the other hand, for SMEs that only have one glaring violation, this will be more difficult to negotiate because there is less on the table for them to offer in exchange. Therefore SMEs will face reduced incentives to disclose their misconduct voluntarily under the FCPA in light of potentially higher penalties from private multijurisdictional enforcement. These reduced incentives diminish the DOJ's ability to detect misconduct and reprioritize its enforcement resources,<sup>209</sup> which frustrates the FCPA's broader goal of punishing firms that pay bribes in their overseas dealings.

2. *Increased Payoffs to Bribe Receivers.* — Voluntary disclosure aside, the higher penalties from private multijurisdictional enforcement increase payoffs to bribe receivers, which independently frustrates the FCPA's goal. While the FCPA aims to prevent U.S. companies from engaging in bribery overseas, it also furthers a broader goal of deterring global bribery.<sup>210</sup> At the very least, the FCPA intends to diminish U.S. companies' contributions toward the problem of corruption.<sup>211</sup> But for bribe receivers, the additional penalties from private multijurisdictional enforcement increase the returns to bribery without an increase in countervailing deterrence, thereby hindering the FCPA's ability to reduce overseas bribery.

---

Protracted, Controversial Bribery Case with U.S. and U.K. Authorities, Miller Chevalier (Feb. 2, 2010), <http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=26504> (on file with the *Columbia Law Review*).

208. See Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1909–10 (1992) (asserting “plea bargains are . . . *bargains*” in which “parties . . . trade various risks and entitlements”).

209. See *supra* Part I.A.2 (describing how sentencing guidelines are tailored toward reducing bribery); see also *supra* note 57 and accompanying text (explaining how voluntary disclosure is linked to curbing bribery).

210. See *supra* note 29 and accompanying text (supporting idea that FCPA's broader goal is to curb foreign bribery).

211. See Tor Krever, Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act, 33 N.C. J. Int'l L. & Com. Reg. 83, 84 (2007) (referring to FCPA as “first legislation in the world to . . . seek to curb the contribution of domestically based corporations to foreign corruption”); Spalding, *supra* note 10, at 357 (noting FCPA as product of corporate scandals that “tarnished the U.S. image abroad”).

This argument may initially appear counterintuitive. The FCPA takes a supply-side approach—penalizing companies that pay bribes in order to reduce the returns on supplying bribes, thereby curbing bribery.<sup>212</sup> In line with this approach, FCPA penalties are imposed for purposes of punishing the violating company and deterring future misconduct.<sup>213</sup> This deterrence rationale applies to insider trading as well.<sup>214</sup> In insider trading cases, contemporaneous traders may receive civil penalties the SEC sought in its enforcement action<sup>215</sup> and may seek disgorgement damages from insiders.<sup>216</sup> Arguably, these contemporaneous traders are “innocent winners” because they would have acted the same way independent of the insiders’ behavior and thus were not “harmed” by the insiders’ conduct. However, the recipient of the penalties is irrelevant for deterrence purposes: The “contemporaneous traders are ‘surrogate plaintiffs’ for those [who were] actually [harmed]” and these surrogate plaintiffs are used “to

---

212. Krever, *supra* note 211, at 87 (outlining supply-side approach); see also *supra* note 10 and accompanying text (explaining FCPA’s supply-side approach).

213. See Kathleen A. Lacey et al., *Assessing the Deterrent Effect of the Sarbanes-Oxley Act’s Certification Provisions: A Comparative Analysis Using the Foreign Corrupt Practices Act*, 38 *Vand. J. Transnat’l L.* 397, 440 (2005) (“[T]he FCPA[] . . . is part of a cumulative effort to deter . . . corrupt and unethical corporate behavior . . . .”); Matthew Shabat, Comment, *SEC Regulation of Attorneys Under the Foreign Corrupt Practices Act: Decisions on Efficiency and Their Role in International Anti-Bribery Efforts*, 20 *U. Pa. J. Int’l Econ. L.* 987, 988 (1999) (“[A]gencies will choose to enforce their regulations in cases where there is a high deterrent value,” which is “a practice deemed permissible by the [U.S.] Supreme Court.”); Weiss, *supra* note 64, at 497 (“SEC fines exist to . . . punish and deter corporate malfeasance.”). Legislative history substantiates this interpretation, stating that the FCPA was enacted to “restore the efficacy of the system of corporate accountability.” Comptroller Gen., U.S. Gen. Accounting Office, *Impact of Foreign Corrupt Practices Act on U.S. Business* 69 (1981) (quoting S. Comm. on Banking, Hous. & Urban Affairs, 95th Cong., Rep. of the SEC on Questionable and Illegal Corporate Payments and Practices, at b (Comm. Print 1976)); see also U.S. Sentencing Guidelines Manual, ch. 8, introductory cmt. (2010) (asserting sentencing guidelines are “designed so that the sanctions imposed upon organizations . . . will provide just punishment, adequate deterrence, and incentives for organizations to [detect misconduct internally]”).

214. For purposes of this Note, “insider trading” refers to instances where corporate insiders, tippees, or misappropriators buy or sell securities based on material nonpublic information. It excludes the violations of section 10(b) (codified at 15 U.S.C. § 78j(b) (2006)), which involve materially misleading statements or omissions.

215. 15 U.S.C. § 7246(a) (stating that if SEC obtains disgorgement order and civil penalty, then civil penalty “shall, on the motion . . . of the Commission, be added to . . . the disgorgement fund for the benefit of the victims of such violation”).

216. *Insider Trading and Securities Fraud Enforcement Act of 1988*, Pub. L. No. 100-704, § 20A, 102 Stat. 4677, 4680–81 (codified at 15 U.S.C. § 78t-1). There are limitations on these damages, however. First, damages are limited to profits gained or loss avoided regardless of how many contemporaneous traders file suit. *Id.* § 20A(b)(1). Second, damages awarded to contemporaneous traders must be reduced by the defendant company’s prior disgorgement to the SEC. *Id.* § 20A(b)(2). But private plaintiffs can recover their pro rata share of disgorged funds directly from the SEC without bringing a lawsuit. 15 U.S.C. § 7246(a).

accomplish the deterrent purposes of rule 10b-5.”<sup>217</sup> Based on the parallel to insider trading, the higher penalties from multijurisdictional enforcement appear consistent with congressional intent because these penalties serve the goal of general deterrence. In this vein, the recipients of the additional penalties—the foreign contracting parties—are irrelevant because of the focus on deterring foreign bribery.

Although the analogy to insider trading appears compelling, it is inappropriate in the FCPA context. While the recipient of the money is usually irrelevant for deterrence purposes, the recipient’s potential culpability in FCPA cases warrants attention. Whereas contemporaneous traders are “innocent winners” in the insider trading context, a foreign contracting party that received a bribe may not be.<sup>218</sup> For example, in *World Duty Free*, President Moi, who controlled the government of Kenya at the time, benefited from the very bribe that the same government later used to void the contract.<sup>219</sup> Although the FCPA is supply-side oriented—punishing bribe payers rather than bribe receivers—it does not aim to punish bribe payers to the benefit of bribe receivers. In fact, Congress’s inaction in light of the Sixth Circuit’s finding that the FCPA did not imply a private right of action<sup>220</sup> suggests that Congress did not envision any unfettered private enforcement of the FCPA, let alone private enforcement that favored bribe recipients. While domestic private actions may also constitute additional penalties to violating companies, they are qualitatively different because the damages yielded by such actions do not accrue to bribe recipients or their principals.<sup>221</sup> Private multijurisdictional consequences only constitute penalties because they redistribute money away from the violating company (or bribe payer) toward the bribe receiver.<sup>222</sup> For example, in *World Duty Free*, the tribunal’s refusal to enforce

217. Howard W. Friedman, *The Insider Trading and Securities Fraud Enforcement Act of 1988*, 68 N.C. L. Rev. 465, 485 (1990) (quoting *Fridrich v. Bradford*, 542 F.2d 307, 326 n.11 (6th Cir. 1976) (Celebrezze, J., concurring)). The deterrence rationale also elucidates the limit on damages to disgorgement of profits gained or loss avoided since “[c]ompensation is less important for stand-in plaintiffs, because they were not . . . victims . . . in the first place.” *Id.*

218. See Davis, *supra* note 152, at 29 (“[A]fter all, bribery is not an individual crime, it is a corrupt bargain that always has at least two sides.”).

219. *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶¶ 169, 188 (Oct. 4, 2006), 46 I.L.M. 339, 367, 371 (2007) (recognizing “payment was received corruptly by the Kenyan head of state” but concluding Kenya “was legally entitled to avoid . . . the [contract]”).

220. See *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1024, 1027–30 (6th Cir. 1990) (“[N]o private right of action is available under the [FCPA].”).

221. RICO or state law claims must be brought by competitors, who are certainly not bribe recipients. Section 10b claims are brought by the SEC or shareholders, neither of whom are bribe recipients. See, e.g., *In re Nature’s Sunshine Prods. Sec. Litig.*, 486 F. Supp. 2d 1301, 1303–05 (D. Utah 2007) (basing Rule 10b-5 suit on FCPA violation). Although shareholders may have benefited from the bribery if the company profited from it, they are required to prove damages in Rule 10b-5 claims. *Id.* at 1304.

222. See Alison Ross, *ILA Delegates Consider Corruption*, *Global Arb. Rev.* (Aug. 27, 2010), <http://www.globalarbitrationreview.com/news/article/28695> (on file with the

Mr. Ali's contract redistributed money from Mr. Ali (the bribe payer) to the government of Kenya, an organization that President Moi (the bribe receiver) directly controlled.<sup>223</sup> These higher penalties may augment deterrence,<sup>224</sup> but they also increase the payoffs to bribe receivers or foreign governments who fail to control corrupt agents.<sup>225</sup> While this result may be logical for a private arbitral tribunal that focuses on judicial integrity rather than a public policy aimed at reducing bribery,<sup>226</sup> such a practice frustrates the FCPA's public policy goal of curbing bribery abroad.<sup>227</sup>

### III. OFFSETTING PENALTIES AND MODERATING APPROACH TO BRIBERY DEFENSE

Part III proposes a solution to the problem that this Note identifies. Because changes in both the public and private enforcement schemes are necessary to alleviate the problem this Note analyzes, Part III suggests two solutions, one from each enforcement perspective. Part III.A explains that the DOJ should offset penalties that arise from private multijurisdictional enforcement. Part III.B advocates for arbitration tribunals to take a tempered approach in their decisions on awarding restitution or reliance damages. While the DOJ solution will eliminate the additional penalties that firms experience, it will not address the distributional consequences of those penalties. On the other hand, the arbitration solution effectively

---

*Columbia Law Review*) (noting controversy over "whether tribunals should balance the behaviour of both investor and state to determine whose hands are more unclean"); supra Part II.A (explaining how FCPA violation benefits bribe receivers who seek to breach or renegotiate contract with violating company).

223. *World Duty Free*, ICSID Case No. ARB/00/7, ¶ 188, 46 I.L.M. at 371 (concluding Ali could not maintain breach of contract claims based on international public policy).

224. Note that over-deterrence is also possible and undesirable. See Jonathan M. Karpoff et al., *The Legal Penalties for Financial Misrepresentation 2* (May 1, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=933333> (on file with the *Columbia Law Review*) (noting argument that "higher penalties compel innocent firms to misallocate resources").

225. See Davis, supra note 152, at 8 (explaining that permitting principal whose agent received bribe to avoid contractual obligations "risks compensating the principal for having chosen an imprudent or even incompetent agent").

226. See infra note 268 and accompanying text (contrasting public and private enforcement goals).

227. See supra notes 26–29 and accompanying text (addressing FCPA's goal of deterring foreign bribery). The overall policy analysis is not as simple as it may appear. If the foreign contracting party is a government, the beneficiaries of the damages may well be the country's taxpayers, not the government agent who received the bribe. Assuming that the government official took the bribe in exchange for accepting a less favorable contract, those same taxpayers were defrauded as a result of the bribe payment. See *World Duty Free*, ICSID Case No. ARB/00/7, ¶ 181, 46 I.L.M. at 369 ("[T]he law protects not the litigating parties but the public; [which] in this case [means] the mass of tax-payers and other citizens making up one of the poorest countries in the world."). In such cases, it may be desirable from a policy perspective to permit defrauded taxpayers to recover. This Note reserves that question because it would shift the focus of FCPA penalties from deterrence to compensation.

tackles the distributional issue but only partially reduces the costs of the FCPA violation for the violating company. Thus, measures from both the FCPA and the arbitration perspectives are necessary to address the problem caused by the overlap in the two types of enforcement.

#### A. *Public Enforcement Perspective*

The risk of private multijurisdictional enforcement imposes additional penalties on FCPA-violating companies by providing foreign contracting parties with leverage against the violating company.<sup>228</sup> The DOJ can address the voluntary disclosure problem that these additional penalties cause. To do so, the DOJ should reduce the company's total monetary settlement by the amount the company lost or would lose in an arbitration proceeding to void the contract. In addition, the DOJ should publicly declare that this will be its practice and should follow through by consistently offsetting penalties.

Part III.A.1 describes the advantages of offsetting private multijurisdictional penalties in order to explain how it resolves this Note's voluntary disclosure problem. Part III.A.2 discusses the limitations of the offsetting approach. Finally, Part III.A.3 proposes solutions to these limitations that would enhance the effectiveness of offsetting penalties.

1. *Advantages of Offsetting Penalties.* — The solution of offsetting penalties is beneficial for two reasons: It eliminates the voluntary disclosure problem,<sup>229</sup> and it is consistent with DOJ practice for other types of penalties.<sup>230</sup> By engaging in a consistent practice of offsetting the additional penalties from private multijurisdictional enforcement, the DOJ can decrease the FCPA-violating company's expected risk-to-reward ratio for voluntary disclosure of its conduct.<sup>231</sup> For companies that depend on foreign contracts, the additional penalties increase the risk-to-reward ratio for voluntary disclosure.<sup>232</sup> By offsetting the penalties, the DOJ reduces the risk-to-reward ratio by exactly the same amount that it increased due to the private multijurisdictional consequences.<sup>233</sup> The public declaration

228. See *supra* Part II.A (discussing FCPA violations as leverage for foreign contracting parties to bring private arbitration proceedings and resultant imposition of additional penalties).

229. See *supra* Part II.B.1 (outlining voluntary disclosure problem).

230. See *supra* note 170 (noting DOJ offsets public enforcement penalties from foreign jurisdictions); *infra* text accompanying note 237 (same).

231. The risk-to-reward ratio involves a comparison between the firm's expected costs of disclosing and their expected benefits from disclosing. Arlen & Kraakman, *supra* note 57, at 728 (arguing optimal mitigating sanction for voluntary disclosure "must ensure that *ex post*, after wrongdoing is detected, the firm is better off reporting the misconduct—and accepting the sanction [rewards]—than it is remaining silent and risking the default sanction [risks]").

232. See *supra* notes 177–182 and accompanying text (explaining collateral consequences increase firm's risk of disclosure without increasing its rewards, leading risk-to-reward ratio to increase).

233. Collateral consequences would have increased the risk-to-reward ratio, so removing them allows the risk-to-reward ratio to rebound to where it would have been if

and consistent implementation are integral parts of the remedy because companies' decisions to disclose are governed by their perceived risk-to-reward ratio as opposed to an actual risk-to-reward ratio.<sup>234</sup> If the DOJ does not apply this remedy consistently or fails to make it publicly known, companies will be uncertain about whether the DOJ will offset these penalties. This uncertainty will increase the risks associated with disclosure,<sup>235</sup> increasing the risk-to-reward ratio, and making the solution less effective. As long as the practice is consistently applied and publicly available, it will resolve the voluntary disclosure problem.

Moreover, the solution of offsetting penalties for multijurisdictional consequences is consistent with current DOJ practice for multijurisdictional *public* enforcement.<sup>236</sup> Previously, if foreign authorities investigated a company for the same conduct that formed the basis of an FCPA charge, the DOJ offset the company's penalty by the amount it paid to the foreign authorities.<sup>237</sup> This has already occurred in a few FCPA cases, including *Statoil*,<sup>238</sup> *Akzo Nobel*,<sup>239</sup> and *Siemens*.<sup>240</sup> For example, in *Statoil's* deferred prosecution agreement with the DOJ, the company agreed to pay a criminal penalty of \$10.5 million.<sup>241</sup> But the DOJ offset this penalty

---

the collateral consequences had not existed. Cf. Low et al., *supra* note 56, at 24 ("As FCPA penalties, and the collateral consequences of FCPA violations including third-country enforcement, continue to increase, companies are likely to begin to reassess the benefits of voluntary disclosure.").

234. See *supra* note 177 and accompanying text (acknowledging firms' perceptions or expectations determine whether they disclose).

235. See Tarun & Tomczak, *supra* note 166, at 184 (noting "uncertainties over the benefits of self-reporting" may serve as disincentives to disclose); *id.* at 191 ("The SEC has also stated that it 'believes it important to provide the maximum possible degree of clarity, consistency, and predictability in explaining the way that its corporate penalty authority will be exercised.'" (quoting Press Release, SEC, Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 4, 2006), available at <http://www.sec.gov/news/press/2006-4.htm> (on file with the *Columbia Law Review*))).

236. See *supra* note 170 (discussing DOJ practice of offsetting penalties for multijurisdictional public enforcement).

237. See Weiss, *supra* note 64, at 501 (referring to *Statoil* as example of DOJ practice of offsetting penalties).

238. See *Statoil*, *supra* note 170 (explaining that in *Statoil* case, the DOJ "provided that the fine be partially offset by money already paid to the Norwegian authorities").

239. See Robert C. Blume et al., 2008 Year-End FCPA Update, Gibson, Dunn & Crutcher LLP (Jan. 5, 2009) [hereinafter Blume et al., 2008 FCPA Update], <http://www.gibsondunn.com/Publications/Pages/2008Year-EndFCPAUpdate.aspx> (on file with the *Columbia Law Review*) (citing "2007 Akzo Nobel prosecution[] as [an] example[] in which [the] DOJ has credited penalties paid in foreign jurisdiction[s] against those to be paid in the United States").

240. See Siemens Press Release, *supra* note 62 (implying Siemens's fines were reduced based on amount company paid to German authorities); Litigation Release No. 20829, SEC Files Settled Foreign Corrupt Practices Act Charges Against Siemens AG, SEC v. Siemens Aktiengesellschaft, Civil Action No. 08 CV 02167 (D.D.C. Dec. 15, 2008), <http://www.sec.gov/litigation/litreleases/2008/lr20829.htm> (on file with the *Columbia Law Review*) (same).

241. In re *Statoil, ASA*, Exchange Act Release No. 54599, 2006 SEC LEXIS 2321 (October 13, 2006).

by \$3 million, “deem[ing] [that portion of the penalty] satisfied by a penalty previously paid to the Norwegian criminal authorities.”<sup>242</sup> Similarly, in the Siemens investigation, the DOJ and SEC offset Siemens’s penalties by those paid to German authorities.<sup>243</sup>

The DOJ and SEC purposefully commenced this practice as a means of reducing multijurisdictional penalties. Mark Mendelsohn, formerly part of the DOJ’s Criminal Division, asserted that the DOJ’s resolutions would “‘reflect . . . what’s going on in [the foreign] jurisdiction in some way,’” citing the *Statoil* and *Akzo Nobel* prosecutions as examples of the DOJ’s practice of offsetting penalties.<sup>244</sup> Mendelsohn further stated that in certain nonpublic cases, the DOJ has “‘elected to do nothing in deference to ongoing foreign investigations.’”<sup>245</sup> Clearly, the SEC and DOJ have intentionally employed this practice of offsetting penalties for purposes of avoiding higher penalties for the same conduct internationally. Extending this current practice to private multijurisdictional consequences is therefore consistent with current SEC and DOJ policy.

2. *The Problems with Offsetting Penalties.* — The above offsetting solution has a fundamental technical limitation: It is virtually impossible to calculate the exact value of additional penalties caused by the FCPA settlement or charging documents. The value of the FCPA settlement for the foreign contracting party fluctuates on a case-by-case basis in both kind and degree. While the difference in kind is problematic, the difference in degree might not be as critical as it appears. The difference in degree refers to the fact that the FCPA settlement holds only as much value as the foreign contracting party places on it, which varies by the foreign contracting party and its initial evidentiary position.<sup>246</sup> For example, if the foreign contracting party already held strong evidence that the contract was procured by bribery, the FCPA settlement might be less helpful in asserting the bribery defense.<sup>247</sup> Nevertheless, although tribunals vary in their specific evidentiary requirements and foreign con-

---

242. Press Release, Sec. & Exch. Comm’n, SEC Sanctions Statoil for Bribes to Iranian Government Official (Oct. 13, 2006), available at <http://www.sec.gov/news/press/2006/2006-174.htm> (on file with the *Columbia Law Review*).

243. The DOJ asserted that Siemens would pay a “combined total of more than \$1.6 billion . . . including \$800 million to U.S. authorities.” Siemens Press Release, *supra* note 62.

244. Blume et al., 2008 FCPA Update, *supra* note 239 (alteration in original) (quoting Mark Mendelsohn, Deputy Chief, Fraud Section, U.S. Dep’t of Justice Criminal Div.).

245. *Id.* (quoting Mark Mendelsohn, Deputy Chief, Fraud Section, U.S. Dep’t of Justice Criminal Div.).

246. See *supra* text accompanying notes 115–126 (discussing range of evidentiary requirements for tribunals and implying that FCPA settlement’s value will vary in each case).

247. In some scenarios, an FCPA settlement may be unnecessary. See, e.g., *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶¶ 136, 166–67, 188 (Oct. 4, 2006), 46 I.L.M. 339, 360, 366–67, 371 (2007) (stating Mr. Ali’s admission to paying bribes served as clear evidence that contract was against transnational public policy).

tracting parties start out with different evidentiary positions regarding the bribery defense, the FCPA settlement will often prove determinative in permitting the foreign contracting party to successfully assert its claim.<sup>248</sup> Therefore the difference in degree is not as problematic as it first appears.

The difference in kind, though, does weaken the effectiveness of this Note's solution. The difference in kind refers to the fact that the value of the FCPA settlement is manifested in different ways. The settlement may enable the foreign contracting party to breach the contract, renegotiate its terms, threaten to reopen proceedings, or present the FCPA violation as evidence for an arbitral tribunal considering a breach of contract claim.<sup>249</sup> For instance, if a company declines to arbitrate the reopened claim, as Siemens did, it will be unclear whether the tribunal would have certainly concluded that the contracts were obtained by bribery.<sup>250</sup> In such a case, offsetting a company's penalties by the total amount of its arbitral award may constitute slight over-compensation.<sup>251</sup> Perhaps most problematic is a situation in which the foreign contracting party uses the FCPA settlement as leverage to renegotiate the contract on terms less favorable to the violating company due to changed market conditions or fluctuations in commodity prices.<sup>252</sup> If this situation occurs, the foreign contracting party may receive a windfall, but it will be difficult to quantify the value of the FCPA settlement in renegotiating the contract. In these cases, offsetting penalties will be more difficult than merely deducting the value of an FCPA-induced arbitral award.

The timing of a company's FCPA settlement in relation to the potential bribery defense exacerbates the problem of quantifying damages incurred from renegotiating a contract. When the DOJ imposes penalties on the company, the private consequences might not yet have unraveled. In fact, part of the problem this Note outlines is that the FCPA settlement triggers the breach of contract or arbitration proceedings.<sup>253</sup> For the cases where the foreign contracting party uses the FCPA settlement to

---

248. See *supra* text accompanying notes 132–139 (outlining how FCPA violation may be determinative).

249. See *supra* text accompanying notes 150–155 (discussing various possibilities for FCPA settlement's value to foreign contracting party).

250. Peterson, *Siemens Waives Rights*, *supra* note 148 (“As part of the settlement deal, each side waives its rights to pursue further legal actions arising out of the earlier contract dispute.”).

251. For example, if Siemens had arbitrated and the bribery defense was not successful, it would have retained its arbitration award. The additional penalty imposed by the FCPA settlement, then, would not have been the value of the arbitral award but rather the cost of re-arbitrating the claim.

252. See *supra* note 153 and accompanying text (describing risk of windfall to foreign contracting party in cases of contract renegotiation, particularly in natural resource contracts).

253. See *supra* text accompanying notes 150–155 (distinguishing between *Siemens*-type cases and other cases where FCPA settlement causes foreign contracting party to breach).

renegotiate the contract or breach the contract a few years later, this solution falls short.

3. *Alternatives and Limitations.* — Fortunately, these quantification issues are not completely incurable. There are two options available to the DOJ to quantify the additional penalties. First, the DOJ may require the violating company itself to assess the value of the penalties and explain the reasoning behind their calculations. For example, when a company asks the DOJ to reduce its settlement value due to the additional cost from private contracts, the company can use its own methods to calculate this additional private cost. The company may explain to the DOJ the method used and the specific facts in their case that led them to a particular value. This information enables the DOJ to take a case-by-case approach that mirrors the variations in cases where the private-public tension is implicated.<sup>254</sup>

Alternatively, if the firm is unable to accurately quantify the value of additional penalties from private enforcement because they are simply too speculative, the DOJ can approach the problem in the same way that the Second Circuit did in a prominent securities fraud case, *SEC v. Texas Gulf Sulphur Co.*<sup>255</sup> The DOJ can place a portion of the company's monetary settlement into an escrow account. Then, if the foreign contracting parties assert the bribery defense to a breach of contract claim or seek revision of an arbitral award after the DOJ has already imposed penalties, the company can pay the award out of the escrow fund.<sup>256</sup> The money in the account may be "subject to disposition in such manner as the court might direct upon application by the SEC or other interested person, or on the court's own motion."<sup>257</sup> When the company finds itself the victim of the bribery defense for the same conduct it paid for in the FCPA settlement, the company may ask the DOJ or SEC to apply to the court for the money to be paid out of the account.

This alternative resolves the timing aspect of quantification. However, the valuation difficulties caused by the difference in kind remain. That is, if the foreign contracting party chooses to renegotiate the contract rather than to use the bribery defense in arbitration proceedings, the difficulties in quantifying the leverage granted to the foreign contracting party persist.

---

254. This approach is consistent with the DOJ's current ad hoc policy in which the SEC and DOJ develop law by "respond[ing] to the exigencies of particular factual situations." James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 *Bus. Law.* 1233, 1255 (2007).

255. 446 F.2d 1301 (2d Cir. 1971).

256. When determining damages to be paid to the SEC for Texas Gulf's violations of Rule 10b-5, the Second Circuit stated: "The payments are to be held in escrow in an interest-bearing account for a period of five years . . . . To protect the appellants against double liability, any private judgments against these appellants arising out of the events of this case are to be paid from this fund." *Id.* at 1307.

257. *Id.*

Most importantly, though, the offsetting solution is substantively limited because it fails to resolve the issue of awarding damages to bribe receivers at the expense of bribe payers.<sup>258</sup> In public enforcement actions, the foreign government pursuing an enforcement action is not the same government that received the bribes at issue,<sup>259</sup> so the bribe receiver problem does not apply. In the context of private multijurisdictional consequences, although the DOJ can reduce the voluntary disclosure problem by offsetting penalties, there is little the DOJ can do to prevent the foreign contracting party from benefiting from the settlement.

### B. *Private Enforcement Perspective*

In contrast to the DOJ, arbitration tribunals can reduce the implications of both the bribe receiver and voluntary disclosure effects, even without the ability to eliminate the overlap between public and private enforcement entirely. In order to achieve this goal, tribunals should moderate their current approach toward the bribery defense.<sup>260</sup> Although such an approach appears to deviate from that of *World Duty Free* and its predecessors, a tempered approach to the bribery defense is in fact consistent with arbitral precedent on bribery.<sup>261</sup>

Part III.B.1 provides a description of the modified approach that this Note proposes in order to explain how the solution reduces the overlap between public and private enforcement. Part III.B.2 suggests that this Note's solution is a natural extension of current arbitral precedent, thus making it a feasible approach for arbitral tribunals to adopt.

1. *Description of Modified Approach.* — Arbitral tribunals can address the problem caused by the overlap in enforcement schemes by moderating their approach toward contracts obtained by bribery. Ideally, tribunals would consider the FCPA settlement as a factor in determining whether to refuse to enforce the contract based on public policy,<sup>262</sup> granting firms who had “purg[ed] the[ir] company of improper prac-

---

258. See *supra* Part II.B.2 (discussing problem created by rewarding bribe receivers even if additional penalties are otherwise harmless).

259. Statoil was prosecuted by its state of incorporation, Norway, whereas the bribes it paid were to the Iranian government. Statoil, *supra* note 170. Similarly, Siemens was prosecuted by Germany, its state of incorporation, whereas it paid bribes in various other regions. Siemens Press Release, *supra* note 62.

260. Cf. Davis, *supra* note 152, at 49 (advocating for “more nuanced response” to allegations that contract was procured through bribery).

261. See *id.* at 4, 36–37, 46–49 (reconciling proportional approach to bribery—which conditions bribe-payer firm's liability in part on “evidence of whether it made reasonable efforts to monitor, supervise and punish its employees and co-operate with law enforcement authorities”—with existing doctrine).

262. See *id.* at 47 (arguing “the idea of giving governments an automatic entitlement to avoid contracts procured through bribery should be rejected”).

tices” increased leniency.<sup>263</sup> Yet *World Duty Free* and its predecessors appear to foreclose that possibility by embracing a zero-tolerance approach.<sup>264</sup> Therefore, instead, tribunals should consider the FCPA settlement as a factor in calculating restitution or reliance damages for FCPA-violating companies whose claims for breach of contract fail due to the public policy defense.<sup>265</sup> Specifically, courts should resolve ambiguities in the damage calculation in favor of the FCPA-violating company.<sup>266</sup> This will reduce a company’s liability from private multijurisdictional enforcement while also alleviating the leverage afforded to the foreign contracting party, albeit to a lesser extent than enforcing the contract.<sup>267</sup>

2. *This Approach Is Consistent with World Duty Free.* — It is difficult to modify arbitral tribunals’ approach to contracts in order to address perverse effects of a public statute against bribery. This is because tribunals are not primarily concerned with deterring bribery in the most effective way. Rather, they are concerned with the integrity of the arbitration (or judicial) system that will be compromised by giving effect to a contract tainted by corruption.<sup>268</sup> Yet, even this concern for judicial integrity leaves the tribunal with latitude with which to determine restitution or reliance damages.<sup>269</sup> Most significantly, ICSID tribunals have never

263. See Ross, *supra* note 222, at 2 (questioning whether avoidance of FCPA liability through “paying a fine and purging the company of improper practices” would “cleanse[] [the investment] of . . . corruption”).

264. *World Duty Free* emphasizes that contracts procured by bribery will not be enforced in an attempt to protect the public. See *supra* note 227 (outlining contention that refusal to enforce contract is favorable because it compensates members of defrauded public). Even if the foreign contracting party ratifies the agreement post-FCPA settlement, this may not suffice. See Davis, *supra* note 152, at 45 (“Ratification by the legislative branch of the Kenyan government would be even more difficult to classify as malign or benign.”). Therefore, under *World Duty Free*, an FCPA settlement probably does not cure the violating firm’s bribe payment for purposes of transnational public policy.

265. See Davis, *supra* note 152, at 6 (acknowledging “the government may become subject to an obligation . . . to [pay] restitution” damages or reliance damages).

266. This resolution is similar to an approach taken in *U.S. Naval Institute v. Charter Communications, Inc.*, 936 F.2d 692, 697 (2d Cir. 1991), in which the court stated: “[I]t is not error to lay the normal uncertainty [when calculating damages for breach of contract] at the door of the wrongdoer . . . instead of at the door of the injured party.” *Id.* at 697.

267. If the company is able to claim restitution or reliance damages, the foreign contracting party will at least be liable for that amount, which reduces the overall loss of the FCPA-violating company. If the company receives the benefit of construing ambiguities in its favor, this method will further reduce the sum transferred to the foreign contracting party.

268. See *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 180 (Oct. 4, 2006), 46 I.L.M. 339, 369 (2007) (acknowledging unfairness to plaintiff whose contract has been breached); *id.* ¶ 181, 46 I.L.M. at 369 (“No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act . . . . It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.”) (quoting *Holman v. Johnson*, (1775) 98 Eng. Rep. 1120 (K.B.) 1121; 1 Cowp. 341, 343)).

269. See Davis, *supra* note 152, at 46 (referencing “flexibility [that] is available under existing law”).

reached the issue of how to calculate restitution or reliance damages in this type of situation because the bribe-paying company did not plead those claims.<sup>270</sup> Therefore there is no governing precedent in this area that tribunals are expected to follow,<sup>271</sup> giving future tribunals room to maneuver.

In addition, the *World Duty Free* tribunal acknowledged that a claim for restitution faces only one limitation: “[It] cannot include the return of the bribe to the [claiming party].”<sup>272</sup> Although the tribunal discussed a limitation on restitution, this discussion implicitly demonstrated that claims for restitution are appropriate.<sup>273</sup> Claims for reliance are also not precluded.<sup>274</sup> The tribunal’s approach reflects a preference to permit some damages rather than to leave the nonbreaching party with nothing. Moreover, the tribunal suggested that deviations from regular arbitral practice in favor of the nonbreaching party were preferable in this context.<sup>275</sup> When deciding whether to award attorney fees to the breaching party who was technically successful in the arbitration, the tribunal explained that “in different circumstances, [it] would . . . follow the general practice . . . that the successful party under an award should recover its legal costs.”<sup>276</sup> But the tribunal proceeded to explain that when a party has prevailed on grounds of international and public policy, “there can be no successful party on the merits,” leading them to conclude that each party was responsible for its own legal costs.<sup>277</sup> Clearly, the tribunal was willing to exercise flexibility from general rules in order to adapt to this context in which the breaching party was allowed to avoid their obligations.

In this vein, the solution of calculating damages in favor of the nonbreaching party when ambiguity exists is a natural outgrowth of the governing precedent rather than a deviation from it. Nevertheless, this remedy does not completely eliminate the overlap between the public

270. See *World Duty Free*, ICSID Case No. ARB/00/7, ¶ 186, 46 I.L.M. at 370 (noting nonbreaching party did not plead restitution).

271. Even though arbitral precedent is technically not binding on future tribunals, tribunals “concur on the need to take earlier cases into account.” Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity, or Excuse?*, 23 *Arb. Int’l* 357, 368 (2007). In particular, ICSID tribunals employ “a kind of *de facto* case-law system whereby [they] routinely rely upon previous decisions and discuss them as quasi-authoritative manifestations of the law.” August Reinisch, *The Role of Precedent in ICSID Arbitration*, in *Austrian Arbitration Yearbook 2008*, at 495, 508–10 (Christian Klausegger et al. eds., 2008).

272. *World Duty Free*, ICSID Case No. ARB/00/7, ¶ 186, 46 I.L.M. at 370.

273. *Id.* ¶ 164(7), 46 I.L.M. at 365.

274. The decision does not address claims for “reliance,” suggesting they are not precluded. Alternatively, reliance claims may fall under the general umbrella of “restitution.”

275. See *World Duty Free*, ICSID Case No. ARB/00/7, ¶¶ 189–191, 46 I.L.M. at 371 (asserting tribunal deviated from “general practice in transnational arbitration”).

276. *Id.* ¶ 190, 46 I.L.M. at 371.

277. *Id.*

enforcement scheme and private tribunals because companies remain unable to enforce their contracts. That said, it does reduce the problems caused by voluntary disclosure incentives and distributional consequences. While neither solution completely resolves the problem, this Note advocates for implementing both solutions. Adopting these two policies will certainly diminish the extent to which private multijurisdictional consequences frustrate the FCPA's goal of reducing bribery overseas.

#### CONCLUSION

The FCPA aims to reduce foreign bribery by imposing penalties on companies who pay bribes in their business dealings abroad. However, companies also face private multijurisdictional consequences for this conduct because arbitration tribunals may refuse to enforce contracts obtained by bribery. Paradoxically, these public and private enforcement schemes overlap in a way that frustrates the FCPA's goal. Specifically, FCPA violations lead to an extensive government investigation of the violating company, and may result in charging documents and possibly a settlement. This FCPA enforcement process inadvertently spurs private enforcement of antibribery norms by providing foreign contracting parties with tangible evidence of bribery with which to void their contracts. In turn, the leverage afforded to foreign contracting parties serves as a collateral consequence for companies that violate the FCPA. Ultimately, the risk of facing private multijurisdictional enforcement frustrates the goal of the FCPA by reducing companies' incentives to voluntarily disclose their misconduct as well as by increasing the payoffs to bribe receivers. Both enforcement agencies and arbitral tribunals can contribute to resolution of the problem: Enforcement agencies should offset private penalties while arbitration tribunals should allow greater flexibility to the violating company in claiming restitution or reliance damages for breach of contract claims. Together, these measures will diminish the unintended problems caused by the overlap between the public and private enforcement of antibribery norms, enabling the international community to more effectively tackle corruption.