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Remediation in Foreign Bribery Settlements: The Foundations of a New Approach

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Abstract

A handful of nations spearhead the global anti-corruption regime through the transnational enforcement of foreign bribery laws. These laws prohibit corporations with a connection to the enforcing nation from paying or offering bribes to the officials of a foreign nation. Enforcement agencies construe the extraterritorial application of these laws broadly, establishing their global prominence. The most notable example is the United States Department of Justice's enforcement of the Foreign Corrupt Practices Act of 1977 (FCPA). Enforcement agencies typically resolve investigations against corporations through deferred prosecution agreements and other consensual settlement mechanisms known generally as non-trial resolutions. Fines and penalties paid pursuant to these agreements can extend beyond the billion-dollar mark. In most cases, money paid in fines and penalties goes to the treasury of the enforcing nation. However, a movement has emerged that advocates for the sharing of proceeds of non-trial resolutions with the victims of foreign bribery, namely, citizens and governments in the developing world. This movement is complemented by a small number of instances in which non-trial resolutions have been used to provide remediation in this manner. However, these cases do not reveal a coherent approach to remediation, and enforcement agencies do not have the benefit of any kind of conceptual or practical framework to guide the provision of remediation. The extant literature also fails to consider the many political and practical difficulties of coupling transnational foreign bribery enforcement with a remedial agenda. The purpose of this Article is to address the practicalities of when and how remediation might be written into the terms of non-trial resolutions. To achieve

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this goal, this Article assumes two functions. First, it offers a conceptual framework to underpin remediation by defining elusive notions such as harm, victimhood, and remediation itself. Second, it presents a list of factors to guide the provision of remediation in foreign bribery cases. The shared benefit of these conceptual and practical frameworks is that they allow remediation in foreign bribery settlements to be approached with newfound precision. These frameworks are ultimately geared toward moving practice forward in this fledging field by improving the consistency of outcomes and developing a body of precedent and best practices.

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I. INTRODUCTION

Corruption can have corrosive economic consequences within the developing world. A veritable mass of literature demonstrates how both the governments and populaces of developing nations are harmed when foreign corporate actors bribe government officials.[1] The anti-corruption efforts of Western nations focus on policing and punishing those under their jurisdiction who commit the criminal offense of foreign bribery by offering or paying either bribes or things of value to influence the acts or decisions of public officials in foreign nations.[2] This regulatory activity, known as supply-side foreign bribery enforcement,[3] often involves schemes in which corporate actors from developed nations offer or pay bribes to the public officials of developing nations in order to procure lucrative public infrastructure contracts.[4] Controversially, anti-corruption enforcement agencies like the U.S. Department of Justice (DOJ) and the United Kingdom Serious Fraud Office (SFO) broadly construe the extraterritorial application of their national foreign bribery laws, such that enforcement actions are often initiated against foreign corporations with only tenuous connections to the enforcing nation.[5] This regulatory market is remarkably robust; enforcement agencies levy substantial fines, while entities subject to regulation dedicate significant resources to foreign bribery compliance.[6] Since 1999, prosecutors around the globe have collected in excess of US$15 billion

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1 *See* Elizabeth Dávid-Barrett, *Are Some Bribes More Harmful than Others? Exploring the Ethics behind Anti-Bribery Laws*, 26 J. INTERDISC. ECON. 119 (2014) (providing an overview of this literature); *see also* Philip M. Nichols, *Are Extraterritorial Restrictions on Bribery a Viable Policy Goal Under the Global Conditions of the Late Twentieth Century? Increasing Global Security by Controlling Transnational Bribery*, 20 MICH. J. INT'L L. 451, 463–471 (1999) (providing an overview of how transnational bribery corrodes governments, distorts economies, undermines support for democratic institutions, and degrades transnational relationships).

2 GILLIAN DELL & ANDREW MCDEVITT, TRANSPARENCY INT'L, EXPORTING CORRUPTION – PROGRESS REPORT OF 2018: ASSESSING ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION 10 (2018).

3 OECD, FOREIGN BRIBERY ENFORCEMENT: WHAT HAPPENS TO THE PUBLIC OFFICIALS ON THE RECEIVING END? 3 (2018) (defining supply-side foreign bribery as "relat[ing] to what bribers do—it involves offering, promising or giving a bribe to a foreign public official to obtain an improper advantage in international business. In contrast, the demand side of foreign bribery refers to the offence committed by public officials who are bribed by foreign persons.").

4 KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM 41–54 (2019) (setting out the hallmarks of foreign bribery practice, labelling the modern enforcement landscape as "the OECD paradigm").

5 *Id.*; *see also* Section II.A.2.

6 *See generally* Mike Koehler, *A Foreign Corrupt Practices Act Narrative*, 22 MICH. ST. INT'L L. REV. 961, 1006 (2013) (discussing the phenomenon of "FCPA Inc."); Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 L. & CONTEMP. PROBS. 193 (2017) (describing the modern FCPA enforcement landscape as "one of the largest and busiest fields of corporate crime practice in the world").

through foreign bribery enforcement.[7] Unsurprisingly, enforcement is sometimes justified with reference to the harmfulness of bribery in the developing world.[8] However, the money extracted through foreign bribery enforcement is typically retained by the treasury of the enforcing nation.[9] These proceeds, extracted almost exclusively through criminal settlement agreements made between prosecutors and corporations, are rarely used to remedy, or to attempt to remedy, the harm caused by corruption.[10] Several scholars and commentators have proposed that the money extracted through foreign bribery settlement agreements should go toward more constructive ends that would assist the victims of corruption[11] or the global anti-corruption efforts generally.[12] However, the academic literature to date has yet to reveal satisfactorily how this proposal might be operationalized on a practical level. These proposals are nonetheless buttressed by a small handful of instances in which either the DOJ or the SFO has negotiated settlement agreements that include terms providing some type of remediation to the victims of corruption.[13] However, neither the DOJ nor the SFO has adopted any sort of comprehensive criteria to determine whether remediation should be pursued in a given case, which victims should receive it, or how they should receive it. As such, seeking remediation through foreign bribery settlement agreements has proven unprincipled and inconsistent in practice. The purpose of this Article is to provide a coherent framework to support the use of foreign bribery settlement agreements to assist the victims of corruption. The term "remedial settlement distribution" has been coined to describe this practice.

This Article offers three contributions to the extant literature. First, it explains how remedial settlement distribution has thus far functioned in practice and situates such distribution within the modern foreign bribery enforcement landscape. Second, it supplies working definitions for important concepts—such as harm, victimhood, and remediation—in the context of foreign bribery settlement agreements that have not been meaningfully addressed elsewhere. These definitions are broad and flexible to ease both their adoption and use by

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7 OECD, RESOLVING FOREIGN BRIBERY CASES WITH NON-TRIAL RESOLUTIONS 14–15 (2019).

8 Both senior personnel from the U.S. and U.K. governments have expressed this view. *See, e.g.*, Press Release, U.S. Dep't of Just., Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations (Dec. 15, 2008), https://perma.cc/6WSF-9NRK; Elizabeth Baker, *All Economic Crime Has Victims*, SFO (Sept. 6, 2018), https://perma.cc/A87V-K7BM.

9 *See also* JANCINTA ANYANGO ODOUR ET AL., LEFT OUT OF THE BARGAIN: SETTLEMENTS IN FOREIGN BRIBERY CASES AND IMPLICATIONS FOR ASSET RECOVERY 71 (2014).

10 *Id.*

11 Andrew B. Spalding, *Corruption, Corporations, and the New Human Right*, 91 WASH. L. REV. 1365 (2014).

12 Matthew C. Turk, *A Political Economy Approach to Reforming the Foreign Corrupt Practices Act*, 33 NW. J. INT'L L. & BUS. 325 (2013).

13 *See* Section II.C.1–2.

enforcement agencies seeking to pursue remediation in a more precise and principled manner. Third, this Article provides a multifactorial framework for the provision of remediation in settlement agreements. The factors comprising the framework have been derived from a study of enforcement actions and analogous areas of the law spanning multiple jurisdictions. They have also been tailored to account for the complicated practical nature of foreign bribery enforcement actions.

This Article proceeds as follows: Section II provides a high-level overview of the practical backdrop to remedial settlement distribution. It begins with an explanation of the modern foreign bribery enforcement landscape before addressing the numerous facets of foreign bribery practice that render remediation through settlement agreements resolutions inherently difficult. In doing so, Section II shows that any framework to guide remediation must be flexible enough to accommodate the importance of enforcement agencies' prosecutorial discretion, as well as other vicissitudes of this area of practice. Section II concludes with an overview of current approaches to remedial settlement distributions in the U.S., U.K., and Canada. The U.S. and the U.K. are analyzed as they are particularly active in this space compared to other nations. Canada has also been selected, even though it is not an active enforcer of the foreign bribery offense, as it is the only jurisdiction of which the author is aware that has passed legislation specifically addressing remedial settlement distribution. Section II also establishes the relatively narrow scope of this Article. This Article does not consider the victims of securities fraud linked to foreign bribery or civil foreign bribery enforcement.[14] Neither does this Article consider whether or how legislatures might approach remedial settlement distribution,[15] or the provision of legal remedies to the victims of corruption through a legally enforceable right of action.[16] Instead, it focuses solely on the exercise of prosecutorial discretion by enforcement agencies negotiating settlement agreements in foreign bribery cases. Section III introduces key terminology and concepts. It provides working definitions of harm and victimhood that enforcement agencies can easily adopt

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14 It should be noted, however, that the U.S. Supreme Court has recognized the importance of remediation within the context of the civil enforcement of U.S. foreign bribery laws by the U.S. Securities & Exchange Commission. *See* Liu v. SEC, 140 S. Ct. 1936 (2020).

15 Legislation has been introduced in the U.S. Congress that would apportion a percentage of all criminal FCPA fines and penalties to anti-corruption initiatives. *See* Countering Russian and Other Overseas Kleptocracy Act, H.R. 3843, 116th Cong. (2019); *see also* Abigail Bellows, *Guest Post: Why the U.S. Congress Should Pass the CROOK Act*, GLOBAL ANTICORRUPTION BLOG (July 7, 2020), https://perma.cc/67VM-ESW3. There is also legislation pending in the U.S. Senate that would mandate the transfer of certain FCPA civil settlements to pediatric research. *See* Gabriella Miller Kids First Research Act 2.0, H.R. 6556, 116th Cong. (2020).

16 Arguments have been made in favor of reforms to create a private right of action under the FCPA. *See, e.g.*, Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419 (2012). However, these proposed reforms have never appeared likely to be passed in either legislative house.

and adapt. Section III then proffers a conceptual breakdown of remediation, demarcating three distinct types: first, compensation, a loss-based remedy applicable to identifiable victims who have suffered ascertainable loss; second, reparations, which respond to the widespread and diffuse harms suffered by populaces en masse; and third, restitution, a gain-based form of remediation that strips ill-gotten gains from corrupt actors and awards them to victims. This Article focuses on compensation and reparations because these are the forms of remediation surfacing most often in practice. Sections IV and V then provide the guiding frameworks.[17] These frameworks assume the form of multifactorial approaches, like those employed by the DOJ and SFO when determining whether to prosecute corporations that have breached foreign bribery prohibitions.[18] The factors comprising the framework for compensation include: (i) whether a victim can be identified; (ii) whether a victim has suffered direct harm; (iii) whether that harm is ascertainable; (iv) whether there is a risk of repeat corruption; and (v) whether compensation is appropriate in the circumstances. The factors comprising the framework for reparations include: (i) whether victims have suffered indirect harm; (ii) whether there is a nexus between the act of bribery and the victims' harm; (iii) whether there is a risk of repeat corruption; and (iv) whether reparations are appropriate in the circumstances.

II. BACKGROUND, CHALLENGES, AND CURRENT APPROACHES

A. Fundamental Aspects of Foreign Bribery Enforcement

1. The FCPA and the Foundations of the Global Foreign Bribery Regime

The global foreign bribery regime originated from the enactment of the Foreign Corrupt Practice Act of 1977 (FCPA). The FCPA was passed following a string of corruption scandals that came to light in the 1970s. Relevantly, numerous U.S. companies were found to have paid bribes to foreign public officials so as to rig the procurement process for government-awarded contracts in developing nations.[19] The FCPA accordingly prohibited the offering and

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17 It would be redundant to present a framework on both compensation and restitution. The only substantial difference would be that "the need to ascertain a victim's loss" would be replaced by "the need to ascertain a corrupt actor's gains."

18 Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Just., to Heads of Dep't Components and U.S. Attorneys 3–4 (Aug. 28, 2008); SERIOUS FRAUD OFFICE, DEFERRED PROSECUTION AGREEMENTS CODE OF PRACTICE, 2013, at 4 (UK).

19 For a more comprehensive overview of the historical backdrop to the FCPA, see Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929 (2012); Kevin Davis, *Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism?*, 67 N.Y.U. ANN. SURV. AM. L.

payment of bribes to influence the acts or decisions of foreign public officials.[20] Foreign public officials who demanded or accepted bribes remained beyond the statute's reach. Hence, the FCPA regulated the "supply-side" of foreign bribery.[21] The FCPA also required companies to make and keep accurate books and records and to devise and implement adequate accounting systems.[22] The statute was policed weakly until the early 2000s.[23] The U.S. government then began to devote significant resources to its enforcement. In punishing FCPA breaches, the DOJ has since levied eighty-two fines ranging from US$10 million to US$100 million, twenty-five fines ranging from US$100 million to US$1 billion, and four fines exceeding US$1 billion.[24] Businesses accordingly devote substantial resources to anti-corruption compliance policies and programs to avoid liability under the FCPA and the similar statutes that other nations have passed in its image.[25]

The FCPA is buttressed by an international regime, centralized by the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention.[26] The Convention, which became effective in 1999, requires parties to criminalize supply-side foreign bribery. Forty-three nations have acceded to or ratified it. The FCPA served as a blueprint for the OECD Convention, and it set the contours of foreign bribery enforcement generally. Therefore, understanding the provisions of the FCPA is key to understanding how the global foreign bribery practice functions. However, not every foreign bribery statute follows the FCPA's structure. The U.K. Bribery Act 2010, for example,

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497 (2012). For a recount of the most notable corporate scandals, see H. Lowell Brown, *The Extraterritorial Reach of the U.S. Government's Campaign against International Bribery*, 22 HASTINGS INT'L L.J. 407, 423–29 (1999). For an account of how the revelations of bribery were perceived at the time, see Charles R. McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 YALE L.J. 215 (1976) (noting that corruption scandals had "shaken foreign governments, rocked American corporate management, and tarnished the image of American private enterprise both at home and abroad").

20 More specifically, the FCPA prohibits the payment or offer of payment either directly, indirectly, or through a third party, of money or "anything of value" to an official of a foreign government or political party, with corrupt intent, to obtain or retain business. 15 U.S.C. §§ 78dd-1–2 (2020).

21 An ad hoc committee of the Association of the Bar of the City of New York authored a report that was particularly influential in the drafting of the FCPA and, in fact, warned against this sort of "reaching out" by Congress. *See* ASS'N OF THE BAR OF THE CITY OF N.Y., REPORT ON QUESTIONABLE FOREIGN PAYMENTS BY CORPORATIONS: THE PROBLEM AND APPROACHES TO A SOLUTION 5–6 (1977).

22 15 U.S.C.S. § 78m(a)–(b).

23 Barbara Black, *The SEC and Foreign Corrupt Practices Act: Fighting Global Corruption Is Not Part of the SEC's Mission*, 73 OHIO ST. L.J. 1093, 1096–1105 (2012).

24 *Key Statistics from 1977 to Present*, STANFORD LAW SCH. FOREIGN CORRUPT PRAC. ACT CLEARINGHOUSE, https://perma.cc/9844-TF8R.

25 *See* Joe Palazzolo, *FCPA Inc.: The Business of Bribery*, WALL ST. J. (Oct. 2, 2012), https://perma.cc/89HC-UECR.

26 OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43 (1998).

casts an even broader net by simply criminalizing all failures by corporations to prevent bribery.[27]

Despite widespread ratification of the Convention, foreign bribery enforcement remains concentrated in a small number of nations. Transparency International classifies just six countries, other than the U.S., as "active enforcers" of foreign bribery laws: Germany, Israel, Italy, Norway, Switzerland, and the U.K.[28]

2. The Extraterritorial Application of Foreign Bribery Laws

The FCPA has assumed global prominence due to its extraterritorial application.[29] In addition to covering "any person" who acts while in the U.S., the statute also applies to "issuers" and "domestic concerns" (as well the agents of issuers and domestic concerns) who make "use of the mails or any means or instrumentality of interstate commerce" in relation to an act of foreign bribery, regardless of where they are situated.[30] "Issuers" are entities with securities registered in the U.S.[31] or that are otherwise required to file reports with the U.S. Securities & Exchange Commission.[32] An entity can meet the definition of "issuer" even if it is incorporated in a nation other than the U.S.[33] "Domestic concerns" include U.S. citizens, nationals, and residents, as well as businesses organized in or with their principal place of business in the U.S., regardless of where they act.[34]

The DOJ has interpreted these terms broadly. Liability can attach to foreign nationals and foreign entities for conduct that has only a slight U.S. nexus. For example, the DOJ has asserted jurisdiction simply because a transaction connected to a foreign bribery scheme resulted in money momentarily passing through a U.S. bank account or because a foreign bribery scheme involved electronic communication (such as an email) that passed through an internet server located in the U.S.[35]

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27 Bribery Act 2010, (2010) c. 23, § 7 (U.K.).

28 DELL & MCDEVITT, *supra* note 2.

29 *See, e.g.*, BRANISLAV HOCK, EXTRATERRITORIALITY AND INTERNATIONAL BRIBERY: A COLLECTIVE ACTION PERSPECTIVE (2019); DAVIS, *supra* note 4.

30 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

31 *Id.* § 78c(a)(8). Furthermore, foreign issuers whose American Depository Receipts are listed on a U.S. exchange are "issuers" for purposes of the FCPA.

32 *Id.* § 78o(d).

33 *See* Michael S. Diamant, Christopher W. Sullivan & Jason H. Smith, *FCPA Enforcement against U.S. and Non-U.S. Companies*, 8 MICH. BUS. & ENTREPRENEURIAL L. REV. 353, 359 (2019).

34 15 U.S.C. § 78dd-1.

35 CRIMINAL DIV. OF THE U.S. DEP'T OF JUST. & ENFORCEMENT DIV. OF THE U.S. SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 10 (2012)

Perhaps unsurprisingly, the extraterritorial application of the FCPA and foreign bribery statutes in other jurisdictions has invited allegations of imperialism.[36] These allegations are naturally exacerbated by both the fact that corrupt malefactors often have minimal links to the enforcing nation, as well as the failure of enforcing nations to distribute the proceeds of foreign bribery settlements among the victims of foreign bribery. One U.K. civil society organization has identified a "growing realisation that it is unjustifiable for the U.K. government to financially benefit from fines levied against U.K. companies or individuals found guilty of corruption overseas, while not having suffered the damages of these acts, and with very little allocated to compensating the real victims."[37] Another U.S. commentator has remarked, "I am not sure where criminal fines should go when a French company bribes Costa Rican 'foreign officials,' but I am pretty sure that the answer should not be 100% to the U.S. Treasury."[38]

3. The Reliance on Non-Trial Resolutions and Prosecutorial Common Law

The vast majority of foreign bribery enforcement actions are resolved through settlement agreements. The most prominent type of agreement wielded by the U.S. and the U.K. is the deferred prosecution agreement (DPA). Enforcement agencies like the DOJ and the SFO use DPAs to resolve criminal investigations against corporate entities without trial provided the corporation cooperates with the agency. The terms of these agreements impose certain obligations upon the corporation. If the corporation does not comply, the enforcement agency may commence prosecution. Hence, the prosecution is "deferred" for a period of time set by the DPA, rather than obviated altogether as is the case when an enforcement action is resolved by a non-prosecution

("[P]lacing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce—as does sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across state borders or internationally to or from the United States."). For an example of a DOJ enforcement action in which jurisdiction was asserted where only minimal contact with the U.S. existed, see Deferred Prosecution Agreement at Attachment A ¶ 25(c), United States v. Magyar Telekom, Plc., No. 1:11CR00597 (E.D. Va. Dec. 29, 2011) (finding that it was enough to justify jurisdiction that an "email . . . passed through, was stored on, and transmitted to servers located in the United States").

36 DAVIS, *supra* note 4; Elizabeth Spahn, *International Bribery: The Moral Imperialism Critique*, 18 MINN. J. INT'L L. 155 (2009).

37 RAID & AFREWATCH, DEMOCRATIC REPUBLIC OF CONGO: CONGO'S VICTIMS OF CORRUPTION 13 (2020) [hereinafter RAID].

38 *Is ICE a Victim? And an Open Question!*, FCPA PROFESSOR (May 25, 2011), https://perma.cc/N3XC-ZWXN. Professor Koehler's comment is useful insofar as it prompts us to consider where the proceeds of foreign bribery cases ought to go. However, Professor Koehler has emerged as opposing remedial settlement distribution generally, decrying the practice as providing "feel good measures." *See Am I a Victim?*, FCPA PROFESSOR (Apr. 15, 2015), https://perma.cc/32GA-KRGS.

agreement. The conditions imposed by DPAs typically require the corporation to agree to a specific set of facts, to pay a financial penalty, and to implement a program to achieve compliance in the future.[39] To describe settlement agreements, this Article employs the broader term "non-trial resolution." The term "non-trial resolution" was coined in a 2019 report by the OECD. A non-trial resolution is "any agreement between a legal or natural person and an enforcement authority to resolve foreign bribery cases without a full trial on the merits of the allegations either before or after indictment with sanctions and/or confiscation, irrespective of whether it is a conviction or a non-conviction mechanism."[40]

Corporate entities and enforcement agencies enter into non-trial resolutions to resolve allegations of foreign bribery without the reputational and financial risks of litigation. The U.S. has resolved 96% of its enforcement actions through non-trial resolutions, while the U.K. and Germany have each resolved 79% of their enforcement actions in this manner.[41] Collectively, these three nations account for 80% of all foreign bribery enforcement and nearly 90% of all non-trial resolutions since the OECD Anti-Bribery Convention came into force.[42] As of 2018, signatories to the OECD Anti-Bribery Convention had collectively levied US$14.9 billion in fines enforcing foreign bribery offences. Of this sum, 95% had been exacted through non-trial resolutions.[43] This reliance on non-trial resolutions is a crucial, yet controversial, feature of the global foreign bribery regime.[44]

A criticism often made is that to avoid the risk of trial, companies simply acquiesce and accept enforcement agencies' aggressive and broad interpretations of foreign bribery laws, even if there is a strong liability defense.[45] As a consequence of this, foreign bribery laws are rarely interpreted by courts, and an informal body of precedent has arisen based on the practices of enforcement agencies.[46] This body of informal precedent, also referred to as "prosecutorial

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39 For a brief overview of DPAs in the U.S. and U.K., see OECD, *supra* note 7, at 52.

40 *Id.* at 11.

41 *Id.* at 13.

42 *Id.*

43 *Id.* at 14–15.

44 *See* NICHOLAS LORD & COLIN KING, *Negotiating Non-Contention: Civil Recovery and Deferred Prosecution in Response to Transnational Corporate Bribery*, *in* CORRUPTION IN COMMERCIAL ENTERPRISE: LAW, THEORY AND PRACTICE 234 (Routledge, 2018) (offering a U.K. perspective and an explanation of how the increased use of DPAs can be likened to an "accommodation" of foreign bribery); David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 74 MD. L. REV. 1295 (2013) (presenting a U.S. perspective).

45 *See* Mike Koehler, *The Facade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907 (2010).

46 *See id.* ("Against the backdrop of aggressive enforcement and the resulting multi-million-dollar fines and penalties is the undeniable fact that, in most instances, there is no judicial scrutiny of the FCPA enforcement theories. The end result is that the FCPA often means what the enforcement agencies

common law," has cyclically entrenched expansive interpretations of foreign bribery laws, including their extraterritorial reach.[47] Another feature of the global regime relevant to this Article is the fact that almost all of the money raised through foreign bribery enforcement is retained by the treasury of the enforcing nation.[48] This is so despite the fact that prominent enforcement agencies often refer to the harm foreign bribery causes vulnerable persons in the developing world as one of the justifications for enforcement.[49] Remedial settlement distribution, as shown below, is the exception and not the rule.

4. The United Nations Convention Against Corruption

The OECD Convention is complimented by another international instrument: The United Nations Convention Against Corruption (UNCAC).[50] The U.S. and the U.K. are both parties to this instrument. Chapter V of the UNCAC generally provides that state parties must repatriate embezzled wealth and property derived from corruption offences.[51] However, this instrument has

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say it means. Because of the 'carrots' and 'sticks' relevant to resolving a government enforcement action, FCPA defendants are nudged to accept resolution vehicles notwithstanding the enforcement agencies' untested and dubious enforcement theories or the existence of valid and legitimate defenses.").

47 *Bingham's Michael Levy on the Rise of Prosecutorial Common Law*, CORPORATE CRIME REPORTER (Feb. 7, 2011), https://perma.cc/CU5L-HWVF ("Companies don't want to have to take a conviction. But companies don't particularly have a strong incentive to fight on complex legal theories around jurisdiction and liability. What they care about is—what is going to be the dollar amount of the fine? Is it going to affect key employees? What is going to be the reputational damage? . . . The government on the other hand has a broader institutional interest. The government has consistently used the common law of settlement to push more and more aggressive interpretations of some of the laws it is interpreting, getting companies to agree to those aggressive interpretations, and then using the fact that a large company agreed that this was a violation of law to bring a similar case against other companies. . . . The fact that one company agreed that such and such was the law doesn't make such and such the law. Only judges and courts can decide what the law is—not prosecutors and settling companies.").

48 31 U.S.C. § 3302(b) is the statute responsible for the deposit of these funds into the U.S. Treasury. *See also* ODUOR ET AL., *supra* note 9, at 71 ("[B]etween 1999 and July 2012, a total of about $4.2 billion was collected in criminal monetary sanctions. About 71 percent of the criminal sanctions were imposed in the form of fines. Confiscations and forfeitures made up about 26.3 percent of the total, with 2.4 percent from restitution or reparations and 0.3 percent imposed in legal or procedural costs.").

49 U.S. DEP'T OF JUST., *supra* note 8 ("For let there be no doubt that corruption is not a victimless offense. Corruption is not a gentlemen's agreement where no one gets hurt. People do get hurt. And the people who are hurt the worst are often residents of the poorest countries on the face of the earth, especially where it occurs in the context of government infrastructure projects, contracts in which crucial development decisions are made, in which a country will live by those decisions for good or for bad for years down the road, and where those decisions are made using precious and scarce national resources.").

50 U.N. Convention against Corruption, *adopted* Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005).

51 *Id.* arts. 53, 57.

not prompted the majority of enforcing nations to use the proceeds of non-trial resolutions negotiated in foreign bribery cases for remedial purposes. The money that companies pay as punitive fines is not property derived from corruption offences, and it is unlikely that the UNCAC has any bearing upon the way in which enforcement agencies are obligated to deal with the proceeds of DPAs and other non-trial resolutions.[52] Even if the UNCAC could be construed in this manner,[53] it is clear that this is not how the most prominent enforcer of the foreign bribery offense, the U.S., has interpreted it.[54] The practices of the DOJ reveal a distinction drawn between, on one hand, the seized or forfeited proceeds of corruption, and, on the other, the punitive fines paid out by corporate entities resolving foreign bribery offences through non-trial resolutions.[55] The fact that neither the UNCAC nor the OECD Convention seemingly control remedial settlement distribution reinforces the prosecutor-led nature of remedial settlement distribution.

B. Practical Barriers to Remedial Settlement Distribution

Numerous features of foreign bribery enforcement render remediation difficult. At the outset, it is important to acknowledge the role of prosecutorial discretion. Enforcement agencies must retain the discretion to deviate from the framework proposed in this Article when the situation demands it. It would be a mistake to base a framework on a set of mandatory rules and then contend that enforcement agencies should adhere to those obligations without exception. Without legislative backing, such an approach would come to nothing. Remedial settlement distribution emerged from the practices of enforcement agencies, and by and large it remains a fruit of prosecutorial discretion. A framework is, therefore, useful only if enforcement agencies are able and willing to adopt it.

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52 *See* CECILY ROSE, MICHAEL KUBICIEL & OLIVER LANDWEHR, THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: A COMMENTARY 49 (Oxford University Press, 2019); Matthew Stephenson, *UNCAC Does not Require Sharing of Foreign Bribery Settlement Monies with Host Countries*, GLOBAL ANTICORRUPTION BLOG (Sept. 16, 2014), https://perma.cc/55P6-VCM8 (noting that fines paid pursuant to a disgorgement rationale could arguably fall within Chapter V).

53 Professor Kevin Davis has argued that the "spirit" of the UNCAC leans toward the sharing of the proceeds of foreign bribery non-trial resolutions. DAVIS, *supra* note 4, at 221. Davis does not, however, substantiate this argument with meaningful analysis. A similar argument is raised in RAID, *supra* note 37, at 15.

54 Jennifer Shasky, former supervisor of the DOJ's Kleptocracy Asset Recovery Initiative, has even gone so far as to suggest that the DOJ's asset repatriation efforts are not required under international law. Shasky is reported to have said that "there is no legal requirement to return the funds at all." *See* Christopher M. Matthews, *Fledging Kleptocracy Initiative Faces Challenges, Expectations*, JUST ANTI-CORRUPTION (Sept. 19, 2011), https://perma.cc/F8NT-NZX3.

55 *See* LARISSA GREY ET AL., FEW AND FAR: THE HARD FACTS ON STOLEN ASSET RECOVERY (2014) (providing an overview of the difficulties in seeking the return of stolen wealth in accordance with the terms of the UNCAC; *see also* Section II.C.2 (providing a high-level overview of the different approaches taken by the Fraud Section and the Money Laundering and Asset Recovery Section of the DOJ).

Assuming that legislatures in prominent foreign bribery enforcing jurisdictions will not adopt a comprehensive approach to remedial settlement distribution in the foreseeable future, the most productive discussion that can be had is one that is aimed towards enforcement agencies and that shows deference to the role of prosecutorial discretion.

This Section pursues two lines of thought. First, it explains why prosecutorial discretion in foreign bribery enforcement actions cannot always be expected to accommodate a remedial agenda. Second, it shows that despite the difficulties in constructing a framework for remedial settlement distribution, there is reason for taking on this challenge and improving current practices.

1. The Demands and Implications of Prosecutorial Discretion

The futility of arguing for a framework based on mandatory rules that are not statutorily entrenched stems from three interconnected features of foreign bribery enforcement and the function of enforcement agencies. The first is that the negotiation of non-trial resolutions is an inherently and necessarily discretionary process. The negotiation of non-trial resolutions is subject to considerations that are innumerable and case dependent.[56] These might include the strength of an enforcement agency's evidence, the resources available to both parties, the risk involved in litigating a particular point of law, the skill of the negotiators representing each side, and so on. Second, the transnational character of many financial crime offenses invites political influences to come into play. Many anti-corruption agencies are politically accountable and cannot pursue a foreign bribery investigation when the executive has forbidden it,[57] while some agencies are beholden to overarching political commands that are capable of influencing, undermining, and determining their actions.[58] The third feature of foreign bribery practice complicating remediation is the limited competences and resources of anti-corruption agencies. Enforcement agencies are not adjudicative bodies equipped to calculate loss and formulate remedies for the harm caused by foreign bribery schemes. Nor are they able to assume the mandate of foreign aid agencies and administer complex systems that ameliorate the harms that corruption can cause to societies at large.[59]

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56 *See* Michael Bisgrove & Mark Weekes, *Deferred Prosecution Agreements: A Practical Consideration*, 6 CRIM. L. REV., 416, 420–22 (2014) (providing a brief discussion of the negotiation of DPAs).

57 *See* R (on the Application of Corner House Research and Others) v. Director of the Serious Fraud Office, [2008] UKHL 60 (appeal taken from Eng.) (illustrating an example of the U.K. government exercising its power to halt a foreign bribery investigation initiated by the SFO on what arguably were national security grounds); *see also* Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 N.Y.U. J. INT'L L. & POL. 437 (2008).

58 *See, e.g.*, *Attorney General William P. Barr Delivers the Keynote Address at the Department of Justice's China Initiative Conference*, U.S. DEP'T OF JUST. (Feb. 6, 2020), https://perma.cc/NPV9-R7MA.

59 *See* Section IV.

The corollary of these three factors is that agencies need to maintain a degree of discretion to respond to factual peculiarities that arise case-by-case and to operate within the confines of particular political agendas and their own resources and capabilities. Enforcement agencies may therefore have to deviate from the framework proposed below for the sake of resolving an investigation. The degree and nature of possible deviations are not discussed further. This is because it is impossible to anticipate what might warrant deviation in future cases. What is important to note is that the framework proposed by this Article is intended to operate subject to prosecutorial discretion.[60]

2. Justifications for Improving Extant Practice

The practical challenges of pursuing remedial settlement distribution outlined above must be considered in light of the fact that enforcement agencies have already begun to practice remedial settlement distribution, while numerous governments have committed, at a policy level, to pursuing remediation in foreign bribery cases. Consequently, the aforementioned challenges do not justify neglecting to develop a framework to guide remedial settlement distribution.

This Article does not delve deeply into normative arguments for or against remedial settlement distribution. Debating the merits of the practice is beyond its scope. However, for the sake of providing broader context to the underlying policy debates, it is worth at least canvassing some of the primary arguments for and against remedial settlement distribution.

Those in favor of remedial settlement distribution typically rely on policy and ethical considerations. Perhaps unsurprisingly, there is a growing sentiment among senior personnel of enforcement agencies,[61] civil society organizations,[62] and NGOs[63] that some portion of the proceeds of foreign bribery non-trial

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60 There are of course additional difficulties, such as the risk of remediation monies being repurposed for corrupt ends, diplomatic and security risks associated with providing remediation monies to certain countries, and difficulty in formulating remedies for the diffuse types of harm caused by corrupt practices. These risks are considered below, as they are dealt with as considerations that come into play when determining whether and how to pursue remedial settlement distribution. The difficulties that have been raised here pertain to the general functions of enforcement agencies.

61 *See, e.g.*, Richard Vanderford, *Victims of Other Companies' Foreign Bribery Should Come Forward to Seek Cash, DOJ Says*, MLEX GLOBAL ADVISORY (Dec. 3, 2019) ("On December 3, 2019, Daniel Kahn, the Principal Deputy of the Criminal Fraud Section at DOJ, went a step further and invited purported victims of FCPA cases to make a claim: 'If there is a victim of a crime, [DOJ] of course wants those victims to come forward. That is our primary objective, to ensure that victims are made whole.'"); Baker, *supra* note 8 ("The ideal outcome, where-ever it is possible, is for the money secured through asset recovery to be returned to victims, using that term in the widest sense.").

62 RAID, *supra* note 37, at 15; Matthew C. Stephenson, *Standing Doctrine and Anticorruption Litigation: A Survey*, *in* LEGAL REMEDIES FOR GRAND CORRUPTION: THE ROLE OF CIVIL SOCIETY 38 (2019).

63 ODUOR, ET AL., *supra* note 9. Note also the attempt of a Nigerian NGO to convince the Securities and Exchange Commission to divest a portion of settlement proceeds to assist the citizens of

resolutions should be diverted to victims in developing nations. The rationale supporting this sentiment can be expressed in numerous ways. One view is that it is ethical to remediate the harm caused by corruption in the developing world because corruption is pervasive and citizens in developing nations are vulnerable to its corrosive impact. Another position, which goes a step further, is that it is unethical for Western nations to extract billions of dollars in fines and penalties through non-trial resolutions for conduct that has occurred in developing nations, and that has harmed governments and citizens in developing nations, only to retain that money as public revenue.[64] Another argument is that diverting the proceeds of foreign bribery enforcement away from enforcement agencies and their respective governments and toward developing nations in which bribery occurs would reduce the incentive of enforcing nations to enforce these laws overzealously in a rent-seeking fashion, and instead incentivize developing nations to police foreign bribery.[65]

Buttressing these claims, it is clear that there are no other available methods for addressing the harm caused by corruption. Foreign bribery non-trial resolutions have emerged as practical mechanisms that are at least capable of remediating some of the harm done to victims of corruption in the developing world in certain circumstances.[66] The global asset recovery regime has not emerged as a completely effective means of repatriating stolen assets to governments, let alone as a solution to the economic and social havoc to civilians caused by corrupt practices.[67] Further, private rights of action have proved largely ineffective, for numerous reasons, at providing individual victims with remedies.[68] These include a lack of access to courts for individuals in developing nations and difficulties posed by legal standards that arise as preconditions to the commencement of litigation, such as standing, venue, and jurisdiction.[69] Difficulties in pursuing remediation through courts are further intensified due to the necessity of proving causation and of satisfying legislative definitions of

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Nigeria. Alexander W. Sierck, *African NGO Asks for Distribution of FCPA Recoveries*, FCPA BLOG (Mar. 16, 2012), https://perma.cc/3LT6-YQD9.

64 Spahn, *supra* note 36; RAID, *supra* note 37, at 13.

65 Turk, *supra* note 12.

66 ODUOR ET AL., *supra* note 9, at 2 ("The reality is that, in the majority of settlements, the countries whose officials were allegedly bribed have not been involved in the settlements and have not found any other means to obtain redress.").

67 *See generally* GRAY ET AL., *supra* note 55, at 19; KEVIN STEPHENSON ET AL., BARRIERS TO ASSET RECOVERY: AN ANALYSIS OF THE KEY BARRIERS AND RECOMMENDATIONS FOR ACTION (2011).

68 *See* Mark, *supra* note 16 (arguing in favor of including a private right of action in the FCPA and pointing out numerous shortcomings in those few rights and remedies available to private individuals harmed by foreign bribery).

69 *See generally* RICHARD E. MESSICK, LEGAL REMEDIES FOR VICTIMS OF BRIBERY UNDER U.S. LAW (2016); Cheryl W. Gray, *Reforming Legal Systems in Developing and Transition Countries*, FIN. & DEV. 14 (1997).

victimhood and standing that were not fashioned for the foreign victims of corruption.[70] Taking all these considerations into account, it is worthwhile to consider less conventional avenues of redress.

There are, of course, strong ripostes to these views, including that enforcement agencies are government-funded entities enforcing national laws and their governments are entitled to retain whatever money is raised through enforcement.[71] Indeed, it was never the purpose of the FCPA to cater to the victims of foreign bribery. In passing the FCPA, Congress was primarily concerned with the economic and political effects of foreign bribery on U.S. interests.[72] Proponents of this view might also argue that the nations enforcing foreign bribery prohibitions should not share the proceeds of their enforcement efforts with other nations that have left them to act alone in these efforts.[73] Another argument is that enforcement agencies are already assisting developing nations by fighting corruption on a transnational basis.[74] Detractors might also allege that funneling capital back into corruption-prone states is counterproductive and provides corrupt governments with more resources to support illicit activities (this particular issue is dealt with in depth below).

Additional arguments, both for and against distributing the proceeds of foreign bribery non-trial resolutions, can be made. However, it is beyond the scope of this Article to consider whether one nation might be obliged, legally or morally, to share proceeds. What is ultimately important for the purposes of this Article is that there is a growing sentiment among influential stakeholders that remediation is an agenda worth pursuing and that enforcement agencies and governments are beginning to recognize and support this agenda. As such, this Article simply adopts the view that it is better to instill a degree of principle into the practice than to leave the practice entirely unprincipled. The merits and demerits of remedial settlement distribution itself present a distinct, and much broader, issue that is beyond the scope of this Article.

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70 Stephenson, *supra* note 62.

71 Luke Balleny, *Foreign Bribery Fines and Settlements: Who Should Get the Money?*, REUTERS (May 9, 2020), https://perma.cc/E8ZR-VWR7 ("'I think it's unlikely that U.S. enforcement authorities would share U.S. penalties with other countries, as U.S. penalties are intended to serve U.S. enforcement objectives and arise under various U.S. statutory schemes,' said Jay Holtmeier, an FCPA expert and a partner at global law firm WilmerHale.").

72 Koehler, *supra* note 19, at 929.

73 The Chairman of the U.S. Securities and Exchange Commission, Jay Clayton, has emerged as a proponent of these views, noting that the U.S. is essentially alone in its enforcement efforts, while some other nations attempt to game the system by paying bribes to gain an edge in foreign markets over U.S. companies that do not pay bribes. Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n, Remarks to the Economic Club of New York (Sept. 9, 2019), https://perma.cc/K9BQ-MSHE.

74 *Id.*

This Article has a narrow purpose: posing suggestions for the improvement of enforcement agency techniques regarding remedial settlement distribution. This Article proceeds upon the premise that, if remedial settlement distribution is to occur, it should be subject to objective and palpable criteria to allow for the development of a body of informal precedent and best practices over time. The development of such a body of precedent will increase consistency of outcomes in this space by allowing enforcement agencies to refer to past decisions for guidance. Current practices are marred by uncertainty: there are no tools agencies can refer to for the purpose of determining whether a particular non-trial resolution should include remediation. Similarly, there exists no guidance on identifying victims, ascertaining loss, or managing the risk that monies put toward remediation might be repurposed for corrupt ends. The adoption of a guiding framework will go a long way toward curing the inconsistency and lack of transparency that has burdened remedial settlement distribution in its infancy. Furthermore, the adoption of a framework to guide remediation in non-trial resolutions is important for the sake of accountability. If adopted, the framework set out below would prevent enforcement agencies from ignoring remediation where it is warranted and from pursuing it where it is not. At the very least, it would require them to justify their reasons for pursuing or refusing to pursue remediation. The importance of accountability cannot be understated. Foreign bribery non-trial resolutions involve substantial sums of money, and that money should not be subject to disposal in a manner that is unprincipled and without justification.

In sum, the creation of a clear yet flexible framework will improve consistency of outcomes and deliver a degree of much needed principle and accountability into an area of foreign bribery practice that implicates the interests of those harmed by corruption.

C. Current Approaches to Remedial Settlement Distribution

The remainder of this section outlines the approaches of the U.K., U.S., and Canada to remedial settlement distribution. The U.K. has been selected because it has pursued remediation for corruption victims in the developing world through foreign bribery non-trial resolutions more than any other jurisdiction. The U.S., on the other hand, is worth discussion because it is the most active enforcer of the foreign bribery offense and has pursued a remedial agenda through non-trial resolutions on several occasions. Meanwhile, Canada is neither an active enforcer of the foreign bribery offense, nor does it have a history of pursuing remediation in foreign bribery enforcement. However, Canada is the only jurisdiction the author has encountered that has a dedicated statutory regime geared toward remediation in foreign bribery settlements. While other prominent enforcers of

the foreign bribery offense, such as Germany, have successfully obtained modest forms of remediation, they are not discussed here due to language limitations.[75]

1. United Kingdom

U.K. government agencies, primarily the SFO, the Department for International Development (DFID), and the Foreign and Commonwealth Office (FCO), are largely responsible for pioneering remedial settlement distribution in foreign bribery cases.[76] The SFO investigates and prosecutes foreign bribery and negotiates the terms of non-trial resolutions, while the DFID and occasionally the FCO formulate and administer reparations programs in developing nations in accordance with the terms of those agreements. The SFO entered into a string of non-trial resolutions between 2010 and 2017 in which some form of remediation was negotiated for the benefit of a government or populace harmed by either foreign bribery or some other form of corrupt conduct.[77] The DFID, the FCO, the SFO, and various other instrumentalities of the U.K. government assisted in accomplishing these remediation efforts. The SFO has also pursued remediation in criminal prosecutions as well as criminal and civil forfeiture cases, which are instructive insofar as they employ remedial techniques that can be adapted for non-trial resolutions.[78] The SFO practice in this area is particularly illuminating because DPAs negotiated by the SFO are given legal force only if they are judicially approved, and every DPA approval judgment published to date has considered whether remediation ought to be awarded. Remedial settlement distribution in the U.K. is unique in that it is accompanied by a small amount of relevant judgments. The U.K DPA regime came into effect in February 2014 and provides that judges should approve DPAs only if they are likely to be in the interest of justice and their terms are fair, reasonable, and proportionate.[79] That regime also specifies that a DPA "may impose" a requirement to "compensate

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75 *See* OECD, IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION: PHASE 4 REPORT: GERMANY 34, 89–95 (2018). In bribery cases, German courts may suspend individual defendants' prison sentences and instead impose various other conditions, including a requirement that the defendant make specified contributions to charity. *Id.* at 34. While courts imposed a handful of such conditions in the last decade, the amounts were relatively small. *See id.* at 89–95 (noting required charitable contributions ranging from €22,000 to €175,000).

76 The cooperation of various U.K. government instrumentalities is reflected in the U.K. compensation principles. SERIOUS FRAUD OFFICE, GENERAL PRINCIPLES TO COMPENSATE OVERSEAS VICTIMS (INCLUDING AFFECTED STATES) IN BRIBERY, CORRUPTION AND ECONOMIC CRIME CASES (2018).

77 A complete account of DPAs entered into by the SFO can be found on the SFO website. *Deferred Prosecution Agreements*, SFO, https://perma.cc/2KT8-PXLK.

78 Civil recovery orders, which permit forfeiture of the proceeds of crime in the absence of a criminal conviction, have also been a point of controversy in England and Wales. *See* Jennifer Hendry & Colin King, *How Far Is Too Far? Theorising Non-conviction-based Asset Forfeiture*, 11 INT'L J.L. IN CONTEXT 398 (2015).

79 Crime and Courts Act 2013, c. 22, § 45, sch. 17 (UK).

victims of the alleged offence" or "donate money to a charity or other third party."[80] Also in 2014, a prosecutorial manual and a sentencing guideline were published, encouraging the SFO and U.K. courts to consider awarding remediation wherever possible.[81] To date, U.K. government agencies have sought approximately £33 million in remediation and have obtained a total of approximately £602 million through non-trial resolutions.[82]

Five cases exemplify the various ways that the U.K. has dealt with the question of remediation in corruption cases. The first involved the corrupt conduct of U.K. weapons manufacturer BAE Systems Plc.[83] The SFO and BAE entered into a settlement agreement in February 2010. The settlement agreement pertained to accounting malpractice in the sale of a radar system to the Tanzanian government.[84] Clause 5 of the agreement is particularly relevant. It provided for reparations to be paid by BAE. Specifically, BAE was to "make an *ex gratia* payment for the benefit of the people of Tanzania in a manner to be agreed between the SFO and [BAE]. The amount of the payment shall be £30 million less any financial orders imposed by the court."[85] DFID played a key role in orchestrating this scheme, brokering the arrangement and monitoring its execution.[86] Having a presence in Tanzania, DFID was able to play a monitoring role to ensure that the funds were used for their intended purposes.[87] Second, in 2014, U.K. print company Smith & Ouzman, along with four of its directors, was found guilty at trial of bribery-related offenses involving public officials in Kenya, Ghana, Mauritania, and Somaliland.[88] The case did not involve a non-trial resolution, as it proceeded to judgment, and Smith & Ouzman and key directors

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80 *Id.* § 5(3)(b)–(c).

81 *See* SENTENCING COUNCIL, FRAUD, BRIBERY AND MONEY LAUNDERING OFFENSES: DEFINITIVE GUIDELINE 45.

82 Genevieve Theriault-Lachance, *When Will Prosecutors Identify and Compensate Overseas Victims of Corruption?*, THE FCPA BLOG (May 26, 2020), https://perma.cc/CW4N-JQZJ; RAID, *supra* note 37, at 12.

83 This case was accompanied by significant controversy that is beyond the scope of this Article. *See UK Wrong to Halt Saudi Arms Probe*, BBC NEWS (Apr. 10, 2008), https://perma.cc/636Q-SCD6; *Lords Says SFO Saudi Move Lawful*, BBC NEWS (July 30, 2008), https://perma.cc/FTA6-6RNA.

84 Settlement Agreement Between the Serious Fraud Office and BAE Systems, Feb. 2010.

85 *Id.*

86 *BAE Systems Will Pay towards Educating Children in Tanzania after Signing an Agreement Brokered by the Serious Fraud Office*, SERIOUS FRAUD OFFICE (Mar. 15, 2012), https://perma.cc/YPT8-TMT2.

87 *See* Fuime Nicholas et al., *Effective Access to Compensation in Transnational Corruption: A Fortiori Question*, *in* ISSUES IN COMBATTING TRANSNATIONAL CORRUPTION 41 (2014) (citing HOUSE OF COMMONS, INTERNATIONAL DEVELOPMENT, FINANCIAL CRIME AND DEVELOPMENT: ELEVENTH REPORT OF SESSION 2010-12: VOL. 1: REPORT, TOGETHER WITH FORMAL MINUTES, ORAL AND WRITTEN EVIDENCE 10 (2011)).

88 Corporate Sentence and Confiscation Judgment, R v. Smith & Ouzman Ltd (Southwark Crown Ct. Jan. 8, 2016).

were convicted. In its sentencing remarks, the court found that neither compensation nor reparations was appropriate because there was a risk that money paid in compensation might be repurposed for corrupt ends.[89] However, though remediation was not ordered as part of the sentencing phase, the SFO, the DFID, and the FCO later identified a method of delivering reparations to Kenyan citizens: using part of the money extracted through fines and penalties to purchase eleven ambulances for public hospitals in Kenya.[90]

Third, in 2015, Standard Bank Plc, a U.K. bank, self-reported that one of its subsidiaries had paid bribes in connection with a public contract obtained in Tanzania. The contract in question granted the subsidiaries the right to act as underwriters for the Tanzanian government for purposes of a sovereign note placement. After the subsidiaries won the right to act as underwriters, one of them entered into a sham consulting agreement to provide a kickback to a consulting company owned by Tanzanian public officials. This agreement stipulated that one percent of all proceeds raised during the underwriting process would be advanced to the shell company for nonexistent consulting services. The note placement ultimately raised US$600 million, so US$6 million was advanced to the shell consulting company. After the payment was discovered, Standard Bank entered into a DPA with the SFO. Because the Tanzanian government would have received the US$6 million paid to the shell consulting company but for the corrupt scheme, it was ordered that this money would be paid in compensation to the Tanzanian government (plus interest).[91]

Fourth, in July 2016, U.K.–based design and manufacturing company Sarclad Ltd. entered into a DPA with the SFO after Sarclad's management self-reported suspicious activities that it had identified in its operations in Asia. It eventually came to light that Sarclad had entered into at least twenty-eight contracts with foreign governments between 2004 and 2012 that had been procured through bribery. The bribes had been paid throughout numerous Asian countries via a complex web of third-party intermediaries. A total of £17.24 million was paid to Sarclad as a result of the twenty-eight contracts. Compensation was deemed inappropriate. In a decision that has attracted criticism,[92] the court

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89 *Id.*

90 Max Golbart, *£2m Smith & Ouzman Fine Funds African Development*, PRINTWEEK (Mar. 21, 2017), https://perma.cc/2QGE-TYEW.

91 Serious Fraud Office v. Standard Bank [2015] NICC, No. U20150854 (UK).

92 The facts of *Sarclad* and the reasons offered for denying remediation in that case were analogous to another DPA concluded by the SFO with Rolls Royce Plc. The reasoning in *Rolls Royce* has been criticized on the basis that it shows a failure to engage meaningfully with the complexities that need to be addressed if remediation is to become a staple of anti-corruption enforcement. *See* Matthew Stephenson, *Guest Post: The UK's Compensation Principles in Overseas Corruption Cases–a New Standard for Aiding Victims of Corruption?*, THE GLOBAL ANTICORRUPTION BLOG (July 5, 2018),

found that the SFO had not been able to identify victims due to the complexity of the bribe schemes. Moreover, the use of intermediaries had made it impossible to identify victims or quantify loss.[93] Criticism is warranted inasmuch as this case shows that the same criminal restitution schemes used to remediate the harm to victims of nonfinancial crimes are unlikely to be able to address the type of harm suffered by the victims of corrupt practices. Finally, in March 2018, Canadian energy company Griffiths Energy used a front company to bribe Chadian diplomats by offering them significant discounts on its shares. The wife of a former Chadian public official purchased 800,000 shares at less than CA$0.001 each and sold them for a significant profit. The sale of the shares generated £4.4 million, and the SFO obtained property-freezing and forfeiture orders against those proceeds. The DFID then orchestrated the investment of these funds in infrastructure and development projects in Chad.[94]

Each of these cases reflects the commitment of the SFO to achieving some form of redress for the victims of corruption. In June 2018, the U.K. government formally cemented this commitment by adopting a policy of remedial settlement distribution with the publication of *General Principles to Compensate Overseas Victims (Including Affected States) in Bribery, Corruption and Economic Crime Cases* (also known as *Compensation Principles*). However, despite its title, this document does not set out a principled approach to remediation. It reads as a list of overarching instructions, couched in qualifying terms, that create a sense of low modality.[95] *Compensation Principles* provides, among other things, that various U.K. enforcement agencies, including the SFO, "will consider the question of compensation in all relevant cases." In cases in which "compensation is

https://perma.cc/LMC9-SUUA ("The picture that emerges is that compensation is not straightforward, even when the government commits to pursuing whatever legal means to achieve it. While the Code of Practice for UK Deferred Prosecution Agreements (DPAs) states that it is 'particularly desirable' for compensation to be paid, and despite the fact that under a DPA it should be easier for a prosecutor to get a company to agree to pay compensation, only one of the three UK DPAs concluded so far for foreign bribery has included compensation to affected countries or victims. In the other two (including one involving Rolls Royce), no compensation was provided, for two related reasons: First, the cases were 'too complex' involving bribes paid across multiple jurisdictions, and, second, it was not obvious who the victims were. . . . [T]he UK enforcement bodies need to develop mechanisms that enable compensation determinations to be made even in complex cases. The current legal landscape, whereby compensation can only be given in 'simple' cases, has left the UK in the somewhat bizarre situation whereby the more widely a company bribes, the more global its wrongdoing, and the more it uses intermediaries to pay the bribes, the less likely it is to have to pay out compensation to countries or individuals affected by its wrongdoing. *Complexity should not be an insurmountable obstacle to compensation*.") (emphasis added).

93 Preliminary Judgment ¶¶ 52–53, Serious Fraud Office v. Sarclad Ltd. No., U20150856 (Southwark Crown Ct. July 11, 2015).

94 Saleh v. Dir. of the Serious Fraud Office [2017] EWCA (Civ) 18 (appeal taken from Eng.), https://perma.cc/RY4R-TS94.

95 See RAID, *supra* note 37, at 15, for a list of recommendations to the SFO aiming to improve the operation of the Compensation Principles.

appropriate," those agencies are to "use whatever legal means are available to secure it." The agencies are also to "work collaboratively" with other U.K. government entities to

> identify who should be regarded as potential victims overseas[,] . . . assess the case for compensation, obtain evidence which may include statements in support of compensation claims, ensure the process for payment of compensation is transparent, accountable and fair, [and] identify a suitable means by which compensation can be paid to avoid the risk of further corruption.[96]

Unfortunately, the principles do not provide any guidance regarding which cases will be "relevant" for the purposes of remediation, when remediation will be "appropriate," or the means that might be used to secure remediation. Further, *Compensation Principles* does not significantly alter preexisting practices—it directs the SFO, DFID, and FCO to do what they were already doing. Nevertheless, the existence of *Compensation Principles* reflects a palpable commitment by the U.K. government to remedial settlement distribution. Most importantly, they are proof of the way in which the agencies' practices gained traction and eventually led to a shift in government policy.

2. United States

The FCPA Unit of the DOJ's Fraud Section does not typically practice remedial settlement distribution in its enforcement of the FCPA, but there have been some exceptions. For example, in September 2018, the DOJ entered into a non-prosecution agreement with Brazilian oil company Petrobas following numerous breaches of the FCPA. The terms of the agreement required Petrobas to pay a criminal penalty of approximately US$853 million. Of that sum, approximately US$682 million would be paid to a Brazilian agency, Ministerio Publico Federal.[97] In a press release, Petrobas revealed that the money paid to this agency would be "deposited by Petrobras into a special fund in Brazil to be used in strict accordance with the terms and conditions of the consent agreement, including for various social and educational programs to promote transparency, citizenship and compliance in the public sector."[98] In contrast with the U.K.'s

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96 SERIOUS FRAUD OFFICE, *supra* note 76; *see also* HM GOV'T, United Kingdom Anti-Corruption Strategy 2017–2022: Year 1 Update 26 (2018).

97 *See* Letter from Sandra Moser, Acting Chief, Fraud Section, Crim. Div., Dep't of Just., to F. Joseph Warin, Gibson, Dunn & Crutcher LLP (Sept. 26, 2018).

98 *Petrobras Reaches Coordinated Resolutions with Authorities in the United States and Agreement to Remit Bulk of Associated Payments to Brazil*, PETROBAS (Sept. 27, 2018), https://perma.cc/N3H4-2C84. It must be noted that this scheme was not executed as smoothly as had been planned. The highest appellate court in Brazil at first found this attempt at remediation to be unconstitutional. Since then, the money has been diverted away from general infrastructure projects and toward fighting the COVID-19 pandemic. *See* Kevin Abikoff & Aline Osorio, *Corruption Settlements, Coronavirus and the Road Paved with Good Intentions*, FCPA PROFESSOR (Apr. 2, 2020), https://perma.cc/33NL-SMY2.

efforts in this area, the DOJ does not have the same institutional commitment to remediation. Rather than orchestrate the method of payment itself, the DOJ simply redirected enforcement proceeds to the anti-corruption agency of the state in which bribes had been paid. This is unsurprising. Unlike the SFO, the DOJ has no enshrined responsibility to consider the question of remediation in foreign bribery cases. Nevertheless, the DOJ's practice in the Petrobas enforcement action reveals that the world's most active and influential anti-corruption enforcement agency is willing to pursue remediation in certain instances.

The DOJ's relative inactivity in this field should also be understood in light of the existence of a separate statutory regime that provides for the payment of remediation through the judicial system. Those who allege they have sustained losses due to a foreign bribery conspiracy have the option of seeking to recoup their losses under the Mandatory Victims Restitution Act of 1996 (MVRA).[99] Certain requirements under this statute (especially victimhood status) make recovery difficult, such that only a small handful of foreign governments have successfully claimed remediation.[100] Indeed, the MVRA has been criticized as imposing too high a bar for recovery by only a narrow class of claimants for it to meaningfully contribute to efforts to remediate the harm to victims of corruption.[101] Moreover, the statute does not provide for those who seek to rectify societal harm or harm suffered by citizens in developing nations.

It is important not to discredit the U.S.'s commitment to remediating harm to victims of corruption. Under the novel Kleptocracy Asset Recovery Initiative,[102] the DOJ's Money Laundering and Asset Recovery Section works in partnership with other U.S. enforcement agencies to forfeit the proceeds of

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99 *See* 18 U.S.C. § 3663(a)(1)(A). Although the remedy provided under this statute is termed "restitution," it calculates remediation using a loss-based formula, thereby likening it to the concept of compensation discussed below. Note that this provision does not authorize restitution for a substantive breach of the FCPA, but it can provide restitution for losses incurred over the course of a conspiracy to violate the FCPA. Section 3663(a)(1)(A) provides restitution for breaches of offenses contained under Title 18 of the U.S. Code, but the FCPA is an offense under Title 15. However, the general conspiracy offense, 18 U.S.C. § 371, encompasses "any offense against the United States," including conspiracies to violate the FCPA, and thus opens the possibility of obtaining restitution under the MVRA. Some corporate entities have tried unsuccessfully to attain victim status under the MVRA and other related statutes. *See, e.g.*, United States v. Alcatel-Lucent France, SA, 688 F.3d 1301 (11th Cir. 2012).

100 United States v. Diaz, No. 20346-CR-JEM (S.D. Fla. May 23, 2012); United States v. Green, No. CR 08-00059(B)-GW (C.D. Cal. Sep. 10, 2010).

101 Stephenson, *supra* note 52; Spalding, *supra* note 11, at 1412; *see also* Shane Frick, *"Ice" Capades: Restitution Orders and the FCPA*, 12 RICH. J. GLOB. L. & BUS. 433, 437 (2013) (noting that the statutory regimes for victim compensation in the U.S. "fail to address FCPA victims' needs in almost every conceivable scenario").

102 For an informative discussion of the initiative, including an assessment of its success, see Pablo J. Davis, *"To Return the Funds at All": Global Anti-Corruption, Forfeiture, and Legal Frameworks for Asset Return*, 47 U. MEMPHIS L. REV. 291 (2016).

corruption offenses and, where appropriate, return those proceeds to benefit the people harmed.[103] Put another way, the DOJ repatriates assets after it has successfully sought the forfeiture of the proceeds of crime through the U.S. judicial system, even though it does not typically redistribute the proceeds of FCPA settlements. The Kleptocracy Asset Recovery Initiative was founded in 2010, and, as of 2016, had returned approximately US$63 million in bribery proceeds and embezzled funds to the victims of corruption.[104] Asset recovery, which focuses on the receipt or demand-side of foreign bribery rather than the supply-side, often involves the use of non-trial resolutions and the payment of reparations. The efforts of the DOJ in this field are therefore instructive with regard to how FCPA settlements might be drafted for the purpose of remedial settlement distribution in foreign bribery cases. Indeed, several cases concluded as part of the Kleptocracy Asset Recovery Initiative are discussed in depth below.

Of course, the amount of money repatriated under the Kleptocracy Asset Recovery Initiative pales in comparison to the fines and penalties that the DOJ has levied in FCPA cases.[105] But despite its relative inactivity in seeking remediation through its enforcement of the FCPA, the U.S. remains a global leader in the field of asset repatriation and remediation in corruption cases generally.

3. Canada

Canada does not enforce foreign bribery prohibitions to the same extent as either the U.S. or the U.K.[106] However, unlike those two countries, Canada's federal legislature has adopted a statutory framework for non-trial resolutions that explicitly contemplates remediation in certain cases involving economic crime, including foreign bribery.[107] In late 2018, Canada amended its federal Criminal Code to introduce "remediation agreements."[108] Remediation agreements, like other non-trial resolutions, allow corporations to report certain economic crimes

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103 Kleptocracy Asset Recovery Rewards Act, HR 389, 116th Cong. (2019).

104 Loretta E. Lynch, Attorney General, Remarks at the Organization for Economic Co-Operation and Development Anti-Bribery Ministerial Meeting, U.S. DEP'T OF JUSTICE (Mar. 16, 2016), https://perma.cc/3XU6-977C.

105 *See generally* ODUOR ET AL., *supra* note 9.

106 Whereas the U.S. had concluded 207 non-trial resolutions to impose sanctions on legal persons in connection with a foreign bribery scheme and the U.K. had concluded 11, Canada had concluded just 3 such resolutions. OECD, *supra* note 7, at 107 n.202.

107 For an overview of the procedure that preceded this development, see *id.* at 36–37.

108 The Criminal Code defines "remediation agreement" as "an agreement, between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement." R.S.C. 1985, c C-46, § 715.3.

and to enter into agreements to resolve cases without risking conviction.[109] Canadian remediation agreements are similar to the U.K. DPA model in that they require judicial approval before going into effect.[110] Moreover, a remediation agreement submitted for judicial approval must state what remediation the corporation is required to make to victims, or alternatively, must contain a statement by the prosecutor showing why remediation is not appropriate.[111] The controlling legislation (the Criminal Code) provides that remediation agreements are intended to denounce corporate wrongdoing, hold organizations accountable, "contribute to respect for the law," "encourage voluntary disclosure of [ ] wrongdoing," "provide reparations for harm done to victims or to the community," and "reduce the negative consequences of the wrongdoing" for persons associated with a corporate offender who did no wrong, such as employees, customers, and pensioners.[112]

Canada's new remediation agreements will not necessarily pave the way for a more principled approach to this practice. The legislation provides a list of factors for prosecutors to take into account in deciding whether to enter into a remediation agreement,[113] but it does not give any guidance on how the recipients of remediation should be determined, or how remediation should be distributed. The conceptual framework proposed by the legislation is also unclear. In remedial settlement distribution, a clear conceptual approach to notions of harm is essential to achieve any degree of cogency. It is also noteworthy that the term "victim" has not received any useful explanation in the legislation. "Victim" simply means those who have "suffered physical or emotional harm, property damage or economic loss," including persons outside of Canada.[114] One reading of the new Canadian legislation is that it is deficient in laying the basis for any kind of principled approach to remedial settlement distribution. Another view, however, is that the Canadian federal legislature recognized that concepts of harm and victimhood in the remedial settlement distribution context are particularly amorphous and that it is best to leave it to enforcement agencies to construe these notions on a case-by-case basis until the practice evolves. To date, no remediation

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109 It should be noted that remediation agreements came into effect after entities within SNC-Lavalin Group Inc. came under scrutiny for engaging in sophisticated foreign corruption schemes. SNC-Lavalin thereafter engaged in lobbying efforts to secure the introduction of a DPA regime. *See* MARIO DION, OFF. OF THE CONFLICT OF INT. & ETHICS COMM'R, TRUDEAU II REPORT 21 (2019).

110 Criminal Code, R.S.C. 1985, c C-46, § 715.37(6). There are numerous features unique to the Canadian regime, however. DPAs also require consent of the Attorney General and the prosecutor must be satisfied that there is a reasonable prospect of conviction with respect to the offence. *Id.* § 715.32.

111 *Id.* § 715.34(1)(g).

112 *Id.* § 715.31(a)–(f).

113 *Id.* § 715.32.

114 *Id.* § 715.3(1).

agreements have been entered into, and so it is unclear how these non-trial resolutions will be wielded in practice. Nonetheless, it is apparent that Canada has emerged as a country that recognizes the importance of remedial settlement distribution, and it is possible that Canada's efforts on this front will continue to develop.

III. TERMINOLOGY AND CONCEPTS

Because remedial settlement distribution developed from the practices of enforcement agencies, it has never been supported by a comprehensively articulated policy rationale or any kind of theoretical substructure. This is one of the reasons that a review of cases involving remedial settlement distribution reveals a disjointed and incoherent approach to remediation. Accordingly, this Article considers several basic yet foundational concepts that can be used to support future research and practice in this field. These include, first, a conception of harm and victimhood, and second, an approach to conceptualizing the different kinds of remedial responses in non-trial resolutions.

A. Direct and Indirect Harm

Foreign bribery in the developing world is capable of harming citizens and governments.[115] The explanation of harm provided here is intended only to underlie working definitions for enforcement agencies considering whether to include remediation in a non-trial resolution. The balance of this Section describes how acts of foreign bribery can cause harm to citizens and governments and then provides a simple taxonomy to describe this harm.[116]

Harm caused by foreign bribery can be classified as "direct" or "indirect," and those who suffer harm can accordingly be classified as either "first-order" or

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115 It is not the purpose of this Article to provide a complete account of the manifestations of this harm nor to distinguish which forms of bribery ought to be thought of as harmful. Neither does this Article explore the ethicality of bribery, whether some bribes might in some cases achieve utilitarian benefit or the role of subjectivity in characterizing bribes. That has been done elsewhere. For a helpful overview of the literature detailing ways in which foreign bribery can cause harm to individuals, companies, governments, public institutions, and societies at large, see Dávid-Barrett, *supra* note 1. See also Jeffrey R. Boles, *The Two Faces of Bribery: International Corruption Pathways Meet Conflicting Legislative Regimes*, 35 MICH. J. INT'L L. 673, 678–80 (2014) for an overview of the way in which foreign bribery can cause harm, and David Kennedy, *The International Anti-Corruption Campaign*, 14 CONN. J. INT'L L. 455 (1999), for a discussion of the role of subjectivity in the ethicality of bribery.

116 This Article focuses only on the harm caused by bribes that fall within the purview of the foreign bribery offence. This excludes most forms of petty corruption and embezzlement, as well as most instances where the bribe-payer and recipient are of the same nationality and operate within the same country. For an overview of the harm caused by corrupt practices more generally, see INT'L COUNCIL ON HUM. RTS. POL'Y, CORRUPTION AND HUMAN RIGHTS: MAKING THE CONNECTION (2009), https://perma.cc/H8TN-M5CK.

"second-order" victims.[117] Direct harm is that which an enforcement agency is satisfied would not have occurred *but for* the payment of a *particular* bribe or the existence of a *particular* bribery scheme.[118] When agencies are satisfied there exists a sufficient link between foreign bribery and harm, harm can be classified as "direct." It is this type of harm that enforcement agencies are typically addressing when an individual or an entity is made to pay compensation to a specific victim. "Indirect harm" describes the "trickle-down" effects of foreign bribery that manifest because economic conditions and institutional instability render acts of corruption especially harmful.[119] Typically, this is the harm suffered by citizens *en masse* and societies at large.[120] It is this harm that enforcement agencies are attempting to address when non-trial resolutions provide for charitable donations, the purchase of assets for public benefit, or the injection of capital into public infrastructure. The recognition of each type of harm for purposes of remedial settlement distribution is naturally contingent on prosecutorial discretion. In the absence of a third-party decision-maker or court to assess harm and designate victims, the prosecutor alone makes these determinations. Under these

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117 In the absence of legislative guidance on or judicial analysis of victimhood, this Article has opted for broad definitions of "victimhood" that enforcement agencies will be able to adapt to particular cases. This approach has found favor in practice, with senior personnel at the SFO stating that the broadest possible definition of "victimhood" is to be preferred. *See* Baker, *supra* note 8 ("All economic crime has victims . . . . They may be the citizens of those states that fail to thrive due to rampant corruption and theft by their leaders . . . . The ideal outcome, where-ever it is possible, is for the money secured through asset recovery to be returned to victims, using that term in its widest sense.").

118 A but-for standard has been employed in the context of discerning whether compensation was appropriate under a DPA negotiated by the SFO. *See* discussion *supra* Section II.C.

119 The literature on this topic has long recognized the concept of "social harm." *See* Juanita Olaya, Kodjo Attisso & Anja Roth, *Repairing Social Damage Out of Corruption Cases: Opportunities and Challenges As Illustrated in the Alcatel Case in Costa Rica* (SSRN Working Paper, Dec. 6, 2010), https://perma.cc/S9RN-YEKP ("Social damage is the loss experienced in aspects and dimensions of the collective or the community relevant to the law.").

120 Elizabeth Dávid-Barrett and Mihály Fazekas provide a recent overview discussing how both corruption generally and bribery within public procurement can cause far-reaching harm.

> Given that public procurement accounts for on average 29% of total general government expenditure in OECD countries (2013 data), and closer to 50% of public spending in developing countries, [corrupt] practices can cause serious damage to the economy and to public confidence in institutions. Favoritism in the allocation of public contracts can lead to higher prices, reduced value for money, the provision of low-quality or unsafe works, goods and services, and reduced competition. It is also likely to harm democracy since, by distributing resources according to particularistic ties, partisan favoritism disadvantages parties that lack connections and thus weakens political competition. Clientelism may even reverse the conventional relationship of democratic accountability, with politicians holding supporters to account for their behavior.

Elizabeth Dávid-Barrett & Mihály Fazekas, *Grand Corruption and Government Change: An Analysis of Partisan Favoritism in Public Procurement*, EUR. J. CRIM. POL'Y RES., at 2 (2019), https://perma.cc/82JP-KD8B (emphasis omitted) (citations omitted).

circumstances, prosecutors are not bound by the narrower concepts of causation that determine rights and duties under common law.[121] Anti-corruption enforcement agencies do not undertake detailed causal analysis in deciding whether to pursue remediation, so causation in this context must be understood as clothed in prosecutorial discretion.

Direct harm is often facially apparent and easily subject to quantification. Cases involving direct harm are likely to involve compensation directed toward the government of the nation whose public official requested or received a bribe.[122] For example, when a government agent or contractor pays a bribe using money that belonged to the government or to which the government was entitled, the government has sustained a loss equal to the value of that bribe.[123] Alternatively, when a bribe is paid to a government employee to avoid paying import duties or some other form of taxation, then that government has been deprived of whatever capital it would have received had the tax been paid.[124] A third example arises when a service provider wins a government contract by paying a bribe to a rogue government official, and it can be shown that the bribe-payer ultimately provided defective or overpriced services.[125] In these examples, harm can be classified as direct because there is a self-evident connection between the bribe being paid and the government being deprived of capital that an enforcement agency may well recognize.[126] As evinced below, cases involving direct harm present fewer practical hurdles.

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121 It should be noted that while some countries do involve the judiciary in the approval of DPAs, those countries' courts do not afford sustained analysis to questions of remediation. For example, see *supra* Section II.C for a discussion of *Standard Bank*, in which Lord Leveson found that harm would not have occurred "but for" the relevant acts of bribery but did not undertake the kind of causal analysis typical of decisions addressing whether a particular act caused damage or loss and rights under the common law.

122 While corporations might also suffer direct harm, they are not the focus of this Article because non-trial resolutions have not been used to ameliorate harm to corporations. The fact that the corporate competitors of bribe-paying companies might suffer harm through FCPA violations is a longstanding observation. The original Senate Bill of the FCPA provided a right of action to harmed competitors. International Contributions, Payments, and Gifts Disclosure Act, S. 3379, 94th Cong. § 10, 122 Cong. Rec. 12,607 (1976), https://perma.cc/Z8MF-25AN ("Any person who can establish actual damage to his business resulting from illegal . . . contributions, payments, or gifts, made by a competitor and who has not made such illegal payments himself in a relevant time period, may maintain a cause of action against that competitor.").

123 *See supra* Section II.C (discussing *Standard Bank*).

124 *See, e.g.*, United States v. Kay, 359 F.3d 738 (5th Cir. 2004).

125 *See supra* Section II.C (discussing *Sarclad*).

126 Although non-trial resolutions have not yet been used to award compensation to individual citizens for direct harm, it is possible that citizens might also suffer direct harm if an enforcement agency is satisfied that a specific act of foreign bribery caused them harm that was not "trickle-down."

It is more difficult to articulate the nature and extent of indirect harm sustained by citizens, governments, and societies at large.[127] This is because indirect harm is diffuse.[128] It is typically expressed in terms of its intangible impact, such as the inefficiencies that result from public spending being distorted by bribes, and the more abstract harm that results as a byproduct of diminished institutions.[129] Put another way, citizens suffer and the public interest is compromised when public spending decisions are influenced by the interests of bribe-payers and bribe-taking public officials. For example, individual citizens of developing nations might suffer indirect harm when an act of foreign bribery causes a misdirection or depletion of public resources that otherwise could have been made available for areas of public outlay that contribute to human development (healthcare, education, social welfare, etc.).[130] This misallocation of public resources might occur when bribe-paying service providers ingratiate themselves to public officials over time, monopolizing a particular area of government spending and overpricing their services.[131] Citizens might also sustain indirect harm because inefficient redirection of resources results in inferior public services. This occurs when an entity that bids for a public infrastructure contract pays a bribe, is successful in its bid, and then provides services inferior to those that would have been provided by an unsuccessful bidder that did not pay a

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127 For an overview of the fraught nature of attempting to calculate the harm caused by corruption on a macro scale, see Matthew Stephenson, *It's Time to Abandon the "$2.6 Trillion/5% of Global GDP" Corruption-Cost Estimate*, THE GLOBAL ANTICORRUPTION BLOG (Jan. 5, 2016), https://perma.cc/6HUV-QEPU.

128 In his opening statement in *Liu v. Sec. & Exch. Comm'n* before the U.S. Supreme Court earlier this year, Deputy Solicitor General Malcolm Stewart stated that there is "no obvious universe of individual victims from an FCPA violation." Transcript of Oral Argument at 35, Liu v. Sec. & Exch. Comm'n, 140 S. Ct. 1936 (2020) (No. 18-1501). While Stewart was speaking in the context of investors, his comments are arguably relevant to FCPA violations generally.

129 *See generally* SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM (1999); Vito Tanzi & Hamid Davoodi, *Corruption, Public Investment and Growth* 1–26 (IMF, Working Paper No. 97/139, 1997). See also Dávid-Barrett, *supra* note 1, for a general theory of how bribery's distortion of public decision-making causes harm. The OECD reported in 2014 that the purpose of fifty-seven percent of all instances of foreign bribery involved the public procurement process. OECD, PREVENTING CORRUPTION IN PUBLIC PROCUREMENT (2016), https://perma.cc/FM6E-M5FQ.

130 *See* Dávid-Barrett, *supra* note 1, at 128 n.13. *See* OECD, CONSEQUENCES OF CORRUPTION AT THE SECTOR LEVEL AND IMPLICATIONS FOR ECONOMIC GROWTH AND DEVELOPMENT (2015), https://perma.cc/4545-473U (providing a discussion of how corruption in the procurement process can lead to misallocated resources, higher expenses, and lower quality goods and services).

131 *See* Dávid-Barrett & Fazekas, *supra* note 120, at 2; *cf.* Sanjeev Gupta, Luiz R. de Mello & Raju Sharan, *Corruption and Military Spending* 4–6 (IMF, Working Paper No. 00/23, 2006) (discussing the mechanism of corruption in the military spending context).

bribe.[132] Finally, citizens can also sustain indirect harm from worsened economic outcomes associated with pervasive levels of corruption. This harm can be expressed in terms of its trickle-down effects on society at large. These trickle-down effects manifest by diminishing foreign investment,[133] undermining the legitimacy of government institutions,[134] contributing to fiscal deficits, and increasing income inequality.[135]

Populations might also sustain harm in ways unrelated to inefficiencies that result from the redirection of public spending. This is evidenced by the Och-Ziff Capital Management Group bribery scandal.[136] Between 2008 and 2012, American investment and hedge fund manager Och-Ziff Capital Management and related entities paid bribes to the Congolese government to procure a mining license.[137] Before the license could be awarded, the Congolese government initially had to strip Canadian mining company First Quantum Minerals Ltd. of the license it held. The abrupt closure of the mine had a devastating economic impact on local communities that were suddenly deprived of income.[138] Before the mine's closure, the World Bank had invested in First Quantum's mining activity through the International Finance Corporation.[139] In return for the World Bank's investment, First Quantum was obligated to provide social and environmental benefits to local communities, including the delivery of clean water, the provision of healthcare and education, and the alleviation of air pollution.[140] After First Quantum was stripped of its mining license, World Bank involvement and all related infrastructure and social programs ceased.[141] Tens of thousands of citizens in local communities were affected.[142] Och-Ziff Capital Management and one subsidiary

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132 See WIM WENSINK & JAN MAARTEN DE VET, IDENTIFYING AND REDUCING CORRUPTION IN PUBLIC PROCUREMENT IN THE EU (2013), for a discussion of case studies showing how corruption leads to suboptimal decision-making and cost overruns in the procurement process.

133 Mary Hallward Driemeier, *Who Survives? The Impact of Corruption, Competition and Property Rights Across Firms* 27–28 (World Bank Dev. Rsch. Grp., Working Paper No. 5084, 2009).

134 *See* Johann Graf Lambsdorff, *How Corruption Affects Economic Developmen*t, *in* GLOBAL CORRUPTION REPORT 310 (Robin Hodess et al. eds., 2004).

135 Vito Tanzi, *Corruption Around the World: Causes, Consequences, Scope and Cures* 26–27 (IMF, Working Paper No. 98/63, 1998), https://perma.cc/B76R-8VUL.

136 *See generally* RAID, *supra* note 37.

137 Press Release, U.S. Dep't of Just., Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay $213 Million Criminal Fine (Sept. 29, 2016), https://perma.cc/6H97-KF4R.

138 RAID, *supra* note 37, at 11–12.

139 *See* IFC, *Kingamyambo Musonoi Tailings SARL*, IFC PROJECT INFORMATION & DATA PORTAL, https://perma.cc/PFT8-CM5F.

140 RAID, *supra* note 37, at 11.

141 *Id.* at 7–8.

142 See *id.* at 11–38, for a description of how the closure of the mine and withdrawal of the World Bank aggravated conditions that led to the impoverishment and in some instances death of citizens.

were found to have breached the FCPA and entered into a DPA with the DOJ,[143] but no remediation was provided to Congolese citizens. Shareholders of one of Och-Ziff's related entities, however, were able to claim victimhood status and seek remediation under the MVRA.[144] The SFO is still investigating this matter, and Congolese citizens have come forward and identified themselves to the SFO as victims.[145] The Och-Ziff Capital Management bribe scheme is just one example of how foreign bribery can cause widespread harm.

It is not only citizens who sustain indirect harm from the distortion of public spending. Governments might, for example, sustain either direct or indirect harm when their resource allocation has been diverted or influenced by a foreign entity paying a bribe to a rogue public official through the procurement process. In this situation, the government has been deprived of a degree of autonomy—which naturally varies based on the extent to which corruption pervades the national government and economy. The government might also sustain harm in the form of inefficient resource expenditure or reputational loss. This harm can, of course, be contrasted with the harm that flows from entities paying bribes to influence lawmaking and policy formulation. The phrase "state capture" describes the practice of bribes being paid to influence the lawmaking process.[146] A government may sustain harm if the bribe-payer redirects an entire government agenda that is ultimately against the national interest.[147]

Admittedly, this description of the harm suffered by governments is simplistic, and the distinction between direct and indirect harm resulting from resource misallocation is difficult to draw without sustained and detailed economic analysis. Indeed, several factors might complicate the nature of the harm suffered by governments. For instance, it is difficult to argue that a government is a victim when the bribe-seeking public official is not rogue and the corrupt behavior is a common or expected practice in a particular

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143 Deferred Prosecution Agreement, United States v. Och-Ziff Cap. Mgmt. Grp., No. 16-CR-00516-NGG (E.D.N.Y. Sept. 29, 2016); Plea Agreement, United States v. Oz Afr. Mgmt. Grp., No. 16-CR-00515-NGG (E.D.N.Y. Sept. 29, 2016).

144 United States v. OZ Afr. Mgmt. GP, LLC, No. 16-CR-515-NGG, 2019 WL 4199904 (E.D.N.Y. Aug. 29, 2019).

145 *DR Congo Residents Come Forward As Potential Victims in SFO Corruption Investigation into ENRC*, RAID (Jan. 28, 2020), https://perma.cc/C9AG-XG6F.

146 Joel S. Hellman, Geraint Jones, & Daniel Kaufmann, *Seize the State, Seize the Day: State Capture, Corruption, and Influence in Transition* 3 (World Bank, Working Paper, No. 2444, 2000).

147 For a discussion of the role of state capture in creating social harm in the Philippines, see Hannah Isabella Chan et al., *Civil Action Against Corruption: Empowering the Filipino People in a Captured State Situation*, *in* ISSUES IN COMBATTING TRANSNATIONAL CORRUPTION, *supra* note 87. See also Dávid-Barrett & Fazekas, *supra* note 120, for a discussion of how corruption can derail democratic public spending by hijacking policy at its formulation, implementation, or monitoring.

administration.[148] Moreover, the extent to which it is appropriate to distinguish between the harm sustained by citizens and the harm sustained by their governments can also be disputed. It is entirely arguable, if not facially apparent, that citizens also sustain harm when their government's agenda has been influenced or completely commandeered by bribe-payers.

The harm described here as indirect is not only diffuse, but also vague and involves conceptions of loss that are difficult, if not impossible, to quantify.[149] This is because conceptions of societal harm that rely on a trickle-down analysis cannot be applied to isolate the harm caused by a specific bribe or bribery scheme. Put another way, the above descriptions of indirect harm conflate the harm caused by a given act of foreign bribery with the harm caused by other forms of corruption and institutional instability generally. Foreign bribery typically causes harm in developing nations when it contributes to a broader culture of corruption permeating the state. This is why a singular bribery scheme within a developing country may cause more harm than an identical bribery scheme in a developed country. It is therefore difficult in developing economies to delineate the harm that has been caused by one form of corruption from the harm that has been caused by another. This may be problematic if one takes the view that enforcement agencies purporting to pursue remediation against individual bribe-offerors should seek only to remediate the exact harm caused by particular acts of bribery.

Notwithstanding the difficulty (or impossibility) of separating harm caused by specific acts of foreign bribery from harm caused by other more general and pervasive forms of corruption, the remedial practices of enforcement agencies reveal a willingness to conflate these different types of harm and to pursue remediation for social harm generally. The prevailing thinking, as evinced by the cases discussed above, is that it is better to pursue remediation for the benefit of those harmed by bribery than it is to forgo remediation because it is sometimes impossible to calculate the harm caused by a specific bribe.[150] This approach can be easily praised or decried. On one hand, it necessarily attributes a degree of social or economic harm to singular acts of bribery when that harm was actually caused by the amalgamation of many past acts of corruption. In this sense, the

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148 *See, e.g.*, Republic of Iraq v. ABB AG, 768 F.3d 145, 163 (2d Cir. 2014) (refusing to order restitution in favour of the Iraqi government for harm that flowed from the corrupt practices of that government).

149 Similar issues have caused consternation and controversy in the field of international criminal law. *See* L. Moffett, *Reparations for Victims at the International Criminal Court: A New Way Forward?*, 21 INT'L J. HUM. RTS. 1204 (2017) (noting how some of those involved with the drafting of the Rome Statute considered it impractical to deliver legal remedies to large numbers of individuals); *see also* INT'L LAW COMM'N, *Report. of the International Law Commission on the Work of its 44th Session 4 May–24 July 1992*, ¶¶ 88–92, U.N. GAOR, 47th Sess., Supp. No. 10, U.N. Doc. A/47/10 (1992).

150 *See supra* Section II.C.1 (discussing SFO enforcement actions).

remedial response can be criticized as being disproportionate to the harm. On the other hand, it might be argued that bribe-payers operating within the developing world know or should know that their corrupt conduct compounds with prior corrupt acts and institutional instability and is all the more harmful as a result. In support of this view, there are simple and strong policy reasons for extracting capital from corrupt actors for remedial purposes and providing remediation to citizens harmed by bribery in the developing world. This reasoning has found favor with enforcement agencies in the exercise of their discretion.[151]

Another complication of accepting that remedial settlement distribution is an appropriate response to indirect harm is that questions naturally arise as to when harm will be too remote to be considered to have been indirectly caused by a particular act of foreign bribery. An extremely expansive reading would posit that every act of foreign bribery undermines the rule of law, diminishes the institutional integrity of government, and subverts public policy to some degree.[152] On this view, every single act should sound in some form of remediation, and every state in which bribery has occurred and every citizen of that state would be a victim. This Article does not support this kind of expansive approach to remediation and acknowledges that the term "indirect harm" implies a degree of ambiguity and requires enforcement agencies to choose what harm is too remote and what harm is not. For as long as remedial settlement distribution is practiced pursuant to prosecutorial discretion rather than statutory mandate, enforcement agencies will make that choice for themselves on the basis of the factual matrix at hand.

B. Categories of Remediation

The bulk of commentary in this field employs the term "compensation" to describe all transfers of capital to victims.[153] This term is unhelpful. It conflates the provision of remediation in instances where distinct entities have suffered direct harm with the provision of remediation in instances where large groups of people have suffered indirect harm. Practice shows that the appropriate remedy for direct harm in most cases is the advancement of capital equivalent to the loss occasioned by the bribery. To describe this form of remediation, this Article uses

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151 *See* discussion of U.S. and U.K. enforcement actions, *supra* Section II.C.

152 *See, e.g.*, Dávid-Barrett, *supra* note 1, at 132 ("Every bribe paid to influence a public official to divert from following the rules associated with her office demonstrates that the rules are not consistently applied in line with the law. This is true whether the bribe is paid by Oxfam or by an arms dealer, whether the bribe is big or small, and whether the bribe secures a place at the front of the customs queue or a million-dollar contract. The fact that the public official decides to violate the rules in order to secure some private advantage is unjust.").

153 *See supra* Section II.C.1 (discussing the U.K. government's *Compensation Principles*); *see also* Spalding, *supra* note 11; Delphia Lim et al., *Access to Remedies for Transnational Public Bribery: A Governance Gap*, *in* ISSUES IN COMBATTING TRANSNATIONAL CORRUPTION, *supra* note 87, at 3–23.

the term "compensation."[154] The appropriate remedy for indirect harm in most cases is the advancement of capital through charitable endeavors, infrastructure investment, the purchase of public assets, or some other publicly accessible means. To describe this type of remediation, this Article uses the term "reparations." A third kind of remediation that is not typically pursued through non-trial resolutions, but that could be adopted with relative ease, involves the advancement of capital equivalent to the profit made by the bribe-payer. To describe this form of remediation, this Article uses the term "restitution." "Remediation" is an umbrella term that encapsulates compensation, reparations, and restitution. The balance of this Section explains the nature of each of these forms of remediation. Because restitution has not been employed in practice, the focus is on compensation and reparations.

Compensation in this context is informed by the same concept of corrective justice that underlies compensatory damages in tort law. The defining feature of such damages is duality.[155] That is, damages pair the wrongdoer with the victim. The contours of the remedy are determined by the relationship between the wrongdoer and the victim, to the exclusion of all other considerations. In this sense, the remedy aims to restore the normative equilibrium that existed between wrongdoer and victim before the wrong took place.[156] Compensation, therefore, should theoretically aim to correct the harm occasioned by foreign bribery by placing victims in their pre-wrong state, thus restoring whatever degree of normative equality existed between the relevant parties before the wrong occurred.[157] Compensation in this context is a loss-based form of remediation. It is not to be calculated with regard to the value of the bribe, the benefit derived by the bribe-offeror, or the need to punish the bribe-offeror. Of course, this notion of compensation is a creature of private law theory, and its applicability here is limited for numerous reasons. In negotiating remediation terms in foreign bribery settlements, it is unlikely that it will always be feasible to place the victims in the position they were in before the wrong was committed, whether due to the insolvency of the bribe-offeror, the fact that the exact amount of loss sustained cannot be ascertained or even quantified, or the dynamics at play in the negotiation process. Prosecutorial discretion remains the only arbiter for determining the value, form, and recipient of compensation in foreign bribery enforcement

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154 Some texts employ the word "restitution" instead of "compensation." This paper does not adopt this approach. Remedies that operate pursuant to a compensatory rationale are loss-focused, meaning that they respond to the loss of a plaintiff or a victim and attempt to undo that loss. *See* Jeff Berryman, *The Compensation Principle in Private Law*, 42 LOY. L.A. L. REV. 91, 103 (2008). Restitution, on the other hand, also takes into account the gain of the wrongdoer and describes those remedies whereby the wrongdoer is compelled to "give up" their ill-gotten gain.

155 ERNEST WEINRIB, THE IDEA OF PRIVATE LAW 63 (2012).

156 *Id.* at 70.

157 *Id.*

actions. Nevertheless, this notion of compensation has value insofar as it provides a benchmark: a loss-based concept to guide compensation in remedial settlement distribution.[158]

The distribution of reparations to the victims of indirect harm is best understood in light of traditional notions of distributive justice. Distributive justice provides that an appropriate response to a particular wrong with widespread consequences is to divide the remedy among the populace that was wronged.[159] In situations where citizens have sustained harm due to acts of bribery, the remedy does not take the form of a direct transfer of wealth from the wrongdoer to the wronged but rather a distribution of wealth through publicly available means (a practice explored in greater detail below).[160] Finally, restitution in this context refers to a gain-based method for determining remediation. It is measured with reference to the bribe-offeror's ill-gotten gains. The adaptability of restitution to remedial settlement distribution is entirely possible, as enforcement agencies often extract fines and penalties on a disgorgement basis—meaning that the fine or penalty is equivalent to the wrongdoer's ill-gotten gains.

The terms "compensation," "restitution," and "reparations"—while considered appropriate by the author—need not necessarily attach to the concepts articulated above. What is important to appreciate is that remediation can be conceived as being either loss-based, gain-based, or responsive to trickle-down societal harm. This demarcates the ways in which a non-trial resolution can remediate the harm to victims of foreign bribery: first, by advancing compensation to identifiable victims; second, by using public means to disburse reparations to victims who have suffered indirect harm;[161] and third, by requiring an entity that has entered into a non-trial resolution to give up ill-gotten gains to victims.

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158 *Id.* at 60–61.

159 *Id.*

160 *See supra* notes 75–105 and accompanying text.

161 The pairing of direct harm with compensation and indirect harm with reparations may not always be practical. An enforcement agency may find it necessary to advocate for a term in a non-trial resolution that provides victims with reparations, notwithstanding the fact that those victims suffered direct harm. This would likely be the case when the provision of compensation would be unfeasible from an administrative standpoint due to the sheer number of victims harmed. Reparations may be the appropriate or the only practical vehicle for remediation simply because an enforcement agency cannot calculate the loss of each specific victim or organize a transparent and efficient way of providing compensation. In this instance, the enforcement agency might decide that it is better to provide reparations—such as infrastructure investment, donation to a charity to which victims have access, etc.. The concepts here provide the foundation for a cogent and cohesive approach to remedial settlement distribution, but in the absence of being entrenched in statute, they must remain malleable so that enforcement agencies will be willing to apply them.

IV. A FRAMEWORK FOR COMPENSATION

The balance of this Article outlines a framework for the provision of compensation and reparations in foreign bribery non-trial resolutions. The relevant factors that enforcement agencies should take into account in considering whether to seek compensation in a non-trial resolution are as follows (direct harm is not addressed below, as it has already been discussed):

- Whether there is an identifiable victim;
- Whether that victim has suffered direct harm;
- The extent to which that harm is ascertainable;
- Whether there is a risk of repeat corruption and, if so, whether that risk can be managed; and
- Whether compensation is appropriate in the circumstances.

It should be noted that these factors could also be applied to support a framework for restitution. Indeed, it would be redundant to present separate frames for restitution and compensation because the only distinction would be in the third factor: for restitution, "the extent to which illicit gains are ascertainable" would be substituted for "the extent to which that harm is ascertainable."

A. The Identifiability of the Victim

A non-trial resolution can provide for compensation only when a specific victim can be identified.[162] This is the necessary corollary of compensation being measured against the loss of discrete individuals or entities. Indeed, the case law that has emerged from DPA approvals in the U.K. confirms that whether a victim can be identified is a necessary precondition to the provision of compensation. Two cases mentioned above serve as illustrative examples: *Standard Bank* and *Sarclad*.

In *Standard Bank*, Standard Bank's Tanzanian subsidiaries were successful in their bid for a contract that permitted them to act as underwriters on behalf of the Tanzanian government for a sovereign note placement. After the subsidiaries won that contract, one of them entered into a consultancy agreement with a shell company directed by public officials. The agreement stipulated that the Tanzanian subsidiary would pay one percent of all funds raised as part of the note placement to the consulting company.[163] This one percent commission, which under the circumstances was revealed to be a bribe, diverted money that would otherwise

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162 The international asset recovery community has long recognized the importance (and difficulty) of identifying the victims of corruption as a precondition to providing remedies. *See* U.N. Secretariat, Good Practices in Identifying the Victims of Corruption and Parameters for their Compensation: Note by the Secretariat for the Open-ended Intergovernmental Working Group on Asset Recovery (Aug. 4, 2016), https://perma.cc/9SN6-XMBD.

163 Serious Fraud Office v. Standard Bank Plc [2015] EWHC (QB) U20150854 [7] (UK).

have been paid to the Tanzanian government to the consulting company.[164] The note placement raised US$600 million, so US$6 million was paid to the consulting company.[165] Thus, the bribe resulted in the Tanzanian government being deprived of US$6 million. There was no room for doubt about the identity of the victim. The DPA approval judgment unsurprisingly reflects minimal deliberation on this front. The presiding judge and president of the Queen's Bench Division, Lord Justice Leveson, simply found that the Tanzanian government would not have incurred the loss "but for" the bribes paid by the Tanzanian subsidiary.[166] This was enough to justify compensation in the circumstances.[167] Indeed, *Standard Bank* might be termed an "easy case" with regard to discerning the identity of a victim to be paid compensation.

Sarclad falls at the opposite end of the spectrum. As noted above, the DPA in that case pertained to a web of sophisticated bribe schemes spanning multiple jurisdictions over a long time. Lord Leveson, who had again been tasked with presiding over the SFO's DPA approval application, provided the following analysis of why compensation was not appropriate:

> [Seventeen] of the [twenty-eight] implicated contracts were with entities based in a country in Asia with which there is neither a request for mutual legal assistance nor an established mechanism or practice in place for payments of compensation orders to the authorities. Other bribes . . . involved agents based in or working in relation to other countries in Asia and elsewhere in respect of which the same difficulties arise. Further, the amounts of the bribe payment are not always confirmed in the evidence and neither is any rise in the contract price to accommodate it (which would generate the loss). Finally, the SFO is not able to demonstrate whether and, if so, in what sum, the various Sarclad agents actually paid bribes to named or unknown individuals. Taken together, these factors amount to it not being possible to positively identify any entities as victims who may be compensated.[168]

This excerpt illuminates more than the obvious fact that unidentifiable victims cannot be compensated. The reasoning highlights four considerations that indicate whether a victim can be identified: (i) whether there had been a request for mutual legal assistance;[169] (ii) whether the victim(s) resided in a state with established mechanisms or practices for payments of remediation; (iii) whether the amounts of the bribes paid were confirmed in evidence and whether any other

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164 *Id.* [10].

165 *Id.* [8].

166 *Id.* [40], [51].

167 *Id.* [41].

168 Serious Fraud Office v. Sarclad Ltd [2016] EWHC (QB) U20150856, [53] (UK).

169 OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 9, ¶ 1, Nov. 21, 1997, https://perma.cc/U9K4-LWZA (providing that mutual legal assistance entails the provision of "prompt and effective legal assistance . . . for the purpose of criminal investigations and proceedings").

evidence indicated loss; and (iv) whether it could be shown that bribes of a specific amount had been paid by particular agents to particular individuals. These considerations are not presented as creating a mandatory threshold for the payment of compensation, but as factors that might make identifying a victim more practicable on a given set of facts. These are worth discussing further.

The first two considerations are relatively straightforward. In certain cases, a victim might be identified only if the victim's identity is put forward by a foreign enforcement authority. The existence of established mechanisms for payments of compensation orders would doubtlessly facilitate such payment. It should be noted, however, that the existence of such mechanisms bears on the practicality of delivering compensation rather than the antecedent issue of whether a victim can be identified.

The third consideration focuses on whether there is evidence to prove a victim's loss, such as evidence showing the value of bribes or a decline in the value of services provided under an agreement tainted by foreign bribery.[170] Naturally, evidence of a specific victim's loss indicates the existence of that victim. However, Lord Leveson's suggestion that the value of bribes or a decline in the value of services indicates a victim's identity is misplaced, as neither of these pieces of evidence speaks to the identifiability of victims in a precise sense. These two indications are better taken into account when determining whether a loss is ascertainable. Furthermore, there is no reason why the value of the bribe should have any bearing on the amount given to a victim. Indeed, if the point of compensation is to respond to harm sustained by a victim, then the value of the bribe is irrelevant unless the bribe correlates to the loss in some way. Finally, Lord Leveson indicated that victims could not be identified because there was a sparsity of evidence showing whether specific bribes had been paid to specific foreign officials.[171] Put another way, while the SFO's investigation had revealed a broad and pervasive culture of bribery, Sarclad's lack of internal records and documentation ultimately made it impossible to show that a particular entity had sustained direct harm and would be due compensation. This finding provides further support for the assertions made above that the payment of compensation for direct harm requires some kind of connection between an act of bribery and a particular victim's loss.

At bottom, Lord Leveson's comments indicate that when considering whether to award compensation, the first point of inquiry is whether a victim can be identified. In some instances, the identity of the victim will be apparent because

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170 Lord Leveson of course uses the term "compensation," but that term as used in *Sarclad* and *Standard Bank* is cognate with the term "remediation" as used in this article. Lord Leveson does not distinguish between remediating individuals for ascertainable loss and remediating the public at large.

171 *Sarclad*, EWHC (QB) U20150856, [53].

of the nature of the bribe scheme, as in *Standard Bank*. In more difficult cases, enforcement agencies might refer to any one of numerous case-dependent considerations in attempting to discern the identity of a victim.

B. Whether Harm is Ascertainable

Because compensation is a loss-based form of remediation, it is necessary to be able to ascertain some degree of loss before compensation can be included in a non-trial resolution. The case law supports this view. *Standard Bank* and *Sarclad* again reflect opposite extremes. The extent of loss in *Standard Bank* was facially evident. The Tanzanian government had been deprived of exactly the amount given to Standard Bank's bribe-paying subsidiary.[172] In *Sarclad*, Lord Leveson found that the degree of factual complexity meant that loss could not be ascertained at all.[173]

There is little doubt that loss should be established before an award of compensation is made. A more contentious issue is the extent to which loss needs to be determined. This Article rejects the view that it will, in all cases, be necessary to ascertain loss with absolute certainty. Enforcement authorities, at their discretion, might be content to employ means of measuring approximate loss. For example, an enforcement agency might decide that compensation should reflect the devaluation in goods or services provided under a contract tainted by bribery. In cases involving complex, prolonged bribery schemes, enforcement agencies may elect to compensate whatever loss can be ascertained or accurately estimated. Such is an advantage of the discretionary nature of the process of negotiating non-trial resolutions.

The proposition that loss need not be calculated with absolute certainty finds support in relevant areas of U.S. and U.K. corporate criminal law. In *R v. Alstom Power*, a case heard before the U.K.'s Southwark Crown Court, French energy company Alstom Power pleaded guilty to several offenses in relation to a bribe paid to Lithuanian public officials in the energy sector.[174] The Lithuanian government formally requested compensation so that it could reimburse the accounts of Lithuanian banks defrauded as part of Alstom's corrupt scheme. The court ordered that £10,963,000 be paid in compensation to the Lithuanian government, notwithstanding the fact that all parties agreed that loss could not be calculated with absolute certainty.[175] Similarly, in cases under the MVRA in which victims seek remediation for the harm caused by financial crime, U.S. federal courts need only make a "reasonable estimate of the [actual] loss" given the

172 *Standard Bank*, EWHC (QB) U20150854, [9]–[15].

173 *Sarclad*, EWHC (QB) U20150856, [53].

174 Transcript of Sentencing Remarks at 1, R v. Alstom Power, (June 8, 2016) (on file with author).

175 *Id.* at 6.

information available.[176] Enforcement agencies are of course not obligated to borrow from the approaches of courts in corporate criminal cases, but the willingness of courts to award compensation without being able to ascertain harm with absolute certainty indicates that enforcement agencies could function with a similar modus operandi when negotiating non-trial resolutions.

Ultimately, the extent to which loss can be ascertained may bear on the appropriateness of awarding compensation, but it should not mandate that compensation be paid or not paid—unless, of course, the relevant enforcement agency is unsure of whether *any* loss was sustained. It is also worth noting that some enforcement agencies might elect to bypass ascertaining a victim's harm and order compensation pursuant to some other calculus. U.S. lawmakers and academics have considered the payment of remediation calculated with regard to either the value of the bribe, the bribe-payer's gain, or the value of business lost by a victim.[177] However, this Article takes the view that remediation should respond to a victim's loss so as to function as a kind of remedy. Other calculations might be used as alternatives where necessary, depending on the practices of a particular agency.

C. The Risk of Repeat Corruption

A standard objection to remedial settlement distribution is that the practice is mired in the inherent risk that distributed capital might be repurposed for corrupt ends.[178] This Article suggests that neither compensation nor reparations should be provided if an enforcement agency is satisfied that there is too great a risk that remediation monies might be repurposed in this way. The risk of repeat corruption should hold substantial weight in an enforcement agency's decision to pursue remedial settlement distribution. Anti-corruption enforcement agencies generally vie to punish corrupt practices and deter would-be malefactors from engaging in future corrupt acts. It is nonsensical to think that they might exercise their discretion to empower corrupt governments or expend time and resources

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176 United States v. Gallant, 537 F.3d 1202, 1252 (10th Cir. 2008).

177 For example, see the discussion of the Foreign Business Bribery Prohibition Act, H.R. 3531, 112th Cong. (2011), in Spalding, *supra* note 11, at 1419.

178 This view was articulated to the author by several current and former senior prosecutors with relevant experience, and it can also be evidenced by scrutinizing the non-trial resolutions the DOJ has entered in which the DOJ repatriated the proceeds of corruption to the citizens of developing nations. *See also* Matthews, *supra* note 54(quoting the former head of the DOJ's Kleptocracy Asset Recovery Initiative as saying, "We have to be flexible and nimble in finding ways to responsibly repatriate . . . We don't want to give funds back to a potential corrupt government, or to the people who stole the money in the first place."). Indeed, the need to manage the risk of corruption, through audits and other means, in the dispersal of capital—in ways that are akin to reparations as described in this Article—in developing nations is well noted. *See, e.g.*, NORAD, JOINT EVALUATION OF SUPPORT TO ANTI-CORRUPTION EFFORTS: TANZANIAN COUNTRY REPORT (2011).

to assist those who cannot reasonably be considered victims. Indeed, MVRA precedent supports this view. Foreign governments seeking compensation under the MVRA in the wake of foreign bribery enforcement actions have been rejected on the basis that corruption was effectively rampant throughout the entire administration.[179] U.K. courts have shown a similar recalcitrance to award compensation where there is a risk that it might fall into the wrong hands.[180] However, enforcement agencies should, if possible, go one step further than identifying risk at face value and determine whether this risk can be managed or reduced. Practice suggests that if the risk of repeat corruption can be reduced or managed, remediation will still be appropriate.[181]

In some cases, enforcement agencies will not have to explore methods to curb this risk because it will be minimal at the outset. For example, if an enforcement agency is deciding whether to include compensation in a non-trial resolution for the benefit of a foreign government and the bribe-receiving public official in that case was not acting within a prevalent culture of public corruption, and was thus a rogue public official, then the risk of repeat corruption will likely be minimal.[182] Assessing the risk of repeat corruption in cases where compensation is being considered will be relatively straightforward compared to cases involving reparations. In the former, enforcement agencies need only assess the risk associated with a discrete and identifiable victim. The requisite due diligence is therefore limited in scope. In addition, the enforcement agency may be able to cooperate with the victim and come to terms regarding auditing and transparency about the way in which the compensation money is used. Where reparations are concerned, however, the task might be more difficult. The enforcement agency has to assess the risk that repeat corruption remediation

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179 *See*, *e.g.*, Shane Frick, *"Ice" Capades: Restitution Orders and the FCPA*, 12 RICH. J. GLOB. L. & BUS. 433, 446, 449 (2013).

180 *See Smith & Ouzman Ltd: First Corporate Convicted for Overseas Bribery to Pay £2.2m*, CMS LAW NOW (Jan. 11, 2016), https://perma.cc/Y28F-UJRD.

181 In practice, techniques for managing the risk of repeat corruption are drawn from reparations cases and so they are addressed in greater detail below in Section IV.B. These techniques have been employed in two cases involving the DOJ. The James Giffen prosecution eventually led to the creation of the BOTA Foundation, a charitable body that operated within Kazakhstan, and a settlement agreement involving then Vice President of the Republic of Equatorial Guinea Teodoro Nguema Obiang Mangue. For an overview of the BOTA Foundation and the circumstances leading to its creation, see Michael Steen, *Kazakh "Oil Bribe" Millions to Go to Poor Children*, REUTERS (May 4, 2007), https://perma.cc/W9PL-6PQV; WORLD BANK, FINAL SUPERVISION REPORT OF THE BOTA FOUNDATION (2015), https://perma.cc/E2AH-FZQU. For an overview of the Nguema Obiang case, see Press Release, U.S. Dep't of Just., Second Vice President of Equatorial Guinea Agrees to Relinquish More than $30 Million of Assets Purchased with Corruption Proceeds (Oct. 10, 2014), https://perma.cc/4P6C-NDEL.

182 This might be the case when a bribe scheme involves low-level government officials who lacked influence at higher tiers of government, such as customs officials. *See* United States v. Kay, 359 F.3d 738 (5th Cir. 2004).

monies are dispersed through publicly accessible means, which is likely to involve more intermediaries, more recipients, and an increased likelihood of repeat corruption.[183] The risk of repeat corruption in reparations cases is addressed below.

D. The Appropriateness of Compensation

Finally, as remedial settlement distribution is a byproduct of prosecutorial discretion, and its pursuit is a strain on the limited competences and resources of enforcement agencies, it is realistic to expect that enforcement agencies might decline to pursue compensation at the outset when doing so would be highly impracticable or otherwise unnecessary. The most obvious example is when the victim is a wealthy state or entity that has not indicated any interest in receiving compensation or has refused to accept compensation.[184] Another example is when the victim is not barred by jurisdictional hurdles from pursuing compensation through an established statutory framework. Lastly, an enforcement agency negotiating a non-trial resolution might find that remediation is more or less appropriate depending upon whether local enforcement agencies have been cooperative. While this consideration may not have anything to do with the questions of harm and victimhood that ought to guide remediation, it is possible agencies enforcing foreign bribery laws will take this into account when deciding how to exercise prosecutorial discretion; it is for that reason worth mentioning.

This final consideration is admittedly broad. If enforcement agencies were to simply decline to pursue remediation on the basis that it is inappropriate, without further justification, then any commitment to any kind of guiding framework would be pointless. However, this consideration has been included because, as remedial settlement distribution is a fledging practice, it is necessary to include one open-ended consideration to allow enforcement agencies to take the unique facts of each case into account. This is to say, until enforcement agencies have developed experience in assessing the appropriateness of compensation in foreign bribery non-trial resolutions, it would be unrealistic to

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183 *Id.* The terms of the non-trial resolutions in the *James Giffen* and *Teodoro Nguema Obiang Mangue* cases, see *supra* note 181, regarding the way in which reparation monies could be spent reflect, first, that enforcement agencies take the risk of repeat corruption very seriously and, second, that enforcement agencies are capable of dealing with this risk in a variety of ways.

184 A country may also deny remediation on the basis that accepting it would constitute an acknowledgment of corruption. The SFO has experienced this in attempting to provide compensation to the Ghanaian government. *See* INT'L DEV. COMM., FINANCIAL CRIME AND DEVELOPMENT, 2010–12, HC 847, at 38 (UK); *see also* LINKLATERS, PUNISHING CORPORATE OFFENDERS FOR BRIBERY AND CORRUPTION OFFENCES: THE SENTENCING GUIDELINE IN ACTION 4–5 (2016), https://perma.cc/R54F-AEEQ (noting that one of the reasons that compensation was inappropriate in the *Smith & Ouzman* case discussed above was that neither the Kenyan nor Mauritanian governments had requested compensation).

expect them to commit to a narrow list of considerations without any express justification to respond to factual oddities or political and social realities.

V. A FRAMEWORK FOR REPARATIONS

Articulating a framework that can be applied consistently and cogently to guide the provision of reparations is an inherently difficult task. As explained above, indirect harm is diffuse and often intangible. In many cases, it may be impossible to design or implement a remedial scheme that correlates to the harm caused by a particular bribe scheme.[185]

Other than recognizing the need to manage the risk of repeat corruption, enforcement agencies have not applied any palpable criteria to guide the provision of reparations. The available materials do not suggest that enforcement agencies have used any indicia to determine the value of reparations, how they are provided, or to whom they should be provided. Enforcement agencies have seemingly taken the view that, because bribery harms society generally, it is appropriate that corrupt entities pay reparations to society generally, whether that be through charitable donations, infrastructure investment, or some other means. The balance of this Article contemplates how that approach might be improved, exploring whether an open-ended multifactorial approach might provide a more principled and consistent framework for providing reparations. These factors—the first of which was discussed above—are the following:

- Whether an act of foreign bribery has caused indirect harm;
- Whether there is a nexus between the bribery and harm;
- Whether there is a risk of repeat corruption and, if so, whether that risk can be managed; and
- Whether reparations are appropriate in the circumstances.

A. Nexus Connecting Foreign Bribery and Harm

An important issue for enforcement agencies to consider when determining whether and how to include provision for reparations in a non-trial resolution is the extent to which there needs to be some kind of nexus between the indirect harm and the reparations scheme.[186] For example, if bribes paid to secure a

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185 Indeed, it has been argued that it would be impossible to formulate fair and effective legally enforceable rights that would grant redress for indirect or societal harm. *See, e.g.*, Sakshi Aravind & Tanmay Dangi, *Shades of Corruption: Thoughts on Why Compensation May Not be a Viable Solution*, *in* ISSUES IN COMBATTING TRANSNATIONAL CORRUPTION, *supra* note 87, at 82–83.

186 This approach is derived from the DOJ's former enforcement practices pertaining to U.S. environmental regulations. The DOJ routinely used to enter into "supplemental environmental projects" with companies that had been found to have caused tangible environmental harm. The purpose of these projects was to ensure "that any harm or threatened harm to victims or the

monopoly over a state's public health sector lead to the provision of defective services in that sector, recognizing a nexus requirement could mean that reparations be put toward the benefit of hospitals, medical supplies, or the health sector generally. It is beyond the scope of this Article to mount a comprehensive argument regarding whether enforcement agencies should insist upon a nexus requirement as a precondition for including reparations in non-trial resolutions. Instead, this Article will outline reasons both for and against the adoption of a nexus requirement and then suggest a middle ground as the best approach.

Insistence upon a nexus between indirect harm and reparations ensures a degree of parity between harm and remediation. A nexus requirement assumes a pivotal function: ensuring that reparations operate as a type of remedy, it links the harm that is the subject of the non-trial resolution to the reparations.[187] If enforcement agencies do not insist upon a nexus, it is arguable that reparations play a role that is more similar to foreign aid or charity.

However, there are legitimate reasons why an enforcement agency might choose to exercise its discretion to ignore an obvious nexus between foreign bribery and harm. One reason is that it might be counter to the interests of the enforcement agency's government to provide reparations in a particular way. For example, if an act of foreign bribery caused harm to the military sector of a developing nation with unstable institutions, the decision to focus reparations elsewhere would be a logical one for that enforcement agency.[188] Similarly, if an

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environment is actually addressed." *See* SAMUEL HICKEY, BRIDGING THE GAP BETWEEN SFO AND DOJ PRACTICE IN REMEDIATING THE VICTIMS OF FOREIGN BRIBERY 11–12 (OECD 2019), https://perma.cc/LLN5-57EV. The DOJ accordingly required that there be some kind of nexus, or a "relationship between the violation and the proposed project." *Id.* The DOJ relevantly provided that such a nexus could be established when the proposed project had been designed to reduce the likelihood of similar violations, the proposed project reduced the adverse impacts to which the violation contributed, and finally, the proposed project reduced the overall risk potentially affected by the violation at issue. *Id.*; *see also* Spalding, *supra* note 11, at 395.

187 International criminal law provides a loose analogy. Judges of the International Criminal Court have ruled that reparations can be ordered only with respect to "harm suffered as a result of crimes if such crimes have been found to have taken place and the person standing trial for his or her participation in those crimes is found guilty." Prosecutor v. Ruto, ICC-01/09-01/11-2027-Red-Corr, Public Redacted Version of Decision on Defence Applications for Judgments of Acquittal, ¶ 149 (Apr. 5, 2016). The analogy is loose because enforcement agencies are not bound by the same constraints as judges (constraints such as the existence of a conviction, for example). Nonetheless, the quoted reasoning shows that other bodies tasked with providing remediation to large groups for incalculable harm have insisted upon there being some connection between harm and victims. It is not enough that victims simply exist.

188 The BAE Systems settlement agreement negotiated by the SFO, discussed above, could be seen as an example. In that case, the bribe scheme involved the military sector, and reparations were paid to the education sector. *See* Joe Murphy, *Let's Pause Before We Dole Out Dollars*, FCPA PROFESSOR (May 14, 2015), https://perma.cc/TS4A-HYF5 (warning that funneling capital into failing or unstable states could be perilous and warning of "unelected enforcement officials making policy

act of foreign bribery caused detriment to a portion of society or an area of outlay that was not as in need of immediate capital injection as other portions of society or areas of outlay, then it again may make sense to ignore any nexus.[189] One can of course argue that such considerations are unrelated to remediation and that remedial settlement distribution should focus on identifying and alleviating harm, but that position ignores the fact that enforcement agencies are highly unlikely to ignore political and practical realities.

The prevailing approach in anti-corruption cases is to disregard whether any nexus exists. To date, non-trial resolutions have simply mandated that the bribe-payer funnel capital into the country in which the bribes were paid. This may involve purchasing assets for the public benefit,[190] supporting public infrastructure initiatives,[191] donating money to charities,[192] or creating a foundation.[193] However, a point of stark contrast and a potential alternative method is found in the DOJ's past approach to negotiating non-trial resolutions for breaches of environmental regulations.[194] Professor Spalding noted that the DOJ often negotiated remediation schemes as part of non-trial resolutions involving corporate offenders that breached environmental regulations. These remediation schemes were "closely connected" to whatever environmental damage formed the basis of the non-trial resolution.[195] Environmental breaches are, of course, an inapposite point of analogy because environmental harm is necessarily physical, so remediation can be tied to the geographic area in which the harm occurred. The

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decisions about how to spend large pools of funds" before noting that determining victimhood "is not simply an administrative task; there will be important policy decisions to be made, including matters of foreign policy").

189 The SFO followed this approach in the *Chad Oil* case discussed above. There, the SFO transferred the recovered money to DFID to "identify key projects to invest in that will benefit the poorest in Chad." *See SFO Recovers £4.4m from Corrupt Diplomats in 'Chad Oil' Share Deal*, SFO: NEWS RELEASE (Mar. 22, 2018), https://perma.cc/B2JV-RYPH. Furthermore, where the DOJ has opted to pursue infrastructure investment as part of the Kleptocracy Asset Recovery Initiative, the DOJ has opted to identify areas in which infrastructure investment is most needed.

190 Max Goldbart, *£2m Smith & Ouzman Fine Funds African Development*, PRINTWEEK (Mar. 21, 2017), https://perma.cc/RR4S-EQTU.

191 DFID MEDIA TEAM, DFID Acquires £4.4 Million from Corruption Case to Tackle Poverty in Chad, GOV.UK: DFID IN THE NEWS (Mar. 23, 2018), https://perma.cc/B2K8-VWYG; DFID MEDIA TEAM, DFID on Spending UK Aid on Infrastructure in Developing Countries, GOV.UK: DFID IN THE NEWS (Oct. 12, 2018), https://perma.cc/8DP4-9JRB ("The main thrust of DFID's work in [developing countries] centers around improving transportation services and infrastructure.").

192 Press Release, U.S. Dep't of Just., *supra* note 181.

193 *See generally* IREX, THE BOTA FOUNDATION: FINAL SUMMATIVE REPORT (2015), https://perma.cc/LJ3Z-9XZY.

194 Hana Vizcarra & Laura Bloomer, *DOJ Phases Out Supplemental Environmental Projects in Environmental Enforcement*, HARV. L. SCH. ENV'T. & ENERGY L. PROGRAM (Aug. 6, 2020), https://perma.cc/3GTM-D62N.

195 Spalding, *supra* note 11, at 1417.

same cannot always be said for indirect harm flowing from corrupt practices. Nonetheless, this aspect of environmental regulation provides a useful and insightful point of comparison.

There is precedent for a form of remediation that does not require monies to be paid into the state in which bribery occurred. Instead, money can be paid to general anti-corruption initiatives.[196] For example, as part of the settlement agreement entered into between the World Bank and Siemens AG, a German manufacturing giant, for bribery paid in connection with a World Bank development project in Russia, Siemens agreed to dedicate US$100 million over fifteen years to support anti-corruption work.[197] Siemens subsequently launched the "Siemens Integrity Initiative," inviting nongovernmental organizations and international organizations, associations, and universities to apply to Siemens for funding for projects that would "promote business integrity and fight corruption."[198] There is also support for this type of approach in the literature.[199] Matthew Turk has suggested that money paid as part of FCPA disgorgement fines that cannot be transferred to the state in which the bribery occurred should instead be given to the OECD to bolster its anti-bribery efforts.[200] Professor Spalding has similarly suggested that fines could be directed towards local organizations capable of investigating corruption.[201] Spalding makes the point that the DOJ could determine the amount of money to dedicate to remediation in FCPA settlements in the same way it calculates fines.[202] In the U.S., there is even support for this

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196 International criminal law may provide a degree of guidance. International criminal law scholars and courts have dealt with the concept of "transformative reparations," which are dedicated to changing the societal structures that perpetuated a particular breach of international criminal law. *See* Andrea Durbach & Louise Chappell, *Leaving Behind the Age of Impunity: Victims of Gender Violence and the Promise of Reparations*, 16 INT'L FEMINIST J. POL. 543 (2014). However, it must be kept in mind that reparations of this nature can carry the potential to further neocolonial agendas and usurp democratic mandates in the state in which they are carried out. *See* Leila Ullrich, Faculty of Law, University of Oxford, Can Reparations Transform Societies? The Practice of "Transformative Justice" at the International Criminal Court, Presentation at Oxford Transitional Justice Research Seminar (Mar. 17, 2016), https://perma.cc/K9DE-MK6K.

197 Press Release, World Bank, Siemens to Pay $100 Million to Fight Fraud and Corruption as Part of World Bank Group Settlement (July 2, 2009), https://perma.cc/D8UU-MUWQ.

198 Press Release, World Bank, Siemens Launches US$100 Million Initiative for Anti-Corruption (Dec. 9, 2009), https://perma.cc/9J97-AKMH.

199 *See, e.g.*, Lim et al., *supra* note 153, at 17 ("Rather than regarding FCPA fines as national revenue, an institutional mechanism could be established to channel the monies collected towards public purposes, pursuant to a broad conception of 'remedy.'").

200 Matthew C. Turk, *A Political Economy Approach to Reforming the Foreign Corrupt Practices Act*, 33 NW. J. INT'L L. & BUS. 325 (2013).

201 Spalding, *supra* note 11, at 1417.

202 Andrew B. Spalding, *Restorative Justice for Multinational Corporations*, 76 OHIO ST. L.J. 357, 397–402 (2015). See U.S. SENT'G COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 8C1.1–4.11 (2018), https://perma.cc/DJR2-7ERA, for an overview of how fines are calculated.

type of approach at a legislative level. Legislation has been introduced in both the House of Representatives and the Senate that would see a portion of FCPA settlements placed into an "anti-corruption fund."[203] That fund would then be used to assist developing nations in their respective fights against corruption.[204] The proposed legislation would not remediate the harm to victims of corruption, but it is an example of the U.S. political system showing its readiness to repurpose the proceeds of FCPA settlements for relatively benign and constructive purposes. Ignoring a nexus requirement has one distinct advantage: enforcement agencies are not left to attempt to put a number on how much money should be paid in reparations or to identify a portion of society most impacted by an act of foreign bribery. Conversely, there is nothing to tie these payments to the nation in which bribery occurred, let alone to a specific act of bribery.[205] Given the inherent difficulties intertwined with the risk of repeat corruption in orchestrating the payment of reparations, these types of payments could well find favor with enforcement agencies and the other government agencies who take it upon themselves to organize reparations schemes.

Ultimately, this Article expresses a preference for enforcement agencies to first determine whether a nexus exists and only then consider whether reparations can be provided to some other area of public outlay if either no nexus can be identified or there is some other compelling reason to not provide reparations to whichever segment of society was harmed. Alternatively, if it is impossible or impracticable, for whatever reason, to pay reparations into the state in which the bribery occurred, enforcement agencies might consider ordering payment to some kind of general anti-corruption agenda, as occurred in the Siemens case, as a last resort. This way, if adhering to a nexus requirement or paying reparations back into the state in which bribery occurred is infeasible, enforcement agencies can at least try to remedy indirect harm by seeking some other form of remediation. What is most important, however, is that some conception of nexus be articulated, including the circumstances in which that nexus requirement might be disregarded, so that at the very least the provision of reparations is made predictable, consistent, and coherent to the greatest extent possible.

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203 The legislation introduced in the House would apportion five percent of all FCPA fines and penalties to anti-corruption initiatives, while the legislation introduced in the Senate would redirect US$5 million from every case in which fines and penalties exceed US$50 million. *See* H.R. 3843, *supra* note 15; S. 3026, 116 Cong. (2019).

204 For a more in-depth discussion, see Abigail Bellows, *Revamping U.S. Anti-Corruption Assistance*, AM. INTEREST (June 15, 2020), https://perma.cc/JMC2-UKEH.

205 Margaret Urban Walker has argued that transformative reparations that do not respond to any particular type of harm can substitute broader social goals for the need to remediate specific victims, which in turn diminishes the victim-centric function of reparations. *See* Margaret Urban Walker, *Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations*, 10 INT'L J. TRANSITIONAL JUST. 108, 110 (2016).

B. Risk of Repeat Corruption

Assessing the risk of repeat corruption may prove more complex in reparations cases, as the agency administering reparations has to satisfy itself that funds dispersed through a publicly accessible apparatus will not become repurposed for corrupt ends.[206] The U.S. and U.K. exhibit different approaches to managing this risk. Non-trial resolutions negotiated by the DOJ tend to impose positive and negative obligations on the parties to the agreement, stipulating how reparations monies can and cannot be spent. The SFO, on the other hand, does not include these details in non-trial resolutions, leaving reparations schemes to be administered by other U.K. government agencies.

As part of its Kleptocracy Asset Recovery Initiative, the DOJ has implemented reparations schemes by donating money to charity, investing money in infrastructure projects, and creating a charitable organization. One instance in which the DOJ was involved in the creation of an independent foundation to deliver reparations is particularly instructive, as it sets out how those charged with managing the risk of repeat corruption might do so successfully.[207] The settlement agreement, negotiated in 2007 following the seizure and forfeiture of more than US$115,000 over the course of investigating alleged breaches of the FCPA and other federal crimes,[208] contained the following relevant stipulations: the foundation would be administered by a carefully selected multinational panel; money could be withheld from the foundation if the foundation's independence became compromised; stringent procedural safeguards attached to the release of funds from the foundation; the foundation was subject to extensive auditing and reporting requirements; and the DOJ (and other organizations involved) retained the right to demand the return of funds from the organization in the event that its independence became compromised.[209] The foundation supported three programs: conditional cash transfers to increase access to health, education, and

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206 This problem has arisen in the context of India's policy of corporate social responsibility. In India, the Companies Act of 2013 obligates high-earning and high-value companies to donate to charities. The process of donation creates a risk of bribery, exposing companies to liability under both Indian national bribery laws and foreign bribery laws such as the FCPA. Companies subject to India's Companies Act of 2013 are therefore essentially tasked with managing the risk of repeat corruption. This is typically achieved through preemptive means, such as extensive due diligence. For more information, see John E. Turlais & David W. Simon, *Where India's Companies Act Meets the FCPA*, FOLEY (May 18, 2017), https://perma.cc/XD4C-4CGZ.

207 For further background on this case, see Spalding, *supra* note 11, at 1418.

208 *See* Elizabeth Spahn, *Discovering Secrets: Act of State Defenses to Bribery Cases*, 38 HOFSTRA L. REV. 163, 164–75 (2009) (providing a discussion of the convoluted and controversial James Giffen case); *see also* Press Release, U.S. Dep't of Just., DOJ Settlement Successfully Releases More Than $115 Million in Alleged Corruption Proceeds to People in Kazakhstan (Dec. 9, 2015), https://perma.cc/FPA6-68JL.

209 Mem. of Understanding, U.S.-Kaz.-Switz., May 2, 2007, https://perma.cc/QHT6-XVVC; *see also* Press Release, U.S. Dep't of Just., *supra* note 208. *See generally* IREX, *supra* note 193.

social welfare for impoverished families; conditional grants to local and international charities and nongovernmental organizations to promote children's health and the well-being of orphans; and a tuition-assistance program.[210] In this particular case, there were attempts to fraudulently extract money from the foundation, but they all failed when they were detected as a result of the auditing and transparency measures in place.[211] And while substantial costs were incurred in ensuring accountability and transparency, reparations were delivered successfully.[212] Similar techniques were also used by BAE Systems in administering reparations to the Tanzanian education system. BAE Systems insisted that reparations money would be paid out only in tranches, subject to the approval of a supervisory committee that would review the way the money was used.[213]

In another Kleptocracy Asset Recovery Initiative case in 2014, the DOJ entered into a settlement agreement stipulating that the assets of a corrupt politician from a developing nation would be auctioned, and the resultant proceeds would be donated to a charity in that politician's state.[214] That settlement agreement contained the following features to minimize the risk of repeat corruption in dispersing reparations: the reparations monies could be spent only "for the benefit of the people" of the relevant state; the reparations monies could not be used to "make any payments or provide any form of consideration" to an enumerated list of third parties associated with the corrupt politician; and, lastly, the charitable body that received the reparations monies had to publish "an accounting of its expenditures of the funds and the results of those expenditures on an annual basis until such funds are fully expended."[215]

The DOJ has not wavered from its approach of using the terms of non-trial resolutions to solidify the contours of reparations schemes. In February 2020, the DOJ orchestrated the return of approximately US$308 million to Nigeria through the terms of a trilateral agreement with the governments of the Federal Republic of Nigeria and the Bailiwick of Jersey.[216] That agreement included measures to ensure transparency and accountability, including administration of the funds and

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210 IREX, *supra* note 193.

211 *Id.* at 54.

212 *See* Oxford Pol'y Mgmt, Evaluation of the BOTA Foundation's Programmes, Kazakhstan: Summary Note 4 (2014), https://perma.cc/GL2R-B8FJ.

213 *See* Nicholas et al., *supra* note 87, at 42.

214 Press Release, U.S. Dep't of Just., *supra* note 181.

215 United States v. One Michael Jackson Signed Thriller Jacket, No. CV 13-9169-GW-SS, at 21, 23–24 (C.D. Cal. Oct. 10, 2014).

216 Press Release, U.S. Dep't of Just., U.S. Enters into Trilateral Agreement with Nigeria and Jersey to Repatriate Over $300 Million to Nigeria in Assets Stolen by Former Nigerian Dictator General Sani Abacha (Feb. 3, 2020), https://perma.cc/HRS8-4WFJ.

projects by a designated agency, independent audits, and monitoring.[217] The agreement also precluded the expenditure of funds to benefit alleged perpetrators of corruption.[218]

In the U.K., the risk of repeat corruption has been managed primarily by the DFID and the FCO. These agencies have, in the past, been tasked with exploring opportunities to donate and invest monies exacted through non-trial resolutions. This approach relies less on the drafting of the non-trial resolution because an entity separate from the enforcement agency is able to dedicate its competences to managing the risk of repeat corruption.[219] An advantage of this approach can be found in the *Smith & Ouzman* case mentioned previously. In that case, the sentencing judge noted that the SFO had not been able to identify any safe recipient of remediation monies, so remediation of any kind was inappropriate.[220] However, U.K. government agencies, including the DFID, were able to orchestrate a reparations scheme involving the purchase of ambulances. The advantage of this approach to reparations is that dedicated government agencies may be able to achieve outcomes not possible for an enforcement agency seeking to curb the risk of repeat corruption through the terms of a non-trial resolution. The disadvantage is obviously one of resources and funding.

An alternate approach to relying on the terms of the non-trial resolution or involving other government instrumentalities may be to outsource certain work to civil-society organizations. As noted in a report prepared by the University of Dar es Salaam in Tanzania, for the purposes of evaluating reparations administered in the BAE Systems case, "civil society is more likely to ensure that the funds obtained through compensation for corruption benefit the victims. A high number of civil society organizations work directly with people adversely affected by corruption such as impoverished communities."[221] It is therefore possible that enforcement agencies might consider whether there is a reliable civil-society organization that might play some role in transparently administering reparations.

It is beyond the scope of this Article to discern which approach is superior. Indeed, the appropriateness of either may be determined by external factors such as the availability of funds to dedicate to managing risk. What is important is that enforcement agencies consistently refer to the risk of repeat corruption as a precondition for pursuing reparations, explain their reasoning regarding why that risk could or could not be managed in a given case, and articulate their strategies

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217 *Id.*

218 *Id.*

219 The DFID's role in the BAE Systems case provides a useful example. *See generally* Nicholas et al., *supra* note 87.

220 LINKLATERS, *supra* note 184, at 5.

221 *See* Nicholas et al., *supra* note 87, at 49.

for managing repeat corruption.[222] This will ensure that enforcement agencies continue to develop competences in this field.

C. Whether Reparations are Appropriate in the Circumstances

As noted above, the rubrics to underscore remediation presented in this Article are a first attempt at laying the groundwork for a fledging practice entrenched in prosecutorial discretion, so the inclusion of an open-ended consideration is necessary. By taking into account whether reparations are appropriate, enforcement agencies can refer to peculiar circumstances that could not be foreseen. As also noted above, the inherent vagueness of this consideration should not undermine the internal coherence of remedial settlement distribution as a practice if enforcement agencies clearly articulate why reparations are appropriate or inappropriate. Indeed, if enforcement agencies consistently refer to the same consideration as rendering remediation unnecessary, then that particular consideration may find its way into later articulations of official multifactorial approaches adopted by enforcement agencies. That is to say, remedial settlement distribution is a developing practice, and the inclusion of this final consideration will, if wielded correctly, aid in its development.

The most prominent example that may arise in the context of reparations is whether the victim state has a need for the reparations. If the victim of a foreign bribery scheme is a developed nation, it is highly likely that remediation would not be considered by the victim state to be necessary. This is because the trickle-down impact of a single foreign bribery scheme in the developed world is unlikely to cause any harm, even diffuse or indirect harm, to citizens. Further, the willingness of an international organization, foreign government, or a local civil society organization to assist in administering or monitoring a reparations scheme might also count toward the appropriateness of reparations.

VI. CONCLUSION

The remediation of the harm suffered by the victims of foreign bribery, and of corrupt practices more generally, is a conceptually dense and practically fraught field that has received little attention in the literature to date despite its growing prominence. This Article has limited its focus to foreign bribery non-trial resolutions and attempted to reduce some of the more complex issues into a set of working definitions and a framework that can be readily referred to by those

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[222] The importance of enforcement agencies creating a body of informal precedent to develop the competencies of agencies assessing the risk of repeat corruption cannot be overstated. Those involved with administering reparations to the Tanzanian school system following the BAE System cases discussed above complained of "a lack of precedents" to guide the process. *See id.* at 40 (citing INT'L DEV. COMM., *supra* note 184, at 10).

agencies involved with the remedial settlement distribution, in addition to academics and policy-makers operating in this growing area.