GREASING THE WHEELS: BRITISH DEFICIENCIES IN RELATION TO AMERICAN CLARITY IN INTERNATIONAL ANTI-CORRUPTION LAW

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TABLE OF CONTENTS

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I. CORRUPTION: A ROUTINE PRACTICE, BUT NOT FOR LONG

Since the end of World War II, the world has gradually begun to develop a global marketplace.[1] Europe sought to insure peace and create economic stability through the creation of the European Coal and Steel Commission (ECSC) in the late 1940s, an entity that eventually evolved into the common market of the European Community (EC) and the European Union (EU).[2] The need for economic stability was not just sought by states on a regional basis after World War II, but states also sought to create a worldwide trading system in the form of the General Agreement on Trade and Tariffs (GATT), and later the World Trade Organization (WTO).[3] This progression illustrates a clear trend toward open markets and free trade.[4] Scholars recognize that "the driving force [of this trend] is international competitiveness."[5] The immoral and pervasive practice of bribery and corruption of government officials by international businesses undermines competition in the international market, ultimately inhibiting free trade and economic development in many countries.

Bribery is a common aspect of doing international business throughout the world even though it "distorts international trade, increases the cost of economic development, and undermines democratic principles of government."[6] The World Bank notes that corruption has a "negative relationship [with] per capita GDP[,] . . . lowers the quality of public infrastructure[,] . . . encourage[s] regulatory burden[,] . . . distorts public expenditures[,] . . . lower[s] public satisfaction with health care[, . . .] undermines the official economy, [and] reduces the effectiveness of development aid and increases inequality and poverty."[7] Robert S. Leiken has

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[1] JAMES HANLON, EUROPEAN COMMUNITY LAW 3 (3d ed. 2003).

[2] *Id.*

[3] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 77–81 (2005).

[4] Michael A. Almond & Scott D. Syfert, *Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy*, 22 N.C. J. INT'L L. & COM. REG. 389, 391 (1997).

[5] *Id.*

[6] David A. Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus*, 18 NW. J. INT'L L. & BUS. 457, 458 (1998).

[7] WORLD BANK, REPORT NO. 29620, MAINSTREAMING ANTI-CORRUPTION ACTIVITIES IN WORLD BANK ASSISTANCE: A REVIEW OF PROGRESS SINCE 1997, at 1 (2004), *available at* http://lnweb18.worldbank.org/oed/oeddoclib.nsf/b57456d58aba40e585256ad400736404/048351b876971b9285256eed006aae69/$FILE/anti_corruption.pdf (citations omitted). Of particular interest, this report notes that a government project's return is lower by 2.5% for every increased

testified before the U.S. Senate in regard to the need for widespread use of anti-corruption law, saying that "reducing bribery, smuggling and kickbacks is part and parcel of free trade; anti-corruption is part and parcel of democracy. Today's decisive battles for free trade, development and democracy may well be fought on the terrain of corrupt practices."[8]

This battle has begun. The U.N. General Assembly has condemned bribery and corruption in international business transactions, noting that efforts to stop bribery of government officials will improve international trade.[9] According to the General Assembly, combating bribery enhances fairness and competition, promotes transparent and accountable governance, and promotes development and environmental protection.[10] The United Nations is not the only international organization to recognize the positive effect an anti-bribery law will have on international trade, as many other organizations now have anti-bribery policies or conventions.[11]

In order for anti-bribery rules to have the desired effects on international trade, the ideals set forth by the international community in its various treaties and conventions must be implemented at the state level. Before the anti-bribery movement of the 1990s, "the United States . . . was the only major trading nation to make it a criminal offense for its own firms and individuals to make certain 'corrupt' payments to foreign government officials illegal

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point of corruption (as measured according to the ICRG six-point corruption rating scale). *Id.*

[8] Hearings of the Senate Caucus on Int'l Narcotics Control & the Senate Finance Comm. Subcomm. on Int'l Crime, 104th Cong. (1996) (testimony of Robert S. Leiken, President of New Moment, a non-profit organization dealing on issues of international democracy), *quoted in* Almond & Syfert, *supra* note 4, at 391.

[9] *See* United Nations Declaration against Corruption and Bribery in International Commercial Transactions, G.A. Res. 51/191, U.N. GAOR, 51st Sess., Annex 1, U.N. Doc. A/RES/51/191 (Dec. 16, 1996), *reprinted in* 36 I.L.M. 1043, 1046–47 (1997) [hereinafter U.N. Declaration].

[10] *Id.*

[11] These organizations include the European Union (*see* Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, Euro. Union, May 26, 1997, 1997 O.J. (C 195) 1, *reprinted in* 37 I.L.M. 12 (1998)); the Organisation for Economic Co-operation and Development (*see* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 (1998) [hereinafter OECD Convention]); the International Monetary Fund (*see* International Monetary Fund, http://www.imf.org (last visited Mar. 4, 2007) (discussing various articles and reports regarding the IMF's anti-bribery role in surveillance and accountability of government funds and promotion of government transparency)); the World Bank (*see* WORLD BANK, WORLD DEVELOPMENT REPORT (1997) (laying out the general framework for anti-bribery policy)).

under its own law. . . ."[12] This situation, where U.S. firms' international competitors were not subject to the same criminal sanctions for bribery, put U.S. citizens and companies in a difficult competitive position in the ever growing global economy. This situation, along with the ill effects bribery has on states, particularly in the developing world, was to be rectified by the conventions, particularly the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).[13]

But has the situation been rectified? Are foreign firms now on equal footing while they compete with U.S. firms in developing countries? Although many signatories to the OECD Convention claim to have implemented the Convention into their domestic law,[14] not all states are implementing the law with equal strength. The United Kingdom and the United States are two major trading nations and trading competitors who have both reported implementation of the OECD Convention.[15] However, this Note contends that Britain's laws against bribery of foreign officials are less stringent than their American counterparts' and that the U.K. laws fall short of the OECD Convention.

This Note will demonstrate that Britain's complex and ambiguous statutory language creates doubt as to the enforceability of anti-bribery law on British companies, which may concern competing U.S. companies. Part II of this Note will entertain a discussion of the history in international bribery law, including a recounting of the American-led creation of the OECD Convention. Part III contains an in-depth look at each states' implementing legislation, the U.S.'s Foreign Corrupt Practices Act[16] and the U.K.'s corresponding corruption laws. Part IV discusses the adequacy of both the American and British

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[12] Gantz, *supra* note 6, at 457.

[13] OECD Convention, *supra* note 11.

[14] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, REPORT BY THE COMMITTEE ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES: IMPLEMENTATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION (2002), *available at* http://www.oecd.org/dataoecd/52/59/2087917.pdf [hereinafter OECD PROGRESS REPORT 2002].

[15] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, STEPS TAKEN BY THE 36 STATE PARTIES TO IMPLEMENT AND ENFORCE THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS: SUBMISSIONS AS OF JULY 2006 (2006), *available at* http://www.oecd.org/dataoecd/50/33/1827022.pdf [hereinafter OECD PROGRESS REPORT 2006].

[16] Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1-3 (1998).

implementations of the OECD Convention, as well as the differences between American and British anti-bribery law. Part V concludes with a recommendation of what actions Britain should take with regard to satisfying its international obligation, including a look at the proposed Draft Corruption Bill[17] that may in fact be a sound implementation of the OECD Convention.

II. AMERICA'S CORRUPTION LEGACY: FROM NIXON'S SHAME TO CLINTON'S TRIUMPH

A. Watergate: Tricky Dick Opens America's Eyes and Congress Reacts

When an American thinks of government corruption, one of the first things he or she will think of is the infamous Watergate scandal. This widely-publicized misuse of official power removed a president, and when combined with the alleged government deceptions in regard to the Vietnam War, significantly eroded Americans' trust in their own government institutions.[18] The Senate's investigations of the campaign contributions and the Nixon administration led to an investigation of American companies by the Securities and Exchange Commission (SEC), whose discovery was perhaps equally shocking. The SEC investigation "led to *admissions* . . . of foreign bribery totaling over $300 million by over 400 American corporations, of which 177 ranked in the Fortune 500."[19] The most notable of these corruptions involved American defense contractor, Lockheed Martin, which resorted to an enormous pattern of bribery to high-ranking officials (prime ministers, presidents, and princes) in Germany, Sweden, Iran, the Netherlands, Japan, and Italy.[20]

It soon became clear that such corrupt practices existed globally on a large scale, and many in the United States recognized that multinational responses

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[17] *See infra* Part V.

[18] *See generally* SUSAN CARRUTHERS, THE MEDIA AT WAR: COMMUNICATION AND CONFLICT IN THE TWENTIETH CENTURY (2000).

[19] Peter W. Schroth, 43 Years of Transnational Law Against Corruption (of Which 40 in the United States Alone), Post-lunch Address to the Conference on Governance and Corporate Social Responsibility in the New Millennium 6 (Nov. 26–27, 2001), *available at* http://www.deakin.edu.au/buslaw/aef/confs/deakinconf/GCSRC2001/schroth.pdf (last visited Jan. 17, 2007) (emphasis added). Some of the more notable companies include Gulf Oil Corporation (admitting $4 million in bribes to South Korea), General Tire & Rubber Company (admitting bribes in Algeria, Mexico, and Venezuela), and Exxon Corporation (admitting bribes to fifteen States, including $19 million to Italy). *Id.*

[20] *Id.* at 5–6.

were needed.[21] The international community responded inadequately, simply making policy statements in favor of anti-corruption law, while not including any mechanisms for enforcement or even monitoring of the bribery situation.[22] American lawmakers, actively investigating widespread corruption and abuse of power in both the public and private sectors, decided not to wait for a multinational response to bribery and enacted the Foreign Corrupt Practices Act in 1977 (FCPA). This Act was the first domestic law made by a state that criminalized bribery of foreign officials by its own citizens.[23] The law attacks foreign bribery by requiring two things: (1) "record-keeping, internal accounting controls and disclosure, and . . . [(2)] by outlawing certain categories of payments."[24]

B. Clinton's Less Noted, but Important Legacy: Making International Anti-Corruption Law a Priority

Almost immediately following the creation of the FCPA, the United States attempted to get the international community to follow suit through a series of United Nations discussions on the topic of reducing bribery of foreign officials, but these talks broke down by 1981.[25] Despite the competitive disadvantage, created by the FCPA, that American businesses faced in relation to their competitors who were allowed to bribe, the creation of a multinational consensus against bribery was not a priority of the U.S. government until the Clinton Presidency.[26] In 1994, the United States began to put pressure on other nations to "build an international consensus against the bribery of foreign officials in international business transactions."[27] U.S. Trade Representative Mickey Kantor also attempted to use the newly-established WTO to fight corruption, urging the Director General of the organization that "an important first step [in finding a role for the WTO] would be through increasing

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[21] *Id.* at 6.

[22] *Id.* U.S.-initiated GATT discussions of a code of conduct for international business were met with a "deafening silence." *Id.*

[23] *Id.*

[24] *Id. See also infra* Part IV (discussing the mechanics of how the law fights foreign bribery).

[25] Gantz, *supra* note 6, at 466.

[26] Schroth, *supra* note 19, at 7. *See also* Almond & Syfert, *supra* note 4, at 399–400.

[27] Almond & Syfert, *supra* note 4, at 427 (quoting Warren Christopher, U.S. Sec'y of State, Toward a More Integrated World, Statement Before the Organisation for Economic Co-operation and Development (June 20, 1994)).

transparency . . . in government procurement systems in all WTO member [countries]."[28]

Several organizations have addressed the issue of bribery of foreign officials. The United Nations adopted Model Laws on Procurement of Goods and Construction in 1993 and on Services in 1994, which contained anti-bribery provisions.[29] However, mostly due to United States' instigation, the United Nations began a focused effort against bribery in 1996 by taking several steps to condemn the practice.[30] The first measure adopted by the General Assembly was the adoption of an International Code of Conduct for Public Officials.[31] However, this code's effect in combating bribery was weak for two reasons. First, the code avoided the use of the terms "bribery" or "corruption" and instead used the term "conflict of interest."[32] Second, the operative language of the resolution "recommends" the code to the member states to guide their own anti-corruption efforts.[33]

Thankfully, U.N. efforts did not end there, as the General Assembly later adopted the broader and more detailed United Nations Declaration against Corruption and Bribery in International Commercial Transactions.[34] In this declaration, U.N. member states "commit[ted] themselves[ ] to take effective and concrete action to combat all forms of corruption, bribery and related illicit practices in international commercial transactions. . . ."[35] Member states specifically vowed "[t]o criminalize[ ] bribery of foreign[ ] officials in [a] . . . coordinated manner,"[36] and defined bribery as the "offering and the solicitation of payments, gifts, and other advantages."[37] Furthermore, "[t]he Declaration calls for the elimination of the tax deductibility of bribes, and the enactment

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[28] *Id.* at 427. *See also* Gantz, *supra* note 6, at 466. Kantor characterized foreign bribery as "an unfair tariff barrier" whose existence would then be incompatible with the WTO prohibitions on non-tariff trade barriers. Gantz, *supra* note 6, at 465–66.

[29] Almond & Syfert, *supra* note 4, at 439.

[30] Gantz, *supra* note 6, at 470.

[31] G.A. Res. 51/59, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/59 (Dec. 12, 1996), *reprinted in* 36 I.L.M. 1039, 1040 (1996).

[32] Conflict of interest language prohibits public officials from soliciting or receiving, directly or indirectly, any gift or favor that "may influence the exercise of their functions, the performance of their duties, or their judgment." *Id.*

[33] Gantz, *supra* note 6, at 471.

[34] U.N. Declaration, *supra* note 9.

[35] *Id.*

[36] *Id.*

[37] Gantz, *supra* note 6, at 471.

of effective accounting standards. . . ."[38] Despite the fact that this "Declaration reflects the usual U.N. General Assembly concerns over national sovereignty and territorial jurisdiction . . . it [was] clearly a step forward in obtaining broad international recognition and condemnation of the problem of foreign corruption."[39]

C. Building International Consensus: Other International Organizations Begin to Make Law

Several regional organizations have made similar declarations condemning the practice of bribery in international business transactions. The Council of Europe first analyzed possible new criminal laws prohibiting corruption of public officials as early as 1995.[40] It was not until 1997 that the European Union "concluded a draft convention against corruption" that "criminalize[d] the offer or receipt of [ ] payments with regard to public officials. . . ."[41] However, its scope is extremely limited in that it applies only within E.U. member states against the bribery of officials of E.U. member states.[42] This essentially allows citizens to bribe foreign officials so long as that official is not from a member state. Thus the convention can be viewed more as a self-protecting agreement between member states of the European Union since there is no obligation to follow the convention outside the E.U.'s territory.

While the regional response from Europe was rather inadequate and limited in its ability to fight bribery, across the Atlantic, the twenty-two members of the Organization of American States completed the Inter-American Convention Against Corruption, which entered into force in 1997.[43] This Convention was more than a mere declaration that bribery was wrong. Instead, it contained provisions intended specifically to prohibit and prosecute bribery of foreign officials.[44] Specifically, the Convention laid out how states should order their affairs and how they should establish preventative measures in regard to

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[38] *Id.*
[39] *Id.*
[40] *Id.* at 472.
[41] *Id.*
[42] *Id.*
[43] Organization of American States, Inter-American Convention, Mar. 29, 1996, 35 I.L.M. 724 (1996).
[44] *Id.*

bribery of foreign officials.[45] Further, the Convention set forth what acts specifically constituted corruption and bribery.[46]

D. The Capstone of the International Anti-Bribery Movement: The OECD Convention

The most significant agreement formulated in the international community, creating concrete rules to govern bribery in international business transactions and adopted by the OECD on November 21, 1997, is the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention Against Bribery).[47] This is considered "the most significant effort to date . . . because the OECD members are home to most of the [world's] multinational corporations . . . . [and because] the developed members of the OECD are the major capital goods exporting nations of the world. . . ."[48] The creation of this Convention can be traced back to the U.S. efforts, other private and public institutions, and the example set by the Inter-American Convention.[49]

The U.S.-led movement toward the adoption of a multinational consensus began in 1994 with the speech of Secretary of State Warren Christopher at the OECD.[50] This speech coincided with the establishment of a preliminary consensus against bribery in the OECD-issued Recommendation on Bribery in International Business Transactions.[51] This necessary first step was small in that the Recommendation was non-binding, but it got the ball rolling at the very least.[52] Under unrelenting U.S. pressure the OECD Convention was established, albeit after several delays, and it set minimum requirements that contracting parties have to implement.[53] The OECD Convention is not limited to particular regions, like the Organization of American States' convention and the European Union's convention: it is global in scale. Due to its scale, it is arguably the most important treaty on anti-bribery thus far, the implementation

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[45] *Id.* art. III.

[46] *Id.* arts. VI, VIII.

[47] Gantz, *supra* note 6, at 483.

[48] *Id.* Of the $350 billion in global foreign direct investment flows, 66% went to developed nations, all of whom are members of the OECD. *Id.*

[49] *Id.*

[50] Almond & Syfert, *supra* note 4, at 427.

[51] Gantz, *supra* note 6, at 483–84.

[52] *Id.* at 484.

[53] *Id.* at 485.

of which is an accurate measure of the overall progress of the global anti-bribery effort.

E. Making Sure States Keep Their Promises: The OECD Working Group on Anti-Bribery in International Business Transactions

According to the OECD, the implementation of the OECD Convention Against Bribery has progressed well.[54] According to the Treaty, the contracting parties shall establish an OECD Working Group on Bribery in International Business Transactions whose responsibility is to carry out a "programme of systematic follow-up to monitor and promote the full implementation of [the] Convention."[55] This program involved two distinct phases through which the Group would monitor the implementation of the Treaty into national law and determine its adequacy.[56] "Mutual Evaluation" characterizes the Working Group's Phase I and involves consultation and notification with contracting parties in regard to their implementation.[57] Phase II involves a more in-depth look at each contracting party, as the Group spends one week assessing the effectiveness of the states' anti-bribery laws in practice through "intensive meetings in the examined country with key actors from government, law enforcement authorities, business, trade unions and civil society."[58] By 2002, this Working Group opined that the implementation of

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[54] OECD PROGRESS REPORT 2002, *supra* note 14.

[55] OECD Convention, *supra* note 11, art. 12.

[56] Organisation for Economic Co-operation and Development, OECD Working Group on Bribery in International Business Transactions, http://www.oecd.org/document/5/0,2340,en_2649_34855_35430021_1_1_1_1,00.html (last visited Mar. 5, 2007) [hereinafter Working Group Website].

[57] Organisation for Economic Co-operation and Development, OECD Anti-Bribery Convention: Procedure of Self- and Mutual Evaluation - Phase 1, http://www.oecd.org/document/21/0,2340,en_2649_34855_2022613_1_1_1_1,00.html (last visited Mar. 5, 2007).

Phase 1 mutual evaluation includes:

- Preparation of the consultation in the Working Group on Bribery.
- Appointment of two countries to act as lead examiners.
- Country's reply to an evaluation questionnaire.
- Preparation of a provisional report on the country's performance.
- Consultation in the Working Group on Bribery.
- Adoption of a report, including conclusions, on the examined country's performance.

Id.

[58] Working Group Website, *supra* note 56.

the OECD Convention was almost complete.[59] Although the Working Group has found that nearly all states have implemented the Treaty, the Group notes some issues still need to be addressed in regard to how the newly-passed laws work in practice.[60]

III. AGREE TO DISAGREE: AMERICAN AND BRITISH IMPLEMENTATION OF THE OECD CONVENTION

A. The United States' Fight Against Corruption: The Foreign Corrupt Practices Act and American Implementation of the OECD Convention

The United States championed the idea of an OECD convention against bribery of foreign officials, and its own adoption of this treaty may provide an important benchmark in regard to the adequacy of implementation of the convention. The United States' Foreign Corrupt Practices Act has outlawed the bribery of foreign officials by United States citizens and corporations since its enactment in 1977.[61] In response to signing the OECD Convention Against Corruption, Congress further supplemented the FCPA with the International Anti-Bribery and Fair Competition Act of 1998, which only slightly expanded the already expansive FCPA.[62] The law is quite pervasive in its criminalization of payments to foreign officials, leaving little room for Americans to elicit political favors from foreign officials in any way.[63]

1. Who Cannot Offer Bribes Under FCPA?

The U.S. law outlawing bribery of foreign officials casts a large net, as the scope of the FCPA is nearly all-inclusive. The law first applies to all persons and entities that may be deemed as from the United States, namely issuers of

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[59] OECD PROGRESS REPORT 2002, *supra* note 14, at 3.

[60] *Id.* at 6.

[61] Foreign Corrupt Practices Act, *supra* note 16.

[62] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS, UNITED STATES: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 1 (2000), *available at* http://www.oecd.org/dataoecd/16/50/2390377.pdf [hereinafter U.S. REPORT PHASE 1] (noting the 1998 Act expanded the definition of "foreign official," added "securing any improper advantage" to those prohibited purposes, and extended the power of the Attorney General to seek injunctions against non-U.S. entities about to violate the FCPA).

[63] *See generally* Foreign Corrupt Practices Act, *supra* note 16.

securities (typically publicly-traded companies)[64] and domestic concerns (meaning all natural and juridical persons).[65] However, the FCPA also expands its jurisdictional scope to include non-American persons and entities that practice bribery and reside in the United States.[66] Thus, the jurisdictional scope as to whom the law applies includes all persons or entities of the United States and any other persons or entities that do business in the United States.

2. Who Must One Bribe to Be Convicted Under the FCPA?

A second element of the offense under U.S. law involves the scope of the class of persons deemed to be foreign officials, or persons who cannot be bribed, for the purposes of the statute. The statute lists three groups of persons to whom payments will be considered bribery: foreign officials,[67] foreign political parties,[68] and any person who is given "money or [a] thing of value [knowing that it] will be offered, given, or promised, directly or indirectly, to any foreign official . . . [or] political party. . . ."[69] The expansiveness of this element is apparent in light of the statute's definition of the term "foreign official," which applies the label not only to any officer of a foreign government, but also to any employee or person acting "on behalf" of a foreign government or its subdivisions.[70] Furthermore, the FCPA applies not only to officials, employees, and persons acting on behalf of foreign governments, but also to members of recognized public international organizations.[71] However,

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[64] 15 U.S.C. § 78dd-1(a).

[65] 15 U.S.C. § 78dd-2; *see also* § 78dd-2(h)(1)(A)–(B) (defining domestic concern as "any individual who is a citizen, national, or resident of the United States; and any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States or which is organized under the laws of a State [or territory] of the United States").

[66] 15 U.S.C. § 78dd-3. This Act defines a person as "any natural person other than a national of the United States . . . or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof." *Id.* § 78dd-3(f)(1).

[67] 15 U.S.C. §§ 78dd-1(a)(1), 78dd-2(a)(1), 78dd-3(a)(1).

[68] 15 U.S.C. §§ 78dd-1(a)(2), 78dd-2(a)(2), 78dd-3(a)(2). The statute applies not only to political parties but also to "official[s] thereof or any candidate for foreign political office . . . ." *Id.*

[69] 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3).

[70] 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

[71] 15 U.S.C. §§ 78dd-1(f)(2)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A). *See* 15 U.S.C. §§ 78dd-1(f)(1)(B), 78dd-2(h)(2)(B), 78dd-3(f)(2)(B) (providing two ways that a "public international organization" may be determined: either (i) by designation by Executive Order according to

the bribe need not be placed in the hands of a foreign official, or its equivalent, for it to violate the FCPA.[72] The United States confirms that a situation where a person gains a political favor or business gain from a foreign official by paying money to a third party would violate the statute.[73]

This definition of foreign official is broader than the definition required of the United States by the OECD Convention. The OECD Convention defines foreign official to mean "any person holding a legislative, administrative or judicial office of [or in] a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation."[74]

3. What Acts Constitute Bribes Under the FCPA?

Third, the acts proscribed by the FCPA are those made "in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to . . . ." a foreign official, defined later in the statute.[75] Thus, the statute broadly defines a bribe to include not just money, but to include anything of value, making it nearly impossible to enrich a foreign official without implicating the statute. Although the FCPA can only prosecute U.S. entities that commit bribery in the United States, and where the act is committed through interstate commerce, in practice this "interstate nexus requirement" is typically a non-issue.[76] So, U.S. businesses and persons will be prosecuted for bribery of foreign officials occurring domestically almost exactly as they would abroad.[77] Thus, U.S. businesses may be similarly prosecuted for *any act* in furtherance of a bribe *anywhere* in the world.[78]

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section 1 of the International Organizations Immunities Act, or (ii) by designation by the President through any other Executive Order for the purposes of the FCPA).

[72] U.S. REPORT PHASE 1, *supra* note 62, at 7.

[73] *Id.* The logic is that the ability to designate a third party as the beneficiary of the bribe is still a benefit to the foreign official, despite the apparent intangibility of the benefit, under the broad definition of bribery.

[74] OECD Convention, *supra* note 11, art. 1(4)(a).

[75] 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

[76] *See* U.S. REPORT PHASE 1, *supra* note 62, at 3.

[77] *Id.*

[78] *Id.*

4. What Level of Intent Is Required by the FCPA?

A fourth and rather complex element of the offense set forth by the FCPA involves the mens rea of the defendant. First, the language of the statute requiring that the person act "corruptly in furtherance of [a bribe]" reads into the statute a scienter requirement of corrupt intent.[79] This corrupt intent requirement is coupled with the FCPA scienter requirement that the bribe to a foreign official be for one of four broad, enumerated purposes. According to the FCPA, the bribe must be for the purposes of:

> (A)(i) influencing any act or decision of [the official] in his official capacity, (ii) inducing [the official] to do or omit to do any act in violation of [his or her] lawful duty . . ., (iii) securing any improper advantage; or (B) inducing [the official] to use his influence with a foreign government . . . to affect or influence any act or decision of such [foreign] government . . . in order to assist [the briber] in obtaining or retaining business for or with, or directing business to, any person. . . .[80]

Thus the FCPA requires that a person make his bribe for one of these purposes corruptly, which when applied to natural persons involves a willfulness standard of mental culpability.

In short, the FCPA will find a natural or legal person in violation when he makes a bribe to influence a foreign official on the premise that he will use his influence to help the briber obtain or retain business or have business directed to some other beneficiary of the briber's choosing. The mens rea requirements set forth by this portion of the statute, requiring that the purpose of the giving of the gift involve some sort of official capacity of the bribed official, as well as a corrupt intent and purpose of the briber, ensures that the actions targeted by the FCPA are truly those involving bribery and corruption of foreign officials.[81]

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[79] 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

[80] 15 U.S.C. §§ 78dd-1(a)(1)(A)–(B), (2)(A)–(B), (3)(A)–(B) (1998); 15 U.S.C. §§ 78dd-2(a)(1)(A)–(B), (2)(A)–(B), (3)(A)–(B) (1998); 15 U.S.C. §§ 78dd-3(a)(1)(A)–(B), (2)(A)–(B), (3)(A)–(B.

[81] *See also* U.S. REPORT PHASE 1, *supra* note 62, at 7–8. The Working Group also notes that the statute only allows prosecution of individuals whose bribery is in regard to international business. Although this is a valid distinction, in a practical sense most payments by U.S. businesses or citizens to foreign officials for one of the four purposes will "necessarily involve

One further safeguard in the statute, which ensures persons convicted under that statute are in fact making corrupt payments, involves the exception from prosecution for payments made for "routine government action."[82] Under this provision, persons who make "facilitating or expediting payment[s] to [ ] foreign official[s] . . . the purpose of which is to expedite or to secure the performance of a routine governmental action. . . ." cannot be found guilty of bribing foreign officials.[83] Thus an important issue becomes what exactly constitutes a "routine government action." The statute stipulates that the term does not include any part of the decision of awarding new or continuing old business with a party, including those actions involved in the decision-making process, such as dictation of terms of the proposed business relationship involved.[84] Therefore, the exception that the FCPA carves out for the payment of monies to foreign officials is extremely narrow in its scope; rarely, if ever, allowing a person to make a payment to a foreign official that constitutes a bribe.

5. Affirmative Defenses Under the FCPA

Though expansive, the FCPA does have limits, in that a seemingly guilty defendant's acts may be justified by two statutory affirmative defenses.[85] The existence of such affirmative defenses may be viewed by some to be loopholes in the U.S. legislation and thus significantly weaken the anti-bribery protections. But successful use of these defenses will be difficult because the defendant has the burden of proof to demonstrate that his actions fall under either affirmative defense.[86]

'international' business," making this distinction a non-issue. *Id.* at 8.

[82] 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

[83] 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

[84] 15 U.S.C. §§ 78dd-1(f)(3)(A), 78dd-2(h)(4)(B), 78dd-3(f)(4)(A). The statutes enumerate those acceptable practices naming only those actions:

> which [are] ordinarily and commonly performed by [the] official in —
> (i) obtaining permits, licenses, or other official documents [needed] . . . to do business in [the] foreign country; (ii) processing governmental papers . . . ; (iii) providing police protection, mail pick-up . . . or scheduling inspections associated with contract performance or . . . related to transit of goods . . . ; (iv) providing [utility services], loading and unloading cargo, or protecting perishable[s] . . . ; or (v) actions of a similar nature.

[85] 15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c).

[86] U.S. REPORT PHASE 1, *supra* note 62, at 4.

The first affirmative defense under the FCPA is that the gift is lawful under the written laws of the foreign official's country.[87] This affirmative defense is narrow in its scope. A payment or gratuity is only allowed if the written laws of the foreign official's state specifically permit it.[88] Furthermore, silence within the foreign statute will not satisfy the affirmative defense.[89] This narrow defense of a payment to a foreign official is accompanied by an even narrower second affirmative defense.[90]

The second affirmative defense allows payments if they are "a reasonable and bona fide expenditure . . . incurred by or on behalf of a foreign official . . . and [are] directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution of performance of a contract with a foreign government or agency thereof."[91] Despite this defense, the law will still convict where the expenditure is not considered bona fide,[92] where the official is treated lavishly, or where the costs of his accompanying family and friends are paid as well.[93]

6. Complicity in Bribery as Covered Under U.S. Law

The FCPA also covers the aiding and abetting of bribery of foreign officials, which adds to those actions that may incur criminal sanctions.[94] The statute dictates that the authorization of any payment of money or anything of value to foreign officials is illegal.[95] Further, teeth are given to the provision

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[87] 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).

[88] 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).

[89] 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1); *see also* DONALD R. CURVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE 21 (2d ed. 1999).

[90] 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

[91] 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2); *see also* U.S. REPORT PHASE 1, *supra* note 62, at 4.

[92] The statute provides "travel and lodging expenses" as examples of "bona fide" expenditures. 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2). It is certain that "bona fide" expenditures does not include so-called "grease payments," payments to lower foreign officials in order to expedite government action. This practice was acceptable before the FPCA and its broad and inclusive definition of "foreign official." Harold S. Bloomenthal & Samuel Wolff, *Improper and Corrupt Corporate Payments — Corrupt Payments*, *in* 3 SEC. & FED. CORP. L. § 22:52 (2d ed. 2001).

[93] *See* CURVER, *supra* note 89, at 22.

[94] 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

[95] 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a); *see also* U.S. REPORT PHASE 1, *supra* note 62, at 8.

in that the crime of aiding and abetting bribery is complete and discrete, regardless as to whether the authorized payment is ever successfully made.[96] According to U.S. law, if persons conspire to commit any offense, they are guilty of the crime of conspiracy,[97] and therefore, they are guilty under the FCPA as well.[98] So, despite a lack of specific language criminalizing complicity, incitement, and conspiracy of bribery in the FCPA statute, U.S. law finds these to be crimes in that the criminal statutes in relation to these offenses apply to all federal crimes, including the FCPA.[99]

7. What Sanctions Do Violators of the FCPA Face?

There is little doubt as to the pervasiveness of the jurisdiction of the FCPA, its broad character, and its ability to prosecute nearly any U.S.-associated entity for nearly any payment to a foreign official in regard to a business transaction. The criminal law, however, would do little to deter bribery of foreign officials if the law only imposed small, "slap-on-the-wrist" criminal sanctions to guilty companies and persons. The severity of sanctions for bribery of foreign officials can best be discussed in light of the criminal sanctions for bribery of an American official.[100] Specifically, the FCPA provides that natural persons who are officers, employees, directors, or agents of a company found guilty of bribery of a foreign official on behalf of said company are subject to a fine of not more than $100,000 or imprisonment of not more than five years, or both.[101] Also, such a person is subject to a civil penalty of not more than $10,000.[102] The company cannot pay these fines, either criminal or civil.[103]

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[96] U.S. REPORT PHASE 1, *supra* note 62, at 8.

[97] 18 U.S.C. § 371 (1948).

[98] *See* Christopher F. Corr & Judd Lawler, *Damned If You Do, Damned If You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures*, 32 VAND. J. TRANSNAT'L L. 1249, 1261 n.37 (1999); *see also* United States v. Mead, 3 FCPA REP. 699.533 (D.N.J. 1998); United States v. Tannenbaum, 4 FCPA REP. 699.583 (S.D.N.Y. 1998); United States v. Lockheed Corp., 3 FCPA REP. 699.175 (N.D. Ga. 1995).

[99] 18 U.S.C. § 2 (2004); *see also* U.S. REPORT PHASE 1, *supra* note 62, at 9.

[100] U.S. REPORT PHASE 1, *supra* note 62, at 10–11. The only difference between the penalties for bribery of a foreign official and those for a domestic official is the imprisonment period, as the monetary sanctions are relatively the same. *Id.* at 11.

[101] 15 U.S.C. § 78dd-2(g)(2)(A).

[102] *Id.* § 78dd-2(g)(2)(B).

[103] *Id.* § 78dd-2(g)(3).

Furthermore, the U.S. Code authorizes alternate fines to be paid when the "person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant. . . ."[104] These alternate fines may be "not more than the greater of twice the gross gain or twice the gross loss . . ."[105] or up to $250,000 for natural persons.[106] For legal persons, the alternate fines also may be "not more than the greater of twice the gross gain or twice the gross loss . . ."[107] or up to $500,000.[108] Since the FCPA penalty is in excess of one year imprisonment, typically U.S. extradition treaties will allow the United States to obtain and prosecute those who violate the FCPA outside the United States.[109] Other provisions of the U.S. Code authorize fines greater than those set forth in the FCPA where there is pecuniary gain or loss. Department of Justice officials state that, through this law, the fines imposed for violations of the FCPA have often been in excess of those amounts specifically set forth by the FCPA.[110] Further sanctions exist in that a company may be subject to up to $10,000 in civil penalties brought by the Securities and Exchange Commission,[111] or a civil action may be brought by private individuals in accordance with the Racketeer Influenced and Corruption Organizations Act.[112] Finally, collateral sanctions may also exist for a violating company as it may become ineligible for government contracts or government benefits as a result of a FCPA conviction.[113] Thus the penalty provisions of the FCPA are quite strong in light of the overwhelming amount of adverse effects facing a convicted person or company.

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[104] 18 U.S.C. § 3571(d) (1987).

[105] *Id.*

[106] *Id.* § 3571(b)(3).

[107] *Id.* § 3571(d).

[108] *Id.* § 3571(c)(3).

[109] U.S. REPORT PHASE 1, *supra* note 62, at 12.

[110] *Id.* at 11. This U.S. Code provision is 18 U.S.C. § 3571 and its use under the FCPA is illustrated by chart on the cited page.

[111] 15 U.S.C. § 78ff(c)(1)(B) (2002).

[112] 18 U.S.C. § 1961 (2006). It should be noted, however, that the recognition of private causes of action under this Act has not been recognized uniformly by the courts.

[113] *See, e.g.*, 10 U.S.C. § 2408 (1996) (prohibiting convicted persons from having defense-related employment); 48 C.F.R. § 9.406-2 (barring the eligibility of any company convicted of a crime indicating a lack of business integrity).

B. The United Kingdom's Fight Against Corruption: OECD Convention Implementation Through the Prevention of Corruption Acts 1889–1916 and the Anti-Terrorism, Crime and Security Act 2001

The United Kingdom signed the OECD Convention on December 17, 1997 and deposited its instrument of ratification on December 14, 1998.[114] At the time of ratification, the United Kingdom determined that its current domestic law adequately implemented the OECD Convention.[115] The statutes that Britain claimed satisfied the OECD Convention were the Public Bodies Corrupt Practices Act of 1889 (Corruption Act of 1889),[116] the Prevention of Corruption Act 1906 (Corruption Act of 1906),[117] and the Prevention of Corruption Act 1916 (Corruption Act of 1916).[118] However, the OECD Working Group found these claims by Britain to be unfounded and recommended it adopt a modern corruption law implementing the OECD more accurately.[119] To this end, Parliament included corruption provisions in the Anti-Terrorism, Crime and Security Act of 2001 (Anti-Terrorism Act).[120]

1. Who Cannot Offer Bribes Under British Law?

According to the Corruption Act of 1906, the prohibition against bribery applies to "any person."[121] While it is obvious from the plain meaning of the phrase that person includes natural persons, British law is rather non-specific

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[114] OECD PROGRESS REPORT 2006, *supra* note 15, at 84.

[115] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS, UNITED KINGDOM: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION, PHASE I BIS REPORT 1 (2002), *available at* http://www.oecd.org/dataoecd/12/50/2498215.pdf [hereinafter UK REPORT PHASE 1 BIS].

[116] Public Bodies Corrupt Practices Act, 1889, c. 69, §§ 1–10.

[117] Prevention of Corruption Act 1906, 1906, c. 34, §§ 1–4.

[118] Prevention of Corruption Act 1916, 1916, c. 64, §§ 2–4; *see also* UK REPORT PHASE 1 BIS, *supra* note 115, at 2. These acts were collectively referred to as the Prevention of Corruption Acts of 1889–1916.

[119] ORGANISATION FOR CO-OPERATION AND DEVELOPMENT, WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS, UNITED KINGDOM: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 25 (2000), *available at* http://www.oecd.org/dataoecd/8/24/2754266.pdf [hereinafter UK REPORT PHASE 1].

[120] Anti-Terrorism, Crime and Security Act, 2001, c. 24, pt. 12; *see also* UK REPORT PHASE 1 BIS, *supra* note 115, at 1.

[121] Prevention of Corruption Act 1906 § 1(1), para. 2; *see also* UK REPORT PHASE 1, *supra* note 119, at 4 (noting that "any person" is also the language used in common law prohibition of bribery).

in regard to what extent "person" includes business entities. The Interpretation Act of 1978 provides an interpretive definition of person, stating that person "includes a body of persons corporate or unincorporate."[122] The Anti-Terrorism Act does little to specify what types of business entities are included under the Interpretation Act's definition of person, stating that the anti-bribery law applies if "a national of the United Kingdom or body incorporated under the law of any part of the United Kingdom. . . ." commits bribery in or outside of the United Kingdom.[123] Thus, while the Corruption Act of 1906 appears to include all U.K. persons, legal or natural, the modern codification of British anti-bribery law only applies to legal persons that are incorporated.[124]

2. Who Must One Bribe to Be Convicted Under British Law?

Originally, Britain attempted to follow its OECD obligations through the Prevention of Corruption Acts of 1889–1916, contending that they would apply to foreign officials. First, the Corruption Act of 1889 made it a misdemeanor for a person to offer a bribe to any "member, officer, or servant of any public body. . . ."[125] According to this Act,

> "public body" means any council of a county or county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, or the public health, or to poor law[126] or otherwise

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[122] Interpretation Act, 1978, c. 30, sched. 1, para. 1.

[123] Anti-Terrorism, Crime and Security Act § 109(1)(a).

[124] Prevention of Corruption Act 1906 § 1(1), para. 2; Anti-Terrorism, Crime and Security Act 2001 § 109(1)(a); *see* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, UNITED KINGDOM: PHASE 2: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 63–64 (2005), *available at* http://www.oecd.org/dataoecd/62/32/34599062.pdf [hereinafter UK REPORT PHASE 2]. It appears that unincorporated bodies can thus commit offenses in the United Kingdom but it is difficult to prosecute them because of the absence of a theory of attribution. Instead a prosecutor must prove the individual guilt of each person involved in the unincorporated enterprise. UK REPORT PHASE 2, *supra*, at 63.

[125] Public Bodies Corrupt Practices Act § 1(2).

[126] "Poor law" refers to the British system for the provision of social security. BLACK'S LAW DICTIONARY 1199 (8th ed. 2004).

> to administer money raised by rates in pursuance of any public general Act, *but does not include any public body as above defined existing elsewhere than in the United Kingdom.*[127]

This broad definition was expanded even further in 1916 to include "local and public authorities of all descriptions."[128] Although the anti-bribery statute covers illicit payments to all officials and members of public welfare entities, the typical form of bribery may also occur through intermediaries and representatives of public officials. For this reason, the Corruption Act of 1906 prohibits illicit payments made to "any agent" to take an action "in relation to [his or her] principal's affairs or business. . . ."[129] The statute defines a "principal" to include an employer and an "agent" to be "any person employed by or acting for another."[130] Further, the Act notes that "[a] person serving under the Crown or under any corporation or any, borough, county, or district council, or board of guardians, is an agent within the meaning of [the] Act."[131] Finally, the Corruption Act of 1916 has a catch-all provision that expands the bodies that cannot be bribed according to the Corruption Acts 1889 and 1906, stipulating that the bodies discussed therein include "local and public authorities of all descriptions."[132] Upon signing of the OECD, the United Kingdom contended that there is "no legal impediment" to applying these laws to "public bodies," "agents," and "principals" of foreign States, [133] but there is no mandate within the statutes that this is how the laws must be applied either.[134]

In an effort to clarify this discrepancy, Parliament passed the Anti-Terrorism Act, which extended Britain's anti-bribery laws to include foreign

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[127] Public Bodies Corrupt Practices Act § 7 (emphasis added). The emphasized portion of the definition was later changed by the Anti-Terrorism, Crime and Security Act of 2001 § 108(3).

[128] Prevention of Corruption Act 1916 § 4.

[129] Prevention of Corruption Act 1906 § 1(1).

[130] *Id.* § 1(2).

[131] *Id.* § 1(3).

[132] Prevention of Corruption Act 1916 § 4(2).

[133] UK REPORT PHASE 1, *supra* note 119, at 3.

[134] *See* Anti–Terrorism, Crime and Security Act 2001 § 108(3). Indeed, the statement that the bribery law is not prevented from being applied to foreign public bodies and persons seems contrary to the language which was replaced by the Anti-Terrorism Act of 2001 that limited the application of the Corruption Act 1889 to "not include any public body . . . existing elsewhere than in the United Kingdom. . . ."; *see also generally* Public Bodies Corrupt Practices Act; Prevention of Corruption Act 1906; Prevention of Corruption Act 1916.

officials by amending the Prevention of Corruption Acts 1889–1916.[135] First, the Anti-Terrorism Act broadened the scope of the Corruption Act 1889's public body definition, substituting the phrase "and includes any body which exists in a country or territory outside the United Kingdom and is equivalent to any body described above" in place of the statute's old language limiting the definition of public body to only those entities within Britain.[136] The Anti-Terrorism Act also amended the Corruption Act 1906, specifically adding to section 1 of that Act subsection 4, which states:

> For the purposes of this Act it is immaterial if —
> (a) the principal's affairs or business have no connection with the United Kingdom and are conducted in a country or territory outside the United Kingdom;
> (b) the agent's functions have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom.[137]

Finally, the Act further amends the language of the Corruption Act 1916, adding in section 4(2) that the authorities of all descriptions includes "authorities existing in a country or territory outside the United Kingdom."[138] According to the United Kingdom, these changes bring its domestic law into compliance with its OECD obligations under the OECD Convention.[139]

3. What Acts Constitute Bribery Under British Law?

Acts that constitute bribery remained unchanged by the Anti-Terrorism Act 2001, as that Act clarified the applicability of the Prevention of Corruption Acts 1889–1916 to foreign officials.[140] According to British law, one commits bribery if he or she "give[s], promise[s], or offer[s] any gift, loan, fee, reward, or advantage whatsoever to any person . . . as an inducement to or reward for or otherwise . . . [for] doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed. . . ."[141] The Corruption

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[135] UK REPORT PHASE 2, *supra* note 124, at 58.
[136] Anti-Terrorism, Crime and Security Act § 108(3).
[137] *Id.* § 108(2).
[138] *Id.* § 108(4).
[139] UK REPORT PHASE 2, *supra* note 124, at 9.
[140] *See generally* Anti-Terrorism, Crime and Security Act.
[141] Public Bodies Corrupt Practices Act § 1(2).

Act 1906 broadens this more, making a bribe any giving or agreement to give or offer "any gift or consideration as an inducement or reward for doing or forbearing to do . . . *any act*. . . ."[142] The statute notes that "consideration" encompasses "valuable consideration of any kind,"[143] including, courts have held, gifts both intangible and non-pecuniary.[144]

British law also finds bribery where the gift or consideration is made for the benefit of a third party, finding bribery where the bribed person takes action "for the benefit of [the bribing person] or of another person. . . ."[145] However, it should be noted that this third party beneficiary language is not expressly included in the Corruption Act 1906, providing a potential loophole for prosecution.[146] Still, the British contend that such a situation where only the Corruption Act 1906 will apply and the beneficiary receives the benefit (a situation where the strict language of the statute would arguably result in a failure to convict the briber) would nonetheless lead to a conviction in that the benefit to the third party still falls within the statute's definition of "consideration" as "any valuable consideration."[147]

Finally, it should be noted that the Corruption Act 1906 does not require that the offer or gift be in order to obtain business, as the statute is silent as to what purpose, if any, the offer must have.[148] Purpose of the bribe is also irrelevant under the Corruption Act 1889, which finds bribery when the bribe is made to get a person to act "in respect of any matter or transaction whatsoever. . . ."[149]

4. What Intent Is Required to Be Convicted for Bribery Under British Law?

Although the purpose of the bribe is irrelevant under British law, a scienter element does exist under the offense of bribery.[150] The mens rea required by British law for a person to be convicted of bribery is set forth in the Corruption

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[142] Prevention of Corruption Act 1906 § 1(1) (emphasis added).

[143] *Id.* § 1(2).

[144] *See, e.g.*, R v. Braithwaite, (1983) 77 Crim. App. 34; Currie v. Misa, (1875) L.R. 10 Exch. 153, 162.

[145] Public Bodies Corrupt Practices Act § 1(2).

[146] Prevention of Corruption Act 1906.

[147] UK REPORT PHASE 1, *supra* note 119, at 5.

[148] Prevention of Corruption Act 1906.

[149] Public Bodies Corrupt Practices Act § 1(2).

[150] *Id.* § 1; Prevention of Corruption Act 1906 § 1(1).

Acts 1889 and 1906, which require that a person "corruptly" offer or give a bribe to another person.[151] "Corruptly" has been defined by the court as a simple English adverb which meant "purposely doing an act that the law forbids as tending to corrupt."[152] The state of mind required for a bribery conviction is of an intentional nature, in that a person must *know* that he is offering something of value to another in exchange for a favor in contravention of the law.[153] This knowledge requirement does not mean that it is "necessary under the 1906 Act to prove that the offer or conferring was intended to influence the recipient in any specific way; it is sufficient if the intent was to influence the recipient in a general way."[154]

5. Affirmative Defenses Under British Law

No affirmative defenses are set forth by any of the statutes, thus no defensible excuse exists for acting in contravention of the law.[155]

6. Complicity in Bribery as Covered by British Law

British anti-bribery law also bars complicity in actions of bribery. It is a principle of the common law that two or more persons may be a principal in the commission of a single crime.[156] This common law was codified by Parliament in the Accessories and Abettors Act of 1861 (Abettors Act 1861)[157] and later amended by the Criminal Law Act 1977.[158] The Abettors Act 1861 establishes that "[w]hosoever shall aid, abet, counsel, or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender."[159] Since the crime of bribery is codified in an "Act passed," the law of aiding and abetting would

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[151] Public Bodies Corrupt Practices Act § 1; Prevention of Corruption Act 1906 § 1(1).

[152] UK REPORT PHASE 1, *supra* note 119, at 4 (discussing R. v. Wellburn, (1979) 69 Crim. App. 254).

[153] *Id.*

[154] *Id.*

[155] *See generally* Public Bodies Corrupt Practices Act; Prevention of Corruption Act 1906; Prevention of Corruption Act 1916; Anti-Terrorism, Crime and Security Act.

[156] *See generally* RUSSELL HEATON, CRIMINAL LAW 367–400 (2004).

[157] Accessories and Abettors Act, 1861, c. 94, § 8.

[158] Criminal Law Act, 1977, c. 45, § 65(7), sched. 12.

[159] Accessories and Abettors Act § 8.

apply to bribery under British law as noted by the OECD Working Group on the OECD Convention.[160]

Furthermore, persons can be convicted for attempted bribery according to section 1 of the Criminal Attempts Act of 1981, so long as the person "does an act which is more than merely preparatory to the commission of the offence. . . ."[161] Finally, persons can be convicted for conspiracy to commit bribery according to section 1 of the Criminal Law Act 1977, which finds it a crime "if a person agrees with any other[s] . . . that . . . conduct shall be pursued which, if the agreement is carried out in accordance with their intentions . . . (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement . . . ."[162]

7. What Sanctions Do Violators of the British Corruption Laws Face?

Under British criminal law, certain offenses can be tried in a summary trial in a Magistrate's court without the benefit of a jury or in a Crown Court with the benefit of a jury.[163] The penalties imposed upon a person convicted of bribery vary depending upon whether there is a summary conviction by a magistrate or a conviction on indictment by a jury.[164] The penalty for a summary conviction for bribery includes "imprisonment for a term not exceeding 6 months or to a fine not exceeding the prescribed sum . . .,"[165] or both.[166] A conviction on indictment carries a greater penalty, prescribing a

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[160] UK REPORT PHASE 1, *supra* note 119, at 7.

[161] Criminal Attempts Act, 1981, c. 47, § 1(1).

[162] Criminal Law Act § 1(1), 1(4) (defining offense as "an offence triable in England and Wales").

[163] JOHN SPRACK, EMMINS ON CRIMINAL PROCEDURE 1–2 (9th ed. 2002); *see also* MICHAEL ALLEN, TEXTBOOK ON CRIMINAL LAW 12 (8th ed. 2005). The decision as to whether to have a summary trial or not is made by the Magistrate court pursuant to section 19 of the Magistrate's Court Act. In deciding whether to hold a summary trial, the court considers the representations of the prosecutor and the accused, the circumstances of the case, the gravity of the offense, and the sentence available before the Magistrate Court versus that available before the Crown Court. However, to proceed summarily, consent of the accused is required because the accused must be allowed to assert his or her right to trial by jury.

[164] Public Bodies Corrupt Practices Act § 2(a)(i)–(ii); Prevention of Corruption Act 1906 § 1(1)(a)–(b).

[165] Magistrates' Courts Act 1980, 1980, c. 43, § 32, pt. 1. *See also* SPRACK, *supra* note 163, at 173. The statutory maximum fine is £5,000, which as of February 12, 2006 is the equivalent of $8,721.51 U.S.

[166] Public Bodies Corruption Practices Act § 2(a)(i); Prevention of Corruption Act 1906 § 1(1)(a).

person convicted may be "[imprisoned] for a term not exceeding 7 years or [fined], or to both."[167] This fine for a conviction on indictment has no upper limit, and the penalties for conspiracy and complicity are also identical.[168]

In regard to civil penalties, British law does not appear to impose any civil or administrative sanctions on convicted persons.[169] However, the Proceeds of Crime Act 2002 (POCA)[170] allows the Crown Court to decide upon a recoverable amount and make a confiscation order for convicted persons who "benefit [ ] from [their] particular criminal conduct."[171] The amount recoverable is generally an amount equal to the defendant's benefit.[172] Furthermore, Part V of the POCA allows a right of action for civil forfeiture, meaning that the Director of the Assets Recovery Agency (ARA)[173] can bring an action to recover property gained by a person through "unlawful conduct"—actions that can be brought even if the person is acquitted of the criminal charges.[174] Finally, those convicted of bribery under British law face numerous indirect sanctions including disqualification for contracts with the Department for International Development,[175] withholding of transaction

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[167] Public Bodies Corrupt Practices Act § 2(a)(ii); Prevention of Corruption Act 1906 § 1(1)(b).

[168] UK REPORT PHASE 1, *supra* note 119, at 9.

[169] UK REPORT PHASE 2, *supra* note 124, at 74.

[170] Proceeds of Crime Act 2002, 2002, c. 29.

[171] *Id.* § 6(3)(c). However, it should be noted that § 6 requires several criteria for a person to be susceptible to a confiscation order including that the convicted person have a "criminal lifestyle" and that the prosecutor or Director of the Assets Recovery Agency (ARA) has requested a confiscation order. *Id.* § 6.

[172] *Id.* § 7(1).

[173] This is an agency established in the Proceeds of Crime Act 2002, whose powers include the ability to apply for criminal confiscation orders, apply for restraint orders, bring appeals, and enforce confiscation orders. *Id.* § 1, sched. 1.

[174] *Id.* pt. 5; *see also* Ian Smith & Danny Friedman, *Crime doesn't pay — the new asset recovery laws*, NEW L.J., Jan.–Dec. 2003, at 1875.

[175] The Department for International Development (DFID) is the United Kingdom's department in charge of promoting development and reducing poverty in other countries throughout the world. Clauses 10 and 23 of a standard DFID procurement contract disqualify or suspend violators of the Corruption Acts from obtaining DFID contracts. General Conditions, Dep't for Int'l Dev., http:// www.dfid.gov.uk/procurement/generalconditionsmarch04.pdf (last visited Mar. 9, 2007).

approval from the Export Credits and Guarantees Department,[176] and being prevented from voting as well as holding public office.[177]

IV. NOT GOOD ENOUGH, OLD CHAP: AMERICA'S IMPLEMENTATION AND BRITAIN'S NEED FOR CLARITY

The United States and United Kingdom both have declared that they have implemented the OCED Convention through the pieces of legislation discussed above.[178] But how accurate are these proclamations? This Note now looks at the adequacy of the implementation of the OECD statute and compares each state's enactment of each particular issue involved in the offense of bribery of a foreign official.

A. Adequacy in Regard to Who Cannot Offers Bribes

The U.S. law is in accordance with the OECD Convention making it a crime for "any person" to commit bribery,[179] which, according to the language of Article 2, includes legal persons, such as corporations.[180] The painstaking detail in which the U.S. law lists all entities to which the FCPA is applicable[181] is in stark contrast to the British law. The British law can be read to be in accordance with the OECD Convention's "any person" language,[182] but the statutes are ambiguous in nature, relying upon the Interpretations Act of 1977 to ultimately define the term person as inducing "persons corporate or unincorporate."[183]

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[176] UK REPORT PHASE 2, *supra* note 124, at 77; *see also* Export Credit and Guarantee Department, Public Information, Policy on Bribery and Corruption, http://www.ecgd.gov.uk/index/pi_home/policy_on_bribery_and_corruption.htm (last visited Mar. 9, 2007).

[177] Public Bodies Corrupt Practices Act § 2(c)–(e).

[178] OECD PROGRESS REPORT 2006, *supra* note 15, at 84, 87.

[179] OECD Convention, *supra* note 11, art. 1.

[180] *Id.* art. 2. *See also* Organisation on Economic Co-operation and Development, Commentaries on the OECD Convention on Combating Bribery of Officials in International Business Transactions, para. 20, http://www.oecd.org/document/1/0,2340,en_2649_37447_2048129_1_1_1_37447,00.html [hereinafter OECD Convention Commentaries] (last visited Mar. 9, 2007). This provision states that "[i]n the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility." *Id.*

[181] *See supra* Part III.*A.1* and accompanying text.

[182] OECD Convention, *supra* note 11, art. 1.

[183] Interpretation Act, sched. 1, para. 1.

Although a court may read the language as broadly as possible and comply with the OECD Convention, the modern implementation of the law does not cover acts of bribery perpetrated by unincorporated groups of individuals.[184] This lack of clarity is one reason why the OECD Working Group has recommended that the United Kingdom implement a comprehensive law solely addressing corruption,[185] and why the FCPA's protections allow for better combating of the international bribery dilemma.

B. Adequacy as to Who Must Be Bribed for an Action to Be Considered Bribery of a Foreign Official

In regard to the scope of who cannot be bribed under the appropriate domestic law, the United States is not only more stringent than the British, but also exceeds the protections mandated by the OECD Convention itself. Indeed, the OECD and Britain fail to directly address an important bribery situation expressly prohibited by U.S. law—the bribery of political party officials.[186] Although Britain is under no international obligation to implement such a law—as the OECD has failed to speak to it—this does not discount the fact that it should be made law. A corporation can exert tremendous influence in a foreign state and even exchange campaign financing of some sort for political favors upon the condition that the bribed party's officials get into office.

However, U.S. law in this area is not without faults. Although the FCPA bars payments to employees of foreign governments, it does not explicitly indicate that this includes foreign judiciary officials, thus leaving a potential loophole.[187] One further ambiguity lies in the fact that although the FCPA

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[184] *See supra* note 124 and accompanying text.

[185] UK REPORT PHASE 1, *supra* note 119, at 24–27; UK REPORT PHASE 1 BIS, *supra* note 115, at 17–18; UK REPORT PHASE 2, *supra* note 124, paras. 246–58.

[186] 15 U.S.C. §§ 78dd-1(a)(2), 78dd-2(a)(2), 78dd-3(a)(2); *see also* OECD Convention Commentaries, *supra* note 180, para. 14. The only language under the OECD Convention that may apply to political parties of a foreign state may be the public enterprises of a foreign state. However, the definition set forth in the Commentaries indicates that this term seems to mean those entities that the state's government has some control or interest in and thus likely does not include political parties.

[187] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, UNITED STATES: PHASE 2: REPORT ON APPLICATION OF THE CONVENTION ON COMMITTING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, para. 107 (2002), *available at* http://

covers the bribery of instrumentalities of other governments,[188] it is unclear whether this would include entities in the process of privatization or enterprises in which the government is a shareholder.[189]

Even these few ambiguities pale in comparison to British law. The British law bars foreign bribery essentially by adding a foreign element to domestic corruption law.[190] Thus, an international issue is dealt with using language specifically designed for domestic purposes.[191] This makes the law on the task rather unclear and is one reason why the Working Group has proposed that the United Kingdom enact a statute whose sole purpose is to address foreign anti-bribery as addressed in the OECD Convention.[192] Furthermore, unlike the FCPA,[193] the British law fails to specifically bar bribery of members of international organizations, only potentially doing so in section 108(4) of the Anti-Terrorism Act by expanding "public bodies" to include bodies outside the United Kingdom.[194]

C. Adequacy of What Acts Constitute Bribery

The OECD Convention requires states to outlaw any giving of "pecuniary or other advantage, whether directly or through intermediaries . . . for that official or for a third party, in order that the official act . . . in relation to the performance of official duties. . . ."[195] Both U.K. and U.S. law obviously cover the situation in which a quid pro quo, tangible gift in exchange for favorable treatment, or a contract is made between a person and a foreign official.[196] However, both statutes are ambiguous in regard to whether or not the statutes

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www.oecd.org/dataoecd/52/19/1962084.pdf [hereinafter U.S. REPORT PHASE 2].

[188] 15 U.S.C. §§ 78dd-1(a)(1)(B), 78dd-2(a)(1)(B), 78dd-3(a)(1)(B).

[189] But to what extent must the government be a shareholder? The answer as to whether or not these entities constitute instrumentalities of the government is unclear under U.S. law. U.S. REPORT PHASE 2, *supra* note 187, para. 108.

[190] UK REPORT PHASE 2, *supra* note 124, para. 183.

[191] This is particularly true in regard to the Public Bodies Corrupt Practices Act 1889, where the original language of the Act limited the public bodies applicable to those within the United Kingdom.

[192] UK REPORT PHASE 2, *supra* note 124, para. 248.

[193] 15 U.S.C. §§ 78dd-1(h)(2)(B), 78dd-2(h)(2)(B), 78dd-3(h)(2)(B).

[194] Anti-Terrorism, Crime and Security Act § 108(4); UK REPORT PHASE 1 BIS, *supra* note 115, at 9.

[195] OECD Convention, *supra* note 11, art. 1(1).

[196] *See generally supra* Part III.*A.3* and *B.3*.

cover bribery for the benefit of third parties.[197] One other condition present under the FCPA that is absent from the British law and may not be in accordance with the OECD Convention is the requirement that for bribery by U.S. persons, natural and legal, that takes place within the United States, the person must make use of "interstate commerce."[198] The United States contends that this requirement is in practice a non-issue given the expansive definition of interstate commerce within the FCPA and other statutes, and the fact that the crime at issue involves bribery affecting foreign states.[199] However, there has not been a clarification in regard to the validity of this claim as U.S. case law has yet to resolve it.[200]

D. Adequacy in Regard to What Intent Is Required for a Bribery Conviction

The intent requirement under U.S. law finds bribery where a natural or legal person makes a bribe to influence a foreign official on the belief that the official will use his or her influence in order to help the briber obtain or retain business.[201] This intent is indicated by the language "corruptly" within the statute, and it reads a knowledge element into the crime itself.[202] Similarly, the British law uses the word "corruptly" in its statutes, but "the courts have indicated that it is difficult to interpret the word 'corruptly,' and that much of the concern about the existing statutes 'relates to the archaic language and formulations and . . . in particular to the definition of the offence of corruption as acting 'corruptly.' ' "[203] Although the OECD has noted the awkwardness of defining corruptly with the word corruption, there is little indication that

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[197] UK REPORT PHASE 2, *supra* note 124, para. 181; U.S. REPORT PHASE 2, *supra* note 187, para. 106 (discussing United States v. Kenny International Corp., (Cr. No. 79-372), D.D.C. 1979, where bribery for benefit of a third party may have been an issue, but the plea agreement reached in the matter is unclear as to whether the FCPA actually applied in this respect).

[198] 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). This restriction to interstate commerce is made to bring the FCPA solely within the powers of the U.S. federal government granted to it by the Commerce Clause of the United States Constitution. U.S. REPORT PHASE 1, *supra* note 62, at 3.

[199] U.S. REPORT PHASE 1, *supra* note 62, at 3.

[200] U.S. REPORT PHASE 2, *supra* note 187, paras. 103–05.

[201] *See supra* Part III.*A.4*.

[202] *Id.*

[203] UK REPORT PHASE 1, *supra* note 119, at 4 (quoting a Home Office report from June 1997 addressing this issue) [internal quotations omitted].

this language in anyway abrogates the concept set forth in the OECD Convention.[204]

The British law requires that no specific purpose be had by the briber in his bribe, requiring only a general purpose to gain an advantage.[205] This is broader than the FCPA, which requires the bribe be made "in order to assist [the briber] in obtaining or retaining business. . . ."[206] In this regard, the British law appears to be more stringent that the FCPA and maybe even the OECD Convention, whose own language indicates that the bribe should be limited to the purpose of obtaining or retaining business.[207]

E. Does the OECD Convention Allow the United States' Affirmative Defenses?

The OECD Convention does not address any possible affirmative defenses to bribery.[208] The first U.S. affirmative defense, allowing payments that are lawful under the written laws and regulations of the foreign official's country, appears to be in accordance with the OECD Convention.[209] Though not explicitly stated in the Convention, this affirmative defense is allowable in light of the Commentaries on Article 1, which stipulate that "[i]t is not an offence . . . if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law."[210]

However, the Working Group has noted that the second affirmative defense, in regard to reasonable and bona fide expenditure payments,[211] may not be in accordance with the Convention.[212] U.S. officials claim, however, that bona fide payment of expenses is not corrupt, and making this an

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[204] *See* U.S. REPORT PHASE 1, *supra* note 62; U.S. REPORT PHASE 2, *supra* note 187; UK REPORT PHASE 1, *supra* note 119; UK REPORT PHASE 1 BIS, *supra* note 115; UK REPORT PHASE 2, *supra* note 124.

[205] *See supra* Part III.*B.4*.

[206] 15 U.S.C. §§ 78dd-1(a)(1)(A)–(B), (2)(A)–(B), (3)(A)–(B) (1998); 15 U.S.C. §§ 78dd-2(a)(1)(A)–(B), (2)(A)–(B), (3)(A)–(B) (1998); 15 U.S.C. §§ 78dd-3(a)(1)(A)–(B), (2)(A)–(B), (3)(A)–(B) (1998).

[207] OECD Convention, *supra* note 11, art. 1(1).

[208] *See generally, id.* There is not an affirmative defense in the classic sense under the British laws. However, the agency/principal relationship seems to provide a respite from absolute responsibility for a subordinate in situations where the principal has ordered or consented to the bribe; *see infra* note 215 and accompanying text.

[209] U.S. REPORT PHASE 1, *supra* note 62, at 4.

[210] OECD Convention Commentaries, *supra* note 180, para. 8.

[211] 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

[212] U.S. REPORT PHASE 1, *supra* note 62, at 4.

affirmative defense, where the defendant has the burden of proof, ensures that the defense will only be available to persons who truly have not made corrupt payments.[213] This claim may be justified by the fact that there is no controlling deference to the company's characterization of the payment under question, making it nearly impossible for an actual corrupt payment to sit within this defense and avoid prosecution.[214]

A defense of sorts exists under British law based upon the agent/principal system of determining bribery under the Corruption Act 1906.[215] As noted by the Working Group, general principles of agency law will not hold an agent responsible for his actions if the principal consents to the agent's actions.[216]

Therefore, a person may avoid conviction for bribery in those circumstances where the principal, namely the foreign official's boss or government, has consented to the bribe.[217] Although Britain contends that such an exception to agent responsibility does not exist within its law, no case law has dealt with this issue, so the question remains unsettled.[218]

F. Adequacy of Complicity Provisions of Anti-Bribery Statutes

Both British and American laws have firmly established principles in regard to complicity, attempt, and conspiracy crimes, which appear to apply to the states' bribery statutes.[219] This is in accordance with the OECD Convention, which requires that "[e]ach Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence."[220]

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[213] *Id.*

[214] *Id.* Indeed, the Working Group notes that to date no payment prosecuted under the FCPA has fallen into this statutory defense. *Id.*

[215] UK REPORT PHASE 2, *supra* note 124, para. 182.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *See* discussion *supra* Parts III.*A.6*, III.*B.6*.

[220] OECD Convention, *supra* note 11, art. 1(2).

G. Adequacy of Sanctions Imposed Upon Convicted Persons Under the Respective Statutes

The OECD Convention requires that "[t]he bribery of a foreign public official . . . be punishable by effective, proportionate and dissuasive criminal penalties . . . [and that the] penalties. . . be comparable to that applicable to the bribery of the Party's own public officials . . .," further requiring that natural persons be subject to "deprivation of liberty."[221] Also, the OECD Convention requires that the states confiscate the value of the benefit gained from the act of bribery as well as consider the imposition of civil penalties.[222]

Until 2002, the British law only partially complied with the OECD Convention, providing imprisonment and fines for natural persons and steep fines for legal persons.[223] With the passing of POCA, the British law now fully complies with the OECD Convention, although the OECD Working Group does note that, as of March 2005, the British government has not seized any assets in any foreign bribery cases.[224] However, the POCA is still a relatively new piece of legislation, and perhaps cases of asset seizure in relation to foreign bribery are forthcoming.

The U.S. law provides the necessary sanctions required under the OECD Convention. Although the imprisonment period for natural persons is less than both British foreign bribery and bribery of a domestic person, the strength of the FCPA lies in its use of civil sanctions.[225] Although the Working Group notes that the fines imposed for those convicted under the FCPA have been "rather moderate,"[226] the group also notes that in light of collateral consequences of FCPA, convictions make the law effective overall.[227]

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[221] *Id.* art. 3(1).

[222] *Id.* art. 3(3)–(4). Since the British law adds a foreign element to domestic bribery law, the sanctions for bribery of a foreign official are identical to the sanctions for bribery of a British official, complying fully with Article 3(3) of the OECD Convention. UK REPORT PHASE 2, *supra* note 124, para. 228.

[223] *See supra* Part III.*B.7.* These sanctions are particularly harsh in light of the lack of an upper limit on the fines that may be imposed for a conviction on indictment. *See supra* note 168 and accompanying text.

[224] UK REPORT PHASE 2, *supra* note 124, para. 231.

[225] *See* discussion *supra* Part III.*A.7.*

[226] U.S. REPORT PHASE 2, *supra* note 187, para. 48.

[227] *Id.* para. 52.

V. MAYBE THIS WILL WORK: FERRETING OUT A SOLUTION TO BRITAIN'S DISCREPANCIES

As a major trading power, the holes in the United Kingdom's anti-bribery law can adversely affect the entire world, and specifically the United States, whose laws appear to be more in line with the OCED Convention as well as more stringent in their own right.[228] The OECD has said that "[i]t is widely recognised that the current substantive law governing bribery in the UK is characterised by complexity and uncertainty."[229] It is difficult to apply laws created to be domestic in scope to international issues, particularly when the United Kingdom's rationale that its laws are in accordance with the OECD Convention lies in the fact that the law *may* be interpreted accordingly.[230] This complexity has led the OECD Working Group to continuously recommend that the United Kingdom enact a comprehensive and focused statute relating to bribery of foreign officials.[231]

As of the writing of this Note, the British government, while acknowledging the OECD's plea for a clearer and stronger anti-bribery law that is less reliant upon court interpretation,[232] has yet to pass such a law. However, there is at present a Draft Bill on Corruption within the Parliament that may conform more closely to the OECD's recommendations.[233] The Draft Corruption Bill is deliberate and explicit in many of its definitions of important concepts in foreign public official anti-bribery law. The Bill discusses and defines "competitive advantage," as well as how one confers or obtains it,[234] the meaning of the term "corruptly" in several contexts (without using the word corruption),[235] and specifically addresses the foreign official issue.[236]

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[228] *See* discussion *supra* Part IV.

[229] UK REPORT PHASE 2, *supra* note 124, at 58; *see also generally* HOUSE OF LORDS AND HOUSE OF COMMONS JOINT COMMITTEE ON THE DRAFT CORRUPTION BILL, DRAFT CORRUPTION BILL: REPORT AND EVIDENCE, 2002-3, H.L. 157, *available at* http://www.publications.parliament.uk/pa/jt200203/jtselect/jtcorr/157/157.pdf (last visited Mar. 9, 2007) [hereinafter Committee Report on UK Draft Corruption Bill].

[230] Committee Report on UK Draft Corruption Bill, *supra* note 229.

[231] *See* UK REPORT PHASE 2, *supra* note 124, para. 247; UK REPORT PHASE 1, *supra* note 119, at 25.

[232] *See generally* Committee Report on UK Draft Corruption Bill, *supra* note 229.

[233] Corruption: Draft Legislation, 2003, Bill CM 5777, *available at* http://www.archive2.official-documents.co.uk/document/cm57/5777/5777.pdf (last visited Mar. 9, 2007).

[234] *Id.* at cls. 4–5, 8–9.

[235] *Id.* at cl. 5.

[236] *Id.* at cls. 11(2), 13.

However, the Draft Bill does leave some problematic elements of the old law, particularly retaining the agency/principal system despite recommendations from the judicial committee to remove the concept from the law.[237] The Home Office intends to keep the agency/principal system because corruption stems from subversion of loyalty to a principal, because the concept is present in the law of other States like Canada and Australia, and because of a concern that innocent actions may be included under the statute otherwise.[238] The inclusion of this contentious provision may be what has restricted the passing of this comprehensive scheme, which would at least be better than the current United Kingdom laws. Therefore, the present administration should do all that it can to enact this legislation. If this means removing the contentious element of the agency/principal relationship, so much the better, since this element of the present British scheme leads the Working Group to find the law complex and uncertain.[239] Thus the Draft Corruption Bill, while an admirable step at bringing clarity and certainty to the present conglomerate of British anti-bribery laws, is still but a small step in the right direction toward the creation of a clear and coherent anti-bribery law on par with the United States' Foreign Corrupt Practices Act.

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[237] *See* THE GOVERNMENT REPLY TO THE REPORT FROM THE JOINT COMMITTEE ON THE DRAFT CORRUPTION BILL, 2003, H.L. Paper 157, ¶¶ 12–15, *available at* http://www.archive2.official-documents.co.uk/document/cm60/6086/6086.pdf (last visited Mar. 9, 2007).

[238] *Id.* ¶¶ 3–7.

[239] UK REPORT PHASE 2, *supra* note 124, at 58.