I Get by with a Little Help from My Friends? Understanding the U.K. Anti-Bribery Statute, by Reference to the OECD Convention and the Foreign Corrupt Practices Act

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Abstract

The U.K. Anti-Bribery Act ("the Act") makes both bribery of a public official and private-to-private commercial bribery illegal, and imposes a strict liability offense on commercial organizations that fail to prevent bribery by persons associated with them. The Act has extraterritorial effect and applies to transactions of British subjects or on British territory. "Commercial organizations" may raise the statutory defense of having "adequate procedures" in place to prevent bribery, which, if proven, exonerates the commercial organization from strict liability for bribery by their "associated persons." Unlike the Foreign Corrupt Practices Act (FCPA), the U.K. Act does not exempt facilitation payments ("grease") from coverage. The Act meets and exceeds Britain's obligations under the Organization of Economic Cooperation and Development (OECD) Anti-Bribery Convention, itself too an outgrowth of the U.S. FCPA, seeks to raise international standards, and relies on "soft law" to do so in tandem with "hard law."

The British Act is often criticized for overreach and ambiguity. This article analyzes the genesis of the British Act, arguing that several of the criticisms of the British Act are valid but that the Act can be cured of many of its perceived flaws by reference to common law concepts (e.g., agency) or by reference to flanking international instruments as persuasive evidence of the British legislator's intent and/or the goals of the Act. The Act is notable in that it represents the success of hard law crystallizing out of soft law. The Act is also notable in that it will inevitably generate more soft law (codes of conduct, contract terms, managerial guidelines) as companies scramble to set up adequate procedures. The development of best practices in business is an example of the use of private law norms to generate binding law. It could be seen as evidence of Professor Ralph Steinhardt's Lex Mercatoria hypothesis.

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I. Introduction

Terrorist financing. Corrupted officials. Money laundering. The terms of trade in the black market are at times underwritten in blood. Most instances of corruption are not cases of blood money.[1] There is an entire underground economy which is bloodless: undocumented workers; sex workers; penny-ante wagers; and at the riskier end, cigarette smuggling and drug dealing. What about corruption? Official/unofficial corruption is an invisible transaction cost to the expense of businesses; costs aside though, what's wrong with "grease?"[2]

The problem with grease payments, even when oil and blood are not mixed, is that they represent a lack of transparency.[3] We could of course (re)characterize facilitation payments as a simple "user fee," a type of tax levied by impoverished states to finance their essential services. It would be better for the rule of law for developing and transition economies to legally transform the common practice of facilitation payments into overt user fees, *e.g.*, expedited service fees or administrative fines. Essentially, we should see a large part of the battle of corruption as the transformation of illegal transactions into legal ones. From the prosecutorial side, amnesties for giving up evidence and deferrals of prosecution (DAPs) are two more tools. Amnesty is fairly straightforward for whatever reason and to whatever extent certain persons or transactions are immunized from prosecution. In a deferral of prosecution, a tool often permitted in the United States, the prosecutor holds off on prosecuting the illegal activity so as to give the company the chance to get its house in order. The logic of amnesties, DAPs, and plea bargaining is the preservation of scarce prosecutorial resources and the non-disruption of commerce. It is a matter of "winding down" the "dodgy deals" and restructuring them into above the board legality to attain transparency and accountability.[4]

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1. "While there is no doubt that petty corruption in the form of bribes to obtain services such as a passport or a driving licence from government officials is prevalent in many developing countries and injurious to trust in the government and the rule of law, it is corruption at the grand level in the form of bribes by businesses to domestic and foreign public officials that is seen as causing the greatest harm to a country in terms of economic growth and high levels of poverty." Indira Carr & Opi Outhwaite, *The OECD Anti-Bribery Convention Ten Years On*, 5 MANCHESTER J. OF INT'L ECON. L. 3, 4 (2008), *available at* http://epubs.surrey.ac.uk/578/1/fulltext.pdf.

2. Facilitation payments are payments made to government officials not to influence a sovereign decision but to obtain execution of a right to which the payer is already entitled; they are also called "grease payments." *See generally*, Christopher F. Dugan & Vladimir Lechtman, *Current Development: The FCPA in Russia and Other Former Communist Countries*, 91 AM. J. INT'L L. 378, 380 (1997).

3. "The House of Representative makes clear such activities 'cast a shadow on all US companies. The exposure . . . can damage a company's image, lead to costly lawsuits, cause the cancellation of contracts, and result in the appropriation of valuable assets overseas.'" Carr & Outhwaite, *supra* note 1, at 7.

4. "Although many commentators may find it unsurprising that some multinational firms vigorously pursue corruptly influenced contracts—or are at least complacent in accepting such contracts—another view holds that such an account is too cynical. These optimists claim that corruption is inefficient and argue that moral signals from the countries that have prohibited corruption by statute can also motivate firms. Under such a view, most multinational corporations should endeavor to comply with the law." David C. Weiss, *The Foreign Corrupt Practices Act, SEC Disgorgement Of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 472-73 (2009).

Corruption is a problem—a *transnational* problem.[5] Corruption represents an increased transaction cost, a distortion of economic signals, a lack of transparency, an obstruction to free trade, and a source of inefficiencies such as nepotism and tax fraud. Thus, all states benefit from the suppression of corruption. Consequently, there is an ever-greater tendency to criminalize and prosecute bribery both internationally and domestically,[6] as evidenced by the recent upswing in Foreign Corrupt Practices Act (FCPA) prosecutions[7] and the passage of the British Anti-Bribery Act. There are numerous reasons speculated at to explain the increased prosecutions,[8] but the fact of increased prosecution of a growing array of norms is there.

The Organisation for Economic Co-operation and Development (OECD) Convention and the Council of Europe (COE) Convention seek to create a framework within which national legislation can and is developed to end corruption. Accordingly, the Act seeks to implement Britain's normative and legal obligations under anti-corruption treaties promulgated by the OECD, the COE, and the E.U. The Act seeks not only to meet but also to exceed existing international standards, thereby raising the level of legal transparency and accountability internationally.[9] But the Act's own terms are vague, casting a broad net, which reaches actors and actions that might be better regulated through private law relations. This article proposes: (1) interpretations of the Act that would cure it of vagueness by presenting concepts around which to define the ambiguities (*e.g.*, fiduciary duty, good faith and fair dealing) (2) to limit the Act's scope to the types of actions and actors envisioned in existing international treaty law, while (3) enhancing the Act's effectiveness by expanding remedies through equitable concepts such as forfeiture, procurement bars, and licensing restrictions. This paper exposes and critiques the British law in order to help make it more effective. To do so, it must first expose and compare the foreign laws that inspired the U.K. legislation.

The rise of the norm against bribery under international law is an example of a soft law approach that succeeded to form and, over time, implemented a particular norm. The model of shaping and enforcing an international norm described here can be applied to other international governance issues. The experience of the anti-bribery convention could be applied to the fight against pollution, for example.

5. "The US recognised that bribery of foreign public officials was not simply a US problem but a universal one. In aggressively promoting the adoption of similar legislation in other industrialised countries the US sought to ensure a level playing field for competing businesses and to increase market integrity and stability. The FCPA is legislation that has economic interests at its heart. It took until 1997 for the US pressure to bear fruit and that came in the form of the OECD Convention." Carr & Outhwaite, *supra* note 1, at 7.

6. *See* Weiss, *supra* note 4, at 473.

7. *Id.*

8. *Id.* at 483.

9. "Going beyond, for example, the US Foreign Corrupt Practices Act, it has been said to set a new 'gold standard' in anti bribery legislation." Andrew Ottley & Chris Jefferis, *Bribery Act 2010: Briefing and Guidance*, INCE & CO., (Oct. 2010), http://www.incelaw.com/documents/pdf/Strands/Commercial-Disputes/bribery-act-2010.pdf.

II. Legislation

A. The Foreign Corrupt Practices Act (FCPA)

"Genetically," i.e., historically, the most important legislation in the field of international bribery was a U.S. law: the Foreign Corrupt Practices Act. This law was enacted in the wake of the Watergate political scandal and intended to affirm the United States' commitment to the rule of law and international human rights. It was not however merely a case of naïve altruism or enlightened maintenance of U.S. hegemony: the U.S. leadership saw, correctly, that murky overseas illegality represents a hidden transaction cost and a source of inefficiencies,[10] and that combating corruption would be of interest to key U.S. allies. This, however, put the United States at a competitive disadvantage against other countries that did not (then) outlaw the (overseas) transactions covered by the FCPA (bribery,[11] essentially). Because commerce is often international and works as a potential competitive disadvantage to U.S. corporations, the FCPA was given what at that time was a revolutionary international scope of application: bribery at home *and* abroad would be sanctioned. However, it would take decades of lobbying for the U.S.-inspired vision to be translated into international treaty law, and from there, into the laws of other states.[12] Ultimately, the FCPA "became the model for similar international initiatives, most notably the Organization for Economic Cooperation and Development ('OECD') Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,"[13] which explains its interest here.

1. *Bases of Liability under the FCPA*

The FCPA prohibits bribery of public officials,[14] not commercial bribery, i.e. bribery of private law persons. Today, the FCPA also requires companies with securities listed on the U.S. stock market to comply with the accounting provisions of U.S. law.[15] This "books and records" provision of the FCPA[16] is particularly useful[17] and could be taken up in other legislation (viz, the British Anti-Bribery Act). The books and records provisions are more useful than the bribery provisions because they do not require a proof of scien-

10. "U.S. trade officials clearly recognized that bribery and corruption can block and distort international economic transactions." Kenneth W. Abbott, *Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption*, 4 J. Int'l Econ. L. 275, 286 (2001).

11. *See* 15 U.S.C. §§ 78dd-1-78dd-3 (2010).

12. The United States introduced FCPA, then pressured OECD and the U.N., with little success, for 10 years. Abbott, *supra* note 10, at 283.

13. Thomas F. McInerney, *The Regulation of Bribery in the United States*, 73 Int'l R. of Penal L. 81, 82 (2002), *available at* http://www.cairn.info/revue-internationale-de-droit-penal-2002-1-page-81.htm.

14. *See* 15 U.S.C. §§ 78dd-1-78dd-3.

15. *See* § 78m.

16. § 78m(b)(2)(A).

17. "The accounting and internal controls provisions together constitute one of the most effective weapons regulators possess in enforcing the FCPA. While these provisions are only enforceable by the SEC on a civil basis, and apply only to companies with securities registered under the Exchange Act (rather than all persons' as do the anti-bribery provisions), it is much easier for regulators to prove their case." McInerney, *supra* note 13, at 87-88.

ter[18]—the standard of proof is lower. Further, by tracking financial statements, wrongful acts are easier to trace and prove.[19] Since its initial enactment, the FCPA has been amended[20] and strengthened and given greater extraterritorial application; at the same time, defenses to FCPA liability also have been more clearly defined.

2. *Exemptions from Liability under the FCPA*

Because of the wide reach of the law, defenses and exceptions were soon carved out.[21] Payments for "routine governmental action," in other words, the ministerial rather than sovereign acts of the foreign official[22] such as "facilitating or expediting payment to a foreign official, political party or party official" intending to "secure the performance of a routine governmental action," are exempt from the FCPA.[23] This exception applies only to "ministerial" duties and not to discretionary decisions, such as whether "to award new business or to continue business with a particular party."[24] These are called "facilitation" payments or "grease" payments and merely expedite the execution of a right to which one is already entitled.[25] Another exception was also found: payments, gifts, offers, or promises that are lawful under the laws of the recipient's country,[26] as well as sums paid in good faith—for example, travel or lodging expenses in connection with the "promotion, demonstration, or explanation" of products or services, or the "execution or performance" of a contract with a foreign government would be exempted from the FCPA.[27] That is, the sanctioned act must be an instance of "dual criminality," something illegal both in the United States and the country (or countries) where the transaction occurred.

3. *Remedies under the FCPA*

There are several remedies under the FCPA. The Department of Justice can seek a permanent injunction of the wrongful activity,[28] companies can be fined,[29] and natural persons may be fined and/or imprisoned.[30] May the bribe itself be recovered? Yes—to the United States Treasury. "[I]t is unclear whether Congress intended that the SEC pursue disgorgement in FCPA enforcement."[31] Disgorgement of wrongful profits is an

18. "The anti-bribery provisions of the FCPA, unlike the books and records provisions, require scienter for liability to attach. The definitions in the statute indicate that 'knowing' conduct exists if (i) a person is aware that they are engaging in certain conduct, that such circumstances exist, or that the result is substantially certain to occur, or (ii) the person has a 'firm belief' that such circumstance exists or is substantially certain to occur." *Id.* at 84.

19. *Id.* at 87-88.

20. *See* The International Anti-Bribery and Fair Competition Act of 1998, 112 Stat. 3302 (1998) (amending the Foreign Corrupt Practices Act).

21. 15 U.S.C. § 78dd-1(c).

22. § 78dd-1(b).

23. *Id.*

24. 15 U.S.C. § 78dd-1(f)(3)(B).

25. *See* Dugan & Lechtman, *supra* note 2.

26. 15 U.S.C. § 78dd-1(c)(1); 15 U.S.C. § 78dd-2(c)(1).

27. McInerney, *supra* note 13, at 85.

28. 15 U.S.C. § 78dd-2(d); 15 U.S.C. § 78dd-3(d).

29. § 78dd-2(g).

30. § 78dd-3(e).

31. Weiss, *supra* note 4, at 496.

equitable remedy under the FCPA,[32] available thanks to the Sarbanes-Oxley Act,[33] even in cases of violation of the books and records provisions of the FCPA.[34] Disgorgement of wrongful profits and their forfeiture to the state or even private parties is an unproblematic issue internationally.[35] But the potential for jurisdictional conflict indicates why we must be cautious regarding disgorgement as an international remedy: aside from the difficulty of estimating profits that arise directly from a bribe,[36] there is the risk of international conflicts over spoliation of the proceeds of corporate wrongdoing.

B. THE OECD CONVENTION

Following the enactment of the FCPA, U.S. pressure led the OECD to draft an anti-bribery convention.[37] The OECD Convention "in large part tracked the normative aspects of the FCPA."[38] Bribery of foreign public officials is prohibited under the OECD Convention[39] and bribes paid to foreign officials are subject to seizure and confiscation.[40] Corporations may be liable under the Convention.[41] The OECD Convention permits extraterritorial jurisdiction[42] (extraterritorial application of national anti-bribery laws is unproblematic internationally),[43] provides for extradition,[44] and mandates mutual legal

32. "The SEC can support its pursuit of disgorgement under broad equitable principles or statutory authorization. Disgorgement is an equitable concept that has existed in Exchange Act jurisprudence for decades. The first case using the word 'disgorgement' for violations of Rule 10b-5 stated: '[I]t is simple equity that a wrongdoer should disgorge his fraudulent enrichment.' While disgorgement can serve deterrence purposes, it is intended not to compensate the wronged party or to serve as a complete stand-in for the deterrent effects of fining, but to recover the benefits of a wrongful act. Although a longstanding equitable tool, disgorgement was used relatively sparingly by the SEC until the passage of SOX, which is also, now, a part of the Exchange Act." *Id.* at 485.

33. *See* Sarbanes-Oxley Act of 2002, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C. (2000 & Supp. IV 2004)).

34. Weiss, *supra* note 4, at 474.

35. *Id.* at 492.

36. *Id.* at 499.

37. "The prime mover for the OECD to take steps to combat corruption of foreign public officials was pressure applied by the United States . . . which took almost two decades to bring about the intended result." Carr & Outhwaite, *supra* note 1, at 6.

38. McInerney, *supra* note 13, at 89.

39. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents, Nov. 21, 1997, 37 I.L.M. 1 (1998), *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf [hereinafter Convention on Combating Bribery].

40. "Each implementing State must also 'take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.'" Weiss, *supra* note 4, at 480.

41. Art. 2 artificial persons liability states: "Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official." Convention on Combating Bribery, *supra* note 39.

42. *Id.*

43. "Belgium, for example, prohibits foreign bribery under a universal jurisdiction statute that applies to 'any person' 'who is neither a Belgian national nor has their principle place of residence in Belgium.' Brazilian authorities have asserted that an offense needs only to have 'touched' Brazilian territory for jurisdiction to be valid." Weiss, *supra* note 4, at 493.

44. Convention on Combating Bribery, *supra* note 39.

assistance.[45] Article 9(3) is particularly interesting, as it prohibits a state party from asserting bank secrecy as grounds to refuse to cooperate in the enforcement of the treaty.[46] These normative positions could, and I think should, be seen as of interpretive value in construing the British Anti-Bribery Act.

The OECD anti-bribery convention took a "functional approach,"[47] focusing on the effects of the national legislation rather than the individual rules.[48] That is, the OECD Convention resembles an E.U. Directive, indicating to state parties what is to be prohibited, but leaving the means to national law. In sum, slowly, yet inexorably, an international norm against official bribery has formed.[49] Thus, several states have enacted anti-bribery legislation pursuant to the OECD convention.[50]

C. THE WTO

The surprisingly successful "soft law" approach taken by the OECD[51] can be contrasted with the law/no law approach taken by the WTO. The WTO has not undertaken anti-bribery legislation.[52] This is because soft law is regarded with suspicion and skepticism at the WTO.[53] The fear is that developing WTO soft norms would undermine the existing WTO hard law[54] because soft law norms could not be enforced,[55] which would reduce WTO legitimacy. Thus, to date, the OECD, and not the WTO, has been the principle force for the formation of the norm against bribery.

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45. *Id.*

46. "A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy." *Id.*

47. Carr & Outhwaite, *supra* note 1, at 9.

48. "Practices and informal rules are part of this approach as well as other aspects of the legal system taking over ancillary functions. Therefore the focus of comparison would lie on overall *effects* produced by a country's legal system rather than the individual rules." *Id.* at 10 (emphasis added).

49. A recent study on enforcement of anti-corruption laws by OECD countries "showed slow but steady movement toward more proactive government enforcement of anti-corruption laws over the first decade of the OECD Convention. In the past couple of years, the Bush and now Obama Administrations have substantially ratcheted up the US Government's pursuit of all manner of cases in the anti-corruption space." Andrea Bonime-Blanc, *The UK Anti-Bribery Act: How Global Companies Should Prepare*, ETHICAL CORP., Sept. 14, 2010, http://www.ethicalcorp.com/content.asp?contentid=7075.

50. For a list of national legislation implementing the OECD Anti-Bribery Convention, *see OECD Anti-Bribery Convention: National Implementing Legislation*, OECD, http://www.oecd.org/document/30/0,3343,en_2649_34859_2027102_1_1_1_1,00.html (last visited Oct. 27, 2010).

51. "Discussions in the OECD and WTO were based on very different conceptions of the process of legalization. In the OECD, the U.S. pursued a 'transformational' soft law strategy that over five years-1993 to 1997-produced a legally binding Convention. The U.S. undoubtedly adopted a gradualist strategy in this case because an immediate move to hard law seemed politically infeasible, but the approach was highly congenial to the OECD, which acts through a variety of soft (recommendations) and hard (decisions, conventions) legal instruments." Abbott, *supra* note 10, at 290.

52. *Id.* at 275-96.

53. "In the WTO, in contrast, negotiators from the U.S. and other developed country governments, at least, perceived only two possible outcomes: a hard, legally binding multilateral agreement (whether on corruption, market access or TGP) or no action at all." *Id.* at 290.

54. "The focus on hard law was not simply a matter of tactics on this particular issue. It reflected a deep-seated understanding of how the WTO operates and should operate. The conviction that the WTO is an organization that deals only in hard law was most clearly revealed in debates over the applicability of the WTO dispute settlement mechanism to TGP." *Id.*

55. *Id.* at 291.

D. The Counsel of Europe (COE) Convention

Following the FCPA model, the Council of Europe Convention obliges State Parties to create offenses in their national law for fraudulent accounting practices.[56] The COE Convention permits State Parties to exercise extra-territorial jurisdiction over offenses on the basis of nationality or territoriality.[57] Article 17(3), for its part, imposes a duty to extradite or prosecute, which is becoming ever more clearly a general principle of international law: states must prosecute or extradite criminals subject to their jurisdiction—aut dedere aut judicare.[58] The COE convention permits criminal *or* civil liability for legal persons in accordance with national law[59] because, *e.g.*, corporations under German civil law, *e.g.*, cannot commit *crimes*, but can be in (delictual) violation of administrative provisions. Corporate liability shall not exclude the possibility of civil liability of natural culpable persons.[60] Article 21 of the COE convention mandates cooperation between national authorities.[61]

E. Common Features of the Laws

Because the laws described all share a common lineage and logic, they share various features. These are synoptically described below to illustrate the state practice of the forming customary norm against bribery of public officials.

1. *Corporate Criminal Liability—Permitted, Not Mandated*

The conventions mandate that corporations be held liable in accord with national law. The civil liability of corporations here is not at issue—that is unproblematic. What is less clear, internationally, is whether and how a corporation may be held criminally liable, *e.g.* as an accomplice or even principal. Germany and most States using Germanic civil law do not recognize corporate criminal liability for the simple and logical reason that corporations, unlike natural persons, are incapable of moral culpability.[62] Of course, corporations in Germanic civilianist jurisdictions may be liable in tort and for administrative violations (*Ordnungswidrigkeiten*). Accordingly, the international conventions mandate either civil or criminal sanction, leaving the precise characterization of the sanction as civil, criminal, or some mix to national law. Because the common law does recognize corporate criminal liability,[63] the extraterritorial application of common law legislation subjects foreign corporations to criminal liability. Criminal liability of corporations is thus an international

56. Criminal Law Convention on Corruption, Jan 27, 1999, E.T.S. 173, *available at* http://conventions.coe.int/treaty/en/treaties/html/173.htm [hereinafter Criminal Law Convention].

57. *Id.* art. 17.

58. *See e.g.*, *R v. Bow St. Metro. Stipendiary Magistrate And Others*, Ex Parte Pinochet Ugarte (No. 3), [1999] 1 A.C. (H.L.) 147, 154.

59. Criminal Law Convention, *supra* note 56, art. 18.

60. *Id.* art. 18(3).

61. *Id.* art. 21.

62. *See generally* Günter Stratenwerth, *Strafrechtliche Unternehmensbaftung*, IN Festschrift für Rudolf Schmitt zum 70. Geburtstag 295-310 (K. Geppert, J. Bohnert & R. Rengier eds., 1992).

63. *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co.*, [1915] A.C. 705, 713 (H.L.) (Viscount Haldane; 'directing mind' principle; wrongful act of corporate director attributed to corporation).

practice,[64] and holding corporations criminally liable for violations of international law, for example under the Alien Tort Statute, is consistent with customary public international law.

2. *Dual Criminality*

In the context of extradition, "double criminality" (also known as "dual criminality") is the principle that the criminal act which is the basis for the desired extradition must be a crime both in the state asserting jurisdiction and in the state where the crime occurred.[65] States which apply a principle of "double criminality" refuse to extradite unless there is "double criminality."[66] Corporations cannot be extradited, so the issue of dual criminality normally does not arise in the context of corporate crimes. This procedural fact obviates the potential problem of determining whether the civil violations of corporations in jurisdictions which refuse to impute criminal liability to corporations satisfy the dual criminality requirement for extradition. But, because corporations can be liable for bribery under national or international law, and because some states permit extraterritorial application of their anti-bribery statutes only where the principle of dual criminality is satisfied, the theoretical problem reappears. The solution in national law is to assimilate the civil law violations of corporations under Germanic civilian law to the criminal liability of corporations in common law jurisdictions for the application of the test to determine whether the act is wrongful in both (or all) relevant jurisdictions.[67]

3. *Cross Border Cooperation*

The various national and international instruments have extraterritorial effect to remedy international corruption. This leads to the issue of international cooperation, which has been increasing in recent years.[68] Today, informal agreements exist to avoid the problems of double jeopardy and multiple prosecution[69] as well as to ensure transfer of (confidential) information and cooperation between national law enforcement.

64. "Given the many approaches to imputing fault on the part of a company it is unfortunate that the OECD has not put forward an autonomous provision to address this issue." Carr & Outhwaite, *supra* note 1, at 16.

65. "It is a fundamental requirement of international extradition that the crime for which extradition is sought be one provided for by the treaty between the requesting and the requested nation. The second determination is whether the conduct is illegal in both countries." Heilbronn v. Kendall, 775 F. Supp. 1020, 1023 (W.D. Mich. 1991).

66. "A broad interpretation of the requirement of dual criminality is followed: The law does not require that the name by which the crime is described in the two countries shall be the same, nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions. The fact that a particular act is classified differently or that different requirements of proof are applicable in the two countries does not defeat extradition." *Id.* at 1025.

67. One can readily imagine situations where the wrongful act occurred in several jurisdictions, or where the national is subject to multiple states' jurisdiction. In the corporate context the struggle between the "real seat theory" versus the "incorporation theory" to determine the nationality of the corporation recurs here, too. *See, e.g.*, Kilian Baelz & Teresa Baldwin, *The End of the Real Seat Theory (Sitztheorie): the European Court of Justice Decision in Ueberseering of 5 November 2002 and its Impact on German and European Company Law*, 3 GERMAN L. J. 12, *available at* http://www.germanlawjournal.com/article.php?id=214.

68. Siri Schubert & T. Christian Miller, *At Siemens, Bribery Was a Line Item*, N.Y. TIMES, Dec. 20, 2008, http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html.

69. Weiss, *supra* note 4, at 504.

4. *Taxation—Non deductibility of Corruption Payments*

One real point of progress made by the conventions is the rise of a norm that corruption payments will not be deductible from taxable income. Article 12.4, UNCAC provides that "Each State Party shall disallow the tax deductibility of expenses that constitute bribes."[70] Similarly, the OECD recommends that tax deduction of corruption payments be disallowed.[71] It is also worth noting that tax fraud and bribery often go hand-in-hand.[72] The Conventions make bribery non-deductible in order to root out tax fraud as well as bribery.

III. The U.K. Anti-Bribery Act ("the Act")[73]

Against this background, Britain recently enacted an extensive anti-bribery statute in order to meet and exceed the OECD Convention's standards. The British legislation was likely, in part, a response to the OECD's report calling on the United Kingdom to enact effective anti-corruption legislation.[74] The British statute, in sum,[75] attempts to govern not only bribery of public officials but also commercial bribery of private actors inter se (as, for example, where a person bribes another person to breach their fiduciary duty to their employer). The British statute sanctions not only the wrongful acts of physical, i.e. natural persons but also those of corporations.[76] Furthermore, and perhaps problematically, the British law applies a strict liability regime to corporate liability.[77] Like the FCPA,[78] the British law applies extraterritorially.[79] Unlike the FCPA, the British statute does not provide an express exemption for liability for facilitation payments. I do not think one could be fairly implied from the terms of the statute, but some judges are creative sometimes.

The Act includes controversial, even questionable, bases for liability. If I read this statute correctly, it imposes extraterritorial strict liability for corporate commercial bribery.

70. United Nations Convention Against Corruption art. 12.4, Oct. 31, 2003, 2349 U.N.T.S. 41 [hereinafter UNCAC].

71. OECD, *Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials*, at 2, [C(96)27/FINAL] (Apr. 11, 1996).

72. "In our experience, it is during interactions with foreign tax officials (both direct and indirect tax authorities) that many bribes take place." David Lawler, *The Bribery Bill-What Does it Mean For UK plc?*, EUROPEAN UNION ANTI-BRIBERY BLOG, (Jan. 12, 2009), http://www.antibriberyblog.eu/2009/12/the-bribery-bill-a-non-technical-summary/.

73. Throughout this section quotation marks are used to indicate the exact terms of the Act, not as "scare quotes."

74. *See OECD Group Demands Rapid UK Action to Enact Adequate Anti-Bribery Laws*, OECD, Oct. 16, 2008, http://www.oecd.org/document/8/0,3343,en_2649_34855_41515464_1_1_1_1,00.html.

75. "[T]he Bribery Act makes it an offense to receive, as well as give, a bribe; bribery of private individuals and companies is criminalized; there is no need to prove corrupt intent; there is a strict liability corporate offense for failing to prevent bribery; there is no exemption for facilitation payments; and the extraterritorial reach has a broader impact for companies and individuals." *The UK Bribery Act 2010: What US Companies Need to Know*, DLA PIPER, June 1, 2010, http://www.dlapiper.com/the-uk-bribery-act-2010-what-us-companies-need-to-know/.

76. *Id.*

77. *Id.*

78. Lawler, *supra* note 72.

79. Bribery Act, 2010, c. 43, § 12 (U.K.).

This strict liability of the corporate body for the wrongful act of its "associated person" can be avoided if the corporation had "adequate procedures" in place to prevent the wrongful act. The "adequate procedures" defense had not arisen in any of the international instruments or the FCPA so far as I have seen, but neither had strict liability. In addition to controversial theories, which reach extraterritorially to corporate actors and include strict liability, the Act also suffers from ambiguities. None of those weaknesses are fatal, but they will require much judicial interpretation to be cured.

Despite the flaws—ambiguity and overreaching, the Act is a "hopeful monster." First, the legislation represents another example of the success of functionalist method.[80] Second, the statute represents an example of the power of non-binding soft law as a "strange attractor" for *obligatory* compliance.

A. Soft Law: A Strange Attractor for the Accretion of Hard Law

International anti-bribery legislation is an example of effective transnational governance. How exactly did a *binding* international norm against the bribery of public officials arise? The approach taken follows: First, normative goals with few or no enforcement mechanisms, but which may be used to interpret other laws and/or as persuasive evidence of binding law, are established at the global or regional level. Second, these normative goals are then taken up and implemented via regional, national, and even private actors (*e.g.* corporate codes of conduct). Both private law actors (corporations, NGOs) and public law actors (states, international organizations) are used to establish the norm and to attribute greater and greater binding force to it over time. In sum, the persuasive and desired normative goal—here, transparent government, which is desired in fact by all honest persons, is attained gradually by ratcheting standards upward over time.[81]

The British Act attempts to further that process along by addressing commercial bribery and also by giving a hard law role to soft law actions of non-state actors. The corporate defense of adequate procedures is nothing other than an implied command to companies to form soft law in this field, soft law which will influence not merely the interpretation of hard law but also its application. To me, the Act represents the efficacy of soft law transnational governance and this model of international governance should be understood for it may have applications in many other fields.

B. The Terms of the Act

The statute first defines a "general bribery offence"[82]—bribing another person for improper performance.[83] The statute then[84] defines offenses relating to being bribed.[85]

80. Functionalism seeks to attain peace by pieces. Namely, specialist agencies defined around particular problems seek to develop and apply expert knowledge to apply to isolated individual disputes. *See, e.g.*, Eric Engle, Lex Naturalis, Ius Naturalis: Law as Positive Reasoning & Natural Rationality, 36-38, 154-155 (2010).

81. OECD, Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business, at 1-2, [C(2009)64] (May 25, 2009) (non-binding norm; merely recommending state parties to take up binding national legislation).

82. Bribery Act, 2010, c. 43, § 1 (U.K.).

83. *Id.*

84. Bribery Act § 2.

Thus, taking or offering a bribe is covered under the general offense which reaches commercial bribery, sometimes referred to as private to private bribery. Comparatively speaking, commercial bribery is recognized in some form in most U.S. states, though it is generally not addressed in the international conventions or, so far as I understand, in the FCPA. The United Kingdom seeks to raise the international standard on that point. "However, unlike bribery involving public officials, the logic of criminalizing bribery between commercial entities is sometimes questioned."[86]

The two "general offenses"—taking or receiving a bribe—reach commercial i.e. private actors. Do they also reach bribery of officials? The general offenses do not appear to explicitly include or exclude bribery of public officials. Structurally, having defined general offenses which clearly include at least commercial bribery, the statute then defines "specific offenses," starting with the specific offense of "bribery of foreign public officials."[87] That creates the argument that the structure of the legislation excludes bribery of public officials from the general offenses, which is an odd result, because the OECD Convention that the statute effectively implements is aimed only at bribery of public officials.

The second, and perhaps most controversial specific offense, is also the last offense defined in the Act: "failure of commercial organisations to prevent bribery."[88] There, strict liability may be imputed to the corporation for the wrongful act of an associated person. The obvious question is who is an "associated person"? Directors? Officers? Employees? Likely all three. What about shareholders? Spouses? Children? Subsidiaries? Subcontractors? The statute on its own terms doesn't answer who is an "associated person." Happily, we can well imagine the eventual judge drawing on principles of tort liability (respondeat superior, vicarious liability, imputed liability), contract (privity), capital markets law (corporate insiders), and corporate criminal law to determine with some predictability who is or is not an "associated person." I expect "associated person" will be defined as employers, directors, shareholders, persons in privity to those groups, general partners, probably also silent partners, wholly owned subsidiaries, probably also majority owned subsidiaries, joint venture partners, but probably not subcontractors; frankly I have no idea if shareholders or silent partners should be treated as associated persons or, if so, when. The court may well be forced to develop a center of gravity approach of some kind under which sometimes a shareholder will be an "associated person" and at other times will not. Regardless of what the court does in fact do with this undefined term, judicial interpretation can credibly cure this flaw because of the array of flanking corporate laws from which to draw analogies. However, one can imagine this Act leading to the use of subcontractors, and subsidiaries to outsource graft, as similar outcomes resulted from the Alien Torts Statute.[89]

As noted, the Act does not exempt facilitation payments. But, bribes paid by the military or intelligence services are exempted.[90] There the difficult issue is the use of "Her Majesty's Service" to obtain not vital intelligence about impending attacks but market share

85. *Id.*

86. McInerney, *supra* note 13, at 104.

87. Bribery Act § 6.

88. § 7.

89. *See* Eric Engle, *U.S. Corporate Liability for Torts of Foreign Subsidiaries*, 23 CORP. COUNSEL REV. 90 (2004). *See also* Eric Engle, *The Alien Tort Statute and the Torture Victim's Protection Act: Jurisdictional Foundations and Procedural Obstacle*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 1, 8 (2006).

90. Bribery Act, 2010, c. 43, § 13.

for sale of British Aerospace products[91]—industrial espionage masquerading as security. The problem of corruption in military contracting is a matter for domestic British law to sort through. Here, however, the equitable remedy of procurement bars is called to the reader's attention.

With crafty interpretation, the judiciary might somehow reach a judicial (not equitable: equity does not exonerate otherwise wrongful acts—"he who seeks equity must do equity") solutions. Perhaps the judiciary will find an exemption for facilitation payments, or an exemption for de minimis payments? Whether and how the court reaches such exemptions cannot be predicted either from the statute or other laws with which this author is familiar. A good argument might be to compare the U.K. Anti-Bribery Act to other similar laws overseas which do exempt "grease" payments as persuasive evidence that the British legislator did not intend to capture such conduct because it did not specifically say it would do so and because capturing such conduct might lead to conflicts of jurisdiction or between British law and the U.K.'s international obligation.[92]

What is clear is that the Act covers commercial bribery. Commercial bribery is one (the only?) basis for the general claims.[93] Criminalizing commercial bribery is controversial because commercial bribery is not defined internationally, so far as I have seen, though it can be found in the laws of some of the federated states of the United States. It is also clear that commercial organizations are (strictly!) liable for failure to prevent bribery by (not of) persons associated with it (was that the result of bad drafting?). Commercial bribery is not well defined in the statute. I would argue that the essence of commercial bribery is an *economically induced breach of fiduciary duty*. Those are my own terms. Perhaps penetrating legal research would find a better rationale? I do think the terms I suggest reach the gravamen of the wrong. On its own terms, the Anti-Bribery Act centers the wrong on obtaining or retaining commercial advantage[94] and/or business.[95] Just about all company actions aim at commercial advantage and/or obtaining and/or retaining market share. Thus, business advantage is not the best focal point for capturing the wrongful act because that test captures almost all conduct of a commercial enterprise. Commercial organizations may assert the affirmative defense to an accusation of failing to prevent bribery by (not of) persons associated with the organization that the commercial organization had "adequate procedures" in place to prevent the wrongful act of the associated person.[96] The Act does not define "adequate procedures." But, here at least, the judge can look at the vast literature and even case law on corporate governance. So for example, we can readily envision a corporate code of conduct, corporate trainings, and contractual provisions in the company's business practices. In fact, the soft-law aspects of the Act are the most interesting and innovative aspect of the Act. The Act is doing some very interesting things. It is essentially imposing a policing function on corporations—after all, they are the ones acting, the ones closest to the transactions. The Act is also relying on soft law measures to form hard law.[97] Consequently, most law and consulting firms are

91. David Leigh & Rob Evans, *BAE Accused of Secretly Paying Ibn to Saudi Prince*, GUARDIAN, June 7, 2007, http://www.guardian.co.uk/world/2007/jun/07/bae1.

92. Then again, maybe not; your guess is as good as mine, maybe better.

93. Bribery Act, 2010, c. 43, § 7.

94. § 7(1)(a).

95. § 7(1)(b).

96. § 7(2).

97. *Id.*

advising their clients to undertake compliance measures such as audits and trainings.[98] Similar "due diligence" actions such as Corporate Codes of Good Conduct (COGCs) and management trainings were (and are) also recommended with respect to the U.S. FCPA,[99] even though the FCPA does not provide for liability on a theory of commercial bribery or strict liability.

IV. Critique of the British Law

A. Actus Reus

1. *Extortion versus Bribery*

As noted, the Act is vague: as written, the Act potentially covers so much conduct that extortion could well be included into the general offenses. Thus, it would be sensible for the judiciary to interpret the statute to exclude conduct which would be characterized as extortion. Bribery may be distinguished from extortion in that extortion relies on duress.[100] This illustrates that some of the ambiguity in the Act can be cured by interpreting the Act in light of flanking criminal legislation so as to delimit the exact extent of the Act.

2. *Commercial Bribery*

The FCPA and the international conventions surveyed do not criminalize commercial bribery. Criminalization of commercial bribery does not conflict with the terms of the conventions but is not mandated by them. Trying to draw on the international instruments described here will not help the British judge define commercial bribery, nor will looking to the FCPA. Nor is commercial bribery coherently defined in the Act. I suggest centering the definition of commercial bribery on the idea of some *breach of fiduciary duty and/or a breach of the duty of good faith and fair dealing*. However, while the applicability of commercial bribery can be rendered coherent in this way, it cannot be interpreted away by any judge, no matter how interventionist or activist she may be. The challenge for human rights and rule of law advocates is to figure out how best to generate business practices which will ultimately define just what is and isn't commercial bribery. To that extent, one can hope that NGOs will promulgate model codes of business conduct.

B. Mens Rea

The U.K. statute applies "strict liability" to companies.[101] It would be prudent to interpret the statute as applying by implication there from specific intent to natural persons; that distinction is justified because natural persons are capable of being imprisoned and should enjoy the higher standard of proof (beyond reasonable doubt) of criminal defendants. This would be the interpretation moreover that one should expect from the court at

98. *See, e.g.*, Gary DiBianco & Perry Madden, *U.K. Parliament Enacts Landmark Anti-Bribery Law*, Skadden, Apr. 1, 2010, http://www.skadden.com/Index.cfm?contentID=51&itemID=2045.

99. *See, e.g.*, Eric Engle, *Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations?*, 40 Willamette L. Rev. 103 (2004).

100. McInerney, *supra* note 13, at 99.

101. *See id.*

least as to criminal prosecutions—in contrast to civil prosecutions, which would likely be based on an ordinary standard of proof (likelier than not).

C. Possible Remedies

1. *Procurement and Licensing Restrictions*

The problem with the British Act is that it overreaches, taking into account "commercial" bribery and strict liability for corporations (extraterritoriality is not so problematic but elicits howls, too). Further, the Act's substantive offenses and defenses are poorly defined. Judicial interpretation can, should, and likely will clarify the exact contours of the legislation. But, the Act does not address two remedies which would be very effective: procurement bars and license revocation. A procurement bar is the refusal of a State to enter into business contracts with a corporation that has violated the law.[102] A licensing restriction is the suspension or revocation of a license, *e.g.* to practice law or medicine, resulting from the wrongful conduct of the license holder. Courts could and should interpret the statutes in question where possible to find such remedies, for they would be effective.[103]

2. *A Private Cause of Action*

The U.K. Act does not, and should not, create a private law cause of action unless and until it modifies its substantive definitions of the covered actions and actors to create adequate legal certainty to avoid a flood of self-interested litigation.

3. *Disgorgement (forfeiture)*

Because the United Kingdom is a common law country equitable remedies are also generally available. So, in theory, a British court could order disgorgement of wrongful profit. However, the remedy of disgorgement is problematic because measuring the profits resulting from a bribe will at times be difficult or impossible, which is one reason to be hesitant to use disgorgement as a remedy to cases of international bribery.[104] Furthermore, permitting extraterritorial forfeiture could lead to overly zealous enforcement by prosecutors seeking to increase their budgets as well as to jurisdictional conflict.[105]

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102. "In many states, corporations that engage in bribery of public officials may be barred from receiving further government contracts for up to a three year period. Such statutes typically specify that subject to reasonable notice and an opportunity for a hearing, bidders, offerors, or contractors including, in some cases, natural persons such as partners, members, officers, directors, or responsible managing officers of such entities, can be excluded from public contracts based on *inter alia* a criminal conviction in relation to obtaining a public or private contract or a conviction of bribery under state or federal law. Constitutional challenges to such statutes have generally failed." *Id.* at 103-04.

103. "As with bars from procurement, many states make bribery convictions grounds upon which licenses may be withheld. The types of licenses to which such prohibitions apply range from licensed professional counselors to dentistry. Unlike the procurement bars discussed previously, the licensing restrictions can be far more onerous as they usually are irrefutable and presumably last a lifetime." *Id.* at 104.

104. Weiss, *supra* note 4, at 502-03.

105. "[W]hile foreign enforcement is in its relative infancy, the recent growth in the number of these actions is a trend that will continue and that may eventually create a risk of redundant enforcement." *Id.* at 481.

D. Reforming the British Statute through Greater Conceptual and Terminological Clarity

It is unproblematic that the British general offense reaches both the bribed and the briber. But, it is somewhat problematic that the British Act reaches commercial bribery because the British statute defines the offenses too vaguely. A more exacting and doctrinally coherent analysis would look at corruption as a variety of offenses: patronage/nepotism; bribery; misappropriation of funds (embezzlement); breach of fiduciary duty; unlawful and immoral conduct (*e.g.* illegal drugs, prostitution); betrayal of public trust; and political corruption.[106] Carr's groundbreaking work in defining corruption with specificity has not been completed, but legal scholars can and should try to organize thinking about corruption around the above mentioned concepts, and then seek to impose coherence onto the vague British Anti-Bribery Act thereby. Faced with an ambiguous statute but clear scholarship, judges could complete the meaning of the statute by referring to scholars' works as persuasive evidence of the (internationally applicable) law.

V. Overall Conclusions

Although the U.K. Anti-Bribery Act is poorly crafted, it does raise international standards because it effectively forces corporations to institute effective procedures to prevent bribery, such as corporate codes of conduct, internal trainings, contractual provisions, and "triple bottom line" auditing. The Act also raises the international standard by including facilitation payments and commercial bribery. But, because the statute casts its net so broadly, its attempt to raise the standard internationally may miss the mark. The extraterritorial character of the Act is not problematic. The vaguely defined predicate acts may be problematic but can be interpreted by courts so as to create adequate legal certainty for business, especially given the defense such of effective procedures. Doubtless, the Act will be amended, just as the U.S. FCPA was; perhaps facilitation payments will be exempted, or even commercial bribery. But, for now at least, companies are under the strongest pressure to institute procedures and standards so as to have the defense of adequate procedures in the event one of their employees breaks the law and should recast any requested facilitation payment contractually. This paper has tried to propose some interpretations of the Act which would reduce the uncertainties of the as-yet uninterpreted and unenforced law. Hopefully thereby it contributes to creating transparency and the rule of law in international commerce.

106. *See* Indira M. Carr, *Fighting Corruption Through Regional and International Corruption: A Satisfactory Solution?*, 15 Eur. J. Crime, Crim. L. Crim. Just. 121 (2007).