NOTE

DYSFUNCTIONAL EQUIVALENCE: WHY THE OECD ANTI-BRIBERY CONVENTION PROVIDES INSUFFICIENT GUIDANCE IN THE ERA OF MULTINATIONAL CORPORATIONS

MEG BEASLEY*

I. INTRODUCTION

Suppose Squeaky Clean is an Australian company that provides corporate cleaning services and products to both private and state-owned entities. The company's chief executive officer, Debbie Do-right, is especially proud of Squeaky's ethics record—it has been ranked as the "cleanest" company in Australia for the past eight years—a title that is now one of its top selling points. Debbie wants to expand into the international market by establishing subsidiaries in New Zealand, Korea, Japan, China, India, and the United Kingdom.

Debbie begins amending the company handbook, paying special attention to the ethics section regarding interactions with foreign governments. Her corporate counsel warns that trying to comply with such laws is almost impossible because there is no consistent international standard, but Debbie is undeterred. Because Squeaky is incorporated in Australia, she first identifies Australian laws regarding bribery of foreign public officials and discovers commentary on those laws by the Organisation for Economic Co-operation and Development (OECD). She continues reading the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention)[1] and assumes that because Australia, New Zealand, Korea, Japan, and the United Kingdom are signatories, they must have the same laws. She is surprised to learn that is not the case; despite being

* J.D. expected, 2015, The George Washington University Law School; B.A., 2010, The George Washington University. The author would like to thank Associate Dean Jessica Tillipman for her guidance and real-world insight into anticorruption, Professor Ann Woods Hawks for her editing assistance, and the *ILR* Editors and production team.

1. *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Letter of Submittal, Dec. 17, 1997, Hein's No. KAV 5210 [hereinafter OECD Convention].

parties to the OECD Convention, the laws have key differences. For example, her employees in Japan would be liable only if they succeed in paying the bribe, whereas anywhere else even the attempt is illegal; while small payments to facilitate routine transactions are legal in Australia and New Zealand, they are not in Korea, Japan, or the United Kingdom.

Confused but determined to persevere, Debbie turns to the laws of India and China, which are not parties to the OECD Convention but are parties—along with her other target markets—to the United Nations Convention Against Corruption (UNCAC).[2] She discovers that this convention provides no more help than the OECD Convention; it does not establish an actual law but rather encourages countries to use their own laws to promote anticorruption principles. After spending months compiling various laws, Debbie finalizes a complex, several-hundred page guide attempting to include all potential liabilities and defenses, and institutes robust training and oversight measures.

Two years after Squeaky Clean's international debut, Debbie learns that an employee from the London office, Slick, offered to take a British government official on a yacht tour of the Long Island Sound while at a conference in New York. Because the U.K. Bribery Act (Bribery Act)[3] recognizes a defense where the company can show there were adequate procedures in place to prevent bribery, U.K. prosecutors decided not to prosecute Squeaky but rather to prosecute Slick—who Debbie quickly fired—as a private individual. Australian officials did not to press charges against Squeaky, despite having jurisdiction as the country of incorporation, but did impose a two-year probationary period.

Three years after the U.K. and Australian investigations concluded, Debbie learns that the United States Department of Justice (DOJ) is pressing charges for the same cruise offer. The DOJ feels the punishments imposed by Britain and Australia were insufficient because Slick's proffered tour was one of many perks accepted by the official and the DOJ wants to send a message. Debbie is confounded; Squeaky has no connection to the United States at all. She learns, however, that the U.S. Foreign Corrupt Practices Act

2. United Nations Convention Against Corruption, G.A. Res. 58/4, Detailed Analysis at 2, U.N. Doc. A/RES/58/4 (Oct. 31, 2003) [hereinafter UNCAC].

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

(FCPA)[4] reaches any act of bribery committed on U.S. soil, regardless of the parties' nationalities or business ties.

Unlike the Bribery Act, the FCPA does not recognize an adequate procedures defense, and the DOJ holds Squeaky liable for Slick's action. Debbie attempts to argue that the yacht tour was related to business and is therefore covered by the FCPA's bona fide expenditure defense, but DOJ determines the trip was primarily for personal pleasure and proceeds with the prosecution. Debbie is devastated: not only will Squeaky have to pay a fine for the rogue behavior of a former employee but it will also lose its status as the most ethical company in Australia. She remembers what her counsel told her and thinks, "Why even bother trying? My competitors who simply hide their misdeeds are better off than I am trying to comply with the law."

This fictitious—though entirely possible—situation is the result of widely varying national laws that govern the bribery of foreign public officials (also known as transnational bribery or TNB) and the ineffective approach to coordinate those laws (e.g., "functional equivalence"). Functional equivalence seeks to harmonize multiple legal regimes—rather than create a new legal standard—by requiring countries to amend their existing laws to promote similar underlying principles. Though appealing in theory, the international community's efforts to harmonize disparate TNB laws have produced a legal regime that is neither functional nor equivalent because it has not created a consistent standard for permissible interactions between corporations and government officials. As a result, multinational companies (MNCs) continue to operate in an environment of legal uncertainty, harming both the corporations and the effort to eradicate bribery.

The MNCs recognize that "[c]orruption is an impediment to international business, to fair competition, and to sustainable global development" and that "it is not the way to do [business]."[5] However, companies trying to comply with bribery laws often face an "aura of ambiguity" because the lack of a single standard leaves them unsure of the scope of their liability.[6] Even when individual

4. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78-dd-1 to -3, -ff (1977) [hereinafter FCPA].

5. Catherine Dunn, *Double Jeopardy and the New World of Antibribery Laws*, CORP. COUNS. (Mar. 12, 2012), http://www.immagic.com/eLibrary/ARCHIVES/GENERAL/GENPRESS/C120312D.pdf (quoting Massimo Montavi, corporate counsel of Italian Oil and Gas multinational Eni).

6. Harold Kim, Remarks at The George Washington University Law School Conference: The International Fight Against Corruption: Are the OECD and UN Conventions

countries issue guidance regarding their own laws, such resources are of little help for companies operating in today's "post-Westphalian business reality [where] businesses form multiple chains of relationships with little regard for political borders."[7] The MNCs need a single standard to determine the legality of their conduct in advance.[8] Moreover, companies have the potential to be on the "front line" of antibribery efforts because they are in the best position to detect violations, but the only way to capitalize on this advantage is to improve communication between regulators and corporations and develop a single standard.[9]

The current TNB regime fails to provide consistent guidance for MNCs regarding key principles such as liability, defenses, and sanctions. Individual national laws and nonbinding treaties, while beneficial in isolation, create an unpredictable patchwork of liability when viewed holistically, as MNCs must. Inconsistent laws both discourage corporate investment in overseas projects and undermine the TNB eradication efforts;[10] rather than trying to understand and synthesize the multitude of standards to which they are accountable, companies will simply seek to find loopholes under the most permissive laws or conclude that any sanction is worth the advantage gained.[11] The only way to resolve this dilemma is to establish a single international standard defining liability, defenses, and sanctions. Pursuant to a treaty, all nations should agree to adopt such a

---

Achieving Their Objectives? (Dec. 4, 2013) (notes on file with author). Kim is the Executive Vice President of the U.S. Chamber of Commerce for Legal Reform.

7. Philip M. Nichols, *The Business Case for Complying with Bribery Laws*, 49 Am. Bus. L.J. 325, 366–67 (2012); *see also* Stephen J. Kobrin, *Globalization, Transnational Corporations and the Future of Global Governance*, *in* Handbook of Research on Global Corporate Citizenship 249, 253, 255, 259 (Andreas Georg Scherer & Guido Palazzo eds., 2008) (arguing that the transition to a transnational—rather than international—economy has caused dissonance due to a lack of transnational governance mechanisms).

8. *See Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 3–4 (2011) (opening statement by Rep. Robert C. Scott, Ranking Member, H. Subcomm. on Crime, Terrorism, and Homeland Sec.) (observing that good faith rules force companies to make unsubstantiated guesses as to what is proper).

9. Kim, *supra* note 6.

10. See Irina Sivachenko, *Corporate Victims of "Victimless Crime": How the FCPA's Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance*, 54 B.C. L. Rev. 393, 411 (2013).

11. David L. Heifetz, *Japan's Implementation of the OECD Anti-Bribery Convention: Weaker and Less Effective than the U.S. Foreign Corrupt Practices Act*, 11 Pac. Rim L. & Pol'y J. 209, 223 (2002).

standard in its entirety and agree to enforcement oversight by an international body.[12]

Part II of this Note will describe the evolution of the current TNB regime and Part III will explain the theory of functional equivalence at the heart of existing anticorruption conventions. Part IV will discuss key areas in which functional equivalence has failed to create a consistent or equitable standard and Part V will propose the ideal single international standard and explain why it is the most effective solution. Finally, Part VI of the Note will conclude with an illustration of how such a standard would facilitate the MNC operations and compliance and discuss the broader social benefits that would result.

II. The Evolution of the Current TNB Regime

Although many countries have laws prohibiting bribery of foreign public officials[13] and numerous treaties either directly address or include measures to combat such bribery,[14] this Note will discuss only the most significant regimes: the FCPA, the OECD Convention, the UNCAC, and the Bribery Act. Individually and collectively, these regimes have the greatest impact on TNB because of their timing, substantive law, signatories, and commitment to enforcement.

---

12. The details regarding the proper body to promulgate and enforce such a standard are beyond the scope of this Note, but such a body would be responsible for developing the precise language setting out the concrete transnational bribery (TNB) standard proposed in this Note as well as overseeing its implementation and enforcement by signatories.

13. Notably, Russia, Brazil, and Colombia, traditional "hotbeds" of corruption, have recently developed their anticorruption regimes to approach international standards in order to integrate into the global marketplace and eradiate the economic harm of corruption to their companies and economies. *See* Bridget Petherbridge & Alison Geary, *Global Trends in Anti-Corruption: Is the OECD Leveling the Playing Field?*, In-House Law., Dec. 2012/Jan. 2013; Nichols, *supra* note 7, at 362 tbl. 2 (complete list of countries that criminalize TNB).

14. These treaties vary widely in terms of the proscribed conduct, sanctions, binding nature, and enforcement making it difficult to even characterize their coverage. Regional treaties not discussed here include: Inter-American Convention Against Corruption, *done* Mar. 29, 1996, 35 I.L.M. 724; African Union Convention on Preventing and Combating Corruption, *done* July 11, 2003, 43 I.L.M. 5; Council of Europe, Criminal Law Convention on Corruption, *opened for signature* Jan. 27, 1999, C.E.T.S. No. 173; Council of Europe, Civil Law Convention on Corruption, *opened for signature* Nov. 4, 1999, C.E.T.S. No. 174; Convention on the Protection of the European Communities' Financial Interests, *adopted* July 26, 1995, 1995 O.J. (C 316) 48.

A. *The FCPA Lays the Foundation for Fighting TNB.*

Enacted in 1977, the FCPA was the first statute to criminalize the bribery of foreign public officials and thus established the framework for subsequent legislation and agreements.[15] It targets only the bribery of foreign public officials, and its purpose is not to prevent all bribery but rather to target grand corruption in order to level the playing field as to companies competing for business internationally.[16] The FCPA prohibits U.S. persons and businesses (i.e., "domestic concerns"), U.S. and foreign public companies listed on stock exchanges in the United States or which are required to file periodic reports with the Securities and Exchange Commission (i.e., "issuers"), and certain foreign persons and businesses acting while in furtherance of a bribe in the territory of the United States (i.e., "territorial jurisdiction") from making corrupt payments to foreign officials to obtain or retain business.[17] The FCPA remains one of the strictest and most well enforced TNB laws.[18]

B. *The OECD Convention Globalizes the Fight Against TNB.*

Spurred by the FCPA and U.S. Congress,[19] the 1997 adoption of the OECD Convention was the next significant step in fighting TNB and signaled the internationalization of the effort.[20] It

15. Int'l Bar Ass'n, Report of the Task Force on Extraterritorial Jurisdiction 7 (2009) [hereinafter IBA Report], *available at* http://tinyurl.com/taskforce-etj-pdf.

16. Peter B. Clark, Remarks at The George Washington University Law School Conference: The International Fight Against Corruption: Are the OECD and UN Conventions Achieving Their Objectives? (Dec. 4, 2013) (notes on file with author).

17. Criminal Div. of the U.S. Dep't of Justice & Enforcement Div. of the U.S. Sec. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 2 (2012) [hereinafter FCPA Guide]. The Foreign Corrupt Practices Act (FCPA) also has an accounting provision, but this Note discusses only the antibribery provision. Though the FCPA is seen as having expansive jurisdiction, some national laws go even further. For example, Hungary may prosecute non-nationals for the payment or receipt of bribes whenever the conduct is a crime where it occurred, regardless of any substantial connection to Hungary. *See* Büntető Törvénykönyv [Btk.] [Criminal Code], VIII, § 258B, ¶ 4(1)(a) (Hung.).

18. Jon Jordan, *The Need for a Comprehensive International Foreign Bribery Compliance Program, Covering A to Z, in an Expanding Global Anti-Bribery Environment*, 117 Penn St. L. Rev. 89, 94–95, 104–05 (2012); *see also* Nichols, *supra* note 7, at 360 ("[T]he [FCPA] still shapes the behaviors of many transnational businesses.").

19. *See* Jordan, *supra* note 18, at 99.

20. Clark, *supra* note 16. The Organisation for Economic Co-operation and Development (OECD) is broader than this one convention; the organization is a partnership of thirty-four countries ranging from advanced nations such as the United States to developing countries like Turkey; it also works with emerging powers like China, India, and Brazil. It provides a forum in which governments collaboratively seek solutions to a wide variety of

entered into force on February 15, 1999, and holds the greatest potential to reduce the incidence and impact of TNB.[21] The multilateral agreement's potential lies in the identities of the OECD's thirty-four member countries,[22] which collectively account for fifty-nine percent of world GDP, seventy-five percent of world trade,[23] and ninety percent of foreign direct investment.[24] These economic leaders house a majority of MNCs, meaning the companies are subject to the OECD Convention. In addition to its member countries, six non-member countries have signed the Convention.[25] Signatories have jurisdiction over crimes based on the identity of the offender and the location of the offense,[26] and countries are to provide "to the fullest extent possible under [their] laws . . . prompt and effective legal assistance" to other countries for criminal investigations.[27] Representatives of each of the thirty-six State Parties make up the OECD Working Group on Bribery in International Business Transactions (Working Group), which exercises oversight and enforcement functions.[28]

The OECD Convention shares the FCPA's preference for a formal, equalizing convention rather than a "soft law" approach of simply encouraging every country to develop their own law with an

problems, including agriculture, health, finance, and regulatory reform. *See generally About the OECD*, OECD.ORG, http://www.oecd.org/about (last visited Nov. 23, 2014) (outlining the mission of the OECD). The Organisation predates the Convention.

21. *See generally* OECD Convention, *supra* note 1 (putting into law the methods to reduce foreign corrupt practices).

22. *See* Lucinda Lowe, Remarks at The George Washington University Law School Conference: The International Fight Against Corruption: Are the OECD and UN Conventions Achieving Their Objectives? (Dec. 4, 2013) (notes on file with author) (explaining that it is more important to have signatories that are established or growing powerhouses in world trade than merely to have a large number of signatories).

23. *About the OECD*, U.S. MISSION TO OECD, http://usoecd.usmission.gov/mission/overview.html (last visited Nov. 23, 2014).

24. Gemma Aiolfi & Mark Pieth, *How to Make a Convention Work: The OECD Recommendation and Convention on Bribery as an Example of a New Horizon in International Law*, OIL GAS & ENERGY L. INTELLIGENCE J., Dec. 2003, at 3.

25. *See* OECD Convention, *supra* note 1. The six nonmember countries are Argentina, Brazil, Bulgaria, Colombia, Russia, and South Africa. OECD, COUNTRY REPORTS ON THE IMPLEMENTATION OF THE OECD ANTI-BRIBERY CONVENTION (last visited Nov. 23, 2014).

26. OECD Convention, *supra* note 1, art. 4.

27. *Id.* art 9.1.

28. *OECD Working Group on Bribery in International Business Transactions*, OECD.ORG, http://www.oecd.org/corruption/anti-bribery/anti-briberyconvention/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm (last visited Mar. 4, 2014). Only State Parties, not mere signatories, have representatives in the Working Group. The Group is primarily responsible for the enforcement mechanism, peer review. The OECD's enforcement mechanism is beyond the scope of this Note. For more information on OECD peer review, see *Peer Review*, OECD.ORG, http://www.oecd.org/site/peerreview (last visited Nov. 23, 2014).

eye toward a generally shared goal.[29] The Convention relies on functional equivalence, explaining its signatories' requirements as follows:

> Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.[30]

The OECD Convention created a universal awareness of the TNB laws and resulted in a "crescendo" of private sector reactions when companies began to understand the consequences of violations.[31] It has also given rise to the anticorruption compliance industry as companies seek guidance regarding the various laws created in its wake.[32]

C. *The UNCAC Becomes the Largest Legal Regime Addressing TNB.*

In 2003, the U.N. General Assembly sought to expand the fight against TNB by adopting the UNCAC, which entered into force in 2005.[33] The UNCAC is the most endorsed multilateral agreement, with 140 signatories and 168 parties.[34] The UNCAC requires signatories to criminalize basic forms of corruption such as bribery and embezzlement, as well as trading in influence and money laundering; it also dedicates significant attention to corruption prevention.[35] However, in seeking to address the phenomena of bribery and corruption in all of its forms, the UNCAC's primary purpose is to benefit citizens of countries riddled with and choked by such corruption, not to resolve the tangled liability web facing MNCs.[36]

---

29. Clark, *supra* note 16.

29. *See* OECD Convention, *supra* note 1, art. 1.1. This provision embodies the concept of functional equivalence.

31. Homer Moyer, Remarks at The George Washington University Law School Conference: The International Fight Against Corruption: Are the OECD and UN Conventions Achieving Their Objectives? (Dec. 4, 2013) (notes on file with author).

32. *Id.*

33. *United Nations Convention Against Corruption*, U.N. Off. on Drugs & Crime, http://www.unodc.org/unodc/en/treaties/CAC (last visited Nov. 23, 2014).

34. *Id.* (as of Nov. 9, 2013).

35. UNCAC, *supra* note 2, arts. 15–23.

36. Lindy Muzila & Andrew Spalding, Remarks at The George Washington University Law School Conference: The International Fight Against Corruption: Are the OECD and UN Conventions Achieving Their Objectives? (Dec. 4, 2013) (notes on file with author).

D. *The U.K. Bribery Act Raises the Bar for the TNB Prosecution.*

The 2010 U.K. Bribery Act is one of the most recent additions to the TNB legal regime[37] and largely regarded as the strictest.[38] Like the FCPA, "its remit is to deal with the 'top slice' of economic crime,"[39] but unlike the FCPA, which is narrowly tailored to bribery of foreign public officials, the Bribery Act overhauled the United Kingdom's entire antibribery scheme and addresses all types of domestic and international bribery.[40] Thus, multiple sections of the Act must be read together to establish the full scope of TNB liability.[41] Section 6 of the Act addresses bribery of foreign public officials and Section 7 deals specifically with corporate liability.[42] The Bribery Act applies to any bribery committed in the United Kingdom; its extraterritorial reach also encompasses persons or companies that have a "close connection" with the United Kingdom.[43]

Overall, because of the content, jurisdictional reach,[44] enforcement commitment[45] of the FCPA and the Bribery Act, and the number and nature of the signatories to the OECD Convention and the UNCAC, these four regimes provide the most relevant bases for analyzing the current TNB legal environment.

---

37. IBA Report, *supra* note 15, at 207.

38. Jordan, *supra* note 18, at 92; *see also The Bribery Act*, Transparency Int'l UK, http://www.transparency.org.uk/our-work/bribery-act (last visited Nov. 23, 2014).

39. Suzi Ring, *Alstom Said to Face U.K. Bribery Charges After Five-Year Probe*, Bloomberg (Feb. 19, 2014, 9:46 AM), http://www.bloomberg.com/news/2014-02-19/alstom-said-to-face-u-k-bribery-charges-after-five-year-probe.html (quoting Matthew Bruce, a London-based lawyer at Freshfields Bruckhaus Deringer LLP) (internal quotation marks omitted); *see also* Clark, *supra* note 16 (explaining that the FCPA was meant to target grand corruption).

40. Michael Fine, Coordinating UK Bribery Act and FCPA Compliance 5 (2011).

41. *See generally* Bribery Act, 2010, c. 23 (U.K.).

42. *Id.* §§ 6, 7(1)(a)(b). Section 7 was necessary because U.K. law does not recognize *respondeat superior*, and the narrow scope of the prior corporate liability standard made prosecution exceedingly rare. Peter Alldridge, *The U.K. Bribery Act: "The Caffeinated Younger Sibling of the FCPA"*, 73 Ohio St. L.J. 1181, 1200 (2012).

43. "Close connection" is understood to mean citizenship or residency in the case of individuals, and incorporation or a presence in the United Kingdom in the case of companies. Peter Wilkinson, Transparency Int'l UK, The 2010 UK Bribery Act: Adequate Procedures 8 tbl. 1 (2010), *available at* http://www.transparency.org.uk/our-work/publications/95-adequate-procedures—guidance-to-the-uk-bribery-act-2010.

44. *See* Sam Eastwood & Holly Quinnen, *Differences Between the UK Bribery Act and the US Foreign Corrupt Practices Act*, Norton Rose Fulbright (June 2011), http://www.nortonrosefulbright.com/knowledge/publications/52195 (discussing the Bribery Act and the FCPA).

45. Nichols, *supra* note 7, at 366.

III. Establishing and Enforcing an International Standard: The Theory and Failings of Functional Equivalence

An international TNB regime requires coordination because of the limited scope of and content variations among national laws. This need has grown significantly as the expansion of transnational laws, coupled with the expansion of domestic laws, has created an even more complex compliance and enforcement environment than just ten years ago;[46] enforcement of these laws is increasing as well.[47] However, instead of producing a consistent standard, the functional equivalence approach employed by both the OECD Convention and the UNCAC has created a web of incongruous and even conflicting liability.[48]

Functional equivalence seeks to harmonize multiple legal regimes by "defining goals and offering a choice of means tailored to local legal traditions and fundamental concepts."[49] To achieve this, conventions identify key principles but give each country the discretion to implement or amend its current laws to serve those principles. This method "demands a holistic approach to the examination of a law or legal concept within an individual legal system."[50]

For example, many UNCAC provisions call for parties to adopt measures consonant with their own domestic laws or "to the greatest extent possible within [their] domestic legal system."[51] Though this flexible structure had the positive effect of attracting a large number of signatories, it has the negative effect of providing a "potential escape clause for reluctant legislators."[52] Similarly, the

46. Dunn, *supra* note 5.

47. Jordan, *supra* note 18, at 90–91; *see, e.g.*, *FCPA and Related Enforcement Actions*, U.S. Dep't Justice, http://www.justice.gov/criminal/fraud/fcpa/cases/a.html (last visited Nov. 23, 2014); *SEC Enforcement Actions, FCPA Cases*, U.S. Sec. & Exchange Commission, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited Nov. 23, 2014).

48. When such a single standard is established, the international community will also need to devise an enforcement mechanism to ensure each country meets its obligations. Currently the UNCAC and OECD employ a self-policing process known as peer review. *See Peer Review*, *supra* note 28; UNCAC, *supra* note 2, art. 63. However, the OECD has enjoyed limited success with this process, and it has been even less effective in the context of the UNCAC. *See* Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 J. Int'l Econ L. 191 (2005). Webb served as a law clerk at the International Court of Justice, the Hague. While resolving the flaws of peer review is beyond the scope of the Note, it is an issue that should be pursued as the international TNB landscape evolves.

49. Aiolfi & Pieth, *supra* note 24, at 4.

50. *Id.*

51. UNCAC, *supra* note 2, arts. 23, 31.

52. Webb, *supra* note 48, at 206.

OECD Convention prescribes minimum standards and grants countries discretion in meeting those standards by requiring only that signatories "*take such measures as may be necessary* to establish that it is a criminal offence under its law."[53]

In theory, functional equivalence has the advantage of allowing states to enact the TNB laws without needing to implement drastic changes to their current legal regimes. Nevertheless, in reality it has no direct effect on criminalization because the required standards are minimal and permit substantial latitude in implementation;[54] though the conventions nominally require criminalization of TNB, they do not define criminalization. Thus, in practice they "produce[ ] only limited harmonisation" with respect to the substantive conduct each country prohibits, as well as many other significant issues such as jurisdiction, types of liability, sanctions, exceptions, and defenses.[55] Even the architect of the OECD Convention acknowledges the gaps in the current regime.[56]

Moreover, even if resultant incongruent standards are not problematic on their own, they become so when concurrently and cumulatively applied to MNCs. The TNB functional equivalence produces an environment disproportionately hostile to MNCs because it fails to recognize the legal uncertainty arising from operation in numerous spheres with different laws. The global reach and multilayered complex transactions of these companies expose them to liability in many jurisdictions for many types of conduct. For example, one case involved twelve possible jurisdictions with twelve different sets of law.[57] In contrast, individual actors who operate in limited spheres have a clearer picture of potential liability.[58]

---

53. OECD Convention, *supra* note 1, art.1.1 (emphasis added).

54. *See* IBA Report, *supra* note 15, at 209.

55. *Id.*; *see also* Nichols, *supra* note 7, at 364 (discussing differences among the substantive content of various national TNB laws).

56. *See* Mark Pieth, *What is Functional Equivalence in the OECD Convention on Combating Bribery?*, Ethic Intelligence (Dec. 2013), http://www.ethic-intelligence.com/experts/381-functional-equivalence-in-the-oecd-convention-on-combating-bribery.

57. Mark Pieth, Remarks at the OECD Working Group Consultation in Paris, France (Oct. 2011) (on file with the Virginia Journal of International Law Association). The case involved the joint venture known as TSKJ, comprised of Technip S.A., Snamprogetti Netherlands B.V., Kellogg Brown & Root Inc., and JGC Corporation. The venture hired agents to pay approximately $180 million in bribes to a wide range of Nigerian government officials in order to obtain and retain contracts to build liquefied natural gas facilities on Bonny Island, Nigeria. TSKJ was awarded four such contracts, valued at more than $6 billion, by Nigeria LNG Ltd. Elizabeth K. Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 Va. J. Int'l L. 1, 27–31 (2012).

58. *See* IBA Report, *supra* note 15, at 209.

Not only is current regime unfair, it is ineffective. A lack of timelines and concrete commitments has rendered the UNCAC merely a "*lex stimulata*: 'a legislative exercise that produces a statutory instrument apparently operable, but one that neither prescribers, those charged with its administration, nor the putative target audience ever intend to be applied.'"[59] For this reason, subsequent discussion of functional equivalence in this Note focuses on its use by the OECD Convention, which has enjoyed somewhat more, though still limited, success.[60]

Though the OECD Convention has been marginally more successful than the UNCAC,[61] the leading anticorruption organization Transparency International reports that among the forty signatories to the Convention, only four countries—representing 26.6 percent of the world's exports—actively enforce the TNB laws.[62] The remaining statistics show that four countries with 6.1 percent of world exports have moderate enforcement, ten countries representing 11.3 percent have limited enforcement, and twenty countries with 26.9 percent have little to no enforcement.[63] Designation of "active" or "moderate" enforcement requires commencement or conclusion of at least one major case in the past four years.[64] Yet, even when countries meet this requirement, significant inadequacies in legal framework and enforcement systems can result in classification as a limited enforcer.[65]

Thus, sixteen years after coming into force, jurisdictions representing almost seventy-five percent of the world's exports do not

59. Webb, *supra* note 48, at 221 (quoting W. Michael Reisman, Folded Lies: Bribery, Crusades, and Reforms 31 (1979)).

60. Charles Duross, Remarks at The George Washington University Law School Conference: The International Fight Against Corruption: Are the OECD and UN Conventions Achieving Their Objectives? (Dec. 4, 2013) (notes on file with author).

61. For example, the DOJ developed the FCPA Guide, see *supra* note 17, when the OECD Working Group Peer Review showed that companies continued to struggle with the law. Duross, *supra* note 60. Many also credit passage of the Bribery Act to pressure from the OECD following the BAE scandal. Spahn, *supra* note 57, at 23–24. The BAE scandal, also known as the Al Yamamah arms deal, arose when Britain's Serious Fraud Office allegedly abandoned an inquiry into a BAE arms deal with Saudi Arabia because of rumored security threats. *See generally* Alldridge, *supra* note 42 (more information about the BAE case).

62. Fritz Heimann et al., Transparency Int'l UK, Exporting Corruption: Progress Report, 2013, at 2 (2013), *available at* http://www.transparency.org/whatwedo/pub/exporting_corruption_progress_report_2013_assessing_enforcement_of_the_oecd. These nations are the United States, Germany, the United Kingdom, and Switzerland.

63. *Id.* at 4.

64. *Id.* at 6 n.3.

65. *See, e.g.*, *id.* at 25–27 (classifying Canada as a limited enforcer, despite the fact that three cases were initiated and three concluded between 2010 and 2013).

meaningfully enforce the OECD Convention provisions. Moreover, the number of countries in the "active enforcement" and "moderate enforcement" categories has declined, demonstrating a weakening dedication to national enforcement.[66] Despite the increase in the number of anticorruption laws, only twenty-two countries have pursued any enforcement under such provisions in the past thirty-six years.[67]

IV. Disparate Standards that Functional Equivalence Has Failed to Harmonize

The most significant TNB laws for MNCs today are the FCPA, the Bribery Act, and the OECD Convention because of their content, coverage, and enforcement.[68] Even so, these laws create an inconsistent TNB regime with regard to several key areas including (A) liability, (B) means by which to avoid liability, and (C) sanctions.[69]

A. *Liability*

The current regime provides inconsistent liability regarding the (1) substantive definition of the offense, (2) corporate criminal liability, and (3) subsidiary liability; however, the regime is consistent in (4) declining to protect corporations from multiple prosecutions. The liability discrepancies create an environment in which MNCs cannot operate confidently because they do not know what policies are acceptable or by which standards to train their employees. Prevention may indeed be "the best defense to liability for

66. *Id.* at 5, 8.

67. Trace Int'l, Global Enforcement Report 2010, at 5 (2010).

68. *See generally supra* Part II.

69. The regimes also have inconsistent procedural issues, such as cooperation procedures and statutes of limitation. *See* OECD Convention, *supra* note 1, art. 6; FCPA Guide, *supra* note 17, at 34–35; *Global Anti-Bribery Compliance: Statutes of Limitations*, Deming PLLC (Nov. 23, 2011), http://www.deminggroup.com/blog/2011/11 (explaining that in most common law jurisdictions, including the United Kingdom, indictable offenses such as bribery are not subject to statutes of limitation). These elements are within the purview of the respective law enforcement agencies and thus beyond the scope of this Note but will need to be addressed moving forward. For discussion of the importance of a single statute of limitations, see Gabelli v. SEC, 133 S. Ct. 1216, 1217 (2013); *see also* Carlos F. Ortiz & Madeleine Moise Cassetta, LeClairRyan, Understanding the UK Bribery Act 2010 and How Liability Arising Thereunder May Be Limited 7 (2010), *available at* http://www.leclairryan.com/files/Uploads/Documents/Understanding%20The%20UK%20Bribery%20Act%202010%20and%20How%20Liability%20Arising%20Thereunder%20May%20Be%20Limited.pdf (chart-comparison of these issues). For additional information on the negative incentives created by conflicting cooperation procedures, see F. Joseph Warin et al., Gibson Dunn/Navigant, FCPA and U.K. Bribery Act Enforcement and Compliance in 2012, at 28 (2012), *available at* http://www.securitiesdocket.com/wp-content/uploads/2012/09/Sept-28-2012-Consolidated.pdf.

foreign bribery,"[70] but companies cannot prevent bribery without a clear definition of it, an element the current regime lacks.

1. Substantive Definition: Types of Payments and to Whom

Though all regimes seek to prevent TNB, different definitions of the offense create a threshold uncertainty for MNCs regarding the type of payments prohibited and the position of the individual receiving the payment.

The FCPA, Bribery Act, and OECD Convention all criminalize giving a bribe, known as supply-side or active bribery.[71] The OECD elected to focus only on supply-side bribery because its Members collectively house most MNCs, which are the greatest potential source of bribe payments.[72] The OECD recognized that existing domestic bribery laws were better suited to addressing the receipt of such bribes, known as demand-side or passive bribery.[73] The subsequent passage of the UNCAC, which addresses passive bribery, further reduced the need for the OECD Convention to prohibit it.[74] In contrast, the Bribery Act goes further, prohibiting demand-side or passive bribery.[75]

The Bribery Act also imposes additional liability on corporations for failing to have procedures to prevent bribery,[76] a violation that does not require knowledge, intent, or recklessness.[77] In doing so, it pointedly alters the traditional notion of common law liability for omissions—which is typically reserved for situations where there is a duty to act—by placing "a clear onus upon the employer to do something to ensure that employees do not engage in the proscribed activity."[78]

---

70. Jordan, *supra* note 18, at 104.

71. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(a), -2(a), -3(a) (1977) [hereinafter FCPA]; *see* FCPA GUIDE, *supra* note 17, at 10. The FCPA prohibits only the giving of a bribe, so-called "active bribery" made to obtain or retain business, not the demanding or accepting of a bribe, so-called "passive bribery." Bribery Act, 2010, c. 23, § 6 (U.K.); IBA REPORT, *supra* note 15, at 225–26. Additionally, all six major treaties prohibit this type of bribery. *See supra* note 14 (list of the six treaties).

72. *Fighting Bribery & Corruption: Frequently Asked Questions*, OECD.ORG, http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/fightingbriberyandcorruptionfrequentlyaskedquestions.htm [hereinafter *OECD FAQs*] (last visited Nov. 23, 2014).

73. *Id.*

74. *See* UNCAC, *supra* note 2.

75. *Id.* art. 15(b); *see also The Bribery Act*, *supra* note 38.

76. MINISTRY OF JUSTICE, THE BRIBERY ACT 2010—GUIDANCE 15 (2011); *see* WILKINSON, *supra* note 43, at 12; *see also* Bribery Act, § 7 (further discussion of subsidiary liability and avoidance of liability).

77. Alldridge, *supra* note 42, at 1202 (citing the Bribery Act).

78. *Id.*

The three regimes also define "foreign public official" differently, covering different combinations of the following: any person holding a legislative, administrative, or judicial office of a foreign country, whether appointed or elected;[79] any person exercising a public function for a foreign country, including for a public agency or public enterprise;[80] any official or agent of a public international organization;[81] foreign officials, foreign political parties, or officials thereof;[82] candidates for foreign political office;[83] any person, while knowing that all or a portion of the payment will be offered, given, or promised to an individual falling within one of these prior categories.[84] Of significance, the FCPA, unlike the Bribery Act and the OECD Convention, includes officials of political parties in its definition of foreign public officials.[85]

2. Corporate Criminal Liability[86]

While the FCPA and the Bribery Act impose criminal liability for both natural and legal persons (i.e., corporations),[87] the OECD Convention does not.[88] The OECD Convention requires signatories to establish bribery of foreign officials as a criminal offense[89] punishable with criminal sanctions[90] and to "take such measures as may be necessary, in accordance with [their] legal principles, to establish the liability of legal persons" for such an offense.[91] However, when States do not recognize criminal liability of legal persons, functional equivalence requires only that they "ensure that

79. *See* Bribery Act, § 6.5 to .6; OECD Convention, *supra* note 1, art. 1.4; Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(b), -2(d)(2) (1977) [hereinafter FCPA].

80. FCPA, § 78dd-1(b), -2(d)(2); Bribery Act, § 6.5 to .6; OECD Convention, *supra* note 1, art. 1.4.

81. Bribery Act, § 6.5 to .6.

82. FCPA Guide, *supra* note 17, at 19–20.

83. *Id.*

84. *Id.*

85. FCPA, § 78dd-1(a)(2) to (3), -2(a)(2) to (3); Bribery Act, § 6.5; OECD Convention, *supra* note 1, art. 1.4. Even within the FCPA actions, the DOJ's "tenuous and dubious legal interpretation" of foreign official, which is rarely subject to judicial scrutiny, results in inconsistent and illogical prosecutions. Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 Ind. L. Rev. 389, 412 (2010).

86. For discussion of the evolution of criminal liability for legal persons, see Indira Carr & Opi Outhwaite, *The OECD Anti-Bribery Convention Ten Years On*, 5 Manchester J. Int'l Econ. L. 3, 14–15 (2008).

87. FCPA, § 78-dd-1(a) to -3(a); Bribery Act, §§ 6–7.

88. OECD Convention, *supra* note 1, art. 3.2.

89. *Id.* art. 1.

90. *Id.* art. 3.1.

91. *Id.* art. 2.

legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions."[92]

3. Subsidiary Liability

The liability of corporations for the actions of their subsidiaries varies widely under national laws, and the OECD Convention does not address it at all.[93] Under the FCPA, parent companies are liable for violations committed by their subsidiaries in two ways. First, "a parent may have participated sufficiently in the activity to be directly liable for the conduct," and second, "a parent may be liable for its subsidiary's conduct under traditional agency principles";[94] in either scenario, "[t]he fundamental characteristic of agency is control."[95]

Under the Bribery Act, a parent company is liable if "a person . . . associated with [it] bribes another person intending . . . to obtain or retain business . . . or . . . an advantage in the conduct of business, for [the company],"[96] unless the parent can show that it had adequate measures in place to prevent the violations.[97] Though some argue that the fact that the violation occurred is proof that the preventative measures were not adequate, this provision reflects the reality that individuals are autonomous and might act contrary to the policies of their employer.[98]

Both the FCPA and Bribery Act reflect the role of prosecutorial discretion in determining when it is appropriate to hold the parent company liable, but the FCPA turns on control whereas the Bribery Act turns on preventative measures. While these concepts are not mutually exclusive, the evidence to satisfy the two inquiries would likely be different,[99] thus creating two standards for MNCs.

---

92. *Id.* art. 3.2.

93. *See* HEIMANN ET AL., *supra* note 62, at 10.

94. FCPA GUIDE, *supra* note 17, at 47. An employer is subject to liability for torts committed by employees while acting within the scope of their employment. RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006); *see, e.g.*, Pacific Can Co. v. Hewes, 95 F.2d 42, 46 (9th Cir. 1938) ("Where one corporation is controlled by another, the former acts not for itself but as directed by the latter, the same as an agent, and the principal is liable for the acts of its agent within the scope of the agent's authority.").

95. FCPA GUIDE, *supra* note 17, at 27. The DOJ markedly increased such actions in 2013. Shearman & Sterling LLP, *Recent Trends and Problems in the Enforcement of the Foreign Corrupt Practices Act*, FCPA DIGEST, Jan. 2014, at 2, *available at* http://www.shearman.com/~/media/Files/Services/FCPA/2014/FCPADigestTPFCPA010614.pdf.

96. Bribery Act, 2010, c. 23, § 7(1)(a)(b) (U.K.).

97. See *id.* § 7(2), (3)(b) for a discussion of adequate procedures.

98. Alldridge, *supra* note 42, at 1203.

99. *See* FINE, *supra* note 40, at 12.

The intent of subsidiaries also differs under the two laws. Under the Bribery Act, parents are strictly liable only when the subsidiary performs services for or on the behalf of the parent,[100] whereas under the FCPA, parents can be liable even for a subsidiary's self-serving actions.[101]

4. Liability for Multiple Prosecutions

One liability issue on which all three regimes do align is the ability of multiple countries (provided they have jurisdiction) to prosecute a company for the same conduct.[102] The OECD Convention does not limit prosecutorial discretion, instructing only that when more than one Party has jurisdiction over the offense, they consult to determine who has "the most appropriate jurisdiction for prosecution."[103] Nevertheless, there is no actual bar to each country's ability to prosecute while or after other countries conduct their own proceedings because the OECD Convention's language is simply advisory.[104] Some characterize subsequent prosecutions as violations of double jeopardy[105] or *ne bis in idem*,[106] but the FCPA, OECD Convention, and Bribery Act all recognize the propriety of these actions.[107]

B. *Avoidance of Liability*

Under the current regime, some laws recognize exceptions and affirmative defenses that allow companies to avoid liability. These include an exception for facilitation payments[108] and three affirma-

100. Ministry of Justice, *supra* note 76, ¶ 42, at 17.

101. Wilkinson, *supra* note 43, at 4.

102. *See* Michael P. Van Alstine, *Treaty Double Jeopardy: The OECD Anti-Bribery Convention and the FCPA*, 73 Ohio St. L.J., 1321, 1331–32 (2012).

103. OECD Convention, *supra* note 1, art. 4.3.

104. Duross, *supra* note 60. Subsequent prosecutions sometimes take into consideration punishments already imposed. *See* discussion of Statoil *infra* Part V.B.1; Statoil, ASA, Securities Exchange Act Release No. 54,599, 89 SEC Docket 283 (Oct. 13, 2006).

105. The fact of being prosecuted or sentenced twice for substantially the same offense. Black's Law Dictionary 250 (4th pocket ed. 2011).

106. Literally translated as "not twice in the same thing," *ne bis in idem* is the Continental equivalent of double jeopardy. *See generally* Gerard Conway, Ne Bis in Idem *in International Law*, 3 Int'l Crim. L Rev. 217 (2003).

107. *See* discussion of why multiple prosecutions do not violate double jeopardy *infra* Part V.A.1.d.

108. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1-3(b) (1977) [hereinafter FCPA]; OECD Convention, *supra* note 1, at 23, cmt. 9.

tive defenses: local law,[109] adequate procedures,[110] and bona fide expenditures.[111]

1. Facilitation Payments

The FCPA is one of the few national laws[112] that provides a narrow exception for "facilitation payments," authorizing expenditures "for 'facilitating or expediting payments' made in furtherance of routine governmental action" regarding nondiscretionary matters.[113] For example, it permits paying an official a nominal amount to turn on electricity for a factory at night but not to overlook factory operation violations.[114] The rationale is twofold; first, from a theoretical perspective, these payments are not inducements to do something wrongful within the meaning of the Act because they merely get government officials to do something that is already part of their established duty.[115] Second, from a practical perspective, the FCPA targets grand corruption, whereas most facilitation payments are relatively minor and limited in purpose.[116]

The Bribery Act currently does not permit facilitation payments.[117] However, recent reports indicate that the British government is considering allowing such payments because small and

109. FCPA, § 78dd-1-3(c)(1); Bribery Act, 2010, c. 23, § 6 (U.K.).

110. Bribery Act, § 7.

111. FCPA, § 78dd-1-3(c)(2).

112. Australia, New Zealand, South Korea, and Canada also permit facilitation payments. *See* Wendy Wysong, *Facilitating a Global Change? Australia's Position on Facilitation Payments*, Corp. Compliance Insights (June 6, 2013), http://www.corporatecomplianceinsights.com/facilitating-a-global-change-australias-position-on-facilitation-payments. *See generally* Joongi Kim & Jong Bum Kim, *Cultural Differences in the Crusade Against International Bribery: Rice-Cake Expenses in Korea and the Foreign Corrupt Practices Act*, 6 Pac. Rim L. & Pol'y J. 549 (1997) (noting that the Korean practice of giving rice-cake expenses has become a customary practice). The Bribery Act does not authorize facilitation payments.

113. FCPA Guide, *supra* note 17, at 25. For example, "routine governmental action" includes processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water, but does *not* include a decision to award new business or to continue business with a particular party. *Id.*

114. *Id.*

115. *See id.* (The focus of any inquiry is on the intent of the payment.).

116. Clark, *supra* note 16. Clark, a former FCPA Deputy Chief and SEC Special Counsel, explained that the decision not to prosecute an employee for paying an official to receive an inoculation from a clean needle would be a "no brainer" for the DOJ; such payments are viewed as simply necessary to doing business. *See also* Moyer, *supra* note 31 (noting that most facilitation payments are unintentional rather than planned; companies train their employees not to make any payments rather than to distinguish between impermissible bribes and facilitation payments).

117. Ministry of Justice, *supra* note 76, ¶ 44, at 18; *see also* Wilkinson, *supra* note 43, 11–12.

medium businesses are concerned that their inability to make such payments puts them at a disadvantage against U.S. companies.[118] Though the OECD Convention initially authorized such payments, the 2009 Working Group recommended Members cease this practice,[119] and in its 2010 Phase 3 Review of the FCPA, the Working Group explicitly called on the United States to ban the payments.[120]

2. Local Law

The local law affirmative defense (recognized by the FCPA and the Bribery Act) protects a defendant who can show that the alleged bribe was lawful under the foreign country's written law at the time of the payment.[121] Lack of a written law forbidding a payment does not satisfy this requirement.[122]

3. Adequate Procedures

The Bribery Act provides a defense where a company can prove that it had in place "adequate procedures designed to prevent persons associated with [it] from undertaking such conduct."[123] The

118. *Missing the Point of Facilitation Payments*, TRANSPARENCY INT'L UK (June 13, 2013), http://www.transparency.org.uk/news-room/blog/12-blog/635-missing-the-point-on-facilitation-payments.

119. OECD Council, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, at 4, Doc. No. C(2009)159/REV1/FINAL (Mar. 1, 2010) [hereinafter OECD Council, Recommendation], *available at* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C(2009)159/REV1/FINAL&docLanguage=En ("Member countries should (i) undertake to periodically review their policies and approach on small facilitation payments . . . (ii) encourage companies to prohibit or discourage the use of [such] payments . . . ."). This recommendation did not change the text of the Convention, thus though it shows the Working Group's preference, it does not alter the obligations of signatories. The new stance is reflected in the current OECD Guidance. OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES § VII-3, at 47–48 (2011 ed.), *available at* http://www.oecd.org/daf/inv/mne/48004323.pdf (noting that such payments "are generally illegal in the countries where they are made").

120. OECD WORKING GRP. ON BRIBERY, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED STATES 22–24 (2010), *available at* http://www.oecd.org/unitedstates/UnitedStatesphase3reportEN.pdf [hereinafter UNITED STATES PHASE 3 REPORT].

121. FCPA GUIDE, *supra* note 17, at 23 (A defendant must establish that "the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country.") (internal quotation marks omitted) (quoting Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(c)(1), -2(c)(1), -3(c)(1) (1977)); MINISTRY OF JUSTICE, *supra* note 76, ¶ 24, at 11.

122. H.R. REP. NO. 100-576, at 920 (1988).

123. Bribery Act, 2010, c. 23, § 7.2 (U.K.).

company must establish the existence and adequacy of such procedures by "the balance of probabilities."[124] The Act does not definitively establish what procedures are adequate, leaving such determinations for the court to decide on a case-by-case basis.[125] Thus, a single instance of bribery does not establish prima facie that the procedures in place were inadequate; depending on the circumstances the court could find that the employee or agent willfully acted contrary to the established protocol and that it is more appropriate to punish the individual rather than the company.[126]

4. Bona Fide Expenditures

The FCPA's bona fide expenditure affirmative defense permits payment of reasonable "expenses . . . directly related to the promotion, demonstration, or explanation of a company's products or services, or . . . to a company's execution or performance of a contract with a foreign government or agency."[127] For example, the law allows corporate payment for travel and expenses to visit company facilities or to conduct product demonstrations.[128] However, it does not permit corporate payment for trips or expenses that are primarily for personal entertainment rather than business purposes.[129] The Bribery Act does not allow any such payments, providing that any type of payment intended to obtain or retain business is a violation;[130] the OECD Convention does not discuss such payments.

C. *Broad Range of Sanctions*

The OECD Convention provides that "[t]he bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties" comparable to those applicable

124. *Id.* § 7. The British standard of "balance of the probabilities" is akin to the U.S. standard of preponderance of the evidence: whether the alleged occurrence is more likely than not. *See Legal Dictionary: Standard of Proof*, DRUKKER SOLIC. (Sept. 7, 2013), http://www.drukker.co.uk/publications/reference/standard-of-proof/#.UyWwJa1dVyE.

125. Alldridge, *supra* note 42, at 1203.

126. *Id.*

127. FCPA GUIDE, *supra* note 17, at 24.

128. *Id.*

129. *See, e.g.*, United States v. Liebo, 923 F.2d 1308, 1311 (8th Cir. 1991) (holding that providing airline tickets to a government official for his honeymoon in order to corruptly influence that official formed the basis for a violation of the FCPA).

130. *See, e.g.*, Bribery Act, 2010, c. 23, § 7.1 (U.K.). The Act provides exceptions for such payments in domestic transactions but not international transactions. *See also* R. Zachary Torres-Fowler & Kenneth Anderson, *The Bribery Act's New Approach to Corporate Hospitality*, 52 VA. J. INT'L L. DIG. 39, 45 (2011) (observing that while companies may still assert the adequate procedures defense, reputational damage will already have been incurred).

under a State's domestic bribery laws, including, "in the case of natural persons, . . . deprivation of liberty."[131] Nonetheless, domestic bribery sanctions vary widely, demonstrating that, in reality, this guidance has not created a consistent or proportionate transnational penal standard.

Among the OECD Convention signatories, criminal fines for individuals range from US $100,000[132] to unlimited per violation.[133] Individual prison sentences range from six months[134] to ten years.[135] In China, not yet a party to the OECD Convention, the fine is entirely up to the discretion of the judge, life imprisonment is common,[136] and even the death penalty is available.[137] In all countries, sanctions sought are largely discretionary and can reflect the amount of the bribe paid, the unlawful advantage gained, and the corporate culture, among other considerations.[138]

Fines for corporations range from US $2 million[139] to unlimited;[140] collateral sanctions such as suspension and debarment are available to prosecutors in some countries as well.[141] Inconsistent recognition of criminal liability for legal persons increases the dis-

131. OECD Convention, *supra* note 1, art. 3.1.

132. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(b)(1)(B) to (2) (1977) [hereinafter FCPA].

133. Eastwood & Quinnen, *supra* note 44 (discussing the Bribery Act). Many European countries range between 150,000 and 1.1 M euros. Prajakt Samant & Tara Walsh, McDermott, Will & Emery, Anti-Bribery & Corruption Law Multi-Jurisdictional Client Guide 5–8 (2012), *available at* http://www.mwe.com/files/Uploads/Documents/Pubs/Anti-Bribery%20Client%20Guide.pdf; *see* Samant & Walsh, *supra*, at 4 (liability comparison chart among several OECD signatories).

134. Samant & Walsh, *supra* note 133, at 8 (discussing Italy).

135. Countries with a ten-year prison sentence include the United States, the United Kingdom, France, Belgium, and Germany. *See id.* at 5–8, 11–15; FCPA, § 78dd-2(b)(1)(B) to (2).

136. Samant & Walsh, *supra* note 133, at 10.

137. *See* John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 Am. J. Int'l L. 187, 194 n.58 (1998) (discussing imposition of the death penalty for bribery); Associated Press, *Former China Railways Minister Receives Suspended Death Sentence for Corruption*, Fox News (July 8, 2013), http://www.foxnews.com/world/2013/07/08/former-china-railways-minister-receives-suspended-death-sentence-for-corruption.

138. For example, the DOJ follows the U.S. Sentencing Guidelines, under which "the 'offense level' is first calculated by examining both the severity of the crime and facts specific to the crime, with appropriate reductions for cooperation and acceptance of responsibility, and, for business entities, additional factors such as voluntary disclosure, cooperation, pre-existing compliance programs, and remediation." FCPA Guide, *supra* note 17, at 68.

139. *See id.*

140. *See* Eastwood & Quinnen, *supra* note 44 (discussing the Bribery Act).

141. *See, e.g.*, Samant & Walsh, *supra* note 133, at 6, 8 (discussing collateral sanctions in France and Germany); Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(d) to 3(d) (1977) [hereinafter FCPA].

parity, leaving certain companies free from the social disapprobation inherent in a criminal conviction.[142]

Most countries have provisions for increasing the fine proportional to the illegal gain,[143] but Japan limits fines to approximately US $24,600 for natural persons, $2.96 million for legal persons, and disgorgement only to the amount of bribes paid.[144] Thus, the Japanese law will not deter a company that believes bribery will help it realize profit above $2.96 million.

Even though the OECD Convention has made progress toward coordinating the TNB laws,[145] functional equivalence has failed to create a workable transnational liability standard and has realized only limited success in enforcement and universal compliance.[146] Therefore, rather than to continue futile efforts to harmonize national laws, the most effective way to provide certainty for the MNCs and reduce TNB is to promulgate an international standard of concrete provisions that can be adopted as-is. The next Part will discuss what this new standard should be and why it will resolve the deficiencies of the current regime.

142. *See* discussion of corporate criminal liability *infra* Part V.A.2.

143. For example, the FCPA Alternative Fines Act provides that any fine may be increased to double the amount the defendant sought to gain through the bribe. *See, e.g.*, 18 U.S.C. § 3571(d) (2012).

144. OECD, Japan: Review of Implementation of the Convention and 1997 Recommendation § 3.1/3.2 (2002), *available at* http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2387870.pdf; *see also* Heifetz, *supra* note 11, at 224.

145. *See generally* The George Washington University Law School Conference: The International Fight Against Corruption: Are the OECD and UN Conventions Achieving Their Objectives? (Dec. 4, 2013) (notes on file with author); *see also* Webb, *supra* note 48, at 228 (explaining that the UNCAC enforcement is less successful than the OECD Convention enforcement).

146. Moyer, *supra* note 31.

TNB Issue Comparison by Law

		FCPA	OECD	Bribery Act
Liability				
	Substantive definition: Types of payments and to whom	Supply-side ("active")	Supply-side ("active")	Supply-side ("active"), failure-to-prevent, and demand-side ("passive")
	Definition of Foreign Public Official	OECD + (3) foreign officials, foreign political parties or officials thereof, (4) candidates for foreign political office, (5) any person, while knowing that all or a portion of the payment will be offered, given, or promised to an individual falling within one of the prior categories.	Any person (1) holding an appointed or elected legislative, administrative or judicial office of a foreign country, (2) exercising a public function for a foreign country, including for a public agency or public enterprise.	OECD + (3) any official or agent of a public international organization.
	Corporate Criminal Liability	Yes	Yes, but permits states that do not recognize it to enact "proportionate" civil sanctions	Yes
	Subsidiary	Liability based on agency principles	Not addressed explicitly, but commentary suggests some form of liability[147]	Strict liability
	Multiple Prosecutions	Yes	Yes, but urges cooperation	Yes

147. *See* OECD Council, Recommendation, *supra* note 119, annex II, § A(4), at 13 (suggesting companies implement compliance and oversight programs that extend to subsidiaries where appropriate).

Avoidance of Liability				
	Facilitation Payments	Yes	Initially yes, but now urging eradication	No
	Local Law	Yes	Not addressed	Yes
	Adequate Procedures	No	Not addressed	Yes
	Bona Fide Expenditures	Yes	Not addressed	No
Sanctions				
	Fines	Individual: USD $100,000 Corporate: USD $2 million *both with potential to increase to twice the amount gained	"effective, proportionate and dissuasive"	Individual: Unlimited Corporate: Unlimited
	Prison	10 years	Yes, comparable to domestic penalties.	10 years

V. Analysis

These inconsistencies make conducting business in multiple countries difficult and ultimately very costly for companies like Squeaky Clean. Despite their best efforts, it is difficult to develop a clear picture of international parent and subsidiary liability, establish corporate policy for acceptable interactions between employees and foreign public officials, identify valid defenses, and prepare for the possibility of subsequent prosecutions. A single law with concrete provisions will resolve these ambiguities and should be the next step in the effort to address transnational bribery. Section A of this Part sets forth the elements of this new law, and Section B discusses why the proposed standard is the most effective solution.

A. *Elements of the Proposed Standard*

The new TNB legal regime should rely upon the OECD Convention for its framework and be further supplemented with elements from the FCPA and the Bribery Act. The OECD Convention is an appropriate foundation because, though it lacks specificity, it does address the key TNB issues facings MNCs such as liability, defenses, and sanctions. Moreover, the OECD Convention signatories include the most economically advanced countries in the world and therefore its Member States have jurisdiction over the large MNCs that are the most likely sources for "outbound" bribery of foreign public officials.[148] The OECD Convention is a superior foundation than the UNCAC, despite the UNCAC's greater number of signatories, because the economies and transactions regulated by the OECD Convention's signatories are more significant than the sheer number of the UNCAC's signatories.[149] Moreover, while the UNCAC provides a broad aspirational framework it has little practical impact and some argue it never will.[150] The FCPA and the Bribery Act are appropriate resources to inform the substantive gaps in the OECD Convention framework, as they are the current gold standard for the TNB laws.[151] The new standard must

148. Van Alstine, *supra* note 102, at 1325–26.

149. Lowe, *supra* note 22.

150. *See* W. Michael Reisman, Folded Lies: Bribery, Crusades, and Reforms 31 (1979) (describing the UNCAC as a "lex stimulata"—a law that was never intended to be operational).

151. Jessica Tillipman, Associate Dean of the George Washington Law School, Editor of the FCPA Blog, Remarks at The George Washington University Law School Conference: The International Fight Against Corruption: Are the OECD and UN Conventions Achieving Their Objectives? (Dec. 4, 2013) (notes on file with author).

address three key areas: (1) liability, (2) avoidance of liability, and (3) sanctions.

1. Liability

Liability for bribery of foreign public officials consists of several elements, all of which the new standard must address. These are the (a) substantive definition of the offense, (b) criminal liability for legal persons, (c) subsidiary liability, and (d) potential for multiple prosecutions.

(a) Substantive Definition

The substantive definition of the offense should be that of the OECD Convention, which provides a criminal offense is as follows:

> [F]or any person intentionally to offer, promise or give undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties in order to obtain or retain business or other improper advantage in the conduct of international business.[152]

Complicity such as incitement, aiding and abetting, or authorization of such an act, as well as any attempts to commit such acts, are also criminal offenses.[153]

This definition makes clear that the law should only criminalize supply-side bribery. Though some treaties and laws go further and criminalize demand-side bribery,[154] such an expansive new standard is neither necessary nor beneficial. Part of the OECD Convention's success has been its limited focus, targeting powerful MNCs rather than trying to eradicate all bribery.[155] Additionally, other laws address the issues left unresolved by an instrument that only addresses supply-side bribery. For example, most countries already have domestic laws make it a crime for a public official to request or accept bribes,[156] and other conventions like the UNCAC address demand-side bribery as well as the broader effects of corruption.[157] Finally, an effective tool against supply-side bribery will

152. *See* OECD Convention, *supra* note 1, art 1.1.

153. *See id.* art 1.2.

154. *See, e.g.*, discussions on UNCAC and the Bribery Act *supra* Part IV.A.1.

155. *See* Clark, *supra* note 16 (explaining that in advocating for the passage of the FCPA and OECD Convention, Congress intended to level the playing field among major international competitors, not eliminate all bribery).

156. *See* IBA Report, *supra* note 15, at 207.

157. *See* Muzila & Spalding, *supra* note 36 (explaining that the OECD is a properly limited instrument, and other treaties, such as the UNCAC, have developed to pick up

eventually resolve the demand-side issue because officials will stop demanding bribes when all companies refuse to pay them.

The standard should define foreign public official expansively to ensure variations in governmental structure and terminologies do not create loopholes.[158] It should also include candidates for political office to prevent earlier payments from influencing officials' decisions once in office. Thus, "foreign public official" should be defined as officials of any foreign governmental body or agency, any person exercising a public function for a foreign government, officials of or candidates for foreign political positions or parties, officials or agents of public international organizations, and third parties knowing the payment is intended for one of the prior named categories.

(b) Criminal Liability for Legal Persons

The new standard must establish criminal liability for legal persons rather than resting on the OECD Convention's fiction that civil sanctions can be "proportionate" to criminal sanctions.[159] Proportional civil monetary sanctions are a false solution because they are never equivalent to criminal sanctions; they lack the deterrent effect because no dollar amount equals the stigma that attaches to a criminal prosecution and conviction, especially given the wealth of most MNCs.[160] Thus, instructing countries to establish "effective, proportionate and dissuasive non-criminal sanctions"[161] for legal persons is literally impossible, and the current OECD Convention provision creates legal regimes with significant liability disparities.

Critics of corporate criminal liability argue that civil sanctions and fines are more economically efficient deterrents.[162] Even if true, this argument fails to recognize that deterrence is not the sole purpose of criminal liability; retribution "has long been seen as

where the OECD left off regarding the broader impact of bribery as related to development and human rights on the communities in which the bribery occurs).

158. *See* FCPA GUIDE, *supra* note 17, at 19–20 (explaining that because many governments operate through state-owned and state-controlled entities, officers or employees of agencies and instrumentalities must be included within the definition of "foreign official").

159. OECD Convention, *supra* note 1, art. 3.2; *see supra* Part IV.A.2.

160. *See* Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 854 (2000).

161. OECD Convention, *supra* note 1, art. 3.2.

162. *See* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1533 (1996) ("[P]ursuing corporate criminal liability results in society bearing the higher sanctioning costs of stigma penalties and the increased costs of deterring corporate misbehavior created by the procedural protections of criminal law.").

providing normative support for criminal liability regimes."[163] Indeed, the idea of "the fitness of punishment following wrongdoing is axiomatic."[164] This expressive use of retribution allows society the opportunity to condemn criminal behavior in a way that financial sanctions do not.[165]

Corporate criminal liability critics further maintain that corporations, as mere collections of individuals with no substantive identity of their own, are immune from such retributive impacts.[166] However, the identity that matters for purposes of retribution is that of the wrongdoer in the community; because most corporations have a community identity distinct from that of their owners, managers, and employees, they too can be subject to effective expressive retributive punishment.[167] Indeed, it would not be "the general rule today that a corporation may be liable criminally"[168] if such liability did not serve an important purpose.

Because corporate criminal liability serves valid deterrence and retributive purposes that cannot be approximated by civil sanctions, any regime that permits but does not require such liability is unfair to MNCs and less effective at combating TNB. Therefore, the new standard must recognize criminal liability for legal persons.

(c) Subsidiary Liability

The new standard must also account for and provide a mechanism to measure subsidiary liability. Both the FCPA and the Bribery Act recognize the importance of control in subsidiary liability but differ in what they expect that control to look like.[169] Whereas

---

163. Friedman, *supra* note 160, at 831.

164. Oliver Wendell Holmes, Jr., The Common Law and Other Writings 42, 45 (spec. ed. 1982) (1923).

165. Friedman, *supra* note 160, at 834.

166. *Id.* at 844.

167. *Id.* at 845–49 (explaining that these two attributes are (1) an "identifiable persona" and (2) the "capacity to express moral judgments in the discourse of the public square, and so to participate in the process of creating and defining social norms").

168. 10 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Corporations § 4942, at 682 (rev. vol. 2010) [hereinafter Fletcher et al. 2010]; *see, e.g.*, United States v. Agosto-Vega, 617 F.3d 541 (1st Cir. 2010); United States v. Singh, 518 F.3d 236 (4th Cir. 2008); United States v. Inv. Enters., Inc., 10 F.3d 263 (5th Cir. 1993); United States v. Paccione, 949 F.2d 1183 (2d Cir. 1991) (involving mail fraud and Racketeer Influenced and Corrupt Organizations Act violations). Such liability is not limited to U.S. corporations. *See* 18A William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Corporations § 8798 (rev. vol. 2007) [hereinafter Fletcher et al. 2007] (discussion of the criminal liability of foreign corporations).

169. *See supra* Part IV.A.3.

the Bribery Act allows proof of a system to ensure subsidiary compliance to serve as an affirmative defense, the FCPA assumes that a parent will have such a system in place and therefore does not recognize this defense.[170] Therefore, the Bribery Act makes explicit what the FCPA relies upon impliedly—that a parent with control over a subsidiary has a duty establish a system to ensure that subsidiaries comply with all applicable laws. The distinction between the laws is that the Bribery Act allows proof of such a system as an affirmative defense, whereas the FCPA does not.[171] The new standard should strike a balance between these laws, recognizing that the mere existence of some procedures should not be an absolute defense because if procedures truly are adequate, violations will hardly ever occur. At the same time, the standard should include some degree of a good faith defense, recognizing that individuals have free will to act against the explicit orders of their companies and thus not every violation by a "controlled" subsidiary should give rise to strict liability.[172] Such an approach will give prosecutors flexibility in determining the proper party to receive punishment while ensuring that at least one party will be held responsible.

(d) Propriety of Multiple Prosecutions

Though some argue that a TNB regime should foreclose the opportunity for multiple countries to prosecute the same conduct,[173] the standard should allow double jeopardy,[174] or *ne bis in idem*,[175] because foreclosure would impermissibly interfere with state sovereignty and is unnecessary where a single standard puts companies on clear notice of the law.

The OECD Convention instructs States to consult in identifying the primary jurisdictional claim,[176] but the language is advisory rather than in the form of an explicit command. Consequently, proponents of double jeopardy protection posit that without such protection, the broad jurisdictional provisions of the OECD Con-

170. *See supra* Part IV.A.3.

171. *See supra* Part IV.A.3.

172. For discussion of the broader implications of recognizing a good faith defense, see generally Preston Tull Eldridge, *Without Bounds: Navigating Corporate Compliance Through Enforcement of the Foreign Corrupt Practices Act*, 66. Ark. L. Rev. 733 (2013).

173. *See generally* Van Alstine, *supra* note 102.

174. *See* Black's Law Dictionary, *supra* note 105, at 250.

175. *See* Conway, *supra* note 106.

176. *See* OECD Convention, *supra* note 1, art. 5.

vention and national TNB laws leave the MNCs facing "death by a thousand cuts."[177]

Such cuts include "uncertainty for management and shareholders, a drain on time and resources in the legal department, and an inability to clean house and move on" following the initial prosecution.[178] Additionally, the potential for double jeopardy may deter companies from cooperating with one jurisdiction in the first place if such an admission, rather than helping to resolve a matter, only exposes a company to further liability elsewhere.[179] Essentially double jeopardy critics argue that overlapping enforcement of antibribery laws unfairly burdens and penalizes corporations[180] and that refusal to protect companies from multiple prosecutions "create[s] a road map for any new jurisdiction to go after the company."[181]

Nonetheless, any transnational regime that eliminates double jeopardy unacceptably infringes upon state sovereignty by depriving nations of their right to prosecute. This is a significant concession that few nations would be willing to make.[182] Justification for double jeopardy stems from a dual sovereignty, "bottom up" point of view, where the law is rooted in the law of each country and therefore each crime is a separate violation against each sovereign.[183] Proponents of protection from double jeopardy envision a "top down" TNB regime under which each act of bribery is a single violation of that international law, rendering multiple prosecutions

177. Richard W. Grime, Remarks at The George Washington University Law School Conference: The International Fight Against Corruption: Are the OECD and UN Conventions Achieving Their Objectives? (Dec. 4, 2013) (notes on file with author).

178. Dunn, *supra* note 5.

179. *Id.*

180. Peter Herbel et al., *Double Jeopardy—Finding a Balance in Enforcement Actions for Companies*, Legal Week (Nov. 24, 2011), http://www.legalweek.com/legal-week/analysis/2126979/double-jeopardy-finding-balance-enforcement-actions-companies. Herbel is general counsel of Total, Hess is an attorney and the former head of legal of Royal Dutch Shell, and Mantovani is general counsel of Eni, a Japanese multinational corporation (MNC). *Id.*

181. Dunn, *supra* note 5 (quoting Alexandra Wrage, the head of the antibribery nonprofit organization, TRACE International).

182. Some nations, such as the United States, have refused to submit to the jurisdiction of the International Criminal Court (ICC) for this very reason; the ICC protects victims of holocaust and genocide, arguably more compelling interests than protecting wealthy MNCs. *See A Universal Court with Global Support: USA and the ICC*, Coalition for Int'l Crim. Ct., http://www.iccnow.org/?mod=usaicc (last visited Nov. 29, 2014).

183. Van Alstine, *supra* note 102, at 1323; *see also* Heath v. Alabama, 474 U.S. 82, 82 (1985) (When an individual violates the laws of two sovereigns, "he has committed two distinct 'offences.'").

unjust.[184] However, this Note is not proposing such a single law, but rather a single standard adopted by each nation, and therefore the traditional dual sovereignty frame applies.

Moreover, protection from multiple prosecutions is not necessary. With one clear law, the MNCs will know exactly the contours of acceptable behavior and will have no excuse for failing to comply. The uniform sanctions in a single standard will also decrease the likelihood of multiple prosecutions,[185] further weakening the argument for such protection.

Some argue that the existing regime leads to overprosecution because it provides "precious little guidance" to states in determining when to exercise concurrent jurisdiction[186] and does little to limit the ability of multiple states to prosecute the same conduct. However, multiple prosecutions are unfair only when the law is not clearly established or there are several standards governing a single type of conduct,[187] which would not be the case under the proposed solution.

Finally, the prosecutorial coordination inherent in a voluntary scheme ensures that where one state is unable to prosecute due to domestic political or technical legal problems, other states with jurisdiction may step in.[188] "Enforcement competition [also] provides a potential hard law backstop against 'national champion' protectionist tendencies."[189] The virtues of this solution ensure that all MNCs are treated equally.

2. Avoidance of Liability

Because functional equivalence allows some countries to recognize exceptions and defenses that others do not, the current TNB regime essentially codifies loopholes and encourages maneuvering by companies to operate under the most permissive law available. The new standard must close liability escape-hatches by establish-

184. Van Alstine, *supra* note 102, at 1331–32 ("[I]n our modern, deeply interconnected world economy, the result in practical terms [of not recognizing double jeopardy] is that numerous countries may subject a person to successive criminal sanctions for the same criminal offense, although in each case the ultimate source of law is the Convention itself.").

185. *See infra* Part V.B (arguing that consistent sanctions will decrease multiple prosecutions).

186. IBA Report, *supra* note 15, at 210.

187. *See, e.g.*, *id.* at 22 ("The [overlapping jurisdiction] is complicated when the states wish to apply different substantive laws, or laws with vastly different penalties for the same conduct.").

188. Spahn, *supra* note 57, at 1–2.

189. *Id.* at 2.

ing consistent exceptions and defenses. It should ban the exception for facilitation payments[190] and the local law affirmative defense[191] but recognize the affirmative defenses of adequate procedures[192] and bona fide expenditures.[193]

(a) Banning Facilitation Payments

The new standard should prohibit facilitation payments because they harm both companies and the communities in which the payments are made, and they are not vital to a company's success.[194] Additionally, although facilitation payments are distinct from grand corruption in that they are not made to "obtain or retain business" and thus do not secure an "unlawful" benefit within the strict terms of most statutes, they are nonetheless unfair because they secure for the payer a benefit for which others have to wait.[195]

The fact that no major economic player other than the United States feels the need allow such payments demonstrates that safe and effective business transactions do not require them.[196] The OECD's direct criticism of this element of the FCPA[197] increases international pressure to end such payments and illustrates the global consensus that they are neither proper nor necessary for successful international business transactions.[198] Indeed, some believe that political considerations are the only impediment to such changes to the FCPA immediately.[199]

---

190. *See, e.g.*, Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 to 3(b) (1977) [hereinafter FCPA]; OECD Convention, *supra* note 1.

191. *See, e.g.*, FCPA, § 78dd-1 to 3(c)(1); Bribery Act, 2010 (U.K.).

192. *See, e.g.*, Bribery Act, § 7.2.

193. *See, e.g.*, FCPA, § 78dd-1 to 3(c)(2).

194. Marie Chêne, Transparency Int'l, Anti-Corruption Helpdesk: Evidence of The Impact of Facilitation Payments 1 (2013), *available at* http://www.transparency.org/files/content/corruptionqas/The_impact_of_facilitation_payments.pdf ("Evidence shows that [facilitation payments] have a detrimental long term effect on the operations [of] companies, undermine their internal culture and ethical standards, and make them preferential targets for more and greater demands.").

195. Additionally, though not directly on the shoulders of the MNCs, these payments also represent an "abuse of entrusted public power for private benefit," an abuse that the MNCs enable. Chêne, *supra* note 194, at 2.

196. *See* Tom Fox, *The End of the FCPA Facilitation Payment Exception?*, FCPA Compliance & Ethics Blog (Nov. 11, 2010, 9:26 PM), http://tfoxlaw.wordpress.com/2010/11/11/the-end-of-the-fcpa-facilitation-payment-exception.

197. *See* United States Phase 3 Report, *supra* note 120.

198. Jon Jordan, *The OECD's Call for an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act*, 13 U. Pa. J. Bus. L. 881, 882; *see* IBA Report, *supra* note 15, at 222 n.36 ("[The facilitation payment] exception has created conflicts with both host country domestic laws, and, more recently, other TNB laws, most of which treat such payments as bribes.").

199. Grime, *supra* note 177.

Moreover, the domestic bribery laws of almost every country ban facilitation payments.[200] Thus, authorizing facilitation payments in international business creates "a unique problem since corporations making facilitation payments may be very hesitant to properly record [them], because doing so would be essentially tantamount to confessing to bribes in violation of a relevant foreign jurisdiction's domestic bribery law."[201] Finally, rather than facilitating business transactions, continued use of facilitation payments prolongs and worsens corruption; officials will continue to demand payments as long as they know them to be legal, but if the payments are uniformly banned officials will stop asking for them.

(b) The Fiction of the Local Law Defense

The standard should also reject the local law affirmative defense for two reasons. First, it is rarely successful: local laws do not typically permit bribery and it is difficult to interpret foreign laws in U.S. courts to determine precisely what they do allow.[202] Second, this defense has weakened as more countries improve their TNB laws pursuant to the OECD Convention and the Working Group's explicit instructions to remove such exceptions.[203] Furthermore, the defense undermines the effort to combat TNB by encouraging companies and local officials to manipulate local provisions to avail themselves of it.

(c) Recognition of Adequate Procedures

In contrast, companies should be able to assert the existence of corporate policies and practices against corruption as a defense in

200. Jordan, *supra* note 198, at 888; *see also* FCPA GUIDE, *supra* note 17, at 25.

201. Jordan, *supra* note 198, at 888; *see also* FCPA GUIDE, *supra* note 17, at 25 (cautioning companies that even true facilitation payments under the FCPA may violate foreign domestic bribery laws).

202. Kyle P. Sheahen, *I'm Not Going to Disneyland: Illusory Affirmative Defenses Under the Foreign Corrupt Practices Act*, 28 WIS. INT'L L.J. 464, 470 (2010); *see, e.g.*, United States v. Kozeny, 582 F. Supp. 2d 535, 538 (S.D.N.Y. 2008) (noting that a law which provided that a "person who has given a bribe shall be free from criminal responsibility" if the bribe was extorted or reported to the government did not make the bribe legal under the local law; it merely absolved the payer of criminal liability under the local law, and thus the bribe was still a violation of the FCPA).

203. Sheahen, *supra* note 202, at 475, 477 (citing OECD DIRECTORATE FOR FIN. & ENTER. AFFAIRS, MID-TERM STUDY OF PHASE 2 REPORTS: 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 25–27 (2006), *available at* http://www.oecd.org/dataoecd/19/39/36872226.pdf).

the event that an individual employee violates the law.[204] Not only does fairness require it,[205] but recognizing such a defense will also provide a positive incentive for companies to establish robust prevention and training programs. Over time, such internal changes will have an even more significant impact on reducing corruption than ex-post enforcement actions.

(d) Recognition of Bona Fide Expenditures

Finally, the new standard should recognize the bona fide expenditure affirmative defense because such payments for legitimate contract-related expenses, training expenses, and product demonstrations are an accepted element of business transactions generally, whether domestically or abroad.[206] As such, these payments do not even meet the definition of bribery—securing an unlawful advantage. Indeed, although by its terms the Bribery Act currently forbids such payments, the Ministry of Justice recently issued Guidance recognizing that these payments can serve legitimate business purposes.[207] The Guidance suggests that "U.K. prosecutors [will have to] make some showing of unreasonableness or disproportionateness, plus 'mischief,'" resulting in a law that, in practice, very closely resembles the FCPA and its exception for "reasonable and bona fide" corporate hospitality payments.[208] With this shift, the two most significant TNB laws recognize the practical need for such a defense, and the new standard should as well.

3. Sanctions

The new standard must establish a single sentencing regime, including types of sanctions and a means by which to calculate them, because the wide variation in domestic bribery sanctions renders the OECD Convention's harmonizing instruction[209] hollow. The variation in punitive schemes imposed by different countries[210] and acceptable under the OECD Convention creates an

204. *See supra* Part IV.B.3.

205. *See supra* Part IV.B.3.

206. FCPA Guide, *supra* note 17, at 24.

207. Ministry of Justice, *supra* note 76, ¶ 26, at 12.

208. Torres-Fowler & Anderson, *supra* note 130, at 53; *see also* F. Joseph Warin et al., *The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 Tex. Int'l L.J. 1, 22 (2010) (explaining that the Bribery Act does not allow promotional payments, but guidance has indicated that it will be applied in a manner similar to the FCPA).

209. OECD Convention, *supra* note 1, art. 3.1.

210. Heimann et al., *supra* note 62, at 10.

uncertain environment for MNCs and incentivizes forum shopping by both companies and prosecutors.[211]

Inconsistencies in domestic bribery sanctions are unfair to MNCs because an environment in which potential sanctions are unclear or even incomprehensible leaves them open to the whims of prosecutors. They also create negative incentives by encouraging corporations to seek out jurisdictions with less stringent sanctions rather than to decide not to bribe at all. A single sentencing standard will address both of these issues by ensuring uniform treatment of TNB regardless of where the conduct occurs and what nation prosecutes.

These guidelines should reflect the severity of criminal liability for both natural and legal persons[212] and establish minimum and maximum fines and prison sentences. While discretion to consider a variety of factors in sentencing is an important prosecutorial tool,[213] the current "black box" in which such discretion is exercised[214] is unacceptable; basic notions of fairness demand that there be a consensus of factors to be considered and respective weight accorded to each. Such factors should include the gravity of the crime, the track record and culture of the company, the acceptance of responsibility and cooperation in investigation, and the remedial steps taken subsequent to the violation as mitigating factors.

B. *The Proposed Standard Is the Most Effective Solution.*

This solution will be effective because it (1) balances the conflicting interests that have thus far led to an ineffective TNB regime, (2) is realistic, and (3) is superior to proposed alternatives.

1. The Proposed Standard Resolves Conflicting Interests.

The current patchwork TNB regime is in part a result of the tension between the MNCs' interests in a predictable legal environment and countries' interests in fully prosecuting the TNB

211. Though beyond the scope of this Note, a single sanction regime would also promote prosecutorial efficiency by reducing prosecutorial battles. *See* David W. Rivkin, *Foreword to* IBA REPORT, *supra* note 15, at 33. With a single standard, the prosecution location would not impact the sentence available to authorities.

212. *See supra* Part IV.A.2 (discussing the fiction of proportionate sanctions for criminal liability); *supra* Part V.A.1.b (discussing corporate criminal liability under the proposed solution).

213. *See* SAMANT & WALSH, *supra* note 133 (discussing the DOJ's Sentencing Guidelines and antibribery and corruption law in different jurisdictions).

214. Spahn, *supra* note 57, at 29.

offenses. The proposed solution resolves this conflict by clarifying the legal environment for the MNCs, reducing the likelihood of multiple prosecutions, and respecting prosecutorial sovereignty.

A single criminal statute with concrete substantive elements will clarify and simplify the rules governing the MNC conduct. Rather than training employees to comply with a host of different laws, the MNCs need to only ensure compliance with the universal standard. This single standard would provide notice to the MNCs of the conduct prohibited in and prosecuted by every jurisdiction. With such clear notice, any multiple prosecutions would be fair: companies would have no excuse for failure to comply with the only standard by which they are bound.

Additionally, the proposed uniform sanction standard[215] would reduce the likelihood of multiple prosecutions and thus the protests regarding double jeopardy. When several countries have jurisdiction, the most significant reason for multiple prosecutions is one country's dissatisfaction with the sanctions imposed by the primary prosecution. For example, the DOJ prosecuted Statoil, a Norwegian company, after a Norwegian prosecution for the same conduct because the DOJ felt that the sanctions imposed by the Norwegian officials were insufficient.[216] The uniform standard proposed here solves that dilemma because the specific sentencing guidelines will result in similar and consistent punishment regardless of the prosecuting nation. This transparent objectivity will minimize concerns about under- or over-enforcement based on protectionism or retaliation.[217] Therefore, the primary punishment is likely to satisfy other nations, who will not feel the need to institute additional proceedings.

Reduction of multiple prosecutions is also important because "[a]voidance of duplicate proceedings could in many cases accelerate remediation of the underlying causes of the offense."[218] The longer it takes to resolve underlying causes of bribery, the more cases will be prosecuted, resources wasted, and corruption continued. Because the proposed solution eliminates the primary cause

215. *See supra* Part V.A.1.d.

216. IBA Report, *supra* note 15, at 211.

217. *See* Spahn, *supra* note 57, at 41 (discussing the assurance issues facing parties to the OECD Convention).

218. Cannes B20 Business Summit, Final Report, app. A, at A-88, ¶ 8 (2011), *available at* http://www.b20businesssummit.com/uploads/presse/Final-Report-with-with-appendices-B20-2011.pdf. The summit is part of the Group of 20 Summit meant to develop recommendations and issue relevant commitments from leading businesses regarding current issues.

of multiple prosecutions by standardizing punishments, it serves both substantive and efficiency concerns of MNCs and nations.

Finally, countries will be open to the new regime because its voluntary nature recognizes the importance of prosecutorial sovereignty. Unlike other international schemes that require submission to the jurisdiction of a single enforcement body,[219] this standard remains in the law of each adopting country. As such, it does not force the country to submit to the jurisdiction of an independent body, which countries would likely reject.[220] For example, the United States has not submitted to the jurisdiction of the International Criminal Court for this very reason.[221] Thus, the proposed solution will be effective because it addresses central underlying issues that have so far stymied development of a single unified standard.

2. The Proposed Solution Is Realistic.

The proposed solution is also realistic because recognition of and interest in fighting TNB is growing rapidly. Critics argue that designing an effective instrument to which a significant number of economically significant countries would submit will not be an easy or rapid task,[222] but this view is unduly pessimistic. The OECD Convention took almost ten years of meetings and multiple iterations to reach its current form, but this was a rapid pace by international law standards.[223] The relative speed with which the international community embraced the OECD Convention evidences the strong desire to address TNB.

Moreover, the ratification of the UNCAC was seen as a "miracle," as it once seemed impossible that such a broad, sweeping convention would come to fruition.[224] This success demonstrates that the

219. *See, e.g.*, *About the Court*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (last visited Nov. 26, 2014).

220. For an explanation of the United States' refusal to submit to the jurisdiction of the ICC, see generally *A Universal Court with Global Support: USA and the ICC*, COALITION FOR INT'L CRIM. CT., http://www.iccnow.org/?mod=usaicc (last visited Nov. 26, 2014).

221. *The United States and the International Criminal Court*, HUM. RTS. WATCH, http://www.hrw.org/legacy/campaigns/icc/us.htm (last visited Mar. 6, 2014).

222. *See* IBA REPORT, *supra* note 15, at 252 ("[I]t is probably premature to expect the establishment of robust and binding international enforcement cooperation mechanisms . . . .").

223. Lowe, *supra* note 22; *see also* Aiolfi & Pieth, *supra* note 24, at 3 ("The rapidity with which the Convention has been ratified and implemented is unprecedented in international law.").

224. Timothy L. Dickinson, Remarks at The George Washington University Law School Conference: The International Fight Against Corruption: Are the OECD and UN Conventions Achieving Their Objectives? (Dec. 4, 2013) (notes on file with author).

perceived or potential difficulty of creating a single international binding standard is no reason to delay the process. Even if the formal document is decades away, dialogue among governments and the private sector regarding best practices and examining social and economic ramifications will only improve the process and help provide guidance for MNCs in the interim.

3. The Proposed Solution Is Superior to Alternatives.

Though alternative proposed solutions, such as a jurisdictional hierarchy or industry standards, could help reform aspects of the TNB regime, neither would resolve the ambiguities the MNCs face. The International Bar Association Task Force suggests creating a hierarchy of factors to govern jurisdiction selection in order to create a degree of predictability and minimize multiple prosecutions.[225] It suggests that authorities consider "the strength of the target's connection to the prosecuting jurisdiction, the location of the witnesses and evidence, the cost of multiple proceedings to the company, the demonstrated harm to the prosecuting jurisdiction, and other relevant factors."[226]

Jurisdictional guidelines might help states determine prosecutorial primacy, but even if such guidelines reduced the proxy sovereignty battles in which countries engage when determining primary jurisdiction, they would not solve the MNC compliance dilemmas. A hierarchy would only formalize the order in which countries prosecute violations, not resolve the underlying issue of inconsistent liability. The only way to reduce confusion arising out of inconsistent laws is to establish a single law.[227]

A second proposal is use of industry standards to harmonize the MNC norms regarding TNB, rather than relying on a legal regime.[228] Yet, this approach is neither feasible nor appropriate. Industry standards are principles developed voluntarily by leading companies that serve a self-regulatory function. For example, the eleven largest banks developed the Wolfsberg Principles on Anti-

225. IBA Report, *supra* note 15, at 22–23.

226. *Id.* at 22–23, 217.

227. *See id.* at 217 (recognizing that a hierarchy would not be sufficient and recommending greater harmonization of key aspects of national laws beyond the "functional equivalence" standard of the OECD Convention because such harmonization "will reduce pressure for concurrent prosecutions based on differences in national laws").

228. Aiolfi & Pieth, *supra* note 24, at 6.

Money Laundering both as a demonstration of best practices and as guidelines for responding to unforeseeable challenges.[229]

Specific to antibribery, proponents argue that "the concept of industry standards is gradually gaining ground with new efforts discernible in various sectors; such as the oil and gas industry and its supply chain industries, the power sector, the mining industry and contract engineers."[230] They suggest that this approach offers speed and flexibility and could create a multifaceted attack on TNB in which a government takes steps to address bribery related issues as companies recognize them.[231]

Despite the theoretical appeal of industry standards, such an approach will not resolve ambiguity and enforcement issues. At the outset, developing an effective monitoring system, an issue central to any scheme of self-regulation,[232] presents a significant challenge: the risk that lack of transparency in how parties actually implement the principles could diminish their credibility and negate the initial public relations benefit of membership in the group.[233] Proponents predict that it would take only twenty percent of an industry's MNCs to impact industry-wide practice because criminal punishments have an effective deterrent effect.[234] Nevertheless, if criminal prosecution and punishment truly had such a significant impact on companies, governments would not have to continue pouring such significant resources into education, investigation, and prosecution of the continuing waves of offenses.[235]

Moreover, industry standards are ill suited to the task of combating large-scale TNB because the MNCs often operate in multiple industries. While the Wolfsberg Principles are effective for a specific industry (banking) and a relatively small number of homogenous banks, it would be much more challenging to develop

229. *See generally* The Wolfsberg Grp., Wolfsberg Anti-Money Laundering Principles for Correspondent Banking (2014), *available at* http://www.wolfsberg-principles.com/pdf/home/Wolfsberg-Correspondent-Banking-Principles-2014.pdf. This move, by such influential players, has begun to transform the banking world as other banks explicitly adopt the principles or use them as guidance in compliance training programs. Aiolfi & Pieth, *supra* note 24, at 6.

230. Aiolfi & Pieth, *supra* note 24, at 7.

231. *Id.*

232. *Id.* at 7–8.

233. *Id.* at 7.

234. *Id.* at 9.

235. *See generally* John J. Carney & George A. Stamboulidis, Baker Hostetler, Foreign Corrupt Practices Act: 2013 Mid-Year Update (2013), *available at* http://www.bakerlaw.com/files/Uploads/Documents/FCPA/2013FCPAMidYearUpdate.pdf.

standards for MNCs because a single MNC can operate in almost every sector of the economy.[236] Additionally, unlike the banks that formed the Wolfsberg Group, MNCs are the products of vastly different cultures; it would be difficult for such companies to subscribe to a single ethical norm if they do not share underlying morals or views of commerce.[237]

Most importantly, industry standards would not solve the uncertainty of prosecution facing MNCs because pacts regulating companies do not establish actionable liability or address prosecutorial rights and duties. Ultimately, law promulgation is the business of governments, not of private corporations. Such principles are useful to instigate policy changes but are not sufficient on their own because they are not mandatory; they must be accompanied by binding legislation if they are to provide reliable guidance for MNCs.[238]

VI. Conclusion

Though the current TNB regime has made significant strides, it will not and cannot effectively balance the need of MNCs to have an unambiguous TNB statute and countries' interests in their sovereign right to prosecute. A single concrete standard adopted voluntarily is the most effective way to serve both interests and achieve the ultimate goal of decreasing TNB.

Moreover, the MNCs would not be the only beneficiaries of this proposed solution—bribery also harms local economies whose leaders receive illegal payments. Bribery has "a corrosive effect on the overall governance environment and the efficiency of the state apparatus, erode[s] the ability of the government to collect revenues from formal tax channels, and ultimately undermine[s] sustainable economic development and the rule of law."[239] Grand scale corruption, targeted by the legal regimes discussed in this Note, is the most damaging in terms of economic growth and high levels of poverty.[240] In many developing countries where these payments occur, bribery is central to the social structures and mechanisms that perpetuate generations of inequality and engender

236. Since 2008, the United Kingdom has prosecuted violations of the Bribery Act in twelve sectors. Warin et al., *supra* note 69, at 35–36.

237. *See, e.g.*, Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. Legal Stud. 141, 167, 173 (2002) (discussing the "sticky" nature of normative values during the OECD Convention negotiations).

238. *See* Aiolfi & Pieth, *supra* note 24, at 8.

239. Chêne, *supra* note 194, at 1.

240. Carr & Outhwaite, *supra* note 86, at 4.

feelings of hopelessness in the lower classes.[241] Establishing a single code of conduct for the MNCs operating in these economies will help to chip away at this essentially accepted, but deeply problematic, feature of these societies.

Under the proposed solution, Debbie Do-right would have needed to look only to a single law to understand the scope of her liability and create a clear, robust training program for her employees. Additionally, Squeaky would likely only have been subject to one prosecution, as the primary prosecutor would have imposed a sanction in accordance with the agreed upon scheme. Rather than feeling that complying with the law was a lost cause, Debbie would remain dedicated to conducting business ethically.

241. Nathanial Heller, Remarks at The George Washington University Law School Conference: The International Fight Against Corruption: Are the OECD and UN Conventions Achieving Their Objectives? (Dec. 4, 2013) (notes on file with author).