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Blatant Bribery or Locally Lawful?: Is the Foreign Corrupt Practices Act’s “Local Laws” Defense Extinct?

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BLATANT BRIBERY OR LOCALLY LAWFUL? – IS THE FOREIGN CORRUPT PRACTICES ACT’S “LOCAL LAWS” DEFENSE EXTINCT?

Erik J. King

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Abstract

Under the Foreign Corrupt Practices Act (FCPA), it is an affirmative defense if the payments in question were lawful under the written laws of a foreign country. This defense has been largely overlooked by commentators and used sparingly in the court system. This Note examines the utility of this defense, and finds that although the concept underlying the defense remains somewhat alive in certain types of foreign laws that could conceivably excuse a foreign investor, the defense has lost all practical value. U.S. judicial interpretations, multilateral efforts against similar exceptions in other anti-bribery laws, and the subsuming effect of other FCPA statutory elements have rendered this defense useless.

1 J.D. Candidate, George Washington University Law School, May 2013; B.A., University of Florida, Phi Beta Kappa, May, 2010. I would like to thank GW Law Professor Jessica Tillipman for her valuable assistance and suggestions.
The local laws affirmative defense should be eliminated from the FCPA. For the remaining types of foreign laws that could still implicate the defense’s concept, as partially highlighted by the United Kingdom’s Bribery Act approach, this Note also suggests ways the U.S. Department of Justice should explain the effect of local law compliance when evaluating other FCPA elements.

Introduction

In 2010, German car manufacturer Daimler AG found itself in trouble with the United States Department of Justice because two of its subsidiaries, one in Germany and the other in Russia, made improper payments to government officials of several nations other than the United States, including China and Serbia. Daimler ended up agreeing to pay $185 million in civil and criminal penalties for violating U.S. law. This is a common example of the considerable reach of modern anti-bribery legislation, which has been spearheaded by the United States since President Carter’s Administration. After uncovering rampant bribery by U.S. companies overseas in the 1970s, the U.S. Congress recognized that foreign corporate bribery adversely affected the stability of international business and tarnished America’s image abroad. Accordingly, Congress passed the Foreign Corrupt Practices Act (“FCPA”) in 1977, which criminalizes, among other things, giving anything of value to foreign public officials or political candidates to obtain or retain business with a foreign entity.

Despite its passage in the late 1970s, actual enforcement of the FCPA was largely dormant for decades. However, FCPA enforcement has escalated significantly recently, going from six

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2 See Ken Stier, U.S. Cashes In On Corporate Corruption Overseas, TIME BUSINESS (April 7, 2010), http://www.time.com/time/business/Note/0,8599,1977526,00.html.
3 See id.
formal actions initiated in 2002 to 83 in 2010,\textsuperscript{7} and proceeding at a similar pace in 2011.\textsuperscript{8} In conjunction with this increased enforcement activity, greater punishments and innovative avenues to liability have been utilized. Longer prison sentences (including a record-high 15 years),\textsuperscript{9} higher civil and criminal fines,\textsuperscript{10} disgorgement of profits,\textsuperscript{11} asset forfeiture,\textsuperscript{12} collateral consequences especially for U.S. Government contractors,\textsuperscript{13} and shareholder derivative suits\textsuperscript{14} all demonstrate the higher stakes that international businesses and businesspeople face today.

These increased risks add to the other risks common in foreign business transactions, including compliance with the foreign country’s laws. So what if the local laws of the host country require foreign investors to pay for training of the host country’s government officials? Or if high-ranking officials demand payments to be diverted to some third party when the practice is clearly authorized under local laws? Would the U.S. overreach itself by criminalizing conduct done by foreign agents on foreign soil which complies with foreign law?

One of the FCPA’s affirmative defenses attempts to address these concerns. The “local laws” defense, which allows payments that are lawful under a foreign country’s written laws or regulations despite seeming to facially violate the FCPA, has been used very sparingly and recently


\textsuperscript{10} See 2010 FCPA Enforcement Index, THE FCPA BLOG (January 3, 2011, 7:02AM) (stating that eight enforcement actions in 2010 are among the ten biggest FCPA fines of all time).

\textsuperscript{11} See Marc Alain Bohn, What Exactly is Disgorgement?, THE FCPA BLOG (March 17, 2011, 7:10AM).


\textsuperscript{13} See Tillipman, supra note 5.

called “illusory” and “obsolete.” As modern conceptions of international business ethics have changed, the global trend towards stronger and more harmonized anti-corruption policy has certainly limited the practical uses of this defense. In addition, judicial interpretations have further narrowed how the defense can apply.

However, the “local law compliance” concept underlying the defense – that a foreign country’s laws sometimes interpret interactions with public officials differently than the FCPA – remains alive to some extent. There are several categories of foreign laws which seem to sanction what would otherwise be FCPA violations. The problem is that as an affirmative defense, the concept is now useless and could confuse companies and individuals as to what payments are actually permitted under the FCPA. Most FCPA cases do not go to trial, and even if more did, the local laws defense as it stands today would continue to have the proof problems identified with it since it was added to the statute. In the rare circumstances where the local law compliance concept could even be raised by a defendant, other components of the FCPA foreclose all foreseeable possibilities of the local laws affirmative defense actually succeeding. These other FCPA components, including several elements the prosecution must show and an existing exception

16 Tillipman, supra note 5.
17 This is true in developed countries, see UK Bribery Act of 2010 (infra, Part IV.), developing countries, see John Hynes, China Beefs Up Its Anti-Bribery Law With Its Very Own Version of the FCPA, GOVCON (March 16, 2011), http://www.governmentcontractsblog.com/2011/03/Notes/fcpa/china-beefs-up-its-antibribery-law-with-its-very-own-version-of-the-fcpa (announcing China’s 2011 amendment of its Criminal Code to illegalize payment of bribes to non-PRC government officials), and undeveloped countries, see South Sudan’s President Salva Kiir to fight corruption, BBC NEWS AFRICA (September 21, 2011), http://www.bbc.co.uk/news/world-africa-15000900 (announcing declaration by President of newly-independent South Sudan that public contracts and officials shall be subject to new disclosure laws).
19 See Business Accounting and Foreign Trade Simplification Act: Hearing Before the Subcomm. on Int’l Finance & Monetary Policy of the S. Comm. on Banking, Housing & Urban Affairs, 99th Cong. 66 (June 10, 1986), Statement of John Keeney, Deputy Assistant Attorney General, U.S. Dep’t of Justice (noting that the FCPA local laws defense “may cause proof problems for the defendants prosecuted under the Act”).
20 See Part III.
elsewhere in the statute for certain types of payments, occupy the field in which the local laws affirmative defense was intended to apply and demonstrate that it is time to take the defense out.

Congress should eliminate the FCPA’s local laws affirmative defense. U.S. courts and international trends have restricted the defense’s potential uses, and the rationale behind the defense is swallowed up by several elements of an FCPA offense. As a complement to this Congressional action, the concept of local law compliance in FCPA enforcement should be clarified by the primary enforcement agency (the U.S. Department of Justice) in the context of other parts of the statute. This will give much clearer guidance to companies and investors and promote U.S. and international anti-corruption policies.

This Note will discuss why the FCPA’s local laws affirmative defense should be eliminated and why the concept behind the defense should be cleared up to account for relatively rare, yet still existing, ambiguities in certain types of foreign laws. Part I describes the FCPA generally, its local laws affirmative defense, and judicial doctrines and interpretations that have severely restricted the defense’s possible use. Part II covers international efforts to reign in exceptions similar to the local laws affirmative defense, particularly when it comes to raising criminal defenses under foreign laws in domestic courts. Part III explores possible categories of local laws where the concept behind the defense (but not the defense itself) retains at least some importance. Part IV introduces the world’s newest approach to the ‘local law compliance’ concept in the United Kingdom (UK)’s Bribery Act of 2010, and how it differs from the FCPA’s. Part V argues for the removal of the FCPA’s local laws affirmative defense, and suggests how the core concept behind the defense might be clarified in enforcement guidance, suggesting some interpretations of the UK Bribery Act as an example.
I. The FCPA’s Local Laws Affirmative Defense

A. FCPA Overview

The FCPA is broken up into two components – anti-bribery provisions and accounting provisions (“books and records”). This Note focuses almost entirely on the anti-bribery provisions. The FCPA’s wide jurisdiction extends not only to acts done or instructions given on U.S. territory, but also reaches U.S. citizens and businesses (“domestic concerns”), and “issuers” on U.S. securities exchanges (including foreign companies and their agents). In addition, businesses incur FCPA liability not just for acts of corporate officers, but also for acts of employees or shareholders acting on behalf of the corporation, and for acts of foreign subsidiaries when the U.S. business or issuer authorizes or controls the alleged activity. The U.S. Department of Justice (“DOJ”) handles criminal enforcement for all FCPA provisions, as well as civil enforcement of anti-bribery provisions involving domestic concerns and foreign nationals, while the U.S. Securities and Exchange Commission (“SEC”) is responsible for civil enforcement regarding issuers.

The FCPA anti-bribery provisions prohibit any offers, payments, or authorization of payments of “anything of value” made “corruptly” to any person, while knowing that the payments will be offered or given to a “foreign official” in order to assist the firm in obtaining or retaining business or some “improper advantage.” The “foreign official” term extends to officers and employees of foreign governments, “instrumentalities,” political parties, or public international

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24 See id. § 78dd-1.
25 See Castellano, supra note 22.
27 See id. at 3.
organizations, and candidates for foreign political office.\(^{28}\) Even if the business or advantage intended to be improperly obtained or retained is not with a foreign government or instrumentality, FCPA liability is still possible.\(^{29}\)

Significant liability in the form of criminal, civil, and administrative penalties exists for FCPA violations. For instance, a company can be criminally fined up to $2 million per anti-bribery violation\(^{30}\) and up to $25 million for a willful accounting violation.\(^{31}\) Culpable individuals can be subject to $110,000 per violation, as well as imprisonment for up to five years for each offense.\(^{32}\) These fines may be increased substantially under the Alternative Fines Act (up to twice the benefit the defendant sought to obtain by conducting the corrupt transaction).\(^{33}\) Numerous government agencies may also suspend or eliminate valuable licensing, insurance, or contracting privileges (even in the private commercial sector).\(^{34}\) One of the ways defendants can protect themselves (theoretically) from these steep penalties is the FCPA’s local laws affirmative defense. This defense has a narrow history that has been further narrowed by U.S. courts.

**B. Legislative History of the FCPA’s Local Laws Defense**

The FCPA provides an affirmative defense to a bribery allegation if the “payment, gift, [or] offer . . . of anything of value . . . was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country.”\(^{35}\) The “local laws” concept was first proposed by the Senate Banking Committee in 1981, who considered the “delicate balance” brought up by a U.S. State Department official between “restricting potentially harmful business

\(^{29}\) See U.S. Dep’t of Justice, supra note 26, at 4.
\(^{30}\) See 15 USC §§ 78dd-2(g)(1)(A), -3(e)(1)(A).
\(^{31}\) See id. § 78ff(a) (2006).
\(^{32}\) See id. § 78dd-2(g)(2)(A)-(B), -3(e)(2)(A)-(B).
\(^{34}\) See Tillipman, supra note 5, at *12.
\(^{35}\) See 15 U.S.C. §§ 78dd-1(c)(1), -2(c)(1), -3(c)(1).
practices overseas by U.S. firms, while refraining from imposing our own standards on others.”

The concept was originally inserted as an exception to prohibited conduct, along with “facilitating payments.” Facilitating payments are now enumerated as the FCPA’s sole exception (rather than affirmative defense), allowing payments made to “secure the performance of a routine governmental action.” The Senate approved the exclusion of payments lawful under local laws in 1986, but as an affirmative defense, noting that “the Committee does not intend to reduce the burden of proof on U.S. companies where the government successfully demonstrates that a case should go forward. A company must be able to defend its actions by documenting that they are in fact ‘lawful’ in the host country.”

It was likely changed to an affirmative defense due to a DOJ prosecutor’s concerns. The House first accepted the defense in 1988, and the language in the House Bill changed from payments “expressly permitted” to payments that are “lawful under the written laws and regulations” of the foreign official’s country. The addition of the word “written” is significant because some countries and legal systems recognize a substantial amount of non-codified custom as the law of the land. However, Congress thought relying on unwritten law would be too big of a loophole, and explicitly stated in their Conference Report that “the absence of written laws in a foreign official’s country would not by itself be sufficient to satisfy this defense.”

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37 S. 430, 99th Cong. § 104(c) (1986) (a bill to amend the FCPA so that the [prohibition subsections] “shall not apply to . . . any facilitating or expediting payment to a foreign official . . . to . . . secure the performance of a routine governmental action . . . [or] to any payment, gift, offer, or promise of anything of value to a foreign official which is lawful under the law and regulations of the foreign official’s country”).
40 See Hearing, [Senate Banking Comm.], supra note 19, Statement of John Keeney, Deputy Assistant Attorney General, U.S. Dep’t of Justice (Of the proposed local laws exception, he said “to the extent the Banking Committee deems an exception necessary, we think it should be in the form of an affirmative defense.”). Senator Proxmire, the main author of the original FCPA, supported this position during the 1980s amendment debates. See S. REP. 99–486, at 22 (1986).
The narrow bounds of the local laws defense indicated in its history have been further narrowed by judicial interpretations.

C. Judicial Limitations on Uses of the Local Laws Defense

1. Act of State Doctrine and Judicial Interpretations of Foreign Law

The act of state doctrine, a judicially-created doctrine based on respect for sovereignty that makes it easier to dismiss certain cases where the acts complained of were done by a foreign government in its own territory, would at first glance be an attractive route through which FCPA defendants could raise the local laws affirmative defense. If a high-ranking foreign official told a defendant to do something through, e.g., a written order, the defendant might think that their subsequent conduct is “lawful” under the foreign country’s written laws, and that the act of state doctrine will protect them from a court scrutinizing the merits of the foreign “laws” relied upon.

However, this doctrine’s utility to FCPA defendants has been severely limited by U.S. courts. The U.S. Supreme Court has implied that only formal expressions of sovereignty, such as decrees, orders, or regulations, could qualify as an “act of state,” and the only FCPA case to make it to the U.S. Supreme Court implied that foreign officials’ authorizations of alleged bribes cannot be “official” expressions of sovereignty sufficient to preclude judicial review. In addition, courts have not been receptive to ambiguous “local laws” when an FCPA defendant attempts to argue that those laws, as acts of state, should push the court towards dismissing an FCPA charge. In United States v. Giffen, the defendant did not explicitly invoke the local laws affirmative defense, but argued on a very similar premise – that he should be exculpated because the payments he made were lawful under the written laws of the foreign official’s country (there, the Kazakh executive

45 See Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695 (1976) (5 justices cited the lack of such evidence in rejecting Cuba’s grounds for refusal to honor Cuba’s private contract obligations).
46 See W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 407 (1990) (rejecting the act of state doctrine because the case did not “turn upon” finding whether Nigerian government officials’ authorization of alleged bribes was illegal).
branch’s written orders expressly conferring power on the defendant to assist the Kazakh executive branch in preference to their legislative branch in moving around funds for reform programs). 47 Nonetheless, the court still felt it necessary to reject any application of the FCPA local laws affirmative defense because the letters of appointment in evidence failed to show that the “secret payments” were “official [laws or regulations] of Kazakhstan.” 48

Of the few FCPA cases that have made it to court, almost none of them discuss the local laws affirmative defense. 49 If the affirmative defense is raised, judges have significant leeway when it comes to interpreting what a foreign country’s “written law” means, and how to apply it. 50 Determinations of foreign law are decided by the judge, not the jury, and can be established by almost any source, whether or not submitted by a party or admissible under the Federal Rules of Evidence. 51 Judges have relied on a very wide variety of sources, including foreign public officials’ affidavits 52 and information from a phone call with a law clerk in the Hong Kong Trade Office presented to the court. 53 However, expert reports will most often be used. 54 In the FCPA context then, the judge’s decision on a foreign law’s “meaning,” which would determine whether the local laws defense applies at all, could very well boil down to the government pitting their expert against the defendant’s.

48 See Giffen, 326 F. Supp. 2d at 503.
49 In fact, only two U.S. court cases could be found that contain any substantive discussion beyond merely citing the affirmative defense. See id.; United States v. Koczeny, 582 F. Supp. 2d 535 (S.D.N.Y. 2008).
54 See Mitchell, supra note 51, at 1280.
2. Case Study – United States v. Kozeny and the FCPA Local Laws Defense

The most in-depth treatment of the local laws defense thus far in a U.S. Court construed it narrowly. In United States v. Kozeny, defendants including investor Frederick Bourke were charged with FCPA violations stemming from an arrangement to obtain a contract relating to the privatization of Azerbaijan’s state-owned oil company. Bourke requested a jury instruction regarding certain defenses that might be available under local law. He argued that any alleged payments to Azeri officials were lawful under the written laws of Azerbaijan, which provided that a “person who has given a bribe shall be free from criminal responsibility” if the bribe was extorted or reported to an appropriate government official. Bourke argued that the payments resulted from extortion and that he quickly reported them to the President of Azerbaijan, thereby relieving him from criminal liability under local law.

Both sides used experts to interpret several Azeri sources of law. On the extortion point, Bourke’s expert believed that if the payment resulted from extortion threatening one or more legally protected interests, then the payment would be “lawful” under Azeri law. He also stated that the term “relief from criminal responsibility” means that the “criminal code no longer applies to this person,” and that because the reporting rules are structured alternatively rather than cumulatively, that would render otherwise illegal conduct lawful. However, the government’s expert believed that the rule’s structure still did not render the initial payment “lawful,” but merely meant the payer could not be prosecuted for it if properly reported or if made under threat to the payer’s legal interests.

56 Id. at 538 (quoting Article 171 of the Azerbaijan Criminal Code).
57 Id. at 537.
59 See Kozeny, supra note 55, at 539 n.28 (citing testimony of Professor Stephan); see United States v. Kozeny, 2008 WL 7928653, Declaration of Paul B. Stephan ¶ 11 (April 7, 2008).
60 See Kozeny, supra note 55, at 539-40 nn.26,30 (citing testimony of William E. Butler).
The Court found the government’s side more convincing, and denied the instruction, concluding that “there is no immunity from prosecution under the FCPA if a person could not have been prosecuted in the foreign country due to a technicality (e.g., time-barred) or because a provision in the foreign law ‘relieves’ a person of criminal responsibility.”

This interpretation substantially limited how the local laws defense could be used. On the international plane, similar interpretations are further restricting the local laws defense regarding the extent to which defendants accused of foreign corrupt practices try to rely on criminal defenses under foreign laws.

II. Multilateral Efforts and the Scope of the FCPA’s Local Laws Defense


The Organization for Economic Cooperation and Development (“OECD”), an international organization established to promote financial stability, stands at the forefront of multilateral anti-bribery efforts. In 1997, OECD member countries signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business (“OECD Convention”), which sets forth “legally binding standards to [criminalize] bribery of foreign public officials in international business transactions.”

The OECD Convention’s text is followed by official Commentaries interpreting the text’s meaning. Commentary 8 essentially mirrors the FCPA’s local laws defense, stating that it is not a foreign bribery offense within the meaning of the Convention “if the advantage was permitted or required by the written law or regulation of the foreign public official’s  

61 Id. at 539. The court relied on the FCPA’s general focus on the payment rather than the payer, and an interpretation of the Azeri law by the Supreme Court of the U.S.S.R.
62 See About OECD, OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1_00.html (last visited December 1, 2011).
63 See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. I, Nov. 21, 1997, available at http://www.oecd.org/dataoecd/4/18/38028044.pdf. For example, the Convention provides that “[e]ach 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 . . . or give any undue . . . advantage, whether directly or [indirectly], 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 . . . [his or her] official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.”
64 See id. at 14.
country, including case law.” The OECD has supported the reasoning of the Kozeny trial court (both before and after the Kozeny decision) that defenses under a foreign country’s laws generally should not apply to local laws exceptions in domestic statutes prohibiting foreign bribery. OECD Working Group Reports on the OECD Convention’s implementation have recommended the repeal or amendment of several countries’ domestic defenses to foreign bribery allegations – some of them similar to the Azeri laws at issue in Kozeny. For example, the Hungarian Criminal Code provided a defense to a foreign bribery charge if the “[payment] was given or promised upon the initiative of the official . . . in fear of unlawful disadvantage.” The OECD’s rationale is that these types of defenses make sense in cases of bribing domestic officials, but not really when bribing foreign officials, because the domestic officials are likely to be prosecuted, but foreign officials are not.

Furthermore, the 2004 United Nations Convention Against Corruption (“UNCAC”), the world’s most widely-ratified anti-corruption treaty, provides that a State’s domestic law governs applicable defenses for corruption offenses under the treaty; i.e. defenses under foreign local laws

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65 Id. at 15.
66 See Sheahan, supra note 15, at 476-77 (explaining some foreign countries’ reporting exceptions/defenses to bribery charges and the OECD’s efforts to change them).
will usually not suffice for a “bribery of a foreign public official” offense (unless the prosecuting State also recognizes that defense).  

International trends are thus further limiting scenarios in which the FCPA local laws defense can be raised by defendants, especially when it comes to criminal defenses under foreign laws. Only six out of the 38 parties to the OECD Convention (United States, Canada, South Korea, New Zealand, Australia, and the United Kingdom) have made legislative reference to the local laws concept in Commentary 8. Recently, the OECD Director of Legal Affairs, in responding to a question about why Commentary 8 was in the OECD Convention, stated that “[t]his was a provision which existed in the U.S. legislation at the time when the Convention was negotiated. The U.S. negotiator did not want to go back to Congress and modify the legislation, but the boundaries are so thin that if you ask my personal view, this is a useless exception because . . . we can hardly see any case for it.”

Considering the OECD’s bleak position on its own local laws exception drawn from the FCPA’s local laws affirmative defense (coupled with the scarcity of U.S. cases discussing the defense), it is worthwhile to explore possible practical uses of the defense today.

III. Foreign Laws That Could Implicate the FCPA’s Local Laws Defense

There are several general categories of foreign laws that potentially implicate the FCPA’s local laws defense. Some of them have been analyzed by the DOJ under its FCPA Opinion Procedure, some can be attributed to cultural differences, and some apply to relatively limited

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72 Id. at Ev. 91 (Statement of Nicolas Bonucci, responding to Q482 by Baroness Whitaker).
73 The FCPA provides a system to obtain DOJ Opinions to help clarify whether specific prospective conduct might violate the statute. See 15 U.S.C. §§ 78dd-1(e) to -2(f); § 78dd-1(e)(1). If the DOJ decides it would
types of local written laws not yet addressed by DOJ Opinions that expressly require or allow things of value to be given to public officials in ways that raise FCPA red flags.

First, DOJ Opinions provided to investors upon request have highlighted several practical uses of the local law compliance concept in transactions that implicate the FCPA. One potential use recognized even before the local laws affirmative defense was added to the statute is retaining the services of a part-time foreign official.74 For example, the DOJ indicated it would take no enforcement action when a U.S. law firm proposed that a partner appointed to a high-ranking position in a foreign government keep receiving insurance benefits while in office and receive a lump sum client credit and interest on his capital contributions, where a local foreign counsel stated that the payments did not violate local law.75 The DOJ has also addressed joint venture transactions raising issues relating to the local laws defense. If the foreign written law requires (or expressly allows) that the government or a government-owned entity must act as a partner in a joint venture, then the local laws defense would presumably withstand a challenge to that setup.76 The defense would probably not protect all aspects of the investment, though. For example, in a 1993 Opinion, the DOJ approved a sales agreement between a U.S. company and a foreign government-owned business, where the local law gave the entity exclusive rights to purchase and deal with military defense equipment, and required all foreign suppliers to enter into written contracts agreeing to pay

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74 See Hearing, [1986 S. Banking Comm.], supra note 19, at 86, Statement of Calman J. Cohen, VP of ECAT (“The provision will permit U.S. companies, for example, to retain the services of individuals who serve as part-time public servants and are authorized by local law to perform outside activities, provided that they avoid conflicts of interest.”) (italics added).
the entity a percentage of the total contract price. The DOJ approved the deal, but only after the American company insisted on paying the country’s treasury directly. It is unclear whether the DOJ would view all such transactions as permissible if payments are just made directly to a nation’s treasury, but interpretations like these show the limitations of the local laws defense even when the local laws require government participation. Additionally, DOJ Opinions are not precedential, and the requesting party can still be subject to liability despite an Opinion’s conclusion of non-enforcement.

Next, cultural differences, especially reflected in foreign written common law, may also implicate the local laws affirmative defense. Every country prohibits “bribery” of its own public officials in some form, but culture still plays an important role in defining what is acceptable and what is corrupt in different communities. For example, South Korean courts have recognized an exception for a centuries-old practice of giving gifts or “ttokkap” (rice cake expenses) mostly during the holidays, even if the payer’s business is related to the official’s duty.

Lastly, five categories not yet concretely covered by DOJ Opinions potentially raise local laws defense questions. Among these scenarios are: (1) local laws that seem to permit “mere offers” of payments to public officials, (2) local laws that permit foreign lobbying and campaign contributions, (3) coercive foreign government written orders or other “laws” labeled as “fees,” (4) local laws requiring local agent participation, and (5) public offsets in the defense trade.

Regarding “mere offers,” part of the FCPA’s local laws defense is that the “offer . . . of anything of value . . . was lawful under the written laws and regulations of the foreign official’s . . .

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78 Id.
79 See 28 C.F.R. § 80.10 (Government can rebut by preponderance of the evidence).
country.”82 The Kozeny Court left open the possibility of a jury instruction that a “mere offer” was lawful under Azeri law, if Bourke could provide the evidence that his conduct fit that description.83 Some countries do require that the public official accept a bribe to constitute a bribery offense,84 so defendants might wonder if they are off the hook in an FCPA allegation if they only gave an offer of something of value to a public official in those countries.

Another area of relevance to the local laws defense deals with the less common perception of “foreign official” in the FCPA – the foreign political party, party official (not necessarily in office), or candidate for office. In many countries, campaign contributions from foreign sources are strictly regulated.85 Nonetheless, an FCPA defendant might conceivably try to apply the local laws defense in the context of lobbying or political contributions, if the payments are “lawful” under local laws. For example, Israeli law allows foreign individual contributions in its national primaries.86

Foreign laws and/or written orders from government officials, especially in repressive regimes, sometimes will require or allow payments to foreign officials labeled as “taxes” or “fees” even when the money’s ultimate use for public programs is questionable. FCPA bribery prosecutions are not likely to arise when everyone is treated equally, or when the money goes to a treasury rather than a “foreign official.” However, if local law requires investors to pay the Treasurer himself, or even “any person” while a defendant “knows” that a portion will go to a

84 See OECD 2006 Phase 2 Reports, supra note 68, at 31 (Under Italian law, the acceptance of a bribe by an official is an essential element of the offence of bribery, including the bribery of a foreign public official).
“foreign official,” there’s certainly room for the defendant to argue that at least the payment was lawful under local written laws. Iraqi State Oil Marketing Organization orders in the UN Oil-For-Food scandal are a good example of this complexity (and likewise a good example of the weakness of the term “lawful” in the FCPA’s local laws defense). Most FCPA actions relating to the Oil-For-Food Program were based on accounting (rather than anti-bribery) violations, but some contractors did defend their actions on the grounds that the “fees” paid were legitimate.

Although DOJ Opinions about foreign joint ventures have touched on a similar inquiry, they have not specifically analyzed foreign laws requiring government agent participation as part of contracts outside joint ventures. Several Middle Eastern countries have required foreign investors to use local sales agents or distributors, some of whom may work for foreign government “instrumentalities” within the meaning of the FCPA. For example, the Afghani Government recently approved a plan to require all new foreign development projects to employ government

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87 The FCPA states that it is “unlawful . . . to . . . corruptly in furtherance of an offer, payment . . . or authorization of the payment of . . . anything of value to . . . any person, while knowing that all or a portion of such . . . thing of value will be offered [or] given . . . directly or indirectly to any foreign official.” See 15 U.S.C. § 78dd-2(a)(3).
88 Under the UN Oil-For-Food (UN-OFF) Program, administered from 1995 to 2010, Iraq could sell its oil as long as it was sold at what the UN determined was a fair market price, and the proceeds of each sale were deposited into a UN-controlled escrow account. See Indep. Inquiry Comm. into the U.N. Oil-for-Food Programme, Summary of Report on Manipulation, http://www.iic-offp.org/documents/Final%20Report%2027Oct05/IIC%20Final%20Report%20-%20Chapter%20One.pdf [hereinafter “IIC Report”], at 2. For a few years, the Iraqi State Oil Marketing Organization assessed certain “after-sales service” and other fees on oil sales, advising every contractor of the requirement. Id. at 1-5. These fees ended up amounting to over $1 billion going to Saddam Hussein’s political party officials rather than for UN Security Council-authorized purposes. Id. at 1; see also Bilal A. Wahab, How Iraqi Oil Smuggling Greases Violence, 8 MIDDLE EAST QUARTERLY, 53-59 (Fall 2006), available at http://www.meforum.org/1020/how-iraqi-oil-smuggling-greases-violence#_ftnref9 (last visited December 7, 2011) (describing Iraq’s Ba’ath party participation in the UN-OFF scandal).
90 See IIC Report, supra note 88, at 6.
security guards, rather than those from private companies. Because these types of local laws could require payments to people less directly connected to a foreign government than the officials discussed in the DOJ joint venture Opinions, such scenarios raise possible FCPA local laws defense questions.

Perhaps the most widespread laws in foreign countries that could implicate the FCPA’s local laws defense are known as offsets. Offsets are policies by which the award of contracts by foreign governments or entities is exchanged for commitments to provide local industrial benefits and compensation, especially in the defense trade. These often include mandatory licensed production, subcontractor production, technology transfer, and foreign investment requirements entirely unrelated to the primary transaction. While the official U.S. Government policy is that offsets are trade-distorting, and some Congressmen view them as “economic bribes,” defense contractors usually see them as the business reality in the international defense market. For example, in 2003 (four years after Poland passed their Offset Law), U.S. defense contractor Lockheed Martin sold F-16 fighter planes to Poland for $3.5 billion plus an offset package of $6 billion (170% of the contract price) in American business investments (such as opening a General Motors plant in Poland and selling Polish airplanes in southern Florida for highly reduced costs).

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94 See id.
95 See id.
97 See id. (quoting a U.S. defense contractor executive as saying “It’s part of the price of international business; if we couldn’t offer them an acceptable package of offsets, they wouldn’t be buying an American airplane. It’s that simple.”).
98 See id.
In discussions behind the world’s newest comprehensive anti-bribery law, the prevalence of offset laws in many countries clearly affected the treatment of the “local laws” concept.

IV. United Kingdom Bribery Act Approach to the Local Laws Concept

The United Kingdom’s Bribery Act of 2010 (“UKBA”), which began to take effect in July 2011, has implemented an innovative, though not entirely perfect, approach to the local law compliance concept in foreign bribery enforcement. The most important difference between the UK Bribery Act and the FCPA’s local laws defense or the OECD Convention’s Commentary 8 is that rather than being an affirmative defense or exception raised by a defendant, the burden of proof is on the prosecution to prove (beyond a reasonable doubt) that not only was an “advantage” offered, promised, or given to the foreign official or third party at the official’s assent, but also that the foreign official was “not permitted or required to be influenced by [the advantage] as determined by the written law applicable to the foreign official” (italics added). Another significant difference is the UKBA’s focus on written laws permitting or requiring a foreign official “to be influenced by” an advantage, whereas the FCPA’s local laws defense seems to focus on written laws permitting or requiring the payment only. The OECD has called the Bribery Act’s focus on influence rather than the advantage itself a “clear departure from the Convention.” Novel approaches like these and certain types of foreign laws applying in limited circumstances indicate that at least the concept behind the FCPA’s local laws defense – that local law compliance

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100 See id. § 6(3)(b).
101 See Kozeny, supra note 55, at 539.
should usually not be punished – is not entirely extinct. However, even though the underlying concept may remain alive, the FCPA’s local laws *affirmative defense* is dead.

V. Proposal – Eliminate the FCPA’s Local Laws Affirmative Defense

The best option for the United States is to eliminate the local laws affirmative defense from the FCPA, and clarify how the local law compliance concept may still affect other parts of the statute. This concept does not work as an affirmative defense; it is illusory at trial, where affirmative defenses matter. Judicial interpretations and changing international norms have further limited the concept’s practical use as a defense. Perhaps most significantly, even in the remaining instances where local written laws may change the angle at which prosecutors view an FCPA defendant’s conduct, the utility of the local laws affirmative defense is *subsumed* by other parts of the FCPA, including the “corrupt” intent element, the “improper advantage” purpose, the “foreign official” element, and the facilitating payments exception. This Note argues for an elimination of the FCPA local laws defense for these reasons, and suggests possible areas where additional clarification should be considered.

It is true that the DOJ has given at least some weight to local laws compliance in its Opinions through the FCPA Opinion Procedure. Extensive, documented due diligence, the use of foreign local counsel, attempts to reduce conflicts of interest through certifications by the proposed foreign agent, and substantial disclosure in the face of local laws that might seem to encourage FCPA violations are clearly given some “points” when the DOJ has evaluated specific prospective conduct. However, the DOJ Opinions addressing the local laws concept have more of a

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103 See Part III.
104 See Part I.A. (introducing FCPA elements); see also Part I.B. (introducing facilitating payments).
foundation in other parts of the FCPA than in the local laws affirmative defense itself. Most of the relevant Opinions base their non-enforcement stances more on the fact that the proposed payments are not going to a “foreign official” than because the scenario complied with local written laws.\textsuperscript{106} In addition, no matter what the local law says, the DOJ has stressed the FCPA’s corrupt intent element\textsuperscript{107} and the improper advantage concept\textsuperscript{108} in their enforcement decisions more-so than the information that the proposed transaction was “lawful under the written laws . . . of the foreign official’s . . . country.”

The FCPA local laws defense would also likely be useless when doing business in cultures that may sanction gift-giving even to public officials. Though what is “improper” may differ from community to community, cultural norms still have limits, which are being influenced by international trends. Recently, South Korean prosecutors discovered a scheme where corporate conglomerates gave over $600 million in “ttokkap” to very influential government officials.\textsuperscript{109} The South Korean Supreme Court developed a new “comprehensive bribery” theory to legalize these payments so far in excess of cultural practices that they were \textit{de facto} bribes.\textsuperscript{110} In addition, more rigid guidelines on gift-giving are beginning to minimize practical uses of the FCPA local laws

\textsuperscript{106} See U.S. Dep’t of Justice Op. Procedure Release No. 07-03 (Dec. 21, 2007), \textit{available at} http://www.justice.gov/criminal/fraud/fcpa/opinion/2007/0703.pdf (where the payment was made to a court, and the court was appointed the administrator of an estate, concluding no enforcement action would be taken due to the factor that the payment went directly to a government entity, rather than a foreign official); \textit{see also} DOJ Op. 93-02, \textit{supra} note 77.

\textsuperscript{107} See U.S. Dep’t of Justice Op. Procedure Release No. 01-01 (May 24, 2001), \textit{available at} http://www.justice.gov/criminal/fraud/fcpa/opinion/2001/0101.pdf (decision to take no enforcement subject to caveat that could still attach liability if the joint venture – not just the U.S. company – knowingly took any act in furtherance of a payment to a foreign official regarding a preexisting contract made \textit{before} a French anti-corruption law was passed, “irrespective of whether the agreement to make such payments was lawful under French law when the contract was entered into”) (emphasis added).

\textsuperscript{108} See U.S. Dep’t of Justice Op. Procedure Release No. 10-03 (Sept. 1, 2010), \textit{available at} http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1003.pdf (mentioning local law compliance, but chiefly emphasizing recusal policies designed to prevent improper use of the foreign agent/official’s position and contractual terms to limit the foreign agent’s government representation to a level less than permitted by local law).


\textsuperscript{110} \textit{See id.}
defense even for business in traditionally “corrupt” countries such as China.\textsuperscript{111} New regulations restricting “guanxi,” a form of extensive schmoozing in business traditionally used for influencing government or state-owned entity officials, have made many corporate leaders view the practice as “unnecessary and dangerous” now.\textsuperscript{112} The prospect of relying on foreign common law articulating accepted business practices to establish that a payment or gift was “lawful” under local laws is becoming more and more imaginary for FCPA defendants who would seek to prove their local laws affirmative defense.

The fact that some countries require acceptance by the official to constitute a “bribe” does not mean the FCPA’s local laws defense would work for “mere offers” either. This aspect of the defense has been limited almost to the point of mootness by international standards, now that the UNCAC requires all State parties (nearly every country in the world) to illegalize “offers” as well as actual payments of bribes.\textsuperscript{113} However, even if a country doesn’t follow through on their UNCAC obligation, a mere offering of a payment intended to corruptly influence a public official will either usually be covered by another local offense\textsuperscript{114} (precluding the FCPA local laws defense by making the offer no longer “lawful” under the local laws), not discovered at all, or not prosecuted (due to the difficulty of proving the offer’s purpose).\textsuperscript{115}

\textsuperscript{111} TRANSPARENCY INTERNATIONAL, Corruption Perceptions Index 2011, http://cpi.transparency.org/cpi2011/results/ (China ranked 75th out of 182 countries based on NGO multi-factor corruption survey, meaning China’s large business environment was more corrupt than 74 countries’).


\textsuperscript{113} See UNCAC, supra note 70, arts. 15-16 (requiring State signatories to criminalize the intentional “promise, offering or giving, to a public [or foreign] official . . . of an undue advantage”) (italics added).

\textsuperscript{114} See OECD 2006 Phase 2 Reports, supra note 68 (Under Italian law, “the practice has been to prosecute [cases of mere offers] with the offence of istigazione alla corruzione, pursuant to Article 322 of the [Italian] Criminal Code. This offence covers the case where the official has not accepted [or refused] the offer or promise, but not an offer or promise that was not received by the official.”).

\textsuperscript{115} See id. (“It may be prudent to canvass whether Parties that do not require such an agreement [for a bribery offense] will nevertheless require one in practice . . . given that in the absence of proof of such an agreement, it may be difficult to prove the purpose of the payment made to the foreign public official.”).
In the context of lobbying and political contributions, there still may be an argument that the local laws defense might work, on the grounds that the defendant is trying to influence general legislation or policy, rather than a contract award. But for business conducted in those countries that do allow contributions by foreign entities, the DOJ’s focus will most likely be on the FCPA’s corrupt intent and improper advantage elements (including compliance with local disclosure laws), rather than the mere fact that the payments were “lawful” under local law. For instance, a foreign regulation might expressly permit a candidate campaign contribution by a foreign company (making the payment “lawful”), but the law is very unlikely to permit the company to give that contribution expressly in exchange for the candidate’s agreement to endorse legislation in the company’s interests once the candidate is elected.

Other parts of the FCPA also destroy the local laws defense’s viability in the context of required “fees,” local government agent participation, and offsets. Most of the time, if everyone has to do it under local written government orders, then the defendant would probably not have “corrupt” intent, as long as they stayed within amounts or methods prescribed under local laws. If the local law requires payments, but is silent on payment or method restrictions, then the DOJ would look to other corrupt intent evidence, including whether there was honest disclosure. This would especially come into play in occupied or rebuilding nations where what is “lawful” under local laws is hard to determine. For instance, in the UN-Oil-For-Food Program scandal in Iraq, the local laws defense (if raised) would almost certainly not have helped any defendant because even though the “fees” orders were promulgated by a foreign government agency, they were probably not “lawful” under local laws anyway because that foreign government (through its executive, Saddam

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116 See, e.g., Hearing on H.R. 2157 Before the Subcomm. on Int’l Econ. Policy & Trade of the H. Comm. on Foreign Affairs, 98th Cong. 284-85 (July 12, 1983) (discussion of a case which involved political payments to a Honduran Minister to push for a reduction of the general export tax which would indirectly benefit the U.S. company, as not violating the FCPA).
117 See PAR. DEB., H.L. (U.K.), supra note 71, at Ev. 300 (citing a document in evidence in draft UKBA discussions giving this example of how the UK believes the FCPA local laws concept applies).
Hussein) had agreed in 1996 that the Program was to be administered by the UN, and the Iraqi “fees” regulations breached that agreement.\(^\text{118}\) For required local government agent participation, the Afghan example of mandating the hiring of government security guards falls statutorily within one of the things described as a “facilitating payment” outside the scope of the FCPA,\(^\text{119}\) and it is likely that other similar local agent participation laws will too, further demonstrating the futility of the local laws defense. The defense is equally paralyzed in offset transactions for similar reasons, e.g., the offset “things of value” going to foreign governments rather than “foreign officials,” the lack of improper advantage or corrupt intent (since offsets are established for every foreign business partner), and the facilitating payments exception.\(^\text{120}\) For all of these types of foreign laws that seem to send mixed signals compared to FCPA prohibitions, U.S. judicial interpretations, international trends, and other parts of the FCPA make the FCPA local laws defense unnecessary, and indicate that it is time for its elimination. After the defense’s elimination, the local law compliance concept will still make FCPA defendants think twice in certain foreign jurisdictions, and for that reason, the DOJ should clarify how it is taken into account in the rare scenarios where local laws expressly conflict with the FCPA.

Under mounting criticism,\(^\text{121}\) the DOJ plans to issue a new Guidance on the FCPA in 2012 to help businesspeople better understand its provisions and the Government’s enforcement policy.\(^\text{122}\) This is a necessary and opportune time to clarify how local law compliance is taken into

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118 See Report on Illegal Surcharges on Oil-For-Food Contracts and Illegal Oil Shipments from Khor Al-Amaya: Released in conjunction with Hearing Before the S. Subcomm. on Investigations of the Comm. on Homeland Security & Gov’t Affairs, 109th Cong. 5 (May 17, 2005).


120 See id. § 78dd-2(h)(4)(A) (allowing payments for “obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; [and] . . . actions of a similar nature”).


account in enforcing other parts of the statute. The main areas the DOJ should focus on are how the FCPA’s corrupt intent and improper advantage elements are interpreted in light of local written laws, and how the facilitating payments exception affects offset transactions.

The DOJ Guidance should adopt an express policy on criminal defenses under foreign laws and corrupt intent. One approach is to make foreign criminal defenses eliminate a defendant’s corrupt intent if the defendant satisfies the defense under the foreign law. However, international trends shown by the OECD’s resistance to this, along with the lone U.S. court interpretation on the issue (Kozeny), point to the opposite conclusion. The Guidance should thus explain how defenses under foreign laws are viewed from a prosecutor’s perspective. Furthermore, the Guidance should also give examples on appropriate safeguards when local laws seem to grant an investor an “improper advantage” or expressly allow or require beyond what is described as a facilitating payment in the FCPA. For example, the UK Bribery Act’s distinction between locally lawful influence compared to locally lawful payment could be useful at least in the context of enforcing FCPA actions tied to ambiguous foreign offset laws. In offsets, it may be “lawful” under local laws for a public official to “be influenced by” advantages to third parties, while such payments would

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123 See Sheahen, supra note 15, at 489 (arguing that the local laws defense should apply “whenever the payment is legal under foreign law, regardless of whether the conduct is affirmatively permitted or excused”); see UNCAC, Reservations, Paraguay, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-14&chapter=18&lang=en#EndDec (choosing to define the term “offence” as a “punishable act,” in accordance with domestic legislation).

124 Payments intended to influence “any decision by a foreign official whether, or on what terms, to award new business or to continue business with a particular party” are expressly not facilitating payments under the FCPA. 15 U.S.C. §§ 78dd-1(f)(3)(B), -2(h)(4)(B), -3(f)(4)(B). If Congress eliminates the local laws defense, it is unclear how the DOJ would interpret that phrase if a foreign law expressly gave offset criteria and discretion to its foreign officials in negotiating offsets. Payments to foreign officials in such situations would facially not be lawful facilitating payments, yet also would be lawful under the local laws. Perhaps the DOJ could clear this up as well when they explain what “corrupt intent” means when local laws raise FCPA red flags.

125 See Bribery Act (U.K.), supra note 98, § 6(3)(b).
facially not be allowed under the FCPA. The UK Parliament supported its focus on lawful influence while discussing the UK Bribery Act’s compliance with the OECD Convention, giving an example that when foreign laws require a nation’s public officials to “take into account whether a business bidding for a public contract has proposed to place part of the contract with local sub-contractors or to fund local infrastructure projects . . . [s]uch a situation is not a crime, compared to a case where a foreign official is not legally [allowed] to allocate business on the basis of a donation to a charity of his/her choice.” The DOJ could adopt a similar clarification in its Guidance for foreign laws like offsets. This would allow prosecution to proceed where foreign officials are unlawfully influenced, while still respecting businesses’ local law compliance attempts.

Such clarifications would be a step in the right direction for dealing with the local law compliance concept after the FCPA’s local laws affirmative defense is taken out of the statute.

**Conclusion**

There are still some instances in international business where a foreign country’s written laws allow things to be given to public officials or people close to the government in ways that seem to violate the FCPA and traditional Western anti-corruption values. Nonetheless, the FCPA’s local laws affirmative defense would not even succeed in these rare circumstances. The defense’s potential scope, if there ever was much of a scope at all, has been pushed to the point of uselessness by U.S. judicial interpretations, multilateral efforts against similar defenses or exceptions, and swallowed by other parts of the FCPA when the defense could otherwise theoretically work.

The local laws defense should be eliminated from the FCPA. Rather than hanging on to the defense, the DOJ should explain how compliance with local law is taken into account when

126 See [*supra* note 124](#footnote126) (discretionary official acts fall outside “routine governmental action[s]” that the facilitating payments exception allows).

assessing other elements of the FCPA. The DOJ’s focus in FCPA enforcement where local laws may confuse businesspeople should be about compliance at the outset, rather than an after-the-fact affirmative defense.