TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW

VOLUME 20 SPRING 2012 NO. 2

The *Corner House* Case and the Incomplete Incorporation of the OECD Anti-Bribery Convention in the United Kingdom

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The Corner House *case concerned the decision by the Director of the Serious Fraud Office to suspend its investigation into BAE Systems' suspected bribery of Saudi Arabian public officials. This Article examines the reasons why the House of Lords decided not to interpret article 5 of the OECD Anti-Bribery Convention, an unincorporated treaty provision that prohibits national prosecutors from suspending an investigation on the basis of the potential effect that it might have on relations with other states. Ultimately, the manner in which the House of Lords declined to interpret article 5 contributes to a general undermining of the binding force of the Convention in the United Kingdom. The failure of the U.K. Bribery Act 2010 to incorporate article 5 further exacerbates this situation.*

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I. INTRODUCTION

Regina (Corner House Research & Another) v. Director of the Serious Fraud Office (*Corner House*) illustrates the reluctance of national courts to grapple with the politically sensitive issues raised by the intersection of corruption and national security. This case concerned the lawfulness of a decision by the former Director of the Serious Fraud Office (SFO) to discontinue an investigation into bribes allegedly paid by the weapons company, BAE Systems plc (BAE), to the government of Saudi Arabia.[1] The Director's decision to suspend the investigation of BAE came about after Saudi Arabia threatened, among other things, to suspend security cooperation with the United Kingdom should the investigation continue.[2] The House of Lords held that the Director's decision was lawful because he did not exceed his discretion in deciding that the public interest in pursuing the investigation was outweighed by the public interest in protecting the lives of British citizens.[3]

The House of Lords also included some revealing *obiter dicta* on why it should not interpret article 5 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).[4] Article 5 provides that:

> Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.[5]

The U.K. Parliament had only partially implemented the OECD Convention in 2001, omitting article 5 from the legislation that it enacted

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1. R (Corner House Research & Another) v. Dir. of the Serious Fraud Office, [2008] UKHL 60, [2009] 1 A.C. 756, 837 (appeal taken from HM High Court of Justice).
2. *Id.* at 832.
3. *Id.* at 843-45.
4. *Id.* at 845-46.
5. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 5, Dec. 18, 1997, 37 I.L.M. 1.

at that time. In this case, however, the SFO Director took article 5 into account in his decision-making process even though he was not technically required to do so because Parliament had not incorporated it into the laws of England and Wales.[6]

The constitutional principle of the non-justiciability of unincorporated treaties did not necessarily have to prevent the House of Lords from interpreting article 5 in this case.[7] A relevant body of case law provides that courts may review unincorporated treaties that an executive decision maker, such as the SFO Director, has voluntarily taken into account in exercising his discretion.[8] Yet the House of Lords distinguished *Corner House* from this precedent.[9] The court's *obiter dicta* to this effect are troubling in part because of its eagerness to cede responsibility for interpreting the provision to the OECD Working Group on Bribery in International Business Transactions (Working Group), a body that was not designed to play the role that the House of Lords ascribed to it. In addition, the House of Lords' *obiter dicta* essentially discourage executive decision makers from seeking guidance in relevant treaties that Parliament has failed to incorporate into U.K. law. The court's *obiter dicta* concerning article 5 merit attention because they run counter to the U.K.'s international legal obligations under the OECD Convention, a treaty that very much depends on enforcement by national prosecutors and judiciaries.

This Article does not focus on whether article 5 prohibits prosecutors from taking national security into consideration. This question may pose no great interpretive problems but may simply depend on how this provision applies to a given set of facts. National security presumably falls under "the potential effect upon relations with another State" when an investigation or prosecution of a foreign public official would cause bilateral security co-operation to sour, but not necessarily when a trial would lead to the disclosure of national security information of the prosecuting State. In addition, national security concerns may give rise to an exception to article 5 only insofar as the background customary international norm of necessity applies to this treaty obligation.[10] These

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6. *Corner House*, [2009] 1 A.C. at 840.
7. *Id.* at 845.
8. *Id.*
9. *Id.*
10. Rep. of the Int'l Law Comm'n, Draft Articles on Responsibility of States for Intentionally Wrongful Acts art. 25, 53d Sess., Apr. 23-June 1, July 2-Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n, P.C., U.N. Doc. A/56/49 (Vol. 1)/Corr. 4. *But see* Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 N.Y.U. J. INT'L L. & POL. 437, 457-60 (2008).

issues, however, lie beyond the scope of this Article, which instead explores questions of international law in English courts, particularly the legal implications of the House of Lords' determination that it should not interpret this provision at all. The main thrust of this Article is not so much that the House of Lords should have interpreted article 5, but that the manner in which the court declined to do so contributes to a general undermining of the binding force of the OECD Convention in the United Kingdom. Moreover, the significance of the court's *obiter dicta* is undiminished by the U.K. Bribery Act 2010, which finally came into force on July 1, 2011, because article 5 remains unincorporated despite major legislative reform.

This Article begins by outlining the factual and procedural background to the *Corner House* case (Part II) and then proceeds to detail the persistently unsatisfactory status of article 5 in the U.K. domestic legal order (Part III). The Article then explores the ramifications of the manner in which the House of Lords distinguished the *Corner House* case from prior jurisprudence permitting judicial review of similar exercises of executive discretion (Parts IV and V).

II. FACTUAL AND PROCEDURAL BACKGROUND

The United Kingdom ratified the OECD Convention on December 14, 1998, and in 2001, Parliament gave partial effect to the U.K.'s obligations under the OECD Convention by enacting sections 108 through 110 of the Anti-terrorism, Crime and Security Act 2001.[11] These provisions did not implement article 5, although they did make it an offence for a U.K. national or company to make a corrupt payment or to pay a bribe to a foreign public official.[12] In July 2004, the SFO Director, Mr. Robert Wardle, launched an investigation into suspected violations of these provisions by BAE in the context of the Al Yamamah arms contract between the U.K. government and the Kingdom of Saudi Arabia (BAE was the main contractor).[13] Between 2004 and 2006, while this investigation was ongoing, negotiations took place between the United

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11. The United Kingdom signed the Convention on December 17, 1997 and deposited its instrument of ratification on December 14, 1998. *See* ORG. FOR ECON. CO-OPERATION & DEV. (OECD), STEPS TAKEN TO IMPLEMENT AND ENFORCE THE OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (2011), *available at* http://www.oecd.org/dataoecd/17/30/48362318.pdf.

12. *Corner House*, [2009] 1 A.C. at 831.

13. *Id.* at 831-32. *See generally* David Leigh & Rob Evans, *Nobbling the Police*, GUARDIAN (June 11, 2007, 10:34 AM), http://www.guardian.co.uk/world/2007/jun/11/ bae3.

Kingdom and Saudi Arabia regarding an extension of the contract for the supply of military fighter jets, known as Typhoon aircraft.[14]

The SFO's investigation reached a critical juncture in the autumn of 2005, and again in the autumn of 2006. In October 2005, the SFO issued a statutory notice to BAE that required BAE to disclose the details of payments that it had made to agents and consultants in connection with the Al Yamamah contract.[15] BAE subsequently made representations to the SFO and the then Attorney General, Lord Goldsmith, about the adverse impact that this investigation would have on relations between Saudi Arabia and the United Kingdom. Nevertheless, in January 2006, the Attorney General and the SFO Director decided that it was in the public interest for the investigation to continue.[16]

During this period, between October 2005 and January 2006, both the Attorney General and the SFO explicitly referred to article 5 of the OECD Convention in their assessments of whether to proceed with the investigation.[17] A letter from the Attorney General's legal secretary on his behalf referred to the assurance that the Attorney General had given in 2004 to the Working Group that he would not take into account the considerations prohibited under article 5 as public interest factors not to prosecute foreign bribery cases.[18] In addition, the SFO's Case Controller wrote in a brief to the SFO Director that the SFO "*must* investigate all reasonable lines of enquiry and do so in light of our domestic and international obligations," which he described as "currently" including article 5 of the OECD Convention.[19] The Case Controller argued that for instruments such as this one to have any "meaningful effect," they must be applied, "regardless of the seriousness of the consequences stated."[20]

Approximately one year later, however, the Attorney General and the SFO Director reversed course when events led to a reassessment of whether the investigation of BAE should continue. In the autumn of 2006, the SFO succeeded in obtaining the co-operation of Swiss authorities in its investigation of certain Swiss bank accounts to determine whether BAE had made payments to a Saudi agent or public official.[21] At this point, the SFO's investigation drew explicit threats from

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14. *Corner House*, [2009] 1 A.C. at 832.
15. *Id.*
16. *Id.* at 832-34.
17. *Id.* at 832-33.
18. *Id.* at 833.
19. Director Brief from Matthew Cowie on BAE Systems to Robert Wardle, Helen Garlick & Peter Kiernan (Dec. 19, 2005) (emphasis added).
20. *Id.*
21. *Corner House*, [2009] 1 A.C. at 834.

the government of Saudi Arabia, which warned that if the investigation continued, it would withdraw co-operation with the United Kingdom regarding counterterrorism and the U.K.'s strategic objectives in the Middle East.[22] Saudi Arabia also threatened to end the negotiations for the procurement of the Typhoon aircraft.[23] The U.K. ambassador to Saudi Arabia warned the SFO Director on numerous occasions that "British lives on British streets were at risk."[24] In addition, the Prime Minister expressed to the Attorney General his "strong support for the OECD Convention, but considered that his primary duty was to United Kingdom national security."[25] On this basis, the Prime Minister urged the Attorney General to consider the "public interest" in pursuing the investigation.[26]

In December 2006, the SFO Director decided to discontinue the investigation because of the "need to safeguard national and international security."[27] The Director explained that "[n]o weight had been given to commercial interests or to the national economic interest."[28] The Director also stated that:

> [E]ven had I thought that discontinuing the investigation was not compatible with article 5 of the Convention, I am in no doubt whatsoever that I would still have decided, by reason of the compelling public interest representations . . . that the investigation should be discontinued. The threat which I considered existed to UK national and international security if the investigation continued was so great that I did not believe there was any serious doubt about the decision I should make.[29]

On the same day, the Attorney General also made a statement in Parliament about the decision to discontinue the investigation. He explained that article 5 of the OECD Convention precluded him and the SFO from considering national economic interests or relations with another state, and that they had not done so.[30]

In April 2007, two public interest groups, Corner House Research and the Campaign Against Arms Trade, brought an application for judicial review of the SFO Director's decision to end its investigation of

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22. *Id.*
23. *Id.*
24. *Id.* at 835 (internal quotation marks omitted).
25. *Id.*
26. *Id.*
27. *Id.* at 837.
28. *Id.*
29. *Id.* at 849 (internal quotation marks omitted).
30. *Id.* at 837-38.

alleged bribery by BAE.[31] On April 10, 2008, the Queen's Bench Divisional Court held that the SFO Director's decision was unlawful, and accordingly quashed it and remitted it to the Director for reconsideration.[32] In addition to holding that the Director's submission to the Saudi threat was unlawful, the Divisional Court addressed, but did not make any rulings on, the issue of whether the Director had taken account of a consideration precluded by article 5.[33] The court concluded that because the Director had claimed to be observing article 5, the court could review his legal self-direction, particularly because the Anti-Terrorism, Crime and Security Act 2001 gave effect to the Convention.[34] Ultimately, however, the Divisional Court refrained from providing an interpretation of article 5, and instead observed that the contracting parties to the OECD Convention had invested the Working Group with the authority to make such interpretations.[35] Moreover, the court held that a decision on article 5 was unnecessary because it had already concluded that the Director's decision was unlawful under domestic law.[36]

On July 30, 2008, on appeal before the House of Lords, Lord Bingham of Cornhill held that, in deciding that the public interest in pursuing the investigation was outweighed by the public interest in protecting the lives of British citizens, the SFO Director did not make an unlawful decision that exceeded his discretion.[37] In reaching this holding, Lord Bingham rejected the Divisional Court's application of a "novel and unsupported" principle whereby submission to a threat is only unlawful when there is no alternative course open to the executive decision maker.[38] Discussion of article 5 of the OECD Convention occupies a relatively small portion of the judgment. Like the Divisional Court, the House of Lords did not make any rulings on article 5, although *obiter dicta* in the speeches of Lord Bingham, Baroness Hale of Richmond, and Lord Brown of Eaton-under-Heywood leave us with some important, if troubling, statements concerning international law in English courts.[39]

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31. Claimant's Skeleton Argument, R (Corner House Research & Campaign Against Arms Trade) v. Dir. of the Serious Fraud Office & BAE Sys. plc, [2009] 1 A.C. 756 (No. CO/1567/2007).

32. *Corner House*, [2009] 1 A.C. at 803. *See generally* David S. Lorello, Rose Parlane & Andrew D. Irwin, *UK High Court Al-Yamamah Decision Signals Debate on Role of Prosecutorial Discretion in Anticorruption Investigations*, 5 INT'L GOV'T CONTRACTOR 1, ¶ 45 (2008).

33. *Corner House*, [2009] 1 A.C. at 794-95.

34. *Id.* at 789.

35. *Id.* at 800.

36. *Id.*

37. *Id.* at 843-45.

38. *Id.* at 843.

39. *Id.* at 846-49.

III. THE STATUS OF ARTICLE 5 OF THE OECD CONVENTION

Before examining how and why the House of Lords decided not to interpret article 5 of the OECD Convention, the precise status of this provision in the U.K. domestic sphere merits some attention. The unincorporated status of article 5 had significant consequences in this case: had article 5 been incorporated into U.K. law at the time of the events giving rise to the *Corner House* case, then the constitutional principle of the non-enforceability of unincorporated treaties would not have prevented the House of Lords from assessing whether the SFO Director's decision was in accordance with a statutory provision reflecting the prohibitions of article 5. While the outcome of this case would likely have been essentially the same (i.e., the House of Lords would probably still have decided that the Director's decision was lawful), the Divisional Court or the House of Lords might have made an unprecedented ruling on whether the prohibited considerations leave room under article 5 for a national security exception.

Yet the status of article 5 did not enjoy close examination by the Divisional Court or the House of Lords. Neither court dwelled at any length on the status of article 5 in U.K. law. Lord Bingham merely referred to article 5 as "an unincorporated treaty provision not sounding in domestic law."[40] Similarly, the Divisional Court simply noted that "there is no domestic legal obligation which expressly requires the Director to take into account article 5 of the Convention . . . ."[41] In addition, the Law Commission failed to recommend article 5's incorporation in its lengthy 2008 report calling for reform of U.K. bribery laws.[42] Unsurprisingly, Parliament then omitted this provision from its Bribery Act 2010. Although the SFO and the Crown Prosecution Service (CPS) have incorporated article 5 into their guidelines for prosecutors, they have done so in a defective manner that leaves a lingering uncertainty as to article 5's status in the U.K.'s legal order. Thus, as will be explained in more detail below, while the status of article 5 in the laws of England and Wales has evolved since the *Corner House* case, it remains unsatisfactory.

A. Parliament's 2001 Act and the Law Commission's 2008 Reform

Although Parliament incorporated several core provisions of the OECD Convention in 2001, it did not incorporate article 5, which

40. *Id.* at 845.
41. *Id.* at 790.
42. LAW COMM'N, NO. 313, REFORMING BRIBERY, para. 9.7 (2008).

arguably constitutes an ancillary provision. Articles 1 and 2 of the OECD Convention set forth the States Parties' core obligations: article 1 requires States Parties to criminalise the bribery of foreign public officials, and article 2 requires them to establish the liability of legal persons for such bribery.[43] Article 5, however, does not require any sort of criminalisation, but instead concerns the manner in which States Parties must investigate and prosecute the bribery of foreign public officials.[44] Article 5 specifically prohibits the consideration of "national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."[45] The Commentary to the Convention, which essentially serves as the *travaux préparatoires*, explains that while article 5 "recognizes the fundamental nature of national regimes of prosecutorial discretion," it also recognises that "in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature."[46] The broadness of the phrase "political nature" suggests that article 5's prohibited considerations should be interpreted to have a relatively expansive rather than narrow application.

The U.K. Parliament sought to meet the requirements of the OECD Convention through the insertion of part 12 into the Anti-terrorism, Crime and Security Act 2001. This Act, which Parliament passed in response to the events of 9/11, included provisions on corruption because of a perceived link, however tenuous, between corruption and the creation of conditions that allow for and foster terrorism.[47] Part 12 of this Act was intended to be a temporary measure, to be replaced by comprehensive corruption legislation. After attempts at reform failed in 2003, however, part 12 continued to govern until well after the litigation of the *Corner House* case in 2008.[48] Part 12 sought to bring U.K. law into compliance with the OECD Convention by expanding the scope of the existing offences to include extraterritorial bribery.[49] Sections 108 to 110

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43. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 5, arts. 1-2.

44. *Id.* art. 5.

45. *Id.*

46. DIRECTORATE FOR FIN., FISCAL & ENTER. AFFAIRS, COMM. ON INT'L INV. & MULTINATIONAL ENTERS., OECD, COMMENTARIES ON CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS ¶ 26 (1997) [hereinafter COMMENTARIES].

47. LAW COMM'N, *supra* note 42, para. 4.7; 629 PARL. DEB., H.L. (5th ser.) (2001) 152-53 (U.K.).

48. LAW COMM'N, *supra* note 42, paras. 4.8-.9.

49. *Id.* para. 4.10.

of part 12 did not, however, give any effect to article 5 of the Convention. Thus, while part 12 incorporated the U.K.'s main obligations under the OECD Convention, it left article 5 outside the realm of U.K. law. We are left to speculate about the reasoning, if any, behind this omission. Parliament may have considered incorporation of article 5 to be unnecessary, or alternatively, perhaps Parliament deemed incorporation necessary, and intended to address the requirements of article 5 during a subsequent reform of the U.K.'s bribery laws.

In the Law Commission's November 2008 report, which followed the House of Lords' high-profile judgment by several months, the Commission failed to note that article 5 required incorporation, despite the fact that both the Divisional Court and the House of Lords had recently found that article 5 did not form a part of U.K. law. The Law Commission's report neither explains its stance with respect to article 5, nor demonstrates an awareness of the Working Group's criticisms on this point, which will be discussed below. The Law Commission determined that the current law satisfied the U.K.'s international law obligations, although it was arguably defective in some other respects.[50] The Law Commission pointed to three relatively technical defects concerning the jurisdictional scope of the current laws, but it made no mention of article 5.[51] The Commission also cited policy reasons for reforming the law, none of which touched on issues of enforcement. The Commission found that "[t]he motley of common law and statutory offences, each with their own scope, has left the law in need of rationalisation and simplification."[52] The Commission accordingly pushed for a discrete offence of bribing a foreign public official not because aspects of the OECD Convention remained unincorporated, but because such an offence would: (1) demonstrate the U.K.'s commitment to its international obligations, (2) make it easier to interpret the law in light of the U.K.'s international obligations, and (3) facilitate a comparative approach.[53] The 2010 Bribery Act's omission of any reference to article 5's prohibited considerations is therefore in keeping with the Law Commission's seeming lack of concern about the status of this provision.

It may be noted, however, that the Bribery Act 2010 does make one important change with respect to enforcement of anti-bribery laws by eliminating the requirement that the SFO obtain permission from the Attorney General before instituting criminal proceedings for bribery

50. *Id.* para. 8.15.
51. *Id.* paras. 8.15-.18.
52. *Id.* para. 2.24.
53. *Id.* paras. 5.61-.71.

offences, including the bribery of foreign public officials.[54] The Act now requires that only the SFO Director (or the Director of Public Prosecutions or the Director of Revenue and Customs Prosecutions) consent to prosecutions under the Act in England and Wales, thereby eliminating the role previously played by the Attorney General.[55] This change addressed concerns regarding the Attorney General's perceived interference with the decision-making process of the SFO Director in the Al Yamamah investigation, and ensures that in the future, the Director's decisions will be freer of concerns of a "political nature."

B. Amendments to the Prosecution Guidelines of the Crown Prosecution Service and the Serious Fraud Office

Perhaps the Law Commission's silence with respect to article 5 may be explained, at least in part, by amendments to the prosecution guidelines of the CPS and the SFO. In January 2008, the CPS amended its publicly available online guidance for the CPS to ensure that the investigation and prosecution of the bribery of foreign public officials would comply with article 5.[56] The guidance for the CPS now provides that:

> In the event that the CPS decides to review a file for a possible prosecution then a very careful consideration of the Code for Crown Prosecutors will be essential and prosecutors must ensure that they are not influenced in the negative by considerations of national economic interest, the potential effect upon relations with another State or the identity or the nature of legal persons involved. (NB: Article 5 of the OECD Convention on the Bribery of Foreign Public Officials in International Business Transactions, to which the UK is party, specifically prohibits such considerations.)[57]

The SFO's Guidance on Corporate Prosecutions similarly includes a provision reminding prosecutors dealing with bribery cases to abide by article 5 during investigations and prosecutions.[58] Meanwhile, the Code

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54. *See generally id.* para. 9.1-.7.

55. Bribery Act, 2010, c. 23, § 10(1) (U.K.).

56. WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, OECD, UNITED KINGDOM: PHASE 2 FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS para. 18 (2007).

57. *Bribery and Corruption*, CROWN PROSECUTION SERV., http://web.archive.org/web/20100428110542/http://www.cps.gov.uk/legal/a_to_c/bribery_and_corruption/ (last updated Jan. 17, 2008).

58. SERIOUS FRAUD OFFICE (SFO), GUIDANCE ON CORPORATE PROSECUTIONS para. 33, http://www.sfo.gov.uk/about-us/our-policies-and-publications/guidance-on-corporate-prosecutions.aspx (last visited Apr. 27, 2012) [hereinafter GUIDANCE ON CORPORATE PROSECUTIONS].

for Crown Prosecutors has remained unchanged. As will be explained below, this is problematic.

The Working Group has pointed to the flaws in these amendments, but the Law Commission did not take up these criticisms. Although the Law Commission's Report explicitly relied on the Working Group's assessments of many other weaknesses in the U.K.'s bribery legislation, it made no reference to the Working Group's concerns about the status of article 5. Immediately prior to the issuance of the Law Commission's report, the Working Group had underlined the need for article 5 "to be clearly binding in the UK domestic sphere (although not necessarily through legislation)."[59] Although the CPS and the SFO did amend their guidelines so as to bring them into compliance with article 5, these changes were not enough to make them "clearly binding."

First, the Working Group had indicated that this amendment to the CPS's online guidance would be problematic given the text of the Code for Crown Prosecutors, which includes a conflicting provision on "public interest factors tending against prosecution."[60] The Code provides that a prosecution is less likely to be required if details must "be made public that could harm sources of information, international relations or national security."[61] Thus, while the CPS's online guidance regarding the prosecution of bribery prohibits the consideration of "the potential effect upon relations with another State," the Code actually permits considerations of "international relations or national security."[62] The online guidelines and the Code therefore appear to conflict irreconcilably, suggesting that the CPS's incorporation of article 5 is defective. The SFO's Guidance is subject to the same criticism, as their guidelines must

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59. WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, OECD, UNITED KINGDOM: PHASE 2*BIS* REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS para. 99 (2005) [hereinafter PHASE 2*BIS* REPORT].

60. WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS, OECD, UNITED KINGDOM: PHASE 2 REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS paras. 163-64 (2005). Peter Cullen has also criticised the Code for Crown Prosecutors because the Code transgresses article 5's requirement that prosecutors must not be subject to the influence of concerns of a political nature. Peter J. Cullen, *Article 5. Enforcement*, *in* THE OECD CONVENTION ON BRIBERY: A COMMENTARY 289, 319 (Mark Pieth et al. eds., 2007).

61. CROWN PROSECUTION SERV., THE CODE FOR CROWN PROSECUTORS para. 4.17(k) (2010).

62. *Id.*; GUIDANCE ON CORPORATE PROSECUTIONS, *supra* note 58, para. 33.

be read in conjunction with, and subordinate to, the Code for Crown Prosecutors.[63]

Second, the Working Group pointed out that the CPS's guidance is flawed because it refers only to the application of article 5 during the prosecution stage, and not during investigations.[64] Given that the Attorney General and the SFO Director arguably took considerations of international relations into account when deciding to suspend the Al Yamamah investigation, the guidance's application only to prosecutions represents a glaring omission. This criticism, however, does not apply to the SFO's Guidance, which explicitly applies to investigations as well as prosecutions. Taken together, these observations lead to the conclusion that both the CPS and the SFO have incorporated article 5 in a defective manner. The Guidance for prosecutors issued by the CPS and the SFO has an inferior status to the Code for Crown Prosecutors, which conflicts with article 5 by calling for the consideration of factors that article 5 prohibits. The flawed incorporation of article 5 by the CPS and the SFO suggests that Parliamentary direction or supervision would have been useful in this instance.

Finally, the status of article 5 remains a live issue, as the Working Group has continued to criticise the U.K.'s failure in this regard.[65] In its May 2011 Phase 2bis Follow-up Report, the Working Group repeated its concerns about the CPS Guidance and included a series of detailed recommendations about the implementation of article 5.[66]

C. The Legitimacy of Article 5's Incorporation by the CPS and the SFO Rather than Parliament

The *Corner House* case also raises questions concerning the legitimacy of article 5's incorporation not by Parliament, but by the CPS and the SFO, both of which carry out executive rather than legislative functions. On the one hand, it may be argued that a Parliamentary act was not necessary for the incorporation of article 5 into the U.K. domestic sphere. Because article 5 concerns the manner in which the United Kingdom should enforce its foreign bribery laws, the most direct and efficient way to give effect to this provision is through inclusion in guidelines for prosecutors rather than in Parliamentary legislation. After

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63. *See* sources cited *supra* note 62.

64. PHASE 2*BIS* REPORT, *supra* note 59, para. 103.

65. WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, OECD, UNITED KINGDOM: PHASE 2BIS: FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2BIS RECOMMENDATIONS 4 (2011).

66. *Id.* at 5, 7, 17, 22.

all, had the Bribery Act 2010 included a provision incorporating article 5, it may have simply directed the CPS and the SFO to make the appropriate changes to their prosecution guidelines. Although Parliamentary instructions might have brought about a more satisfactory incorporation of article 5 by the CPS and the SFO, it may be argued that practically speaking, only the CPS and the SFO needed to take action in this instance.

On the other hand, this method of giving effect to article 5 runs counter to the notion that treaty provisions can only become a part of U.K. domestic law through incorporation by an Act of Parliament.[67] Although the OECD has stressed that article 5 need not acquire binding force in the United Kingdom through the enactment of legislation per se, the U.K. domestic order requires an Act of Parliament, at least in theory.[68] An entire body of jurisprudence effectively defends parliamentary sovereignty against the royal prerogative by requiring that Parliament give effect to the U.K.'s international obligations through the enactment of legislation. The implementation of article 5 through direct incorporation into guidelines for prosecutors effectively bypasses the role of Parliament that has been upheld by the judiciary. In addition, the Law Commission took no note of this state of affairs, thereby evidencing a disconnect between the concept of parliamentary sovereignty, as upheld by the courts, and the Law Commission's far more relaxed or unconcerned approach towards such matters. Although the incorporation of article 5 directly into prosecutor's guidelines is perhaps the most efficient manner in which to give effect to the U.K.'s international obligations in this instance, this method of incorporation does undermine, or at least call into question, traditional notions of Parliamentary sovereignty. We are faced with a contrast between the formalism that characterises the court's approach in this case towards the incorporation of international law in the domestic system, and the far more informal, pragmatic approach that appears to have been taken by the Law Commission, prosecutors, and perhaps even Parliament itself.

Finally, the incorporation of article 5 through a single sentence in the prosecution guidelines for the CPS and the SFO brings into question the necessity of incorporating article 5 in the first place. The guidelines

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67. *See* DAVID POLLARD, NEIL PARPWORTH & DAVID HUGHES, CONSTITUTIONAL AND ADMINISTRATIVE LAW: TEXT WITH MATERIALS 335 (4th ed. 2007); *see also* R v. Sec'y of State for the Home Dep't, *ex parte* Bhajan Singh, [1976] Q.B. 198 (A.C.) 207 (Lord Denning) (appeal taken from Q.B. Div. Ct.) ("[A] treaty does not become part of our English law except and in so far as it is made so by Parliament.").

68. *Ex parte Bhajan Singh*, [1976] Q.B. at 207.

essentially incorporate article 5 by reproducing its text, nearly verbatim. It is difficult to explain why the court's ability to review an interpretation of this provision should hinge on whether the executive decision maker was interpreting article 5 as it appears in prosecutorial guidelines, rather than article 5 as it appears in the OECD Convention. The notion that the inclusion of one sentence in prosecutors' guidelines could have such a significant impact challenges the cogency of the judiciary's approach towards the incorporation of treaties. At this point, it becomes difficult to argue that the reproduction of a single treaty provision in prosecutors' guidelines is actually related to the defence of parliamentary sovereignty.

Ultimately, the persistently uncertain status of article 5 in the United Kingdom is striking given both the prominence of the *Corner House* case, and the large-scale reform undertaken by the Law Commission after the House of Lords found that article 5 was unincorporated. As will be discussed below, this situation suggests that what really drives the House of Lords' avoidance of this provision is not its unincorporated status, but rather the sensitive political issues that it brings with it.

IV. DISTINGUISHING *CORNER HOUSE* FROM JURISPRUDENCE PERMITTING JUDICIAL REVIEW OF EXECUTIVE EXERCISES OF DISCRETION

In general, under English common law, when statutes confer discretion upon decision makers, they are not obliged to comply with or have regard to the U.K.'s unincorporated treaty obligations, although they may elect to do so, as a matter of policy.[69] Such treaty obligations constitute optional relevant considerations, unless a statute provides that an international legal obligation constitutes a mandatory relevant consideration or a mandatory irrelevant consideration.[70] In this case, section 1(3) of the Criminal Justice Act 1987 conferred discretion upon the SFO Director, who "may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex

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69. R v. London N. Dist. Coroner, [2007] UKHL 13, [55]-[57], [2007] 2 A.C. 189 (appeal taken from Eng.); R v. Sec'y of State for the Home Dep't, *ex parte* Brind, [1991] 1 A.C. 696, 748; Fernandes v. Sec'y of State for the Home Dep't, [1981] Imm. A.R. 1 (C.A.) 5-6; Chundawadra v. Immigration Appeal Tribunal, [1988] Imm. A.R. 161 (C.A.), 167-68; CREEDNZ, Inc. v. Governor Gen., [1981] 1 NZLR 172, 183 (C.A.); *see also* SHAHEED FATIMA, USING INTERNATIONAL LAW IN DOMESTIC COURTS §§ 9.1, 11.4.2 (2005); Philip Sales & Joanne Clement, *International Law in Domestic Courts: The Developing Framework*, 124 L.Q. REV. 388, 404 (2008).

70. *CREEDNZ*, [1981] 1 NZLR 172 at 183; FATIMA, *supra* note 69, § 9.1; Sales & Clement, *supra* note 69, at 404.

fraud."[71] In addition, section 1(5)(a) provides that the Director may "institute and have the conduct of any criminal proceedings which appear to him to relate to such fraud."[72] The OECD Convention thus constituted an optional relevant consideration in this case, as these statutory provisions neither mandated its relevance nor its irrelevance. As discussed above, the SFO Director did opt to take article 5 of the Convention into consideration even though he was not required to do so because of its unimplemented status.

English common law further provides that where a decision maker opts to have regard to the U.K.'s treaty obligations, courts will require the decision maker to interpret these obligations correctly.[73] The Director's claim to be acting in accordance with article 5 therefore could have brought *Corner House* under the umbrella of a series of cases holding that where executive decision makers voluntarily take unincorporated treaty obligations into account in exercising executive discretion, courts may review that self-direction or advice.[74] Thus, the unincorporated status of article 5 at the time of this case did not necessarily prevent the House of Lords from assessing whether the SFO Director had exercised his discretion in accordance with this provision.

In keeping with this line of cases, the Divisional Court took the view that because the Director had publicly claimed to observe article 5's prohibition, the court could review his legal self-direction, especially because section 109 of the 2001 Act had been enacted to give effect to the OECD Convention.[75] Lord Bingham, however, did not take this approach. He began by noting that if the Director had ignored this unincorporated treaty provision, then "his decision could not have been impugned on the ground of inconsistency with it."[76] Lord Bingham went on, however, to acknowledge that in this case the SFO Director claimed to be acting in accordance with article 5.[77] Yet Lord Bingham concluded

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71. Criminal Justice Act, 1987, 35 Eliz. 2, c. 38, § 1(3) (Eng., Wales & N. Ir.).

72. *Id.* § 1(5)(a).

73. R v. Sec'y of State for the Home Dep't, *ex parte* Launder, [1997] 1 W.L.R. 839 (H.L.); R v. Dir. of Pub. Prosecutions, *ex parte* Kebilene, [2000] 2 A.C. 326 (H.L.); R (Campaign for Nuclear Disarmament) v. The Prime Minister, [2002] EWHC (Admin) 2777, [2002] All E.R. (D) 245 (Dec.); Gangadeen v. Sec'y of State for the Home Dep't, [1998] Imm. A.R. 106 (A.C.) 111-12; R v. Sec'y of State for the Home Dep't, *ex parte* Johnson, [1999] QB 1174 (D.C.); R v. Sec'y of State for the Home Dep't, *ex parte* Arman Ali, [2000] Imm. A.R. 134; *see also* FATIMA, *supra* note 69, §§ 11.8.3, 11.8.9.

74. *Ex parte Launder*, [1997] 1 W.L.R. at 867; *Ex parte Kebilene*, [2000] 2 A.C. at 341; *Ex parte Johnson*, [1999] Q.B. at 1189, 1191; FATIMA, *supra* note 69, § 11.8.3.

75. R (Corner House Research & Another) v. Dir. of the Serious Fraud Office, [2008] UKHL 60, [2009] 1 A.C. 756, 789-90, 840 (appeal taken from HM High Court of Justice).

76. *Id.* at 845.

77. *Id.*

that this case was distinguishable from *Regina v. Secretary for the Home Department, ex parte Launder* (*Launder*) and *Regina v. Director of Public Prosecutions, ex parte Kebilene* (*Kebilene*), two cases in which judges actually reviewed decision makers' claims to be acting in accordance with an unincorporated treaty.[78]

Launder and *Kebilene* both involved decision makers who claimed to be acting consistently with the European Convention on Human Rights (ECHR), prior to the Human Rights Act 1998, which gave it effect in domestic law. In *Launder*, the Secretary of State considered whether the extradition of the applicant to Hong Kong would breach articles 2, 3, 5, and 6 of the ECHR, which concern the rights to life, not to be subjected to inhuman or degrading treatment or punishment, to liberty, and to a fair trial.[79] Lord Hope of Craighead held that "[i]f the applicant is to have an effective remedy against a decision which is flawed because the decision-maker has misdirected himself on the Convention which he himself says he took into account, it must surely be right to examine the substance of the argument."[80] *Kebilene* involved the Director of Public Prosecutions' consideration of whether his consent to prosecutions for terrorism related offences would violate article 6(2) of the ECHR, which guarantees the presumption of innocence.[81] In *Kebilene*, Lord Bingham found that it was appropriate for the Divisional Court to review the soundness of the legal advice on which the Director of Public Prosecutions publicly claimed to rely, "for if the legal advice he relied on was unsound he should, in the public interest, have the opportunity to reconsider the confirmation of his consent on a sound legal basis."[82] Furthermore, Lord Bingham found that "[i]n offering such guidance as it can on the true effect of the Convention, the court does not in my view usurp the legislative responsibility of Parliament nor the independent decision-making responsibility of the Director, so long as it leaves the final decision to him."[83]

Commentators have heavily criticised *Launder* and *Kebilene*, and Lord Bingham himself took the lead in narrowing their application in *Corner House*. In a July 2008 article that preceded the House of Lords'

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78. *Id.*

79. *Ex parte Launder*, [1997] 1 W.L.R. at 867.

80. *Id.*

81. Although the House of Lords decided *Kebilene* in 2000, the facts at issue in this case took place in 1997, before the Human Rights Act 1998 incorporated the ECHR. R v. Dir. of Pub. Prosecutions, *ex parte* Kebilene, [2000] 2 A.C. 326 (H.L.).

82. *Id.* at 341.

83. *Id.* at 342.

judgment, Philip Sales and Joanne Clement described the potentially large scope of *Launder*. They argued that:

> [T]he executive may not have any practical option but to direct itself by reference to international law, and if the rule in *Launder* is treated as unlimited it will lead to very extensive direct application of treaties and international law in the domestic courts, thereby for practical purposes undermining the basic constitutional principle about non-enforceability of unincorporated treaties.[84]

Sales and Clement expressed a lack of certainty about the extent to which constitutional principles, such as the non-justiciability principle articulated in *J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade & Industry* (*International Tin Council*), might limit the application of the rule in *Launder*.[85] They argued that *Launder* constitutes "a major in-road upon the non-justiciability principle," especially for central government ministers, who may often "seek advice about and direct themselves by reference to the UK's international obligations, [such that] the practical effect of *Launder* in making international law the subject of domestic legal proceedings is potentially considerable."[86]

Sales and Clement therefore proposed the limitation of the rule in *Launder* through a mechanism whose general rationale, at least, the House of Lords appears to have adopted, as will be explored below. Sales and Clement suggested that domestic courts could allow executive decision makers a "margin of appreciation," whereby courts would only examine whether the executive had adopted a "tenable view" on the international legal issue.[87] Such a solution would recognise the limits of judicial competence to provide fully authoritative rulings on unincorporated treaties.[88] Sales and Clement stressed in particular that such a deferential approach would be appropriate in circumstances where "the proper interpretation of international law is uncertain, the domestic courts have no authority under international law to resolve the issue and the executive has responsibility within the domestic legal order for management of the United Kingdom's international affairs."[89] The executive would then have the space necessary to press for legal interpretations on the international plane that favour the U.K.'s national

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84. Sales & Clement, *supra* note 69, at 405.

85. J.H. Rayner (Mincing Lane) Ltd. v. Dep't of Trade & Indus. (International Tin Council), [1990] 2 A.C. 418, 500 (Eng. H.L.).

86. Sales & Clement, *supra* note 69, at 405 n.80.

87. *Id.* at 405-06 (internal quotation marks omitted).

88. *Id.*

89. *Id.* at 406.

interests, while also providing for a degree of judicial control to ensure that the executive adopts reasonable positions.[90]

The House of Lords' judgment in *Corner House* is somewhat in keeping with this call for a narrowing of *Launder*'s scope. Lord Brown quoted extensively from Sales and Clement's article and concluded that the SFO Director did hold a tenable view on the meaning of article 5.[91] Lord Bingham, however, did not adopt the "tenable view" approach in his majority opinion. Lord Bingham instead narrowed *Launder* by distinguishing it from *Corner House* in a manner that is both unpersuasive and problematic. The House of Lords overemphasised its lack of competence to interpret a treaty provision without an existing body of jurisprudence, and it seems to have misconceived the role of the Working Group.[92] In addition, the House of Lords implied that a treaty provision must constitute the primary consideration undertaken by an official exercising his discretion in order for the courts to interpret it.[93] Ultimately, the approach taken by the House of Lords reveals not an aversion to interpreting international treaties in the context of executive exercises of discretion, but rather an aversion to interpreting international treaties in the context of national and international security threats.

A. The Absence of a Body of Jurisprudence

Lord Bingham and Lord Brown limited the application of *Launder* in part by pointing to the absence of jurisprudence on article 5 as a rationale for declining to interpret its meaning in this case. Lord Bingham distinguished *Corner House* from *Kebilene* on the basis that the House of Lords in the latter case was able to draw on a body of Convention jurisprudence in order to resolve the dispute before it.[94] Lord Bingham also distinguished *Launder* by noting that this case did not even involve a dispute between the parties about the interpretation of the relevant provisions of the Convention.[95] Lord Bingham generally questioned whether courts should undertake "the task of interpretation from scratch" when there is "a live dispute on the meaning of an unincorporated provision on which there [is] no judicial authority."[96] Lord Bingham explained that it would be unfortunate "if decision-

90. *Id.*

91. R (Corner House Research & Another) v. Dir. of the Serious Fraud Office, [2008] UKHL 60, [2009] 1 A.C. 756, 852 (appeal taken from HM High Court of Justice).

92. *Id.* at 846.

93. *Id.* at 845.

94. *Id.*

95. *Id.*

96. *Id.*

makers were to be deterred from seeking to give effect to what they understand to be the international obligations of the United Kingdom by fear that their decisions might be held to be vitiated by an incorrect understanding."[97] Lord Brown similarly distinguished *Launder* and *Kebilene* from the case at hand by noting the "marked distinction" between a court's application of established Convention jurisprudence, as in *Launder* and *Kebilene*, and its determination, in the absence of any relevant jurisprudence, of "a deep and difficult question of construction of profound importance to the whole working of the Convention."[98]

Lord Bingham and Lord Brown thereby sought to limit the application of *Launder* to cases that concern the interpretation of unincorporated treaties that enjoy a substantial body of jurisprudence. In doing so, the Lords effectively narrowed *Launder*'s application to treaties that create an international judicial body for the settlement of disputes arising under them. In *Launder* and *Kebilene*, the House of Lords had the advantage of being able to draw on a substantial body of jurisprudence developed by the European Court of Human Rights. This body of human rights jurisprudence, however, is highly unusual and should not be held out as the threshold for establishing judicial competence at the domestic level. Relatively few multilateral treaties provide for such regional or international courts—the ECHR is one of the notable exceptions. Moreover, other treaties that provide for the referral of disputes to international judicial institutions do not necessarily give rise to the development of a robust body of jurisprudence that may be relied on by national courts.[99]

In addition, many other treaties, such as the OECD Convention, make no provision for the judicial settlement of disputes arising under the treaty, but instead simply provide for a body that monitors or encourages the treaty's implementation and enforcement at the domestic level. International criminal law treaties like the OECD Convention and the many treaties relating to terrorism generally rely exclusively on enforcement at the national level.[100] Consequently, the House of Lords'

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97. *Id.*

98. *Id.* at 851.

99. See, for example, the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention on the Elimination of all Forms of Racial Discrimination, which provides for the referral of disputes to the International Court of Justice, and the U.N. Convention on the Law of the Sea, which established the International Tribunal for the Law of the Sea.

100. *See, e.g.*, Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532; International Convention

approach to limiting *Launder* is nonsensical in its application to international criminal law treaties, which are often premised on the absence of an international adjudicator that could develop a body of jurisprudence. National courts function as the only potential judicial interpreters of such treaties. Thus, outside of the relatively unusual case of the ECHR, the likelihood is slim that judges in England and Wales will be able to refer to jurisprudence on the interpretation of a given provision of an unincorporated treaty. Moreover, given that the ECHR has been incorporated through the enactment of the Human Rights Act 1998, the application of *Launder* to unincorporated treaties may now be extremely limited.

Finally, this limitation on the principle set forth in *Launder* is also troubling because it seeks to restrict the competence of the judiciary in a manner that calls into question the U.K.'s commitment to its international treaty obligations. By describing the issue at stake as "a deep and difficult question of construction of profound importance to the whole working of the Convention," Lord Brown implies that not only would it be inappropriate for English courts to interpret the OECD Convention, but also that they are not capable of doing so due to the unusual complexity of article 5.[101] Leaving aside the prudence of doing so, interpreting article 5 would have been well within the realm of the House of Lords' competence. The issues of national and international security raised by article 5 are challenging, but no more so than those raised by complex and politically sensitive domestic statutory provisions. Given that courts interpret difficult provisions on a daily basis, it seems disingenuous for the court to cite article 5's complexity as a reason for avoiding its interpretation. Ultimately, the court's deference to the Working Group on this interpretive issue of "profound importance" to the Convention's functioning is misguided, and undermines the treaty's enforcement at the national level.

Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205, T.I.A.S. No. 11,081; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 1456 U.N.T.S. 124, 18 I.L.M. 1419; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474, 27 I.L.M. 627; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304; International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, U.N. GAOR, 52d Sess., Annex, Agenda Item 152, U.N. Doc. A/RES/52/162 (1998), *reprinted in* 37 I.L.M. 249 (1998); International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/109 (1999), *reprinted in* 29 I.L.M. 270 (2000).

101. *Corner House*, [2009] 1 A.C. at 851.

B. Ceding Authority to the Working Group on Bribery

Ironically, in the process of explaining why it could not interpret article 5, the House of Lords effectively offered an interpretation of article 12, which establishes a role for the Working Group. Yet the speeches of Lord Bingham and Lord Brown betray a misconception of the role that the Working Group is supposed to play in the treaty's implementation and enforcement. Article 12, which concerns monitoring and follow-up, provides that States Parties, through the framework of the Working Group, "shall co-operate in carrying out a programme of systematic follow-up to monitor and promote" the Convention's full implementation.[102] Thus, while the Working Group is an OECD body, it also acts as a Conference of the Parties.[103] The Commentary to the Convention provides the Working Group's terms of reference, which include a process for the regular exchange of information, systems of self- and mutual-evaluation, the provision of regular information to the public, and the examination of bribery-related issues.[104] While these terms of reference are quite vague, they do at least indicate that the Working Group should act as a mechanism for assessment by peer states, not as a dispute settlement body or as an independent court.[105]

The monitoring mechanisms under article 12 did not take shape until after the negotiation of the Convention.[106] Over the last fourteen years, the Working Group has developed fairly elaborate procedures for peer review, which occurs in three different phases. Phase 1 involves the evaluation of the adequacy of the legislation of States Parties in implementation of the Convention, Phase 2 concerns the assessment of whether States Parties are applying such legislation effectively, and Phase

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102. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 5, art. 12.

103. Nicola Bonucci, *Article 12. Monitoring and Follow-up*, *in* THE OECD CONVENTION ON BRIBERY: A COMMENTARY, *supra* note 60, at 445, 449.

104. Paragraph 33 of the Commentary indicates that article 12 incorporates article VIII of the 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions, which sets forth the terms of reference for the Working Group. COMMENTARIES, *supra* note 46, para. 33.

105. Mark Pieth, *Introduction*, *in* THE OECD CONVENTION ON BRIBERY: A COMMENTARY, *supra* note 60, at 3, 30.

106. The Working Group regularly reviews and modifies its procedures. *See, e.g.*, OECD, *Anti-Bribery Convention: Phase 2 Monitoring Information Resources, Revised Guidelines for Phase 2 Reviews*, DAF/INV/BR/WD(2005)12/REV3 (Feb. 27, 2006).

3 focuses on enforcement of the Convention.[107] At each of these phases, the Working Group produces publicly available reports that typically make detailed but technically non-binding recommendations regarding implementation and enforcement.

Although the Working Group is generally a remarkably effective body, given the "softness" of its working methods, the House of Lords appears to have overestimated its role in the Convention's implementation and enforcement. Lord Bingham wrote that although article 12 does not create a mechanism for binding judicial interpretations of the Convention, it does provide for the discussion and reconciliation or resolution of differences of approach to the Convention's interpretation and application.[108] Furthermore, Lord Bingham agreed with the Divisional Court that uniformity of interpretation is highly desirable, and that a "national court should hesitate before undertaking a task of unilateral interpretation where the contracting parties have embraced an alternative means of resolving differences."[109] Similarly, Lord Brown wrote that it is generally undesirable for the Court to decide questions regarding the U.K.'s obligations under unincorporated treaties, especially when the Contracting Parties have chosen to provide for the resolution of disputed questions by a Working Group that operates on consensus rather than by an international court.[110] Lord Brown further concluded that it would be remarkable for a national court to assume the role of determining such questions of interpretation, given the damaging consequences that this could have for the state's own attempts to influence an emerging international consensus: in his view, this could not be countenanced, save for compelling reasons.[111]

Contrary to the understandings of Lord Bingham and Lord Brown, the resolution of disputed questions under the Convention actually lies with a far more diffuse range of actors—not with the Working Group alone. The Working Group is, in fact, a fairly informal mechanism that effectively cedes authority back to the States Parties who drive the peer review process. Mark Pieth, the Chairman of the Working Group, has explained that the monitoring prescribed in article 12 of the Convention

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107. *Country Monitoring of the OECD Anti-Bribery Convention*, OECD, http://www.oecd.org/document/12/0,3746,en_2649_37447_35692940_1_1_1_37447,00.html (last visited Apr. 22, 2012).

108. R (Corner House Research & Another) v. Dir. of the Serious Fraud Office, [2008] UKHL 60, [2009] 1 A.C. 756, 846 (appeal taken from HM High Court of Justice).

109. *Id.*

110. *Id.* at 850.

111. *Id.* at 851.

"is neither a dispute settlement procedure by State Parties nor supervision of implementation by an independent court. It is, rather, the assessment by a group of peers of the effectiveness of implementation and application."[112] Susan Rose-Ackerman and Benjamin Billa have also explained that the interpretive issues that arise under the Convention "must be taken up by the OECD itself, by domestic courts, by civil society groups, and by scholars concerned with the integrity and force of international law."[113] Because the Convention does not establish an international forum for formal challenges to enforcement actions by contracting parties, the Convention depends on a wide range of actors to exert pressure on states to consider the goals of the Convention in making domestic prosecutorial decisions.[114] The system in place for the implementation and enforcement of the OECD Convention is thereby far more decentralised than the one which Lord Bingham and Lord Brown appear to envision, based on the text of article 12.

This method of implementation runs the risk of a lack of uniformity among the various interpretations of the Convention, but it does so for the sake of garnering as much cooperation as possible from States Parties. In general, the OECD has been able to foster such cooperation through its use of a "management model" of compliance that emphasises peer pressure, technical assistance, and full transparency.[115] The OECD has had considerable success with soft measures such as dialogue and the threat of reputation loss.[116] The Working Group essentially attempts to herd States Parties in the same direction, without necessarily definitively resolving differences among them. The Working Group does not, for example, issue authoritative interpretations of the Convention's provisions, as this would be out of keeping with its use of peer pressure in implementation and enforcement. The Working Group has yet to issue an authoritative interpretation of article 5 and is unlikely to do so in the future. While the Working Group's reluctance to interpret provisions of the Convention is open to criticism, it remains the reality of how this body operates. The success of the OECD Convention therefore depends on its enforcement by member states, including the judiciary. As the OECD Convention did not create an international court for the binding resolution of disputes about its interpretation, the most powerful

112. Pieth, *supra* note 105, at 30.

113. Rose-Ackerman & Billa, *supra* note 10, at 460.

114. *Id.* at 494.

115. Martin Marcussen, *OECD Governance Through Soft Law*, *in* SOFT LAW IN GOVERNANCE AND REGULATION: AN INTERDISCIPLINARY ANALYSIS 103-04 (Ulrika Mörth ed., 2004).

116. *Id.*

interpretations of its provisions will come from national judiciaries, not from the Working Group, as Lord Bingham and Lord Brown suggest.

The OECD's response to the House of Lords' decision in this case illustrates the general softness of its approach. Not only did the OECD's press release refrain from offering an interpretation of article 5, but it also did not declare that the House of Lords' decision was inconsistent with article 5 of the Convention.[117] The press release's most condemnatory passage noted that the Working Group "maintains its serious concerns as to whether the decision was consistent with the OECD Anti-Bribery Convention."[118] The Working Group also underlined the broad notion that "bribery of foreign public officials is contrary to international public policy and distorts international competitive conditions."[119] The Working Group further reminded the parties to the Convention that they "shall be mindful of their obligations and of the object and purpose of the treaty."[120] The careful tone and general language of the OECD's press release thereby embody the OECD's cautious—yet often effective—approach toward compliance.

By declining to interpret article 5 of the Convention, the House of Lords directed the United Kingdom towards a different vision of the Convention's implementation, one in which the interpretations of domestic officials remain unreviewed because of a mistaken assumption that such interpretations should be made only by the Working Group. In fact, the OECD Convention requires that national courts also play a crucial role in the implementation and enforcement of the Convention. The House of Lords did the Convention a disservice by leaving its interpretation in the hands of the officials of States Parties, who, as Rose-Ackerman and Billa argue, "may only be trying to advance the narrow interests of the states they represent or to shore up the political position of their governments."[121]

C. Concerns About Uniform Interpretations of the Convention

Both the House of Lords and the Divisional Court also exaggerated the risk of a lack of uniformity in interpretations of the Convention by the national courts of States Parties. In general, uneven interpretations

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117. Press Release, OECD, OECD To Conduct a Further Examination of UK Efforts Against Bribery (Mar. 14, 2007), *available at* http://www.oecd.org/document/12/0,2340,en_2649_37201185_38251148_1_1_1_1,00.html.

118. *Id.*

119. *Id.*

120. *Id.*

121. Rose-Ackerman & Billa, *supra* note 10, at 460.

by national courts of multilateral treaties are a valid concern, but not in the particular case of the OECD Convention. The Divisional Court emphasised that the line between the permissible and the prohibited must be drawn in an authoritative and uniform manner. The Divisional Court explained that the States Parties had invested the authority to draw that line not with domestic courts, but with the Working Group.[122] The Divisional Court reasoned that if it were to strike down the Director's decision by deciding where that line should be drawn, then "it would damage the uniformity on which the OECD Convention depends."[123] In deciding not to express a view on whether the SFO Director had complied with article 5, the Divisional Court went so far as to characterise the Working Group as a "court," before which the U.K. government would have to defend itself.[124] The Divisional Court therefore concluded that it would be for the Working Group "to determine whether it was open to the UK to yield to the explicit threat."[125] Lord Bingham largely endorsed the Divisional Court's overstated concerns about the need for uniformity: although he rejected the Divisional Court's portrayal of the Working Group as a body that may provide binding judicial interpretations, he otherwise adopted its concerns about uniformity.[126]

The risk of disunity among national courts is, in fact, minor because so few national courts have actually interpreted the OECD Convention. Thus, the real risk faced by the Convention is not a lack of uniformity in enforcement, but a lack of enforcement altogether. As of December 2010, only fifteen out of the thirty-eight parties to the Convention had sanctioned individuals and/or entities in criminal proceedings for the bribery of foreign public officials.[127] The other twenty-two countries had neither sanctioned nor acquitted any individuals or entities.[128] Thus, the

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122. R (Corner House Research & Another) v. Dir. of the Serious Fraud Office, [2008] UKHL 60, [2009] 1 A.C. 756, 800 (appeal taken from HM High Court of Justice).

123. *Id.*

124. *Id.* at 801.

125. *Id.*

126. *Id.* at 845.

127. WORKING GROUP ON BRIBERY, OECD, 2010 DATA ON ENFORCEMENT OF THE ANTI-BRIBERY CONVENTION 1 (Apr. 2011). The fifteen countries that had brought enforcement actions as of December 2010 are Canada, Czech Republic, France, Germany, Hungary, Italy, Japan, Korea, Netherlands, Norway, Portugal, Sweden, Switzerland, the United Kingdom, and the United States.

128. The other twenty-two countries that had not brought any enforcement actions as of December 2010 are Argentina, Australia, Austria, Ireland, Brazil, Bulgaria, Chile, Denmark, Estonia, Finland, Greece, Iceland, Israel, Luxembourg, Mexico, New Zealand, Poland, Slovak Republic, Slovenia, South Africa, Spain, and Turkey. Belgium did not supply any information. *Id.*

courts of the great majority of the parties to the Convention are not producing any interpretations of the Convention, as prosecutors have not brought any enforcement actions. Of the fifteen countries that have enforced the Convention, only eight have undertaken criminal enforcement proceedings against legal, as opposed to natural, persons such as BAE.[129] Moreover, approximately seventy-five per cent (or forty-four out of fifty-nine) of the criminal enforcement actions against legal persons have resulted in plea agreements, which means that the proceedings never even reached the stage at which a court would have an opportunity to pronounce on the Convention.[130] In the United States, which has been by far the most active enforcer of the Convention, practitioners and commentators have been highly critical of the notable lack of judicial guidance on the provisions of the Foreign Corrupt Practices Act (FCPA).[131] The FCPA is seldom litigated, as almost all enforcement actions settle before going to trial.[132]

The Lords' *obiter dicta* concerning the undesirability of interpreting article 5 appear at first to be grounded not in concerns about parliamentary sovereignty, but rather, in concerns about how the interpretation of the Convention by individual national courts would give rise to a lack of uniformity. Thus, the Lords' objections, at least initially, appear to be grounded not in the particularities of the U.K.'s constitutional system, but in their concerns about the coherency of the international anti-bribery movement as a whole. Yet, as discussed above, the risk of a lack of uniformity is slim in the context of the OECD Convention. Perhaps the House of Lords was, in reality, reluctant to endorse an interpretation of article 5 that would have been widely viewed, by the Working Group and States Parties generally, as conflicting with the object and purpose of the treaty.

D. Insulating Executive Decision Making from Judicial Review

In distinguishing *Launder* and *Kebilene*, the House of Lords also offered a troubling gloss on what kinds of executive decisions may be reviewed by the judiciary in the context of unincorporated treaties. Lord Bingham, Lord Brown, and Baroness Hale limited the application of

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129. The eight countries that have undertaken enforcement actions against legal persons are Canada, Germany, Italy, Japan, Korea, Norway, the United Kingdom, and the United States. *Id.*

130. *Id.*

131. Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 560, 563 (2010).

132. *Id.* at 495-97.

Launder in a manner that potentially insulates executive decision making from judicial review. Lord Bingham explained that it was "unnecessary and undesirable to resolve these problematical questions" concerning the meaning of article 5 for two reasons:

> First, it is clear that the Director throughout based his adherence to article 5 on a belief that it permitted him to take account of threats to human life as a public interest consideration. Secondly, the Director has given unequivocal evidence that he would undoubtedly have made the same decision even if he had believed, which he did not, that it was incompatible with article 5 of the Convention.[133]

Lord Bingham explained that it would "be unfortunate if decision-makers were to be deterred from seeking to give effect to what they understand to be the international obligations of the United Kingdom by fear that their decisions might be held to be vitiated by an incorrect understanding."[134]

Lord Brown also distinguished this case from *Launder* and *Kebilene* on the basis that the decision makers in those cases "would have taken different decisions had their understanding of the law been different."[135] Those decision makers intended to comply with the U.K.'s international obligations and would have adjusted their decisions accordingly.[136] By contrast, the SFO Director and the Attorney General would not have altered their decisions based on article 5 of the OECD Convention:

> Although both the Director (and the Attorney General) clearly believed—and may very well be right in believing—that the decision was consistent with article 5, it is surely plain that *the primary intention* behind the decision was to save this country from the dire threat to its national and international security and that the same decision would have been taken even had the Director had doubts about the true meaning of article 5 or even had he thought it bore a contrary meaning. All that he and the Attorney General were really saying was that they believed the decision to be consistent with article 5. This clearly they were entitled to say: it was true and at the very least obviously a reasonable and tenable belief.[137]

Finally, Baroness Hale acknowledged that Rose-Ackerman and Billa made a powerful case that the OECD Convention does not allow for an

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133. R (Corner House Research & Another) v. Dir. of the Serious Fraud Office, [2008] UKHL 60, [2009] 1 A.C. 756, 846 (appeal taken from HM High Court of Justice).

134. *Id.* at 845.

135. *Id.* at 851.

136. *Id.*

137. *Id.* (emphasis added).

implicit national security exception, but nonetheless concluded that the SFO Director "made it clear that he would have reached the same conclusion in any event and as a matter of domestic law he was entitled to do so."[138]

The *obiter dicta* in these passages insulate such exercises of executive discretion from judicial review if the decision maker merely indicates that he would have made the same decision even if it were in violation of the U.K.'s unincorporated treaty obligations. This type of insulation creates the wrong incentives for executive decision makers in England and Wales. These passages in the House of Lords' judgment have the potential actually to encourage decision makers to distance their decisions from any unincorporated treaty obligations so as to avoid judicial review. The most extreme manifestation of this would result in decision makers outright declaring that their decisions are not in compliance with international law. On the other end of the spectrum, decision makers simply would intentionally refrain from considering international law. Somewhere in the middle of this spectrum we would find decision makers, such as the SFO Director in this case, declaring that they would have made the same decision even if it had been contrary to international law. As will be discussed below, this type of incentive structure brings into question the U.K.'s good faith performance of its treaty obligations.

These passages also imply that an unincorporated treaty must have been the primary consideration of the decision maker in order for judicial review to be triggered. If, however, an unincorporated treaty was just one of several considerations, such that it did not comprise a predominant factor for the decision maker, then the rule in *Launder* does not apply and courts need not ensure that they have interpreted those treaty obligations correctly. A requirement that a treaty obligation constitutes a primary consideration presents a problem because executive decision makers engaged in the process of making complex decisions will often look towards a myriad of factors, including both domestic law and treaty obligations. A primacy test would most likely have the effect of severely limiting the application of *Launder*, such that nearly all exercises of executive discretion would be unreviewable.

Finally, if the SFO Director had chosen not to take article 5 of the OECD Convention into consideration, this would have been politically unacceptable, regardless of its technically unincorporated status in England and Wales. Given the high profile nature of this case and the

138. *Id.* at 848.

fact that Parliament had actually implemented core provisions of the Convention, the Director's total failure to consider whether his decision complied with article 5 of the Convention surely would have drawn criticism from the Working Group, States Parties generally, civil society, and scholars. The facts of this case are significantly different from those cases in which decision makers could not reasonably be expected to be aware of the relevant international law obligations.[139] Here, the SFO Director was acutely aware of article 5's requirements and viewed them as obligatory, at least during the earlier phases of his investigation. Thus, while the SFO Director theoretically could have chosen not to take article 5 into consideration, political realities practically prevented him from ignoring its requirements. The Lords' *obiter dicta* thereby run counter to this political context by encouraging future decision makers to shy away from considerations of unincorporated treaties, for fear that their decisions will be judicially reviewable.

V. GOOD FAITH PERFORMANCE OF THE OECD CONVENTION

Since the mid-1970s, English courts have developed methods for softening the traditional approach to the non-justiciability of unincorporated treaties.[140] Had the House of Lords cared to review the Director's interpretation of article 5, it could have found a reasoned way to do so without infringing upon Parliamentary sovereignty, a doctrine which seems to be unrelated to the Lords' concerns about uniformity in the interpretation of article 5. In this case, however, the House of Lords appears to have ignored Parliament's attempt to implement the U.K.'s obligations under the OECD Convention through the Anti-terrorism, Crime and Security Act 2001. Although Parliament did not actually comprehensively implement the Convention, as article 5 was not incorporated, Parliament did at least attempt to give effect to the U.K.'s obligations under the Convention. The House of Lords could perhaps

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139. R v. Chief Immigration Officer, Heathrow Airport, *ex parte* Salamat Bibi, [1976] 1 W.L.R 979, 985.

140. *See, e.g.*, R v. Sec'y of State for the Home Dep't, *ex parte* Bhajan Singh, [1975] 3 W.L.R. 225, 230-32; R v. Sec'y of State for the Home Dep't, *ex parte* Begum, [1975] 3 W.L.R. 322; R v. Miah, [1974] 1 W.L.R. 683, 694; R v. Immigration Officer at Heathrow Airport, *ex parte* Thakrar, [1974] 2 W.L.R. 34; James Crawford, *Decisions of British Courts During 1974-1975 Involving Questions of Public or Private International Law: Public International Law*, 47 BRIT. Y.B. INT'L L. 341, 361 (1977) (noting the relatively sudden jurisprudence referring to the ECHR as well as the Universal Declaration on Human Rights, despite their lack of municipal implementation); *see also* FATIMA, *supra* note 69, §§ 8.6-8.7; Michael Kirby, Retired Justice of the High Court of Austl., James Crawford Biennial Lecture on International Law at the University of Adelaide: International Law and the Common Law: Conceptualising the New Relationship 20 (Oct. 14, 2009).

have followed the Divisional Court in justifying its review of the Director's interpretation of article 5 by pointing to Parliament's partial implementation of the Convention.[141]

Instead, the House of Lords avoided interpreting article 5 in a manner that is problematic from the perspective of article 26 of the Vienna Convention on the Law of Treaties, under which the United Kingdom must perform in good faith a treaty that is in force and binding upon it.[142] In this judgment, the House of Lords ultimately perpetuated and encouraged the U.K. government's collective failure to perform its treaty obligations in good faith.[143] First, Parliament initially failed to carry out the U.K.'s obligations under the OECD Convention by neglecting to implement article 5, even though it does not constitute a core obligation. Despite Parliament's recent reform of the anti-bribery laws in England and Wales, statutory law still does not incorporate article 5. In addition, references to article 5 in the prosecutor's guidelines appear to be defective, as they conflict with the Code for Crown Prosecutors. Second, the SFO Director contributed to the U.K. government's failure to perform its treaty obligations in good faith by declaring that he would have made the same decision to suspend the investigation regardless of whether it conflicted with the prohibitions of article 5. Finally, the U.K.'s highest court created an incentive for prosecutors not to take article 5 into consideration when deciding whether to investigate or prosecute. The judiciary has thereby furthered the U.K. government's failure to comply with its treaty obligations. Rather than criticise Parliament's failure to incorporate article 5 and search for a persuasive justification for reviewing the Director's interpretation of this provision, the House of Lords instead encouraged prosecutors not to take article 5 into consideration at all.

The House of Lords' judgment also raises issues under article 27 of the Vienna Convention on the Law of Treaties, which prohibits states from invoking provisions of internal law as a justification for its failure to perform its treaty obligations.[144] Although the judiciary's ability to uphold the U.K. government's good faith performance of its treaty obligations is hampered by the non-justiciability of unincorporated

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141. *Corner House*, [2009] 1 A.C. at 789-90. It may also, however, be argued that by not incorporating article 5, Parliament did not intend for other governmental organs to do so through other means.

142. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

143. *But see* R v. Lyons, [2002] UKHL 447, [2003] 1 A.C. 976 [40] [Lord Hoffmann]; FATIMA, *supra* note 69, § 8.9.

144. Vienna Convention, *supra* note 142, art. 27.

treaties, article 27 does not permit their use as a mechanism for the U.K.'s avoidance of its obligations under the Convention. In addition, it is hard to argue that these doctrines were really at play in this case. The Lords make only fleeting reference to article 5's unincorporated status, and their conclusions instead seem to reflect an unwillingness to make rulings on a prosecutorial decision that touched on national and international security issues. The Lords' willingness to surrender responsibility for interpreting the treaty to the Working Group signals not its faithfulness to the principle of Parliamentary sovereignty, but its reluctance to grapple with such politically sensitive issues.

VI. CONCLUSION

The success of the OECD Convention ultimately depends on enforcement at the national level, especially in high-profile corruption cases such as this one. As the available data on the enforcement of anti-bribery laws indicates, the Convention suffers not from conflicting interpretations of its provisions, but from a striking absence of interpretations by the national courts of States Parties. This may be attributed partly to the fact that many States Parties have yet to begin enforcing the Convention, and partly to the fact that in those countries that are enforcing implementing legislation, prosecutorial strategies tend to preclude cases from being heard by courts that might issue interpretations of the Convention. Yet because the Working Group plays the role of gentle monitor rather than authoritative interpreter, only national courts are in a position to develop a body of jurisprudence on the meaning of the Convention's provisions. The Working Group plays a crucial role in guiding the Convention's implementation and enforcement, but only domestic prosecutors can investigate allegations of bribery and only national courts can hold prosecutors to account and demand their compliance with the treaty's requirements.

In this context, the House of Lords' decision not to interpret article 5 of the OECD Convention was disappointing as well as troubling. Not only did the court pass up a rare opportunity to offer an interpretation of the Convention, but the House of Lords also did so in a manner that undercuts the U.K.'s commitment to its legal obligations under the treaty. The House of Lords indicated that it would not be appropriate to interpret article 5 in the absence of an established body of jurisprudence on the subject, even though such case law will never come to be if national courts do not step forward. Moreover, the House of Lords also implied that courts should only review what would be, in reality, a very narrow range of decisions by executives who take unincorporated international

legal obligations into consideration. Finally, the aftermath of the *Corner House* case also calls into question the U.K.'s commitment to the OECD Convention because the legal issues at stake in this case have not been resolved, as article 5's status in the laws of England and Wales remains uncertain. Collectively, Parliament, the Law Commission, the SFO, and the CPS have failed to bring about the Convention's full implementation and enforcement, and the judiciary has not played the critical role implicitly envisaged for it by the treaty itself.