THE OECD CONVENTION ON BRIBERY

A Commentary

A Commentary on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997

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Introduction

MARK PIETH

Preamble to the OECD Convention

The Parties,

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)123/FINAL, which, *inter alia*, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;

Welcoming other recent developments which further advance international understanding and co-operation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the Council of Europe and the European Union;

Welcoming the efforts of companies, business organisations and trade unions as well as other non-governmental organisations to combat bribery;

Recognising the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

Recognising that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up;

Recognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence;

Have agreed as follows: ...

Official Commentaries

General

1. This Convention deals with what, in the law of some countries, is called 'active corruption' or 'active bribery', meaning the offence committed by the person who promises or gives the bribe, as contrasted with 'passive bribery', the offence committed by the official who receives the bribe. The Convention does not utilise the term 'active bribery' simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.

2. This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system.

Recommendation 2009

General

I. [THE COUNCIL] NOTES that the present Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions shall apply to OECD Member countries and other countries party to the OECD Anti-Bribery Convention (hereinafter 'Member countries').

II. RECOMMENDS that Member countries continue taking effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.

III. RECOMMENDS that each Member country take concrete and meaningful steps in conformity with its jurisdictional and other basic legal principles to examine or further examine the following areas:

i) awareness-raising initiatives in the public and private sector for the purpose of preventing and detecting foreign bribery;

ii) criminal laws and their application, in accordance with the OECD Anti-Bribery Convention, as well as sections IV, V, VI and VII, and the Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, as set out in Annex I to this Recommendation;

iii) tax legislation, regulations and practice, to eliminate any indirect support of foreign bribery, in accordance with the 2009 Council Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, and section VIII of this Recommendation;

iv) provisions and measures to ensure the reporting of foreign bribery, in accordance with section IX of this Recommendation;

v) company and business accounting, external audit, as well as internal control, ethics, and compliance requirements and practices, in accordance with section X of this Recommendation;

vi) laws and regulations on banks and other financial institutions to ensure that adequate records would be kept and made available for inspection and investigation;

vii) public subsidies, licences, public procurement contracts, contracts funded by official development assistance, officially supported export credits, or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases, and in accordance with sections XI and XII of this Recommendation;

viii) civil, commercial, and administrative laws and regulations, to combat foreign bribery;

ix) international co-operation in investigations and other legal proceedings, in accordance with section XIII of this Recommendation.

...

Follow-up and institutional arrangements

XIV. INSTRUCTS the Working Group on Bribery in International Business Transactions to carry out an ongoing programme of systematic follow-up to monitor and promote the full implementation of the OECD Anti-Bribery Convention and this Recommendation, in co-operation

with the Committee for Fiscal Affairs, the Development Assistance Committee, the Investment Committee, the Public Governance Committee, the Working Party on Export Credits and Credit Guarantees, and other OECD bodies, as appropriate. This follow-up will include, in particular:

i) continuation of the programme of rigorous and systematic monitoring of Member countries' implementation of the OECD Anti-Bribery Convention and this Recommendation to promote the full implementation of these instruments, including through an ongoing system of mutual evaluation, where each Member country is examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the Member country in implementing the OECD Anti-Bribery Convention and this Recommendation, and which will be made publicly available;

ii) receipt of notifications and other information submitted to it by the Member countries concerning the authorities which serve as channels of communication for the purpose of facilitating international co-operation on implementation of the OECD Anti-Bribery Convention and this Recommendation;

iii) regular reporting on steps taken by Member countries to implement the OECD Anti-Bribery Convention and this Recommendation, including non-confidential information on investigations and prosecutions;

iv) voluntary meetings of law enforcement officials directly involved in the enforcement of the foreign bribery offence to discuss best practices and horizontal issues relating to the investigation and prosecution of the bribery of foreign public officials;

v) examination of prevailing trends, issues and counter-measures in foreign bribery, including through work on typologies and cross-country studies;

vi) development of tools and mechanisms to increase the impact of monitoring and follow-up, and awareness raising, including through the voluntary submission and public reporting of non-confidential enforcement data, research, and bribery threat assessments;

vii) provision of regular information to the public on its work and activities and on implementation of the OECD Anti-Bribery Convention and this Recommendation.

Chapter contents

I. History and development of the legal framework

1. Why attempt to combat corruption now?

Corruption is by no means a new phenomenon. It is as old as human nature itself; however, political and economic corruption has taken on a specific meaning during the latter half of the twentieth century. With decolonisation, former colonial states, but also newcomers amongst exporting nations, tried to maintain or establish their power basis with the emerging elites in the southern hemisphere by buying allegiances. Whereas the motivation to bribe will have been primarily economic, to a large extent corruption was also used as a political means in the struggles of the Cold War to secure influence across the world. If therefore the East-West *détente* has not immediately brought a substantial reduction in political and economic bribery, the opening of the East and the growing pace of globalisation are essential conditions for a process towards openly addressing corruption as a serious impediment to worldwide

development.[1] It is no coincidence that, since 1990, a dramatic change in public attitudes regarding corruption has taken place. This development can be identified in both the northern and southern hemispheres. There are commentators who maintain that the rampant bribery in industrialised centres of, for instance, Italy, could be attacked by law enforcement only following the East-West *détente*, since the highly corrupt former political structures were until then perceived as necessary bulwarks against Soviet influence. In a similar way, it became possible to criticise persons holding high political or legal office in other European states, such as Germany, France and Belgium, for their lack of sensitivity to conflicts of interest.[2]

This is not to say that political change or globalisation as such have led to a reduction of bribery. In fact, in an initial period the contrary may have been the case.[3] Whereas the extent of 'graft' by political exponents in potentially rich countries in the South (e.g. Angola, Brazil, Nigeria or the Philippines) is common knowledge,[4] we still need to develop a clear understanding of the full dimensions of commercial bribery. So far, we are getting used to dramatic headlines about payments worth hundreds of millions of dollars, or euros, in order to acquire contracts, obtain exploitation rights or permits to build pipelines, etc.[5] Reliable analyses of the dimensions of the problem are, however, still rare,[6] and we are only just beginning to understand some of the reasons for the persistence of the problems.[7] Legislative

[1] Crutchfield George, Lacey and Birmele 1999, 9; Pieth 1997a, 119 *et seq.*

[2] Belgium: *Neue Zürcher Zeitung*, 9 December 1994, 1; France: *Neue Zürcher Zeitung*, 13 November 2003, 5, *New York Times*, 14 November 2003, 9, *Guardian*, 13 November 2003 (online edn); Germany: BBC News, 29 June 2000 (online edn), Focus, 11/2004, 18 *et seq.*

[3] Even the Preamble to the OECD Recommendation 2009 (cited as OECD 2009a) suggests that 'bribery of foreign public officials is a widespread phenomenon in international business transactions' (6th indent); see also the Selected Documentation at the end of this book.

[4] Angola: Global Witness 2004, 36; Brazil: *Neue Zürcher Zeitung*, 26 July 2005, 5, *Financial Times*, 22 July 2005, 11; Nigeria: *Basler Zeitung*, 21 October 2002, 44, BBC News, 20 October 2000 (online edn), *Neue Zürcher Zeitung*, 4 October 2000, 25; Philippines: BBC News, 1 February 2002 (online edn), *Neue Zürcher Zeitung*, 22 April 1998, 7.

[5] Acres: M2 Pressure, 23 July 2004; World Bank List of Debarred Firms, available at www.worldbank.org>projects&operations>procurement; Giffen: *Neue Zürcher Zeitung*, 2 April 2003, *Financial Times*, 30 May 2003, 4; Halliburton: *Financial Times*, 30 March 2004, 6, *Neue Zürcher Zeitung*, 14/15 February 2004; Siemens-Enelpower: *Süddeutsche Zeitung*, 20 August 2004 (online edn).

[6] Mauro 1995, 681 *et seq.*; according to research by the World Bank Institute, more than US$1 trillion of bribes is paid each year: see World Bank 2004.

[7] Cartier-Bresson 2000, 11; Rose-Ackerman 1999, 40.

action against transnational commercial bribery in fact began well before these geopolitical changes, for reasons primarily linked to the local political agenda of the United States. The enactment of the Foreign Corrupt Practices Act (FCPA) in 1977 marked the first important step.

2. *US initiatives against 'foreign corrupt practices'*

2.1. Early legislative activities[8]

2.1.1. SEC disclosure programme and enactment of the FCPA In the mid 1970s media reports revealed that US companies were acquiring business at home and abroad through clandestine payments to foreign public officials. Such doubtful practices were exposed in particular by the Watergate Special Prosecutor examining questionable contributions to President Nixon's re-election campaign.[9] Following a public outcry, the US Securities and Exchange Commission (SEC) created a voluntary disclosure programme and announced an amnesty for companies under the condition that they disclosed past payments to foreign public officials and introduced internal anti-bribery compliance procedures.[10] Shocked by the extent of the revelations,[11] the administration of President Ford suggested legislation requiring US companies to disclose bribes. The draft of 1976, however, failed to pass the Democratic-dominated Congress. The administration of President Carter shortly afterwards pushed for legislation criminalising the bribery of foreign public officials and demanded the definition of additional accounting and auditing requirements and 'in-control standards' to be supervised and, if necessary, sanctioned by the SEC. The new law entered into force in December 1977.[12]

2.1.2. Interpreting the developments Scholars have taken the enactment of the FCPA more or less for granted; few discuss the reasons for such an unusual step in the 1970s. It is true that an international debate

[8] Corr and Lawler 1999, 1255; Low 2003a, 3; Schoenlaub 1999, A-1057.

[9] Fitzgerald 2011, 28 *et seq.*; Hines 1995, 3 *et seq.*; Tarullo 2004, 673; Weinstein *et al.* 2012, para. 1.03 [1] [a].

[10] Hearings on Activities of American Multinational Corporations Abroad Before the Subcommittee on International Economics Policy of the House Committee on International Relations, 94th Cong. 57, 63 *et seq.* (1975). For the findings of the SEC, see the Report of the Comptroller General of the United States to Congress in 1981.

[11] More than 400 companies, over 177 of them ranked amongst the Fortune 500, owned up to having paid substantial bribes in the recent past.

[12] FCPA 1977 (Pub. L. No. 95-213, 91 Stat. 1494 (1977)).

about the behaviour of large multinational enterprises (MNEs) had already reached a critical stage. The fact that the OECD enacted its first version of an 'OECD Guideline for Multinational Enterprises' in 1976 was an expression of the need perceived by governments to contain public discontent with the role of MNEs. On the other hand, there must have been strong domestic reasons for the US legislator to take this step unilaterally, reasons going beyond the general sympathy of the Carter administration for business ethics.[13] Case law and legislative materials suggest that the US legislator believed it was acting to protect the free market system against the erosion of public confidence. On a more concrete level it had an interest in preventing US companies from becoming dependent upon such behaviour and thereby losing their competitive edge over others. Additionally, it was feared that businesses with an ethical track record would cave in under the pressure of competition and lower their standards. Still, it remains interesting that the United States acted unilaterally without prior consultation with major trading partners. This may be explained with reference to the size and nature of some of the cases revealed. Notably, the Tanaka-Lockheed scandal, involving Japan's Prime Minister and one of the largest defence contractors in the United States, was highly embarrassing for US foreign policy. Defence industry insiders of that time offer additional explanations: lobbyists in Washington apparently feared that the defence industries could attempt to open up new markets, including with the help of illicit means, especially in the Middle East, if transnational bribery was tolerated. Even if this additional explanation cannot be corroborated, together with the other theories it indicates that enacting the FCPA was probably not only an effort to protect the US image abroad, but a very straightforward and fundamentally utilitarian step to keep the private sector from interfering with US foreign policy and national security interests, as defined by the government.[14]

2.2. Efforts to internationalise the FCPA

It rapidly became evident to the US business sector that the FCPA (at least seen from a short-term perspective) placed it at a competitive disadvantage compared to its foreign competitors.[15] It was therefore

[13] Tarullo 2004, 673; Weinstein *et al.* 2012, para. 1.03 [1] [b].

[14] Pieth 1999b, 1; Schoenlaub 1999, A-1057 with reference to US court decisions (e.g. *United States* v. *Donald Castle*, 1925 F. 2d 831 (5th Cir. 1991)).

[15] Langer and Pelzman 2001, 3; Tarullo 2004, 676 (note 31): reference to Warren Christopher, Deputy Attorney-General when the FCPA was passed.

quite an obvious step to support the drafting of an anti-corruption Convention in the context of the Economic and Social Council (ECOSOC) of the United Nations (UN). In fact, the UN made great efforts to negotiate such a Treaty in the late 1970s; due to North-South and also East-West differences the efforts ended without success and had to be abandoned in 1979.[16]

Concurrently, the rules of conduct developed by the International Chamber of Commerce (ICC) in parallel to the UN negotiations, and aiming to supplement an international public standard, were finalised. They too remained, however, a more or less dead letter without the public backing of the Convention, until new efforts in the 1990s proved more successful.[17]

2.3. What did work?

Towards the late 1980s, pressure mounted within the US business sector to either tone down or even abolish the FCPA or to encourage major competitors to follow suit. Successive publications of the US Department of Commerce, based on complaints by the private sector and frequently adding references to intelligence sources, presented figures showing lost business due to foreign bribery by foreign competitors.[18]

2.3.1. FCPA 1988 In 1988, the FCPA was reformulated.[19] Documents of the time raise the question whether the intention was 'clarification' or 'evisceration'.[20] Some of the amendments, e.g. the shift from the 'knowing or having reason to know' standard regarding third parties to 'evidence of awareness' and the widening of the exceptions and affirmative defences (for facilitation payments, lawful payments and reasonable

[16] Cf. the work of, first, the ECOSOC's Commission on Transnational Corporations, and later of its Committee on an International Agreement on Illicit Payments; Pieth 1999c, A-1039.

[17] For the history of the ICC Rules of Conduct, cf. Heimann 2008, 11 *et seq.*

[18] The carping became more than ever explicit: see US GAO, *Report to the Congress: Impact of Foreign Corrupt Practices Act on U.S. Business* (4 March 1981); Gareis 1999, A-1013; Hines 1995, 19 *et seq.*, with reference to the US Department of Commerce, Unclassified Summary of Foreign Competition, October 1995 (pre 1994: 100 cases, amounting to US$45 billion; and 1994–98: 239 cases amounting to US$108 billion); Kantor 1996, in Sacerdoti 2003, 43; *Wall Street Journal*, 23 February 1999 (calling OECD members the worst offenders); cf. also Schoenlaub 1999, A-1058.

[19] FCPA 1988; Tarullo 2004, 674; Weinstein *et al.* 2012, para. 1.03 [3].

[20] Bliss and Spak 1989, note 16.

and bona fide expenditures), seemed to weaken the law.[21] Essential for the future, however, was the President's obligation under the new law to pursue negotiations with major competitors to conclude an international agreement against foreign bribery.[22] This provided the domestic legal justification for the US request to the OECD in 1989 to initiate work on an instrument on combating bribery of foreign public officials.[23] There was to be debate then and later within various US administrations about the choice of an organisation to pursue the issue. As a consequence of the traditional US distrust of the UN, it was obvious that this organisation was not considered. However, the GATT would have been an option.[24] In 1989 the G-7 had just taken a similar decision in a related area. Following on from the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, it had created the Financial Action Task Force on Money Laundering (FATF), and it asked the OECD to supply secretariat services, in particular because it was hoping to make use of the OECD's well-established 'peer review' and 'soft law' procedures.[25] Moreover, the OECD, as the organisation of the major exporting and investing nations, seemed to be best suited to develop international rules on foreign commercial bribery.[26]

2.3.2. The initiative in the OECD The Paris-based Organisation for Economic Co-operation and Development (OECD) was created in 1960 and had a crucial role in the post-war reconstruction of Europe. It was created to facilitate the implementation of the US European Recovery Program or Marshall Plan. Together with the Bretton Woods institutions, the OECD managed to implant into European politics a shift of paradigm from aggressive mercantilism to economic co-operation.[27] The 1960 OECD Treaty stated its main goal as follows: to enable its state Parties to consult and co-operate in order 'to use more effectively their capacities and potentialities so as to promote the highest sustainable growth of their economies and improve the economic and social well-being of their people'.[28]

[21] Crutchfield George, Lacey and Birmele 1999, note 109; Hines 1995, 21; Low 2003a, 1; Tarullo 2004, 679.

[22] Pub. L. No. 100-418, 102 Stat. 1415.

[23] OECD 1989a.

[24] An option suggested even as late as 1997 by the US Trade Representative, M. Kantor.

[25] Financial Action Task Force on Money Laundering, Reports, Paris, February 1990.

[26] See the reference to the mandate of the OECD as an organisation in OECD 1997a, Preamble: see also note 3 above and OECD 1999, F-1005.

[27] Guilmette 2004a, 28.

[28] OECD 1960, 7th recital.

Over the post-war period, the OECD has evolved into the pre-eminent organisation of the industrialised nations for international economic research. The OECD has a key role in economic analysis; on a policy level, securing free market access is still the paramount concern of its members. After the fall of communism and the opening of East European markets, bribery is more than ever perceived as a non-tariff trade barrier to European and global trade.[29] The issue therefore blends well into the OECD's work programme of promoting exports and foreign investment.

Within the some 120 committees and subgroups of the OECD consensus politics has become well established.[30] Peer review has become an accepted method of securing compliance by state Parties with their Treaty obligations.[31] Its subtlety commends itself to states, and its effectiveness can be enhanced by the exercise of peer pressure, depending on the topic.

3. *OECD initiatives against corruption*

3.1. 1989–1994

3.1.1. The first tentative steps The idea that, in 1989, the topic of corruption was new in a forum dealing with international business would be wrong. Just as the private sector, through the ICC, had worked on the issue between 1975 and 1977 (Shawcross Committee),[32] so the OECD, as early as 1976, had itself already addressed corruption (even if still in a rather general manner) in its 'Guidelines for Multinational Enterprises'.[33] However, the political context of the 1970s was quite different from that of the 1990s. Beyond the issue of unfair competition, the Guidelines had aimed to come to terms with the general discontent and criticism pertaining to the behaviour of MNEs in the 1970s; they were widely condemned for basing their action entirely on profit maximisation. Moreover, it must be added that these early instruments did little to change endemic corrupt practices around the world.

The nature of the discussions concerning commercial bribery in the Ad Hoc Group on Illicit Payments[34] at the OECD, which began its work

[29] Kubiciel 2012, 431. [30] Guilmette 2004a, 44. [31] OECD 2003a.
[32] Heimann 2008, 11 *et seq.* [33] Now Part I, ch. VII OECD 2011.
[34] A Working Group which was created by the Committee on International Investment and Multinational Enterprises of the OECD (CIME): see OECD 1989a and OECD 1999, F-1005.

in 1989, was thus entirely different from what it is today.[35] Even though the efforts were being undertaken in parallel to the work of high-powered task forces like the FATF and Chemical Action Task Force (CATF), the issue was treated with distrust by the state Parties. The representation was rather low-level (including the US delegation) and the work rhythm slow in the beginning.[36] The OECD Council insisted on cautiously worded mandates on an annual basis, first requesting a comparative review of national legislation, then a series of feasibility studies of possible substantive actions and procedural approaches. Only after several years of preliminary work was it possible to envisage proposing a Recommendation on specific actions to be taken by the state Parties.[37]

There was no NGO support at the time, no other international organisations were as yet addressing the topic, and the private sector was quite uninterested in these discussions. In fact, this general scepticism went along with double standards at home. Even though in all OECD state Parties corruption was prohibited domestically, countries did not feel responsible for what their companies did vis-à-vis foreign officials, be it on their own territory or abroad. Furthermore, the vast majority of state Parties still allowed tax deductibility of bribes,[38] thereby indirectly condoning such practices. Frequently, politicians and economic leaders saw bribery as a means of supporting domestic industrial or business interests.[39]

Whereas the Republican administration of George Bush senior (1988–1992) would probably have been ready to accept a 'no' by major competitors such as Japan, if only in order to further weaken or even abolish the FCPA, the Clinton administration (elected in 1992) had no choice but to aggressively pursue the internationalisation of the FCPA. They followed in the footsteps of the Carter administration in this respect: from 1993 Secretary of State Warren Christopher, who had been involved in the drafting of the FCPA under Carter in 1977, dramatically intensified the efforts to promote an OECD instrument.[40] At home, US companies were convinced by a sequence of high-profile cases prosecuted by the Department of Justice, leading to rather sizeable sanctions, that there

[35] OECD 1989a; OECD 1999, F-1005 *et seq.*; Pieth 2000a, 54 *et seq.*; Sacerdoti 2003, 72 *et seq.*
[36] Tarullo 2004, 675, 677.
[37] Council Decisions of March 1989 C(89)49; of June 1990 C(90)87; of February 1992 C(92)16; Ministerial Communiqué of 2 June 1998 (CES(93)22).
[38] Sacerdoti 2003, 71. [39] Pletscher 1999, 275, 279. [40] Tarullo 2004, 675.

was no way back from the FCPA: see the cases against Goodyear decided in 1989, General Electric in 1994 and Lockheed Corporation in 1995.[41] Meanwhile, major competitors in Europe and Asia, who were not really interested in the abolition of the FCPA, agreed that the international community needed at least to consider action against transnational bribery. This change of attitude led to the 1994 Recommendation.[42]

3.1.2. Recommendation of 1994 The Recommendation of 1994[43] itself makes rather unspectacular reading. It starts with the general Recommendation to state Parties of the OECD to 'take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions' (section I).[44] It goes on to give a tentative 'shopping list' of issues which it invites each member to examine (section II).[45] If in hindsight this does not seem much of an achievement, it needs to be pointed out that this was the first international document in which states publicly promised to 'take concrete and meaningful steps to meet this goal' and agreed to monitor implementation and follow up this Recommendation (section VIII),[46] in particular 'to carry out regular reviews of steps taken by Member countries to implement the Recommendation and to make proposals, as appropriate, to assist Member countries in its implementation'.

Even if this Recommendation was not legally binding, its value lay in its political impact.[47] Its real significance has been to generate confidence within the OECD and within other organisations and NGOs that bribery could be overcome, provided states, the private sector and civil society all co-operated. Both the Council of Europe (COE) and Transparency International (TI) picked up their work on corruption shortly after the adoption of the 1994 Recommendation.[48] For the future evolution of the OECD initiative, the passage on follow-up and on monitoring was crucial: it introduced a peer process which was

[41] *United States* v. *Goodyear International Corp.*, 2 FCPA Rep. 698.1601 (D.D.C. 1989); *United States* v. *Steindler*, 3 FCPA Rep. 699.131 (S.D. Ohio 1994); *United States* v. *Lockheed Corp.*, 3 FCPA Rep. 699.175 (N.D. Ca. 1995).

[42] This part of the evolution is frequently misrepresented in particular by US academics, as materials are not easily available. Incorrect: Abbott and Snidal 2002, 154, 164 *et seq.*; Crutchfield George, Lacey and Birmele 2000, 496; Spahn 2013, 10 *et seq.*

[43] OECD 1994; also OECD 1999, F-1106.

[44] See now section II OECD 2009a.

[45] See now section III OECD 2009a.

[46] See now section XIV OECD 2009a.

[47] OECD 1999, F-1006; Guilmette 2004a, 77.

[48] Aiolfi and Pieth 2002, 350; Pieth 2000a, 52; Sacerdoti 1999, 214.

to allow this initiative to develop into one of the most dynamic instruments of international law.[49]

Summing up, on an abstract level, a shift of attitude towards commercial bribery was made possible by geopolitical and global economic change (East-West *détente* and expanding globalisation). On a more concrete level, an institution like the OECD, backed by strong political will, was needed to create a real anti-corruption drive. Instrumental too was the effective lobbying of the US business sector, being sensitive to trade disadvantages allegedly suffered since the enactment of the FCPA in 1977. The process nevertheless remained arduous because in 1994 governments continued to be largely ambivalent and the private sector outside the United States sceptical. They still needed to be convinced that strictly enforced harmonisation over a limited period would genuinely lead to a reduction of bribery without endangering their competitive position.

3.2. 1994–1997

The ensuing years involved the participants in a detailed examination of the items contained in the 'shopping list' and marked the transition from unilateral to collective action.[50] Once again, state Parties' laws were analysed (1995). Priority was given to criminalisation, since it became evident that it was crucial for all other aspects to draw a clear line between permitted and forbidden behaviour. An essential step in this process was taken when, in 1996, the Council agreed with the Working Group on Bribery (WGB) that it was 'necessary to criminalise the bribery of foreign public officials in an effective and co-ordinated manner'.[51] The WGB was the renamed expert committee in charge of developing the rules. Ministers asked it, through the Committee on Investment and Multinational Enterprises (CIME), to 'further examine the modalities and the appropriate international instruments to facilitate criminalisation'.[52] With this mandate the WGB would develop, on the one hand, a substantive standard, i.e. the 'Agreed Common Elements',[53] which would be the blueprint for the Convention; and on the other hand, it would

[49] For further details see IV. below.

[50] Aiolfi and Pieth 2002, 351; Pieth 2000a, 54; Sacerdoti 1999, 214 *et seq.*; Sacerdoti 2003, 72 *et seq.*

[51] OECD 1999, F-1008, 1011.

[52] See note 45 above.

[53] Cf. Annex in OECD 1997a and see the OECD Documents in the Annex to this book.

once more engage in discussions about the adequate legal form (Recommendation or Convention?). Before getting there, however, over the next three years the WGB picked up a series of other key issues from the 'shopping list', studied them, and developed language for the revision of the Recommendation in 1997.[54] In so doing, it applied the 'interactive process' for which the OECD has become famous.[55]

In the same period the WGB's sister entities within the OECD structure, partly in co-operation with the WGB, developed Recommendations on some of the issues contained in the 1994 Recommendation: the Committee on Fiscal Affairs (CFA) continued its work on banning tax deductibility of bribes[56] and the Development Assistance Committee (DAC) on anti-corruption provisions in bilateral aid-funded procurement and related matters.[57] Independently of the efforts of the WGB, a series of other OECD sub-committees have since raised issues relating to combating corruption (PGC, SIGMA, etc.).[58]

The text of the Revised Recommendation of 23 May 1997[59] pulled together the analytical work done on the items of the 'shopping list' and transformed the 1994 Recommendation into a far more meaningful document, specifying commitments of state Parties in a series of areas. Like the earlier text, it contains procedures for follow-up and for review of the Recommendation in the future (section VIII). The Revised Recommendation defines the actions to be taken by state Parties in such a concrete manner that some members felt the most sensitive topics (criminal law and book-keeping rules) needed to be carried over into a legally binding instrument.[60]

3.3. From the Revised Recommendation to the Convention of 1997

Since 1993, when the decision was taken to opt for a Recommendation, the WGB had worked under the assumption that in such diverging legal

[54] Cf. the detailed texts contained in OECD 1999, F-1003–1128: accounting requirements, external audit and internal company controls, the use of access to public procurement to counter corruption, etc.

[55] Progressing from fact-finding, brainstorming and Recommendations to more precise language and eventually to very specific requirements. Cf. Guilmette 2004a, 94.

[56] OECD 1999, F-1041. [57] OECD 1999, F-1092, 1101, 1116.

[58] OECD: Public Governance Committee (PGC), formerly titled Public Management Group (PUMA); Support for Improvement in Governance and Management (SIGMA); see also I.3.10 below.

[59] OECD 1997a. [60] Pieth 2000a, 54; Sacerdoti 2003, 32.

systems 'soft law' was the quickest and most subtle way to harmonise rules on transnational bribery. The Revised Recommendation continued to pursue this approach by defining, inter alia, a template of criminal rules to be implemented by state Parties, namely, the 'Agreed Common Elements of Criminal Legislation and Related Action' (ACE) appended to the Recommendation.[61]

In the final round of negotiations on the Recommendation, some countries, led by France and Germany, suggested that criminalisation required a more binding legal form. In order to promote this approach, they proposed a draft Convention, largely drawing upon texts recently agreed in the COE or European Union (EU) frameworks.[62] Whereas Germany suggested the UN as the best forum to negotiate such a Treaty, France favoured the WTO. In opposition to the 'collective unilateralism' so far embraced by the WGB,[63] France and Germany also sought to follow a traditional *inter partes* approach. The heated debates about the best way to bring about a binding instrument allowing for a rapid change of law in all key jurisdictions provoked the WGB into action. Between June and August 1997 a first draft of the Convention was developed on the basis of contributions by France, Germany, Italy, the United States and the Secretariat; the draft was further refined at an informal meeting in Lugano in August 1997 under the 'Friends of the Chairman' format ('Lugano I Conference'). In two following negotiation conferences (October and November)[64] the text was finalised. It was signed by Ministers on 17 December 1997 in Paris.[65]

The extraordinary speed with which this process was concluded was facilitated by a compromise of May 1997, which is reflected in section III(1) of the Revised Recommendation:

> 'Member countries should criminalise the bribery of foreign public officials in an effective and co-ordinated manner by submitting proposals to their legislative bodies by 1 April 1998, in conformity with the agreed common elements set forth in the Annex, and seeking their enactment by the end of 1998.'

[61] Reproduced for readers at the back of this book along with the Recommendation itself.

[62] See II.2.2. below. [63] See II.1. below.

[64] Working Documents DAFFE/IME/BR(97)12 and 16.

[65] Pieth 2000a, 55; Sacerdoti 2003, 73. See the full text of the Convention in the Annex to this book.

In the next paragraph (section III(2)) the Council took the binding procedural Decision:

> 'to open negotiations promptly on an international Convention to criminalise bribery in conformity with the agreed common elements, the Treaty to be open for signature by the end of 1997, with a view to its entry into force twelve months thereafter.'

Under normal circumstances this ambitious calendar would have simply been unrealistic. However, due to the intense political pressure[66] exerted by more than one country, the envisaged deadline for entry into force was missed by only a few months, with the Convention entering into force on 15 February 1999. The negotiating situation was very much inspired by what economists call the prisoner's dilemma.[67] From the moment the decision to go ahead was taken by G-7 countries, notably Canada, Germany, Japan, the United Kingdom and the United States, who all ratified in 1998, the Convention was a done deal. The negotiations behind the scenes and the extent of the peer pressure necessary to convince state Parties are not discussed here. Of course, in this phase of the emergence of international rules, the contribution of the private sector and of the NGOs was crucial. In particular, the NGO TI helped convince sceptical business leaders and politicians in some key countries that the time was ripe to commit themselves to combating transnational economic bribery.[68]

Even though the Convention has received far more publicity, the Revised Recommendation stayed in force and remained the basic 'politically binding' text, embodying the overall consensus on how best to combat the bribery of foreign public officials in business transactions, including the entire preventive concept and the basic rules on follow-up and co-operation.

[66] See the detailed inside story by the US 'sherpa': Tarullo 2004, 675.

[67] Guilmette 2004a, 59; Tarullo 2004, 668; cf. also Hardin 2012; Reuben 2003, 5 *et seq.*

[68] From 1995 onwards, the WGB held regular meetings with representatives of the private sector, trade unions and non-governmental organisations (NGOs): Business and Industry Advisory Committee to the OECD (BIAC), Trade Union Advisory Committee to the OECD (TUAC), International Chamber of Commerce (ICC) and TI. In the final stage of the negotiations, TI's intervention proved to be instrumental: it drafted a helpful letter signed by Chief Executive Officers (CEOs) of large international companies.

OECD Bribery Convention Ratification Status as of November 2012

Country	Deposit of instrument of ratification/ acceptance/approval	Entry into force of the Convention	Entry into force of implementing legislation
Argentina	8 February 2001	9 April 2001	10 November 1999
Australia	18 October 1999	17 December 1999	17 December 1999
Austria	20 May 1999	19 July 1999	1 October 1998
Belgium	27 July 1999	25 September 1999	3 April 1999
Brazil	24 August 2000	23 October 2000	11 June 2002
Bulgaria	22 December 1998	20 February 1999	29 January 1999
Canada	17 December 1998	15 February 1999	14 February 1999
Chile	18 April 2001	17 June 2001	8 October 2002
Colombia	20 November 2012	19 January 2013	14 November 2012
Czech Republic	21 January 2000	21 March 2000	9 June 1999
Denmark	5 September 2000	4 November 2000	1 May 2000
Estonia	23 November 2004 (accession instrument)	22 January 2005	1 July 2004
Finland	10 December 1998	15 February 1999	1 January 1999
France	31 July 2000	29 September 2000	29 September 2000
Germany	10 November 1998	15 February 1999	15 February 1999
Greece	5 February 1999	6 April 1999	1 December 1998
Hungary	4 December 1998	15 February 1999	1 March 1999
Iceland	17 August 1998	15 February 1999	30 December 1998
Ireland	22 September 2003	21 November 2003	26 November 2001
Israel	11 March 2009 (accession instrument)	10 May 2009	21 July 2008
Italy	15 December 2000	13 February 2001	26 October 2000
Japan	13 October 1998	15 February 1999	15 February 1999
Korea	4 January 1999	5 March 1999	15 February 1999
Luxembourg	21 March 2001	20 May 2001	11 February 2001
Mexico	27 May 1999	26 July 1999	18 May 1999
Netherlands	12 January 2001	13 March 2001	1 February 2001
New Zealand	25 June 2001	24 August 2001	3 May 2001
Norway	18 December 1998	16 February 1999	1 January 1999
Poland	8 September 2000	7 November 2000	4 February 2001
Portugal	23 November 2000	22 January 2001	9 June 2001
Russian Federation	17 February 2012	17 April 2012	16 May 2011
Slovak Republic	24 September 1999	23 November 1999	1 November 1999
Slovenia	6 September 2001 (accession instrument)	5 November 2001	23 January 1999
South Africa	19 June 2007 (accession instrument)	18 August 2007	27 April 2004
Spain	4 January 2000	4 March 2000	2 February 2000
Sweden	8 June 1999	7 August 1999	1 July 1999

(*cont.*)

Country	Deposit of instrument of ratification/ acceptance/approval	Entry into force of the Convention	Entry into force of implementing legislation
Switzerland	31 May 2000	30 July 2000	1 May 2000
Turkey	26 July 2000	24 September 2000	11 January 2003
United Kingdom	14 December 1998	15 February 1999	14 February 2002
United States	8 December 1998	15 February 1999	10 November 1998

3.4. Ratifying and implementing the Convention

3.4.1. Ratification In comparison to traditional criminalisation Treaties, it is remarkable not only how quickly the OECD Convention entered into force; it has also been ratified and implemented by the entirety of its constituency in an exceptionally short space of time. Whereas all state Parties adopted implementing legislation, one country needed longer to ratify for technical reasons.[69] The table lists all the original state Parties as well as the more recent accession countries (see I.3.9. below). Currently the OECD Working Group on Bribery has 40 members, all of which have ratified the Convention.

3.4.2. Securing implementation and application The rapid pace of implementation is mainly attributable to sustained peer pressure, which is directed to the various forms of follow-up addressed by the 2009 Recommendation and the Convention. As we will see, one approach focuses on the formal steps towards implementation (*Tour de Table*); another evaluates the abstract substantive implementation ('Phase 1' monitoring), with a re-evaluation of laws after they have been amended to meet the critical comments of the WGB ('Phase 1bis' monitoring); and finally, there is the most ambitious procedure yet, focusing on effective application ('Phase 2' and 'Phase 3' monitoring).[70] The procedures of Phases 2 and 3 are the prerequisite for one of the most effective harmonisation efforts in international law of the past years.[71] Whereas formal harmonisation of anti-corruption laws was a clear success story, securing application was to become a far more challenging endeavour.

[69] Ireland. [70] Discussed in detail in IV. below.
[71] More sceptical: Tarullo 2004, 680 *et seq.*

3.5. The crisis: discontinuance of the BAE investigation

Fifteen years into the evaluation process and well into the Phase 2 process concentrating on application, an incident brought the efforts to a sudden halt. Upon the advice of UK Prime Minister Tony Blair, the Attorney General ordered an already quite far advanced investigation by the UK's Serious Fraud Office (SFO) to be discontinued for reasons of public interest ('war on terror').[72] The decision sparked a huge public outcry.[73] On the legal front academics discussed whether the OECD Convention allowed for a public order or national security exception.[74] The OECD WGB took the position that Article 5 of the Convention prohibited the use of prosecutorial discretion beyond professional motive, in particular for economic or political reasons. Several public statements by the Prime Minister and the Attorney General indicated that wider economic and political considerations had influenced the decision.[75] The House of Lords ultimately decided that the discontinuance was not illegal.[76] The WGB demanded a Phase 2bis evaluation of the United Kingdom. In its report it accepted implicitly that there may be extreme situations of duress forcing a state to abstain from law enforcement activities (the UK Court of Appeal shared this view, quoting the *Leila Khaled* case);[77] however, it made clear that where the threat was no longer imminent, the decision to discontinue should be revisited.[78]

[72] Decision of the Director of the SFO of 14 December 2006; based on the order by the Attorney General (see *R (on the application of Corner House Research and Campaign Against Arms Trade)* v. *Director of the Serious Fraud Office (BAE Systems PLC, Interested Party)* [2008] EWHC 714 (Admin), para. 31 *et seq.*) and a letter by the Prime Minister of 8 December 2012 (see 'Personal Minute of the Prime Minister to the Attorney General', available at www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/RedactedDocsRW2.pdf).
[73] In a matter of three months hundreds of thousands of media reports were registered on the Internet.
[74] Rose-Ackerman and Billa 2008; see also our chapter on Article 5.
[75] Interview with the Prime Minister in 'Black Money', PBS Frontline documentary, available at www.pbs.org/wgbh/pages/frontline/blackmoney/view/; *Financial Times*, 16/17 December 2006, 4; Statement of the Attorney General in the House of Lords (cf. House of Lords Hansard, vol. 687, cols 1711–13, 14 December 2006). See also our chapter on Article 5, notes 146 and 155.
[76] *R (on the application of Corner House Research and others)* v. *Director of the Serious Fraud Office* [2008] UKHL 60.
[77] The *Leila Khaled* case is about the hijacking and acute threat to blow up an airplane if Palestinian prisoners were not freed immediately; see *R (on the application of Corner House Research and others)* v. *Director of the Serious Fraud Office* [2008] UKHL 60, paras. 25 and 39 *et seq.*
[78] UK-Ph2bis, 41 (para. 168).

While some commentators[79] were of the opinion that the *Al Yamamah* crisis had weakened the OECD Convention, in the end the contrary was the case. The United Kingdom confronted the rest of the WGB constituency head on with its decision. The WGB took its toughest decision as yet and demanded an entirely new legislation. In order to raise pressure the United Kingdom had to report twice a year on its legislative progress. Furthermore, a political and technical delegation was sent to assist London with the drafting. Finally, the WGB indicated that it could consider trade sanctions against the United Kingdom if it failed to enact effective and comprehensive legislation.[80] The difficult history of the enactment of the UK Bribery Act 2010 proved that such pressure was necessary. Ultimately, however, the tough UK Bribery Act[81] can be seen as a consequence of a misguided government policy.

3.6. Ensuing boost in application

3.6.1. FCPA 1998 In 1998 the United States adapted its legislation to the standards of the OECD.[82] Part of the amendment was the extension of jurisdiction on the one hand to acts of US persons committed outside the United States (nationality principle), and on the other hand to acts of non-US nationals committed within the United States. Furthermore, the new law broadened the scope of the definition of foreign public official to include employees of international organisations. Finally, the law was clarified to include payments to secure any improper advantage.[83]

3.6.2. Practice by the DOJ and SEC More striking than the change of law, however, was the dramatic increase in law enforcement activities since the entry into force of the OECD Convention. Some commentators argue that there is a direct link between the Convention and an increase of US cases by a factor of four and beyond. What is more, the level of sanctions, especially against corporations (fines and disgorgement), has dramatically risen over the last five years. In the most famous cases the sanctions (US Department of Justice (DOJ) and SEC action taken

[79] Heineman and Heimann 2007, 80 *et seq.*, 87.
[80] UK-Ph2bis, 71 (chapeau of the Recommendations, 6th indent).
[81] The UK Bribery Act 2010 is considered 'tough' even in comparison to the FCPA, cf. Warin, Falconer and Diamant 2010.
[82] FCPA 1998 (Pub. L. No. 105-366, 112 Stat. 3302).
[83] Weinstein *et al.* 2012, para. 1.03 [3] [b].

together) amount to hundreds of millions of US dollars: in the *Halliburton/KBR/TSKJ* case, sanctions of US$579 million, in the *Siemens* case of US$800 million (in the United States alone, and another US$500 million in Germany), and in the *BAE* case of US$400 million have been spoken about or agreed upon. This is, however, only the tip of the iceberg. In the United States alone, multiple further sanctions ranging just below or above the US$100 million threshold have been imposed.[84]

3.6.3. Non-US law enforcement Outside the United States, the sanctions are generally lower and the efforts of law enforcement agencies are, to say the least, unequal.[85] However, several jurisdictions are catching up. In particular, Germany has currently around 100 cases running and has convicted 69 individuals and six companies for foreign bribery from 2005 to 2010. As the figures published by the WGB in its annual report[86] as well as the TI figures demonstrate, roughly one-third of the countries represented in the WGB are 'active enforcers'[87] and another one-third 'moderate enforcers'.[88] The rest of the Group has failed this NGO's test. An analysis of the so-called 'Matrix', an internal document used for the purposes of monitoring (see IV.1.1. below), shows however that there are hundreds of cases in the pipeline not yet fully visible to the outside world.[89]

3.6.4. Chances and challenges of co-operation A major reason for this shift in enforcement policy is the system of international co-operation in law enforcement created by the Convention. Cases like *BAE, Siemens* and *TSKJ* demonstrate that there is intensive co-operation, even if sometimes mutual legal assistance has been blocked for political reasons in the past.[90]

The WGB has placed a tool it has informally been using for years on an institutional base: the prosecutors' meetings.[91] Prosecutors now meet regularly in chambers to discuss the challenges posed by international investigations.

[84] Spahn 2013, 23 *et seq.*; Tyler 2011, 141.
[85] TI Report 2012.
[86] OECD WGB Annual Report 2011, 10 *et seq.*
[87] Germany, Italy, Norway, Switzerland, United Kingdom, United States.
[88] Australia, Austria, Belgium, Canada, Finland, France, Japan, Korea, the Netherlands, Spain, Sweden.
[89] Pieth 2010, 174 *et seq.*
[90] See our chapter on Article 4.
[91] OECD 2009a, section XIV(iv).

It would be exaggerated to say that the move towards application has been smooth. Major challenges persist. However, the WGB possesses formidable tools (see IV. below) to promote an even enforcement level. Criticism has in the past not only been levelled at the uneven approach of state Parties to enforcement:[92] the legal community in the United States and in Europe has been worried by the prospect of multiple convictions for identical facts ('double jeopardy' or *ne bis in idem*).[93] Furthermore, the US business community is becoming increasingly vociferous in its critique of the cost of FCPA compliance, whereas the European business community is concerned about the growing number of 'extra-territorial' investigations by US agencies.[94]

3.7. Upgrading the instruments: the 2009 Recommendation

Over time, monitoring generated a body of detailed rules specifying the standards of the Convention and Recommendation. The WGB endeavoured to collect and analyse its standards in a horizontal way with the help of a so-called 'mid-term study' (of Phase 2 evaluations).[95] This document led to a debate on the potential review of the instruments. Very rapidly it was decided that amending the Convention, or even drafting an additional Protocol (the usual ways to developing international treaty law), were not adequate. Rather, the WGB chose to draft a new Recommendation to supplant its predecessors of 1994 and 1997. Interestingly, it saw no difficulties in engaging in criminal law issues with the help of soft law. This was probably possible because the contents had already been largely developed in the context of country evaluations. However, the new Recommendation, like its predecessors, had to pass the political test with the OECD Council, the most senior body of the Organisation. The Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions was adopted on 26 November 2009.[96] It covered the traditional ground of the previous Recommendations, if in greater detail. Furthermore, it clarified touchy criminal law issues like 'facilitation payments', corporate liability, the responsibility for subsidiaries and intermediaries, how to deal with solicitation and extortion, as well as how to foster enforcement and co-operation amongst law enforcement agencies. In a

[92] TI Report 2012; Tarullo 2004, 665 *et seq.*; Tyler 2011, 156 *et seq.*
[93] Low in IBA 2008; Pieth and Lelieur 2007; Spahn 2013; see our chapter on Article 4.
[94] New York City Bar 2011. [95] OECD 2006b. [96] OECD 2009a.

separate Annex, the OECD Council published a harmonised standard for ethics and compliance.[97]

> Whereas Commentary 9 to Article 1(1) of the Convention had clarified that 'facilitation payments' are not an offence under the Convention regime, section VI of the 2009 Recommendation goes a step further by acknowledging the 'corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law'. State Parties are encouraged to undertake periodic reviews of their policies and to encourage companies to prohibit or discourage their use.[98]
>
> Section B) of Annex I to the 2009 Recommendation defines the long awaited minimum standard of corporate liability. Whereas Article 2 in combination with Article 3(1) and Article 3(2) of the Convention had merely asked for 'effective, proportionate and dissuasive' sanctions, the 'Good Practice Guidance' draws the bottom line.[99] It defines the failure of supervision and failure to implement adequate ethics and compliance programmes as an alternative to strict liability. Annex II defines what an adequate ethics and compliance programme requires.[100] The standard is very close to the US Sentencing Guidelines[101] and to the new UK MOJ Guidance[102] implementing section 7 of the UK Bribery Act.
>
> Annex I C) clarifies that 'a legal person cannot avoid responsibility by using intermediaries including related legal persons' (subsidiaries, joint ventures) to pay a bribe.[103]
>
> Annex I A) 1st indent repeats the established principle that solicitation does not provide a defence or exception. Only in extreme cases of physical threat would an excuse be granted.[104] Apart from simply resisting,[105] so-called 'Collective Action' may frequently be a way out of the dilemma.[106]
>
> The 2009 Recommendation deals in separate chapters with the specific challenge of upgrading international co-operation amongst state Parties (sections XIII and XIV) and with non-members (sections XVI and XVII).

Outside observers consider these additions an essential step to fill loopholes of the OECD anti-corruption instruments.[107] Almost concurrently with the enactment of the 2009 Recommendation, the Council has decided to elevate the OECD WGB to a Committee. This may be a

[97] OECD 2009a, Annex II. [98] See our chapter on Article 1.
[99] See the details in our chapter on Article 2 (II.3.2.).
[100] Cf. Pieth 2011, 45 *et seq.* [101] USSG 2012, §8B2.1.
[102] UK MOJ Guidance 2011; Raphael 2010, 57; Wells 2011, 106.
[103] This principle was experienced by Shell in *United States* v. *Shell* in a case related to *United States* v. *Panalpina*.
[104] Murphy 2011, 22, 136, 158; O'Shea 2011, 194; Pieth 2011, 70.
[105] Cf. Resist 2011. [106] Pieth 2012b, 3 *et seq.*; Pieth 2011, 105 *et seq.*
[107] Tyler 2011, 163.

purely formal step, but it underlines the significance the OECD is attributing to the anti-corruption work.

3.8. Phase 3 evaluations

Again concurrently with the move to upgrade the substantive instruments, the WGB decided to develop a new monitoring procedure[108] to follow Phases 1 and 2, now completed for most countries. The newcomers to the club (like South Africa, Israel, Russia and Colombia) have to pass Phases 1 and 2 in a rapid sequence in order to catch up with the main body of the state Parties now undergoing Phase 3. Phase 3 (see in more detail IV.1.5. below) is focused entirely on application, even if it does revisit, in a brief manner, the yet open issues of the previous monitoring rounds.

3.9. Accession

Under the tenure of the current Secretary-General, Angel Gurría, the OECD has pushed for an enlargement towards emerging economies. Whilst actual accession to the OECD as an institution is a very cumbersome procedure, involving assessments by all major sub-entities of the organisation and political decisions of the Council,[109] accession to the WGB is a far easier process.[110] Yet, it would be exaggerated to talk about an open door policy. Candidates for accession to the WGB have to pass the test of 'mutual benefit' and of 'ableness and willingness' to accede.[111] Finally, a group of countries is regularly invited to participate as observers in order to move gradually towards accession.[112]

3.10. Becoming part of an anti-corruption 'system'

Encouraged by the adoption of the Convention, other subgroups within the OECD structure have extended their focus to preventing corruption. The CFA,[113] PGC,[114] DAC,[115] ECG,[116] SIGMA,[117] CIME for the

[108] For Phase 3 procedures see OECD 2009b.
[109] Chile and Israel amongst the WGB members have recently acceded to the OECD as such, Russia and Colombia are in progress.
[110] Recent additions include Chile, Colombia, Estonia, Israel, South Africa, Slovenia, Russia.
[111] See for details our chapter on Articles 13–17.
[112] Currently China, India, Indonesia, Latvia, Malaysia, Peru.
[113] OECD: Committee on Fiscal Affairs; on the historical development, see also I.3.2. above.
[114] OECD: Public Governance Committee.
[115] OECD: Development Assistance Committee. [116] OECD: Export Credits Group.
[117] Support for Improvement in Governance and Management (see for the SIGMA programme: www.oecd.org/site/sigma/).

Guidelines for Multinational Enterprises,[118] and the Corporate Governance Committee[119] are all contributing to an 'anti-corruption system' within the OECD. A more recent internal initiative led by Deputy Secretary-General Boucher attempts to pull together the activities of the OECD on corruption and at the same time to reach out to other initiatives outside the OECD (see www.oecd.org/cleangovbiz).

The efforts to combat corruption have in the meantime gone far beyond the OECD. They encompass initiatives both on the 'supply side' and on the 'demand side', also embracing the role of financial centres in organising bribery. They include other Intergovernmental Organisations (IGOs)[120] and the Multilateral Development Banks (MDBs),[121] civil society in a wider sense (private sector,[122] NGOs,[123] academia[124] and the media).[125] Biannual conferences (for example, the International Anti-Corruption Conference (IACC))[126] serve as important platforms for the development of this wider movement. TI acts as its secretariat. The international agreements adopted over the last decade, in particular, have helped to create a sense of political urgency in dealing with issues of corruption.

On a regional level the Organization of American States (OAS) came first, with its Inter-American Convention Against Corruption of 29 March 1996, a very broad instrument fostering above all mutual legal assistance. The EU adopted its Protocol to the Convention on the Protection of the European Communities' Financial Interests on 27 September 1996 and the Convention on the Fight Against Corruption on 26 May 1997. More recently, the European Commission has proposed a Directive on the fight against fraud to the Union's financial interests by means of criminal law.[127] The COE also adopted two anti-corruption Treaties: the Criminal Law Convention of 27 January 1999 and the Civil Law Convention of 4 November 1999. These Treaties have already been implemented by many states. The African Union adopted its Convention

[118] OECD 2011, Part I, ch. VII, Combating Bribery, Bribe Solicitation and Extortion.
[119] OECD 2004b.
[120] FATF in general and the UN in repatriation of assets (UN Convention Against Corruption, ch. IV and V); also Wolfsberg 2011.
[121] Especially the World Bank and the regional development banks.
[122] Heimann and Vincke 2008.
[123] TI; Global Witness; Accountability International; TRACE, etc.
[124] E.g. Basel Institute on Governance or U4. [125] Coeurdray 2003, 54 *et seq.*
[126] A biennial conference devoted to civil society action against corruption.
[127] EU 2012a; cf. Kaiafa-Gbandi 2012, 319 *et seq.*

on Preventing and Combating Corruption on 11 July 2003. The UN adopted a comprehensive global anti-corruption Convention, covering criminal law, preventive measures, development co-operation and the repatriation of assets.[128] More recently it has developed its own monitoring mechanism, now operational,[129] as have the Council of Europe[130] and the OAS.[131]

The most recent activity is not embedded in a permanent institution: the G-20 Anti-Corruption Working Group builds an essential bridge between the OECD and the major emerging economies. Even though most states are at the same time parties to the UNCAC, this is an action-oriented Task Force not dissimilar to the FATF. Business-oriented Working Groups (the B-20) are working alongside the G-20 on all of its topics.

This plethora of activities should not, however, create the illusion that the goal of effectively combating bribery in international business transactions is close at hand. There are serious problems of co-ordination within this movement, and it is sometimes hard to distinguish the political and rhetorical 'progress' from practically meaningful efforts.

II. The approach: 'collective unilateralism' to tackle the 'supply side' of corruption

1. *A focused ambition*

The OECD initiative against transnational commercial bribery has, from the very beginning, deliberately restricted its scope to reducing the 'supply', i.e. the influx of corrupt funds, especially into economies of the southern hemisphere.[132] The idea here is that it is easier to tackle potential bribe-payers, especially if they are commercial operators, because of their vulnerability. At the same time, if all major competitors refused to pay, even after tenacious solicitation by officials and their

[128] These international instruments are further discussed at II.2.2. below.

[129] Conference of the States Parties to the United Nations Convention against Corruption, Implementation Review Group; see Art. 63 UNCAC.

[130] Group of States Against Corruption (GRECO): see GRECO 1999, establishing this Group.

[131] Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption (MESICIC), see www.oas.org.

[132] OECD 1989a; OECD 1999, F-1005; Aiolfi and Pieth 2002, 349; Pieth 2000a, 52; Sacerdoti 2003; Tarullo 2004, 681.

middlemen, bribes would become much harder to come by. Reducing the influx of bribe money would ultimately benefit the competitors by 'levelling the playing field' for them; it would also favour the population administered by the officials, since corrupt officials would lose their ability to buy allegiances.[133] Of course, this logic depends upon an even application of the anti-bribery rules to all potential bribe-payers. An anti-bribery system must therefore ensure that those continuing to bribe will be sanctioned and ultimately disbarred from business.

2. *A narrow definition of corruption*

The focused approach finds its expression in a narrow concept of corruption pursued, however, with all available means.

2.1. International business transactions

Consistent with the role of the OECD as the leading economic organisation of industrialised states, representing roughly 63 per cent[134] of the world's exports and 79 per cent[135] of the global foreign direct investment (FDI) outflows, the Convention is restricted to bribery 'in international business transactions'.[136]

Not all countries will adopt this narrow approach, all the more since some have implemented the OECD Treaty in conjunction with other regional instruments such as the COE or EU Treaties. The OECD cannot, however, overstep its mandate as an organisation for economic development. On the other hand, the OECD has to make sure that 'international business' is not given too narrow a meaning.[137]

2.2. Active bribery

Since companies domiciled in OECD countries are the world's major exporters and investors, they are most exposed to solicitation and to the temptation to pay bribes in order to secure business. Focusing on the source of corrupt payments, the OECD, therefore, follows the approach

[133] See the double rationale in the Preamble to the Convention, 1st recital.

[134] In 2011 (see OECD statistics on world imports and exports, available at www.oecd.org/trade/internationaltradeandbalanceofpaymentsstatistics).

[135] In 2011 (see OECD, 'FDI in Figures', available at www.oecd.org).

[136] See Preamble to the Convention and our chapter on Article 1.

[137] See our chapter on Article 1.

chosen by the FCPA[138] and limits itself to criminalising the offering and the payment of bribes, so-called active bribery.

In comparison, according to regional European instruments the recipient is also subject to criminal sanctions. From an EU perspective, the recipient's responsibility is just as much a concern as the donor's action is. EU action in the anti-corruption field should be analysed against the background of the process of economic and political 'integration' to which the Union is subject. The Communities on which the Union is based were founded with the main economic goal of establishing and maintaining a single market for goods, persons, services and capital; achieving this goal required the creation of a body of legislation common to all state Parties. European laws are enacted and interpreted at a 'supranational' level. In fighting fraud against the budget of the Communities, the Union protects first and foremost a common economic interest.[139] The Protocol to the Convention on Protection of the Communities' Financial Interests[140] indeed aims at protecting the Communities' budget, being based on provisions which entered into force with the Maastricht Treaty of 1992. This Treaty made criminal justice co-operation part of the remit of the EU: the EU's Convention on the Fight Against Corruption of 26 May 1997[141] is also an instrument of this policy which aims at the improvement of judicial co-operation in the fight against corruption. It frees itself, however, from the link to the Community's financial interests, making corruption of or by public officials (be they national or Community officials) a matter of Union-wide concern. The entire system of the EU to protect its financial interests is currently under review. It is expected to lead to the enactment of a Directive shortly.[142]

Equally, the COE[143] does not limit its sphere of influence to the pursuit of the briber only. The Council's definition of corruption results from its mandate: the facilitation of transnational co-operation in criminal matters. Mutual legal assistance, extradition and confiscation of the proceeds of crime form the core of this remit. By promoting a broad definition of corruption, including all kinds of corrupt behaviour, the Council primarily aims at creating a legal 'platform' on the basis of which

[138] Attempts by the US Department of Justice to broaden the scope of the FCPA by indicting the official for conspiracy have so far failed (see *United States* v. *Eagle Bus Mfg.*, 2 FCPA 698.6910 (S.D. Tex. 1990)).
[139] Pieth 1999a, 346. [140] Article 2 EU 1996b. [141] EU 1997a.
[142] Cf. EU 2012a; Kaiafa-Gbandi 2012, 319 *et seq.* [143] COE 1999a.

judicial co-operation can be pursued across the borders of the state Parties. The ultimate goal of all this is to create a harmonised economic criminal law for the whole of Europe.

The UN Convention of 2003[144] closely follows this approach by requiring legislators to criminalise not only active and passive domestic bribery, whether public or private, but also active and passive transnational commercial bribery (see Articles 15–19 and 21–22). The Convention does not, however, even attempt to resolve the inherent conflict: whereas Article 16(1) deals with the active bribery of foreign public officials in a way similar to the OECD's autonomous approach, Article 16(2), albeit worded less strictly ('shall consider adopting'), seems to adopt the same definition of 'official' as in Article 16(1). It is excluded, however, that a foreign country, taking proceedings against the recipient of a bribe from abroad, should define the 'public official' independently of the 'victim country'. Exactly this problem has led the OECD to refrain from criminalising the recipient.[145] This extension could indicate a careful move towards creating a *ius gentium* against corruption.

2.3. Public officials

So far, the Convention concerns only advantages offered to public officials. There have been various attempts to enlarge the scope, be it to politicians, to private bribery in general or, more specifically, to sports organisations.[146] With growing privatisation, a substantial part of the problem is being shifted into the private sector.[147] The WGB discussed whether to extend the reach of the OECD instruments to private bribery during the run up to the 2009 Recommendation. However, there was no consensus on this issue. Therefore the WGB continues to restrict itself to public bribery.

2.4. Foreign officials

Furthermore, the OECD's interest is focused on transnational bribery, i.e. the bribery of foreign officials. Domestic bribery is regarded as a local issue to be left to other organisations dealing with the mandate of harmonising law in general.

[144] UN 2003. [145] See our chapter on Article 1. [146] See our chapter on Article 1.
[147] Heine, Huber and Rose 2003: foreword by Maria Livanos Cattaui.

Concerning this aspect, again, the Convention of the COE and other European instruments go a step further, in accordance with their mission of integration. They outlaw bribery inside the common economic area, including cases which take place in one country only. The Inter-American Convention does not limit its application to transnational cases either. We have discussed the UN Convention above.

2.5. Exclusion of facilitation payments?

The Convention is directed at serious cases of 'genuine' or 'grand' corruption. Even if 'petty corruption',[148] when endemic, can seriously hamper public life and endanger the trust in public institutions, it was the view of the state Parties to the Convention that it would be very difficult to tackle all forms of 'grease money' and gratuities with a kind of 'long arm jurisdiction'. The OECD has therefore in 1997 shied away from criminalising small facilitation payments. Official Commentary 9[149] puts it this way:

> 'Small "facilitation payments" do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licences or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.'

Recommendation 2009 (section VI) has not changed this approach fundamentally. However, it recommends to state Parties to undertake periodic reviews of their policies and to encourage companies to prohibit or discourage the use of facilitation payments in internal compliance programmes.[150]

3. *With a broad geographic reach*

Unlike a traditional Treaty, the OECD Convention does not only have effects *inter partes*. Since state Parties seek to enforce correct behaviour within the entire reach of their jurisdiction (territorially or

[148] For the distinction between 'grand' and 'petty' corruption, see Moody-Stuart 1997.
[149] See note 158 below for the legal nature of the Official Commentaries in OECD 1997b.
[150] See ch. on Art. 1 below.

extra-territorially), the effects of the Convention are meant to be deployed *erga omnes*: even bribing the official of a country not a party to the Convention is therefore to be regarded as an offence. This was also the approach chosen by the FCPA. Thus, 'unilateralism' has been substituted by a 'collective unilateralism': among themselves the state Parties agreed no longer to tolerate bribery of any foreign public official worldwide. Even though the primary reason for this attitude may be to further the states' own business interests, the approach also contains an essential element of taking responsibility towards the countries afflicted by corruption.[151] The state Parties, however, did not want to go as far as introducing a genuinely supranational approach: it is multilateral in the sense that substantive law is harmonised, but enforcement is left to national agencies and courts.[152]

4. *Further specifics of the OECD instruments*

The anti-corruption system to which members of the WGB have agreed is therefore made up of two international instruments: the Convention of 21 November 1997 and the Recommendation for Further Combating Foreign Bribery of 26 November 2009 with its two Annexes. Even though international lawyers consider only the Convention legally binding, the monitoring system[153] has its roots in the implementation and application of the Recommendation (section XIV). Therefore the evaluation texts contain both legal and political observations: first, the identification of legal flaws compared to the binding standard, and secondly, a note of political considerations suggesting further action in areas regulated by 'soft law'.

We should also note that the Convention is primarily a 'criminalisation Treaty'. Nevertheless, it also contains non-criminal provisions. On the one hand, it allows state Parties to use non-penal measures as substitutes in certain areas (e.g. Article 2: Corporate Liability); on the other hand, the accounting and auditing provisions of Article 8 go beyond criminal law.[154] The Recommendation again gives indications how to interpret the criminal law provisions (see I.3.7. above). The Council has decided to add 'soft law' rather than to amend the Convention or add a Protocol.

[151] Cf. OECD 1997b, Preamble.
[152] Spahn 2013, 7, 49 *et seq.*
[153] See IV. below.
[154] Sacerdoti 2003, 74 *et seq.*

The Convention was deliberately drafted so as to necessitate implementing legislation in state Parties; it is not self-executing. The rules are in general too open to be directly applied; they must be integrated into domestic law. One of the consequences of this is that the WGB will thoroughly screen even legislation which simply copies the formulations of the Convention into national law, because the wording could obtain a different meaning in the domestic context.[155]

Furthermore, the Negotiating Conference formulated a series of Official Commentaries[156] to supplement the Convention. The background was as follows: some issues seemed too specific to be introduced into the Convention; other topics needed exemplification (e.g. the definition and treatment of public enterprises); in further areas disputed issues could be treated in a more subtle way (e.g. exceptions and defences). The notes were originally conceived as footnotes; only later on in the process were they shifted into a separate document with the title of *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*. As indicated in the text, they were adopted by the Negotiating Conference on 21 November 1997 alongside the Convention in exactly the same procedure (unanimous decision). It is therefore correct to treat them as *travaux préparatoires* in the sense of Article 32 of the Vienna Convention on the Law of Treaties of 1969.[157] Even though they have not been ratified by the state Parties, because of the manner of their adoption, we may nevertheless regard them as an 'authentic interpretation' of the Convention.[158]

III. Methodology: going new ways in international law

1. *Respecting basic national legal principles*

The WGB had to address a very challenging goal: the harmonisation of rules across a range of widely divergent legal traditions in a very limited space of time. As we have seen, the original method chosen was to develop

[155] See e.g. GR-Ph1, 17; now GR-Ph3, 9 *et seq.*

[156] These (numbered) Official Commentaries, adopted by the Negotiating Conference at the same time as the Convention (OECD 1997b), are reproduced in the Annex to this book.

[157] Vienna Convention 1969.

[158] See Sacerdoti 2003, 74, who would, however, not go quite as far as the authors of this commentary.

'soft law' Recommendations to state Parties and to follow them up in 'peer reviews'. This approach has a long history within the organisation.[159] The imposition of a legally binding criminalisation requirement, as the centrepiece of the anti-corruption initiative, created a new challenge. In the mere six months between the adoption of the Revised Recommendation and the signing ceremony of the Convention it was certainly out of the question to attempt any kind of legal unification,[160] not least since some of the differences were of a fundamental kind (different concepts of criminal procedure and evidence, liability of legal persons, etc.). If, therefore, the standard expression of respect for the state Parties' 'jurisdictional and other basic legal principles', contained in section II of the Revised Recommendation, were not to impede significant harmonisation, a flexible yet meaningful approach needed to be chosen. Not unlike the method applied by the EU legislation in the form of Directives, the OECD chose to define goals rather than means: the method termed 'functional equivalence' was applied to compliance with the Convention obligations.

2. *'Functional equivalence'*

2.1. The principle

The method used by the Negotiating Conference is termed 'functional equivalence'. The Convention borrowed this concept from the methodology of comparative law and developed it further.[161] The approach assumes that every legal system has its own logic, which is not necessarily determined by legal texts alone. Only the holistic appraisal of the law in operation, including informal rules and practices as well as functions assumed by other legal institutions, will allow us to assess whether the overall legal effects produced by a country's legal system adequately meet the requirements of the Convention. The crucial advantage over the more formal methods of comparison of law is that the functional approach goes beyond comparing individual institutions. Even if it is a challenging methodology, it is especially well suited for the purposes of the peer evaluation envisaged by the OECD anti-bribery system.

[159] OECD 2003a; Guilmette 2004a.

[160] For discussion of legal 'unification', see Delmas-Marty 1998, 107 *et seq.*

[161] Upon suggestion by the Chairman of the WGB: Pieth 2000a, 56 *et seq.*; Pieth 2000b, 477 *et seq.*

The concept was first introduced into the OECD instruments by the Preamble to the Convention:

> '[r]ecognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence;'[162]

and then, more specifically, in Official Commentary 2:

> 'This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system.'

In a number of ways, the *travaux préparatoires*, the Official Commentaries or even the Convention itself indicate options or leeway for alternative approaches. How the principle of functional equivalence can be applied in practice is finally revealed only in the course of the evaluation of countries' legislation and practice. We shall now give a few examples of how the methodology has so far been understood.

2.2. Examples

2.2.1. Integration in national legal systems A fundamental question not explicitly answered by either Convention or Official Commentary is the way in which criminalisation of bribery of foreign public officials should be introduced into the legal system(s) of a state Party. The *travaux préparatoires*[163] recount that the WGB envisaged four methods of criminalisation:

- explicit and specific criminalisation of bribery of foreign public officials (following the model of the FCPA);
- making use of a general bribery statute broad enough to encompass the obligations of the Convention (perceived at the time to be the UK approach);
- amending existing domestic bribery statutes to include foreign bribery (called 'assimilation', an approach chosen by many state Parties); or
- introducing the rule into specific unfair competition legislation.

[162] OECD 1997b, Preamble, final recital.
[163] OECD 1989a; OECD 1989b; OECD 1999, esp. F-1037–1040; Sacerdoti 2000, 36.

It emerged from this analysis, inter alia, that the WGB would accept the Japanese or Polish[164] choice to include the offence in a specialised statute outside the traditional criminal code, even if it were focused on unfair competition. The proviso added in the discussion by the WGB, however, was that regular prosecutors and judges rather than competition authorities or other agencies of an economic character should deal with infringements.

2.2.2. Definition of the criminal act The definition of the criminal act[165] in Article 1(1) of the Convention is based on a *quid pro quo* concept of bribery, whereby the *pro quo* (the goal of the briber) is defined in a rather open manner (following the French, British and US approaches): 'in order that the official act or refrain from acting in relation to the performance of official duties'. In order to put at ease those countries whose definition of corruption refers to breach of duty, Official Commentary 3 reiterates and exemplifies the concept of functional equivalence as follows:

> 'Article 1 establishes a standard to be met by Parties, but does not require them to utilise its precise terms in defining the offence under their domestic laws. A Party may use various approaches to fulfil its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph ... Similarly, a statute which defined the offence in terms of payments "to induce a breach of the official's duty" could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an "autonomous" definition not requiring proof of the law of the particular official's country.'

It will be noted that the concept of functional equivalence is not simply a formula to accept all domestic variations; it insists on certain minimum requirements.

2.2.3. Corporate liability Whereas in the above example the Official Commentary gives options in defining criminal liability,[166] far more leeway is left to the appreciation of the WGB during the evaluation process. Article 2 and Article 3(2) merely provide the wider framework; the Convention allows countries to choose whether they wish to introduce a criminal or an equivalent civil or administrative concept of liability, as long as the sanctions are 'effective, proportionate, and

[164] JP-Ph3, 13 *et seq.*; JP-Ph2bis, 28 *et seq.*; JP-Ph1, 1, 26 (regarding the placement of the unfair competition legislation); PL-Ph1, 32 (regarding corporate liability).
[165] Nastou 2010, 32 *et seq.*; Pieth 2000a, 57.
[166] Nastou 2010, 39 *et seq.*; Pieth 2000a, 58.

dissuasive'. The chapter on Article 2 of this commentary[167] will show how the OECD has built up a body of rules to fill even this very open standard with meaning.[168] This standard has finally been codified in Annex I of the 2009 Recommendation.

2.2.4. Confiscation In a further example of functional equivalence, the Convention itself provides alternatives in Article 3(3) when requiring confiscation of the proceeds of bribery[169] or the application of 'monetary sanctions of comparable effect'. From a strictly legal perspective confiscation and fines are two quite different concepts. Rightly, lawyers would dispute their comparability: fines are calibrated according to the degree of culpability, whereas confiscation depends upon the proof of provenance of the proceeds of crime. Nevertheless, the OECD system against corruption is less concerned with the abstract rationale than with the concrete likelihood of ill-gotten gains being siphoned off. Therefore the WGB did not object when the United States and Korea opted for confiscatory fines.[170]

2.3. A gradual rapprochement *expected*

What functional equivalence means can be fully understood only in the context of the Phase 2 and 3 evaluations,[171] in which the WGB focuses particularly on the effectiveness of national implementing legislation. It is obvious that these methods allow countries to adopt different approaches when implementing the agreed standards.[172] It is, however, to be expected that there will be a *rapprochement* among countries as the monitoring process continues.[173] The amount of detailed information gathered under the now established Phase 3 evaluation procedure is proving to be considerable, and discussions are becoming more and more fine-tuned.

3. Monitoring

The peer process developed during the 'soft law' phase and maintained even after the drafting of a binding law made it possible to achieve ratification and implementation of the OECD Treaty in such a short time by all state Parties. However, monitoring in this sense is neither a

[167] See our chapter on Article 2 and OECD 2009a, Annex I B); Pieth and Ivory 2011.
[168] DE-Ph3, 22 *et seq.*; DE-Ph2, 28 *et seq.* [169] Pieth 2000a, 57.
[170] KR-Ph1, 22 (cf. however, the recent change of concept in KR-Ph3, 21); US-Ph1, 22; see our chapter on Article 3(3).
[171] See IV. below and our chapter on Article 12.
[172] Critical: Low 2003a, 36; Aiolfi and Pieth 2002, 352. [173] Nastou 2010, 35 *et seq.*

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. Inevitably, this will result in a mixed technical and political procedure: in particular, for this reason it is essential that clear rules are followed.

IV. Legal basis and characteristics of OECD monitoring

The legal basis for the monitoring procedure is contained, first, in section XIV of the 2009 Recommendation, in which the Council instructs the CIME through the WGB 'to carry out a programme of systematic follow-up to monitor and promote the full implementation of the Recommendation'. The obligations are further specified in Article 12 of the Convention and in Official Commentary 34.[174] These rules oblige state Parties to the Convention both to submit to the evaluation and to participate as evaluators. The procedures are left open, except that they provide for both 'vertical' analyses of implementation in each country and for 'horizontal' analyses, examining specific issues across the board.

The WGB has developed an elaborate sequence of monitoring procedures, drawing upon the experience of OECD subcommittees and the organisation's accession procedures,[175] and on human rights audits by the UN and other fora. It also made use of recent experiences with peer evaluation within the FATF. Similar monitoring mechanisms have been introduced in other organisations dealing with corruption, especially in the COE,[176] the Organisation of American States[177] and the UN.[178]

There are, however, marked differences between the OECD system and other such procedures. First, the theory (at least) is that the OECD monitoring is state Party-driven and not Secretariat-driven ('peer evaluation'). The so-called 'lead examiners' are responsible for the draft report submitted to the WGB, even if the Secretariat has a role in securing that equal standards are applied: in the WGB, unlike the FATF, the peer evaluation is conducted by peer states rather than individual experts. Furthermore, there is a very active role for the private sector and civil society in this process, and finally, the reports are always fully published and made available on the Internet. These last two points also serve to distinguish the OECD system from others.

[174] For full details see our chapter on Article 12. [175] OECD 2003a; see now OECD 2009b.
[176] Notably in GRECO: see note 130 above. [177] See note 131 above.
[178] See note 129 above.

1. *Five monitoring mechanisms*

The system in itself is quite sophisticated; it has over time developed five types of monitoring as well as several follow-up stages.

1.1. *Tour de Table*

In the *Tour de Table*, conducted four times a year by the WGB, countries report on the legislative progress in implementation and, more recently, on the steps taken to react to WGB critique. This information is published periodically on the Internet.[179] The procedures of the *Tour de Table*[180] allow the state Parties also to raise questions about concrete cases of transnational commercial bribery which have come to their attention or have been reported publicly. This part of the exchanges remains confidential. The arrangement makes the *Tour de Table* both a valuable means of keeping track of formal change and a very useful informal sounding board for issues of practical application.

The procedures have evolved over time. Currently, at every meeting one-quarter of the countries represented report on the status of their cases and take questions. A formal document takes stock of the comments ('Matrix'). The Matrix is continuously adapted, closed cases eliminated and transferred to a dormant data file ('the refrigerator'). In a further part of the *Tour de Table*, the Working Group addresses a specific topic related to enforcement (either corruption cases in a particular sector, or methods to detect bribery, or specific challenges like intermediaries or company havens). This is a part of the evaluation where prosecutors of countries are present to answer questions from their peers. The material generated in the *Tour de Table* is routinely used in the evaluations.

1.2. 'Phase 1' monitoring

'Phase 1',[181] now approaching conclusion,[182] has proved a rapid way to assess the abstract legal compliance of implementing laws with the agreed standards of the Convention and the Revised Recommendation. Even though it did not raise issues of application, it developed into a very

[179] OECD 2004c.

[180] Procedural order, 'Outline for a Revised Tour de Table' of 12 February 2004, adopted by the WGB.

[181] See www.oecd.org>browse by topic: Bribery and corruption>Country monitoring> Phase 1.

[182] Except for 'newcomers' like Colombia or Estonia.

useful tool and the WGB did not shy away from harsh critique. Basically, three types of deficiencies were identified:

- major issues in need of immediate action;
- issues requiring observation in the application phase, to be pursued further in the context of Phases 2 and 3;
- other minor shortcomings, to be ironed out as and when the opportunity lends itself.

Major deficiencies demanding immediate legislative action were identified in about one-third of the evaluated countries.

1.3. 'Phase 1bis' monitoring

'Phase 1bis' is a follow-up procedure to Phase 1: once the state Parties have reacted to the critique of the Group and supplemented or modified their laws, the new legislation will be formally re-evaluated. The report is then appended to the Phase 1 reports and published in the same manner.[183] Phase 1bis is not intended to be a sanction.

1.4. 'Phase 2' monitoring

'Phase 2' monitoring[184] concentrates on the application in practice of the Convention and of the Recommendation: this involves looking at the structures established both to prevent and to prosecute cases of bribery. Resource levels, training, etc. are discussed both with public agencies and selected private sector operators (either MNEs[185] or small and medium-sized enterprises (SMEs)).[186] Phase 2 monitoring follows the basic structures of the Phase 1 evaluation, but is more resource intensive, because of the nature of the issues involved, because of the on-site visit to the country, and because of the multitude of interlocutors (up to 100 in a full Phase 2 evaluation!). The WGB has since developed an oral and a written follow-up to the Phase 2

[183] See so far 'Phase 1bis' evaluations for Austria, Bulgaria, Czech Republic, Iceland, Italy, Japan and United Kingdom.

[184] See www.oecd.org>browse by topic: Bribery and corruption>Country monitoring> Phase 2.

[185] See I.2.1.2. above.

[186] See the standardised profile adopted in Phase 2 evaluations available at www.oecd.org>browse by topic: Bribery and corruption>Country Reports>Phase 2 Country Reports.

monitoring.[187] Again, Phase 2 is completed for all state Parties except for the newly acceding countries.

1.5. 'Phase 3' monitoring

In December 2009[188] the WGB decided, rather than re-run its Phase 2 which had just come to an end, to develop a new, leaner and more focused approach, allowing also more room for horizontal issues. Like Phase 2, Phase 3 is far more directed at implementation (enforcement and awareness raising) than at mere regulation. In the main elements (questionnaire, on-site visit, hearing, publication), Phase 3 follows the model developed for Phase 2. Already the WGB has begun to consider the future after Phase 3 and is seeking a more focused, however still effective procedure.

2. *WGB evaluation procedures*

WGB evaluations for the OECD typically follow the procedures set out below.[189]

2.1. Preparatory stage

The first stage is preparatory, involving the evaluated country filling in a detailed questionnaire.[190] The Secretariat and the lead examiners (chosen by the Chair in consultation with the Management Group of the WGB, on the suggestion of the Secretariat) will raise concrete questions in need of further detailed treatment.

In Phases 2 and 3 a more specialised follow-up questionnaire and the on-site visit[191] follow. The procedural rules contain detailed provisions on the timing and how to organise the on-site visit.

In all procedures a draft report[192] is prepared by the Secretariat and discussed with lead examiners and with the country examined. The country is entitled to present its observations; if at all possible, these will be included. The texts are presented to the WGB.

[187] See IV.3. below.

[188] Post-Phase 2 Evaluation Procedure: The Conduct of Phase 3 Evaluations, 17 December 2009 (DAF/INV/BR(2008)25/FINAL) (cited as OECD 2009b).

[189] See for more detail our chapter on Article 12.

[190] Both standardised Phase 1 and Phase 2 questionnaires available at www.oecd.org>browse by topic: Bribery and corruption>Country monitoring>Phase 1 and Phase 2; for Phase 3 see OECD 2009b, Annex 2; Nastou 2010, 21 *et seq.*

[191] Nastou 2010, 17.

[192] Cf. for a template OECD 2009b, Annex 3.

2.2. Hearings and finalisation of report

The hearings start with an informal consultation between examiners, representatives of the country examined and the Secretariat in order to clarify misunderstandings and, if possible, minimise disagreement.[193]

The first reading[194] of the report in the plenary sessions of the WGB allows the examiners to make their case, the country examined to respond, and the other members of the WGB to give their opinion, ask questions and raise further issues.

In the case of Phase 1 evaluations, the examiners draft a short evaluative text to be appended to the descriptive text; in the case of Phase 2 and 3 evaluations, Recommendations on the country evaluated are drafted. The draft concerned is immediately submitted to the examined country for informal comment on the evening of the first day of hearings.

The following day a second hearing concentrates on the evaluative text or Recommendations, on which the WGB will give a value judgement; the second hearing must result in an agreed text, to be adopted verbatim. There is, however, the possibility for the examined country to include a dissenting opinion in the report (see below).

After the meeting the OECD Secretariat used to send a revised report reflecting the Group's discussion and including the agreed evaluation. This report was sent to the delegates for approval via a written procedure. After difficulties of interpretation arose since the process is gradually getting tougher, it was decided to hold a third reading, still within the same meeting, and adopt the full report, an executive summary and a brief press release by the WGB.

Two general comments should be added at this point. First, the *private sector* and *civil society* both play an essential role in the procedures of the WGB. Whereas, in Phase 1, their contributions are introduced in writing and distributed to the WGB as 'room documents', an elaborate system of hearings during the on-site visits allows all opinions to be heard by the examiners.

Secondly, the whole evaluation process is based on the concept of *unanimity*, the general working principle of the OECD as an organisation. The country evaluated is, however, expected to abstain from

[193] The preparatory meetings are regulated in a further text: see OECD 2009b, Annex 4.

[194] The meetings surrounding the adoption of evaluation reports are again regulated in an Annex (4) to the procedure (OECD 2009b); Nastou 2010, 24 *et seq.*

blocking consensus within the group; it will nevertheless be given ample time to represent its case and can even introduce a dissenting opinion into the published text. The Working Group may then indicate whether it shares this opinion; a rejection will clarify to the wider public that the country stands alone with its interpretation. Finally, under the conditions of unanimity, if the country finds an ally, the consensus of the Group can be blocked and the text will be modified. This last observation may raise the concern that in an intergovernmental process with decisions taken ultimately *in camera*, countries with similar shortcomings might collude to prevent critical comments.[195] This is, however, unlikely as, on the one hand, the Secretariat and Chair have assumed the roles of neutral observers: they have repeatedly raised questions of substance and consistency quite independently of the evaluators. On the other hand, the competitive pressure on state Parties in the area dealt with by the WGB is so strong, that it would be economically and politically unwise to give any participant preferential treatment. Upon the suggestion of the Chairman during Phase 1, the WGB has accepted to work according to the rule of *consensus minus one*.[196]

2.3. Publication

Following the completion of the written procedure, the OECD Secretariat arranges for publication of the final report on the website: evaluation reports are published on the OECD website upon adoption.[197] The country evaluated may choose to organise a media event to mark this publication, to which representatives of the OECD may be invited; they are able to influence the date of publication within a short-time frame.

3. *Follow-up to Phase 2 and 3 monitoring*

When it became clear that a full round of Phase 2 monitoring was going to take close to seven years, state Parties saw the need to introduce a follow-up mechanism to the Recommendations made by the WGB in Phase 2.[198] In a recent revision of the Guidelines for Phase 3 Monitoring,[199] the WGB therefore created an elaborate follow-up mechanism. It distinguishes an ordinary procedure for all Parties and

[195] Cf. the concern articulated by Low 2003a, 47 that 'mutual back scratching' could impede effective monitoring by the WGB.
[196] Phase 3 procedure, cf. OECD 2009b, para. 41. [197] See IV. above.
[198] See our chapter on Article 12. [199] OECD 2009b.

extraordinary measures to be taken in the case of persistent lack of adequate implementation.

3.1. Ordinary follow-up

One year after the Phase 2 or 3 hearing, countries are invited to present an *oral report* on the steps taken to react to the Recommendations made by the WGB. A brief discussion within the group is summarised by the Secretariat and included in the summary record of the meeting. It remains an internal document of the group. Two years after the Phase 2 or 3 evaluation, countries are expected to produce a *written report* on their efforts to react to the WGB Recommendations. A more intensive discussion within the group, led by 'intervenants' (typically the former lead examiners), is held; and a short summary, adopted by the WGB plenary, is published as an annex to the Phase 2 or 3 report on the OECD website.

3.2. Extraordinary measures

In order to make the peer process more effective, the WGB has identified a series of graded measures in case implementation remains insufficient. On the soft end of the scale it could, for instance, request written reports. As a more intense follow-up measure, a second on-site visit could be requested by the WGB, a so-called Phase 2bis[200] or 3bis[201] procedure. Other measures, like official letters to governments, Ministers, Prime Ministers or Presidents,[202] high-level political missions to state Parties[203] or formal public statements and press releases, are within the discretion of the WGB in the case of 'continued failure to adequately implement'.[204]

Overlooking the first twenty Phase 3 evaluations, starting from October 2010, four types of follow-up arrangements have been made:

- the regular follow-up according to the procedure, touching on all Recommendations;
- the regular follow-up, however mentioning specific Recommendations for extra attention already in the Phase 3 report;[205]

[200] E.g. Japan, Luxemburg, United Kingdom.
[201] See Phase 3 procedure (OECD 2009b), para. 68 *et seq.* (Inadequate implementation of the Convention).
[202] E.g. Czech Republic, Finland, Japan, Slovak Republic.
[203] E.g. to the United Kingdom. [204] Phase 3 procedure (OECD 2009b), para. 72.
[205] LU-Ph3, 59; MX-Ph3, 37; UK-Ph3, 59; US-Ph3, 61.

- request for a written report within six months from the Phase 3 evaluation on a specific issue;[206]
- requesting a full Phase 3bis evaluation, sometimes stipulating that the time and scope will be decided at the next ordinary follow-up.[207]

The toughest measure taken so far was the threat to consider trade sanctions against the United Kingdom in Phase 2bis (October 2008) in order to speed up the legislative process.[208]

4. *Critical assessment*

Commentators, of course, ask the question whether the OECD Convention is really working. Whereas some see it as an 'unambiguous success story',[209] others just as flatly declare its 'ineffectiveness'.[210] This difference of opinion can be explained partly by the divergence of focus: whereas nearly all commentators agree that concluding the Convention was a success, they disagree on its application record. While considerations of public diplomacy may indeed motivate countries to adopt texts rather than apply the rules,[211] it may also be difficult for an outside observer of the OECD process to assess the full impact of the instruments, including the monitoring mechanisms applied. Several indicators in fact point towards the instruments having more impact than the critics would allow.

There is widespread agreement that the OECD managed – astonishingly rapidly – to harmonise formal law.[212] Other authors credit the OECD for patching up loopholes in the previous system by enacting the 2009 Recommendation and its Annexes.[213]

It is often repeated that OECD countries are slow in generating prosecutions for bribery.[214] Correctly, Tarullo[215] assumes, though, that the amount of prosecutions is probably not a reliable indicator of general compliance. Certainly, domestic prosecutors and law enforcement agencies need time to become accustomed to their new role: they need training, resources and know-how to run an international case, and all of these may still be in short supply. They must link up with their

[206] CA-Ph3, 58; IT-Ph3, 50; JP-Ph3, 42; SK-Ph3, 5, 47. [207] GR-Ph3, 48; SE-Ph3, 45.
[208] UK-Ph2bis, 71 (al.1). [209] Guilmette 2004a, 146. [210] Tarullo 2004, 680 *et seq.*
[211] Tarullo 2004, 687. [212] Spahn 2013, 1 *et seq.* [213] Tyler 2011, 162 *et seq.*
[214] New York City Bar 2011, 12 *et seq.*; TI Report 2012; Nastou 2010, 39 *et seq.*; Spahn 2013, 40 *et seq.*; Tyler 2011, 156 *et seq.*
[215] Tarullo 2004, 684 *et seq.*

counterparts abroad; many large international bribery cases are complex, because they involve the co-operation of several jurisdictions (those where acts were committed, effects were felt, actors located and funds prepared and/or laundered). Nevertheless, in the course of Phase 2 and 3 evaluations several convictions have been notified.[216] Furthermore, several dozens of cases in total are currently under investigation in state Parties.[217]

As the following example illustrates, there is indirect evidence that the risk of being brought to trial on charges of transnational bribery is taken very seriously by shareholders worldwide.

> When it was reported in the Norwegian Press that Statoil had entered a US$15.2 million contract with Horton Investments Ltd., a small consulting company based in the Turks and Caicos, for advice on securing oil concessions in Iran, the mere suspicion of possible bribery led to a drop in share prices of over US$1 billion in little more than a week. Shortly afterwards, before an inquiry could even get under way, three senior officials had to step down: the Chairman, the Chief Executive Officer, and the Director of Exploration and Production. The degree of nervousness that this case generated on the stock markets across the globe demonstrates how serious the issue of transnational bribery by a public company is taken nowadays. E.g. Statoil is listed on the New York Stock Exchange. The company has been sentenced both in Norway (with a fine of NOK 20 million = EUR 2.4 million) and in the US by the DOJ (US$10.5 million fine) and the SEC (US$10.5 million disgorgement). The case shows that both companies and executives are facing increasing risks.[218]

If one adds the more recent cases involving MNEs, it is understandable that there is pushback from the various business communities: with the United States, Germany, the United Kingdom and some other active enforcers (like Italy, Norway and Switzerland) the risks are growing and the costs of compliance are rising.[219] If the growth rate of the 'compliance industry' was to be a criterion of success, it would probably be just as informative as the statistics of sanctions. True, the enforcement is still uneven and in the past there has been an element

[216] WGB Annual Report 2011, 10 *et seq.*; WGB Annual Report 2010, 14 *et seq.*; TI Report 2012.
[217] WGB Matrix (detail confidential).
[218] NO-Ph2, 4, 39 (para. 102), 45 (para. 145); NO-Ph3, 7 *et seq.*; *Payvand's Iran News*, 3 July 2004; *Oekocrim*, 12 September 2003 (press release); *Daily Telegraph* (UK), 24 September 2003 (online edn).
[219] New York City Bar 2011.

of protectionism of national industries from law enforcement in significant economies like Australia (wheat, embargo busting), Canada (mining), Japan (general inhibition to initiate cases), United Kingdom and Sweden (defence).

The suggestions by the New York City Bar to yet further expand the unilateral US jurisdiction are politically not viable.[220] The proposition to increase the OECD WGB's clout by adding trade sanctions to its options[221] is unnecessary, as it already has them at its disposal.[222] The solution has to be sought in reinvigorating the existing monitoring mechanism of the OECD. Not only companies but also countries need to give the issue priority.[223] Under these circumstances it may astonish that some state Parties have actually disputed the competence of the WGB to review concrete case-examples even though Phase 3 asks the WGB to take a position on enforcement effectiveness.[224]

V. Role and responsibilities of enterprises

The OECD instruments against bribery are addressed to state Parties.[225] They should implement and secure the application of the standards concerned. The ultimate goal, however, is not the criminalisation of as many bribers as possible. The system seeks rather to deter corporate entities which may be prone to indulge in significant commercial bribery: they should be convinced that by taking such action they would risk serious material and reputational damage. The indirect goal is thus to raise material and reputational risk for corporate entities, by threat of legal (criminal) sanction. This risk should induce them to introduce meaningful compliance programmes. This means more than just writing a company code, even though a clear statement by the Chief Executive Officer or President is crucial.[226] It means organising training, offering help in uncertain situations (internal helplines), supervision and,

[220] New York City Bar 2011, 24. [221] This is a suggestion of Tyler 2011, 170 *et seq.*
[222] See note 208 above.
[223] It certainly does not help that countries who feel unfairly criticised by the WGB, but cannot contest the findings due to the *consensus minus one* principle, attempt to impeach the Chairman, who has to be elected by unanimity on a yearly basis (past experience with Italy (2005), the UK (2007) and Canada (from 2011)).
[224] Canada in Spring 2013.
[225] Cf. the exceptions relating to rules on accounting, 'in-control' and auditing, which (partly) address the private sector (OECD 2009a, section X; OECD 1997b, Art. 8).
[226] Article 10 ICC 2011; Vincke 2008, 77 *et seq.*

ultimately, in-house discipline.[227] It also means applying particular care when dealing with non-employees acting on behalf of the company (third parties like agents, sales representatives, etc.) and developing 'due diligence' procedures, clear contractual relationships,[228] adequate remuneration and safe remuneration agreements,[229] as well as effective supervisory and auditing procedures.

Smaller companies, in particular, may be helped by following model codes developed by representatives of the private sector[230] or by NGOs;[231] larger corporations will most likely introduce their own approach, adapted to their management concepts. The action of intergovernmental organisations and governments will not go beyond the development of the basic legal framework to counteract transnational commercial bribery. Law enforcement practice will take time to make an impact. It may therefore be crucial for key business sectors to implement standards more quickly or to fill gaps in the system.[232] Already in a series of sectors, leading businesses are creating their own industry-wide standards to prevent bribery and related issues. So far, sector-specific standards in the financial sector[233] and in engineering and construction[234] have been published. According to reports, similar efforts are under way in the energy sector, in power systems, in the defence industry and in the pharmaceutical industry.[235] The World Economic Forum (WEF), together with the NGO TI, the Research Centre Basel Institute on Governance and the Global Compact of the UN, have been working on the overall architecture of these standards. In the meantime, the international public standards, especially the OECD's Annex II to the 2009 Recommendation, based largely on the USSG, have overtaken the private efforts.[236] General codes, industry-specific agreements and company compliance programmes can all contribute greatly to the efficiency of the public standards against commercial bribery. Indeed, they are a necessary complement to these standards.[237]

[227] Vincke 2008, 79 *et seq.*; Corr and Lawler 1999, 1331 *et seq.*
[228] Corr and Lawler 1999, 1333 *et seq.*; Davies 2008, 53 *et seq.*
[229] Article 3 ICC 2011. [230] ICC Rules on Combating Corruption (ICC 2011).
[231] TI Business Principles 2009. [232] Aiolfi and Pieth 2002, 356 *et seq.*
[233] Wolfsberg 2002c; also Pieth and Aiolfi 2003a, 267 *et seq.*
[234] Business Principles for Countering Bribery in Engineering and Construction Industry, an Initiative of the WEF, TI and the Basel Institute on Governance of January 2004. See more recently the Partnering Against Corruption Initiative (PACI).
[235] *The Economist*, 2 March 2002, 11 and 67 *et seq.*
[236] See recently FCPA Resource Guide 2012; Murphy and Boehme 2010; Pieth 2011.
[237] Vincke 2008, 68 *et seq.*

Beyond mere avoiding of risk, the action of the private sector is also directed towards developing a more positive approach: towards public acknowledgement of serious compliance efforts (e.g. in public procurement: 'white listing').

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PART II

Commentary