

## Review

# Implementing international laws to fight business bribery: Case of the Organization for Economic Co-operation and Development (OECD) anti-bribery convention

Cheng Wenhao\* and Umme Aiman Ahmad

School of Public Policy and Management, Tsinghua University, Beijing 100084, P. R. China.

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Foreign bribery poses an increasingly serious threat to the probity of international business transactions. In the 1990s, the Organization for Economic Co-operation and Development (OECD) developed an anti-bribery convention specifically designed to prevent and detect corrupt activities in these transactions. To date, the Convention has successfully recruited 38 signatory countries. However, its effectiveness was mitigated by the absence of a strong enforcement mechanism and a lack of political will on the part of its signatories. This article analyzed these deficits, reviewed the suggested improvements offered by different stakeholders, and summarized the key lessons for future anti-bribery initiatives. The authors concluded that the implementation of appropriate reforms could secure the Convention's future as a highly effective anti-bribery instrument.

**Key words:** Organization for Economic Co-operation and Development (OECD) anti-bribery convention, business bribery, foreign public officials, international business transactions.

## INTRODUCTION

Transnational businesses have long been associated with corruption. One prominent manifestation is the bribery of public officials to gain unfair advantage on contracts and investments. When public officials are corrupted, citizens start to question the legitimacy of governance. The consequences are graver in poverty stricken countries, where a one million dollar bribe may result in the loss of hundreds of millions of dollars, owing to distortion of competition and the implementation of reckless projects. According to a World Bank report released in 2007, the annual global cost of bribery is \$1

trillion, with the burden falling disproportionately on the billions of people living in extreme poverty (Seager, 2007). This is largely comprised of corrupt business dealings, not least corporate payments to foreign public officials.

It is therefore, imperative that the international community develops rules that can both prevent and fight business bribery worldwide. The Organization for Economic Co-operation and Development (OECD) has recognized this need by taking the lead role in the organization of international efforts to eliminate the bribery of foreign public officials. The international community can learn a lot of lessons from OECD's efforts in this field.

\*Corresponding author. E-mail: [Chengwh@tsinghua.edu.cn](mailto:Chengwh@tsinghua.edu.cn).

**Abbreviation:** OECD, Organization for Economic Co-operation and Development; FCPA, Foreign Corrupt Practices Act; TI, Transparency International; SME, small and medium enterprises.

## THE BEGINNING OF THE ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) ANTI-BRIBERY CONVENTION

The OECD's conception of an anti-bribery initiative has

evolved since 1977, when the United States (US) enacted the Foreign Corrupt Practices Act (FCPA), which prohibits the bribing of foreign government officials for business privileges. At the time, no other country's businesses were subject to such laws and restrictions and this motivated the US government to work with the OECD to create a more level playing field through a multilateral solution. The OECD responded in 1994, a year in which many major corruption scandals were unveiled. Moreover, a dramatic increase in the amount of bribes demanded by foreign public officials was observed, and this posed a serious threat to international businesses' bottom lines. Hence, there was a clear need for international anti-bribery agreements (Lewis, 1998).

Consequently, in 1994 the OECD created a working group on bribery, which played a critical role in developing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereafter the convention). The convention was signed in Paris on 17<sup>th</sup> December 1997 and came into force on 15<sup>th</sup> February 1999. Up until 2010, the convention has a total of 38 signatory countries, of which 37 have ratified the convention and provided enforcement data (OECD, 2010b). Besides approaching its formal member states, the OECD also actively engages emerging economies such as China, India, Indonesia, Russia and Thailand, through bilateral and regional anti-corruption programs (OECD, 2010b).

In addition to the signatory countries, the convention has many major stakeholders and supporters, including (1) among the international partners: the United Nations, the World Bank, the International Monetary Fund, and the World Trade Organization; (2) among other partners: International business organizations, trade unions, and non-governmental organizations (hereafter NGOs) working to combat bribery (OECD, 2010 b).

#### **GENERAL STRUCTURE OF THE ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) ANTI-BRIBERY CONVENTION**

The convention is essentially a legally binding international agreement that specifically focuses on the supply side of foreign bribery. All signatories agree to enshrine the bribery of a foreign public official as a criminal offence in their national laws, and to implement effective policies to prevent, detect, investigate and sanction foreign bribery (OECD, 2010a). Hence, all signatories must hold every bribe payer (be it a corporate enterprise, intermediary, subsidiary or agent) responsible as long as the bribes benefit a foreign public official, their family, political parties, or any other third party. The convention also obliges each signatory to provide legal assistance to other countries investigating foreign bribery cases, in addition to denying tax deductibility for bribe payments. It

is also stipulated that adequate sanctions for foreign bribery convictions must be imposed (OECD, 2010a).

The convention is codified into 17 formal articles, which were adopted at the Negotiating Conference on 21<sup>st</sup> November, 1997. Its most significant provisions include the criminalization of the bribery of foreign public officials in international business transactions; the setting of a definition of a foreign public official; the imposition of effective, proportionate and dissuasive sanctions for natural and legal persons; the establishment of territorial and nationality jurisdiction over the offence; the establishment of the bribery of foreign public officials as a predicate offence to money laundering; disallowing economic and political grounds for investigating and prosecuting the offence; the setting and auditing of standards prohibiting the use of accounting documents for bribery; and the facilitation of mutual legal assistance and extradition, along with provision for systemic monitoring (Cache, 2008). These formal provisions are complemented by the OECD Anti-bribery Recommendations proposed in 2009 (hereafter 2009 Recommendations).

#### **IMPLEMENTATION OF THE ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) ANTI-BRIBERY CONVENTION**

The OECD has developed a three phase monitoring process to ensure the compliance of signatories with the convention provisions subsequent to ratification. This process is known as the "procedure of self and mutual evaluation", where the Working Group on Bribery works as the examiners, while inviting evaluation through signatory peer reviews. This process aims to create peer pressure and healthy competition, thus motivating signatory countries to comply with the Convention. This three-phase country evaluation then leads to a set of country-specific recommendations in the form of individual reports.

Phase 1 of the monitoring process is an in-depth peer evaluation to determine the adequacy of countries' legislations in implementing the Convention. Most signatory countries had achieved this to a large extent by 2001 (Pieth et al. 2007).

Phase 2 carries out a mutual evaluation of whether the signatory countries are effectively applying these legislations and anti-bribery frameworks. This includes on-site visits from examiners from two signatory countries whilst members of the OECD secretariat meet with key stakeholders in the country under review (OECD, 2010a).

Phase 3, which commenced in 2010, assesses the structures put in place by the signatory countries to enforce the convention, the 2009 Recommendations, and any additional recommendations from the Phase 2

assessments. Phase 3 specifically focuses on three things: the progress made by signatory countries in addressing the weaknesses identified in Phase 2; issues raised by changes to the national legislation and institutional framework of the signatory countries; enforcement efforts and results, as well as other cross-border issues common to the signatories.

The OECD Working Group on Bribery has recommended that signatory countries take specific steps through their jurisdictional and legal principles in order to satisfy the provisions of the convention. The concrete recommendations included: Awareness building initiatives in the public and private sectors to detect and prevent foreign bribery; changes to criminal laws and their application consistent with the convention; the removal of tax legislation, regulations and practices that may indirectly support foreign bribery; the maintenance of administrative, civil and commercial laws and regulations prohibiting foreign bribery; as well as international co-operation in legal proceedings and investigations (OECD, 2009a).

On the basis of these recommendations, the signatories have adapted their domestic laws and regulations through various means. For example, the US has trained Foreign Service officers posted in overseas US embassies to detect potential bribery cases. FCPA units were established in the Department of Justice, the Securities and Exchange Commission and the Federal Bureau of Investigation, to increase the consistency of enforcement (OECD, 2002). In 2010, the US passed the Dodd-Frank Act to provide incentives and protection for whistleblowers to accelerate the detection and investigation of FCPA violations. Moreover, the act introduced a new whistleblower cause of action for employees who performed tasks relating to consumer financial products or services and other ways for whistleblowers to assert their rights. To further engage the private sector, American law enforcement agencies have adopted many innovative methods, including plea agreements, deferred prosecution agreements, and non-prosecution agreements.

Other signatory countries have also taken various measures to adapt their domestic laws and regulations. For example, the United Kingdom (UK) has promised to enact a Bribery Act since becoming a signatory to the Convention 13 years ago. With the Act expected to come into force in 2011, it is anticipated that the British government will take further action.

Measures to implement the convention have also been evident in the laws and regulations governing private corporations in signatory countries. Examples include the environmental policies of the European Union, anti-money laundering efforts in Switzerland and competition policies in Australia. These initiatives both directly and indirectly assist the enforcement of the convention's provisions (Gordon et al., 2000).

## **SUCCESSSES AND FAILURES OF THE ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) CONVENTION**

More than ten years have passed by since the convention came into force in 1999. The question is: to what extent has the convention successfully achieved its ends?

### **Evaluation and comments**

#### ***Organization for Economic Co-operation and Development's (OECD's) own evaluation and comments***

According to the OECD, the convention is the first and only international anti-corruption instrument focused on the supply side of the bribery transaction (OECD, 2010a). The OECD has further concluded that in 2009 alone, the 38 signatory countries to the Convention accounted for approximately two-thirds of global exports and approximately 90% of foreign direct investment. Therefore, appropriate implementation and management of the convention could make an enormous difference to global business transactions. Over the last decade, more than 150 companies and individuals from at least 10 signatory countries have been sanctioned through fines and prison sentences for foreign bribery and other related offences. In 2010, there were approximately 280 ongoing investigations of foreign bribery in the signatory countries (OECD, 2010e).

One of the specific achievements of the convention, as identified by the OECD, has been the increased levels of international cooperation associated with combating corruption. Signatory countries to the convention are more likely to cooperate than those who are outside the convention. For example, a 2002 country report prepared by the Working Group on Bribery focusing on the US, mentioned that the convention has opened up new sources of evidence from abroad (in the form of business and bank records and testimonials from overseas companies and individuals) for the American law enforcement agencies, when they enforce the FCPA. This is due to Article 9 of the convention, which requires signatories to provide "prompt and effective legal assistance" to one another in criminal and civil proceedings (OECD, 2002).

#### ***Signatory countries' evaluation and comments***

The signatory countries have regarded the convention as playing an integral part in the fight against corruption, even though reservations have been expressed about the enforcement efforts of some members. This is evident in the US Administration's testimonial on the Convention in 2010, where Attorney General Eric Holder said the OECD has been at the forefront of efforts to combat corruption. Holder conceded that none of the US's progress would

have been possible without the constant cooperation of their law enforcement partners around the world, especially those established through the OECD (Holder, 2010).

South Africa's Minister for Public Service and Administration claimed that the OECD's advice had strengthened the country's anti-bribery framework. This meant that South Africa now enjoys "a better corporate reputation and investment" (OECD Observer, 2011) and that the country's "individuals and businesses are held to higher standards. Their clients can therefore have more confidence when doing business with them" (OECD Observer, 2011).

### **International community's evaluation and comments**

The international community's overall evaluation of the convention is generally positive. For example, Transparency International (TI) developed a 2010 OECD Anti-bribery Convention Progress Report, which stated that seven of the 36 signatory countries evaluated have shown continuous progress by banning foreign bribery in the last six years. These seven countries are said to represent 30% of world exports. TI regards this as a very positive development compared to 2009, when only four of the signatories were reported to have actively enforced the Convention. Furthermore, TI found evidence of moderate enforcement by nine other signatory countries, accounting for 21% of world exports. However, there is still room for substantial improvement, given that 20 countries, which make up 15% of world exports, have taken little or no action (TI, 2010).

Many other international organizations have shown their approval of the convention through their cooperative approach. Important organizations such as the United Nations Office on Drugs and Crime and the World Bank have closely cooperated with the convention on various initiatives, such as the Stolen Asset Recovery Initiative.

The international mass media has also shown considerable support for the convention. Indeed, the media appears to use the convention as a tool to evaluate countries. For example, the Guardian, a well-known British national daily newspaper, has reported that, the UK has been too slow with regards to introducing the Bribery Act (Bowers, 2011). The Bribery Act is expected to come into force in April 2011, and the Guardian has announced its intentions to report on the activities of the UK Ministry of Justice, as well as the OECD's responses to the enforcement of the Act (Sokenu, 2011).

### **ACHIEVEMENTS OF THE ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) CONVENTION**

Since the convention came into force in 1999, the

consensus is that, it has been able to fully take shape under the aegis of the OECD, successfully promote itself on a global scale, and gain initial support from a significant number of countries. Any anti-corruption initiative able to accomplish all this can be regarded as successful. At the same time, the convention can also be considered successful in terms of the theoretical and practical uses of its provisions, in tandem with its implementation and monitoring process.

The theoretical value of the convention has to do with the fact that the bribery of foreign officials is detrimental to both parties involved in such transactions. The convention stipulates the rules that the bribe paying countries (the supply side of foreign bribery) are required to comply with. Furthermore, the convention has been signed by the major industrialized nations which account for two thirds of world exports. If the convention successfully establishes common standards in these industrialized signatory countries, it will promote fair global competition, meaning that every country and company will have an equal chance in bidding for business projects and investment opportunities. Each host country stands to benefit by attracting the most qualified business partners and projects.

In theory, these principles sound admirable, but it is their practical application that will ultimately determine whether they have any real benefit. The convention appears to acknowledge this by creating a rigorous monitoring technique, which provides much needed pressure, encouragement and guidance to the signatory countries. Those countries without an anti-corruption record can find it difficult to identify their problems in the interest of reform. The convention's monitoring system assists in these respects by providing external expertise and pressure for implementation. This post-ratification support facilitates the introduction of legislative amendments designed to strengthen and enforce anti-bribery laws.

Signatory countries without an anti-corruption record can adopt the Working Group on Bribery's recommendations and address their weaknesses over time to the point where their enforcement levels are commensurate with those of their more developed counterparts. Denmark, Italy, the UK and Argentina, are all examples of countries which have been identified by TI as having progressed from either moderate to advanced enforcement, or from little or none to moderate enforcement.

In 2010, TI issued a report specifying the impact of the convention to date. In the six years since TI began reviewing the implementation of the OECD ban on foreign bribery, enforcement has doubled from eight to sixteen countries. Although, there is still much room for improvement, many of the signatory countries have seized the initiative. In the long term, their enforcement actions will have a cumulative effect that will help to significantly reduce the overall amount of foreign bribery.

For example, the Phase 3 report on the US pointed out

that the country benefited from resolving FCPA cases through negotiated settlements, plea agreements, deferred-prosecution agreements and non-prosecution agreements. These measures have increased enforcement and private sector compliance and have lowered the time and resource costs associated with trials (Funk, 2010). Furthermore, the creation of FCPA units in key American government agencies has also proven beneficial through economies of scale, concentrated expertise and increased enforcement.

### **WEAKNESSES OF THE ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) CONVENTION**

There is no perfect solution to corruption. There can be loopholes in any anti-corruption initiative. The convention is unexceptional in this regard as it has a number of weaknesses which need to be redressed by future initiatives.

#### **Inherent defects**

The provisions of the convention have been subject to considerable debate. This is partially a byproduct of the attempt to accommodate the different socio-economic backgrounds of its members by giving them some latitude to interpret the rules and regulations.

Gillian Dell, co-author of TI's 2010 Progress Report on the OECD Convention, has identified six major weaknesses of the Convention. They are all related to loopholes generated by the generality, flexibility or vagueness of the provisions:

- 1) It excludes coverage of facilitation payments (also known as 'grease' payments).
- 2) It is inadequate coverage of foreign subsidiaries.
- 3) It is inadequate coverage of foreign political parties and party officials.
- 4) Its inadequate coverage of private sector bribery (private-to-private).
- 5) Its inadequate coverage of preventive measures, except for the accounting provisions.
- 6) Its inadequate coverage of whistleblower or witness protection (Dell, 2006).

Although, these weaknesses were highlighted in 2006, with the convention subsequently introducing the 2009 Recommendations, these criticisms remain applicable. The recommendations are mere suggestions for preferred practices rather than important codes of conduct. For example, in regard to criticism of the exclusion of facilitation payments, the 2009 Recommendations urge signatory countries to periodically review their policies on small facilitation payments (OECD, 2009a). Such advice in effect does not obligate them to take any immediate

action. Instead, it merely serves as a set of guidelines which countries are free to act on, or ignore, as they see fit.

Another example can be drawn from TI's criticism of the convention's inadequate coverage of bribes made by or to foreign subsidiaries. The 2009 Recommendations merely suggested there was a need to communicate with and train foreign subsidiaries "where appropriate" on corporate anti-foreign bribery (OECD, 2009a). Again, this leaves a lot of flexibility for countries to choose the extent to which they monitor companies' responsibility towards foreign subsidiaries.

Hence, a major weakness of the convention is its inability to communicate and exercise authority and power through the provisions. Such flexibility only downplays the values of the convention, which is in turn reflected through ineffective laws in the signatory countries. For example, Article 1 of the convention states that companies may not pay bribes, either directly or through intermediaries. Typically, in order to implement this provision, signatory countries should enact laws stating that "a firm will be liable for the improper payments made by an intermediary if its management 'knew or should have known' that a particular intermediary was likely to make an inappropriate payment" (Lambsdorff, 2011). This requirement of having knowledge of inappropriate payments can be easily refuted by companies, as they can prove in a number of ways that they did not have such knowledge. Thus, laws should be strict and clear enough to catch the dishonest, while having the due proceedings necessary to allow the honest to prove their innocence. However, in order for laws to be strict and specific in signatory countries, the convention must also require this from them by communicating upfront what ought to be done, by providing guidelines and cooperating with signatory countries to achieve what is required, and by imposing strict sanctions on those who do not comply accordingly. Strict and clear laws will ensure countries and companies assume full responsibility for their actions.

Another weakness of the convention, which can be attributed to the lack of strict and clear provisions (and higher standards), is its negative effect on countries' political will for change. Despite the number of comprehensive recommendations and guidelines available, if they are not presented strongly, signatory countries will simply overlook them.

#### **Lack of political will to implement the Organization for Economic Co-operation and Development (OECD) Convention**

As emphasized by OECD Secretary-General Angel Gurría in 2007, "the credibility of the convention depends on its implementation and enforcement by the countries that are signatories to it." Moreover, the convention is

“only effective when all parties implement it fully and adhere to its tough standards” (OECD, 2009b). Although, the convention has been operational for over a decade, it is still unable to induce most of its signatories to comply with its provisions. According to TI’s 2010 Progress Report of the Convention, 20 countries have undertaken little or no enforcement, and this number remains largely unchanged over the last five years. TI deems this “deeply disturbing because companies in these countries will feel little or no constraint about foreign bribery, and many are not even aware of the OECD Convention” (Heimann et al., 2010). TI has further pointed out that a lack of political will is the chief reason for failure to enforce the ban on foreign bribery. The passive form of this lacking is the failure to provide adequate funding and staffing for enforcement, whereas the active form is through political obstruction of investigations and prosecutions (Heimann et al., 2010).

#### **CONTROVERSIES FACED BY THE ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) CONVENTION**

Because the convention falls under the remit of the OECD, any controversies faced by the latter will spill over into the former. The OECD is faced with the challenge of maintaining a positive image around the world. Especially troubling in this respect are perceptions of the organization as a ‘rich men’s club’. Some non-OECD countries and civil society organizations perceive the OECD as “a servant of developed country interests, sometimes even as an adversary, rather than a partner, in globalizations and sustainable development” (Julin, 2003). Therefore, despite the OECD’s interest in cooperating with non-OECD members, questions remain about its legitimacy as a global actor.

This impacts the convention, especially since its membership is limited to the supply side of corruption (the industrialized nations). Coupled with the fact that the monitoring of signatory countries to the convention is conducted through peer review by industrialized nations, the issue of bias and a perceived inability to genuinely curb foreign bribery will overshadow the reform agenda, especially in the eyes of developing nations (the demand side of business bribery). This automatically creates a hurdle for the signatory countries which will be bombarded by demands for bribes. These countries in turn face a stark choice between bribing and winning contracts, or refraining from bribery and losing out on contracts.

#### **IMPROVING THE ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) CONVENTION**

The convention has currently adopted a ‘better late than

never’ approach, the aim of which is to gradually garner support for its anti-foreign bribery mandate. Concerned organizations have described the impact of the convention as “gradual and cumulative rather than sudden and dramatic” (Bray, 2009). Hence, the approach may prove less successful in the short term. Clearly though, both long and short term goals are necessary to facilitate reform on a global scale.

The OECD and its signatory countries have their own ideas and plans for making the Convention more effective.

#### **Organization for Economic Co-operation and Development’s (OECD’s) own reform plans**

In a recent analysis of the convention, the OECD Deputy Secretary General, Richard Boucher, explained that, the OECD has identified corruption as an “ever-changing” issue, in open acknowledgement of the holes and weaknesses in global rules and regulations (Boucher, 2011). The OECD has also recognized that the assortment of anti-corruption tools introduced by global anti-corruption organizations are not necessarily complementary and do not “carry the same weight”. As pointed out by Mathilde Mesnard, Senior Economist at the OECD who is working on new OECD anti-corruption initiatives, there are considerable discrepancies in terms of the respective depths and strengths of the instruments. Some have very detailed ‘how to’ implementation toolkits that are accompanied by rigorous and well-established peer review processes, while others are more like open-ended declarations which are not always closely monitored (Boucher, 2011). To tackle this problem of incommensurability, the OECD has expressed its interest in working with key global actors against corruption, including the United Nations Office on Drugs and Crime, the World Bank, Transparency International, and the World Economic Forum. The aim is to accumulate a comprehensive set of anti-corruption tools and instruments that are mutually reinforcing and coherent. The OECD has already tried to use the peer-review system to complement that of the UN Convention States Parties’, and both the UN Convention and the World Bank joined the OECD Working Group on Bribery to further work on this issue (Boucher, 2010).

In 2009 the OECD also developed a new initiative called the “Initiative to raise global awareness of foreign bribery”. The specific goals include: (1) Raising awareness of foreign bribery as a crime, (2) illustrating the negative impact of foreign bribery and (3) increasing interest in anti-bribery measures for every country. The initiative is a three year program which would include a worldwide media outreach campaign and a study of the impact of foreign bribery. The cooperation of business and law schools is also sought with a view to including course materials on foreign bribery that will educate the next generation of business leaders about this corrupt

practice. The participants will include all 38 signatory countries of the convention, international organizations, NGOs, corporate networks as well as governments that have an anti-corruption agenda.

The product of the new initiative will be an anti-corruption toolkit and a user-friendly, flexible and comprehensive web-based tool, which allows users to identify steps to fight corruption and to access reference instruments and examples of good practice. Moreover, it will create an international network for people involved in the fight against corruption, where countries join to support one another, share experiences and gain recognition for their achievements. The OECD also plans to use the new initiative to support the anti-corruption efforts of developing countries (Boucher, 2011).

### **SIGNATORY COUNTRIES' SUGGESTIONS**

The signatory countries have often suggested ways to improve the convention, including clarifying the conditions of its provisions and supporting other international anti-corruption treaties to complement the implementation of the convention.

For example, in 2007, during the Phase 2 evaluation of Chile, the country's Public Prosecutor's Office mentioned that Article 1 of the Convention requires criminalization of the offer, promise, or giving of any "undue" advantage to a foreign public official. Both the Public Prosecutor's Office and academics in Chile thought the word "undue" need not be used in the provisions, as no one would be prosecuted for making legitimate payments. Moreover, the absence of the reference to an "undue" payment would not hamper any prosecutions. The Working Group on Bribery has decided to take up this issue in the Phase 3 evaluation process (OECD, 2010b).

In the 2010 Phase 3 evaluation report on the US, the Working Group on Bribery mentioned that representatives of the US private sector expressed their concern about the facilitation payments demanded by foreign public officials. They were also concerned about the lack of enforcement of foreign laws prohibiting the solicitation of facilitation payments. Representatives of civil society organizations have responded by encouraging these countries to increase enforcement through the implementation of the UN Convention Against Corruption (OECD, 2010d).

In Germany, concerns have been expressed about the difficulties faced by small and medium enterprises (SME) who conduct business in foreign countries without bribes. Representatives from the legal and auditing professions have pointed out that it is very difficult to prevent bribery in SMEs. This problem is compounded by the fact that SMEs cannot afford to hire compliance officers, which makes them less prepared to deal with foreign public officials. Moreover, although the German embassies in

these countries know about the bribes, they are often torn between complying with anti-bribery laws and supporting the export practices of German companies. The OECD Working Group on Bribery has also recognized that fighting bribery in SMEs is a common problem throughout signatory countries and that further guidance is required to assist companies, especially SMEs, in curbing foreign bribery.

### **Suggestions from international partners**

International partners have offered many suggestions on how to improve the convention. TI has been an important international partner of the convention from the outset. It has been conducting evaluations for the convention for six years and has successfully developed the progress reports on the Convention, which prescribe courses of action.

In terms of the strategic suggestions for the convention, TI recommends the Convention continually engages the governments of important countries such as China, India and Russia. These countries currently account for one third of world exports and this figure is set to increase. Therefore, bringing them into the Convention would contribute to a leveling of the playing field for international business transactions. Furthermore, TI has urged the OECD to forcefully tackle the lack of political will on the part of some governments. For example, it suggests that the continuous failure of lagging governments in taking concrete steps to strengthen enforcement should result in the suspension of their convention membership (Heimann et al., 2010).

TI has also issued many specific suggestions including: (1) Paying attention to transactions which are not-for-profit and study whether or not they should be covered by the convention; (2) encouraging transparent negotiated settlements to bribery cases to avoid long delays, high costs, and unpredictable litigation outcomes; (3) encouraging signatory countries to assign adequately resourced, qualified prosecutorial staff to foreign bribery cases (Heimann et al., 2009).

The Trade Union Advisory Committee to the OECD has suggested changes in some common issues faced by the Convention signatories, including: (1) Clarifying through the provisions that bribes paid by intermediaries may not be permitted; (2) removing the exemption on facilitation payments; (3) ensuring that each signatory's definition of "public official" coincides with the one used by the Convention; (4) ensuring that the bribery of foreign political parties and their officials is prohibited; (5) criminalizing foreign private sector (business-business) bribery (also recommended by the International Chamber of Commerce); (6) encouraging monitoring and public reporting by trade unions, civil society and other stakeholders in the signatory countries; (7) encouraging

signatory countries to protect whistleblowers (OECD, 2008).

By 2008, 35 organizations and individuals had responded to the Convention instruments, including multi-lateral organizations, NGOs, prosecutors, international legal experts, accounting and auditing professionals, and private-sector representatives (OECD, 2008). Some of their feedback has already been taken into consideration by the convention. Each of their respective contributions provides an excellent reference point for the future initiatives of the Convention.

### The authors' suggestions

Since the convention came into force, the main problem it has faced is its inability to systematically ensure the implementation of the convention. If this impasse remains, the convention will lose its credibility to the point where it will merely serve a rhetorical function. One possible reform is for the OECD to actively regulate the membership of its signatories by fostering competition between them. Regulation should commence at the outset, with the acquisition of membership. For example, only those countries that have successfully introduced up-to-date foreign bribery laws in accordance with the convention's provisions will be entitled to membership. Moreover, countries must show adequate proof of having actively planned to enforce the convention by allocating adequate resources.

Furthermore, once countries become members, they receive a basic entry level status (that is, essentially the bottom level of membership). Before they are promoted to the intermediate level, these countries must reach specific targets agreed upon by both the convention and the respective countries. If some countries reach the intermediate level and then start lagging in their enforcement, they should be demoted in accordance with the convention's zero tolerance policy. Any country unable to show evidence of enforcement after a certain period should be removed forthwith from the convention.

This form of membership regulation will benefit the convention by dissuading countries who are only interested in improving their national image by signing anti-bribery treaties. It will also ensure the convention is regarded for its integrity. In short, membership regulation will create a system of sanctions and rewards for its signatories.

Another important initiative would be to revamp the convention's provisions, recommendations and guidelines, to make them stricter and clearer. This is extremely important as it prevents signatories from defending inappropriate conduct by claiming the convention was too ambiguous.

Due to the highly complicated and changing nature of foreign corruption, the convention cannot possibly cater

to every case. However, it can be made flexible enough to prevent bottlenecks for the signatory countries.

The convention's initiatives, together with the suggestions of its signatories and international partners, warrant serious consideration. However, the key to the convention's future development will be its focus on combating foreign bribery, choosing the most effective projects, followed by swift and coordinated actions to implement them.

### Lessons learned from the convention

Despite the many problems and challenges that have been referred to here, the Convention's response to foreign bribery holds great value for future anti-corruption initiatives. It not only demonstrates the gravity of the issue, but also the flexible and prompt approach required to tackle it. Moreover, it shows the importance of patience and perseverance with which anti-corruption actors must deal with countries, organizations and individuals. Future anti-corruption actors and initiatives stand to benefit from the following lessons:

- 1) Importance of a united effort. The convention has so far worked with the governments of 38 countries to identify their foreign bribery issues. This has led to cross-country cooperation which has fostered innovative solutions. There is potential for more cooperation in terms of uniting the developed and developing countries by identifying and tackling cross-country issues.
- 2) Importance of an organized effort. The convention provides many provisions, recommendations and guidelines for fighting foreign bribery. Some of these instruments cohere with other anti-corruption treaties, while others do not. These relationships can be enhanced through cooperation with global anti-corruption actors and national governments, thereby identifying and minimizing the effect of any discrepancies and flaws. These efforts will make the global fight against foreign bribery more efficient and effective.
- 3) Importance of high quality standards. The lack of active enforcement and political will from most of the Convention's signatories proves there is a need for higher standards. Every form of corruption must be met by a policy of zero-tolerance. Those that have successfully fought corruption should be rewarded, while any who do not meet their obligations should be sanctioned.

### CONCLUSION

The convention is indisputably an important instrument with great potential. In addition to raising more awareness, the OECD needs to focus on creating the necessary political will and demanding worldwide commitment



to the fight against foreign bribery. This can be accomplished by improving its own standards, inclusive of its system of zero-tolerance sanctions and rewards, as well as by upgrading its provisions, recommendations and guidelines, to take into account the complicated and changing nature of foreign bribery.

Moreover, for the convention to attain the level of a universal instrument against foreign bribery, it needs to incorporate both the demand and supply sides of corruption. Furthermore, it needs to identify which countries are most susceptible to foreign bribery and encourage them to dedicate the human, financial and legal resources required to prioritize its unconditional prosecution.

During turbulent economic times, countries tend to deprioritize anti-corruption initiatives. The resulting lack of political will slows the progress of international anti-corruption actors. This article has argued that the safeguarding of economic globalization demands a more vigilant approach. The OECD Convention has the potential to be exemplary in this regard, given its emphasis on cooperation, continuous improvement and organization. Ideally then, the international community will actively support the convention as it enters a period of renewed growth and consolidation.

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