Implementing the Anti-Bribery Convention: an update from the OECD

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Introduction

In 1997, 34 of the world's largest exporting countries agreed to ban corruption in international business transactions by adopting common rules to punish companies or individuals that engage in bribery. Bribery of domestic public officials has long been illegal in member countries, but the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention) is testimony to a larger trend to improve public and private sector governance globally. The Convention categorically makes it a crime to bribe a foreign public official in order to obtain or retain international business.[1]

Four years after this historic event, ratification of the Anti-Bribery Convention is almost complete. Thirty-three of the original 34 signatories have deposited instruments of ratification with the OECD Secretary General (see table). Ireland was expected to complete ratification imminently, as the *Global Corruption Report 2001* went to print. Twenty-nine countries have meanwhile implemented legislation to bring national law into accordance with the Convention.

The Anti-Bribery Convention is part of a growing international arsenal against bribery and corruption. The OAS, the Council of Europe and the EU – among others – all have legal instruments binding their member states to take anti-corruption measures. These instruments need to be monitored internally among the parties to the agreements and scrutinised publicly to ensure that governments are living up to their obligations. In this regard, the Anti-Bribery Convention is one of the more effective of the anti-corruption agreements.

When a country ratifies and adopts legislation to implement the Convention in national law, the OECD Working Group on Bribery in International Business Transactions then undertakes a two-phase monitoring process. Phase One, detailed below, assesses whether new legislation meets the standards set by the Convention. Phase Two, scheduled to begin in November 2001, examines application of the Convention in practice.[2] It will involve looking at the structures and institutional mechanisms that are in place in the different countries to enforce leg-

		or ratification
1	Iceland	17 August 1998
2	Japan	13 October 1998
3	Germany	10 November 1998
4	Hungary	4 December 1998
5	United States	8 December 1998
6	Finland	10 December 1998
7	United Kingdom	14 December 1998
8	Canada	17 December 1998
9	Norway	18 December 1998
10	Bulgaria	22 December 1998
11	Korea	4 January 1999
12	Greece	5 February 1999
13	Austria	20 May 1999
14	Mexico	27 May 1999
15	Sweden	8 June 1999
16	Belgium	27 July 1999
17	Slovak Republic	24 September 1999
18	Australia	18 October 1999
19	Spain	14 January 2000
20	Czech Republic	21 January 2000
21	Switzerland	31 May 2000
22	Turkey*	26 July 2000
23	France	31 July 2000
24	Brazil*	24 August 2000
25	Denmark	5 September 2000
26	Poland	8 September 2000
27	Portugal	23 November 2000
28	Italy	15 December 2000
29	Netherlands	12 January 2001
30	Argentina	8 February 2001
31	Luxembourg	21 March 2001
32	Chile*	18 April 2001
33	New Zealand	25 June 2001

Status of ratification of the OECD Anti-Bribery Convention

**As of 12 July 2001, these countries had not yet enacted implementing legislation.*

islation, including in the private sector. Input from civil society will also be invited.

Findings of Phase One

So far, almost all of the countries that have implemented laws in order to meet the Convention's standards have been reviewed.[3] Most of the countries have done a satisfactory job, and overall compliance with standards is underway. There were, however, significant deficiencies, and OECD ministers have asked some countries to take remedial action. Legal loopholes or provisions that might lead to inconsistent application have been identified, most of them relating to indirect bribery through intermediaries, or bribes paid to third parties for a public official's benefit. Because the Convention works within a country's existing legal system, such differences are to be expected. Nevertheless, the Working Group's role is to ensure that there are no major discrepancies that would undermine the goal of equal application.

Responding to the Group's recommendation, Japanese authorities recently informed the OECD that the Diet (parliament) has adopted an amendment to its law, which will broaden the scope of its foreign bribery offence. In the UK, the government will soon submit to

parliament new legislation that will specifically apply to bribery of foreign public officials. Meanwhile other countries either have already eliminated, or are in the process of eliminating, the application of certain domestic bribery defences (such as 'provocation', or 'effective regret') to cases of foreign bribery. The expectation is that this will forestall attempts to bypass liability.

A key provision of the Convention is that both 'natural' (physical) and 'legal' persons (including companies) should be held responsible for bribery acts. But in their domestic law, some countries can impose criminal liability on legal persons, while others cannot. In order to bridge this difference, the Convention allows parties to provide either for criminal or non-criminal liability, as long as the sanctions are effective. Nevertheless, the monitoring process has shown that this is an area where many countries will have to make greater efforts, and some are considering introducing legislation to this end.

In terms of punishments, the Convention does not actually specify what the sanctions for bribery should be, leaving this to be determined by each country's penal system. Generally, countries have provided for imprisonment penalties ranging from one to ten years. A country is not evaluated in the monitoring process solely on the basis of its penalties, but there are concerns that weak sanctions may have an adverse impact on the ability to provide effective mutual legal assistance and extradition. Some countries have taken the opportunity to review their sanctions, and some, like Iceland, have removed any limits on fines for legal persons. In addition to fines and imprisonment, the Convention requires seizure and confiscation of the bribe itself, as well as of any other illegal gains from bribery.

Meanwhile, in order to pursue cases of international bribery effectively, a broad interpretation of territorial jurisdiction is required to reflect the reality of today's international business transactions. Many countries in the Convention have provided that some form of connection to the territory, be it by fax, e-mail or telephone, is sufficient to establish territorial jurisdiction over a given bribery-related offence. The Convention also encourages those countries that can prosecute their nationals for crimes committed abroad, without territorial connection, to extend this jurisdiction to foreign bribery offences. At least 24 countries have now provided for such nationality jurisdiction for foreign bribery, usually on condition that the act is also a crime in the place where it was committed ('dual criminality'). Still, Phase One reviews showed that there might be different interpretations of dual criminality among countries, as well as certain special requirements that can undermine the effectiveness of this basis of jurisdiction.

The Working Group looks closely at the conditions or requirements for instituting prosecutions. The Convention respects legal regimes of prosecutorial discretion, but does not permit concerns of a political nature to influence prosecuto-

rial decisions. Phase Two monitoring will carefully examine whether, in practice, the statutes of limitations relating to foreign bribery offences allow an adequate time period for investigation and prosecution to take place.

To put a stop to bribery in international business transactions, OECD countries have also agreed to end the practice of allowing tax deductions for bribes to foreign public officials. Almost all countries now prohibit these. The effectiveness of this change will also be assessed in Phase Two.[4]

Conclusion

Overall, the results of two years of monitoring are very encouraging. To ensure a level playing field for companies from all states that are party to the Convention, it is important that the remaining countries ratify and adopt implementing legislation as soon as possible.

Governments' commitment to stamping out bribery in international business transactions must be strictly enforced and, in this regard, there are many aspects of the Anti-Bribery Convention that will be judged by how they are applied in practice. It is too early to look for actual prosecutions under the Convention's auspices, but Phase Two will reveal what indictments are pending. Phase Two of the monitoring process will also keep up the pressure on signatory states, both to continue modifying domestic law in order to meet the Convention's standards, and to realise fully the effort to combat bribery abroad.

1 The Organisation for Economic Cooperation and Development (OECD) is an intergovernmental group of 30 member countries which provides governments with a forum for discussion and development of economic and social policy. All 30 OECD countries signed the Convention as well as four non-members (Argentina, Brazil, Bulgaria and Chile).

2 Rules of procedure and the questionnaire for Phase One and Phase Two evaluations are at: <http://www.oecd.org/daf/nocorruption>.

3 Twenty-one countries were reviewed between April 1999 and May 2000 and an additional seven countries were reviewed between May 2000 and May 2001. Individual country reports are available on the OECD website.

4 In New Zealand, the tax amendment to deny deductibility is pending in parliament. The Netherlands has introduced a bill proposing to remove the requirement of a prior criminal conviction as a condition for denying tax deductibility.

TI keeps up the pressure

Most major multinational enterprises have their headquarters in OECD countries and, from its earliest days in 1993, Transparency International (TI) recognised that OECD action to prohibit bribery of foreign officials could sharply curtail the supply side of international corruption.

The OECD also provided the right forum to overcome the 'prisoner's dilemma' which had long prevented action to stop bribery. Many business leaders recognised the damage done by corruption, not least to the public image of their companies. But they were concerned about the loss of business that would result if they stopped bribing, while their competitors continued.

Steps to the Anti-Bribery Convention

Although discussions began several years earlier, in 1994 the OECD recommended that its member countries consider a list of possible actions to curb corruption. While there was little support for prohibiting foreign bribery, there was less opposition to ending the tax deductibility of bribes, about which the OECD duly issued a recommendation in 1996. In 1997, OECD ministers decided that a convention to prohibit foreign bribery should be negotiated. There was concern that adopting a convention, rather than using the OECD's more common approach of a recommendation, would result in long delays. To meet that concern, a deadline was set to complete the negotiation of a convention by the end of 1997. The Anti-Bribery Convention was signed on 17 December of that year.

The Convention reflected a sea change in public attitudes about corruption in both developing and industrialised countries that in turn influenced the attitudes of business leaders and government officials. TI's efforts to raise awareness of the damage done by corruption and to build coalitions to promote reforms played a major role in overcoming decades of apathy, cynicism and denial. The achievement was also testimony to the effective leadership of the OECD's Working Group on Bribery in International Business Transactions, chaired by Professor Mark Pieth.

TI and the International Chamber of Commerce collaborated in spring 1997 to bring together 20 leading European business leaders who addressed a joint letter to the OECD, urging prompt action to prohibit foreign bribery. The letter helped overcome perceptions that the European business community opposed such action.

Through its national chapters in key OECD countries, TI played a further role in galvanising support by promoting the ratification of implementing laws in many countries. TI also provided the OECD Working Group with its own evaluation of these laws. A few examples deserve mention:

- TI-UK played a key role in disproving the contention of the UK government that no new legislation was needed because existing laws could be applied to foreign bribery.
- TI-Germany took issue with the German government's plan to terminate tax deductibility of bribes only in cases where there had been criminal convictions. This would have continued the deduction of most bribes. As a result of TI-Germany's criticism, an effective prohibition of tax deductibility of bribes was adopted.
- When the Canadian government failed to take action to secure ratification of the Convention, TI-Canada led the effort to gain support from all major parties for expedited action by parliament. Canada became the eighth country to ratify.
- TI-France worked successfully to delete a provision from French implementing legislation that would have broadly 'grandfathered' all bribe commitments made before the effective date of the French law. This would have permitted the continuation of bribe payments indefinitely.
- TI-USA testified before the Senate Foreign Relations Committee and helped persuade the Committee's chairman, Senator Jesse Helms, to overcome his scepticism about

the usefulness of international conventions. Senator Helms persuaded the Senate leadership to schedule the Convention for prompt action, and it received unanimous approval. TI-USA also played an active role in securing swift US implementing legislation.

- TI-Italy helped secure approval for the Convention and the implementing law in the Italian parliament. This required much sustained effort because of the weakness of the governing coalition at the time, while opposition efforts to bring down the government made it difficult to motivate parliament to take action.

Looking ahead

Beginning in November 2001, the OECD Working Group will monitor the enforcement of the Convention by national governments. The plan is to send review groups to about eight countries per year with the goal of reviewing all signatories by the end of 2005.

Many business people remain to be convinced that governments will really enforce the Convention. Some governments may be reluctant to take strong action until they are convinced that other governments are doing so. Only when enforcement actions are brought will there be a clear signal that the bribery of foreign officials must stop. The review of enforcement programmes is the critical test of whether the Convention will really change the way international business is conducted. This process will be more difficult than Phase One. It is not yet clear whether the OECD Working Group will be able to obtain sufficient staff and budget to be effective.

Another concern is the role of civil society and the private sector. TI has taken the position that obtaining objective, non-governmental assessments of the adequacy of enforcement programmes is essential to the effectiveness and credibility of the review process. However, this is a controversial issue. Concerns have been expressed that it could lead to public confrontations similar to those that occurred in Seattle. In TI's view, a more open process is likely to defuse confrontations. Efforts are underway to develop a reasonable basis for consultation.

Making the Convention effective, in its present form, must continue to have the highest priority. However, looking ahead, consideration should also be given to several amendments. The most important change would be to cover the bribery of political parties and party officials, since presently only bribery of public officials is covered. This is a dangerous loophole that will grow in importance as the Convention is enforced.

A second issue to be considered is coverage of bribery of corporate officials, sometimes referred to as 'private-to-private' bribery. At a time of increasing privatisation, it is hard to maintain that bribing a minister of telecommunications should be prohibited, but that there is no need to prohibit bribing the same individual when s/he becomes the CEO of the privatised telephone company. Bribery of public, party and corporate officials has taken on transnational dimensions in a global economy, and there is a similar need for international action to combat each effectively.

Thirdly, foreign bribery should become a predicate offence under anti-money laundering laws. Such action was recommended by OECD ministers in 2000. It is time to change the present language of the Convention, which obligates countries to make foreign bribery a predicate offence only if domestic bribery is treated as such. This makes little sense, as money laundering is much more likely to occur in cases of foreign bribery.

Finally, it should be noted that the next TI Bribe Payers Index (BPI) will be published in 2002. The BPI measures the propensity of companies from the 19 leading exporting states to pay for foreign bribes. The first BPI was published in October 1999 and was based on surveys conducted shortly after the OECD Anti-Bribery Convention became effective. The next BPI will provide a report card on the Convention's impact.

Transparency International

Building civil society coalitions

For the battle against corruption to be successful, a multi-stakeholder approach is required. Governments, businesses and specialists in the field recognise that without the involvement of civil society, it is impossible to establish an effective coalition against corrupt practices in the state and corporate sectors.

States draw their strength from their authoritative decision-making powers; the market from its economic influence. Civil society's legitimacy rests on its defining characteristic as citizens acting collectively in the public interest. To ensure recognition as a legitimate public actor in the fight against corruption, civil society itself has to embrace the highest standards of transparency and accountability.

The malpractice of a small number of NGOs, as well as the general backlash from senior government officials who accuse civil society leaders of being largely self-appointed 'do-gooders', unaccountable to anyone other than themselves, are factors that have led civil society organisations to make these issues a priority. 'Downward accountability', or developing and retaining links to grassroots' constituencies, as well as trust among the greater public, are crucial in this respect.

The experience of Transparency International and other groups working in the field of combating corruption has shown that 'anti-corruption campaigns cannot succeed unless the public is behind them'.[1] Civil society is uniquely placed to raise awareness about the negative consequences of corruption for democracy and development, and to create a readiness to act against corrupt practices in state bureaucracy and the private sector.

There are many success stories of citizens taking action in fighting corruption at all levels, individually and collectively. Just as important as high-profile cases, such as the overthrow of President Estrada's corrupt regime in the Philippines earlier this year, are the day-to-day activities of the many anti-corruption groups and organisations around the world working to pull out corruption by its roots.

Civil society is able to bring together a range of societal stakeholders in a joint effort to combat corruption. In the context of globalisation, crucial tasks ahead for civil society in its fight against corruption are to build transnational coalitions and to share knowledge on both effective anti-corruption strategies and internal civil society accountability initiatives. Here, transnational civil society networks, such as CIVICUS: World Alliance for Citizen Participation and Transparency International, have a crucial role to play as clearing-houses, convenors and information-providers on the pertinent issues surrounding corruption and accountability in the world today. The *Global Corruption Report* is a welcome contribution to this endeavour.

Transparency International is an important member of CIVICUS. Since joining the World Alliance for Citizen Participation, it has highlighted the urgent interventions needed in combating global corruption at several CIVICUS events. CIVICUS is interested in supporting TI in generating a broader debate both within civil society and at large, promoting the idea that all civil society groups need to address the issue of corruption.

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CIVICUS: World Alliance
for Citizen Participation

1 Jeremy Pope (ed.), *The TI Source Book* (Berlin: Transparency International, 1997).