

THE OECD ANTI-BRIBERY CONVENTION'S NECESSARY DUAL COMMITMENTS: SUBSTANCE AND ENFORCEMENT

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ABSTRACT

International corruption took the spotlight on the world stage during the first impeachment of President Donald Trump, but corruption involving foreign governments has been a focal point for international organizations for decades. The Organization for Economic Cooperation and Development (“OECD”) adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“Anti-Bribery Convention”) in 1997, aiming to harmonize standards and efforts against corruption worldwide. Although all States Parties to the Convention have adopted implementing legislation, enforcement remains the burden of a small handful of countries. This Note analyzes the reasons for the lack of domestic enforcement and provides possible solutions to encourage greater success in the OECD fight against global corruption.

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I. INTRODUCTION

“Quid pro-quo” was in nearly every headline in late 2019 and early 2020, as President Donald Trump’s first impeachment and Senate trial spotlighted an alleged exchange of U.S. assistance for a personal, political benefit. Such an allegation gripped people in the United States and across the globe, in part because of its possible similarity to a factor of

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President Richard Nixon's infamous Watergate scandal — “a U.S. President's use of undisclosed contributions from multinational corporations and foreign states to pay for legal expenses in connection with the President's abuses of power and a resulting impeachment inquiry.”¹ In the 1970s, the Watergate scandal was a catalyst for the United States to monitor, regulate, and prosecute bribery, eventually leading to the Foreign Corrupt Practices Act (“FCPA”) in 1977.² Corruption scandals and the end of the Cold War in the 1990s sent shockwaves through other governments, providing the stimulus necessary for a multilateral agreement against bribery.³

When the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“Anti-Bribery Convention”) was signed in 1997, OECD member states and non-member states committed to more than just a passive signature of support for the OECD and disapproval of bribery. Unlike many other international documents, the Anti-Bribery Convention morphed from non-binding recommendations to legally binding responsibilities — to prohibit and prosecute bribery of foreign public officials. Because Convention signatories included many of the world's most developed and wealthiest countries, success seemed within reach.

More than two decades have passed since the original signature and ratification of the Convention. Participating countries — including all OECD member states and a growing number of non-member signatories — come from five continents and account for eighty-three percent of world exports and “over ninety percent of foreign direct investment.”⁴ All of these States have passed legislation outlawing the bribery prohibited by the Convention.⁵

1. Susan Simpson, *Federal Criminal Offenses and the Impeachment of Donald J. Trump: Foreign Corrupt Practices Act*, JUST SECURITY (Dec. 16, 2019), <https://www.justsecurity.org/67738/federal-criminal-offenses-and-the-impeachment-of-donald-j-trump/#ForeignCorruptPracticesAct>.

2. See CECILY ROSE, *The Domestic Influence of the OECD Anti-Bribery Convention and the Working Group on Bribery*, in INTERNATIONAL ANTI-CORRUPTION NORMS: THEIR CREATION AND INFLUENCE ON DOMESTIC LEGAL SYSTEMS 59, 63 (2015).

3. See *id.* at 63, 65.

4. IMF, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, at 2, 4 (Sept. 18, 2001), <https://www.imf.org/external/np/gov/2001/eng/091801.pdf>; Transparency Int'l, *Exporting Corruption: Progress Report 2020: Assessing Enforcement of the OECD Anti-Bribery Convention 4* (Oct. 2020), <https://images.transparencycdn.org/images/A-slim-version-of-Exporting-Corruption-2020.pdf>.

5. See Organization for Economic Cooperation and Development [OECD], *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Monitoring Schedule December 2016 - June 2026* (June 2020), <https://www.oecd.org/corruption/anti-bribery/Phase-4-Evaluation-Calendar.pdf>. Each country has passed Phase I, which requires implementing

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Even with a legally binding Convention, bribery continues worldwide, and enforcement actions have been brought by only a handful of countries. In 2018, the global cost of corruption was at least five percent of the world's gross domestic product, and active enforcement of the OECD Convention has decreased since then.⁶ When expanded throughout the world, small- and large-scale bribery invokes moral and political concerns, creates problems for good governance and economic development, and undermines international competition.⁷ Such problems continue to provide incentives for committing to the substance and enforcement necessary to make the OECD Convention successful.

This Note will argue that although the OECD Convention has achieved remarkable success in harmonizing state laws prohibiting bribery of foreign officials, it has not achieved as much success in encouraging member states to vigorously enforce these laws. However, OECD member states have a number of tools to encourage more vigorous enforcement. First, this Note will provide a short background on the OECD Convention, its provisions, and the widespread adoption of its uniform standards. Second, this Note will briefly explain the functions of the OECD Working Group on Bribery (“WGB”) and its peer review system. Third, this Note will assess States Parties’ commitment to enforcement against bad actors and compliance within the OECD Working Group on Bribery peer review system. Fourth, this Note will provide possible solutions for strengthening that commitment and increasing enforcement to improve the OECD’s likelihood of success in the fight against corruption.

II. THE ANTI-BRIBERY CONVENTION AND ITS ADOPTION

The OECD Anti-Bribery Convention was signed in 1997, two decades after the United States passed the Foreign Corrupt Practices Act (“FCPA”), and created the first multilateral and legally binding standards to criminalize bribery of foreign public officials in international business transactions.⁸ Prior to the Convention’s signing, non-binding

legislation. To access individual country’s reports, see <https://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm>.

6. See Press Release, Security Council, Global Cost of Corruption at Least 5 Percent of World Gross Domestic Product, Secretary-General Tells Security Council, Citing World Economic Forum Data, U.N. Press Release SC/13493 (Sept. 10, 2018), <https://www.un.org/press/en/2018/sc13493.doc.htm>; Transparency Int’l, *supra* note 4, at 13.

7. IMF, *supra* note 4, at 2.

8. See Subarna Samanta & Rajib Sanyal, *The Effect of the OECD Convention in Reducing Bribery in International Business*, 8 GLOB. BUS. & MGMT. RSCH.: INT’L J. 68, 69 (2016).

recommendations from the OECD's Working Group on Bribery ("WGB") were regarded as the most "efficient method for harmonizing [domestic] laws on international bribery."⁹ However, the U.S., seeking to have other countries bound by the same standards as those of the FCPA and to minimize disadvantages to its own corporations doing business abroad, applied intense political pressure which eventually transformed those non-binding recommendations into negotiation, and eventual signing, of an international, binding convention.¹⁰

The OECD Anti-Bribery Convention is highly focused, containing only one criminalization provision that focuses on the Convention's core goal of targeting bribery of foreign public officials. Article 1 requires States Parties to make it a crime

for a person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties in order to obtain or retain business or other improper advantage in the conduct of international business.¹¹

Article 1 is the main provision of the Convention and is likely the easiest for which third parties can measure States' compliance. This piece encapsulates the main goal of the Anti-Bribery Convention, and compliance with this binding provision signals a commitment, at the very least, to its substance.

This provision has seen success, especially relative to other international documents, such as the U.N. Convention against Corruption; all States Parties to the Anti-Bribery Convention have adopted some form

9. ROSE, *supra* note 2, at 65.

10. See Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 673-80 (2004); see also Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 434-35 (2000).

11. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1, Dec. 17, 1997, S. TREATY DOC. No. 105-43, 2802 U.N.T.S. 49274 [hereinafter OECD Anti-Bribery Convention]. In general, the Convention also creates a definition of a foreign public official and establishes territorial and nationality jurisdiction over the offense. *Id.* arts. 1(4)(a), 4. Notably, the Convention disallows economic or political considerations in investigation and prosecution of bribery-related offenses. *Id.* art. 5. The Convention also establishes bribery of foreign public officials as a predicate offense to money laundering and sets accounting standards to prevent the use of accounting and auditing documents for bribery. *Id.* arts. 7, 8.

of national legislation implementing the Convention that “largely conform[s]” with the legal text.¹²

Commitment to the main pillar of the OECD Convention is a strong start to seeing positive results and reduced corruption in international business transactions. Generally, firms based in countries that have signed the Anti-Bribery Convention, passed domestic legislation, and are part of multilateral legal enforcement of the treaty’s provisions are perceived to be less likely to bribe foreign public officials than firms based in non-member countries.¹³ Greater chances of being caught and the high cost of prosecution, if caught, in possibly multiple jurisdictions seems to substantially deter bribery by firms based in OECD countries.

This general result, however, fails to analyze firms’ actual propensity to bribe, only measuring “perceptions” of firms’ propensity. It also does not address how foreign firms doing business in a signatory country are perceived and their actual propensity toward bribery. More importantly, such a conclusion fails to highlight that some OECD countries—like Turkey—score far lower on the Corruption Perceptions Index than some non-OECD states, like Singapore and Hong Kong.¹⁴ Further, the result does not appreciate the nuance of multilateral law enforcement and whether those signatory-based firms are less likely to bribe because they fear enforcement from their home state or from an OECD anti-bribery powerhouse, like the U.S.

Although all States Parties to the Anti-Bribery Convention have passed implementing legislation that criminalizes bribery of foreign public officials, these laws simply showcase general compliance with the Convention’s binding requirements and not commitment to enforcement.¹⁵ The mere possibility of prosecution—especially without

12. Organization for Economic Cooperation and Development [OECD], *Implementing the OECD Anti-Bribery Convention: Phase 1 Report: Peru* 1, 41 (Mar. 6, 2019), <https://www.oecd.org/corruption/anti-bribery/OECD-Phase-1-Report-Peru-ENG.pdf>; see ROSE, *supra* note 2, at 68–69. To view individual countries’ reports, see *Country reports on the implementation of the OECD Anti-Bribery Convention*, OECD, <https://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoccdanti-briberyconvention.htm> (last visited Feb. 11, 2023).

13. See Samanta & Sanyal, *supra* note 8, at 73.

14. See *id.* at 72, 74. A low score on the Corruption Perceptions Index (formerly called the Bribe Payers Index) indicates more frequent bribery and corruption, while a high score on the index indicates a lack of bribe-paying and corruption. See *id.*; *Corruption Perceptions Index*, Transparency Int’l, <https://www.transparency.org/en/cpi/2021> (last visited Sept. 24, 2022).

15. See *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, OECD, <https://www.oecd.org/corruption/countryreportsontheimplementationoftheoccdanti-briberyconvention.htm> (last visited Oct. 18, 2022).

“example” cases to demonstrate the States’ political willpower to enforce — is not enough alone to stamp out corruption.

III. THE WORKING GROUP ON BRIBERY AND THE PEER REVIEW PROCESS

Article 12 of the Anti-Bribery Convention provides a mechanism for monitoring States Parties’ enforcement efforts:

The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference.¹⁶

Importantly, the Anti-Bribery Convention facilitates multilateral legal assistance and extradition¹⁷ and provides for systematic monitoring of implementation and enforcement by the OECD’s WGB, which is comprised of representatives from the States Parties to the Convention.¹⁸ This monitoring provision has evolved into a peer review system following the Convention’s entry into force, “predicated upon consensus building and peer pressure.”¹⁹ As part of the monitoring process, Parties to the Convention are subject to compulsory review by their peers. Experts from different countries which are part of the WGB serve as the examiners of each reviewed country to compile a preliminary report and recommendation, subject to evaluation and vote by the Parties to the Convention in the WGB, which meets four times each year.²⁰ The reviewed party may not veto the final report or recommendation, and all such reports are publicly available on the OECD web

16. OECD Anti-Bribery Convention, *supra* note 11, art. 12.

17. *See id.* arts. 9, 10.

18. *See id.* art. 12.

19. ROSE, *supra* note 2, at 69.

20. *See Country monitoring of the OECD Anti-Bribery Convention*, OECD, <https://www.oecd.org/corruption/countrymonitoringoftheoecdanti-briberyconvention.htm> (last visited May 17, 2021); *see* Organization for Economic Cooperation and Development [OECD], *OECD Working Group on Bribery in International Business Transactions 2021 Annual Report* (2021), <https://www.oecd.org/corruption/anti-bribery/anti-briberyconvention/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm> (last visited Sept. 24, 2022); *Phase 1 country monitoring of the OECD Anti-Bribery Convention*, OECD, <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/phase1countrymonitoringoftheoecdanti-briberyconvention.htm> (last visited Sept. 24, 2022).

site.²¹ Following the publication of the report, the WGB monitors the reviewed party's response and efforts to implement the recommendations. Should the reviewed party's response be deemed inadequate, the WGB may use a variety of tools to promote greater compliance, such as repeated monitoring, sending letters to country leaders, issuing a formal statement on the OECD website, requiring an action plan, and suspending the reviewed country's advancement to the next monitoring phase.²²

The WGB conducts peer review monitoring in sequential phases, focusing on domestic implementing legislation and enforcement efforts.²³ Phase I assesses the adequacy of the State's implementing legislation (i.e., a national law criminalizing bribery) through a questionnaire answered by the reviewed party itself.²⁴ Importantly, these self-reported answers provide the only basis for the WGB's Phase I review, with no input from the private sector or civil society.²⁵ The WGB analyzes the sufficiency of national legislation with precision, measuring whether the law covers bribes to all foreign public officials — including employees of state-owned or state-controlled enterprises, for example — and applies to “undue” advantages and “improper” benefits.²⁶ The WGB may still make recommendations for better clarity to ensure such laws fully apply as intended in the Convention, but thus far, every State has passed Phase I of the peer review, at least indicating

21. See *Country monitoring of the OECD Anti-Bribery Convention*, OECD, <https://www.oecd.org/corruption/countrymonitoringoftheoecdanti-briberyconvention.htm> (last visited Apr. 8, 2022).

22. See *id.*

23. See *id.*; see also Organization for Economic Cooperation and Development [OECD], *OECD Working Group on Bribery in International Business Transactions 2021 Annual Report*, <https://www.oecd.org/corruption/anti-bribery/anti-briberyconvention/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm> (last visited May 17, 2021); Organization for Economic Cooperation and Development [OECD], *Fighting the Crime of Foreign Bribery* (2018), <https://www.oecd.org/daf/anti-bribery/Fighting-the-crime-of-foreign-bribery.pdf>.

24. *Phase I country monitoring of the OECD Anti-Bribery Convention*, OECD, <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/phaseIcountrymonitoringoftheoecdanti-briberyconvention.htm> (last visited Sept. 24, 2022).

25. *Id.*

26. *Id.*; see, e.g., Organization for Economic Cooperation and Development [OECD], *Implementing the OECD Anti-Bribery Convention: Phase I Report: Arg. 1, 4-6* (Jun. 29, 2019), <https://www.oecd.org/corruption/anti-bribery/Argentina-Phase-Ibis-Report-ENG.pdf>. For more country reports on Phase I, see *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, OECD, <http://www.oecd.org/daf/anti-bribery/countryreportsonteimplementationoftheoecdanti-briberyconvention.htm> (last visited Sept. 24, 2022).

in “largely conform[ing]” legal text that they are committed to the main substance of the Convention.²⁷

Phase II evaluates the State’s application of the legislation — through another questionnaire and self-report — and involves week-long on-site visits conducted by lead examiners (usually two appointed parties from the WGB).²⁸ During these on-site visits, lead examiners and OECD Secretariat members meet with judges, police, tax authorities, and other law enforcement agencies to discuss the application of the Phase I legislation. In theory, the visits may also include informal meetings with representatives of the private sector and civil society, but there is no formal involvement of these groups in the evaluation process.²⁹

Phase III measures each State’s actual enforcement of the Convention. In 2009, the WGB adopted this phase to act as a permanent cycle of peer review. Phase III is much shorter and more narrowly focused than Phase II, concentrating on the reviewed country’s i) “progress made . . . on weaknesses identified” in Phase II, ii) “issues raised by changes in the [country’s] domestic [implementing] legislation or [in the Parties’] institutional framework,” and iii) “enforcement efforts and results.”³⁰ The review includes another questionnaire for the reviewed party’s self-report and a three-day on-site visit, with similar participants to the Phase II visits.³¹

Finally, Phase IV addresses similar topics as Phase III, but it also considers “cross-cutting issues tailored to [a] specific country[’s] needs.”³² Phase IV also includes a questionnaire and two-to-four-day on-site

27. See *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, OECD, <http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm> (last visited Sept. 24, 2022); see, e.g., Organization for Economic Cooperation and Development [OECD], *Implementing the OECD Anti-Bribery Convention: Phase 1 Report: Peru* 1, 41 (Mar. 6, 2019), <https://www.oecd.org/corruption/anti-bribery/OECD-Phase-1-Report-Peru-ENG.pdf>.

28. See Organization for Economic Cooperation and Development [OECD], *Phase 2 country monitoring of the OECD Anti-Bribery Convention*, <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/phase2countrymonitoringoftheoecdanti-briberyconvention.htm> (last visited Apr. 10, 2022).

29. See *id.*

30. Organization for Economic Cooperation and Development [OECD], *Phase 3 country monitoring of the OECD Anti-Bribery Convention*, <https://www.oecd.org/daf/anti-bribery/phase3countrymonitoringoftheoecdanti-briberyconvention.htm> (last visited July 10, 2022).

31. *Id.*

32. Organization for Economic Cooperation and Development [OECD], *Country monitoring of the OECD Anti-Bribery Convention*, <https://www.oecd.org/corruption/countrymonitoringoftheoecdanti-briberyconvention.htm> (last visited May 17, 2021).

visits.³³ The WGB invites private sector and civil society to participate in the evaluations through written submissions to the WGB only in Phase IV.³⁴

Article 12's focus on enforcement is vague, calling only for cooperation in "systematic follow-up" to promote monitoring and enforcement.³⁵ However, *actual enforcement* is not included as a binding piece of the Convention, and States Parties are not bound to investigate or prosecute any number of cases.³⁶ Such a vague provision necessitates that States Parties commit largely on their own regard to taking action, in order for the Convention to be effective and to prevent opportunities for free-riding and distrust among members.³⁷

In 2009, the WGB introduced a new general recommendation ("2009 Recommendation"), re-emphasizing the principles of the Convention on the tenth anniversary of the Convention's entry into force and reaffirming parties' responsibilities to mitigate foreign bribery.³⁸ New, nonbinding recommendations included "combating small facilitation payments, protecting whistleblowers, and improving communication between public ... [sector employees] and law enforcement."³⁹ Additionally, the new document recommends ensuring that companies cannot avoid punishment by using agents or intermediaries for bribes and promotes better coordination among member states on investigations and recovery of international bribery proceeds.⁴⁰ The 2009 Recommendation also included "Good Practice Guidance on Internal Controls, Ethics, and Compliance" for use by companies to improve compliance and prevent bribery by their employees.⁴¹

33. See Organization for Economic Cooperation and Development [OECD], *Phase 4 country monitoring of the OECD Anti-Bribery Convention*, <https://www.oecd.org/daf/anti-bribery/oecd-anti-bribery-convention-phase-4.htm> (last visited July 10, 2022).

34. See *id.*

35. OECD Anti-Bribery Convention, *supra* note 12, art. 12.

36. Rachel Brewster, *The Domestic and International Enforcement of the OECD Anti-Bribery Convention*, 15 CHI. J. INT'L L. 84, 105 (2014).

37. *Id.* at 106.

38. See generally Organization for Economic Cooperation and Development [OECD], *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (Nov. 26, 2009), <https://www.oecd.org/corruption/anti-bribery/OECD-Anti-Bribery-Recommendation-ENG.pdf>.

39. *Governments Agree to Step Up Fight Against Bribery*, OECD (Dec. 9, 2009), <https://www.oecd.org/corruption/governmentsagreestostepupfightagainstbribery.htm>.

40. See *id.*

41. See generally Organization for Economic Cooperation and Development [OECD], *Good Practice Guidance on Internal Controls, Ethics, and Compliance* (adopted Feb. 18, 2010), <https://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44884389.pdf>.

Most recently, the OECD published the “2021 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions” (“2021 Recommendation”) following an extensive review of the 2009 Recommendation.⁴² This newest Recommendation is similarly nonbinding, but it also includes agreements to “strengthen enforcement of anti-bribery laws [and] address[] the demand side of foreign bribery.”⁴³ Additionally, the Recommendation “enhanc[es] international cooperation, introduc[es] principles . . . [for] non-trial resolutions in foreign bribery cases,” provides incentives for companies’ anti-corruption compliance, and aims to effectively protect reporting persons.⁴⁴ Notably, the 2021 Recommendation responds to the lack of enforcement by States Parties since the 2009 Recommendation, calling for greater proactive detection and investigation of foreign bribery, increased international cooperation between law enforcement agencies, and collaboration in multi-jurisdictional cases.⁴⁵

The primary goal of the WGB and the peer review process is to encourage vigorous enforcement of the OECD Convention. Such a system provides a springboard for countries to work together and hold each other accountable for adopting anti-bribery provisions in their own domestic legal systems and implementing those laws, to further mitigate the impact of bribery worldwide.

Notably, the U.N. Convention against Corruption (“UNCAC”), adopted in 2003, does not have a dedicated working group or other peer review process.⁴⁶ This Convention covers many different forms of corruption, including “bribery, trading in influence, abuse of functions, and various acts of corruption in the private sector,” and addresses “preventive measures, criminalization and law enforcement, international cooperation, asset recovery, and technical assistance and information exchange.”⁴⁷ Today, UNCAC has 140 signatories from all over the world, undisputedly gathering a broader range of support and members than the OECD Anti-Bribery Convention.⁴⁸

42. See *2021 OECD Anti-Bribery Recommendation*, OECD (Nov. 26, 2021), <https://www.oecd.org/daf/anti-bribery/2021-oecd-anti-bribery-recommendation.htm>.

43. *Id.*

44. *Id.*

45. *Id.*

46. U.N. Office on Drugs and Crime, U.N. *Convention Against Corruption* (2004), <https://www.unodc.org/unodc/en/corruption/uncac.html> (last visited Apr. 8, 2022).

47. *Id.*

48. *Id.*

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When compared to UNCAC, the Anti-Bribery Convention has seen relative success. UNCAC, on the other hand, has been viewed as ineffective, likely due to its breadth of goals, large membership, and, importantly, lack of binding norms and peer review process.⁴⁹ The WGB and peer review process, unique to the OECD Anti-Bribery Convention, has likely been the instrumental piece in achieving relative success with regard to all 44 signatories progressing past Phase I with domestic implementing legislation.⁵⁰ However, relative success is not enough. Implementing legislation that criminalizes foreign bribery is not *true* success. Enforcement of these laws and the downstream effects of such enforcement — deterrence and lower levels of corruption worldwide — are the marks of true success, which have yet to be seen.

Given the OECD's primary goal in the Anti-Bribery Convention of criminalizing bribery of foreign public officials, this Note will focus its analysis on countries' actual, not merely formal, compliance with Articles 1 and 12 — their commitment to monitoring and vigorous enforcement of domestic legislation.

IV. DOMESTIC (LACK OF) ENFORCEMENT OF THE CONVENTION

Implementing legislation that criminalizes bribery of foreign public officials is only the first step of an important process; States Parties must also commit to actually enforcing the relevant domestic law.

Measuring enforcement is difficult, but the most popular metric analyzes the number of cases brought by individual parties to the Anti-Bribery Convention. Using this metric, only a handful of countries have demonstrated commitment to the OECD process. While each State Party has passed Phase I of the peer review — with national legislation

49. *Id.*; see generally Cecily Rose, *The Limitations of the U.N. Convention Against Corruption, in International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems*, in INTERNATIONAL ANTI-CORRUPTION NORMS: THEIR CREATION AND INFLUENCE ON DOMESTIC LEGAL SYSTEMS INTERNATIONAL ANTI-CORRUPTION NORMS: THEIR CREATION AND INFLUENCE ON DOMESTIC LEGAL SYSTEMS (2015), <https://academic.oup.com/book/36270/chapter-abstract/316512651?redirectedFrom=fulltext>.

50. Organization for Economic Cooperation and Development [OECD], *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of May 2018*, <https://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf> (last visited Apr. 10, 2022); Organization for Economic Cooperation and Development [OECD], *Working Group on Bribery in International Business Transactions: Monitoring Schedule December 2016 - June 2026*, <https://www.oecd.org/corruption/anti-bribery/Phase-4-Evaluation-Calendar.pdf> (last updated June 2020) (demonstrating the schedule of parties due to undergo Phase I and subsequent reviews); *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, OECD, <http://www.oecd.org/daf/anti-bribery/countryreportsonthetheoecdanti-briberyconvention.htm> (last visited Sept. 24, 2022) (demonstrating all parties have passed Phase I).

criminalizing bribery of foreign public officials — the United States and Germany have historically borne the largest burden of enforcing anti-bribery laws and prosecuting individuals and corporations responsible for bribery.⁵¹ In the two decades since the adoption of the OECD Anti-Bribery Convention, almost 75 percent of the criminal cases for bribing foreign public officials among OECD member states were brought by the United States or Germany.⁵² The United States alone brought almost 75 percent of all administrative and civil cases among OECD members against natural and legal persons for foreign bribery.⁵³ In 2020, Transparency International reported that only four countries — the U.S., U.K., Switzerland, and Israel — are actively investigating incidents of bribing foreign public officials.⁵⁴ Germany recently slipped from active to moderate enforcement, largely due to its decreased anti-bribery enforcement against companies.⁵⁵ Even more concerning, thirty-four parties have limited to no enforcement,⁵⁶ and twenty-one parties have never completed a foreign bribery case.⁵⁷

Although resource allocation and the number of bribery incidents may play a role in the number of cases brought by other countries, prosecution by members of the OECD Convention is conducted almost entirely by only four countries.⁵⁸ Ironically, burden-sharing does not appear to be happening within an organization that aimed for consensus-building and positive peer pressure,⁵⁹ and even worse, the majority

51. Lianlian Liu, *The Dynamic of General Compliance with the OECD Anti-Bribery Convention: Two Interpretive Approaches*, 69 CRIME, L., AND SOC. CHANGE 615, 618 (2018); ROSE, *supra* note 2, at 68–69; Elizabeth Acorn, *Twenty Years of the OECD Anti-Bribery Convention: National Implementation and Hybridization*, 51 U.B.C.L. Rev. 613, 616 (2018).

52. Organization for Economic Cooperation and Development [OECD], *2019 Enforcement of the Anti-Bribery Convention: Investigations, Proceedings, and Sanctions*, at 2–4 (Dec. 23, 2020), <https://www.oecd.org/daf/anti-bribery/OECD-Anti-Bribery-Convention-Enforcement-Data-2020.pdf>.

53. *Id.* at 5.

54. See Transparency Int'l, *supra* note 4, at 13; Transparency Int'l, *Transparency International Calls on Governments to Crack Down on Foreign Bribery* (Oct. 23, 2014), <https://www.transparency.org/en/press/transparency-international-calls-on-governments-to-crack-down-on-foreign-br/#>.

55. See Transparency Int'l, *supra* note 4, at 13.

56. See Transparency Int'l, *supra* note 4, at 12.

57. See Hortense Jongen, *Peer Review and Compliance with International Anti-Corruption Norms: Insights from the OECD Working Group on Bribery*, 47 REV. INT'L STUD. 331, 341 (Mar. 16, 2021); Organization for Economic Cooperation and Development [OECD], *Fighting the Crime of Foreign Bribery: The Anti-Bribery Convention and the OECD Working Group on Bribery*, at 5, (Dec. 2018), <http://www.oecd.org/daf/anti-bribery/Fighting-the-crime-of-foreign-bribery.pdf>.

58. See Liu, *supra* note 51, at 621; ROSE, *supra* note 2, at 93–94; *Phase 4 Country Monitoring of the OECD Anti-Bribery Convention*, *supra* note 33.

59. See ROSE, *supra* note 2, at 69.

of parties' lack of investigation leaves room for possibly countless bribery incidents to go forward, unhindered and unpunished.

Various general theories of compliance offer insight into why States Parties may choose to comply — or not comply — with the Anti-Bribery Convention's implicit demand for enforcement of national legislation. States Parties may be rational actors, who will act based on incentive structures and cost-benefit analyses.⁶⁰ States Parties may also be generally inclined to comply but may lack the resources and capacity to do so, or they may lack a clear understanding of the State's responsibilities, due to ambiguous treaty language.⁶¹ Finally, States may be "positively predisposed to compliance with international agreements, as long as these norms are regarded as legitimate" — but when the norms or organization itself seem illegitimate, a State may choose not to comply.⁶²

These general theories are evident in States' noncompliance and low levels of enforcement of domestic legislation mirroring Article 1 of the Convention. First, the incident-based nature of foreign bribery may contribute to noncompliance.⁶³ Some States may simply house more firms predisposed to bribery or have an environment in which foreign firms may want to do business — like the United States with the New York Stock Exchange — and therefore have more incidents they can prosecute.⁶⁴ However, metrics including the State's economy size, level of exports, amount of foreign direct investment, and involvement in sectors with high risk of bribery may indicate the presence of corruption in many countries that is likely going uninvestigated and unprosecuted.⁶⁵

60. See Jongen, *supra* note 57, at 334–35; George W. Downs & Michael A. Jones, *Reputation, Compliance and International Law*, 31 J. LEGAL STUD. S95, S97 (2002); see generally George W. Downs, David M. Roche, & Peter M. Barsboom, *Is the Good News About Compliance, Good News About Cooperation?*, 50 INT'L ORG. 379 (1996).

61. Jongen, *supra* note 57, at 335. For further reading on these topics, see generally ABRAM CHAYES & ANTONIA CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (Harv. Univ. Press ed., 1995); Abram Chayes, Antonia Chayes, & Ronald Mitchell, *Managing Compliance: A Comparative Perspective*, in *ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS* (Edith Brown Weiss & Harold Jacobsen eds., 1998); Harold H. Koh et al., *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); Miriam Hartlapp, *On Enforcement, Management and Persuasion: Different Logics of Implementation Policy in the EU and the ILO*, 45 J. COMMON MKT. STUD. 653 (2007).

62. Jongen, *supra* note 57, at 335.

63. See Liu, *supra* note 51, at 621; ROSE, *supra* note 2, at 93–94.

64. See Brewster, *supra* note 36, at 103; ROSE, *supra* note 2, at 91.

65. See Transparency Int'l, *supra* note 4, at 32; Isabel Gernand, *Only Four Countries Actively Enforce OECD Anti-Bribery Convention*, GLOBAL COMPLIANCE NEWS (Oct. 28, 2014), <https://globalcompliancencews.com/only-four-countries-actively-enforce-oecd-anti-bribery-convention/>.

Additionally, States' widely differing capacities and resource allocation may force countries to focus their law enforcement efforts on domestic issues. For example, Greece and Italy have a high prevalence of corruption and may need to tackle domestic bribery before investigating foreign bribery.⁶⁶ Beyond domestic corruption, national law enforcement agencies may prioritize other severe illegal activity — like violent crime or national security threats⁶⁷ — or may simply lack resources generally to uncover needed evidence for prosecution.⁶⁸ In 2020, Transparency International estimated that lack of resources, staff, and training for law enforcement or courts remained problematic for twenty-five countries.⁶⁹ Without the ability to devote significant resources to monitoring and evidence collection, the scant resources that may be available would be wasted on likely acquittals resulting from insufficient evidence and criminal burdens of proof.

Some defectors choose not to investigate or prosecute due to economic or political factors, violating Article 5's prohibition of such considerations. Although States have prosecutorial discretion, Article 5 explains that States "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."⁷⁰ The OECD recently commented on Turkey's inexplicably low level of enforcement, possibly due to improper economic or political considerations,⁷¹ and Canada's halted investigation, possibly motivated by national economic interests, into SNC Lavalin for bribery of Libyan officials.⁷² Although such considerations are explicitly prohibited, the Convention lacks any real enforcement mechanism to prevent countries from using their prosecutorial discretion in a self-interested way.

66. See Del Monte Alfredo & Pennachio Luca, *Corruption, Government Expenditure and Public Debt in OECD Countries*, 62 COMPAR. ECON. STUDIES 739, 739 (2020).

67. See Brewster, *supra* note 36, at 102.

68. See Tarullo, *supra* note 10, at 707–08; Jongen, *supra* note 57, at 349.

69. Transparency Int'l, *supra* note 4, at 28.

70. OECD Anti-Bribery Convention, *supra* note 11, art. 5.

71. *Turkey's foreign bribery enforcement framework needs to be urgently strengthened and corporate liability legislation reformed*, OECD (Mar. 14, 2019), <https://www.oecd.org/corruption/turkey-foreign-bribery-enforcement-framework-needs-to-be-urgently-strengthened-and-corporate-liability-legislation-reformed.htm>.

72. *OECD will follow Canadian proceedings addressing allegations of political interference in foreign bribery prosecution*, OECD (Mar. 11, 2019), <https://www.oecd.org/corruption/oecd-will-follow-canadian-proceedings-addressing-allegations-of-political-interference-in-foreign-bribery-prosecution.htm>; Mark Gollom, *What you need to know about the SNC-Lavalin affair*, CAN. BROAD. CORP. (Feb. 13, 2019), <https://www.cbc.ca/news/politics/trudeau-wilson-raybould-attorney-general-snc-lavalin-1.5014271>.

As a result, the onus is on the State to commit, in more than its passive Convention signature, to not allowing these factors to affect its decision-making.

Pessimistically, some States may simply want the benefit of an appearance of cooperation while seriously distrusting a global regime or prefer free-riding off other countries' enforcement.⁷³ Recent populist movements across the world, including those in Hungary, Poland, the Czech Republic, and Slovakia, have shown citizens' dissatisfaction with the top-down international order and preference of "nation first" policies that solely focus on the immediate benefits to their country.⁷⁴ Enforcement of the OECD Convention, in their likely view, is not only acceptance of internationally-mandated rules but doing so at a possible detriment to national economies and corporations. The Working Group on Bribery has grown increasingly concerned with Hungary's lack of enforcement; for example, the Group noted that Hungary had not initiated a case in more than nine years while growing increasingly popular as a recipient of foreign direct investment.⁷⁵

Relatedly, individual interests may outweigh the perceived benefits of cooperation when it comes to enforcement of anti-bribery provisions. Other States' enforcement reduces competition for defectors' businesses and increases the defectors' businesses' share of foreign contracts through bribery.⁷⁶ On the other hand, distrust of others' willingness to enforce leads to noncompliance; a possible cooperator's businesses would be put at a serious disadvantage if other States did not enforce their anti-bribery legislation. This distrust and individual interest approach — typical of prisoner's dilemma situations — harms not only the success of the Convention but more broadly the efficiency of international markets.⁷⁷ To this group of defectors, the incentives of

73. Alexander Cooley & Daniel Nexon, *Why Populists Want a Multipolar World*, FOREIGN POL'Y (Apr. 25, 2020), <https://foreignpolicy.com/2020/04/25/populists-multipolar-world-russia-china/>; Liu, *supra* note 51, at 622.

74. See generally Tim Gosling, *Europe's Populist Governments Have a Problem: Their Capitals*, FOREIGN POL'Y (Nov. 4, 2019), <https://foreignpolicy.com/2019/11/04/europes-populist-governments-have-a-problem-their-capital-cities-czech-republic-hungary-poland-slovakia/>; James McBride, *Europe Wrestles With Hungary's Populist Challenge*, COUNCIL ON FOREIGN RELS. (Sept. 21, 2018), <https://www.cfr.org/in-brief/europe-wrestles-hungarys-populist-challenge>.

75. See *Hungary must enforce its foreign bribery offence against companies, including foreign subsidiaries*, OECD (Aug. 1, 2019), <https://www.oecd.org/newsroom/hungary-must-enforce-its-foreign-bribery-offence-against-companies-including-foreign-subsidiaries.htm>.

76. See Brewster, *supra* note 36, at 96.

77. See Brewster, *supra* note 36, at 96–97.

global cooperation, multilateral enforcement, decreased corruption, and better economic health in the long term are simply not enough.

Different parties likely have various motivations for their noncompliance, through one or more of the previously listed theories. Regardless of the reasons, the majority's noncompliance currently hinders the Convention's success. Any measures taken or changes made to increase enforcement would likely need to understand these varying reasons for noncompliance and appeal to countries' self-interests in order to gain the largest amount of improvement.

V. INCREASING ENFORCEMENT AMONG STATES PARTIES

If commitment to both the Article 1 standards and the enforcement of the OECD Convention are requisite to the regime's success, the question then remains how to increase States Parties' willingness to enforce the terms of the Convention and their own implementing legislation. The Anti-Bribery Convention signatories have a number of tools at their disposal to encourage and increase enforcement among parties.

First, threatening sanctions mechanisms and applying peer pressure has already been demonstrated as an effective means of pressuring potential free riders.⁷⁸ The United Kingdom was part of the first group to sign the OECD Convention in 1998 but notoriously lagged in its implementation of the Convention into its law.⁷⁹ In its Phase I report for the U.K., the OECD noted that Parliament reviewed its laws and believed existing law, the Prevention of Corruption Act 1906, was already sufficient to meet its obligations under the Convention, though it planned to adopt a new, comprehensive anti-corruption statute.⁸⁰ Although this law criminalized foreign bribery, the Working Group concluded the law did not clearly apply to bribery of foreign public officials.⁸¹ Without such a provision, the United Kingdom would be unable to fulfill its obligations under the Anti-Bribery Convention, because U. K. laws governing money laundering, extradition, and mutual legal assistance have a listed criminal offense as a prerequisite.⁸² Additionally,

78. See Liu, *supra* note 51, at 618; ROSE, *supra* note 2, at 88–89; Jongen, *supra* note 57, at 343; Philip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 LAW & POL'Y INT'L BUS. 305, 362 (1997).

79. Rose, *supra* note 2, at 84–86.

80. Organization for Economic Cooperation and Development [OECD], *United Kingdom: Review of the Implementation of the Convention and 1997 Recommendation*, at 1 (1999), <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2754266.pdf> (last visited Apr. 9, 2022).

81. See *id.* at 25.

82. See *id.*

the U.K. law did not provide for nationality jurisdiction over bribery offenses, which severely limited the U.K.'s ability to prosecute its own citizens for bribery committed outside of U.K. territory.⁸³ As a result, the U.K. did not initially pass Phase I.⁸⁴

In Phase I Bis,⁸⁵ the OECD reviewed changes the U.K. made via the Anti-Terrorism, Crime and Security Act 2001.⁸⁶ New coverage of bribery and corruption offenses was added to this law, rather than to a dedicated anti-corruption statute, due to the government's need to respond to the events of September 11, 2001.⁸⁷ However, the scope of these amendments — and the extent to which these amendments responded to the Phase I concerns — was limited to extending nationality jurisdiction to the relevant bribery offenses, clarifying the Act's applicability to "foreign" bribery, and lifting restrictions on tax authorities' information-sharing to facilitate investigation and prosecution of bribery offenses.⁸⁸ Though these changes were eventually deemed sufficient to meet the terms of the Convention, the WGB noted serious uncertainties that remained in the law, particularly related to the definition of a foreign public official, and emphasized the U.K.'s prior commitment to adopt a dedicated, comprehensive anti-corruption statute.⁸⁹

The U.K.'s progression continued to be slow. Although it moved to Phase II, the U.K.'s progressions stalled yet again, moving to Phase II Bis rather than progressing towards Phase III due to the U.K.'s lack of implementation of recommendations regarding the legislation's scope and its expected lackluster effects.⁹⁰ The U.K. then underwent a Phase I review for the proposed U.K. Bribery Act in 2010, more than ten years

83. *See id.* at 26.

84. *See id.* at 24; *United Kingdom - OECD Anti-Bribery Convention*, OECD, <https://www.oecd.org/corruption/unitedkingdom-oecdanti-briberyconvention.htm> (last visited Apr. 9, 2022).

85. Phase I Bis is a repeated evaluation by the WGB when a country has not adequately implemented the Convention's requirements for that phase. THE OECD CONVENTION ON BRIBERY: A COMMENTARY 43 (Mark Pieth, Lucinda A. Low, & Nicola Bonucci eds., 2d ed., 2014), https://www.legalanthology.ch/t/pieth_oecd-convention-bribery_2014.pdf.

86. Organization for Economic Cooperation and Development [OECD], *United Kingdom: Review of the Implementation of the Convention and 1997 Recommendation, Phase I Bis Report*, at 1–2 (2003), <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2498215.pdf>.

87. *See id.*

88. *See id.*

89. *Id.* at 16–17.

90. *United Kingdom - OECD Anti-Bribery Convention*, *supra* note 84; Organization for Economic Cooperation and Development [OECD], *United Kingdom: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, at 80–83 (2005), <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/34599062.pdf>.

after the originally promised comprehensive anti-corruption law.⁹¹ However, this step, though in the right direction, was still taken far behind many of the U.K.'s peer countries — and the U.K. delayed its entry into force.

In 2011 — more than a decade after originally signing the Convention — the U.K. announced, for the third time, that it would delay the U.K. Bribery Act's entry into force to later in the year.⁹² Chairman of the OECD Working Group expressed “disappoint[ment] that despite public commitments” the U.K. would continue to delay its U.K. Bribery Act.⁹³ The Working Group had “already threatened to blacklist British companies if they remained under-regulated”⁹⁴ and the Chairman warned a “‘blacklist’ . . . would increase the cost of doing business with [U.K.] . . . companies”⁹⁵ by requiring companies doing business with U.K. corporations to set aside a portion of the contract value — five percent — “against the possibility that they may be held responsible if the U.K. firm engaged in bribery.”⁹⁶

The OECD itself does not have the legal authority to “blacklist” countries, and the Financial Action Task Force (“FATF”) could only list “‘high-risk and non-cooperative jurisdictions’ with . . . [insufficient] anti-money laundering legislation,” not corporations with bad track records or histories of corruption.⁹⁷ Further, the World Bank’s

91. See Organization for Economic Cooperation and Development [OECD], *United Kingdom: Phase 1ter*, at 1, 3 (Dec. 16, 2010), <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/46883138.pdf>.

92. See *Anticorruption Alert: Implementation of U.K. Bribery Act Delayed*, JONES DAY (Feb. 2011), <https://www.jonesday.com/en/insights/2011/02/anticorruption-alert-implementation-of-uk-bribery-act-delayed>.

93. *UK: Chair of OECD Working Group on Bribery concerned over delay of new Bribery Act*, OECD (Feb. 1, 2011), <https://www.oecd.org/newsroom/ukchairfoecdworkinggrouponbriberyconcernedoverdelayofnewbriberyact.htm>.

94. David Leigh, *British Firms Face Bribery Blacklist, Warns Corruption Watchdog*, GUARDIAN (Jan. 31, 2011), <https://www.theguardian.com/business/2011/jan/31/british-firms-face-bribery-blacklist>.

95. ROSE, *supra* note 2, at 89.

96. ROSE, *supra* note 2, at 89.

97. ROSE, *supra* note 2, at 91. For more information, see generally Fin. Action Task Force [FATF], *High-risk and other monitored jurisdictions*, <https://www.fatf-gafi.org/en/topics/high-risk-and-other-monitored-jurisdictions.html> (fatf_releasedate) (last visited May 17, 2021); Fin. Action Task Force [FATF], *About the Non-Cooperative Countries and Territories (NCCT) Initiative*, <https://www.fatf-gafi.org/en/publications/Fatfgeneral/Aboutthenon-cooperativecountriesandterritoriesncctinitiative.html> (fatf_releasedate) (last visited May 17, 2021); Fin. Action Task Force [FATF], *Annual Review of Non-Cooperative Countries and Territories 2006-2007: Eighth NCCT Review* (Oct. 12, 2007), <https://www.fatf-gafi.org/content/fatf-gafi/en/publications/Fatfgeneral/Aboutthenon-cooperativecountriesandterritoriesncctinitiative.html>.

debarment mechanism can only be used for corporations who have already bribed or committed a corrupt act; it may not apply to those companies that are simply under-regulated or with poor internal oversight.⁹⁸

However, even without the particular legal authority to support such threats, the potential action by an international regulator — or the very real possible action by individual member states — seemed to have its intended effect; the U.K. finally published the necessary guidance under the U.K. Bribery Act and allowed the law to take effect.⁹⁹

Peer pressure within the Working Group must be *used* to actually force free-riding States Parties to take action. Following a lagging peer review process and threatened action by the Chairman, the WGB writ large, and individual member states, the U.K. changed its course.¹⁰⁰ It adopted new legislation, published new guidance, and allowed the law to take effect. Quickly thereafter, it progressed to Phase III and straight to Phase IV, picking up speed and differing significantly from its prior pace in its compliance with the Convention.¹⁰¹ Today, the U.K. has joined the ranks of the few countries actively taking enforcement action against violators.

Second, increased formal involvement of the private sector and civil society organizations will provide more holistic information and increase transparency and trust between signatories. Given the nature of enforcement, establishing concrete criteria to observe compliance and achievement is difficult. For example, passing implementing legislation is an easy box to check, but assessing enforcement necessarily implies consideration of differing economies, cultures, political and legal systems, judicial traditions, and prevalence of corrupt conduct.¹⁰² Creating a system that includes these factors would require engaging companies, the private sector at large, and civil society organizations more fully in the review process, rather than via informal exchanges during site visits.¹⁰³ WGB Questionnaires could be formally answered

98. *Id.* at 91–92.

99. See ROSE, *supra* note 2, at 92.

100. See *id.* at 84–86, 91–92; David Leigh, *British Firms Face Bribery Blacklist, Warns Corruption Watchdog*, GUARDIAN (Jan. 31 2011), <https://www.theguardian.com/business/2011/jan/31/british-firms-face-bribery-blacklist>.

101. *United Kingdom - OECD Anti-Bribery Convention*, *supra* note 84; Organization for Economic Cooperation and Development [OECD], *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom*, at 80 (Mar. 2012), <https://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf>.

102. See Liu, *supra* note 51, at 625, 626.

103. See *Phase 3 country monitoring of the OECD Anti-Bribery Convention*, *supra* note 30.

by these groups, giving weight to responses other than those simply given by the country. Private sector and civil society groups may be better-equipped and more honest about the State's enforcement efforts than the self-reporting State itself — thereby giving force to other voices that may lead to States Parties having more trust in the results of each phase of monitoring.

Additionally, allowing private sector companies and civil society groups to act as whistleblowers via civil actions or reporting mechanisms may also facilitate using competition as a tool in the States Parties' playbook. Whistleblowers may report to both their own country and the home state of the competitor involved in bribery; doing so would allow the home state the opportunity to regulate or prosecute, and the whistleblower's state to exert pressure on the noncompliant State.¹⁰⁴ Worries about disadvantaging oneself and one's companies can transform free-riders into active political participants, pressuring national regulators of bribe-paying companies. In this way, private competitors and public competitors alike can use pressure to force action.

To make this possible, future general OECD recommendations, or better yet, future amendments to the Anti-Bribery Convention, should include increased protections for whistleblowers. The European Union has made significant progress in this area through the Whistleblower Protection Directive, which is “poised to improve . . . legal and institutional frameworks” within the bloc.¹⁰⁵ However, whistleblower protections remain likely inadequate in more than 25 States Parties.¹⁰⁶ For example, Canada's protection of whistleblowers seems doubtful with a criminal standard of proof, and zero cases have been brought under the provision.¹⁰⁷ Hungary's protections are even more sparse.¹⁰⁸ Currently, OECD recommendations to specific countries like these examples may reference increased protection for whistleblowers; however, such recommendations have been ignored by some countries that continue to progress to the next phase of the peer review.¹⁰⁹ Drafting a binding amendment to the Convention that includes legal standards to

104. See Liu, *supra* note 51, at 631–35.

105. See Transparency Int'l, *supra* note 4, at 27.

106. See Transparency Int'l, *supra* note 4, at 28.

107. See Organization for Economic Cooperation and Development [OECD], *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada*, at 1, 55 (Mar. 2011), <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Canadaphase3reportEN.pdf>.

108. See Organization for Economic Cooperation and Development [OECD], *Implementing the OECD Anti-Bribery Convention: Phase 4 Report: Hungary*, at 1, 21 (Jun. 27, 2019), <https://www.oecd.org/corruption/OECD-Hungary-Phase-4-Report-ENG.pdf>.

109. See, e.g., *id.*

be domestically adopted in protection of whistleblowers — similar to the Convention's requirement for implementing legislation in Article 1 — would be a positive step in minimizing risk to whistleblowers and increasing the likelihood that bribery will be reported to the relevant authorities. These protections should include lower burdens of proof than required for the criminal, corrupt conduct itself and long statutes of limitation, allowing whistleblowers — who may lose their livelihood in retaliatory action — time to find other employment and resources to file suit.

Third, the OECD should clarify and define each of the Article 5 factors that are prohibited considerations within each State's prosecutorial discretion, including “national economic interest” and “relations with another State,” in guidance directed to the Convention's parties.¹¹⁰ Doing so would better assist peers in understanding when the Convention may have been violated in a country's choice not to investigate and in applying peer pressure to investigate when necessary. Additional guidance on the scope of Article 5 — whether the presence of one of these factors, along with accepted reasons for choosing not to investigate, violates the Convention — would also better assist States Parties in using quarterly meetings and public statements to pressure the non-actor into investigating.¹¹¹

Fourth, decentralization would improve information-sharing and individual country involvement — and would likely appeal to “nation first” objectors. By restructuring the WGB's peer review mechanism, States Parties may be more involved in the peer review process and better able to exert stronger peer pressure on specific States.¹¹² In this scenario, the OECD WGB could change the supervisor-signatory relationship. Currently, the WGB and a specific State exchange requests, questionnaires, and information prior to sharing that information with all other States Parties.¹¹³ Instead, information collection and information flow could be expanded to have more signatory-signatory interaction and peer pressure.¹¹⁴ Allowing two appointed states to take part in on-site visits is a positive start; however, allowing individual countries

110. OECD Anti-Bribery Convention, *supra* note 11, at art. 5.

111. For further discussion about the effect of peer pressure, *see generally* Jongen, *supra* note 57, at 10; CHAYES & CHAYES, *supra* note 61; Chayes, Chayes, & Mitchell, *supra* note 61; Koh, *supra* note 61.

112. *See* Liu, *supra* note 51, at 627.

113. *See Phase 2 country monitoring of the OECD Anti-Bribery Convention, supra* note 28; *Phase 3 country monitoring of the OECD Anti-Bribery Convention, supra* note 30; *Phase 4 country monitoring of the OECD Anti-Bribery Convention, supra* note 33.

114. *See* Liu, *supra* note 51, at 636.

the opportunity to ask specific questions in supplements to the standard questionnaires — to both the focus country and private and civil society groups — may more fully involve signatory States in the peer review process. Allowing the OECD Working Group to be a better facilitator, rather than a middleman, may require time, but it may ultimately allow for better meeting the consensus-building and peer pressure goals of the Group.

VI. CONCLUSION

In the two decades since it took effect, the OECD Anti-Bribery Convention has seen some progress. States Parties to the Convention have, according to their binding responsibilities, passed domestic legislation to criminalize bribery of foreign public officials. Doing so has, at the very least, demonstrated States Parties' commitment to the substance of the Convention. However, legislation alone cannot eliminate corruption; the parties have to take substantive action to actually enforce those laws against bad actors. Such action will not only lead to investigation and prosecution of violators but will also provide example cases to deter potential bad actors. Although investigations and prosecutions are not explicitly part of the Convention — and, therefore, States are not explicitly bound to perform them — States Parties must commit to the implicit, and necessary, enforcement of the Convention for it to succeed.

Understanding why the majority of States choose not to comply with this process provides a basis for future reforms and future action. From resource allocation and political priorities to ambiguity and distrust, the reasons are not easy ones to diffuse. However, key reforms including binding whistleblower protections, stronger peer pressure, and restructured information-sharing may allow a greater number of States to participate and permit the OECD Anti-Bribery Convention to succeed as planned, significantly reducing corruption worldwide.

Bribery of foreign public officials will not disappear overnight with the implementation of these changes. Bribery continues among non-member states, and introducing new members to the OECD's Anti-Bribery Convention may do more harm than good if a newcomer country's ideals, resources, or commitment to enforcement are not aligned with those of current members.

However, hope need not be lost. Increased international attention to corruption following President Trump's first impeachment and the renewed analysis of global supply chains after the COVID-19 pandemic may together be an impetus for greater action, and an organization and Convention built on a foundation of consensus, positive peer

pressure, and shared enforcement goals can create a better incentive structure for countries who are willing to commit to the Convention's substance. A country that has made the effort to pass national legislation — no easy feat in almost all governments — has already taken an important step in the right direction. But “[a]t the end of the day, it is all about political will.”¹¹⁵ For the majority of States, the real work is yet to be done.

115. Jongen, *supra* note 57, at 349.