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The Role Of "OECD Convention On Combating Bribery Of Foreign Public Officials In International Business Transactions" In The Fight Against Corporate Bribery In International Business Transactions

Annotasiya

Rüşvətxorluğun dağıdıcı təsiri ilə bağlı müzakirələr əsasən dövlət orqanları kontekstində aparıldığından onun digər sahələrdə, xüsusilə dünya üzrə rüşvətxorluğun 60%-ni öz üzərinə götürən korporativ sahə diqqətdən kənarda qalmaqdadır. Bununla bağlı bir sıra səbəblərə görə İqtisadi Əməkdaşlıq və İnkişaf Təşkilatı çoxmillətli müəssisələri ciddi iqtisadi təhlükə mənbəyi kimi xarakterizə etmişdir. Məqalədə digər oxşar beynəlxalq saziş və müqavilələr arasında vacib rola malik İƏİT-in Korrupsiyaya qarşı Mübarizə Konvensiyasının Korrupsiyaya qarşı mübarizədəki əhəmiyyəti təhlil edilmiş, tətbiqi, icrası və konvensiyada yeniliklər əks etdirilmişdir. Digər tərəfdən isə ABŞ-ın Konvensiyanın ərsəyə gəlməsində rolu və məhkəmə təcrübəsi araşdırılır.

Abstract

Because of the dominating place of discussions on public sector bribery the corporate bribery of all has stayed out of focus with 60%. With the regarding reasons The Organisation for Economic Co-operation and Development characterised multinational enterprises as the carrier of serious danger. As an important convention among other anti-corruption agreements the role of the OECD Anti-Bribery Convention has been analysed in this article. Article focuses the issues about implementation, enforcement of convention and reforms to it. On the other hand, role of the United States in establishing the OECD Anti-Bribery Convention and case law are included in this article.

Introduction

Bribery in international business transactions is a cause for serious moral and political concern; it undermines governance and economic development, and it distorts international competitive conditions.[1] According to the World Bank, 'around $1 trillion is paid each year in bribes around the world.'[2] Large-

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[1] International Monetary Fund (Prepared by Policy Department and Review Department), *OECD Convention on Combating Foreign Bribery in International Business Transactions* (2001).

[2] World Bank, 'Anti-Corruption' (2016), http://www.worldbank.org/en/topic/governance/brief/anti-corruption (Last visited: 14 February 2017).

scale bribery investigations involving large multinational enterprises (MNEs) such as BAE Systems[3] and Siemens[4] exemplify how serious bribery can be.[5] Arguably, corporations are among the leading organisations in the globalised economy.[6] The Organisation for Economic Co-operation and Development (OECD) suggests that MNEs' 'trade and investment activities contribute to the efficient use of capital, technology and human and natural resources.'[7] Although corporations are a source of prosperity, they can also cause serious harm. Sara Sun Beale makes the important point that 'modern corporations not only wield virtually unprecedented power, but they do so in a fashion that often causes serious harm to both individuals and to society as a whole.'[8] Of the bribes studied in the OECD Foreign Bribery Report, 60% were paid by large enterprises.[9] How should the behaviour of large corporations be regulated? In general terms, the 'regulation of the MNEs tends to be based on formal, mandatory sources of regulations such as national laws, administrative rules, and binding international agreements.'[10] In the 1970s, the US tried to combat corporate bribery in international business transactions unilaterally, but the side effects of its efforts were negative. The rationale behind this US decision to act unilaterally is analysed in greater detail in a subsequent section of this paper. One of the ramifications of its ineffectiveness in tackling transnational corporate bribery, moreover, was a more urgent need for a multilateral agreement to deal with the problem.[11]

A number of international agreements have been enacted over the past 20 years in order to tackle transnational corporate bribery. These have included regional agreements such as the Inter-American Convention against Corruption, the Council of Europe's Criminal Law Convention on Corruption, and the African Union Convention on Preventing and Combating

[3] The United States Department of Justice, 'BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine' (2010) See: https://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine.

[4] The United States Department of Justice, 'Former Siemens Chief Financial Officer Pleads Guilty in Manhattan Federal Court to $100 Million Foreign Bribery Scheme' (2015) https://www.justice.gov/usao-sdny/pr/former-siemens-chief-financial-officer-pleads-guilty-manhattan-federal-court-100 Last visited: 25 March.

[5] Nicholas J Lord, 'Responding to Transnational Corporate Bribery Using International Frameworks for Enforcement: Anti-Bribery and Corruption in UK and Germany' (2014) 14(1) Criminology Criminal Justice 100.

[6] Peter T. Muchlinski, Multinational Enterprises & The Law (2nd edn, OUP 2007) 3.

[7] OECD, 'Guidelines for Multinational Enterprises' (2011) http://www.oecd.org/daf/inv/mne/48004323.pdf (Last visited: 25 March 2018).

[8] Sara Sun Beale, 'A response to the Critics of Corporate Criminal Liability' (2009) 46 American Criminal Law Review 1481.

[9] OECD, *Foreign Bribery Report* (2014)

[10] Muchlinski, *supra* note 6, 110.

[11] Clare Fletcher and Daniela Herrmann, '*The Internationalisation Of Corruption: Scale, Impact And Countermeasures*' 11 (1st edn, Gower Publishing Limited 2012).

Corruption; and multiregional agreements such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (known as the OECD Anti-Bribery Convention), and the United Nations Convention against Corruption (UNCAC). These latter two are multiregional agreements which indicate the determination of the international community to fight transnational corporate bribery. This essay, which examines the role of supply-side factors in dealing with the problem, will focus solely on the OECD Anti-Bribery Convention. It is, however, important to acknowledge the role the UNCAC plays in global anticorruption campaigns as it 'embodies innovative and globally accepted anticorruption standards'.[12]

The OECD was created in 1960 and played an important role in the reconstruction of Europe.[13] According to the OECD Treaty, the main goal of the organisations is 'to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy.'[14] The OECD always was keen to tackle transnational corporate bribery as it demonstrated it by the adoption of the 'Multinational Enterprises Guidelines' in 1976.[15] However, it was only in 1997 when the OECD finally adopted OECD Anti-Bribery Convention, 3 years after the Recommendation of 1994.[16]

The central argument of this research is that international corporate bribery is no longer a solely domestic issue, and that while an international law response has been offered by the OECD Anti-Bribery Convention, it provides an inadequate solution and so further reform may be required. The first section of this dissertation demonstrates that tackling transnational corporate bribery unilaterally is ineffective and that the adoption of a multilateral agreement is therefore necessary. The second section illustrates the inadequacies of the OECD Anti-Bribery Convention, focusing especially on the difficulties of implementing the Convention provisions into domestic legal systems, and highlighting, too, the challenges presented by the diversity of juridical systems in the context of corporate liability. Central to the discussion is the assertion that liability for legal persons is a key mechanism in the fight against transnational corporate bribery. Thus, this paper primarily

[12] Stefano Manacorda, Gabrio Forti and Francesco Centonze, '*Preventing Corporate Corruption: The Anti-Bribery Compliance Model*' (1st edn, Springer, 2014) 31.

[13] Mark Pieth, 'Introduction' in Mark Pieth, Lucinda A. Low and Nicola Bonucci (eds), '*The OECD Convention On Bribery: A Commentary*' (2nd edn, Cambridge University Press 2014) 13.

[14] Article 1 of the Convention on the Organisation for Economic Co-Operation and Development.

[15] Pieth, *supra* note 13, 14.

[16] *Id*, 16-22.

examines the role of the OECD Anti-Bribery Convention with respect to that particular key mechanism. The US, a key innovator in the battle against international corporate bribery, is the main case study.[17] The third chapter of this dissertation, noting a clear gap between the law and its application, examines problems around enforcement in foreign bribery cases. The final chapter considers the desirability of some potential reforms to the current system.

I. Role of US and OECD Anti-Bribery Convention

This chapter analyses the role of the US in establishing the OECD Anti-Bribery Convention. More specifically, the discussion focuses on the role of the US's Foreign Corrupt Practice Act (FCPA), which is an archetypical law concerned with challenging international bribery.[18] This section demonstrates how inefficient the FCPA is in curbing transnational corporate bribery, before going on to consider why it has been so difficult to internationalise the fight against this transnational problem. This chapter concludes by highlighting the weakness of the OECD Anti-Bribery Convention's 'functional equivalence' doctrine, and by explaining the provisions of the 'soft-law instrument'.

A. Role of the Foreign Corrupt Practices Act 1977

The fight against transnational corporate bribery was first initiated by the US. In 1977, the US passed the Foreign Corrupt Practices Act, which was the first legal instrument to criminalise bribery among foreign public officials.[19] This harsh and unique measure was widely seen as reflecting the US government's domestic political agenda.[20] The legislation was passed as a response to the infamous Watergate scandal of the early 1970s. During the Securities and Exchange Commission's (SEC) investigation of Watergate, it was revealed that many companies did not disclose the donations and political contributions they made. Under the terms of the SEC's investigation, 400 corporations voluntarily disclosed their illegal payments and bribes.[21] This caused further public resentment, leaving the Gerald Ford and Jimmy Carter administrations with little choice but to react unilaterally, without any

[17] Natalie Shu Ying Wee, 'The OECD Convention On Combating Bribery of Foreign Public Officials And The Impact Of The Unite Kingdom's Bribery Act 2010 On Corporations: Is The Act Too Harsh?' (2014) 17 International Trade and Business Law Review 130.

[18] Marco Arnone and Leonardo S. Borlini, '*Corruption: Economic Analysis and International Law'* (1st edn, Edward Elgar Publishing Limited, 2014 2014) 209.

[19] Pieth, *supra* note 13, 10.

[20] *Id*, 10.

[21] Arnone and Borlini, *supra* note 18, 209.

consultation with their main trade partners.[22] The rationale behind this response is widely debated, and a range of different reasons have been suggested. Firstly, the behaviour of large enterprises was deemed to be extremely unethical. Although MNEs are vehicles for development,[23] their unregulated behaviour in international business was a cause for concern. According to Mark Pieth, 'the fact the OECD enacted its version of an "OECD Guideline for Multinational Enterprises" in 1976 was an expression of the need perceived by governments to contain public discontent with the role of MNEs.'[24] Public discontent was enormous in the US because of the size and the nature of its corporate scandals,[25] of which The Lockheed scandal was one of the most notable. The Lockheed Corporation, one of the world's largest defence contractors, was involved in bribing foreign public officials. In 1976, the corporation admitted that they had paid up to $26 million in bribes.[26] As a result of the scandal, Kakuei Tanaka, a former prime minister of Japan, was found guilty of accepting $ 2.1 million in bribes.[27] Pieth notes that this 'was highly embarrassing for US foreign policy'.[28] Clearly, therefore, the US government felt obliged to respond to this highly publicised transnational corporate bribery. However, its decision to act unilaterally had very serious side effects. Indeed, before the enactment of the FCPA, the US was already acknowledging its potentially harmful effects.[29]

The instigation of this unique legislation was, at the time, met with firm condemnation. In 1981, a General Accounting Office (now known as the Government Accountability Office) report to Congress acknowledged that reforms should strengthen the system of corporate accountability,[30] but it also stressed that 'more than 30 percent of the respondents engaged in foreign

[22] Pieth, *supra* note 13, 10..article 16D Anti-Bribery ibery bery COnvetion ConvetionECD Anti-Bribery Convetion equal the same. But curront author views this

[23] Adefolake Adeyeye, '*Anti-Corruption as A CSR Standard. Corporate Social Responsibility Of Multinational Corporations In Developing Countries: Perspectives on Anti-Corruption'* (1st edn, Cambridge University Press 2012) 44.5biditionally, ty Office) report0. Convetion cer.d the OECD Anti-Bribery Convetion equal the same. But curront author views this

[24] Pieth, *supra* note 13, 11.

[25] *Ibid.*

[26] Martin T.Biegelman and Daniel R.Biegelman, *'Foreign Corrupt Practice Act Compliance Handbook: Protecting Your Organization From Bribery And Corruption'* (1st edn, Wiley & Sons Inc 2010) 40.

[27] The New York Times, 'Tanaka Is Guilty in Bribery Trial' (1983) http://www.nytimes.com/1983/10/12/world/tanaka-is-guilty-in-bribery-trial.h tml (Last visited: 21 March 2017).

[28] Pieth, *supra* note 13, 11.

[29] Lianlian Liu, 'The Dynamic of the Institutionalization of the OECD Anti-Bribery Collaboration' (2014) 11.1 South Carolina Journal of International Law & Business 29, 42.

[30] By the Comptroller General Report to the Congress of United States, 'Impact Of Foreign Corrupt Practices Act On U.S. Business' (General Accounting Office 1981) http://www.gao.gov/assets/140/132199.pdf Last visited: 25 March 2017.

business cited the anti-bribery provisions as a cause of US companies losing foreign business.'[31] Additionally, Hines indicated that there was a decline in the activity of US firms in corrupt countries; he argued, however, that this fact did not imply that US law was at fault.[32] Other scholars, such as Wei, argue that US enterprises are hostile to corruption when they find it, except in the case of other OECD states.[33] Despite different scholars perceiving and evaluating the effect of the FCPA differently, there is no doubt that FCPA alarmed US corporations.

After passing the law, the US expected that other countries would follow their example and outlaw foreign bribery, because otherwise corporations in the US would be disadvantaged.[34] Unfortunately, this did not come to pass. Some states even used tax policies to incentivise bribery payments, which could be written off as expenses.[35] This caused significant concern in the US; and although the US tried to internationalise the fight against corporate bribery by adopting a multinational agreement, all their attempts in the 1980s were unsuccessful.[36] One possible reason for this failure is that other states did not share the US's domestic agenda,[37] so they were not inclined to act in the same way. Furthermore, Kenneth W. Abbott and Duncan Snidal have argued that the US's competitors were aware of the fact that Congress would not be able to repeal or weaken the FCPA legislation, because it was seen to represent American values and interests.[38] The US government certainly did not have any leverage in negotiating with its international partners, putting it in an extremely disadvantageous position. Repealing the law would have caused public outrage, so the only possible solution would be to amend it.

In 1988, the US government relaxed the act but, more importantly, it authorised the President to 'pursue negotiations of an international agreement, among the members of the [OECD].'[39] The rationale for choosing

[31] *Ibid.*

[32] James R. Hines, Jr, 'Forbidden Payment: Foreign Bribery and American Business After 1977' (NBER Working Paper 5266, 1995) http://www.nber.org/papers/w5266 (Last visited: 25 March 2017).

[33] Shang-Jin Wei, 'How Taxing is Corruption on the International Investors' (NBER Working Paper 6030, 2000) <http://www.nber.org/papers/w6030.pdf> Last visited: 2 March 2017.

[34] 'The Limits of Institutional Design: Implementing The OECD Anti-Bribery Convention' (2004) 44:3 Virginia Journal of International Law 665, 673.

[35] OECD, 'No Longer Business as Usual: Fighting Bribery And Corruption' (OECD 2000) 67.

[36] Liu, *supra* note 29, 45.

[37] Kenneth W. Abott and Duncan Snidal, 'Filling in the Folk Theorem: The Role of Gradualism and Legalization in International Cooperation to Combat Corruption' (ResearchGate, 2002) https://www.researchgate.net/publication/228746902 (Last visited: 25 March 2017).

[38] *Ibid.*

[39] Amendments to Foreign Corrupt Practice Act 1977, https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/08/29/houserpt-100-418.pdf (Last visited: 25 of March).

the OECD as the institution through which transnational corporate bribery would be outlawed was that its member countries were the US's main business competitors.[40] This is less true today, because emerging economies such as China and India are not members of the OECD.

In 1994, Bill Clinton's government was determined to use aggressive tactics in its negotiations with its European and Asian partners. The results of these efforts led to the adoption of the Recommendation of 1994, which proposed 'that member countries take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions'.[41] The OECD Anti-Bribery Convention was adopted in 1997 and came into force in 1999. The Convention internationalised attempts to criminalise the supply side of bribery, and in so doing it revolutionised global anti-bribery policy.

The effort of the US in internationalising the FCPA is uncontestable. There are three main reasons why the US was successful in pursuing its negotiations which resulted in the adoption of the Convention. First, many large corporations abandoned the idea that the FCPA would be repealed, which therefore focused their attention on internationalisation of the problem.[42] Second, many economists changed their view of the corruption: they had, with the World Bank, formerly seen corruption as a means of avoiding bureaucracy in developing countries. The shift in their perception was effected, in part, by the establishment of Transparency International (TI) by an erstwhile World Bank employee. Peter Eigen, former economist for the World Bank, established a non-governmental organisation which aimed to change social attitudes towards corruption. The role of TI in shaping public opinion was unquestionable.[43] The third reason for the US's success was a domestic one: in Clinton it had a newly-elected president, and new presidents comes to power with new ideas and new strategies.[44] Due to the convergence of these three factors, the US was finally able to achieve much of what it had long wished for. Twenty years after the adoption of the Convention, however, not much has changed. The OECD-Anti Bribery Convention possesses serious structural challenges which act as obstacles to the curbing of transnational bribery.

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[40] Barba Crutchfield George, Kathleen A.Lacey and Jutta Birmele, 'The 1998 OECD Convention: An Impetus For Worldwide Changes In Attitudes Towards Corruption In Business Transactions' (2000) 37 American Business Law Journal 487.

[41] Council Recommendation of the Council on Bribery in International Business Transactions (adopted 27 of May 1994) http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/1952622.pdf (Last visited: 25 March).

[42] Tarullo, *supra* note 34, 676.

[43] Geoge, A.Lacey and Birmele (n 40) 523.

[44] Tarullo, *supra* note 34, 676.

B. OECD Anti-Bribery Convention

It is remarkable how swiftly the Convention was adopted by the OECD member states. The Convention is itself very unique as it possesses two legal instruments: 'the Convention of 21 November 1997 and the Recommendation for Further Combating Foreign Bribery of 26 November 2009 with its own Annexes.'[45] This paper discusses both of these, focusing on the former or the latter depending on the context.

Generally, international conventions do not necessarily signify or indicate that international law will be implemented into domestic legal systems directly, nor that there will be a uniform application thereof.[46] Consequently, in the case of the present study, which is concerned with the criminalisation of bribery among foreign public officials, does not have a direct effect.[47] Before adopting the Convention, the OECD Working Group on Bribery (WGB) presumed that in contrasting legal systems a 'soft law' instrument would be the most efficient and appropriate means to coordinate international rules on transnational corporate bribery.[48] Therefore, in the fight against transnational corporate bribery, the OECD adopts the principal doctrine of 'functional equivalence'.[49] Note that the principal doctrine of 'functional equivalence' is found in the official Commentaries of the Convention. Although these official Commentaries are an addition to the Convention, they do not form part of the Convention and they were not endorsed by its signatories.[50] Nonetheless, they play a crucial role in the interpretation of the Convention, and can certainly be used for such a purpose.[51]

The concept of functional equivalence was taken from comparative law. According to Pieth:

> The approach assumes that every legal system has its own logic, which is not necessarily determined by legal texts alone. Only holistic appraisal of the law in operation, including the formal rules and practices as well as functions assumed by other legal institutions, will allow us to assess whether the overall legal effects produced by a country's legal system adequately meet the requirements of the Convention.[52]

The doctrine aims to harmonize various different systems and implement provision of the agreement into domestic legal systems. Although it might

[45] Pieth, *supra* note, 35.

[46] Arnone and Borlini, *supra* note 18, 223.

[47] *Ibid.*

[48] Pieth, *supra* note 13, 37.

[49] Official Commentaries of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention).

[50] Arnone and Borlini, *supra* note 18, 223.

[51] Section 31(2) Vienna Convention on the Law of Treaties.

[52] Pieth, *supra* note 13, 37.

seem admirably ambitious in principle, it presents various obstacles to the smooth operation of MNEs, and it creates unnecessarily complicated language for communication between corporations and the various states.[53]

As for the provisions of the Convention, Article 1 forbids:

'any 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'.[54]

The scope of the provision only includes the 'pecuniary or other advantage' given to the foreign public official. Foreign public officials are those who hold administrative or judicial office, and they are required to behave according to the accepted standards for public servants, whether they are elected or appointed. Article 1 relates to officials from both public international organisations and public enterprises. Furthermore, the Article does not specify for whom it is illegal to commit an act of bribery, as the article simply refers to 'any person'. The rationale for using this terminology is that it includes anyone who can potentially be involved in bribery.[55]

Looking closer at the Convention, however, it becomes clear that 'any person' can also be a legal person.[56] As Article 2 of the Convention notes: 'Each party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the foreign public official.'[57] This Article is extremely salient for MNEs in that different signatories to the agreement implementing this particular provision become problematic. Nevertheless, the designers of the Article intended for it to be open to broad interpretation.[58] By consulting Article 3, it becomes evident that, regardless of the legislation implemented by the relevant parties, the

[53] Meg Beasley, 'Dysfunctional Equivalence: Why The OECD Anti-Bribery Convention Provides In The Era Of The Multinational' (2015) 47 The George Washington International Law Review 191,193.

,'Introduction'Foreign Public Officials'ribery ConvetionECD Anti-Bribery Convetion equal the same. But curront author views this[54]Article 1(1) of the OECD Anti-Bribery Convention.,'Introduction'Foreign Public Officials'ribery ConvetionECD Anti-Bribery Convetion equal the same. But curront author views this

[55] Ingeborg Zerbes, 'The Offence of Foreign Public Officials' in Mark Pieth, Lucinda A. Low and Nicola Bonucci (eds), '*The OECD Convention On Bribery: A Commentary'* (2nd edn, Cambridge University Press 2014) 73.

[56] Article 2(1) OECD Anti-Bribery Convention.

[57] *Ibid.*

[58] Peter J. Cullen, 'Sanctions' in Mark Pieth, Lucinda A. Low and Nicola Bonucci (eds), '*The OECD Convention On Bribery: A Commentary'* (2nd edn, Cambridge University Press 2014) 259.

sanctions have to be 'effective, proportionate and dissuasive.'[59] Even though there are certain differences, this point was largely inherited from EU law,[60] and the fundamental justification for it hinges crucially on the principle of 'functional equivalence'.[61]

Article 4 of the agreement calls on states to implement international law into their respective national legal systems.[62] The Convention's approach is one of compromise, as it incorporates 'territoriality' supplemented by 'nationality', as long as the concept already existed in the legal system of the state.[63] The investigation and prosecution of parties must be in accordance with the legal principles of the states that were party to the agreement.[64] More importantly, the investigation and prosecution of parties involved in the bribery of foreign public officials should not be influenced by 'considerations of national economic interest, the potential effect upon relations with another state or the identity or legal persons involved.'[65]

This section will become more relevant in the discussion, below, of the UK Serious Fraud Office's (SFO) investigation of the Al Yamamah arm deal. The OECD Anti-Bribery Convention notes that statute limitation should be adequate for a certain period of time.[66]

Furthermore, Article 8 imposes the accounting standards which companies must follow.[67] Additionally, it requires states to punish the contravention of accounting standards with sanctions.[68] Articles 9, 10 and 11 are concerned with international cooperation, while Article 12 stipulates that: 'The parties shall co-operate in carrying out a program of systematic follow-up to monitor and promote the full implementation of this Convention'. Generally, the lack of monitoring was also perceived to be one the vulnerabilities of the soft law instruments.[69] The monitoring process is implemented by the OECD Working Group on Bribery in International Business Transactions, 'whose only main sanction is bad publicity.'[70] The final provisions of the Convention are focused

[59]Article 3(1) OECD Anti-Bribery Convention.

[60] Zerbes, *supra* note 57, 69.

[61]Official Commentaries of the OECD Anti-Bribery Convention.

[62] *Id,* article 4(1).

[63] Mark Pith, 'Jurisdiction' in Mark Pieth, Lucinda A. Low and Nicola Bonucci (eds), '*The OECD Convention On Bribery: A Commentary'* (2nd edn, Cambridge University Press 2014).

[64] Article 5 of the OECD Anti-Bribery Convention.

[65] *Ibid.*

[66] *Id,* article 6.

[67] *Id,* article 8(1).

[68] *Id,* article 8(2).

[69] Nicola Bonucci, 'Monitoring and Follow up' in Mark Pieth, Lucinda A. Low and Nicola Bonucci (eds), '*The OECD Convention On Bribery: A Commentary'* (2nd edn, Cambridge University Press 2014) 538.

[70] Susan Rose-Rockerman, 'International Actors And The Promises And Pitfalls Of Anti-Corruption Reform' (2013) 34:3 University of Pennsylvania Journal of International Law 447.

on the signatory and accession;[71] ratification and depositary;[72] entry into force;[73] amendment;[74] and withdrawal.[75]

This concludes the overview of the general provisions of the Convention. The next phase will focus on two main issues: the general implementation procedure of the Convention, and the specific implementation of its Article 2.

II. Implementation

The previous chapter illustrated the role of the US in the opposition against transnational bribery. It outlined the ineffectiveness of the unilateral criminalisation of bribery among foreign public officials. Furthermore, it elucidated the main principle of 'functional equivalence', on which the OECD Anti-Bribery Convention was engineered, coupled with an explanation of the provisions of the 'soft law' instrument.

This chapter identifies and explores three main issues with the OECD Anti-Bribery Convention. These issues hinder the combating of transnational corporate bribery. As is now evident, international agreements have to be implemented by states into their domestic system with a common standard.[76] The domestic implementation of the Convention can be a laboured process, as in the case of the UK in 2010.[77] By comparison, the US and Japan successfully amended their anti-bribery laws in order to comply with the convention in 1998 and 1999, respectively.[78] Moreover, the signatories to the agreement implement its provisions according to their respective domestic legal principles; there is no uniformity, therefore, in the fight against transnational corporate bribery. An international agreement does not guarantee the consistency of its application, so the larger the difference in the law, the larger the enforcement gap between states.[79]

A. United Kingdom

The UK finally complied with the OECD Anti-Bribery Convention in 2010, when it enacted the Bribery Act 2010. Clearly, the BAE Systems scandal was a catalyst for the implementation of the law, as its effect in the UK was comparable to Watergate in the US. By outlining the process by which the UK adopted the new anti-bribery laws, this section analyses the limits of the OECD Anti-Bribery Convention.

[71] Article 13 of the OECD Anti-Bribery Convention.
[72] *Id*, article 14.
[73] *Id*, article 15.
[74] *Id*, article 16.
[75] *Id*, article 17.
[76] Arlone and Borline, *supra* note 18, 209.
[77] Bribery Act 2010 (UK).
[78] Edmund W. Searby and Erin Murdock-Park, 'Closing The Gaps in Global Anti-Bribery Enforcement' (2012) 3:1, Global Business Law Review 143, 145.
[79] *Id*, 148.

Before the enactment of the Bribery Act 2010, the UK's anti-bribery laws were divided into various acts such as the 1906 Prevention of Corruption Act and the 1889 Public Bodies Corrupt Practices Act. Some bribery offences were also covered by common law. Even though after ratifying the Convention the UK Parliament concluded that existing laws were enough to comply with the Convention, government representatives also admitted that the law should be in a separate, new statute.[80] In its Phase 1 Report, 'the working group [on the implementation of the Convention urged] the UK to enact appropriate legislation and to do so as a matter of urgency.'[81] One of the issues identified in this first phase was that UK law did not contain explicit laws criminalising foreign bribery, and that its national jurisdiction did not extend over acts of foreign bribery.[82] The UK government addressed these concerns in the twelfth part of the 2001 Anti-terrorism, Crime and Security Act. The OECD WGB, in its Phase 1 bis report, noted that "the laws in the United Kingdom against 'foreign' bribery are now strengthened."[83] However, the WGB expressed its concerns regarding Article 5 of the OECD Anti-Bribery Convention, and hoped that the United Kingdom would fully implement that particular provision.[84] In Phase 2 and Phase bis 2, the WGB further expressed its disappointment with UK authorities.[85]

The main source of disappointment was the UK SFO's decision to suspend its investigation into the Al Yamamah arms deal. In July 2004, the SFO commenced an investigation into the violation of the newly implemented provisions of the Anti-terrorism, Crime and Security Act by BAE Systems. It was concerned, in particular, with the Al Yamamah arms contract between the UK government and the Kingdom of Saudi Arabia.[86] In December 2006, the director of the SFO ceased the investigation into the BAE system because:

[E]ven had I thought that discontinuing the investigation was not compatible with Article 5 of the Convention, I am in no doubt whatever that

[80] Monitoring Report, 'United Kingdom: Review of Implementation Of The Convention And 1997 Recommendation' (OECD 1999) http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2754266.pdf Last visited: 25 March 2017.

[81] *Id*, 24.

[82] *Ibid.*

[83] Monitoring Report, 'United Kingdom: Review Of Implementation Of The Convention And 1997 Recommendation Phase 1 Bis Report' (OECD 2017) http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2498215.pdf (Last visited: 25 March 2017).

[84] *Ibid.*

[85] Cecily Rose, 'The UK Bribery Act 2010 And Accompanying Guidance: Belated Implementation of The OECD Anti-Bribery Convention' (2012) 61 International and Comparative Law Quarterly 485,489.

[86] *Ibid.*

I would still have decided, by reason of the compelling public interest representations … that the investigation should be discontinued.[87]

The Corner House Research argued that it was unlawful for the SFO to disregard its international obligations under Article 5 of the OECD Anti-Bribery Convention.[88] However, as Lord Bingham suggested, this was a case of 'an unincorporated treaty provision not sounding in domestic law.'[89] The concern regarding Article 5 was expressed by the WGB in the previous report, as is outlined above. Therefore, in the 2007 report, the WGB wrote: 'The recent discontinuance of a major foreign bribery investigation concerning BAE SYSTEMS plc. and the Al Yamamah defense contract with the government of Saudi Arabia has further highlighted some of these concerns.'[90] It was not until a full 12 years after it ratified the OECD Anti-Bribery Convention that the UK parliament enacted the Bribery Act 2010.

Three conclusions can be drawn from this. The first relates to the fact that the UK anti-bribery laws were outdated over a long period of time, which allowed many firms to take advantage of the ill-defined laws.[91] Thanks to these loose laws on foreign bribery, the Al Yamamah arms deal investigation was suspended. Evidently, the UK did not fully incorporate Article 5 of the Convention, despite the concerns expressed by the OECD WGB. Hence, domestic courts were unable to apply the international law as part of the domestic law. This leads to a second conclusion: there are doubts about the role of the OECD WGB. Indira Carr and Opi Outhwaite commented in their response to the Consultation Paper on the Review of the OECD Anti-Bribery Instruments that 'questions remain in respect of the effectiveness of the monitoring process in bringing about the necessary level of compliance'.[92] They further argued that the OECD suggested implementing a single anti-bribery law, but that this process was only making limited progress.[93] Although the member states are satisfied with the role of the OECD WGB, Daniel K. Tarullo, argued that 'without sanctions for non-compliance' it would be very hard to implement the legislation.[94] The final conclusion is a

[87] *R. (on the application of Corner House Research) v. Director of the Serious Fraud Office* [2008] UKHL 60, ¶ 849.

[88] *Ibid.*

[89] *Id*, ¶ 840.

[90] Monitoring Report, 'Following Up Report On The Implementations Of The Phase 2 Recommendations' (OECD 2007) <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/38962457.pdf> Last visited: 25 March 2017.

[91] Jessica A .Lordi, 'The UK Bribery Act : Endless Jurisdictional Liability On Corporate Violations' (2012) 44 Case Western Reserve Journal of International Law 956, 970.

[92] India Carr and Opi Outaite, 'Responses To The Consultation Paper Review Of The OECD Anti-Bribery Instruments' (OECD 2008) <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/40497521.pdf> Last visited: 25 March 2017.

[93] *Ibid.*

[94] Tarullo (n 34) 687.

reiteration of the aforementioned contention that the incorporation of the OECD Anti-Bribery Provisions is a difficult process: it is important to note that the technique employed by the OECD Anti-Bribery Convention is insufficient to curb transnational corporate bribery, as evinced by the delayed actions of the UK government.[95]

B. Liability for Legal Persons

In its reply to the Consultation Paper on the Review of the OECD Anti-Bribery Instruments, the French Prometheus Foundation pronounced that 'the concept of 'functional equivalence', in the heart of the implementation of the Convention, has considerably underestimated the difference between the juridical environments of each Parties, both from the point of view of the modalities of juridical pursuit and sanctions as well.'[96] The previous chapter argued that 'functional equivalence' was an ineffective measure. This chapter seeks to display how inadequate the doctrine is in the context of Article 2 of the OECD Anti-Bribery Convention. This Article requires states to implement laws which ensure the liability of legal persons. In curbing transnational bribery, particularly when examining the role of the OECD Anti-Bribery Convention, attributing liability to corporations becomes critical.[97]

1. Criminal vs Non-Criminal Liability

The liability of a legal person for a foreign bribery offence is crucial to the development a legal infrastructure for the globalised economy because, without liability for corporations, fighting against transnational corporate bribery would be fruitless.[98] Corporate liability ensures that individual enterprises can be held specifically accountable for any wrongdoing.[99]

The OECD Anti-Bribery Convention has adopted a broad approach to corporate liability, due to the fact that different states have different approaches to corporate liability. As the Convention does not require the state to adopt criminal liability for corporations if doing so would not be consistent with the legal system of the certain states.[100] Out of the 41 state parties to the OECD Anti-Bribery Convention, only 27 states ensure criminal liability for corporations, while 11 states have non-criminal liability, two states have both,

[95] Rose (n 87).

[96] The Promethaus Foundation (France), 'Responses To The Consultation Paper Review Of The OECD Anti-Bribery Instruments' (OECD 2008) <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/40498944.pdf> Last visited: 25 March 2017.

[97] Arnone and Borlini (n 18)

[98] OECD, 'Liability Of Legal Persons For Foreign Bribery: A Stocktaking Report' (OECD 2016) <http://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf (Last visited: 26 March 2017).

[99] *Ibid.*

[100] Simeon Obidairo, *Transnational Corruption And Corporations: Regulating Bribery Through Corporate Bribery* (1st edn, Ashgate Publishing 2013) 103.

and one state does not impose liability at all.[101] From these statistics it is clear that not all states ensure the criminal liability of legal persons. This creates uncertainty as different states impose different types of liability.

The US implements the doctrine of the *respondeat superior*.[102] Within this, vicarious criminal liability is when a corporation is responsible for the wrongful act committed by the employee or the agent within their responsibilities on behalf of the corporation. This doctrine is also applied by the FCPA.[103] Multinational enterprises can be criminally liable for the wrongful acts of their subsidiaries.[104] This can occur in two particular circumstances. Firstly, the parent company has to be directly liable for the wrongful act.[105] Secondly, the parent company might be liable under the general agency doctrine.[106] Furthermore, under the agency concept, any unlawful action and knowledge by the subsidiary can be attributed to the parent company.[107]

The primary justification for imposing criminal corporate liability onto the corporations is that 'potential offenders make rational choices regarding their crimes, that they weigh the advantages and disadvantages of committing offenses.'[108] Corporations are concerned with profit maximisation and will therefore be cautious with their improper behaviour, since criminal liability will increase the cost of that behaviour.[109] An alternative view is that, by making corporations criminally liable, the punishment is ascribed to the innocent parties as the 'innocent shareholders pay the fines and the innocent employees, creditors, customers and communities sometimes feel the pinch too.'[110] This stands true to a certain extent, as once criminal charges are brought against a legal person, those charges automatically represent a form of conviction because of the reputational harm caused.[111] Patently, this has

[101] OECD, 'Liability Of Legal Persons For Foreign Bribery: A Stocktaking Report' (OECD 2016) <http://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf> Last visited: 26 March 2017, 21.

[102] *Standard Oil Co. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962).

[103] The Criminal Division of the US Department of Justice and the Enforcement of US. Securities and Exchange Commission, 'Resource Guide to The US. Foreign Corrupt Practice Act' (The Department of Justice 2012) 27.

[104] *Ibid.*

[105] *Ibid.*

[106] *United States v. NYNEX Corp*, 788 F. Supp. 16, 18 n.3 (D.D.C. 1992).

[107] *Pacific Can Co v Hewes ex Corp*, 95 F.2d 42, 46 (9th Cir. 1938).

[108] John T. Bryan, 'Economic Inefficiency Of Corporate Liability' (1982) 72 Journal of Criminal Law and Criminology 582, 586.

[109] *Ibid.*

[110] Albert Alschuler, 'Two Ways To Think About Punishment of Corporations'(Faculty Working Papers 192, 2009) <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1191&context=facultyworkingpapers> (Last visited: 26 march).

[111] Obidario (n 102) 179.

unfair ramifications on the corporations, as they are forced to plead guilty in order to contain the problem.[112] Therefore, it is logical to consider an alternative approach to corporate liability. Germany, for example, does not recognise corporate criminal liability. The rationale for the absence of criminal liability for the legal person is that unlike a 'natural person', a legal person cannot act: it is an empty body.[113] There are administrative sanctions that can be imposed on the corporations instead, and this can be done either by the administrative or by the criminal court.[114] For Roland Hefendehl, this means that '[l]iability is restricted to instances in which the company's legal representatives or directors have ever acted improperly or failed to supervise their employees properly.'[115] One might argue that administrative liability is as a more neutral approach than criminal liability.[116] Administrative liability is not intended to establish personal liability or guilt but, rather, to act as a preventative measure and to limit risk in the economic environment and decision-making.[117] The other argument for the imposition of civil liability on the corporation stems from the idea that corporate liability and civil liability have the same consequences, as it is physically impossible to imprison the corporation.[118]

In the context of international corporate bribery, it is hard to disagree with the American approach to corporate liability. Although the OECD Anti-Bribery Convention does not require states to adopt criminal liability for legal persons, it appears to be a more influential tool for curbing transnational corporate bribery. Regarding corporations as an 'empty body' is misleading particularly in the context of MNEs. The MNEs do not simply hold unrivalled power:[119] their wrongful conduct harms individuals and society as a whole.[120] In the case of Siemens,[121] investigators uncovered that the bribers were part of

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[112] *Ibid.*

[113] Roland Hefendehl, 'Corporate Criminal Liability : Model Penal Code Section 2.07 And The Development In Western Legal Systems' (2000) 4(1) Bufallo Criminal Law Review 283, 300.

[114] *Ibid.*

[115] *Ibid.*

[116] Gennady A.Esakov, 'Corporate Criminal Liability: A Comparative Review' (2010) 2:1 University of Hong Kong Law Review 173, 184.

[117] Hefendehl, *supra* note 115, 300.OECDti-bribery/44176910.pdf>ing 956, 970.dia are not part of the OECD Anti-Bribery Convetion as it' 256256256256256256256256256256256256256256256256256256256256256256256256256256256 256

[118] Obidario, *supra* note 102, 178-179.

[119] Muchlinski, *supra* note 6.

[120] Beale, *supra* note 8.

[121] '#08-1105: Siemens AG and Three Subsidiaries Plead Guilty To Foreign Corrupt Practices Act Violations And Agree To Pay $450 Million In Combined Criminal Fines (2008-12-15)' (Justice.gov, 2017) <https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html> (Last visited: 28 March 2017).

the company's business strategy.[122] Therefore, many shareholders, creditors and investors could benefit from high stock prices due to the unlawful activities of the corporation.[123] In order to achieve results in the fight against transnational corporate bribery, it is important that states ensure criminal liability for legal persons, as the crime is exceptional and a wide range of legal tools are required to fight it.[124]

2. Who can trigger liability for a legal person?

The OECD Recommendation of the Council urged the member states not to limit the liability cases where natural persons who committed the offence have already been 'prosecuted and convicted.'[125] Thus, the OECD Recommendation urged the states to try to attribute the liability of the natural person to the legal person.[126] By examing how member countries determine when the legal person will be held liable for the acts of natural persons, it becomes clear that there is significant diversity in the conditions they employ.[127] This is clearly a matter of great concern. As the OECD report states, the range of different conditions employed by states:

> 'can be grouped into five main categories: (1) in relation to the legal person's activity; (2) in the legal person's name or on its behalf; (3) within the scope of the natural person's particular duties or authority; (4) for the legal person's benefit or interest; (5) as a result of a failure to supervise.'[128]

An examination of two common law states that apply the imputation theory[129] towards corporate liability demonstrates that the diversity of corporate liability complicates the functioning of corporations.

In contrast with the principle of vicarious criminal liability used in the US, the UK generally adopts an 'identification' approach to corporate criminal liability.[130] According to this approach, it is important to establish a corporate mind when examining the *mens rea.*[131] 'The idea behind this theory is the

[122] Beale, *supra* note 8.

[123] *Ibid.*

[124] *Ibid.*

[125]Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions , < http://www.oecd.org/ daf/anti-bribery/44176910.pdf > Last visited: 26 March

[126] *Ibid.*

[127] OECD, 'Liability Of Legal Persons For Foreign Bribery: A Stocktaking Report' (OECD 2016) <http://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf> Last visited: 26 March 2017, 53.

[128] *Id, 54*.

[129] Mark Pieth, 'The Responsibility of Legal Person' in Mark Pieth, Lucinda A. Low and Nicola Bonucci (eds), '*The OECD Convention On Bribery: A Commentary*' (2nd edn, Cambridge University Press 2014) 218.

[130] *Tesco Supermarkets, LTD vs Nattrass* [1972] A.C. 153.

[131] Lord, *supra* note 5.

distinction maybe made by between employees who act as hands and those who represent the brains.'[132] The identification approach is less useful when it comes to MNEs, which are often heavily decentralised due to their complicated structure.[133] It would be easy for large enterprises to distance themselves from wrongful conduct by shifting the burden of blame for their bribery to the foreign commission agent.[134] The ineffectiveness of the corporate liability regime in the UK was criticised by the OECD WGB[135] and acknowledged by the Joint Committee on the Draft of the Bribery Bill.[136] Nevertheless, the Bribery Act 2010 incorporated the 'alter ego'[137] approach. Under Sections 1 and 6 of the Bribery Act 2010, such an approach is considered to exclude bribery committed by 'regional managers, relatively senior management, a salesperson or an agent'[138] because the 'directing mind' needs to be in the board of directors. In the light of Sections 1 and 6 of the Bribery Act, one might perceive the US approach to be more effective than the UK one due to the fact that the identification theory requires 'state of mind' to be taken into consideration; it is, after all, very hard to hold MNEs liable under such a theory because of their decentralized nature.

The UK also adopted a strict liability regime in Article 7 of the Bribery Act, as it notes 'the failure of commercial organisations to prevent bribery.'[139] Section 7 of the Bribery Act imposes liability on the commercial organisation if a person 'associated' with the commercial organisation commits foreign bribery. An obvious conclusion from this provision is that it does not ensure liability for the act of bribery[140] but, rather, for the inability to foresee it. The rationale for adopting an additional type of liability for legal persons is that it covers the operation of MNEs. Clearly, MNEs are generally comprised of groups of companies, and such groups consist of the different companies headed by the parent company.[141] Consequently, and by definition, MNEs operate in a multitude of jurisdictions. As Marco Arnone and Leonardo Borlini convincingly put it, '[c]orrupt practices are characterized by the "race to bottom" – that is, a search for those jurisdictions that offer the most

[132] Arnone and Borlini (n 18) 369.
[133] Pieth, *supra* note 131, 220.
[134] Lord, *supra* note 5.
[135] Monitoring Report, 'United Kingdom : Phase 2 Bis' (OECD 2008) <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/41515077.pdf> (Last visited: 26 March 2017, 21-22).
[136] Joint Committee on the draft Bribery Bill (28 July 2009), para 72.
[137] *Lennard's Carrying Co. v Asiatic Petroleum* [1915] A.C. 7.
[138] Bribery Act 2010 (UK), 1-6.
[139] *Id*, 7.
[140] Newman C. J., Michael Macaulay M, 'Comment: *Placebos or Panaceas : Anglo-New Zealand Experiences of Legislative Approaches to Combatting Bribery'* (2013) 77 Journal of Criminal Law 482, 492.
[141] *Ibid.*

forgiving rule, the least transparency and accountability, [and] the greatest ease of "no questions" operations'.[142] Thus, in their attempts to curb transnational corporate bribery, states are limited by their lack of power over extra-territorial jurisdictions.

'As a traditional extension to "territoriality",' Mark Pieth points out that '"active personality" or "nationality" have facilitated the trial of a state's nationals at home for crimes committed anywhere in the world.'[143] The OECD Anti-Bribery Convention adopts the 'territoriality' doctrine in combination with the 'nationality' doctrine, which has to be applied if it existed before in the domestic legal system.[144] The UK adopts both principles with respect to commercial organisations, but this fails to prevent bribery.[145] The UK's anti-bribery legislation applies the behaviour of companies anywhere in the world as long as they conduct at least part of their business in the UK. More significant, however, is that the Ministry of Justice Guidance states that 'the government anticipates that applying a common sense approach would imply that the organisations that do not have a demonstrable business presence in the United Kingdom would not be caught'. Further, 'the government would not expect, for example, the mere fact that a company's securities have been admitted to the UK Listing Authority's Official List and therefore admitted to trading on the London Stock Exchange, in itself, to qualify that company as carrying on a business or part of a business in the UK, and therefore falling within the definition'.[146] As it clear from the MOJ guidance mere listing in the London Stock exchange does not confer jurisdiction to the UK.

Returning to consider the US, it should be noted that the FCPA adopts very aggressive jurisdictional provisions. First, it adopts an extra-territorial jurisdiction over foreign bribery as the extension on the 'territorial' principle as well as a nationality principle as an alternative jurisdiction.[147] According to the US Department of Justice (DOJ), 'issuers and domestic concerns – as well as their officers, directors, employees, agents, or stockholders - may be prosecuted for using the US, mails or any means or instrumentality of "interstate commerce"[148] in furtherance of a corrupt payment to foreign

[142] Arnone and Borlini (n 18) 634.

[143] Pieth, *supra* note 65, 325.

[144] *Ibid.*

[145] Article 4 of the OECD Anti-Bribery Convention.

[146] Bribery Act 2010 (UK) s 7

[146] Ministry of Justice Guidance (MOJ), ¶ 36

[147] The Criminal Division of the US Department of Justice and the Enforcement of US. Securities and Exchange Commission, 'Resource Guide to The US. Foreign Corrupt Practice Act' (The Department of Justice 2012).

[148]Foreign Corrupt Practice Act (US) 1977.

officials.'[149] Furthermore, the FCPA also adopts a 'nationality' jurisdiction. Under the FCPA, mere trading in the US stock market means that the company has to comply with the SEC. Therefore, the DOJ can more easily bring charges to a company; the example of Statoil indicates that mere listing in the US suffices under the FCPA. Clearly, the US's application of the extraterritorial jurisdiction has been significantly influenced by its political objectives.[150] However, the reasons that the US possesses such stringent extra-territorial laws is clear: they are arguably policing transnational corporate bribery.[151]

The FCPA rules on corporate liability are very severe and, as argued by many scholars, it is unfair to hold a corporation liable for the unlawful conduct of low-level employees.[152] By contrast, the UK approach precludes liability for corporations, as Section 7 of the 2010 Bribery Act provides the appropriate defence for the commercial organisation to prevent bribery.[153] The defence is required in order to protect the corporation in cases where the employee or agent acts alone, without any consent from the parent company. The corporation is required to prove that it had adequate policies or procedures in place to prevent bribery.[154] The defence is very distinctive, as it allows commercial organisations to avoid criminal liability by designing and implementing adequate procedures to ensure that they act in an ethically and morally correct manner.[155] A similar defence is not part of the FCPA and, in fact, just 12 out of 41 countries have a similar type of defence.[156] Many scholars in the US urge the DOJ to adopt a UK-style principle of defence.[157]

To conclude this chapter, reference should be made to two important points. First, the general implementation of the convention is an extremely laboured process. The reason for the slow implementation of the Convention

[149] The Criminal Division of the US Department of Justice and the Enforcement of US. Securities and Exchange Commission, 'Resource Guide to The US. Foreign Corrupt Practice Act' (The Department of Justice 2012).

[150] M Sornarajah, The International Law On Foreign Investment (Cambridge University Press 2004) 184.

[151]William Magnuson, 'International Corporate Bribery and Unilateral Enforcement' (2013) 61 Columbian Journal of Transnational Law 360,363.

[152] Ved P. Vanda 'Corporate Criminal Liability' in Mark Pieth and Radha Ivory (eds), 'Corporate Criminal Liability: Emergence, Convergence and Risk' (1edn, Springer, 2011) 85.

[153] Bribery Act 2010 (UK).

[154] Bribery Act 2010 (UK), 7.

[155]Jon Jordan, 'The Adequate Procedures Defense Under The UK Bribery Act: A British Idea For The Foreign Corrupt Practices Act' (2011) 17:1 Stanford Journal of Law, Business & Finance 25.

[156] OECD, 'Liability Of Legal Persons For Foreign Bribery: A Stocktaking Report' (OECD 2016) <http://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf> Last visited: 26 March 2017, 56.

[157] Vanda, *supra* note 154, 86.

can be attributed to the flaws in the design of the Convention, and to the weaknesses of the OECD WGB whose only sanction is 'bad publicity'.[158] The second point relates to the lack of consistency in corporate liability regimes. As we examined above, the difference between criminal and non-criminal liability, and between the vicarious liability principle and the identification doctrine, renders it more apparent that in such diverse juridical environments it is inadequate to fight transnational issues through domestic legal systems. The next chapter demonstrates more explicitly that increased diversity of legal systems leads to greater diversity in the enforcement of foreign bribery law.

III. Enforcement

Previously, this paper described the BAE scandal, illustrating how the SFO suspended the investigation due to the fact that the UK had not implemented article 5 of the OECD Anti-Bribery Convention. Thus, BAE System was able to avoid corporate liability under UK law. A few months after the investigation was suspended, the DOJ launched its own investigation into BAE System PLC.[159] Hence, in 2010, BAE pled guilty and paid a fine of around $400.[160] According to the William Magnusson, "what is most striking about the BAE affair is not that the BAE was held liable, but who held them liable, and for what."[161] The paper has already illustrated how certain issues have fostered new glitches. This chapter thus primarily focuses on two intertwined problems: (1) the colossal gap in enforcement between member states and (2) the fact that the US polices international bribery. The final section of this chapter describes the results of the accumulated weaknesses of the OECD Anti-Bribery Convention.

A. Lack of Enforcement

This section argues two main points. The first of these pertains to the fact that while 41 states have formally implemented the OECD Anti Bribery Convention to some extent, that does not necessarily translate into effective enforcement.[162] This section thus demonstrates how states have failed to engage in any investigations, and it also illustrates the enforcement gap

[158] Rose Rockerman, *supra* note 72.

[159] 'Department Of Justice Is Right To Investigate BAE Systems' (ft.com, 2007) < https://www.ft.com/content/9e9a7c62-24e0-11dc-bf47-000b5df10621> Last visited: 26 March 2017.

[160] 'BAE Systems PLC Pleads Guilty And Ordered To Pay $400 Million Criminal Fine' (*Justice.gov*, 2017) <https://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine> Last visited: 28 March 2017.

[161] William Magnusson, 'International Corporate Bribery and Unilateral Enforcement'(2013) 51 Columbian Journal of Transnational Law 360.363

[162] Rachel Brewster. 'The Domestic and International Enforcement of the OECD Anti-Bribery Convention'(2014) 15 Chicago Journal of International Law Vol 84,105.

between various states. Examples of the enforcement of foreign bribery cases in four countries (i.e., the US, Japan, the UK, and Germany) are also provided.

As a side note, it essential to justify why comparison between those particular states is made. First of all, it would be very hard to compare the number of foreign bribery cases enforced by, for example, the US and Latvia, as Latvia would be at a disadvantage since it has fewer resources than US.[163] Thus, the comparison would be inaccurate. Secondly, an analysis of Latvia would undercover significantly fewer corporations involved in international business transactions than would a similar analysis of the US, Germany, or the UK. Therefore, it is not reasonable to expect the same level of enforceability from Latvia. Thirdly, some states are willing to enforce the convention in more cases, but corporations do not engage in a substantial amount of unlawful behaviour. In such instances, it would logical to expect low levels of enforcement.[164]

In 2015, the US sanctioned 67 individuals and 37 legal persons,[165] while the UK sanctioned 10 individuals and 3 legal persons.[166] Germany, the laws of which do not mandate criminal corporate liability, sanctioned 73 individuals (17 of whom agreed to punitive action) and penalized 12 legal persons.[167] In Japan, which provides 3.7% of total global exports, enforceability left much to be desired, as that country only punished 10 individuals and 2 legal persons.[168] Thus, there is a clear gap between the US and the other countries. Japan's lack of enforcement for foreign bribery cases is especially shocking, due to the fact that it was deemed a "clear model of a compliant signatory to the OECD Convention."[169] Transparency International indicated that an obvious lack of resources and inadequate sanctions were the reasons behind this lack of enforcement.[170] However, these factors alone cannot explain such a low level enforcement, as it undermines the OECD Anti-Bribery Convention's entire concept and larger goals. The main goal of the OECD Anti-Bribery Convention is to achieve greater efficiency in foreign investment

[163] *Id,* 104-105.

[164] *Id,* 105.

[165] OECD Working Group on Bribery, '2015 Data On Enforcement Of The Anti-Bribery Convention' (OECD 2016) <http://www.oecd.org/daf/anti-bribery/WGB-Enforcement-Data-2015.pdf> Last visited: 27 March 2017.

[166] *Ibid.*

[167] *Ibid.*

[168] *Ibid.*

[169] Obidario (n 102) 100.

[170] Transparency International, ''Exporting Corruption: Progress Report 2015: Assessing Enforcement Of OECD Anti-Bribery Convention' (Transparency International 2017) <http://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2015_assessing_enforcement_of_the_oecd> Last visited: 27 March 2017, p 8.

by preventing bribery from undermining it.[171] However, it is not up to states to decide where and how MNEs should invest. Rather, the job of the home state is to regulate their behaviour, but the statistics suggest that some states have failed to do so. Thus, this example exhibits one of the main problems with the anti-bribery agreement: If even a single state attempts to cheat in terms of upholding the agreement by allowing bribery to take place and undermines the efficiency of entire anti-corruption strategy.[172] Unfortunately, due to the prisoner's dilemma and the lack of sanctions against states,[173] the entire initiative thus comes face-to-face with a dead end.

In some cases, however, the home state might be incapable of regulation. While this initially seems to simply be a restatement of the previous problem, this interpretation views the issue from a different angle. "Prosecuting bribery abroad requires both knowledge of the crime and the ability to gather evidence on the crime."[174] The cases brought against Siemens, Walmart, and GlaxoSmithKline were based on the information collected by the host country's own investigations.[175] Consequently, the role of the host country might be significant, as it might possess important evidence that could help to hold the involved persons accountable.[176] If the host decides to conceal this evidence, the result is a home state that cannot regulate its own companies. This is more relevant in situations in which the investment in the host state is made by a country that is not party to the OECD Convention.

This point consequently leads to another important fact, namely, that OECD member states only account for 64% of FDI flows.[177] Although this more than half of all such flows, this figure still highlights a challenge, since it illustrates the geographical limitations of the OECD Anti-Bribery Convention.

Returning to the response of the Prometheus Foundation (France), that organization expressed its concern that other big economies such as China and India are not part of the OECD Anti-Bribery Convetion as it's distorts

[171] Blundell-Wignall, A. and C. Roulet 'Foreign direct investment, corruption and the OECD Anti-Bribery Convention'(2017) OECD Working Papers on International Investment, <http://dx.doi.org/10.1787/9cb3690c-en> Last visited: 26 of March.

[172] Brewster (n 164) 97.

[173] Brewster (n 164) 97.

[174] Nathan Jensen and Edmund J.Malesky, 'Does the OECD Ant-Bribery Convention Reduce Bribery? An Empirical Analysis Using the Unmatched Count Technique'(working paper 2014) < http://www.natemjensen.com/wp-content/uploads/2014/09/20141205_OECD_Working-Paper_ejm.pdf> Last visited: 26 march

[175] *Id*,8.

[176] *Ibid*.

[177] Blundell-Wignall, A. and C. Roulet 'Foreign direct investment, corruption and the OECD Anti-Bribery Convention'(2017) OECD Working Papers on International Investment, <http://dx.doi.org/10.1787/9cb3690c-en> Last visited: 26 of March.

competition.[178] This trepidation is due to the fact that countries like China, India, Hong Kong, Indonesia, Malaysia, Singapore, Philippines, and Thailand represent 22% of FDI. Thus, they are not monitored and reviewed by the OECD WGB. This issue was firmly stressed by the secretary general of the OECD.[179]

B. FCPA Enforcement

The US is the largest enforcer of foreign bribery cases, as the example demonstrated. We have already outlined the US' role in ensuring the passage of the OECD Anti-Bribery Convetion. However, there is a significant difference between FCPA enforcement prior to the passage of the OECD Ant-Bribery Convention and after its passage.[180] Thus, FCPA can be attributed to the OECD Ant-Bribery Convention because the FCPA's hands were tied due to the competitive disadvantages faced by US corporations.

As one of the largest enforcers of foreign bribery cases, the US essentially acts as a policeman. The above example of BAE System comes into play here, because the US conducted an investigation just few months after the SFO suspended its own inquiry. Thus, one might argue that the reluctant enforcement of foreign bribery cases forces the US to act as an international policeman. The US exercises extra-territorial jurisdiction to the fullest extent allowed by customary international law, meaning that it exercises overreaching jurisdiction, even in non-OECD countries.[181] Nonetheless, the US has been heavily criticized for impinging on other states' sovereignty, prosecuting MNEs from foreign states too often, and using the FCPA as a foreign policy instrument.[182]

US actions might result in a breach of article 5 of the OECD Anti-Bribery Convention, because enforces it in light of political and/or economic considerations.[183] One could argue that by policing international bribery, the US has effectively forced other OECD members states to respect the provisions of the soft-law instrument.[184] Even if this is the case— which is

[178] The Prometheus Foundation, *supra* note 98.

[179] Thomson Foundation, 'China, India And Others Should Join Anti-Bribery Convention – OECD' (news.trust.org, 2017) <http://news.trust.org//item/20140204160554-3n6b9/?source=hptop> (Last visited: 27 March 2017).

[180] Searby and Murdock-Park, *supra* note 147.

[181] David A. Gantz, 'Globalizing Sanctions against Foreign Bribery: The Emergence of a New International Legal Consensus'(1998) 18 Northwestern Journal of International Law and Business 457, 466.

[182] Spahn, Elizabeth K. 'Implementing Global Anti-Bribery The Foreign Corrupt Practice Act To The OECD Anti-Bribery Convention To U.N Convention Against Corruption.'(2013) 23 Indiana International & Comparative Law 1, 14-15.rategies. le. Final reason rests with new elected president in US. New president always comes to power with new ideas and new st

[183] Article 5 of the OECD Anti-Bribery Convention.

[184]'Developments in the Law of Extraterritoriality' (2011) Vol. 124 Harvard Law Review 1285-1290.

debatable—significant questions remain as to whether the US enforces anti-bribery cases to suit its own agenda. Surprisingly, FCPA actions have had a substantial impact on foreign corporations. If we look at the 10 largest FCPA and SEC settlements, 9 of them concerned foreign corporations.[185] Returning to the BAE System investigation, the US charged BAE Systems on the grounds that it had previously conducted business with US Department of Defense and thus promised to comply with the FCPA.[186] This all sounds questionable to this author, as the evidence suggests that the US tried to clear a path for its own corporations.

Stephen J Choi and Kevin E. Davis have acknowledged a discriminatory effect towards foreign corporations, but they have argued that, "[i]t could be that the DOJ and SEC obtain better evidence when a foreign regulator is involved, allowing the DOJ and SEC to construct a stronger case leading to a higher sanction."[187] Furthermore, they "[found] evidence that the SEC and DOJ impose disproportionately large sanctions against firms from countries which have strong legal institutions and cooperation agreements with the DOJ or the SEC."[188]

This research recognizes that the stronger the cooperation between OECD member states, the easier it is to enforce foreign bribery cases. However, even if this is the case, it gives the US too much authority to regulate transnational corporate bribery offenses, because it creates an unfair system. On the other hand, it is possible to argue that the US has more expertise than any other member state and that in the future, enforcement from other states will be its equal.[189] That said, this author views this as highly unlikely, as the US was the main initiator of the OECD Anti-Bribery Convention, and it will continue to act as its chief enforcer.

IV. Reforms

In previous chapters, this paper has illustrated the limits of soft law initiatives in the context of the OECD Anti-Bribery Convention's combat against corporate bribery in international business transactions. The OECD Anti-Bribery Convention technique, which seeks to fight corporate bribery in an international business context through the enforcement of corporate

i[185] Magnuson, *supra* note 153, 403.

[186] *Ibid.*

[187] Kevin E. Davis and Stephen J.Choi, 'Foreign Affairs and Enforcement of the Foreign Corrupt Practice Act' (NYU Law and Economics Research Paper No. 12-15, 2012) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116487> Last visited: 26 march.

[188] *Ibid.*

[189] Duncan Smith, 'Responses To The Consultation Paper Review Of The OECD Anti-Bribery Instuments' (OECD 2017) <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/40497680.pdf> Last visited: 27 March 2017.

liability through domestic legal systems, generates obstacles.[190] Evidently, the trust placed on domestic laws at the time by the OECD was a suitable mechanism for achieving this goal. However, two decades later it has become apparent that an enquiry into international law is necessary if a successful solution is to be reached.[191]

Nevertheless, international hard law is required in this instance. It is important to remember that the OECD Anti-Bribery Convention is a unique international legal instrument, but the reform proposed would be concerned with direct corporate responsibility under international law, which is more legally desirable in terms of its effectiveness in curbing international bribery.[192] The justification for it is that 'national regulation by whatever form is inadequate, bearing in mind the structure of [MNEs] which [have] roots in many countries and so may require different laws and approaches.'[193]

In order to propose a prospective reform, it is necessary to define what is meant by direct corporate responsibility. The definition of Corporate Social Responsibility is widely debated. Jennifer Zerk's definition is particular helpful, however: she argues that corporate social responsibility entails voluntary obligations which are imposed on the MNEs.[194] As Zerk suggests, every MNE 'has a responsibility to operate ethically and in accordance with its legal obligations and to strive to minimise any adverse effects of its operations and activities on the environment, society and human health.'[195]

A. Direct Corporate Responsibility under International Law

Adefolake Adeyeye contends that direct corporate responsibility should be used as the technique to fight international corruption.[196] This paper's foregoing findings strongly support this contention, and this section scrutinise the possible corporate responsibility models in greater detail. The necessity for such a radical view is derived from the impotent role of individual nation states to punish violations of international law.[197] The challenge here is that international law generally applies to the subjects of the international law but that corporations are not subject to it.[198] However, the limited role of MNEs is addressed by foreign investment law through the International Centre for Settlement of Investment Disputes (ICSID). The

[190] Adeyeye, *supra* note 18, 128.
[191] *Ibid.*
[192] *Ibid.*
[193] *Ibid.*
[194] Jennifer A Zerk, *Multinationals And Corporate Social Responsibility* (1st edn, Cambridge University Press 2006).
[195] *Ibid.*
[196] Adeyeye, *supra* note 18, 129
[197] *Ibid.*
[198] *Ibid.*

ICSID is 'an instrument of international policy for the promotion of economic development.'[199]

In order to have direct corporate responsibility under international law, it is mandatory to render corporations subject to international law.In assuming that MNEs will enjoy legal personhood under international law, however, a new set of contentions arises. Soft law instruments proved inadequate in addressing the issue of transnational corporate bribery, as states were implementing the provision of international agreements too slowly and with insufficient zealousness. Therefore, in light of the proposed concept of direct corporate responsibility, we need to consider which precise model should be employed.

1. Flourishing International Criminal Law?

The central argument is that corporate responsibility under international law can develop through international criminal law.[200] The previous chapter indicated that certain states do not recognise criminal corporate liability, on the assumption that a legal person cannot act: it is an empty body.[201] A parallel but contrary point may be advanced, however. As it was stated in the famous Nuremberg trial of Second World War criminals: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[202]

Despite this, in the early negotiations for the Rome Statute in 1998, some states advocated the inclusion of corporate criminal responsibility within the jurisdiction of the International Criminal Court.[203] The idea did not last because 'the discussions had become bogged down in questions of how various national penal systems would accommodate, what was for them, the alien concept of corporate criminal responsibility.'[204] Andrew Clapham continues that :

> 'as long as we admit that individuals have rights and duties under customary international human rights law and international humanitarian law, we have to admit that legal persons may also possess the international legal personality necessary to enjoy some of these

[199]Delaume G., *ICSID Arbitration' in JDM Lew (ed) Contemporary Problems in International Arbitration* (London: Queen Marry College, Centre for Commercial Law Studies, 1986) 23.
[200] Adeyeye, *supra* note 18, 130.
[201] Hefendehl, *supra* note 115, 300.
[202]*Trial of Major War Criminals (Goering et al)*, International Military Tribunal (Nuremberg) Judgment and Sentence 30 September and 1 October 1946 (London: HMSO) Cmd 6964, at 41.
[203] Andrew Clapham, *Human Rights Obligations Of Non-State Actors* (1st edn, Oxford University Press 2006).
[204] *Ibid.*

rights, and conversely to be prosecuted or held accountable for violations of the relevant international duties.'[205]

It may be concluded from this argument that MNEs have some limited personhood under international law in relation to natural persons. Therefore, it is not unreasonable to suggest that MNEs can be held accountable under the emerging international criminal law; and this would certainly avoid the ponderous process of implementation of the previous 'soft law instruments'. Furthermore, it would provide a uniform legal principle on international corporate liability, and will signpost a shift away from the double jeopardy problem.

The justification for imposing international criminal responsibility on MNEs was made in the context of human rights violations. It is not the purpose of the current research to examine if legal persons should be responsible for human rights violations. It would, however, provide a useful comparison, as both violations are serious international crimes. Ilias Bantekas and Susan Nash have argued that 'it is obvious that bribery of foreign public officials has been finally recognized as a contemporary scourge, an international offence, being a threat to commerce, stability and the enjoyment of human rights.'[206] Furthermore, international bribery might be perceived as a crime against humanity in certain circumstances[207] and might also empower the International Criminal Court.[208] In order for a new agreement on international bribery law to succeed, substantial support from individual states will certainly be required.[209] However, although this support might be legally desirable, it is, unfortunately, highly unlikely because if many states were reluctant to implement and enforce the OECD Anti-Bribery Convention, as it doubtful they will give consensus.

Conclusion

It has been demonstrated that role of the OECD Anti-Bribery Convention is limited. In the first chapter of this paper, we outlined the process which brought the Convention into the light. Unilateral criminalization of transnational corporate bribery was faced with failure from the beginning as we have clearly illustrated. US was very concerned that domestic corporations

[205] *Ibid.*

[206] Bantekas Illias and Susan Nash, *International Criminal Law* (2nded, Cavendish, London, 2003) 86.

[207] Article 7(1) of the ICC Statute.

[208] Bantekas Illias, 'Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies.' (2006) Journal of International Criminal Justice 466, 484.

[209] Adeyeye, *supra* note 18, 130.

were at competitive disadvantages, thus they were the ones who started negotiations.

Techniques adopted by the Convention lacked enforceability as OECD Working Group could only criticize the member states. Further, it was unrealistic to expect that there would be the same level of compliance from the member states. UK example has clearly manifested that even leading members of the OECD may lack the necessary will to implement Convention.

In addition different legal systems possess, a different problem as they have different rules on corporate liability which is the critical tool to curb transnational bribery. Enforceability also one of the challenges because some states lack necessary expertise and resources. In the case of US, policing corporations does not seem very fair for the current author.

So where we go from here? Current research proposed reform in the area of international criminal law. It appears to this research that hard international law would be more adequate measure to curb transnational corporate bribery. Having said, it is highly unlike due to the fact that many states would not want to give their right to regulate corporate liability.