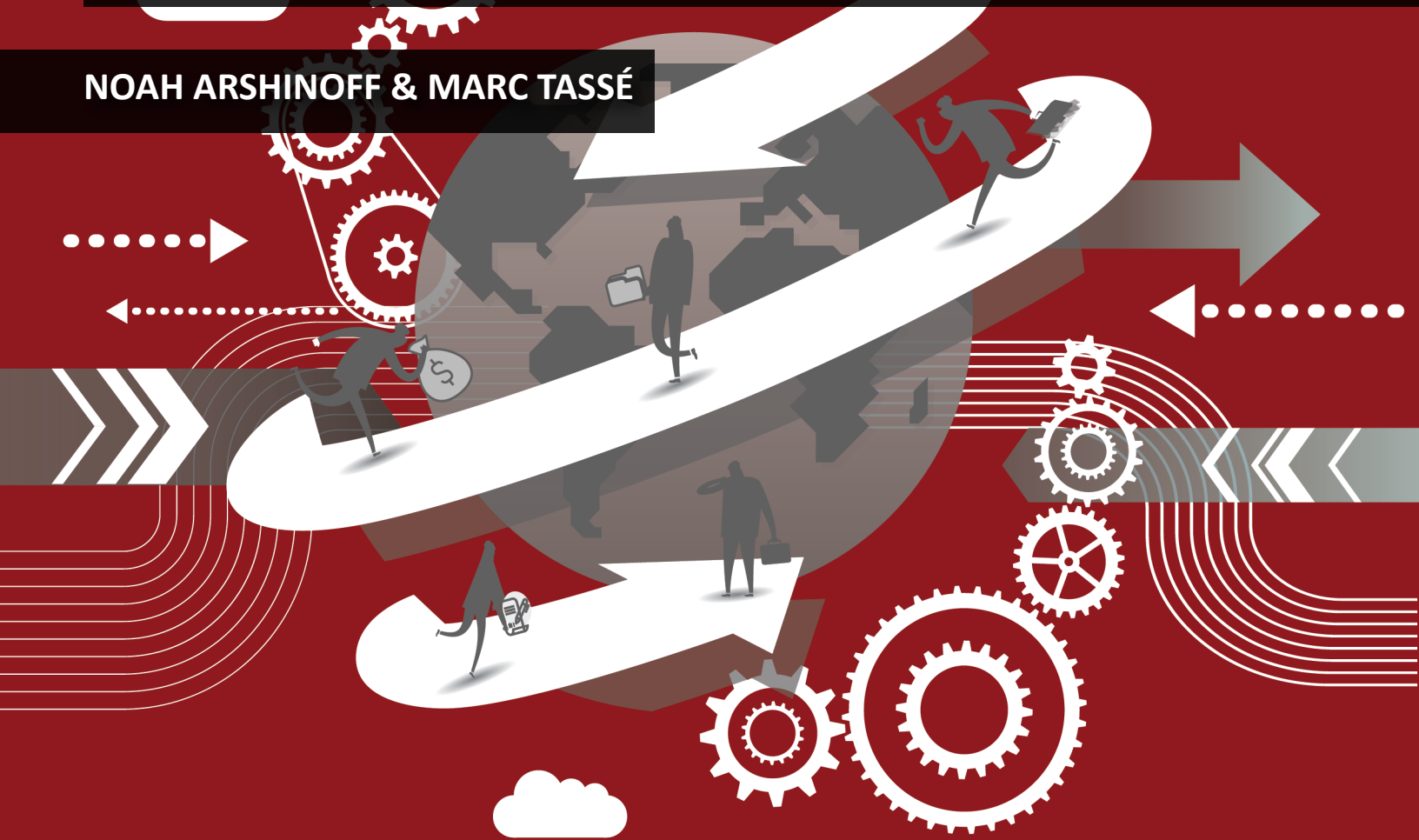




# RE-IMAGINING CORPORATE ACCOUNTABILITY ON A MULTILATERAL SCALE

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## 1. Introduction

How do you hold an entity which only exists on paper accountable for a criminal offence? Dealing with corporate corruption has recently veered away from traditional criminal legal proceedings. As discussed in the OECD's 2018 report,<sup>1</sup> non-trial resolutions have accounted for 78 per cent of all corruption enforcement proceedings in states that are signatories to the OECD Convention.<sup>2</sup> Creative means are being increasingly employed to imbue responsible behaviour on corporate offenders, often aimed at shifting the focus from criminal punishment to preventative measures.

This thought-piece was written with two goals in mind. Firstly, to examine some of the innovative tools that have been utilized to help eradicate corruption before it happens and to determine whether they can be successfully replicated. Secondly, to advance the discussion and illuminate new ways that multilateral instruments, such as the OECD Convention, can be relied upon to achieve a higher state of corporate anti-corruption compliance.

We view this challenge with the presupposition that effective tools require industry, the international community, and domestic regulatory authorities to work together. By looking at some legislative successes, such as the failure to prevent offence under the UK *Bribery Act*<sup>3</sup> and the French law on vigilance,<sup>4</sup> as well as the industry-led Maritime Anti-Corruption Network (MACN) that has thwarted corruption in the shipping industry, we attempt to adapt them to a multilateral environment under the OECD Convention. We also examine how current multilateral international trade and investment agreements have evolved to address corruption on an international scale and where they can be further strengthened.

By assessing the usefulness of these tools, we steer the discussion towards prescriptive measures to advance the state of anti-corruption. We propose that the OECD Convention, being a multilateral instrument with a strong monitoring system and consisting of the most advanced countries in the fight against international corruption, can be further leveraged by including additional requirements. Firstly, that signatories adopt a failure to prevent offence in domestic legislation and, secondly, that all signatories adopt model anti-corruption provisions in their international trade and investment agreements. We further propose that a dispute settlement mechanism be established under the OECD Convention to address allegations of corporate misbehaviour.

In confronting the challenges of corporate accountability, we drew on the best available public data as well as conducted interviews with subject matter experts. This paper is meant as a provocative thought-piece to inspire new thinking about how to approach the issue of corporate accountability in anti-corruption. It should not be read as a comprehensive academic research study. By our own admission, certain topics covered below require additional research to determine their feasibility and utility.

Over the next few pages, we will look at some successful anti-corruption innovations and determine how they can be adapted through new ideas to re-imagine corporate accountability on a multilateral scale.



<sup>1</sup> OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (Paris: OECD, 2019) [www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm](http://www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm).

<sup>2</sup> OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Paris: OECD, 2011) [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf).

<sup>3</sup> H.M. Government, *Bribery Act*, (UK Public General Acts c.23, London, 2010), <http://www.legislation.gov.uk/ukpga/2010/23/contents>.

<sup>4</sup> Parlement français, *LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (Paris: Legifrance, 2017), <https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte>.

# 2

## Current Innovative Regulatory Tools

## 2.1 Failure to Prevent Corruption

In the UK's 2010 *Bribery Act*,<sup>5</sup> a strict liability offence was introduced to incentivize corporations to maintain strong anti-bribery controls in order to prevent corruption. A criminal offence was created for failing to prevent bribery, not just for committing bribery.

The law also contains an “adequate procedures”<sup>6</sup> defence, which allows companies to demonstrate that they had the controls and culture in place but that some “bad apples” slipped through the cracks. In other words, the company acted with good intentions but fell victim to a rogue agent. The UK courts have ruled, however, that simply having procedures in place is not enough to avail oneself of the defence of adequate procedures.<sup>7</sup>

While not multilateral, the UK *Bribery Act* applies extraterritorially by extending to the commercial business affairs of UK companies around the world as well as any organization doing business with the UK. Some commenters have stated that the failure to prevent offence “can be a very effective way to encourage the establishment of compliance programs and the proper resourcing and budgeting of compliance professionals within organizations. It creates pressure to turn to your robust compliance program to show that it is effective, or that it was in place and all employees were properly trained.”<sup>8</sup> Some have even argued that the influence of the failure to prevent offence has resulted in it now being “common practice for companies to assess their high-risk areas and develop a myriad of procedures and processes to mitigate their risks as far as possible, and ensure ‘adequate procedures’ are in place.”<sup>9</sup>

The OECD has reacted favourably<sup>10</sup> to this type of offence. Additionally, several other jurisdictions have begun implementing, or are taking serious steps towards implementing, similar offences within their own anti-corruption statutes. Most importantly, it shifts the conversation from reacting to corruption to eradicating corruption in the first place. It incentivizes proactive consideration of internal risks of corruption.

**Recommendation:** We recommend that Article 1, paragraphs 1 and 2 of the OECD Convention be amended to explicitly require the inclusion of a “failure to prevent” offense in domestic anti-corruption laws.

## 2.2 French Law on Vigilance

The French law on the corporate duty of vigilance<sup>11</sup> can be characterized as the first corporate multilateral law of its kind. It places responsibility on multinational parent companies for acts that surpass the independence of the legal entity. Multinational French companies can be held liable for the activities of their subsidiaries, suppliers, subcontractors and affiliates, removing their ability to deny responsibility for a “family member”. Some have argued that “in order for this type of corporate responsibility to be truly effective, it would require an international binding treaty so that all companies everywhere in the world could be held accountable for their actions and subject to effective sanctions.”<sup>12</sup>

This law would have serious ramifications if adopted globally. It is worth considering whether the OECD Convention could include a provision whereby signatories must adopt a similar domestic law to the one observed in France. It will require examination beyond the scope of this paper to determine whether such a law would respect various legal principles, such as corporate criminal liability, in other jurisdictions.

**Recommendation:** Further study be done to assess whether a similar law on vigilance should or could be applied in other jurisdictions and whether it respects legal principles in other OECD states.

<sup>5</sup> H.M. Government, *Bribery Act*.

<sup>6</sup> H.M. Government, *Bribery Act*, S.7(2).

<sup>7</sup> *Regina v. Skansen Interiors Limited*, T20170224 (Southwark Crown Court, 2018). – Skansen was charged with failing to prevent bribery despite having measures in place as it was seen that Skansen had not made sufficient efforts to ensure all staff had access to these policies or that they received proper training on them. Furthermore, they did not have a tailored approach to preventing bribery, something which was not considered “adequate” to prevent bribery, even for a company of only 30 employees.

<sup>8</sup> James Klotz (Partner, MillerThomson LLP), interviewed by Noah Arshinoff, Ottawa, ON, 17 January 2020.

<sup>9</sup> “The Bribery Act: The Changing Face of Corporate Liability,” White & Case LLP, last modified October 5, 2016, <https://www.whitecase.com/publications/insight/bribery-act-changing-face-corporate-liability> (March 9, 2020)

<sup>10</sup> OECD, *Implementing the OECD Anti-Bribery Convention Phase 4 Report: United Kingdom* (Paris: OECD, 2017), <https://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf>, 80.

<sup>11</sup> The full name is the *Law No.2017-399 of 27 March 2017 on the Corporate duty of vigilance of the parent and outsourcing companies* – (French: *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (Paris: Legifrance, 2017), <https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte>.

<sup>12</sup> Les Amies de la Terre France, *Loi Sur Le Devoir De Vigilance Des Sociétés Mères Et Entreprise Donneuses D'ordre - Année 1: Les Entreprises Doivent Mieux Faire* (Montreuil: Les Amies de la Terre France, 2019), 4, 7, <https://www.amisdela terre.org/wp-content/uploads/2019/02/2019-etude-interasso-devoir-de-vigilance.pdf>.

## 2.3 Industry Fighting Corruption – Maritime Anti-Corruption Network

The Maritime Anti-Corruption Network (MACN)<sup>13</sup> serves as a global success story for how an industry-led initiative can change the way corruption is viewed around the world. MACN was founded in 2011, partly in response to the enactment of the UK *Bribery Act*,<sup>14</sup> when many companies were obligated to review their anti-corruption policies and programs. The shipping industry had been rife with corruption, and a small group of committed maritime companies banded together to take action.

Their success relied largely on their chosen system of detecting and reporting bribery. MACN asked their members to anonymously report demands for bribery wherever they encountered it. Without the risk of being shamed or called out by MACN, companies were not afraid of reporting. MACN was able to collect significant data on problematic ports and tailor collective action projects to those areas most in need.<sup>15</sup>

One such project was initiated in Argentina, where data from MACN member companies highlighted a systemic issue with demands for payment for unclean grain holds. Inspectors tended to have broad discretion and therefore the power to accept or reject shipments based on their categorization. MACN did not seek to sully the reputation of the country, but rather worked with local stakeholders and government to root out the problem. Their local partnerships allowed them to gather and examine data, determine how high up the corruption went, and enabled them to draw up an advocacy plan. This innovative approach meant that MACN was able to empower the Argentine government with a good news story rather than one of gloom and doom.

The government has since put forward a new regulation to address the various problems this initiative uncovered.<sup>16</sup> While the project has reduced corruption by approximately 90 per cent, it is how MACN handled the initiative which truly garners applause.

MACN is engaged in changing attitudes that have been embedded for half a century. To do so, the organization speaks in the language of business (costs, employee engagement, productivity). A key ingredient in doing this, according to Cecilia Müller Torbrand, Executive Director of MACN is “getting practical very early. Every company is going through this journey and all ask the same questions during the implementation phase and receive similar questions from the people on the ground (frontline). A sectoral approach is key in finding common denominators in order to fight corruption.”<sup>17</sup> She further states that MACN’s success has been due to the sensitivity they maintain for the areas in which they operate, including the political realities.

The growth of MACN and their impact is impossible to ignore. The organization now represents over 30 per cent of global tonnage and has more than 130 global members in its network. As it continues to grow, so does the influence of displaying the MACN logo on ships. As per Paul Townsend, former Vice-Chair of MACN: “many port authorities now see the logo and they tend to back off from asking for either facilitation payments or fines because they know that MACN members resist giving anything of value illegally. They are instructed to only give something if under duress.”<sup>18</sup> Their influence has grown to include industries that rely on shipping — such as the oil and gas sector, where companies rely on clean supply chains to ensure their reputations remain intact — giving MACN member companies a leg up.

***Recommendation: The OECD could leverage its position as a multilateral policy think tank to serve as a contact point and gather anonymous data from industry on corruption. This would enable the OECD to partner with industry led initiatives and influence where to focus anti-corruption initiatives.***

<sup>13</sup> “Overview & History,” Maritime Anti-Corruption Network, MACN, <https://www.maritime-acn.org/about-macn>, (March 9, 2020).

<sup>14</sup> H.M. Government, *Bribery Act*.

<sup>15</sup> Paul Townsend, interviewed by Noah Arshinoff, Ottawa, ON, 7 January 2020.

<sup>16</sup> See “Argentina Initiative,” Maritime Anti-Corruption Network, MACN, <https://www.maritime-acn.org/macn-argentina-case-study> (March 9, 2020).

<sup>17</sup> Cecilia Müller Torbrand, interviewed by Noah Arshinoff, Ottawa, ON, 3 February 2020.

<sup>18</sup> Townsend, interview.

# 3

## The Multilateral Context



While the above examples can all claim a variance of success in fighting corruption, adapting similar obligations using international multilateral instruments requires additional creativity. In this section, we discuss how international trade and investment treaties have been evolving to include specific anti-corruption provisions and chapters. We believe that some of these new tools could be included as amendments to the OECD Convention to further bolster its international reach. International treaties provide clarity for businesses and governments, but ensuring parties have appropriate recourse when a party does not abide by its covenants in the agreement is essential. The OECD Convention can be an important tool in this respect.

### 3.1 Investor-State Dispute Settlement

The obligations in Investor-State Dispute Settlement (ISDS) tend to lie with the state having to enforce certain behaviours, while investors benefit from the certainty ISDS provides and the ability to avail themselves of remedies against a sovereign actor. For example, states must comply with the promises they made in the treaty or face a challenge which could result in them having to remedy the harm done to the investor. We believe the burden can be turned around and the onus placed on the investor to abide by certain behavioural standards in order to benefit from the treaty.

Amending the OECD Convention to include a stipulation that all signatories be required to include a model provision on anti-corruption in any future international investment agreements they sign, could be an influential way to accomplish enterprise behavioural standards. Backed by the establishment of an OECD dispute settlement body that is empowered to hear complaints related to these provisions and impose penalties (discussed in section 4), this provision would be a powerful instrument.

The trouble with ISDS is that it is not well-structured to enforce corporate behaviour. As the system currently works, companies make claims against states. A state can file a counterclaim against the company if they are aware of corruption, but states generally cannot launch a complaint directly against a company. The state would instead need to launch a complaint against the offending company's home state.

Some have argued that ISDS could be expanded to provide a mechanism that denies ISDS to investors for certain breaches as agreements "could empower tribunals to order the firm to pay damages or comply with other sanctions."<sup>19</sup>

Tribunals established by investment treaties, however, have limited tools at their disposal in the absence of express provisions. Furthermore, it can be very difficult to overcome state complicity in corruption when not fully enforcing their anti-corruption laws might be in their interest (or in their national public interest). To overcome this challenge, VanDuzer, Simons and Mayeda have come up with a model provision that could be included in all bilateral, or even multilateral investment treaties.<sup>20</sup> A model provision such as this would create an obligation on investors to refrain from acts, or complicity in acts, of bribery and corruption.

#### ISDS Case Study: World Duty Free

ISDS has indeed come up in anti-corruption enforcement, but with a remarkable twist. World Duty Free, a company registered in the United Kingdom, initiated ICSID proceedings<sup>21</sup> against the Republic of Kenya alleging that Kenya had breached contractual obligations it owed and had illegally taken the claimant's property when Kenyan officials ordered that a court-appointed official take over management and control of World Duty Free. It later surfaced that World Duty Free had originally won the contract by bribing the then-President of Kenya. While the company was attempting to enforce a contract it obtained through a bribe, the tribunal held that they had no right to pursue or recover under any of the pleaded claims. The case was important as it showed how investors, in addition to having legal rights, also have certain legal obligations in the host states in which they operate, the violation of which can lead to them losing their legal rights in the host state.

<sup>19</sup> Lise Johnson, "IIAs and Investor (Mis)Conduct," Columbia Center on Sustainable Investment, last modified January 14, 2019, <http://ccsi.columbia.edu/2020/01/21/iias-and-investor-mis-conduct/>, (March 9, 2020).

<sup>20</sup> Anthony J. VanDuzer, Penelope Simons and Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators*, (London: Commonwealth Secretariat, 2012), 344-345, [https://www.iisd.org/pdf/2012/6th annual forum commonwealth guide.pdf](https://www.iisd.org/pdf/2012/6th%20annual%20forum%20commonwealth%20guide.pdf).

<sup>21</sup> Nathalie Bernasconi-Osterwalder and Lise Johnson, *International Investment Law and Sustainable Development: Key cases from 2000–2010* (Winnipeg, MB: International Institute for Sustainable Development, 2011), 162-167, <https://www.iisd.org/library/international-investment-law-and-sustainable-development-key-cases-2000-2010>.

**Recommendation: Amend Articles 3, 4 and 5 of the OECD Convention to make it a requirement that signatories adopt model provisions on anti-corruption in their international trade and investment agreements. Contravention of such requirements should provide a new OECD dispute settlement mechanism with jurisdiction to hear and adjudicate complaints.**

## 3.2 International Trade Agreements

While investment treaties are often restrained in their creativity, due to negotiations starting from a template model treaty, trade agreements tend to be much broader. They often start with a near blank slate whereby everything can be negotiated. The benefit is that you can create provisions, including those focused on anti-corruption and dispute settlements.

Both the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP) and the *United States-Mexico-Canada Agreement* (USMCA) have included anti-corruption chapters that are subject to a dispute settlement mechanism, a novel accomplishment in multilateral treaties. However, both contain the same flaw — neither agreement requires the parties to enforce their laws, but rather only to ensure they have anti-corruption laws on the books.

We propose to take it a step further, whereby a new OECD dispute settlement mechanism could be modelled after the USMCA's Facility-Specific Rapid Response Labour Mechanism. An OECD panel would be empowered through international trade and investment agreements to investigate individual private entities engaging in behaviour outlawed by applicable anti-corruption laws. This would make fighting corruption in international business truly multilateral.

### 3.2.1 CPTPP

When it was signed in 2018, the CPTPP was seen as the high-water mark in anti-corruption within a multilateral trade agreement. The transparency and anti-corruption chapter<sup>22</sup> contains innovative provisions for a trade agreement, including requiring that all signatories criminalize and sanction corrupt behaviour thus directly affecting international trade and investment. It also requires signatories to adopt or maintain measures regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards.

While symbolically this brings anti-corruption to the forefront of an international treaty, there is one fatal flaw — there is no recourse to hold signatories accountable should they fail to apply or enforce their anti-corruption laws. While all CPTPP members must have laws on the books, the dispute settlement mechanism of the CPTPP does not apply to whether a signatory enforces those laws domestically. The laws must physically exist, but they don't need to be breathing.

### 3.2.2 USMCA (new NAFTA)

The USMCA's Anti-Corruption Chapter<sup>23</sup> is largely modelled after the provisions found in the CPTPP<sup>24</sup>. The provisions are fairly detailed and extensive requiring the adoption or maintenance of several legislative standards. As in the CPTPP, the dispute settlement mechanism of the USMCA applies to the anti-corruption provisions, but with a similar flaw. In summary:

*"...Chapter 27 explicitly permits the parties to initiate claims through the USMCA's dispute settlement mechanism to challenge measures alleged to be inconsistent with the Chapter's requirements. ...one USMCA party may someday be able to bring another USMCA party before an international panel to hold it to account for failure to live up to its anti-corruption obligations.*

*...Most notably, the signatories have explicitly excluded disputes arising out of parties' failure to effectively enforce laws adopted or maintained pursuant to the agreement, likely due to sovereignty concerns."<sup>25</sup>*

<sup>22</sup> "Comprehensive and Progressive Agreement for Trans-Pacific Partnership," signed March 8, 2018, Government of Canada (2018): Chapter 26, [https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/index.aspx?lang=eng&\\_ga=2.218325661.542998417.1583762618-1104707900.1583762618](https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/index.aspx?lang=eng&_ga=2.218325661.542998417.1583762618-1104707900.1583762618).

<sup>23</sup> "Agreement between the United States of America, the United Mexican States, and Canada Text," signed November 30, 2018, Office of the United States Trade Representative (2020): Chapter 27, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

<sup>24</sup> See "CPTPP", Chapter 26.

<sup>25</sup> Collmann Griffin, Richard Mojica, Marc Alain Bohn, "Takeaways from the Anti-Corruption Chapter of the USMCA", FCPA Blog, last modified January 9, 2019. <https://fcpcbog.com/2019/01/09/takeaways-from-the-anti-corruption-chapter-of-the-usmca/>, (March 9, 2019).

While the above is a step in the right direction, the obvious shortcoming is the same as that of the CPTPP — having laws on the books is enforceable, but applying those laws is not. Parties cannot initiate proceedings against another party for doing nothing about a company that appears to be in violation of an anti-corruption law.

***Recommendation: Fulfilling the CPTPP and USMCA’s good intentions, we recommend that they be strengthened to ensure all parties must enforce their laws or risk being subject to an empowered dispute settlement mechanism.***

### **3.2.3 USMCA Facility-Specific Rapid Response Labour Mechanism**

The USMCA Facility-Specific Rapid Response Labour Mechanism, though new to a multilateral trade agreement, provides a blueprint from which the OECD Convention could be modelled as it concerns dispute settlement.

Annexes 31-A and B to the USMCA<sup>26</sup> dispute settlement chapter provide for creative recourse. Bilateral agreements between the U.S.-Mexico and Canada-Mexico establish that if a signatory has concerns relating to freedom of association and collective bargaining, it can request an investigation by an independent panel of labour experts and, subject to a positive finding, can take measures to impose penalties on

exports from those facilities. Specifically, “Remedies may include suspension of preferential tariff treatment for goods manufactured at the Covered Facility or the imposition of penalties on goods manufactured at or services provided by the Covered Facility”.<sup>27</sup>

Unlike other trade claims, this is about a specific covered facility (e.g. a factory not respecting the appropriate labour standards) rather than an accusation against the signatory country. The complainant country would work with the specific facility to try to resolve the claim. If unable to do so, it could formally launch a complaint with an independent panel pursuant to USMCA.

For the first time under a multilateral trade agreement, it provides the ability for a signatory country to investigate and pursue an independent private entity operating in another signatory country for failing to adhere to the covenants and standards of the agreement.

***Recommendation: The OECD Convention establish a dispute settlement mechanism largely modelled after this example. The OECD panel could receive complaints and investigate specific entities to determine their compliance with anti-corruption obligations. Failure to comply may result in a variety of sanctions.***



<sup>26</sup> Text available at “Protocol of Amendment to the Agreement between the United States of America, the United Mexican States, and Canada,” signed November 30, 2018, Office of the United States Trade Representative (2018), <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Protocol-of-Amendments-to-the-United-States-Mexico-Canada-Agreement.pdf>. See also “Summary of revised outcomes”, Government of Canada, [https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/summary\\_outcomes-resume\\_resultats.aspx?lang=eng](https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/summary_outcomes-resume_resultats.aspx?lang=eng), (March 9, 2020).

<sup>27</sup> See “USMCA,” Article 31-A.10: Remedies, paragraph 2.

# 4

## Modifying The OECD Convention

The OECD Convention has the ability to bring several of the aforementioned tools together under one roof, providing for multilateral international impact. Although some tools are used singularly elsewhere, the OECD Convention signatories comprise an ideal group from which to test some of these mechanisms in a truly global forum.

## 4.1 OECD Dispute Settlement Mechanism

Dispute settlement under the OECD Convention would focus on non-criminal resolution of corruption offences. It is our belief that this method would be more nimble and possibly more effective at deterring corruption than other tools that have been advocated, such as an International Anti-Corruption Court (IACC), especially given the upsurge in non-trial resolutions of corruption offences in OECD countries.<sup>28</sup>

There is a significant difference in how we should hold corporations and individuals accountable. Corporations might exist on paper, but they cannot be detained or sequestered, meaning the threat of imprisonment is far less effective on a corporate entity. Creativity is required to ensure that meaningful penalties and enforcement mechanisms are in place to influence the behaviour of corporations.

If a signatory to the OECD Convention has a legitimate claim that an offending company domiciled in a signatory country has failed to live up to its covenants under the convention, there would need to be the ability to strike a dispute resolution panel that can issue reports of findings. To truly apply multilaterally, if corruption occurs by an entity domiciled in an OECD state, any party to the convention would be entitled to bring a complaint to a dispute settlement body. The panel, made up of independent judges who are experts in anti-corruption, would be empowered to investigate and decide which measures to put in place to account for the crimes.

To be effective, it would need to overcome a common criticism — that investigators of an international body do not have the appropriate tools at their disposal.<sup>29</sup> If the OECD Convention required all signatories to submit to dispute settlement, it could also confer jurisdictional authority to any investigative authority of a signatory to the convention.

### The Working of an OECD Dispute Settlement Body for Anti-Corruption

- **Jurisdiction** established by amendment to the convention providing an OECD body with the ability to investigate and pursue specific entities in any signatory country upon request of any signatory
- **Panel** created of independent anti-corruption experts from different signatory countries
- **Empowered** to impose economic penalties in the form of fines, sanctions and exclusions
- **Trusted** as the distributor of the fines to various initiatives, victim groups, government
- **Oversight and Mechanism** of implementation through expanded peer monitoring to ensure compliance with findings
- **Partnerships with other Bodies** to facilitate penalties such as cross-debarment (e.g. WorldBank)
- **Pool** of funds used to partner with industry to launch anti-corruption initiatives around the world.  
Possible benefit of removing corruption from aid packages.

## 4.2 Addressing Corporate Accountability Via the OECD Convention

The USMCA's new Facility-Specific Rapid Response Labour Mechanism discussed in 3.2.3 offers an excellent example to draw from. Suppose Company A from Country A committed a bribery offence in Country B. Country A failed to prosecute or investigate. Could Country C (or any other signatory to the OECD convention) launch a claim against Company A to an OECD dispute settlement panel that would be charged with remedying the offence?

For example, if Germany submitted a complaint that Canada had not lived up to its covenants by adequately investigating an offence, German authorities would have jurisdiction to investigate and bring the findings to the OECD panel. Alternatively, signatories could agree on enabling any panel established as part of dispute settlement to work with the authorities in the jurisdiction to gather required evidence.

Another method would be to allow OECD dispute settlement panels to act as *ad hoc* autonomous investigative bodies, similar to the UN-backed anti-impunity commission in

<sup>28</sup> OECD, *Settlements and Non-Trial Agreements*.

<sup>29</sup> Alex Whiting, "Guest Post: Is an International Anti-Corruption Court a Dream or a Distraction?", The Global Anti-Corruption Blog, last modified 4 October 2018, <https://globalanticorruptionblog.com/2018/10/04/guest-post-is-an-international-anti-corruption-court-a-dream-or-a-distraction/>, (March 9, 2020).

Guatemala.<sup>30</sup> Empowering an international body has been seen by many as one of the necessary solutions to combatting widespread corruption.<sup>31</sup>

Bringing a dispute settlement mechanism under the tent of the OECD Convention would ensure equal treatment of anti-corruption offences across all OECD jurisdictions. It also has the potential to reduce or eliminate the threat of political interference, protectionism, and complicity that may result when domestically-important entities are accused of corruption as the rest of the international community would have a *de facto* ability to launch a complaint. However, as the MACN experience illuminated, this would still need to be approached with extreme sensitivity and awareness of the political consequences in the host state of the accused. The flexibility of a dispute settlement body is that it need not focus on criminal liability, but instead may be able to strike deals focused on collective action projects to root out corruption.

#### 4.2.1 Remedies

While a body could theoretically be struck to investigate and ensure compliance with an investigation, what kind of remedies could an OECD panel offer? In international trade agreements, remedies are generally limited to a denial of benefits (such as tariffs in the World Trade Organization). One example worthy of further consideration falls under the *Comprehensive Economic and Trade Agreement* (CETA) between Canada and the European Union, in which it clarifies that an investor cannot submit an ISDS claim if the investment was made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.<sup>32</sup> This clarification does not point to domestic law, but rather an exclusion of benefits under the treaty.<sup>33</sup> Dispute settlement under the OECD Convention may need to be more imaginative, however, as it does not convey economic benefits to signatories — therefore it cannot rely on their exclusion as a remedy to corruption.

#### Monetary

An OECD panel may be able to issue arbitral style awards that would issue specific sums calculated based on the harm done to the victims of corruption. It could be as simple as adding a multiplier to the amount of the bribe that was paid or offered. An OECD body having responsibility for the distribution of monies obtained from fines could ensure that remedial efforts are made by helping to fund on the ground anti-corruption initiatives, rather than adding to general government revenues.

The Siemens case in 2009 is instructive on this topic. While the company reached an agreement with the World Bank<sup>34</sup> to contribute \$100 million towards anti-corruption initiatives,<sup>35</sup> there has been criticism that allowing a corporation to set up and manage its own fund as part of a settlement risks that “they and the recipients of their largess could be seen to be more concerned with their mutual benefit, whether income, reputation, or anti-corruption visibility – a form of *greenwashing*.”<sup>36</sup>

While the notion of paying the victims of bribery is a laudable ideal, neither corporate entities nor sovereign governments are necessarily the right mechanism to administer such a fund. The OECD, on the other hand, could be leveraged as an important body that could bring together industry, governments, NGOs, and anti-corruption practitioners to best distribute funds obtained from fines.

**Recommendation:** *An OECD dispute settlement panel be empowered to impose fines, but also to collect and distribute those funds to anti-corruption initiatives around the world in partnership with NGOs, industry and governments where warranted.*

<sup>30</sup> Matthew C. Stephenson and Sofie A. Schütte, *An International Anti-Corruption Court? A synopsis of the debate*, (Bergen: U4 Anti-Corruption Resource Centre, 2019), <https://www.u4.no/publications/an-international-anti-corruption-court-a-synopsis-of-the-debate>, (March 9, 2020).

<sup>31</sup> Mark L. Wolf, “The World Needs an International Anti-Corruption Court,” *Daedalus* 147, no. 3 (Summer 2018):144-156.

<sup>32</sup> “Comprehensive Economic and Trade Agreement (CETA),” signed October 30, 2016, European Commission (2018): Article 8.18(3), <https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>.

<sup>33</sup> David Gaukrodger, *Business Responsibilities and Investment Treaties*, (Paris: OECD, 2020), 98, <http://www.oecd.org/daf/inv/investment-policy/Consultation-Paper-on-business-responsibilities-and-investment-treaties.pdf>.

<sup>34</sup> World Bank, *Siemens Settlement Agreement Fact Sheet* (Washington, D.C.: World Bank Group, 2009), <http://pubdocs.worldbank.org/en/910931449242961996/113009-Siemens-Fact-Sheet.pdf>

<sup>35</sup> World Bank, “Siemens Launches US\$100 Million Initiative for Anti-Corruption, World Bank Group,” World Bank Group press release, December 9, 2009, <https://www.worldbank.org/en/news/press-release/2009/12/09/siemens-launches-million-initiative-anti-corruption>, (March 9, 2020).

<sup>36</sup> Alan Doig, “Structuring Effective Corporate Pay-Back To Help Fight Corruption”, The Global Anti-Corruption Blog, last modified March 24, 2016, <https://globalanticorruptionblog.com/2016/03/24/guest-post-structuring-effective-corporate-pay-back-to-help-fight-corruption/>, (March 9, 2020).

### **Economic Sanctions**

An OECD panel would need to be empowered to make binding decisions, however, a jurisdictional issue exists. How can a multilateral body impose a sanction on a private company? Sanctions are essentially blacklisting — it is forbidden to do business with entities on the sanctions list. The U.S is currently the world leader in sanctions enforcement led by the *Office of Foreign Assets Control* (OFAC). OFAC sanctions primarily target trade with particular countries but also come up against individuals and groups of individuals.

Several countries around the world have also implemented Magnitsky sanctions, which restrict dealings in property and freeze assets of foreign nationals if that person has been found to violate internationally recognized human rights laws. These sanctions can also be imposed upon public officials, or an associate of such an official, who are responsible for or complicit in acts of significant corruption.<sup>37</sup> Magnitsky sanctions can be an excellent tool to hold those complicit in corruption accountable and can be targeted to the individuals ultimately responsible.

If an OECD dispute settlement body was capable of imposing sanctions, it could be very influential. While many options may exist in how to accomplish this, our view is that a voluntary agreement be struck by all OECD Convention signatories that requires their respective financial institutions to refuse doing business with any entity on an OECD sanctions list due to contravening the OECD Convention. In other words, an OECD panel would add an entity to the sanction list after performing an investigation, or after an investigation was completed, in a signatory country. The entity would face a debarment period from obtaining funding from any major financial institution domiciled in an OECD Convention signatory country. Rather than punishment being the goal, the real winner with this type of power would be prevention — being blacklisted from obtaining funding or engaging with financial institutions in 44 countries would likely be a death knell for many organizations. Compliance could suddenly look much more attractive.

**Recommendation:** *The OECD should examine how a sanctions system on a multilateral scale might function and determine whether under the OECD Convention the creation of side agreements with the major financial institutions of all signatory countries that would bind them to not do business with an entity that was sanctioned by an OECD dispute settlement panel could be implemented.*

**Alternative Recommendation:** *Amend Article 3 of the OECD Convention to require that signatories adopt Magnitsky style sanctions in their domestic laws.*

### **Compliance with Panel Findings**

The OECD's country monitoring system is the current gold-standard in terms of the application of an international treaty. We believe that this system could be adapted to the purpose of ensuring any findings issued by an OECD dispute settlement body are being complied with.

Given the timing of country reporting and the fact that phase 4 is well underway, it is an opportune time to determine how else country monitoring could be effective. While dispute settlement findings under many international trade agreements are hard to enforce, the OECD Convention comes ready-built with an effective tool.

**Recommendation:** *Adapt and expand the OECD Convention's country monitoring system to ensure compliance with findings issued by any OECD dispute settlement body.*

<sup>37</sup> See for example Global Affairs Canada, *Justice for Victims of Corrupt Foreign Officials Act*, Ottawa, ON: Government of Canada, 2019, [https://www.international.gc.ca/world-monde/international\\_relations-relations\\_internationales/sanctions/victims\\_corrupt-victimes\\_corrompus.aspx?lang=eng&\\_ga=2.215011348.2093784686.1575330033-54809398.1575330033](https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/victims_corrupt-victimes_corrompus.aspx?lang=eng&_ga=2.215011348.2093784686.1575330033-54809398.1575330033).

# 5

## Recommendations & Conclusion



We have painted a fairly large canvas above of some innovative tools that are being used to fight corruption and how they can be adapted to be brought under the OECD Convention to continue to fight corruption on a multilateral scale. We believe that the discussion steers the conversation away from criminal sanctions and instead focuses it more towards embedding a culture of compliance within corporate entities. As a colleague eloquently put it:

“ we should be focused on creating good citizens through compliance, not crushing them into oblivion through punishment.<sup>38</sup> ”

In that light, we believe the following *recommendations* merit further consideration in how to re-imagine corporate accountability on a multilateral scale.

### **1. Add a Failure to Prevent Offence to the OECD Convention's Expectations**

We recommend that Article 1, paragraphs 1 and 2 of the OECD Convention be amended to explicitly require the inclusion of a “failure to prevent” offence in domestic anti-corruption laws. This would increase the robustness and completeness of what signatories must do to combat corruption, but more importantly it shifts the focus from punishment to prevention.

### **2. Add Anti-Corruption Provisions to International Treaties**

Amend Articles 3, 4, and 5 of the OECD Convention to make it a requirement that signatories adopt model provisions on anti-corruption in their international trade and investment agreements, including requiring parties to properly apply and enforce laws, not merely having them on paper. Contravention of such requirements should provide recourse to a new OECD dispute settlement mechanism with jurisdiction to hear and adjudicate complaints.

### **3. Adopt a Dispute Settlement Mechanism Under the OECD Convention**

The OECD Convention, being the model treaty on anti-corruption around the world with the best monitoring system, is well-placed to be the arbiter of anti-corruption disputes or complaints. It can base the jurisdictional approach off the new USMCA Facility-Specific Rapid Response Labour Mechanism and can be the effective distributor of funds to further combat corruption around the world.

### **4. Conduct Further Research on the Imposition of Sanctions by an OECD Dispute Settlement Body**

Further research is required to examine how a sanctions system on a multilateral scale might function and determine whether, under the OECD Convention, the creation of side agreements binding the major financial institutions of all signatory countries to refuse business with an entity that was sanctioned by an OECD dispute settlement panel could be implemented.

### **5. Consider Magnitsky-Style Sanctions**

Consider the merits of amending Article 3 of the OECD Convention to require that signatories adopt Magnitsky-style sanctions in their domestic laws.

### **6. Research the Adaptability of the French Law on Vigilance to Anti-Corruption**

Further study should be conducted to determine the effectiveness of the French law on the duty of vigilance to assess whether similar laws should be applied in other jurisdictions, including adding a requirement to the OECD Convention.

### **7. OECD Leverage its Position to Gather Data and Partner on Anti-Corruption Initiatives**

The OECD could leverage its position as a multilateral think tank to serve as an international contact point and gather anonymous data from industry on corruption. This would enable the OECD to partner with industry-led initiatives and influence where to focus anti-corruption initiatives.

<sup>38</sup> Jennifer Quaid (Associate Professor of Civil Law at the University of Ottawa), interviewed by Noah Arshinoff, Ottawa, ON, December 6, 2019.

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