Where do we stand 20 years after the OECD Convention was signed?

Transparency International, the Berlin-based global anti-corruption organization, has just released its twelfth progress report (the 2018 Exporting Corruption Report)[1] on the enforcement of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the OECD Convention)[2]. This report follows on 11 reports published annually from 2005 to 2015. It is an occasion to reflect on what has been achieved by the OECD Convention so far and what more can be expected in the coming years.

But first, what is the OECD Convention and where does it come from?

Until the end of the past century, it was considered that it was up to each country to repress the bribing of its own public officials. However, in an increasingly globalized world, such as the world that emerged after the end of the second World War, bribes often crossed borders from the rich countries of the Northern hemisphere to the poor countries of the South in order to secure business or access to natural resources. This kind of corruption could flourish unhindered since it was not illegal in the countries of the bribe payers (as it concerned not national but foreign public officials) and was not likely to be prosecuted in the countries of the recipients of the bribes (because the state apparatus was controlled precisely by those recipients who would of course not let their legal system interfere with their enrichment).

A first attempt to close this loophole was made in 1977 when the United States enacted the Foreign Corrupt Practices Act (FCPA) following the discovery, in the wake of a scandal involving the sale of the fighter aircraft F-104 by Lockheed, that American corporations were routinely paying bribes in order to obtain business abroad. At first, the FCPA was not very successful. It had created an uneven playing field to the detriment of US corporations and was only weakly enforced. However, repealing it was not an option since it would have been seen as abandoning the battle field to the corrupt. Instead, the United States were doomed to use their diplomacy to convince others to follow suit.

These efforts were supported by a favorable political constellation. With the collapse of the USSR it was no longer necessary to tread carefully in the international arena out of fear that a country could switch camps in the cold war that had raged so far. The attitude that prevailed before this happened is illustrated by an anecdote involving James Wolfensohn who reported that, when he joined the World Bank in 1995, "we were not allowed to mention the word « corruption ». It was called the « C » word. I was told by the General Counsel within days of my getting to the institution, and in great secrecy, « Don't mention the « C » word. So I asked, « What's the « C » word ». He replied, « Corruption »[3]. This did not discourage James Wolfensohn to work with others to change the attitude towards international corruption from indifference and benign neglect to a major concern worldwide.

Since international corruption involves on the active side (offering or paying a bribe) to a large extent actors from rich countries, the appropriate forum to tackle it appeared to be the Organization for Economic Co-operation and Development (OECD). Established in 1948 as

[1] https://www.transparency.org/whatwedo/publication/exporting_corruption_2018

[2] http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf

[3] Reported by Klaus Decker, World Bank Rule-of-Law Assistance in Fragile States : Developments and Perspectives, in : Law in the Pursuit of Development : Principles into Practice, edited by Amanda Perry Kessaris, Abingdon/New York, 2010, pp. 224-253

the Organization for European Economic Cooperation (OEEC) to run the US-financed Marshal Plan for the reconstruction of Europe after the war, its name was changed to its current name in 1960 to reflect a mission no longer limited to Europe. The OECD has been sometimes described as a rich countries' club, reflecting the fact that its members constitute essentially what is generally referred to as the developed world[4].

In 1989, an OECD *ad hoc* working group was established to review national legislations regarding the bribery of foreign public officials and in 1994, the OECD Ministerial Council adopted the "Recommendation of the Council on Bribery in International Business Transactions". The following negotiation of a convention went astonishingly fast and the OECD Convention was signed in 1997 and came into force on 15 February 1999[5].

The OECD Convention follows the model of the FCPA. As its title says, it covers the active bribery of foreign public officials in international business transactions. It does not cover passive bribery (soliciting or receiving a bribe) nor private bribery (bribing an officer or personnel of a private corporation or organization like e.g. the world soccer association FIFA) and is limited to international business transactions (which does not include e.g. a bribe paid to an immigration agent by a vacationer or a migrant), although the legislations of many countries extend to these cases as well.

The OECD Convention is not directly applicable but commits its signatories to enact legislation reflecting its requirements. As of now, 44 countries have ratified the Convention, viz. the 36 OECD members plus 8 countries that have joined them without being members of the OECD (Argentina, Brazil, Bulgaria, Colombia, Costa Rica, Peru, Russia and South Africa). All have enacted legislation implementing the Convention but there are significant differences in the way these legislations are implemented.

The implementation and enforcement of the OECD Convention are monitored by the OECD Working Group on Bribery in international business transactions[6] through a monitoring system in 4 Phases: in phase 1, the adequacy of the implementing legislation is evaluated in a desk review without country visit; in phase 2, the effective application of the legislation is assessed on-site; phases 3 and 4 are conducted by way of a country visit as well and focus on the enforcement of the Convention and outstanding recommendations from the earlier phase. The monitoring is conducted by way of peer reviews by a team of experts of a signatory to the Convention other than the country being reviewed[7].

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[4] This was true at the beginning but is less so today: currently, the 36 members of the OECD include: in North America: the United States, Canada and Mexico; in Europe: 24 of the 28 members of the European Union (the non-OECD members being Romania, Bulgaria, Croatia and Cyprus) plus 2 non-EU members, Switzerland and Iceland; in Oceania: Australia and New Zealand; in Asia: Japan, Korea, Israel and Turkey; and in South America: Chile.

[5] A non-binding *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* was issued in 2009. It includes an Annex II on *Good practice guidance on internal controls, ethics, and compliance*.

[6] http://www.oecd.org/daf/anti-bribery/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm

[7] Canada has gone through phases 1 to 3 and is scheduled to undergo phase 4 review in June 2021 by Austria as lead examiner assisted by the United Kingdom.

The monitoring reports include recommendations that are an important tool to encourage countries to improve their legislation and its enforcement. They are made public on the OECD website for consultation by the public, including the media and NGOs that can use them to put pressure on the political system.

There is little doubt that the OECD Convention and the tools it has created are the most powerful instrument to combat international corruption. Other conventions, such as the United Nations Convention Against Corruption (UNCAC)[8], may have a significantly broader scope but they have had less practical impact so far.

Such is the broad framework of the OECD Convention and of the instruments that have been put in place to monitor its implementation. What does then the 2018 Exporting Corruption Report say about the state of this implementation 19 years after the coming into force of the OECD Convention.

The 44 Parties to the Convention are ranked in categories based on investigations that have been initiated, cases that have been started and cases that have been closed. There are four categories depending on the level of deterrence to foreign bribery:

- Active enforcement means that the OECD Convention is enforced in a way to constitute a major deterrent to foreign bribery;
- Moderate and limited enforcement mean that progress is being made but that there is insufficient deterrence to foreign bribery;
- In countries with little or no enforcement, nothing is done or what is done is not sufficient to constitute any deterrence to foreign bribery.

The first, sobering, conclusion, is that 18 countries[9] have *little or no enforcement* of the OECD Convention, including some major economies and players in international trade. This is only slightly better than according to the previous report, where 20 countries were found to have little or no enforcement. While four countries (*Israel, Brazil, Argentina and Chili*) that were in that category in 2015 have moved to a higher category, two countries, *South Korea and Finland*, both not insignificant players in international trade, have moved down to little or no enforcement.

Another 11 countries[10] (vs. 9 in 2015) have *limited enforcement*, including again some major players in the international field. There have been five new comers to that category: two coming up from the little or no enforcement category: *Argentina and Chile*; two being downgraded from the moderate enforcement category, *Austria and Canada*; and one, *Lithuania*, that was not included in 2015 because it only joined the OECD Convention in 2017. On the other hand, three countries left that category: two moved up to moderate enforcement, *Sweden and Portugal*; and one country, *South Korea* , moved down to little or no enforcement.

[8] http://www.unodc.org/unodc/fr/treaties/CAC/

[9] *Belgium, Bulgaria, Colombia, Czech Republic, Denmark, Estonia, Finland, Ireland, Japan, Luxembourg, Mexico, Poland, Russia, Slovakia, Slovenia, South Korea, Spain and Turkey*. And in addition *China, Hong Kong SAR, India and Singapore* that have been assessed although they are not parties to the OECD Convention.

[10] *Argentina, Austria, Canada, Chile, France, Greece, Hungary, Lithuania, Netherlands, New Zealand and South Africa.*

Four countries[11] (vs. 6 in 2015) are in the *moderate enforcement* category. Three came up from lower categories: *Brazil*, that has experienced and is still experiencing a tsunami with the Odebrecht case[12] and its ramifications in the entire economy of Brazil and other countries, came up from little or no enforcement; and Sweden and Portugal came up from limited enforcement. Three were downgraded: Austria and Canada to limited enforcement and Finland to little or no enforcement. Two more, Norway and Italy, left that category to move up to the active enforcement category.

Last but not least, only 7 countries[13] (vs 4 in 2015) are in the *active enforcement* category. They include the United States, Germany, the United Kingdom and Switzerland that have been in this category for several years. This is not surprising with respect to the United States, the United Kingdom and Switzerland, that have an interest to monitor their financial sector lest it be used for corrupt transactions. The role of Germany, a major exporter, in combating international bribery is, however, often underestimated. The German corporation Siemens, that has topped the list of FCPA cases for several years until it was topped by the Swedish company Telia, agreed, in relation with two German proceedings with the Munich Public Prosecutor's Office (one covering the Telecommunications group and the other the operating groups other than Telecommunications) to pay a total equivalent to $ 856 million, which is slightly more than the $ 800 million paid to the US authorities[14]. The other countries in the active enforcement category, Italy, Norway and Israel are newcomers, although Italy and Norway had already been assessed as active enforcers at the beginning of the current decade. Israel joined the group for the first time because it concluded its first foreign bribery case by means of a settlement and because of a significant increase in the number of opened investigations

Four parties to the OECD Convention are not covered in the 2018 Exporting Corruption Report: *Costa Rica, Iceland and Latvia* because their economies and their share of global exports are too small to allow a classification, and *Peru* that only joined the OECD Convention in 2018.

For the first time, in the 2018 Export Corruption Report, countries[15] that are not parties to the OECD Convention, *China, India, Singapore and Hong Kong SAR* have also been assessed. These countries , all four major players in international trade or finance, have all been classified in the little or no enforcement[16] category. While China has criminalized foreign bribery, it has not enforced its legislation so far in spite of investigations and charges levelled against Chinese companies and individuals in several countries. China is the world leading exporter with 10.8 % of world exports in 2014-2017, ahead of the United States' 9.95%, according to OECD data.

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[11] *Australia, Brazil, Portugal and Sweden.*

[12] The Odebrecht case is summarized on pages 107 seq. of the 2018 Exporting Corruption Report. It is an example of an investigation that has implied a large number of countries and intensive cooperation between the prosecuting authorities of Brazil, Switzerland and the United States. It is by far the largest case of international bribery so far.

[13] *Germany, Israel, Italy, Norway, Switzerland, United Kingdom and United States.*

[14] See the press release of the Department of Justice of 15 December 2008, at : https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html

[15] The Special Administrative Region of Hong Kong is referred to as a country here for convenience purposes.

[16] Since these countries are not parties to the OECD Convention, their enforcement is assessed with respect to the repression of foreign corrupt practices rather than to implementing the OECD Convention.

India, Singapore and Hong Kong have no legislation prohibiting foreign bribery and, of the three, only Singapore has had some (modest) enforcement activity in the past four years; the involvement of these countries and of China in repressing foreign bribery is badly needed with regard to their importance in international transactions.

The 2018 Exporting Corruption Report points out that, whatever changes there has been in the various enforcement categories, the countries in the top two categories (active and moderate enforcement) account for approximately the same share of world exports as in the 2015 report. It concludes therefore that there has been little change in enforcement level and makes a number of country-specific and overall recommendations to scale up that enforcement.

It is correct that the enforcement of the OECD Convention can be improved in several ways, such as e.g. by increasing efforts in the areas of mutual legal assistance, money laundering and accounting violations. More and better data should also be collected and made public on foreign bribery cases in order to support the dissuasive effect of criminalization.

However, the fact that only 11 out of 44 countries are in the active and moderate enforcement categories does not reflect the intensity of enforcement by these countries. In the 20 years since coming into force of the OECD Convention, the attitude towards foreign bribery has changed dramatically as exemplified by several developments.

While there was little enforcement of anti-bribery laws in the first years of this century and even enforcement of the FCPA, that preceded and inspired the OECD Convention, was rather limited, things soon changed. All cases of the top ten list of FCPA cases but one are from the second decade of this century, the exception being the Siemens case that was concluded in 2008 and may be considered as a major step in enforcing the laws against foreign bribery. Until 2010, the United Kingdom, a major exporter and financial center, was not considering adapting its 19th century legislation to the OECD Convention in spite of repeated encouragements from the OECD to do so. The UK was one of the last countries to enact a modern anti-bribery legislation, the UK Bribery Act[17], but when it did so, it surprised everyone by enacting what is now seen as the strictest law prohibiting the bribery of foreign officials worldwide. France, although still in the limited enforcement category, has enacted legislation, the so-called "loi Sapin II"[18] that obliges large enterprises to implement a program to prevent and detect corruption and creates an enforcement agency, the "Agence française anticorruption (AFA)" (French Anticorruption Agency); it also establishes a procedure, the "Convention judiciaire d'intérêt public" (judicial convention in the public interest)" that permits the settlement of cases against corporate entities like the deferred prosecution agreements (DPAs) that conclude most FCPA prosecutions.

The private sector has also experienced major changes in its attitude towards corruption. Most large corporations and many other organization have put in place anti-corruption measures and several instruments have been developed to assist corporations in this respect, such as the

[17] https://www.legislation.gov.uk/ukpga/2010/23/contents

[18] The « loi Sapin II » is not called after a Christmas tree (« sapin ») but after the Finance Minister at the time, Michel Sapin ; its official title is LOI n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique

Business Principles for Countering Bribery of Transparency International[19] or the Rules for Combating Corruption of the International Chamber of Commerce[20]. More recently, in October 2016, the International Organization for Standardization (ISO) has published Standard ISO 37001 – Anti-Bribery Management Systems that has established itself as the global standard for such systems.

Although China has been assessed in the little or no enforcement category, it has participated and is still participating actively in the work of the ISO 37001 Committee; this interest may forebode a more active enforcement of its own legislation on foreign bribery and possibly joining the OECD Convention. If this happens, it will be a major boost for establishing a level international playing field, the major objective of the fight against foreign bribery.

Parallelly to these developments, under pressure from OECD's Financial Action Task Force (FATAF)[21], most countries had to strengthen their legislation and procedures to prevent money laundering. Many countries, including Switzerland, well-known for its banking secrecy, had to accept more transparency in financial transactions as well as the automatic exchange of financial information. Because money laundering is systematically associated with large-scale corruption, progress in this area is key to detect corruption and unmask the corrupt.

While Transparency International's work, as an NGO, is to constantly point to areas of improvement, these considerations permit a certain level of optimism, even though it is still the case that a lot of work remains to be done before bribery in international transactions is, if not eliminated, at least reasonably under control.

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[19] https://www.transparency.org/whatwedo/tools/business_principles_for_countering_bribery/1
[20] https://iccwbo.org/publication/icc-rules-on-combating-corruption/
[21] http://www.fatf-gafi.org