Confronting Corruption

Past Concerns, Present Challenges, and Future Strategies

FRITZ HEIMANN
MARK PIETH

Foreword by
JIMMY CARTER

CONTENTS

Foreword by President Jimmy Carter  xiii
Acknowledgments  xv
Abbreviations  xvii

PART ONE  Setting the Scene

1. Introduction  3
   1. FIFA, a Criminal Organization?  3
   2. The Malaysian Wealth Fund “1MDB”  4
   3. Odebrecht, Petrobras, Lula da Silva, and Michel Temer  6
   4. Panama Papers  7

2. Why the Growing Concern About Corruption?  9
   1. Present at the Creation  9
   2. Putting Corruption on the International Agenda  12
   3. Need for Action  14
   4. Reasons for Continuing Resistance  14
   5. Growth of Anticorruption Capability  15
   6. Expansion of Global Economy  15
   7. Digital Communications  15

3. The Politics of Anticorruption  17
   1. Transparency International and Its Politics  17
   2. International Organizations  18
      a. OECD  18
      b. UNODC  19
      c. G20  20
      d. World Bank  20
      e. International Chamber of Commerce (ICC)  22
      f. FIFA  22
3. Governments 22
   a. United States 22
   b. UK 23
   c. Nordic Countries 24
   d. China 24
   e. Bangladesh 25
4. Role of Media 25
5. Growth of Anticorruption Movement 25
6. Government Departments 25
7. Private Industry 26
8. NGOs 26
9. Professional Organizations 26
10. Universities 26
11. Illicit Activities 27
12. Major Political Influences 27
    a. Tone at the Top 27
    b. Power of the Legal Establishment 27
    c. Role of Civil Society 27
    d. People Power 27
    e. Counteractions 28

   1. A “Cancer” to Be Rooted out? 29
   2. Giving and Taking 30
   3. Legal Definitions 31
   4. Corruption Comes in Different Forms 32
   5. A Systemic Perspective 35
   7. Are We Sure That Corruption Is Harmful? 38
   8. How Big Is the Problem? 39
   9. Why Have We Chosen to Fight Corruption Now? 42
  10. Are We Making a Difference? 43

PART TWO  Drivers of Change

5. Evolution of Transparency International 49
   1. Peter Eigen and the World Bank 49
   2. The Genesis of TI 50
3. Organizing TI 52
   a. Meeting with Amnesty International 52
   b. Organization Meeting at Dutch Foreign Ministry 53
   c. Berlin Launch Conference 53
   d. Ecuador Meeting 54
   e. Jeremy Pope Becomes Managing Director 55
   f. Growth of National Chapter Network 56
   g. Publication of TI Index 57
      Bribe Payers Index 58
      Rapprochement with the World Bank 58
4. Conventions Advocacy 59
   a. OECD Convention 59
   b. TI Progress Reports on Enforcement 61
   c. United Nations Convention against Corruption 62
   d. Evolution of TI Management 64
   e. The 2005 Election 66

6. The United States: Foreign Corrupt Practices Act and Campaign Financing 69
   1. Colonial Heritage 69
   2. Constitutional Debates 70
   3. Yazoo Controversy 70
   4. Construction of the Panama Canal 71
   5. Watergate 71
   6. Foreign Corrupt Practices Act 72
   7. Citizens United Case 73

7. Bribing Foreign Officials: The OECD Anticorruption Instruments 75
   1. Is Bribery a Necessary Evil? 75
   2. The US Foreign Corrupt Practices Act 77
   3. The Initiative and First Steps in the OECD 78
   4. The 1994 Recommendation and the Follow-Up 80
   5. Implementing the Convention 84
   6. The Crisis 87
   7. Overcoming the Crisis: The UK Bribery Act 2010 93
   8. Uneven Application 94
   9. Further Challenges 96
   10. A New Step Forward: The 2009 Recommendation 99
   11. A Final Positive Experience 100
   12. Conclusion 101
8. The UN Convention Against Corruption 103
   1. Global Significance 103
   2. The Politics of UNCAC 104
   3. The United Nations Convention against Corruption: Anticorruption’s Expanding Frontier 105
      a. Overview of the United Nations Convention against Corruption 106
      b. Provisions Directly Affecting International Business 108
      c. Strengthening National Integrity Systems 112
      d. The Implementation Review Mechanism 115

PART THREE Pervasive Trouble Spots

9. Finance and the “Shadow Economy” 119
   1. Grand Corruption and Money Flows 119
   2. A New Topic Altogether 124
   3. Expansion 127
   4. Current Status of Rules against Corruption-Money Laundering 128
   5. Asset Recovery 132
   7. The Overarching Theme: Overcoming the “Shadow Economy” 136
   8. Conclusion 137

10. Extractive Industries 139
    1. The “Resource Curse” 139
    2. Publish What You Pay 140
    3. The Extractive Industries Transparency Initiative 140
    4. The Struggle for Regulation 141
       a. United States: Section 1504 of the Dodd-Frank Act 141
       b. EU: Revision of Its Transparency and Bookkeeping Directives 142
    5. Regulating Trading? 143
    6. Collective Action as a Way Forward? 144

11. Infrastructure and Construction 145
    1. The Risks 145
    2. What Needs to Be Done? 147

12. Aeronautics and Defense 149
    1. What Are the Particular Risks in Defense Procurement? 150
    2. The Key Role of Defense Offsets 150
    3. Specific Corruption Risk Related to Offsets 151
Contents

13. The Art Market 157
   1. Challenges 157
   2. Self-Regulation? 159
   3. International Law? 161

14. The Pharmaceutical Industry 163
   1. Challenges 163
   2. What Needs to Be Done? 166

15. Sports Governing Bodies: The FIFA Experience 167
   1. Emotions and Big Business 167
   2. Multinational Enterprises and Quasi-intergovernmental Organizations 169
   3. Old Boys Suddenly Becoming Rich 170
   4. FIFA: A Company in Trouble or a Criminal Organization? 170
   5. The Responsibility of the Host Country 174
   6. What’s Wrong with Self-Regulation? 174
   7. Example FIFA 177
   8. International Regulation 179

16. Development Assistance 181
   1. Its Logic 181
   2. Is Development Assistance Effective? 182
   3. Donor Interest 183
   4. Tolerating Embezzlement? 183
   5. Is There a Way out of the Dilemma? 185
   6. Oil-for-Food 186
      a. The Official Programme 186
      b. Planned Distribution of Oil Proceeds 186
      c. What Went Wrong? 186
      d. Oil Surcharges—Flow of Funds 187
      e. Humanitarian Contract Kickbacks—Flow of Funds 189
      f. Illicit Income Received by Iraq under the Programme 189
   7. The Contribution of the IFIs 193

PART FOUR Criminal Law and other Forms of Regulation

17. Strengths and Limitations of Criminal Law 199
   1. Is Criminal Law Really That Essential to Combating Bribery? 199
   2. Who Is a “Foreign Public Official”? 200
   3. What about the Perpetual “Facilitation Payments”? 202
4. Individuals versus Corporate Liability 204
5. Watch Your Agents! 205
6. The Proof Is in the Pudding 207
7. Are Prosecutors and Courts out of Their Depths? 209
8. Do We Need a Supranational Criminal Court for Large-Scale Corruption? 211

1. Regulatory Sanctions 213
2. Debarment by MDBs 214
3. Automatic Debarment? 215
4. Is Debarment Always the Best Solution? 215
5. Dealing with Corruption in Arbitration Procedures 216
6. Prevention 217

PART FIVE Private Sector Responses

19. Private Sector Response to Corruption 221
1. Major Trends 221
2. Evolution of Compliance 222
   a. Role of NGOs 224
   b. UN Global Compact 225
   c. Industry Sector Initiatives: Wolfsberg 225
   d. Other Industry Sector Initiatives 226
      Extractive Industries Transparency Initiative (EITI) 226
      Construction Sector Transparency (CoST) 227
      Aerospace and Defense (IFBEC) 227
3. Common Problem Areas 227
   a. Gifts, Entertainment, and Travel Expenses 227
   b. Lobbyists and Sales Representatives 228
   c. Political Contributions 228
   d. Avoiding Extortion 229
   e. Private-to-Private Bribery 229
   f. Facilitation Payments 230
   g. Foreign Subsidiaries and Joint Ventures 230
4. Psychology of Corrupt Conduct 230
   a. Type A 231
   b. Type B 231
   c. Type C 231
Contents

5. Factors Needed to Influence Corporate Culture 231
   a. Tone at the Top Is Important 232
   b. Transparent Rules 232
   c. Leadership Selection 232
6. Moving Anticorruption to the Next Level 233

20. Collective Action 235
    2. From an Academic Think Piece to a Practical Solution 236
    4. Is Collective Action Really Necessary? 239

PART SIX Moving Forward

21. What Have We Achieved? 243
    1. Achievements and Challenges 243
    2. Accomplishments 243
    3. Challenges 245

22. Globalization and Digital Revolution 247
    1. Globalization 247
      a. Globalization of Corruption 248
      b. Impact of Globalization on Law Enforcement 248
    2. Digital Revolution 249
      a. Cyber Forensics 250
      b. Digital Initiatives 251
      c. The Political Impact 253
      d. Awareness Raising 253

23. Different Strategies for Different Countries 255
    1. Countries with Strong Democratic Institutions 256
    2. Countries with Weaker Democratic Institutions 257
    3. Countries with Autocratic Governments 258
      a. Working with China 259
      b. Working with Russia 263
      c. The Arab Spring and Its Implications for the Middle East and North Africa 263
    4. Failed States 265
    5. Long-Term Strategy Perspective 266

Bibliography 269
Index 281
1. IS BRIBERY A NECESSARY EVIL?

Before the year 2000 bribery was considered a “necessary evil” by most exporting countries. Of course, it was perceived as a nuisance to those having to pay, and the exporters realized that local judiciaries were rarely able to deal with it. In fact, in many instances local law enforcement agencies and judges were part of the problem. Therefore, an attitude “when in Rome do as the Romans do” prevailed. Even companies based in countries culturally averse to bribery (such as the Nordic States) rarely saw a problem when bribing in the Third World. Lawyers in developed states helped bolster this attitude with the corresponding theory: host states of companies are not responsible for the protection of the public interest of foreign states, they said. Overall, this attitude was very much embedded in (post-)colonial thinking.

This cynical approach was even reinforced in many exporting states by tax-deductibility of bribes (as so-called “necessary expenses”). Tax authorities claimed their role was to be ethically “neutral.”

It is true that bribery was rampant and that in many instances exporters were solicited for bribes. The attitude of these companies and of their host states, however, contributed substantially to keeping the corruption cycle going.

In some cases, the companies bribing pursued an ulterior interest beyond obtaining a contract or a license abroad: sometimes they developed complex bribery schemes to obtain so-called “retro-commissions.” Part of the corruption
money would flow home to friends, frequently to clandestinely finance political campaigns.

A particularly problematic case of this type seems to be the French Karachi/Nautilus scandal. The facts are gradually emerging from legal decisions, French secret service sources, and investigative journalism; there is to date, however, no finally researched version of the facts. The following can be said on a provisory basis:

"Le dossier Karachi"

The Nautilus saga starts with the sale of three submarines on September 21, 1994, by the French shipyard DCN to Pakistan. A second arms contract followed in November of the same year. Reports claim that the two contracts were worth 90 billion French francs and that large "commission payments" were agreed upon. The reports talk of 33 million French francs alone for the second contract. The commissions were due to go through the inevitable middle men to Pakistani military commanders, in close contacts with secret service operators and Islamists. The reports, however, also claim that a part of the commissions was destined to fuel the French presidential campaign of M. Balladur in 1995. The argument was that the eventually elected new president of France, Jacques Chirac, stopped the payments in 1996. Whether there was a link to the upcoming adoption of the OECD Convention in 1997 is unclear, though. All commentators, however, see a link between the "breach" of the bribe contracts of 1994 and the bombing of a bus in Karachi, killing eleven DCN technicians. Apparently, the bomb was far less amateurish than comparable devices: it points toward military involvement.

It remains unclear whether the attempt of the French legislature in 1998 to allow its companies to continue to honor bribe contracts concluded prior to the new law—the so-called "grandfather-clause" ultimately dropped by the Assemblée Nationale after intense critique by the OECD—has been influenced by this experience.


So, why would legislators of all major exporting nations suddenly adopt laws outlawing foreign bribery and banning tax-deductibility of such bribes?

2. THE US FOREIGN CORRUPT PRACTICES ACT

The OECD initiative on corruption in 1989 was a consequence of the US Foreign Corrupt Practices Act (FCPA) enacted in 1977 (see also above Chapter 6).

In the aftermath of the Watergate scandal the United States embarked on a moral cleanup. An international corruption scandal involving the US defense giant Lockheed Martin and the Japanese prime minister Tanaka triggered a vast Securities and Exchange Commission (SEC) investigation. For lack of a clear legal basis the SEC offered exemption from sanctions to those issuers voluntarily disclosing foreign bribery. Close to four hundred companies owned up to having bribed abroad. Shocked by this fact the US legislator drafted laws subjecting foreign bribery to criminal punishment.

Authors have disputed that the origin of the Foreign Corrupt Practices Act in 1977 had a purely moral background. They saw economic and political advantages: companies allowed to procure contracts by bribery were in the long run going to lose their competitive edge. Furthermore, the fact that hundreds of US companies were bribing abroad and some of them—such as Lockheed—bribed prominent political allies, was going to interfere with US foreign policy. Some of the staffers participating in the legislative efforts at the time came up with even more adventurous explanations: a former high-level official of the Department of Defense explains that Jewish interest was supporting the Foreign Corrupt Practices Act, as it was feared that bribery would promote arms sales to Arab countries. There is no way of telling if these explanations are correct, except that securing a level playing field in commerce was a key factor.


5. More than 400 companies, over 177 of them ranked amongst the Fortune 500, owned up to having paid substantial bribes in the recent past.

At any rate, the unilaterally enacted legislation was bound to put US commerce into a difficult situation internationally vis-à-vis their competitors. Therefore, it is not astonishing that the United States tried to internationalize the approach. The first ports of call were the United Nations. Between 1978 and 1979 the Committee on Transnational Corporations of the United Nations Economic and Social Council (ECOSOC)\(^8\) tried to draft an international treaty mirroring the approach of the FCPA. In 1979, however, Member States had to realize that these efforts were not going anywhere. They were abandoned.

The FCPA in its first ten years of existence was used sparingly and yet, toward the end of the 1980s business interests in the United States got restless. The “Omnibus Trade Act,” enacted in 1988, softened the FCPA’s touch; it introduced explicit exceptions and defenses (especially for facilitation payments). At the same time, it obliged the president to seriously engage in negotiations with the major trading partners to internationalize the FCPA.

This time the OECD was chosen and especially the Group of 7 (G7) Countries were targeted. In the meantime, chances had grown, as new markets were about to open with the ending of the Cold War.\(^10\)

3. THE INITIATIVE AND FIRST STEPS IN THE OECD

Rather astonishingly, the Council, the supreme body of the OECD, accepted by unanimity a US initiative in 1989 to work toward an international instrument combating “illicit payments”,\(^11\) the code word used at the time. In 1989 a study group was created under the chairmanship of the then Legal Counsel of the OECD, Christian Schricke.\(^12\) It basically analyzed national laws and came to the conclusion that the United States was the only country able to tackle foreign bribery. The Council, again by unanimity, created a new working party to explore options, the “Ad-hoc Working Group on Illicit Payments,” a

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7. Langer and Pelzman 2001, 3; Tarullo 2004, 676 (31): reference to Warren Christopher, deputy attorney general, when the FCPA was passed.
8. Cf. the work of, first, the ECOSOC’s Commission on Transnational Corporations, and later of its Committee on an International Agreement on Illicit Payments; Pieth 1999, A-1039.
10. Pieth 2014a, 13 et seq.
subsidiary body to one of the standing OECD Committees, the Committee on International Investment and Multilateral Enterprises (CIME).\textsuperscript{13}

\section*{HOW TO BECOME CHAIRMAN}

As frequently there is more than one reason for a choice: during the first year of the OECD’s work on corruption I had (as a young Criminology professor) been rather pushy and critical of the usual means of comparison of law. Concurrently, the Swiss Ministry of Economy, who had sent me to the OECD, seemed interested in the issue: Marino Baldi, then deputy director of the Swiss Federal Office of Economy and Chairman of CIME even put in a voluntary contribution to get this work off the ground. As life goes in International Organizations, those who promote an issue get remunerated with a job. Up to then I was totally unaware of these power mechanics. In 1989 I was a thirty-six-year-old inexperienced, but maybe overly self-conscious young lawyer. And then I was invited to lunch by a charming representative of the Secretariat, Enery Quinones. I did not really know how to react to the suggestion that I become president of this new working group (and of course I had no idea that this job was going to cling to me for the next twenty-four years).

The first three years of work in the new Working Group were rather drab: the old hands in the OECD, in particular French (such as Henri Chavransky) and Japanese commerce officials with a long career behind them, tried to explain that everyone else was incredibly naive and why this entire effort was driven by religious fanatics from across the ocean. We spent basically three years not speaking of contents, but of form: what type of instrument would we choose if we were to do any work at all.\textsuperscript{14}

It all changed when the Clinton administration took over in the United States. Since the new secretary of state, Warren Christopher, had been involved in writing the FCPA in 1977, there was no way back: suddenly, the level of representation in the Group was drastically raised. The US ambassador to the OECD and later undersecretary of state, Alan Larson, took the helm on behalf of the United States.

\textsuperscript{13} A Working Group that was created by the OECD Committee on International Investment and Multinational Enterprises.

\textsuperscript{14} OECD Council Decisions of March 1989 C(89)49; of June 1990 C(90)87; of February 1992 C(92)16; Ministerial Communiqué of 2 June 1998 (CES(93)22); Pieth 2000, 54 et seq.; Sacerdoti 2003, 72 et seq.
Allergic to Power Breakfasts or to Scallops?

Another anecdote illustrates the change of mind:

We were obviously stuck in these technical arguments about form over content. Alan Larson invited us to the US embassy for a “power breakfast” at 7 am. The issue was how to achieve the breakthrough. Up until now we were focused on a Convention, which seemed to get everybody worked up and the Group nowhere at all.

It was just the time when in another similar body, in the Financial Action Task Force on Money Laundering (the FATF),15 rules against money laundering were created in a rather smooth way with the help of soft law, with Recommendations. There was no need for domestic ratification. Once the Recommendations were adopted unanimously by the Group, they could be further developed internationally and countries’ compliance could be subject to evaluations.16

Having been a “founding member” of the FATF between 1989 and 1993 and one of the three examiners of the first monitoring exercise (of France in 1992), I advocated a soft-law approach also on anticorruption in the OECD. I know that it took the US Delegation a lot of energy to convince people at home of the change of approach—but it was worthwhile: in 1994 the OECD adopted its first Council Recommendation on Bribery.

The side effects of the breakfast were just as dramatic, even though I am sure that the cook of the US embassy is absolutely not to blame: I am probably simply allergic either to scallops or to power breakfasts altogether.


To a modern reader the 1994 Recommendation may seem rather simple. It starts off with exhortative language promising collectively to do something about bribery in foreign business relations and then goes on to give a so-called “shopping list” of possible areas of further work.17 What has been frequently overseen, though, is that this text already contains the rules of the further development: the peer process and the monitoring mechanism. Based on these

15. Cf. below Chapter 9.
16. Cf. below 124 et seq.
procedural rules the Working Group, now called “Working Group on Bribery,” spent the years between 1994 and 1997 developing more detailed language on the individual items of the “shopping list.” The method at the time was quite simple: the Working Group had a Deputy Chair, but no Bureau. We created Subgroups for each of the issues on the “shopping list” (especially criminalization of bribery, tax-deductibility, accounting and auditing, public procurement, and international cooperation as well as accession to the Group). We held seminars on each of these topics and nominated Subgroup Chairpersons to drive the process forward. In the course of three years we managed to supplement the Recommendation drastically. Paradoxically, the failure of the so-called Multilateral Agreement on Investment (MAI)\(^\text{18}\) helped our work in more than one way: first, we inherited the professional workforce who had been acting as Secretariat to the MAI (in particular Carolyn Ervin and the legal counsel, David Small). Furthermore, the OECD had learned its lesson from the MAI that civil society and the private sector needed to be involved in its work from an early stage. We therefore held regular open meetings and invited civil society representatives to our seminars.\(^\text{19}\)

It must be added that during this period resistance by countries was relatively small; furthermore, other OECD bodies contributed largely to the emerging upgraded standard of 1997.\(^\text{20}\) The toughest part, however, remained criminalization. Under the chairmanship of Deputy Chairman Professor Gorgio Sacerdoti, a subgroup developed the backbone of a text on criminal law called the “Agreed Common Elements”.\(^\text{21}\) They were added to the draft of the 1997 Recommendation as an Annex. However, several countries—amongst them Germany, France, and Japan—were opposed to enacting criminal law on the basis of soft law. The example of the FATF had gone too far for them already. They insisted that criminalization be done based on a Treaty, either by the UN or the World Trade Organization (WTO). This led to a deadlock in the run-up to the Council Recommendation of May 1997.\(^\text{22}\) The United States now insisted

\(^{18}\) OECD MAI 1998.

\(^{19}\) From 1995 onward, the WGB held regular meetings with representatives of the private sector, trade unions, and NGOs: Business and Industry Advisory Committee to the OECD (BIAC), Trade Union Advisory Committee to the OECD (TUAC), International Chamber of Commerce (ICC), and Transparency International (TI). In the final stage of the negotiations, TI’s intervention proved to be instrumental: it drafted a helpful letter signed by Chief Executive Officers (CEOs) of large international companies.


\(^{22}\) OECD Revised Rec. 1997; Pieth 2014a, 18 et seq.
on a Recommendation (as they had changed their approach altogether after our 1993 breakfast), the Europeans on a Convention in the UN or the WTO.

The then-deputy director of the Directorate for Financial, Fiscal and Enterprise Affairs (DAFFE), the Department of the Secretariat servicing the Working Group, Rainer Geiger, had the decisive idea: “let’s call their bluff, let’s do a Convention, here in the OECD and quick.” The immediate reaction was not forthcoming; the Europeans doubted it was possible and the United States had changed their mindset and strategy from Convention to Recommendation. Everybody was caught off guard. Nevertheless, the main countries agreed to give it a try and to build a strategic safeguard into the 1997 Recommendation: in case the project of a Convention should fail at the end of the year, criminal law would be enacted by Recommendation on the basis of the Agreed Common Elements.23

**Lugano/Gandria**

**How to draft a Convention in three days?**  
Imagine sunshine at the height of summer in a lovely place on the lake of Lugano with no cars. Rent the rooms of a middle-class hotel on the lake and a boathouse as your meeting room. Take a break every three hours allowing for a swim in the dark green water and to eat well. The main contenders (the so-called “friends of the Chairman”24) all turned up, dressed down, went for a swim, had a fight or two, then an evening together in a traditional restaurant (a grotto) across the lake in Cantine di Gandria—invited by the Swiss Federal Office of Economy—and after three days, with heavy coaching and professional draftsmanship of the OECD Secretariat and Legal Department, we had the blueprint of the Convention.

The rest were seemingly official steps typical to such a process: a full week of negotiations within the entire Working Group in October,25 a formal Negotiation Conference on the ambassadorial level in November,26 and then on December 17, 1997, the big ceremonial signing ceremony27 with ministers,

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23. OECD Working documents, DAFFE/IME/BR(97)12 and 16.
25. OECD Agenda, DAFFE/IME/BR/A(97)4.
26. OECD Agenda, DAFFE/IME/BR/A(97).
27. Cf. OECD DAFFE/IME/BR(97)16/FINAL; DAFFE/IME/BR(97)17/FINAL.
amongst them US secretary of state Madeleine Albright, and French minister of justice Elisabeth Guigou, as well as her colleague, the then-French minister of finance, Dominique Strauss-Kahn, and many others.

What is frequently overseen, though, is that between spring and autumn of 1997 intensive lobbying took place behind the scenes. The US secretary of state sent speaking notes and instructions to all US embassies in key OECD capitals to intervene on behalf of the OECD Convention (I have received a copy of them). Nongovernmental organizations (NGOs), in particular the recently created Transparency International (TI) under the leadership of Peter Eigen and Fritz Heimann, wrote to business leaders and suggested to the former German president to host meetings in Berlin with business leaders in support of the OECD Convention. It was a memorable moment when Richard von Weizsäcker told the general counsel of Siemens (who had hinted at the concept of “do as the Romans do”) that he did not want to see him anymore in the context of these meetings.

It will be noted that at the same time resistance was rather strong. In particular in France business associations such as the Patronat Français, now called Mouvement des entreprises de France (MEDEF), and the Institut Français des Relations Internationales (IFRI) called meetings to discuss the possible trade disadvantages for French companies, especially when exporting to Africa and Asia.

Recent media reports indicate that possibly France had good reasons to fear the new rules: La Libération has quoted findings that French defense corporations had acquired contracts with the help of bribery and were threatening to stop payments if the OECD Treaty went through. As indicated above, they linked the death of eleven French engineers working on a submarine contract in an explosion in Pakistan to this uncertainty. Whether this is true or not, it demonstrates that the struggle for new rules against foreign bribery could have had a very serious impact indeed.

28. TI’s intervention proved to be instrumental: it drafted a helpful letter signed by Chief Executive Officers (CEOs) of large international companies.

29. Two meetings were held in the Aspen Institute in Berlin on an island in the Wannsee upon invitation by the former German president, the Aspen Institute, and Transparency International.

30. Presentation by Mark Pieth at a breakfast meeting in the Paris Sofitel Hotel hosted by IFRI in late 1996.

31. Cf. above footnote 1 and 2.
5. IMPLEMENTING THE CONVENTION

With its entry into force in 1999 the Convention was ready for implementing by Member States. Overall the probably most impressive achievement was the rapid enactment of legislation by virtually all State Parties.

Monitoring helped a great deal. Several methods have been applied: in a first round (“Phase 1”) the Working Group on Bribery (WGB) deliberately concentrated on laws and did not assess application yet: countries were invited to get used to the new standards step by step. This is also the procedure followed with new Members entering later. In a second phase (“Phase 2”) the standards were drastically raised: although adequate legislation was still an issue, now application moved center stage. Law enforcement, awareness, and other evidence that the Convention and the Recommendation were being taken seriously were addressed. Both Phases 1 and 2 were followed up regularly in oral and written follow-up reports.34

How Does Monitoring Work?

First, the evaluated country is invited to fill in a questionnaire and the Members of the OECD Secretariat assemble literature and press clippings on the country’s track record in fighting domestic and foreign bribery. Frequently, the country is quite unhappy at being confronted with public opinion. Then a team made up of representatives of two countries together with the Secretariat visit the country and meet between eighty and a hundred representatives of government, private sector, and the civil society. They try to get a firsthand impression of the ability of the country to run anticorruption cases and to prevent further bribery. Obviously, such an on-site visit allows some quite straightforward discussions. Based on this experience the examiners and the Secretariat draft a report, which will then be discussed in the plenary of the WGB. There are three hearings within one week: the first to establish that the Group is happy with the analysis, the second to agree on Recommendations, and the third to finalize everything, including the press release. Frequently, the debates are heated, direct, and quite undiplomatic. The Group sometimes hears prosecutors and may inquire what methods

32. See Phase 1 country monitoring of the OECD Anti-Bribery Convention (available online); Bonucci 2014, 545 et seq.; Pieth 2014a, 42 et seq.

33. See Phase 2 country monitoring of the OECD Anti-Bribery Convention (available online); Bonucci 2014, 550 et seq.; Pieth 2014a, 43 et seq.

34. Bonucci 2014, 563 et seq.
have been applied in concrete cases. Especially where cases have been closed, prosecutors will expect a “grilling” in order to assess their ability to run foreign bribery cases and their political will.

The WGB developed extraordinary means of monitoring as sanctions in case the “Recommendations” by the WGB were ignored by countries. In parts, they are technical in nature: especially the rerun of the full evaluation (termed “Phase 2bis”) or a technical visit to the country to support legislation in a specific area (i.e., corporate liability, including talks with officials and members of parliaments etc.).\(^\text{35}\) fall into this category. More on the political side are letters to ministers, prime ministers, and presidents or public statements and media conferences.\(^\text{36}\)

The procedures were redrafted in 2009 at the beginning of the so-called “Phase 3” and given a permanent format.\(^\text{37}\) Basically, Phase 3 follows the approach developed in Phase 2 with its emphasis on implementation; it is, though, more concise in nature. Also, Phase 3 can be followed up by extraordinary measures.\(^\text{38}\) After a period in which (too) many “Phase 3bis” evaluations have been called, the WGB had to restrict itself to less burdensome and more effective ways, in particular conditional Phase 3bis follow-ups, in case countries resisted essential Recommendations steadfastly. Currently the WGB—now a permanent Committee of its own—is getting ready to embark on a fourth Phase.

Overall, the crucial element of these evaluations is the concept of “unanimity minus one” applied in adopting the final report. The evaluated country has the right to speak but cannot prevent consensus.

Apart from these rounds of in-depth monitoring—which are very heavy, as they imply on-site visits and multiple hearings and reports—there is also an ongoing process called “tour de table.” Its centerpiece are reports by law enforcement agencies of various countries (at each of the four meetings a year one quarter of the member countries are evaluated). On the basis of media reports a so-called “Matrix” of allegations in the public domain is established, and countries have the right to react to those news stories, if they like.\(^\text{39}\) This matrix has served as a basis of a report recently published by the OECD Secretariat (see Figure 7.1).\(^\text{40}\)

35. UK, Chile; Bonucci 2014, 565 et seq.; Pieth 2014a, 47 et seq.
36. E.g. to the Czech Republic, Finland, Japan, Slovak Republic and the UK.
37. OECD WGB 2009.
38. Bonucci 2014, 571 et seq.; Pieth 2014a, 47 et seq.
Whereas other Conventions have adopted a rather soft touch and are known for their smooth functioning, the OECD Anti-Corruption Initiative was from the outset about unfair competition amongst major trading “partners.” The tone in the Group and its reports was always harsh. The reports mattered, and what the Group did influenced economic positions of countries and companies. This became obvious as soon as law enforcement in countries beyond the United States picked up. In particular the German Siemens prosecution41 served as a wake-up call.

Not everybody appreciated the tone, but the real crisis for the OECD’s Anti-Corruption Convention came in December 2005 when the United Kingdom’s prime minister suggested to the attorney general and indirectly to the director of the Serious Fraud Office (SFO) to close an investigation against British

Aerospace (BAE) in the context of a large arms deal with Saudi Arabia, the so-called “Al Yamamah” contract.42

6. THE CRISIS

Saudi Arabia decided to acquire Taifun planes for £40 billion and later on additional planes for £10 billion. BAE managed to beat French and US competitors with the help of political influence (intense lobbying by the Thatcher and following administrations) as well as through bribes. It is now known that BAE paid off several members of the Saudi royal family through a London-based travel agent. The roughly £60 million expended by Peter Gardiner on behalf of BAE, however, proved to be merely the tip of the iceberg. Far bigger sums have been paid and laundered through the international banking system toward key persons in the Saudi royal family. Indicators point to several billions of dollars.43

Whereas some details about intermediaries and financial flows are known, the entire story will probably never be fully revealed, as shortly before the Swiss Attorney General’s Office could grant the SFO mutual legal assistance, the British prime minister suggested the case be closed. His personal note to the attorney general (AG) was published in the context of the Judicial Review (see Figure 7.2).

The Legal Department of BAE had petitioned the United Kingdom’s attorney general already previously for months to abandon the investigation, so far unsuccessfully.44 (see Figure 7.3)

In autumn 2005 the Saudi ambassador to the United States, Prince Bandar, apparently threatened to stop cooperation on antiterror activities between Saudi Arabia and the United Kingdom if the investigation in the United Kingdom went ahead. Originally, the attorney general resisted these threats. One year later they became more pressing and this time met the interest of the prime minister. He as well as the attorney general leaned on the director of the SFO.

42. PBS Frontline documentary, April 7, 2009: “Interview with the Prime Minister in ‘Black Money’”; Financial Times, December 16 and 17, 2006, 4; Statement of the Attorney General in the House of Lords, Hansard, HL vol. 687, cols 1711-13 (14 December 2006).

43. Some British media reports spoke of £1 Billion: The Guardian, June 8, 12, and 14, 2007; The Daily Mail, June 9, 2007; The Daily Express, June 11, 2007; US media even talked of $2 billion, such as The Washington Post, June 8, 2007.

44. The Queen on the Application of Corner House Research and Campaign Against Arms Trade v The Director of the Serious Fraud Office, Case No: CO/1567/2007, High Court of Justice, Queens Bench Division, Administrative Court, Index to Exhibit RW4, Item No. 3, Letter of 7 November 2005 by Michael Lester to Lord Goldsmith QC, attaching a Memorandum, 3 (www.thecornerhouse.org.uk/pdf/document/IACC.pdf (last visited March 6, 2017).
SECRET – PERSONAL

THE PRIME MINISTER

Personal Minute

Attorney General

AL YAMAMAH: SERIOUS FRAUD OFFICE INVESTIGATION

[...]

relationship with the Kingdom of Saudi Arabia. It is my judgement on the basis of recent
evidence and the advice of colleagues that these developments have given rise to a real and
immediate risk of a collapse in UK/Saudi security, intelligence and diplomatic cooperation.
This is likely to have seriously negative consequences for the UK public interest in terms of
both national security and our highest priority foreign policy objectives in the Middle East.

[...]

by the investigation, it is of course of concern to me, not least because of the critical difficulty
presented to the negotiations over the Typhoon contract.

[...]

I understand and respect the constitutional position and the independent judgement you are
required to make on extremely difficult and delicate issues of this nature, and I know any
intervention you make in the conduct of this investigation must be your decision alone. For my
part, after much careful thought I have come to the conclusion that the seriousness of these risks
to the national interest is such that I would be failing in my duty if I did not bring them directly
to your attention ask you to consider them. That is why I am taking the exceptional step of
writing to you myself.

[...]

Tony Blair

8 December 2006

SECRET – PERSONAL

Figure 7.2 Al Yamamah: Serious Fraud Office Investigation.
07 November 2005

The Lord Goldsmith QC
Attorney General
Attorney General’s Chambers
9 Buckingham Gate
London SW1E 6JP

Private & Confidential

Dear Lord Goldsmith

This Company has been the subject of a Serious Fraud Office (SFO) investigation instituted in November 2004. Recent developments in this investigation raise in our view serious public interest issues which we consider should be brought to your personal attention having regard to the prosecutorial discretion conferred upon you.

I enclose a brief note summarising the position and would welcome the opportunity to see you to amplify its contents and answer any questions you may have. You should be aware that I have discussed the issues referred to in the enclosed note with Sir Kevin Tebbit, the Permanent Secretary at the Ministry of Defence, who is aware that I am contacting you.

I look forward to hearing from you.

Yours sincerely

[Signature]

[...] etc.

Figure 7.3 The Queen on the Application of Corner House Research and Campaign against Arms Trade v The Director of the Serious Fraud Office, Case No: CO/1567/2007, High Court of Justice, Queens Bench Division, Administrative Court, Index to Exhibit RW4, Item No. 3, Letter of 7 November 2005 by Michael Lester to Lord Goldsmith QC, attaching a Memorandum, 3, available at: http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/SecondRedactDocsRW4.pdf.
Reason enough for Mr. Wardle, then director of the SFO, to close the case. In an interview, however, he calls the Saudi move “blackmail.”

Two UK-based NGOs, Corner House and Campaign against Arms Trade, took the case to court to force its reopening. Whereas the High Court saw the advantage of reopening, the House of Lords, to which the case was ultimately transferred, opted against it.

Concurrently, a worldwide media storm with over one thousand articles and quotes arose. Politicians all over the world criticized the United Kingdom, amongst them Thabo Mbeki of South Africa: “Mr Mbeki spoke out in a discussion at the World Economic Forum in Davos on the fight against corruption in Africa. He voiced fears that corruption inquiries focused disproportionately on African countries rather than the Western companies on the other side of the equation.”

The OECD clearly saw its anticorruption work confronted with the toughest of challenges so far. Fritz Heimann and Ben Heineman wrote in *The National Interest*: “The great irony of Britain’s misguided Al Yamamah decision, taken in the name of national security, is that by weakening the OECD Convention, in the end, it will only weaken the security of the United Kingdom, the rest of the developed world and the emerging nations.”

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47. The Queen on the Application of Corner House Research and Campaign Against Arms Trade v The Director of the Serious Fraud Office, Case No: CO/1567/2007, High Court of Justice, Queens Bench Division, Administrative Court, Lord Justice Moses, Mister Justice Sullivan, 10 April 2008.

48. House of Lords, session 2007–08, [2008] UKHL 60, Opinions of the Lords of Appeal for judgment in the cause R (on the application of Corner House Research and others) (Respondents) v Director of the Serious Fraud Office (Appellant) (Criminal Appeal from Her Majesty’s High Court of Justice), 30 July 2008.

49. In a matter of three months more than a thousand media reports were registered on the Internet.

50. The Times online, January 27, 2007: “Mbeki says Blair guilty of double standards over BAE.”

51. Heineman and Heimann 2007, 87; cf. also Rose-Ackerman and Billa 2008.
The OECD officials made strong statements in the media, and the WGB held two hearings and came out with a press statement, distributed at a widely televised press conference. What was probably more effective in the long run, though, was an action plan: the WGB called a Phase 2bis evaluation on the United Kingdom and demanded the reopening of the case as well as new laws to be drafted. It demanded a progress report by the United Kingdom every three months, and it added in a statement an ominous sentence: “The Working Group stresses that failing to enact effective and comprehensive legislation undermines the credibility of the United Kingdom’s legal framework and potentially triggers the need for increased due diligence over UK companies by their commercial partners or Multilateral Development Banks.”

Translated into ordinary language this sentence meant that all British companies could face a trade disadvantage if Britain remained underregulated the way it was. It was the first time in the history of the WGB that it threatened trade sanctions to a Member. Astonishingly, no one asked at the time whether the WGB had the necessary powers. It basically followed the model of the Financial Action Task Force in its dealings with so-called Non-Cooperative Countries and Territories (NCCTs).

The United Kingdom Fights Back

In the OECD, the United Kingdom had to defend its position at several instances, first in two meetings in January and March 2007, when the decision was taken to put the United Kingdom on probation and to re-run its evaluation. Whereas the official exchanges remained relatively civil, moves behind the scene and in the public domain rapidly deteriorated:

First, the magazine The Economist invited its Aeronautics Editor to write a lead article on the newly elected secretary general of the OECD! Under the title “An Angel Flies into Some Flack, Trouble at the OECD” the Economist, in its “top story,” tried (unsuccessfully) to question the secretary general’s integrity.


53. Bonucci 2014, 566 et seq.

54. WGB press release, March 14, 2007: “OECD to conduct a further examination of UK efforts against bribery.”

55. OECD WGB 2008, UK Phase 2bis Report, 71.

56. Cf. below 125.

Shortly afterwards, the *Guardian* reported that the United Kingdom was “covertly trying to oust the head of the world’s main anti-bribery watchdog to prevent criticism of ministers and Britain’s biggest arms company, BAE... British diplomats are seeking to remove Professor Pieth, a Swiss legal expert who chairs the anti-corruption watchdog of the Organization for Economic Cooperation and Development (OECD), claiming he is too outspoken.” The article goes on to remind readers that “at the OECD meeting in Paris last month, British officials tried to stop Prof Pieth addressing a press conference at which he announced his agency was to conduct a formal inquiry into the government’s decisions to terminate the BAE investigation. They then privately briefed other diplomats involved with the OECD, saying he should be removed.”

Whilst the political struggles went on, BAE made a move to reduce some of the tension. Although the “old guard” of BAE continued to make big noises in the House of Lords that they had never bribed, the new company president Dick Olver asked former chief lord Justice Woolf to conduct an investigation into BAE’s compliance system. The analysis was moderately critical and gained some credibility; if it did not lead to the reopening of the case, it helped pave the way toward a new law.

### A Very Special Seminar

As part of the Woolf inquiry, a group of about twenty persons was invited to an informal seminar: some members of civil society, including TI, but also representatives of the Ministry of Defense and of the company BAE. It so happened that I was seated next to Dick Olver. After the seminar, while the other participants went for drinks to the adjoining room, we had a private conversation: realizing that by the time (2008) I had used my power, I was keen to enroll Mr. Olver’s and Lord Woolf’s help to push for the new law. We struck an unofficial “deal” that I would resist from further fueling a media campaign against the company if they wrote to the Ministry of Justice supporting the new legislation. They both stuck to the deal and copied me on their letter to Jack Straw.


59. The Guardian, April 24, 2007: “UK tries to sabotage BAE bribes inquiry”; also NZZ, April 28 and 29, 27.
7. OVERCOMING THE CRISIS: THE UK BRIBERY ACT 2010

The crisis was ultimately overcome not by the reopening of the case, but by Britain enacting a new law, the (theoretically) toughest law on foreign bribery worldwide: the UK Bribery Act 2010.60

When the OECD Convention was adopted, the United Kingdom was amongst the first to ratify, since it believed that the 1906 legislation61 was sufficient to cover the requirements. The OECD, however, from Phase 1 on had serious doubts, in particular as neither this law nor the underlying common law had ever led to a case on foreign bribery.62 The United Kingdom tried to salvage the situation in an annex to its law on terrorism in 2001,63 when it clarified that the 1906 law was indeed applicable also to foreign bribery. However, this left the deficiencies of the old law in place (notably the agent-principal approach and the insufficient corporate liability, based on a pure “identification theory”64). Continuous efforts to enact new laws in 2003 and 2005 failed in Parliament.65 Pressure only mounted dramatically with the Al Yamamah crisis. Now the Law Commission was tasked with drafting new law. Its report66 was a step in the right direction, but was still heavily criticized both domestically and internationally. Amongst other voices the United Kingdom heard the opinion of the WGB and of seven individual Member States of the OECD at a seminar in London.67 The WGB suggested in particular that UK corporate liability ensure adequate capture of cases where junior company representatives had committed the crime, but the company had omitted to prevent them. The probably most creative part of the

60. The UK Bribery Act 2010 is considered “tough” even in comparison to the FCPA, cf. Warin, Falconer and Diamant 2010; Pieth 2014a, 220 et seq.
61. OECD WGB 1999, UK Phase 1 Report, 1.
64. Pieth 2014a, 219 et seq.
67. Pieth 2014a, 220 et seq.
2010 Act is its section 7, the offense “the failure of commercial organizations to prevent bribery,” balanced by a defense of “adequate procedures.”

Overall, the British prime minister was able, in blatant breach of the separation of powers, to close an investigation. Tony Blair’s legacy on anticorruption, though, was to have provided the United Kingdom with the toughest anticorruption law worldwide—if applied.

Even though the United Kingdom had enacted one of the most stringent legal texts on bribery, the crisis was not entirely over yet: in a next stage, the entry into force was delayed until a guidance was adopted, and it looked as if this could take some considerable time yet, as there was resistance from business circles. The OECD restarted its power play, involving letters to ministers and public pressure. When the guidance was published in 2011 the law could finally enter into force. However, at this stage of the budgetary crisis the UK government slashed 40 percent of the SFO ordinary budget, putting in question the practical effectiveness of the main investigative body responsible for implementing the law. Now the SFO has to apply to the Treasury if it needs more money on a case-by-case basis. Furthermore, it still remains unclear whether the SFO is going to survive as an independent organization.

Since 2011, the first cases have been run under the UK Bribery Act, and the Act has had a marked preventative effect on companies doing business abroad. Overall the crisis of the OECD work on bribery and the lessons learned in its course have shown that the OECD and its monitoring process have the power to secure implementation of its instruments.

8. UNEVEN APPLICATION

This leads to a general problem of all anticorruption treaties and of the OECD Convention in particular: although some countries are active and a few others may be moderately active in enforcing the law, the majority, however, is hardly opening any cases at all or closes next to all of the cases again. The OECD Phase 3 monitoring has been very critical of about half of its constituency, and the TI annual survey also gives a rather bleak picture of the OECD implementation. The experience is that in the area of fighting corruption there is much talk and

71. TI Progress Report 2015, 2 et seq.
little genuine action. One needs to face the realities: law enforcement agencies and judiciaries are frequently not overzealous because running corruption cases against the powerful is rarely good for one’s career. Governments are typically more interested in fostering exports than in beating up on corrupt corporations and certainly when it comes to politically sensitive industries, such as defense, governments like to keep a tight control. France has extended its national security legislation to allow governments to declare head offices of corporations off limits for the judiciary.72 Even Nordic States have closed cases in the area of defense giving problematic reasons: Swedish TV showed the senior prosecutor charged with investigating possible bribery by Saab Gripen, claiming that he was drastically understaffed and that he was politically pressurized when closing the cases and when retiring from his job.73 The Finnish Patria Case was dismissed at first instance on the basis of lack of evidence74 after the former Slovenian president had been sentenced by a Court in his own country for taking bribes by this company. Only slightly different are a sequence of cases relating to Austria: in one case involving the payment of €13 million to the Hungarian minister of economy and his friends by a construction company. The case was closed because the Court held that preventing nationalization of motorways was not an activity “to obtain or retain business” by the construction company.75 In another case (the deputy minister of interior of Thailand had just been sentenced to twelve years of prison for taking bribes from an Austrian provider of fire trucks76) Austrian authorities refused to open the case altogether.77 Here, the problem is rather lack of competence combined with political disinterest.78

72. OECD WGB 2012, FR Phase 3 Report, 45 et seq.
74. At the Hämeenlinna District Court (YLE News, 30 January 2014: “Finnish court rejects Slovenian bribery charges against Patria”); the case continues at the Turku Court of Appeal; furthermore, two former Patria executives were convicted, and the company fined, for bribing officials in Croatia (YLE News, February 16, 2015: “Patria executives found guilty of bribing Croatian officials”).
75. Higher Regional Court (Oberlandesgericht) Vienna, Decision No. 23 Bs 43/12k; Kurier, 9 October 2013; Der Börsianer, 9 October 2013: “The STRABAG case.”
76. Supreme Court of Thailand, Criminal Division for Holders of Political Positions, Decisions No. 5/2554 and 7/2556, 10 September 2013 (subject: malfeasance in office, violations of the 1999 Act Concerning Offences Relating to the Submission of Bids to Government Agencies); cf. also Kurier (online), 11 September 2013: “Steyr: Schultsdreiche in Million-Korruptionsfall, Bangkok. 12 Jahre Haft für Vize-Innenminister.”
77. Regional Court (Landesgericht) for Criminal Matters Vienna, Decision No. 130 Bl 51/13h, 27 August 2013, 9 et seq.
78. Pieth 2014c, 367 et seq.
9. FURTHER CHALLENGES

The monitoring system developed by international organizations is a helpful tool to ensure the implementation and application of conventions and especially of soft-law instruments. Especially, where the peers turn rough with a noncompliant member state, the risk is that the members turn on the chairman.

**IMPEACHMENT?**

Already in 2005, a Member State had turned against the Chair of the WGB: as the concept of “unanimity minus one” did not allow a country to oppose its own report, it could only take revenge by blocking the re-election of the Chair. As Chair, I had to be re-elected annually between 1990 and 2013 by unanimity of the Members of the group. The OECD does not elect its Bureau by formal elections, but rather by negotiation. If a candidate loses the full support of the Group, he is expected to step down, but has to stay in office until another candidate is elected by full unanimity.

After I had in the evening news in Italy in 2005 criticized Italy for watering down its legislation on accounting and auditing (in particular the offense of *falso in bilancio*, in order to shorten the statute of limitation and help its prime minister Berlusconi evade law enforcement), Berlusconi tasked his personal secretary with seeing me impeached as the OECD Working Group Chair. The Group did not really know how to handle this politically sensitive issue, in particular as the Group was made up predominantly of technical experts. Ultimately, the deputy secretary general of the OECD in contact with the US undersecretary of state, Alan Larson, handled the issue and managed to dissuade Italy from further action, in particular as it became obvious that Italy was the only country opposing re-election.79

In a similar way the United Kingdom, through the office of Prime Minister Blair (his Secretary Powell) intended to impeach the Chair on the height of the crisis. A letter was sent to the Foreign and Commonwealth Office; it was, however, leaked to the press and published. That was the end of this move.

UK tries to sabotage BAE bribes inquiry

Attempt to oust legal expert heading European corruption investigation

David Leigh and Rob Evans

The UK is covertly trying to oust the head of the world’s main anti-bribery watchdog to prevent criticism of ministers and Britain’s biggest arms company, BAE, the Guardian has learned.

The effort to remove Mark Pieth comes as his organisation has stepped up its investigation into the British government’s decision to kill off a major inquiry into allegations that BAE paid massive bribes to land Saudi arms deals.

British diplomats are seeking to remove Professor Pieth, a Swiss legal expert who chairs the anti-corruption watchdog of the Organisation for Economic Co-operation and Development (OECD), claiming he is too outspoken.

At the OECD meeting in Paris last month, British officials tried to stop Prof Pieth addressing a press conference at which he announced his agency was to conduct a formal inquiry into the government’s decision to terminate the BAE investigation. They then privately briefed other diplomats involved with the OECD, saying he should be removed.

When that failed, the campaign against him continued unabated with further back-channel complaints.

But concern about the conduct of the British diplomats filtered back to Prof Pieth, who confirmed yesterday that he was aware of the attempts to remove him.

“I am aware that the British ambassador was asking at the time for action to be taken against me,” he said.

Prof Pieth refused to elaborate, but he is understood to be privately furious at the way he has been bad-mouthed.

A source at the OECD added: “The UK’s representatives were sent to Paris to emasculate the [watchdog] and ensure they did not say anything publicly. They failed and were not pleased. They behaved in a manner that would not have been out of place in a boxing ring.”

In recent weeks the UK has demanded that OECD officials should be prevented from making any future statements about the BAE case while the inquiry is ongoing. But the request has hit a brick wall. An OECD source said: “The British do not have support from anyone else on this.”

The director general of the OECD, Angel Gurría, also believes the UK is encouraging a smear campaign against him. Last Friday he was accused in a British magazine of giving a job to his daughter, getting free football tickets, and spending £733,000 (£600,000) to refurbish his Paris flat in what was described as “the poshest bit of the swanky 16th arrondissement”.

The article in the Economist quoted an unnamed north European ambassador expressing fears that “the staid old body [OECD] . . . may drift into dangerous waters” under Mr Gurría, the former finance minister of Mexico.

Following the allegations, Mr Gurría issued a combative statement, saying that he was under UK media attack by “innuendo, gossip and partial truths”.

“It is no surprise that this attack occurs at this time,” he added.

Britain’s ambassador to the OECD, David Lyons, admitted yesterday that he had talked off the record to the Economist but added: “The UK had absolutely nothing to do with planting the story.”

The UK partly controls OECD purse-strings, and also has the power to veto Prof Pieth’s reappointment, due next January.

Sensitivity over the OECD inquiry has become more acute since its 36-strong panel announced last month detailed plans to mount a fresh official inspection of Britain because of the manner in which the BAE inquiry had been halted.

It also rebuked the UK for failing to keep its promises to modernise its inadequate corruption laws, under which no one has yet been prosecuted.

The UK also faces a legal challenge in London. Two campaign groups, the anti-corruption group The Cornerhouse and the Campaign Against the Arms Trade, filed detailed pleadings last week alleging that Britain had broken the treaty banning corrupt payments by companies to foreign politicians and officials.

Figure 7.4 UK Tries to Sabotage BAE Bribes Inquiry.

Even later on, other such efforts were made in the context of conflicts with individual Member States: in 2010 Canada received a particularly critical report: since Phase 2 (in 2002), it had not followed up on the Recommendations, had no new cases to speak of, and refused steadfastly to review its policy on the nationality principle (Canada remained one of the last countries to introduce national jurisdiction). The situation has since changed dramatically. However, during the hearings Canada was unable to convince evaluators (Austria and the United States) and the Group that it met the standard. The Canadian representative, however, had it out with the Chair: he was overheard assuring the newly participating Russian Delegation that they could rest assured that the Chair would be deposed before they were evaluated.

All this goes to demonstrate that the work of the OECD WGB seems to be relevant to countries, that the concept of “unanimity minus one” is crucial, but that the weak spot in the arrangement is the position of the Chair.

### Unanimity and Media Policy

Although in monitoring the rule “unanimity minus one” ensures that the country monitored is heard but cannot block publication of the report, the Group needs consensus not only when adopting an international instrument, but also for such prosaic matters as publishing its annual report. Therefore, the United Kingdom was able to block the Working Group on Bribery’s annual report 2006, hinting at the difficulties that had been encountered with the closing of the Al Yamamah case, even though thousands of new stories had been published on the issue and several OECD monitoring reports discussed it in great detail.80

A further issue emerged in the height of the crisis with the United Kingdom, where the United Kingdom tried to prevent a press conference from taking place. When the Group was uncertain whether the principal of unanimity or unanimity minus one applied here, the United Kingdom referred to a draft press policy stating that “media releases drafted by the Chair/Bureau must be approved by the Committee, unless otherwise agreed.”81 Clearly these rules were made for a “nice weather” institution, primarily focusing on economic analysis rather than on peer pressure. In the case of the United

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80. Letter by the British Ambassador David Lyscom to the OECD of March 8, 2007, indicating that the UK delegation will continue to oppose the publication of a report that contains a specific reference to this case, in whatever form.

Kingdom I actually had to threaten to step down as Chair if the Group was not prepared to hold a press conference at the height of the storm.

Of course, this all can only be understood in the context of the very heated atmosphere of the crisis. The press conference turned out to be very tense—including an attempt by the British ambassador to call an end to the event, actually holding his hand into the camera stating “enough damage has been done.”

One journalist described the situation as follows:

“The Chair did an admirable job in presenting the general issues without getting into detailed responses regarding BAE. The British journalists present were clearly out to get aggressive quotes from him, but he didn’t give them any. The situation with the British delegation standing behind was bizarre. The atmosphere was very tense, one of the tensest press conferences I have attended. I have rarely seen so much pressure by someone to end a press conference held at somebody’s premises. (Note—that is a reference to the British Embassy press officer.) At their briefing afterwards, the British flatly contradicted what Pieth had been saying, insisting that there was no tension and that everyone was in agreement. But the (Working Group) statement is fairly damning, particularly when you consider that it concerns a G8 country.”

10. A NEW STEP FORWARD: THE 2009 RECOMMENDATION

The WGB has a peculiar way of advancing. Frequently, there are moments when nothing goes. For years the WGB has been analyzing its own work. It wrote a “mid-term-study” to determine the emerging standards of Phase 3. Based on this study it discussed whether the Convention could be supplemented by an Additional Protocol, an idea given up in the following discussion very rapidly. Shortly afterward, however, the idea of reorganizing the Recommendation of 1997, a document that had somewhat lost traction next to the Convention, emerged. Much of what could have been the object of an Additional Protocol now filtered into the new Recommendation. The WGB reinvented itself and went back to “soft law.” An upgraded Recommendation was presented to the

82. Mail by a British journalist of March 23, 2007 to the OECD media department.
83. OECD WGB 2006.
Council for adoption. As Annex to the Recommendation two texts, one on corporate liability and one on company compliance, were added.

The Annex II was actually adopted only in 2010. It was the object of fierce negotiations between the leading Ministries of Commerce (in particular of Germany, France, United Kingdom, and the United States). Its contents were not really new. It covered the ground that had been already covered by many US deferred prosecution agreements, by NGOs, and be the “compliance industry” in general. Its significance is, however, that it is an intergovernmental public standard. It serves as a blueprint for national guidance, for law enforcement agencies, etc. Thereby, the topic of Annex I, corporate liability, and Annex II, compliance, become intertwined: Annex II indicates what an adequate compliance program entails.

11. A FINAL POSITIVE EXPERIENCE

Everyday life in the WGB remained tedious up to the end of my tenure: last fights with Belgium demonstrate it; Belgium was “insulted” because the Group and especially the Chair believed that its lack of enforcement was based on a deliberate policy decision. Belgium insisted on listening to tapes of meetings and refused to participate in the following work of the Working Group to demonstrate its displeasure. Again, the critical stance of the report seemed to have struck a chord.

Once more, however, the WGB showed its strength when it came to elect a new Chair:

Based on a call for applications a Search Committee screened the field of over 30 applicants and selected the nine most promising candidates. At a meeting in summer 2013 they presented themselves, and then the Group discussed the merits of the candidates in several hearings in camera. Interestingly enough, the WGB was able—without resorting to straw

84. OECD Rec. 2009.


polls— to openly address advantages and disadvantages of each candidate in several rounds until the group of candidates was down to three. And again, it was able to discuss the selection in an open and transparent manner until unanimity was reached on the new Chairman.

12. CONCLUSION

Overall, the WGB and its procedures have developed into probably the most effective international tool against (foreign) bribery. It could serve as a model for other regional or worldwide international bodies.