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IMPLEMENTATION OF THE OECD CONVENTION : THE CONDITIONS FOR SUCCESS

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The objective of the OECD Convention is to reduce or eliminate bribery as a weapon in international business transactions. How likely is it that it will achieve this objective? In order to identify the conditions for success I propose first of all to address eight other questions which I believe need to be answered if we are to define these conditions accurately. These are:

1. is the Convention sufficiently binding on signatory Governments to ensure that the associated legislation (and follow up action) will be effective?
2. are the problems in reconciling national laws on corruption so great that equality of treatment between countries is not achievable?
3. is the will to prosecute sufficiently strong, and how will evidence be obtained?
4. how important are the potential loopholes which are only being considered at an inter governmental level when the Convention is already signed ?
5. how many Governments (both OECD members and others) will sign in the next two years ?
6. will the package of associated measures embodied in the revised Recommendation of May 1997 be implemented effectively in parallel with the Convention ?
7. will the system of monitoring implementation by peer group review be effective ?
8. will companies develop effective codes of conduct and active compliance systems ?

I will take these in turn.

- 1) Is the Convention sufficiently binding on signatory Governments to ensure that the associated legislation (and follow up action) will be effective ?

The Convention accommodates different approaches to the issue of extra territoriality. Clause 1 of Article 4 envisages that a member government will legislate against the bribing of foreign officials where some part of the conspiracy to bribe takes place in its own territory. Clause 2 envisages that where a government already has jurisdiction to prosecute its nationals for acts committed abroad it will specifically do so in relation to transnational bribery. This suggests that for some signatories there will have to be a physical connection with their own countries, and that for others there need be no such connection. The FCPA was drawn up on the basis that there must be some physical connection with the US. Legislation in the UK which will be introduced to Parliament this year partly to respond to the Convention is very likely to preserve this requirement. The Canadian legislation which was passed in last December insists on this connection. The draft Australian legislation uses comprehensive criteria: these may be territorial, national, residential or defined by place of incorporation or business operation. On the other hand the practice in many Civil Code countries is to accept nationality as a basis for prosecution where the offence was carried out in another country.

A second anomaly lies in the question of whether companies which are defined by law as legal persons can be charged with criminal responsibility. This is an issue in Germany where such legal persons cannot be charged in this way, and where there is therefore a particular problem in ensuring that they are covered by the legislative follow-up to the Convention. However a German company can be fined under an administrative law and pay a fine which may not exceed DM 1M, and with no provision for a jail sentence. Correspondingly in Japan existing legislation in the shape of the Unfair Trade Practices Act has been modified to embrace the bribery issue, and this again implies that the offence will be treated as less than criminal.

These discrepancies, and the scope for other related discrepancies in follow up legislation, suggest that there is significant scope for the impact of the impact of the Convention to be unequal - or, said another way, to bind members to different kinds of follow up action. However if these anomalies are sufficiently serious to imply that a members fight against transnational corruption is ineffective then the Treaty requires them to take remedial steps. This will be a key issue under the monitoring process which is discussed below.

- 2) Are the problems in reconciling national laws on corruption so great that equality of treatment between

countries is not achievable ?

The question of whether governments are prepared to take powers to deal with extra territorial crime is a rapidly changing field. In the case of the UK the present indications are that the Government is extremely reluctant to see the principle set aside in the case of transnational bribery but this principle has, in the last few years, been set aside with reference to a number of issues. In fact a set of criteria for defining types of crime for which the extra territorial principle would be applied were defined by an Advisory Committee to the Home Office in 1996. An objective assessment would have to conclude that five out of the six of these criteria would suggest that the extra territorial principle should be waived in relation to transnational bribery. In fact the anti bribery legislation passed in Hong Kong, whose legal system is clearly derived from that of the UK, explicitly stated in 1971, that the offence of bribery in question could take place in Hong Kong or elsewhere.

It seems to be clear that convergence of treatment of transnational bribery could be achieved in principle, but whether it can be in practice inevitably a question of will. This again will be influenced by the monitoring process.

- 3) Is the will to prosecute sufficiently strong, and how will evidence be obtained? In many signatory states the attitude of the corporate sector to the Convention has been ambivalent. The effectiveness of the legislation will depend to a considerable extent on whether some high profile cases are brought within the first two years of ratification. The significance of these will be greatest to the companies which are domiciled in the country where the case is brought - it follows that some cases will be necessary in nearly all signatory states if the Convention is to be effective. In any case the argument for symmetry of action will be crucial if the playing field is to be seen as level.

In what circumstances will cases be brought? The most straightforward instances will probably be between member states of the EU where both parties have a strong influence in seeing that the single market flourishes. Bribes paid in the context of intra-EU defence contracts have become an important issue in the 1990s and most member states will be glad to see an end to this apparently common practice. However, the question of cases in other parts of the world where governments may have a much weaker, non existent or even hostile attitude to a bribe being uncovered is more difficult.

In some cases a reform minded government, coming to power on the back of an anti-corruption platform, may be actively interested in seeing a chain of bribes reversed. Such a case is now unfolding at the International Centre for the Settlement of Investment Disputes (ICSID) in Washington where the Government of Tanzania has referred a dispute between its power generating company (TANESCO) and the Independent Power of Tanzania Ltd (IPTL) a joint venture company from Malaysia linked to a Dutch supplier of generators. It has been widely alleged in the Tanzanian press that bribes paid in this case have deprived Ocelot, the Canadian company, of being able to proceed to implementation of an alternative natural gas project. This is an instance where evidence uncovered by ICSID could be used in other legal contexts.

However this will typically not be the case. More frequently, governments will not wish to uncover a chain of corruption which leads to an individual or company close to it, though Governments which succeed the one which made the corrupt deal may do so. Thus it was the successor Governments to those of Rajiv Ghandi in India which pursued the trail of the Bofors case with the authorities in Sweden. More frequently it will be evidence provided by whistleblowers of one form or another which enable prosecutions to be brought. A majority of the more than eighty cases brought under the Foreign Corrupt Practices Act (FCPA) in the US have originated in this way. Thus it follows that the question of whether signatory states have effective whistle blower legislation in place will be important.

Two additional routes by which a case may reach the investigatory authorities are, first, in evidence arising from other cases where matters unrelated to bribery are under investigation, and second, from the regular audit process as and when this gives the audit profession the responsibility to report suspicious payments. In relation to the FCPA an example of the first point would be evidence of illegal payments made by Teledyne Inc in 1988 in Egypt and Chinese Taipei which came to light as part of the Pentagon's general probe into corruption in the defence sector : Operation Ill Wind.

- 4) How important are the potential loopholes which are only being considered at an inter governmental level when the Convention is already signed ?

The last stages of negotiation of the Convention included some intensive debate on the question of whether provisions could and should be formulated to cover various outstanding points. These were :

1. payments to political parties which are in practice bribes;
2. payment to an individual in anticipation of him or her becoming a public official;
3. the role of foreign subsidiaries;

4. bribery of foreign officials as a predicate offence for money laundering;
5. the role of offshore financial centres as vehicles for the laundering of bribes.

Inter alia the issue of extortion was also discussed, with reference to instances where companies are effectively held hostage to what could be described as a bribe.

The first three of these contain important potential loopholes which will render the Convention less effective. The first two are covered by the FCPA and the US delegation to the OECD argued that they should be covered by the convention. There is strong contemporary evidence to justify the inclusion of political parties since many of the bribe scandals of the recent past in fact involved payment to political parties - from the Bofors case in India, to the Agusta and Dassault cases in Belgium, to the range of cases which have unfolded in Italy. There is strong opposition from a number of EU countries to include payments made to political parties. There is, likewise strong objection to including payments made to candidates have entered the electoral lists (but are not yet elected).

Although there is a variety of reasons for the objections to including such payments, the strongest objective reason is the question of whether it is possible to show that a normal business donation was in fact given to solicit a particular policy outcome. For instance on the domestic front in the UK the payments made by Bernie Ecclestone (a promoter of Formula 1 Grand Prix motor races) to the Labour party, before it came into office in 1997, have been plausibly construed as having been made to prevent a ban on tobacco advertising at motor race meetings. There is of course an argument that a political party can be construed as an intermediary in the sense implied by Article 1 of the convention. However, in practice the exclusion of political parties from the text of the Convention will make it easier for the prosecuting authorities to forbear from prosecution where the trail of preliminary evidence is indecisive.

The issues of foreign subsidiaries is also complex. In this case the fact that the Convention does not explicitly cover foreign subsidiaries is considerably offset by the fact that it (in article 1, para 2) prohibits any form of complicity in abetting or authorising an act of bribery. It is reasonable to suppose that the relationship between most majority owned subsidiaries and their parent companies would make the latter at least complicit in any act of bribery. This argument is further strengthened by the continued trend amongst multinational companies to a single integrated corporate system. As Fritz Heimann, of TI-USA, has put it:

‘To facilitate such integration, the co-ordinating role of the parent company expands, and the autonomy of the subsidiary declines. Also working in this direction is the trend towards regional or international brand identity. The use of a single brand leads the parent to exercise more control over the subsidiary to protect the image and integrity of the brand.’

He adds that : ‘Bribery by foreign subsidiaries can create severe political and public relations problems for the parent company, even though the parent was not involved and has no legal responsibility.’

In spite of the opportunity to interpret the position of the Convention on foreign subsidiaries positively, the fact that they are not formally included remains a serious weakness - simply because that is how most bribes paid to secure business get paid.

The last two points on the list of potential loopholes relate to money laundering, and the need to add the proceeds of bribery to the list of items which banks, and other financial institutions, are required to monitor under the international regime established by the Financial Action Task Force (FAT-F) in 1989. The FAT-F mechanism is now sophisticated and complex, and has probably succeeded in driving an increasing proportion of the proceeds of crime into the less regulated off-shore centres. In 1996, at the instigation of the G-7, FAT_F expanded its mandate to include the proceeds of all serious crime. However not all member states, including for instance the UK, have accepted the need to include explicit references to bribery in the legislation which has been triggered by FAT-Fs forty Recommendations. Further, a number of signatories to the OECD convention succeeded in persuading their negotiating partners that foreign bribery be treated as a predicate offence for money laundering only if domestic bribery is so treated. It appears difficult to justify this clause which in fact contravenes the spirit, and possibly the letter, of the expansion of the FAT-F mandate by the G7 in 1996.

More broadly the continuing existence of about fifty off-shore financial centres, with regulatory mechanisms which by and large differ from the standard established in conventional banking centres provide an opportunity for the proceeds of bribery to find their way into relatively safe havens. Equally important, such havens may support a regime in which it is particularly difficult to trace assets in the event of an international legal action stemming from a bribery case.

The very difficult issue of extortion is one which has exercised the corporate associations from within the OECD in presenting their arguments in relation to the Convention through their umbrella organisation BIAC. Likewise the ICC addressed this question in issuing its 1996 Revision to the Rules of Conduct in Extortion and Bribery in international

business transactions. There is a strong feeling in business that in a number of cases bribes are paid only because they are extorted once a company is already involved in a particular investment. The solicitation issue has in fact been referred back to the OECD Working Party, and could lead to the establishment of an international listening post where such solicitations are recorded on a multilateral basis. However, for the meantime it remains true that the wording of the Convention makes no reference to the need for a distinction between bribery and extortion.

5) How many Government (both OECD members and others) will sign in the next two years) ?

By Feb 15th of this year 15 out of 34 signatory countries will have ratified the Convention including five of the ten larger trading countries which together have 60 per cent of world trade - thus fulfilling the conditions which bring it into effect. Of the five non member states which signed the Convention one - Bulgaria- has so far ratified. However there is little doubt that most signatories will ratify in the course of 1999.

The broader and more complex question is : how many other non member states can reasonably be expected to join in the next two years ? This is dependant both on the out reach programme which the OECD is able to mount, and on the political perception by countries in the south (and of central Europe) that the Convention is essentially a project of the north. The OECD has in fact already mounted a fairly effective out reach programme, holding for instance in late 1998 a conference in Buenos Aires to raise awareness of the convention in Latin America. The fact that this initiative is already bearing fruit is demonstrated by the fact that the OECD secretariat had by February 1st received expressions of interest in membership from : South Africa, Venezuela, Croatia, Russia, Slovenia, Rumania, and Chinese Taipei.

However, although this list is impressive, the position of the Asian Tigers, who may yet regain their reputation as ferocious exporters, and of others such as India, is unclear. Several of these countries remain important competitors in exactly those markets where transnational bribery is an acute problem. Further, they may be drawn towards conventions on the corruption issue which relate more closely to their political (non aligned) position in the international arena. For instance there has been an initiative to have the issue taken up within ASEAN. However, there are other mechanisms which may facilitate a dialogue with countries in this category, including the Trade Policy Review Process which is part of the WTO's regular means of establishing whether its members are indeed contributing to a level playing field in international trade. The explicit recognition by the WTO Ministerial Council of corruption as a distorting factor in world trade would be a very helpful move towards this end.

6) Will the package of non-legal measures embodied in the revised Recommendation of May 1997 be implemented effectively in parallel with the Convention ?

TI has consistently argued that the contents of the revised Recommendations - or semi-binding mutual advice - which the OECD member states adopted in May 1997 is as important as the Convention itself. It deals explicitly with the issues which the Convention, focused as it is on the criminal law, obviously does not address. The key issues in the Recommendation are:

1. that bribes should no longer be tax deductible ;
2. that accounting and audit rules are adapted so that commissions which are actually bribes can be traced ;
3. that measures should be taken in the area of Government and international procurement to increase transparency in procurement, to penalise companies found to have paid bribes and to include no bribe pledges as part of the pre-qualifying process in projects financed through development assistance.

The question of tax deductibility is in fact closely linked to implementation of the Convention since in a number of member states (including Germany and the UK) the formula by which bribes are tax deductible rests on their definition as a crime. In the case of Germany the tax deductibility of transnational bribes has now been placed on the same footing as domestic bribes - in both cases where these can be defined as criminal they will cease to be tax deductible. In the UK and Australia the link to criminality is likely to be sustained. This makes it vital that overseas bribery as an offence is defined with absolute clarity.

‘Amounts paid, or advantages granted, directly or through intermediaries, to public officials within the meanings of article 1.4 of the (OECD) Convention or to a third party in order that this official act or abstain from acting in the performance of his or her official duties, in order to obtain or to keep a contract or another advantage included in international business transactions, are not admitted as a deduction of profits submitted to tax.’

In Belgium the legislation passed in July 1998 consequent to the Convention provides that when a commission is paid to obtain or keep a public contract in another country it will be presumed that it has been paid in order to corrupt a foreign public official. This brings to an end the system of secret commissions which have been allowed by the tax authorities in

Belgium on a systematic and defined basis.

However, the fact that a significant number of those governments which have ratified the Convention are not prepared to de-link criminality and tax deductibility is unsatisfactory, and will be needed to be addressed by the monitoring process.

It has been one of the strengths of the FCPA that the SEC, as one of the to monitoring bodies, required companies to adopt a form of audit which the secrecy and off-the-books accounts which had characterised the Lockheed scandal were to be heavily penalised. In particular these revised audit requirements stated that all payments, however small in relation to turnover, were to be regarded as material. The provision makes it an offence for a director or corporate officer to omit to state a material fact to an auditor, or to fail to clarify a statement. The OECD Recommendation makes envisages similar changes in the audit requirements of signatory states. Specifically, article 8 of the Convention prohibits:

‘the establishment of the off-the-books accounts, the making of...inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object as well as the use of false documents’

The Recommendation also envisages that auditors may be required to play the role of whistleblowers. Those who discover indications of a possible bribe should report this to management and, if appropriate, to corporate monitoring bodies, and that governments should consider requiring auditors to report indications of a possible act of bribery to the competent legal authorities.

The accountancy profession is necessarily at the heart of any system which is capable of identifying bribes, and the adoption of all or some part of this recommendation will be essential if the Convention is to be effective.

7) Will the system of monitoring implementation by peer group review be effective ?

Clearly an effective review of the implementation process will be crucial to its success. The inter-governmental Working Group has based its approach to monitoring on the FAT-F peer review process launched in 1989 which has had considerable success. With this in mind it has put in place a two stage process - the first of which reviews whether national legislation meets the requirements of the Convention, and the second of which focuses on actual implementation including the specific requirements of the Recommendation. The reviews will be conducted on the basis of responses by national governments to a detailed questionnaire prepared by the OECD Secretariat. The first phase of the review (beginning in April 1999) will be performed by three experts, one from the Secretariat and two from different member countries.

At present it seems likely that this will be a relatively closed door process to which the public will have only very limited, if any, access. If the process is to be effective there is every reason to involve professional bodies and others (not least TI) in having access to governments self evaluation of progress. Several criteria of progress would be capable of different explanations. Taking as an example the issue of the number of cases of transnational bribery investigated in any one year, this might be explained by the fact that there are few such cases or alternatively that the prosecuting authorities do not wish (or have been steered away) from pursuing them on any scale. Clearly governments would provide a different explanation to groups from civil society with an interest in the issue.

It follows that the form which the monitoring process takes will itself play a key role in its success, and that the greater the degree of transparency the greater the chances of success.

8) Will companies develop effective codes of conduct and active compliance systems ?

The questions identified so far confirm that there is plenty of scope for the Convention to fail to meet its objectives, particularly if Governmental will is lacking. The outcome will therefore be considerably influenced by the extent to which companies seek to ensure that the spirit of the Convention is indeed observed. This will in turn be largely dependant not only on the extent to which companies in OECD countries introduce codes of ethics but, more importantly, on their internal compliance procedures.

The FCPA directly or indirectly led to a majority of companies trading internationally in the US adopting, or further developing, their ethical codes. Multinational companies in other countries, but with a listing on the New York Stock Exchange, have adopted comparable codes. The BP code of conduct, long before BPs merger with Amoco, referred explicitly to the need to comply with the accounting and audit provisions of the FCPA, given its New York listing.

In fact the trend towards the widespread adoption of corporate codes is auspicious for the objectives of the Convention. The international moves towards forms of auditing that go beyond finance embrace concerns which include the environment, the conditions of adult and child labour, and the interests of distinct groups of stakeholders. The social audit process which assesses companies' performance in relation to several or all of these concerns has now been adopted, at least in part, by companies as different as BodyShop, Ben and Jerrys and Shell. Mechanisms for the carrying out of the social audit and its validation are being developed continuously. The Institute of Social Accountability in the UK and the Council for Economic Priorities are amongst the pioneers in this process. The latter is now proposing to develop a corruption free Standard which can be used as a kite mark on a particular product.

These moves complement the more traditional approaches to ensuring internal compliance which have been associated with the FCPA, as I have discussed above. It is important that the accountancy profession develops guidelines for these compliance procedures both at an international and a national level. PWC in the US has in fact already drafted a manual designed to assist companies in developing appropriate procedures. It would be very useful if the IASC also made specific recommendations in this regard.

Conclusion: the conditions for success

The problems identified in answering the eight questions identified above suggest that successful implementation of the Convention will not be easy. In the light of this I would like to suggest that there are six conditions for success, which are as follows :

1. there must be a willingness by Governments to keep legislation under review, and to adapt it in the light of experience;
2. the prosecuting authorities in member states must aim, to bring a minimum number of significant cases to the courts each year;
3. the number of non OECD members signing the Convention must rise to include additional key middle income exporting countries;
4. the specific measures identified in the Recommendation should be implemented as effectively as the principal provisions of the Convention;
5. the inter governmental monitoring process will need to be as transparent and accessible as possible; the widespread adoption by trading and investing companies based in member states of appropriate corporate codes and internal compliance systems.

There is perhaps a seventh more nebulous condition which is that disputes in other arenas dealing with international trade do not undermine the commitment to this Convention. The key underlying issue is the question of fair access by companies to international markets. The minimisation of corruption is one route towards this objective, but in fact international trade is a seamless web of commercial relationships. Some of these disputes are about equality of products (is a transonic soybean the same as an unmodified one?), some are about price (when is steel dumped as opposed to sold competitively?), some are about finance packages (when is an export credit a subsidy?) and so on. Relevant and current disputes include that:

between the US and the EU over bananas, transonic crops and hormone based growth promoters; between the US and Japan and Korea over steel imports; between the EU and South Africa on reasonable access for the latter's horticultural products; between Canada and the US in the Pacific Fisheries

At least one of these has reached the WTO Disputes Panel, and it is important that in that fora and others they are seen to be resolved fairly and objectively, and with as few declarations of force majeure as possible. However, if this is not the case - and present indications must throw some doubt on it - then the prospects for a successful joining up of another piece of the global free trade jig saw are so much diminished.

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