

RESPONSES TO THE CONSULTATION PAPER ON THE REVIEW OF THE OECD ANTI-BRIBERY INSTRUMENTS

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I have read the Consultation Paper. In general, this is an excellent report that highlights both the strengths and weaknesses of the convention and makes plausible suggestions for how the OECD can engage with the of transnational bribery issue, given the limitations of the convention. Here are my comments on a the report.

The OECD Working Group should consider a proposal made by Daniel K. Tarullo, in "The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention," 44 Virginia Journal of International Law 665 (2003-2004). He proposes that the OECD establish a committee of national prosecutors to monitor the enforcement practices of signatory states. The goals are to help prosecutors develop independent criteria for enforcement, share experiences, and criticize weak or poorly targeted enforcement. One purpose is to give prosecutors some leverage with their own governments and promote their independence. This seems to me a good idea that the OECD could implement effectively.

3.1 confiscation: One issue that is not discussed is who ought to get the proceeds of a confiscation. Could one imagine an OECD managed trust fund that would spend the funds in ways directly to aid the poor in the countries of those who accepted the bribes? Of course, citizens in bribepayers' home countries may also have borne costs if the bribes inflated the tax cost of contracts, but they are also likely to have gained from the jobs generated by the contract. Furthermore, the level of the bribes confiscated may be a very poor measure of the costs of corruption which include the distortionary effect of bribes on public choices. Thus penalties might be better targeted to illicit profit levels. Finally, since the chance of catching the corrupt is much less than one, one ought to consider efforts not just to confiscate bribes but to assess a multiple of the bribes as a fine. Consideration of the level of penalties levied by treaty ratifiers could be a topic for OECD investigation. Paragraph 35 does touch on this issue, but it focuses on debarment--an important issue but not the whole story.

I was very interested in the report on the ICSID case in paragraph 39. This is a good example of a treaty with no formal enforcement mechanisms is being used by a tribunal to determine international legal standards.

The discussion of prosecutorial discretion in paragraphs 49-54 is very valuable and relevant to the dropped BAE investigation in the UK. The idea of a reason-giving requirement (para 51) is a good one, but it is obviously of limited value since it will be the party dropping or not starting an investigation that gives the reasons. The Working Group's efforts to "seek clarification" from those who invoke the "public interest" is welcome but a rather weak way of putting the matter. Does the Working Group propose to comment on a Party's claims to be following the treaty even if it is doing little to put it into effect. Here is where Tarullo's proposal might complement the activities of the Working Group.

I would be interested to see how the Working Group proceeds to examine issues of prosecutorial discretion and article 5. My own article, Treaties and National Security with Ben Billa may be helpful. It is a expansion of a memo written for TI last year and is about to appear in the NYU Journal of International Law and Policy. I can send you the page proofs now if you wish or can provide the finished paper in a few weeks.

Statutes of Limitations. In paragraph 56 the statement that some countries have a statute of limitations that begins WHEN the offense was committed seems a very poor rule for white-collar crimes that are hard to detect. This seems an important weakness of some legal systems that should be fixed and is a place where reform might be helped along by the OECD. I certainly support the emphasis given to study of the issue in paragraph 57.

paragraphs 129-130: The OECD seems right to point out the vagueness of the term "credible evidence". This seems worth study. One idea that has interested me is the possibility of an effort by the OECD or the World Bank to develop rough benchmarks for certain common kinds of contracts that could help highlight suspect deals. That wouldn't be "credible evidence" taken alone, but they could help direct investigations. The risk here is that such data would push corrupt governments and contractors into esoteric, one-of-a-kind deals, but those could be examined as well, at least for the worst cases (for example, writing telephone specs for sub-Saharan Africa that require them to operate in freezing temperatures--reportedly, a real case).

I hope these comments are helpful.