

# Arrested Development

*The fight against international corporate bribery* \_\_\_\_\_

\_\_\_\_ Benjamin W. Heineman, Jr. & Fritz Heimann \_\_\_\_\_

**I**N THE last 15 years, there has been growing recognition that corruption—including bribery, extortion and misappropriation—has a particularly insidious impact on developing nations. It distorts markets and competition, breeds cynicism among citizens, stymies the rule of law, damages government legitimacy and corrodes the integrity of the private sector. It is a significant obstacle to development and poverty reduction. It also helps perpetuate failed and failing states, which are incubators of terrorism, the narcotics trade, money laundering, human trafficking and other types of global crime. Despite strong reasons for addressing these issues, the developed world's efforts to stop emerging market bribery by its own corporations have been uneven at best.

In one of the worst examples, Prime Minister Tony Blair announced in December last year that, for national-security reasons, the British government had stopped investigating bribery allegations involving British Aerospace Systems' (BAE) lucrative Al Yamamah contracts for

the sale of British fighter planes to Saudi Arabia.

According to news reports, several billion dollars may have been paid by BAE, the UK's largest defense contractor, to members of the Saudi royal family to secure past and present fighter orders, quite possibly with the knowledge of the British government. Then—Attorney General Lord Goldsmith pronounced infamously: “It has been necessary to balance the need to maintain the rule of law against the wider public interest.”

The Al Yamamah investigation was initiated as part of Britain's obligations under the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. That convention, adopted in 1997, commits the parties to enact and enforce national laws making foreign bribery by their corporations a crime. The parties include the world's leading industrialized nations, which are home to most of the major multinational companies. The goal was to address the “supply side” of global corruption and create a level playing field for developed-world corporations through serious sanctions when foreign bribes are paid to procure business, especially in the developing world.

The termination of the Al Yamamah investigation threatens the OECD Convention by opening a dangerous loop-

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hole. Even before Blair's announcement, Britain had been a notorious laggard in implementing the convention. Now its blunt, unilateral use of the unauthorized and unreviewed "national security" rationale raises the specter of other nations halting sensitive investigations, using that reason as a pretext, when their real motives are promoting national commercial champions and avoiding worldwide embarrassment.

As the OECD Convention approaches its tenth anniversary, it is time to take stock of the convention's past, present and future and to examine the broader question of how to make companies in developed nations stop bribing. This is a story of tension between an important global commitment and parochial national interests, with some progress and some setbacks on the troubled road from words to deeds. The ultimate goal of the OECD Convention is to deter multinational corporations' (MNCs) wrongdoing and thus to encourage them to build robust compliance programs. But sustained implementation and ultimate effectiveness of the convention will require a change in the politics of the OECD, the signatory nations and their corporations.

### *The Convention and the Anti-Corruption Agenda*

THE ADOPTION of the OECD Convention a decade ago was widely regarded as a major breakthrough, with 34 (now 37) leading industrial countries agreeing to make foreign bribery a crime under their national laws. Previously, foreign bribery was a crime only under U.S. law (the Foreign Corrupt Practices Act of 1977). In fact, foreign bribe payments were treated as tax-deductible business expenses in many nations. However, widely publicized corruption scandals in several important OECD countries—including France, Italy, Germany and Belgium—

combined with a renewed U.S. effort and strong leadership, led the OECD Ministerial to conclude in the spring of 1997 that a convention making foreign bribery a crime should be drafted. The finished product was signed in December of that year and, after ratifications, it became effective in 1999.

The convention is part of a broader anti-corruption agenda. If the OECD strategy doesn't work, it seriously undermines the developed world's credibility in other initiatives. This raises the danger that the broader war against corruption may, in the foreseeable future, be characterized by empty rhetoric and little progress.

The most fundamental strategic approach to combating corruption requires developing nations to create durable, transparent and accountable institutions, which can order fundamental economic, political and legal affairs free from illicit influences. Such institution-building is also vital if they are to achieve economic growth and better the lot of the poor. The set of forces that will start and sustain this process is complex. Each nation has its own history and culture and is at its own stage of development, from failed and failing to rapidly rising.

Multilateral and bilateral donors have sought to help jump-start this capacity building. The World Bank and the UN Development Program fund programs aimed at particular anti-corruption processes (improvement of national budgeting) or broader institutional change (developing a court system). Similarly, bilateral aid from EU nations and the United States has also begun to focus on corruption. In the United States' Millennium Challenge Corporation, assistance is dependent on progress, measured against a range of governance indicators, including corruption. (Unconditional Chinese aid is a notable and controversial exception.)

International treaties are a second element of multilateral reform. Potentially,

the most important is the UN Convention Against Corruption (UNCAC), which was signed by 140 nations in 2003 (and has now been ratified by about one hundred). Its scope is much broader than the OECD Convention, with a wide range of capacity-building measures, law reforms and provisions for international cooperation. But the UNCAC and regional conventions in Latin America, Europe, Africa and Asia all face the same challenge of making anti-corruption laws on the books meaningful in developing nations where institutions are weak and rule of law is tenuous at best.

Of the many initiatives on the broad anti-corruption agenda, the effort to stop foreign bribery by corporations headquartered in the OECD states remains the most clear-cut and straightforward. While these states have hardly rooted out corruption within their own borders, most of them have sophisticated criminal-justice systems that do prosecute domestic crime, including *domestic* bribery. Yet efforts to stop *foreign* bribery have as yet had only uneven success, even though the convention is clearly drafted and monitoring is carried out by the highly professional OECD Working Group on Bribery.

### *The British Debacle*

**O** THER THAN the United States, one might have expected the UK—the OECD’s fourth largest exporter—to have the best record under the convention, given its history, devotion to the rule of law and anti-corruption programs in developing nations. In fact, the opposite is true.

The OECD has consistently criticized the serious deficiencies in UK anti-corruption laws, which were enacted between 1889 and 1916, as well as the country’s administrative arrangements for dealing with foreign bribery. For example, British law’s archaic “agent/principal” concept allows individuals to accept payments if

their employers permit it. In other words, the acceptance of a bribe by a minister (or a prince) might be lawful if the prime minister (or king) consents. This makes no sense, in part because the injured parties are competitors and citizens in the purchasing country.

In the UK, there have been a considerable number of foreign bribery investigations, but the government has yet to bring a case against anyone. The Al Yamamah investigation was a substantial and prolonged effort by the Serious Frauds Office to examine allegations of BAE bribery in Saudi Arabia. However, the termination of the investigation on December 14, 2006, is symbolic of the UK’s unwillingness to prosecute foreign bribery by its national corporations. The UK has since told the OECD that other investigations are continuing. Yet the UK’s record remains unblemished: no prosecutions to date.

In halting the Al Yamamah inquiry, the British government claimed its continuation would have ended intelligence cooperation with the Saudis in the War on Terror. The credibility of that claim was weakened by the refusal of the UK’s intelligence agencies, MI5 and MI6, to corroborate it. Furthermore, in a February 2007 speech in London, Ambassador Stephen Day, a former head of the Middle Eastern section at the Foreign Office, said that Saudi concerns about terrorism were so acute as to make any threats to stop intelligence cooperation implausible.

After the investigation was closed, Prime Minister Blair spoke about the importance of the sales to the British economy and the need to protect thousands of British jobs. He reiterated this point several times in subsequent public statements. But termination under that rationale is flatly unlawful under Article Five of the convention, which states that “investigation and prosecution . . . shall not be influenced by national economic interest.” Article Five also prohibits a ter-

mination stemming from an “effect upon relations with another state”, thus voiding the UK argument that the inquiry injured British-Saudi intelligence relationships.

Importantly, as Yale Law Professor Susan Rose-Ackerman will argue in a forthcoming article, national-security exceptions to international treaties are not to be implied under international law, and such exceptions certainly may not be implied from Article Five of the OECD Convention. Given the difficulty of securing international agreements, exceptions—other than a customary one for self-defense—should be explicitly identified and directly negotiated.

Unmoved by UK explanations, the OECD Working Group on Bribery announced early in 2007 that a new country visit to the UK would take place within twelve months. It also demanded that the UK government immediately modernize its foreign anti-bribery law. OECD Secretary-General Angel Gurría issued a statement criticizing the Al Yamamah termination. In addition, the Justice Department and the Securities and Exchange Commission (SEC) have launched investigations into possible BAE violations of the Foreign Corrupt Practices Act. This followed reports that Prince Bandar, former Saudi ambassador to the United States, had allegedly received huge payments at a Washington bank for his role in arranging the Al Yamamah contract.

The immediate British response was hardly constructive. After seven years of OECD reports about the inadequacy of its laws, the Blair government again temporized, further postponing parliamentary action on new legislation. It remains to be seen whether the new Gordon Brown government will move more quickly on legislation, bring foreign bribery prosecutions or clarify how prosecutorial decisions are made.

### *A Problematic Convention—and a*

### *Mixed Record*

THE UK is an extreme example of broader issues inherent in the convention. The OECD has no legal power to compel signatories to take action. Its principal lever is peer pressure exercised, in the first instance, through the OECD Working Group on Bribery. The group’s monitoring process produces detailed criticisms and recommendations. However, the preparation of country reports is time-consuming, and they are long and highly technical. Although their purpose is to bring peer and public pressure by exposing national weaknesses, the OECD, as a consensual organization, does not run media campaigns to “name and shame” its member states. It has also refused to issue comparative annual reports covering prosecutions and investigations brought by each member state and evaluating the relative performance of their anti-corruption programs.

A comparative summary of the OECD’s record to date is found in Transparency International’s (TI) annual reports on enforcement in 34 OECD countries. Experts from its national chapters conduct detailed inquiries in their countries and the results are reviewed with OECD and country officials, thus providing a good sense of direction, if not official data.

A benchmark is the United States, which has a specialized foreign bribery enforcement office staffed by high-quality career employees in the Justice Department’s Criminal Division. According to the 2007 TI report, the United States has 67 prosecutions under the act since convention ratification in 1999—more than 50 percent of all prosecutions among OECD nations, even though the United States has only 10 percent of total OECD exports.

The key findings of the 2007 TI report show that there is active enforcement in 14 of 34 countries, including France,

Germany, Italy, the Netherlands and the United States, five of the eight largest exporters. The number of countries with active enforcement has increased from eight in 2005 to twelve in 2006. This includes prosecutions of major MNCs such as Siemens, Total, Baker Hughes, Statoil, Alstom, Enelpower and Alcatel. However, there is little or no enforcement in twenty countries, including three of the largest exporters—Japan, the UK and Canada—which means there is a serious lack of commitment by over half of the parties to the convention.

Commitment is compromised when political leaders—normally the politically appointed attorney general or minister of justice—make prosecutorial decisions based on trade, jobs and other political considerations. Countries with better enforcement records often have a strong tradition of career employees making prosecutorial decisions (the United States) or a magistrate system, as in many civil-law countries, where quasi-judicial officers with significant independence can conduct investigations and initiate cases (France).

Other key problems are the organization of enforcement and the level of resources. Because foreign bribery cases are complex, time-consuming and require specialized resources, local prosecutors, overburdened with busy caseloads, don't have the time or the resources to take on foreign bribery. Fifteen OECD countries have established centralized national offices to deal with such cases—a positive step, though much is yet to be done.

One promising recent development has been the broad investigation of Siemens by German authorities. In the same month that Tony Blair killed the BAE inquiry, Siemens disclosed in an SEC filing that, as a result of European police raids on offices and on employee homes, it had uncovered more than half a billion dollars of suspect overseas payments.<sup>1</sup> In the spring of 2007, both the Chairman of

the Supervisory Board (and former CEO) Heinrich von Pierer and the CEO Klaus Kleinfeld resigned under pressure from the supervisory board. A German court recently fined Siemens \$52 million for bribes involving foreign gas turbine sales. The Siemens earthquake has energized German prosecutorial authorities (who are now overwhelmed with complaints) and shaken German exporting industries.

The Siemens and BAE cases symbolize the mixed record of the OECD Convention during its first ten years. There have been important achievements at the governmental level. Getting three dozen states to pass laws making foreign bribery a crime is a major step forward and lays the foundation for achieving the convention's objectives. Monitoring has been professional and has had important results. Getting five of the eight largest exporters to begin significant enforcement action is another important sign of progress. But, on the negative side of the ledger, there has been little or no enforcement in twenty OECD states.

The ultimate objective of the convention is to change corporate culture and stimulate effective anti-corruption programs. And on this subject there is little hard information. But, with so few successful prosecutions outside the United States, there is little reason to think that the convention has produced a sea change in the behavior of international business.

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<sup>1</sup>In subsequent SEC filings, Siemens announced restatement of earnings because unlawful payments had been deducted as legitimate business expenses; stated that it was extending its investigation to the six other main businesses (including power generation and health care equipment); indicated that a "significant increase" in consulting agreement payments were being reviewed; warned of further financial restatements; and described a series of steps taken to centralize control of funds and to institute a more robust anti-corruption program.

The broad success of the convention remains uncertain until there is significant enforcement in many more countries and until the threat presented by a national-security exception has been overcome. Indeed, if the laggards don't come aboard soon, existing support for enforcement could erode.

### *An Unconventional Approach*

**F**UTURE PROGRESS on the convention will require new, concrete actions by the OECD, national governments and multinational corporations.

First, the OECD should state explicitly that the convention provides no national-security exception, and that no such exception can be implied. If the parties wish to create such an exception, it should be done by an explicit amendment. Consistent with practices followed in other treaties, any exception should be narrowly drawn and provide for independent review.

The OECD Working Group on Bribery should also issue annual reports that compare and contrast national enforcement in order to hold nations fully accountable and give monitoring greater persuasive power. This means that funding for monitoring—constantly under attack from resistant nations—must be increased.

Furthermore, the OECD should strengthen the convention to include bribes to political parties and party officials and bribes paid through foreign subsidiaries controlled by OECD-based parent companies. It should also energetically seek inclusion of major exporters like China, Russia and India as signatories, accelerating an effort that is currently underway. These countries have greatly expanded their role in international trade, and the convention's ability to achieve and maintain a corruption-free, level playing field for major multinationals

will be undermined if other powerful exporting countries don't play by the same rules. Other non-members of the OECD have already acceded to the convention, including Brazil, Argentina and, most recently, South Africa.

To achieve these modifications, multinational and national politics must change. Governments that have taken the enforcement path, including France, Germany and the United States, must play an active role in exerting peer pressure. Failure to enforce the convention must be treated as a priority diplomatic issue (rather than an afterthought in a G-8 communiqué). They should closely support efforts by Secretary-General Gurria and also utilize bilateral channels with inert governments. For example, the United States must push its close allies Britain, Canada and Japan to get off the dime. Peer pressure on laggard governments must be elevated to the ministerial level through active involvement by the secretary-general, the OECD Ministerial Council and by top-level officials from member governments. They must deal directly with ministers of the non-enforcing states and think the diplomatically unthinkable—going public if necessary.

Most importantly, various parties within the political system will have to make anti-corruption a priority political issue in lagging nations. Can the development agency partner with the foreign office to persuade the president or prime minister of the vital importance of anti-corruption to the nation's self-interest? Will an opposition party make this an issue—with the aid of the media and non-governmental organizations? Will a scandal which ripens like Siemens's, rather than shrivel like BAE's, transform public and political attitudes? Obviously, the transformation of national attitudes will depend in part on external pressures from the OECD and from other governments, but more heavily on attitudes among key actors within the country, with civil so-

ciety and the media applying constant pressure.

### *Galvanizing Corporate Efforts*

**T**O MAKE anti-corruption efforts a reality, corporations must go far beyond the adoption of anti-bribery policy statements. Without concrete and rigorously enforced policies, companies will be able to shirk responsibility and claim that underlings have violated company policy whenever bribes are uncovered.

Multinational corporations must have complete anti-corruption programs. Beyond clear and comprehensive codes of conduct, this involves an integrity infrastructure that includes systems and processes for prevention, detection, investigation and remediation of internal corruption, including meaningful protections for employee whistleblowers. Most importantly, corporations need a CEO who drives the anti-corruption program deep into the operations of the company through a combination of aspirations, incentives and penalties. Creating a robust culture of high performance and high integrity is the key.

Beyond the acts of individual MNCs, international companies can act in concert: to put pressure on their own governments to enforce anti-bribery laws (clean companies will strongly support leveling the national playing field); to join in public commitments to effective programs, not just nice-sounding codes; and to promote the rule of law in emerging markets. One salient example is the Extractive Industries Transparency Initiative (EITI), under which leading companies in the mining and oil industries are working with governments to ensure that royalty payments are publicly reported. This is an effort to address the widely recognized concern that countries with oil and other natural resources are among the most corrupt in the world because their leaders

can secretly skim off a portion of the royalties. The EITI seeks to make such payments transparent, thereby making them harder to misappropriate.

### *Progress or Hypocrisy in the Developed World*

**W**HAT CAN change the lack of OECD consensus, the usual pull of trade-and-employment politics in government, and the corrupt business practices of bribing transnational corporations? Renewed leadership and energized politics at the OECD, among nations and within multinational corporations is necessary—and will depend on two broad animating ideas which redefine national and corporate self interest—in order to accelerate the anti-corruption agenda beyond the slow, piecemeal and incomplete steps that have characterized the past ten years. The role of the media and of non-governmental organizations like Transparency International—with 94 national chapters worldwide—in exposing, embarrassing, advocating and hounding is vital if these ideas are to gain currency.

In a global economy, developed nations and MNCs must see it as directly in their foreign-policy and economic interests to stop corruption in emerging markets and to help developing nations build transparent and accountable institutions. This goal is necessary for developing countries to achieve sustainable economic growth, which benefits developed nations and their companies. It is also necessary to address the needs of the bottom billion, to use the phrase of Oxford development expert Paul Collier, and to prevent failed and failing nations from creating foreign-policy and national-security threats to the developed world. Admittedly, this is mid-to-long term self-interest and can be trumped by “short-termism”, but “self-interest” it is nonetheless.

A related idea is that other parts of the broader anti-corruption agenda—the developing nations’ work to strengthen their institutions and economies, and multilateral development agencies’ aid in that task—depend, in important part, on the developed world. It must provide direct investment, export markets, technical assistance, and other kinds of aid, resources and support. But the credibility, moral authority and impact of these other approaches are seriously undermined when the developed world does not seriously address foreign bribery by its own companies. For example, President Thabo Mbeki of South Africa accused Prime Minister Blair of hypocrisy in terminating the Al Yamamah investigation while pressing for anti-corruption reforms in Africa. More broadly, the new UN Convention Against Corruption is just beginning the difficult process of implementation and follow-up monitoring. If the OECD fails to bring the many laggards on board—and thus erodes its

own effectiveness—what is the message for UNCAC, with its far more diverse 140 signatories and far more countries without robust rule of law?

Making clear, steady progress in implementing the OECD Convention and stopping foreign bribes by MNCs headquartered in the industrialized world is thus a leading indicator of the potential of the anti-corruption agenda. 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 UK, the rest of the developed world and the emerging nations. If daunting but critical efforts are to succeed in the developing world—like building accountable and durable institutions, stimulating economic growth and aiding the most direct victims of corruption, the world’s poorest citizens—then the blight of hypocrisy and complicity from the developed world must end. □