

## THE “FIGHT SONG” OF INTERNATIONAL ANTI-BRIBERY NORMS AND ENFORCEMENT: THE OECD CONVENTION IMPLEMENTATION’S RECENT TRIUMPHS AND TRAGEDIES

HEIDI FROSTESTAD KUEHL\*

### ABSTRACT

This Article identifies the drastic differences in implementation and enforcement of the OECD Anti-Bribery Convention norms. Since its adoption and entry into force in 1999, the international community and parties to the Convention still struggle with combatting foreign bribery. The United States is a leader in implementation through the Foreign Corrupt Practices Act, but other nations do not have similar domestic statutes and rigor in enforcement or adequate administrative structures for mutual legal assistance or penalties. This Article provides an introduction to the United States and International efforts to curb acts of bribery, provides an overview of the norms and mechanisms for enforcement under the OECD Anti-Bribery Convention, and then analyzes the actual progress of selected G20 nations by examining the most recent Phase 3 peer-review reports and any follow-up recommendations. This data indicates that there are countries with high enforcement, moderate enforcement, and little or no enforcement. To better discourage foreign bribery in the future,

---

\* Heidi Frostestad Kuehl is an Associate Professor of Law and Director of the David C. Shapiro Memorial Law Library at Northern Illinois University College of Law. J.D., Valparaiso University Law School; M.A. University of Iowa; B.A. Luther College. Many thanks go to my generous writing group and its members, Professor Dan McConkie, Jr., Professor Jeffrey Parness, Professor Laurel Rigertas, Professor Carliss Chapman, Professor Sarah Fox, and Professor Maybell Romero. My gratitude and thanks also to my stellar research assistants, Zachary Bock, Scott Hall, and Brittany Miller for their research help for this Article. Thanks also to my husband, Robert, and my daughter, Grace, for all of their continued love and support.

OECD countries should provide more uniform and longer domestic statute of limitations, clear implementing legislation like the FCPA in the United States, national procedures for investigating bribery and coordinating administrative bodies, whistleblower protection, and more severe national penalties and confiscation of bribery funds. This will capture the spirit of the Convention and pave the way for more uniformity in deterring foreign bribery.

## TABLE OF CONTENTS

1. Introduction .....	468
2. Overview of U.S. and International Efforts to Curb Bribery .....	469
3. The OECD Anti-Bribery Convention: An Overview of the Norms and Mechanisms for Their Enforcement .....	474
4. An Analysis of OECD Enforcement After Phase 3 Review .....	477
4.1. <i>Examples of High Enforcement: Germany, Italy, South Korea, and United States</i> .....	479
4.1.1. <i>Germany</i> .....	479
4.1.2. <i>Italy</i> .....	480
4.1.3. <i>South Korea</i> .....	482
4.1.4. <i>United States</i> .....	484
4.2. <i>Examples of Moderate Enforcement: Australia, Canada, France, Japan, and the United Kingdom</i> .....	485
4.2.1. <i>Australia</i> .....	485
4.2.2. <i>Canada</i> .....	487
4.2.3. <i>France</i> .....	488
4.2.4. <i>Japan</i> .....	490
4.2.5. <i>United Kingdom</i> .....	492
4.3. <i>Countries with Limited Enforcement: Argentina, Brazil, Mexico, Russia, and Turkey</i> .....	495
4.3.1. <i>Argentina</i> .....	495
4.3.2. <i>Brazil</i> .....	497
4.3.3. <i>Mexico</i> .....	498
4.3.4. <i>Russia</i> .....	499
4.3.5. <i>Turkey</i> .....	501
5. Observations Regarding the Lack of Adequate Anti-Bribery Enforcement Demonstrated in the Recent OECD Phase 3 and Follow up Reports .....	503
5.1. <i>Increased Length of Statute of Limitations</i> .....	504
5.2. <i>Existence of Whistleblower Protection in Statutes</i> .....	504
5.3. <i>Formal Adoptions of Implementing Legislation and National Anti-Bribery Laws</i> .....	505
5.4. <i>Clarity of Enforcement Mechanism(s) and National Procedure</i> .....	505
5.5. <i>Equality in Severity of National Penalties</i> .....	506
6. Conclusion: Towards Uniformity with FCPA-Modeled Implementing Legislation as a Model for OECD Anti-Bribery Convention Norms and Enforcement.....	507

## 1. INTRODUCTION

The Foreign Corrupt Practices Act of 1977 is the premier statute in the United States to address the nefarious conduct of foreign corrupt payments to foreign officials, foreign political parties, or candidates for political office in order to influence any act of that foreign official and to secure any improper advantage in order to obtain business.<sup>1</sup> Enforcement of the Foreign Corrupt Practice Act is divided between the Department of Justice (“DOJ”) for civil and criminal authority over all covered persons under the Act, and the Securities and Exchange Commission (“SEC”) for civil and administrative authority over all issuers.<sup>2</sup> Historically, the United States has been a beacon for enforcement of foreign corrupt payments within the international community.<sup>3</sup> In December 1997, twenty-eight out of twenty-nine countries who were members of the Organization for Economic Cooperation and Development (“OECD”) signed the OECD Anti-Bribery Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the “Anti-Bribery Convention”). These signatories included the United States, and this international convention reflected the hard work of the United States while championing the draft of international legal standards for foreign bribery.<sup>4</sup> All of the nations that ratified the OECD Convention have been complying with the Anti-Bribery Convention by enacting domestic legislation that prohibits transnational bribery.<sup>5</sup> The United States enacted the changes to the Foreign Corrupt Practices Act in 1998 to align with the broader OECD standards of proscribing payments to secure an “improper advantage” and expanded the jurisdictional scope of the Act to apply to foreign persons.<sup>6</sup> Yet, since

---

<sup>1</sup> See 15 U.S.C. §§ 78dd-1 *et. seq.*

<sup>2</sup> See *id.* at § 78dd-1(f)(1)(A) (“An officer or employee of a foreign government or any instrumentality will qualify as a foreign official”).

<sup>3</sup> See, e.g., MIKE KOEHLER, THE FOREIGN CORRUPT PRACTICES ACT IN A NEW ERA 1–45 (2014) (providing a history of and rationale for the FCPA).

<sup>4</sup> See *Id.*

<sup>5</sup> See *Country monitoring of the OECD Anti-Bribery Convention*, OECD, <http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm> [<https://perma.cc/H6C2-UJJJ>] (listing the four phases of its peer-review monitoring system).

<sup>6</sup> International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 2, 112 Stat. 3302 (modifying 15 U.S.C. §§ 78dd-1(a)(A), 78dd-2(a)(1)(A), 78dd-3(a)(1)(A)).

the OECD Convention was signed and implemented by various parties to the Anti-Bribery Convention, there have been varying success stories with domestic enforcement. For example, a weak legal system in an OECD nation and subpar domestic legal enforcement mechanisms may lead to few sanctions or domestic review of these economic crimes in the international business market.

This Article will first analyze the goals and mandates of the OECD Anti-Bribery Convention on Combating Bribery of Foreign Public Officials in International Business Transactions since its entry into force in 1999. Then, it will analyze the relative dearth of enforcement or settlements for bribery violations by some OECD countries who have ratified the Convention as juxtaposed to the more vigorous prosecutions and penalties in other OECD countries. More specifically, the Article will highlight OECD nations that are falling behind in anti-bribery efforts according to the recent OECD Working Group's reports ("Phase 3" OECD reports<sup>7</sup>). Third, the Article will provide analysis of case studies of several nations that are meeting or exceeding their OECD anti-corruption obligations as a normative standard. Finally, the Article will conclude with a proposal for increased international cooperation and mutual legal assistance to align with OECD goals and international anti-bribery norms while also recognizing the United States as a leader in enforcement and prosecutions. This proposal will also consider the need for uniformity in OECD implementation and its associated anti-bribery norms on a global scale as an aspiration for international business dealings in a global economy.

## 2. OVERVIEW OF U.S. AND INTERNATIONAL EFFORTS TO CURB BRIBERY

International corruption has historically existed in a variety of forms. Nations, both through their public officials and business

---

<sup>7</sup> See *Country reports on the implementation of the OECD Anti-Bribery Convention*, OECD, <http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm> [https://perma.cc/M95C-ACM6] (providing access to individual countries' monitoring reports and the 2017-18 timetable for peer reviews and follow-up reports).

traditions or governmental entities, often facilitate corrupt actions by foreigners. Unscrupulous business incentives have often been used to encourage companies to seek out business and trade in foreign nations in lieu of favoring more legitimate business developments or international business transactions in their own jurisdiction.<sup>8</sup> Today's global business corruption affects the international marketplace and creates an opening for crimes of many kinds that weaken the international business terrain.<sup>9</sup> These nefarious effects include criminal networks for narcotics, terrorism, human traffickers, cybercrimes, and many other globally harmful acts.<sup>10</sup>

The United States spearheaded the international anti-corruption movement after the Watergate scandal put international corruption in the spotlight in the 1970s.<sup>11</sup> Until the Foreign Corrupt Practices Act ("FCPA") passed in 1977, after illegal payments to foreign officials were uncovered, the United States had not adequately addressed foreign corrupt practices in the context of extraterritorial business.<sup>12</sup> The Watergate scandal uncovered a myriad of bribery

---

<sup>8</sup> See, e.g., Kenneth W. Abbott, *Fight against Corruption*, MAX PLANCK ENCYCLOPEDIA PUB. INT'L L. (Sept. 2009), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e918> [<https://perma.cc/8VNK-C2WV>] (identifying various illicit business practices that encourage companies to engage in business transactions in foreign jurisdictions). See also generally KOEHLER, *supra* note 3.

<sup>9</sup> See WORLD BANK, GOVERNANCE AND ANTI-CORRUPTION: WAYS TO ENHANCE THE WORLD BANK'S (2006) (noting that foreign corruption undermines the international marketplace). See also generally Roger P. Alford, *A Broken Windows Theory of International Corruption*, 73 OHIO ST. L. J. 1253 (2012) (arguing that international corruption signals the breakdown of the necessary community controls for general welfare).

<sup>10</sup> See TRANSPARENCY INTERNATIONAL (TI), EXPORTING CORRUPTION, PROGRESS REPORT 2015: ASSESSING ENFORCEMENT OF THE OECD CONVENTION ON COMBATING FOREIGN BRIBERY (2015) (reporting that foreign corruption has diverse and far-reaching consequences). See also Press Release, U.S. Dep't of Justice, Assistant Attorney General Leslie R. Caldwell Delivers Remarks Highlighting Foreign Corrupt Practices Act Enforcement at the George Washington University Law School (Nov. 3, 2016) (asserting that foreign corruption "is far more harmful than can be measured numerically" due to its wide-ranging consequences).

<sup>11</sup> Abiola O. Makinwa, *Researching Civil Remedies for International Corruption: The Choice of the Functional Comparative Method*, 2 ERASMUS L. REV. 331, 332 (2009) ("[T]he Watergates scandal in the United States led to the passage of the Foreign Corrupt Practices Act (FCPA).") (citation omitted).

<sup>12</sup> See KOEHLER, *supra* note 3, at 1-19.

payments by U.S. businesses to foreign public officials.<sup>13</sup> In historically uncharted territory, the United States addressed the illegal, including criminal, activities that businesses should not undertake when conducting international business in other nations.<sup>14</sup> Few prosecutions ensued from the FCPA in its early years because the anti-bribery statutory language was unclear to the DOJ and SEC in the 1980s and 1990s.<sup>15</sup> The 1998 amendments to the FCPA implemented the treaty obligations of the OECD's Anti-Bribery Convention.<sup>16</sup> With this 1998 revision, the DOJ and SEC then began to more vigorously prosecute FCPA violations for facilitating procurement of business deals in foreign jurisdictions through bribes or other payments to public officials.<sup>17</sup>

Since 1998, the DOJ has increased prosecution of FCPA violations, making the United States the leader in foreign corrupt practices enforcement.<sup>18</sup> Two recent cases highlight this recent vigor in prosecution, which often leads to settlement. During the Wal-Mart scandal in Mexico in 2011 involving illegal payments made to facilitate store openings in the country, the DOJ was at the forefront of foreign corrupt practices exposure because a major U.S. corporate entity revealed bribery violations in conjunction with foreign business expansion.<sup>19</sup> After investigating Wal-Mart's business

<sup>13</sup> See *Id.*

<sup>14</sup> See *Id.*

<sup>15</sup> See, e.g., Justin F. Marceau, *A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act*, 12 FORDHAM J. CORP. & FIN. L. 285 (2007) (identifying recent controversial FCPA cases and discussing particular FCPA provisions).

<sup>16</sup> S. REP. NO. 105-277 (1998). See also Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 19, 1997, S. Treaty Doc. No. 105-43 (1998), 37 I.L.M. 1 (establishing legally binding standards to criminalize bribery of foreign public officials in international business transactions).

<sup>17</sup> These are mainly bribery cases under Section 78dd-2 of the FCPA. See FCPA Related Enforcement Actions, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/criminal-fraud/related-enforcement-actions> [<https://perma.cc/PS6N-X8MU>] (listing enforcement actions from 1977 to present); Department of Justice, Opinion Releases Index, DEP'T OF JUSTICE, <https://www.justice.gov/criminal-fraud/opinion-releases-index> [<https://perma.cc/27FP-SQNA>] (listing released FCPA opinions from 1980-2014).

<sup>18</sup> See generally KOEHLER, *supra* note 3, at 169-233.

<sup>19</sup> See generally Miguel Bustillo & Joe Palazzolo, *Wal-Mart Discloses a Corruption Probe*, WALL ST. J. (Dec. 9, 2011), <https://www.wsj.com/articles/SB10001424052970203501304577086933145615936> [<https://perma.cc/QN75-CSV6>].

practices in several countries including the original location of new Wal-Mart stores in Mexico, a settlement was reached in 2016 for at least USD 600 million.<sup>20</sup> And, in January 2017, Rolls-Royce admitted to the DOJ that it bribed government officials in several countries in exchange for government contracts in violation of the FCPA, leading to a USD 170 million settlement.<sup>21</sup> Rolls-Royce also agreed to a cumulative USD 800 million global settlement with U.S., UK, and Brazilian authorities.<sup>22</sup> Between 2000 and 2013, Rolls-Royce paid more than USD 35 million in bribes to foreign officials through third parties.<sup>23</sup> The Rolls Royce and Wal-Mart settlements are prime examples of the DOJ's integral role of leading international anti-bribery enforcements mechanisms under the FCPA since the 1998 revisions to the Act.

Outside the United States and the FCPA enforcement actions, there have also been concerted efforts to curb bribery on a global scale by other G20 nations. The main international business treaty that governs international anti-bribery is the OECD Anti-Bribery Convention.<sup>24</sup> Over thirty-five nations are parties to the OECD Anti-Bribery Convention terms, which reveals substantial agreement in the international community toward combatting bribery since the Anti-Bribery Convention's signature in 1997 and entry into force in 1999.<sup>25</sup> The parties to the Anti-Bribery Convention include many of the G20 nations where corruption still persists in international

---

<sup>20</sup> Tom Schoenberg & Matt Robinson, *Wal-Mart Balks at Paying \$600-Million-Plus in Bribery Case*, BLOOMBERG NEWS (Oct. 6, 2016), <https://www.bloomberg.com/news/articles/2016-10-06/wal-mart-said-to-balk-at-paying-600-million-plus-in-bribe-case> [<https://perma.cc/BH7S-GTRM>].

<sup>21</sup> Press Release, U.S. Dep't of Justice, *Rolls-Royce Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case* (Jan. 17, 2017), <https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act> [<https://perma.cc/P8VW-JWS2>]. See also Tom Schoenberg & Matt Robinson, *supra* note 20 (reporting the same figure).

<sup>22</sup> U.S. Dep't of Justice, *supra* note 21.

<sup>23</sup> *Id.*

<sup>24</sup> See *Country reports on the implementation of the OECD Anti-Bribery Convention*, *supra* note 7 (listing parties to the OECD Anti-Bribery Convention and reports from each country on implementation efforts).

<sup>25</sup> See, e.g., *Data on enforcement of the Anti-Bribery Convention*, OECD, <http://www.oecd.org/daf/anti-bribery/data-on-enforcement-of-the-anti-bribery-convention.htm> [<https://perma.cc/587Y-8WV3>] (summarizing worldwide enforcement actions under the Anti-Bribery Convention).



business dealings based on inconsistent measures to implement the OECD Anti-Bribery Convention into national legal landscapes and business climates.<sup>26</sup> Numerous international business partners of the United States, though, are falling behind in the fight against international foreign corrupt business practices based on the current lack of prosecutions and domestic implementation of the OECD norms, especially when juxtaposed against the U.S. vigor.<sup>27</sup> According to an Assistant Attorney General for the DOJ's Criminal Division, "corruption is far more harmful than can be measured numerically . . . when corruption takes hold, the fundamental notion of playing by the rules gets pushed to the side, and individuals, businesses and governments instead begin to operate under a fundamentally unfair—and destabilizing—set of norms."<sup>28</sup> The Assistant Attorney General explained that international business corruption undermines confidence in the international markets and governments and "destroys the sense of fair play."<sup>29</sup> The harm to the international business "fair play" norms is significant as the World Bank estimates that more than USD 1 trillion is paid each year in bribes, amounting to approximately three percent of the world's economy.<sup>30</sup>

Anti-corruption, including anti-bribery efforts, is also generally available on an international scale with the entry into force of the

---

<sup>26</sup> See, e.g., OECD, OECD FOREIGN BRIBERY REPORT: AN ANALYSIS OF THE CRIME OF BRIBERY OF FOREIGN OFFICIALS (2014) (revealing that foreign bribery persists in some of the G20 nations, such as Argentina, France, and Japan, because of the prevalence of payments to facilitate public procurement of contracts in foreign jurisdictions where this practice is the cultural norm).

<sup>27</sup> See generally OECD, 2015 DATA ON ENFORCEMENT OF THE ANTI-BRIBERY CONVENTION (Nov. 2016) (showing that a majority of parties to the Anti-Bribery Convention have not sanctioned a single party since the treaty came into effect).

<sup>28</sup> Dep't of Justice, *supra* note 21.

<sup>29</sup> *Id.*

<sup>30</sup> *Issue Paper on Corruption and Economic Growth* 5 (2013), OECD, <https://www.oecd.org/g20/topics/anti-corruption/Issue-Paper-Corruption-and-Economic-Growth.pdf> [<https://perma.cc/3T6A-4WDL>] ("A widely quoted estimate by the World Bank(2013) [sic] puts the total amount of bribes paid in both developing and developed countries in 2001/2002 at 1 trillion dollars, about 3 % of world GDP at the time."). See also OECD, ILLICIT FINANCIAL FLOWS FROM DEVELOPING COUNTRIES: MEASURING OECD RESPONSES (2014) (discussing progress in halting illicit financial flows and shortcomings of OECD nations in dealing with illicit flows).

United Nations Convention against Corruption in 2005.<sup>31</sup> This is a treaty involving many G20 nations who are attempting to combat global corruption. With 140 signatories and over 180 parties to this United Nations (“UN”) agreement, the UN Convention provides for increased cooperation among countries to combat global corruption in a wide variety of criminal settings, including bribery in international business.<sup>32</sup> A recent OECD chart summarizes the dramatic increase in foreign bribery cases per year based on international efforts since 1999.<sup>33</sup> Beginning with only one case in 1999, the current number of concluded cases per year ranges between forty to eighty cases since 2008.<sup>34</sup> This highlights the continued widespread prevalence of international bribery and should be a disturbing statistic, considering the number of cases that are presumably never brought against international multinational enterprises that continue to make bribery payments.<sup>35</sup>

### 3. THE OECD ANTI-BRIBERY CONVENTION: AN OVERVIEW OF THE NORMS AND MECHANISMS FOR THEIR ENFORCEMENT

The United States paved the way for comprehensive anti-bribery efforts with the FCPA and advocated for the establishment of international anti-bribery norms with other nations.<sup>36</sup> The OECD Anti-Bribery Convention was signed in 1997 and entered into force

---

<sup>31</sup> See generally United Nations Convention Against Corruption, Oct. 31, 2003, S. Treaty Doc. No. 109-6, 2349 U.N.T.S. 41.

<sup>32</sup> *Signature and Ratification Status*, UNODC, <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html> [<https://perma.cc/WEW3-NU9C>].

<sup>33</sup> OECD FOREIGN BRIBERY REPORT: AN ANALYSIS OF THE CRIME OF BRIBERY OF FOREIGN OFFICIALS, *supra* note 27. See also Roberto A. Ferdman, *How the world's biggest companies bribe foreign governments – in 11 charts*, WASH. POST (Dec. 3, 2014), [https://www.washingtonpost.com/news/wonk/wp/2014/12/03/how-the-worlds-biggest-companies-bribe-foreign-governments-in-11-charts/?noredirect=on&utm\\_term=.6ab1039c235f](https://www.washingtonpost.com/news/wonk/wp/2014/12/03/how-the-worlds-biggest-companies-bribe-foreign-governments-in-11-charts/?noredirect=on&utm_term=.6ab1039c235f) [<https://perma.cc/96TR-72GF>] (exploring the spread of bribes between corporations and national governments and indicating what sort of officials and industries are implicated in bribes).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See, e.g., Elizabeth K. Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Antibribery Convention*, 53 VA. J. INT'L L. 1 (2012) (discussing the development of multilateral enforcement of the Anti-Bribery Convention).

on February 15, 1999. Currently, there are forty-four countries that are bound by the Anti-Bribery Convention as signatories, and those nations are entering Phase 4 of the Convention's monitoring process this year.<sup>37</sup> Phase 4 review (December 2016–June 2024) continues to monitor the effectiveness of the national legislative frameworks and OECD nations' follow-through on the OECD Anti-Bribery Convention enforcement. This is a regular review procedure by independent experts, who are not from the nation being reviewed, and those experts are assigned by the OECD to the peer-review group for each phase of the OECD monitoring process.<sup>38</sup>

The OECD Anti-Bribery Convention provides a clear structure for criminalizing and creating liability for bribes flowing to foreign public officials.<sup>39</sup> Articles 1 and 2 clearly denote a criminal offense of bribery for payments to foreign public officials by legal persons.<sup>40</sup> Articles 3 and 4 create criminal and/or non-criminal sanctions for offenses and national jurisdiction over bribery of foreign officials.<sup>41</sup>

Furthermore, Articles 5 and 6 of the Anti-Bribery Convention provide enforcement according to the applicable rules and principles, and an adequate period for the statutes of limitations to allow for proper investigation and prosecution.<sup>42</sup> Articles 7 and 8 of the Anti-Bribery Convention denote that money laundering should be treated in the same way as bribery and the accounting or auditing standards for financial statements must be regulated in each nation to facilitate proper corporate recordkeeping.<sup>43</sup> Articles 9 and 10 create a basic structure among the OECD nations for mutual legal assistance and extradition for the offense of bribery.<sup>44</sup> Articles 11

---

<sup>37</sup> See *OECD Anti-Bribery Convention: Entry into Force of the Convention*, OECD, <http://www.oecd.org/daf/anti-bribery/oecdanti-briberyconventionentryintoforceoftheconvention.htm> [<https://perma.cc/WEW3-NU9C>] (giving the current status and a brief overview of the Convention); see also *Country monitoring of the OECD Anti-Bribery Convention*, *supra* note 7 (laying out the four phases of the Convention's monitoring process).

<sup>38</sup> *Country monitoring of the OECD Anti-Bribery Convention*, *supra* note 7.

<sup>39</sup> See generally *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, *supra* note 16 (establishing liability for bribes to foreign public officials).

<sup>40</sup> *Id.* at arts. 1 & 2.

<sup>41</sup> *Id.* at arts. 3 & 4.

<sup>42</sup> *Id.* at arts. 5 & 6.

<sup>43</sup> *Id.* at arts. 7 & 8.

<sup>44</sup> *Id.* at arts. 9 & 10.

and 12 designate the Secretary-General of the OECD as the sole channel of communication for making and receiving requests and cooperation among parties for the bribery monitoring and follow-up inquiries.<sup>45</sup> Finally, Articles 13-17 provide treaty procedures for monitoring the country obligations under the Anti-Bribery Convention and outline procedures for regular reporting, treaty signature and accession, and entry into force.<sup>46</sup>

The Anti-Bribery Convention has a monitoring process with four phases that has been touted as the “gold standard” of rigorous peer-review monitoring by Transparency International.<sup>47</sup> Phase 1 review, which began in 1999, evaluated the implementing legislation of each country and the adequacy of national legislation according to OECD norms.<sup>48</sup> Phase 2 review and associated reports assessed the effectiveness of the application of the national legislation in each country.<sup>49</sup> Currently, most OECD nations have concluded the most recent Phase 3 review. Phase 3 review focuses on enforcement of the Anti-Bribery Convention, any outstanding concerns from Phase 2 reports and review, and the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials.<sup>50</sup> During the next year, the Phase 4 reviews of OECD countries will begin. This final monitoring mechanism will focus on any outstanding issues from Phase 3 review, continued enforcement, and any cross-cutting issues that may be tailored to specific country needs.<sup>51</sup>

---

<sup>45</sup> *Id.* at arts. 11 & 12.

<sup>46</sup> *Id.* at arts. 13-17.

<sup>47</sup> *Country monitoring of the OECD Anti-Bribery Convention*, *supra* note 7.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *See, e.g.*, OECD, RECOMMENDATION OF THE COUNCIL FOR FURTHER COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (Nov. 26, 2009) (outlining further steps for countries to take to combat bribery in international business transactions).

<sup>51</sup> *Country monitoring of the OECD Anti-Bribery Convention*, *supra* note 7.

4. AN ANALYSIS OF OECD ENFORCEMENT AFTER PHASE 3 REVIEW<sup>52</sup>

The following chart summarizes enforcement efforts by selected G20 countries that will be discussed in this Article:<sup>53</sup>

Selected G20 OECD Nations	Enforcement (2015 Comparative Data) <sup>54</sup>
Argentina	No - 0 [=Sanctions/ Acquittals]
Australia	No - 0 [=Sanctions/ Acquittals]
Brazil	No - 0 [=Sanctions/ Acquittals]
Canada	Yes - 4 [Sanctions only]
France	Yes - 8/5 [=Sanctions/ Acquittals]
Germany	Yes - 68/3 [=Sanctions/ Acquittals]
Italy	Yes - 10/4 [=Sanctions/ Acquittals]
Japan	Yes - 10/2 [=Sanctions/ Acquittals]
Mexico	No - 0 [=Sanctions/ Acquittals]
Russia	No - 0 [=Sanctions/ Acquittals]
South Korea	Yes - 16/4 [=Sanctions/ Acquittals]
Turkey	No - 0 [=Sanctions/ Acquittals]
United Kingdom	Yes - 10/2 [=Sanctions/ Acquittals]
United States	Yes - 67/37 [=Sanctions/ Acquittals]

This Section will review the most recent OECD Phase 3 reports and recommendations and any available follow-up reports regarding enforcement efforts in selected G20 countries.<sup>55</sup>

These reports and the above chart reveal that some nations are complying with anti-bribery enforcement and meeting the standards of the OECD Anti-Bribery Convention. However, the reports also show that some nations are falling short of their obligations and have significant work to do to appropriately hinder

<sup>52</sup> These nations were selected G20 investment statistics from the World Bank and an equitable selection of countries from each region of the world. See World Bank, *Growth and Development in Emerging Markets and other Developing Countries*, (Nov. 11, 2010) [https://www.g24.org/wp-content/uploads/2014/03/Session-2\\_23.pdf](https://www.g24.org/wp-content/uploads/2014/03/Session-2_23.pdf) [<https://perma.cc/8P59-TP2U>]; see also World Bank, *G20 Financial Inclusion Indicators*, <http://databank.worldbank.org/data/reports.aspx?source=g20-basic-set-of-financial-inclusion-indicators> [<https://perma.cc/ZJ9R-5S6F>].

<sup>53</sup> See 2015 DATA ON ENFORCEMENT OF THE ANTI-BRIBERY CONVENTION, *supra* note 27.

<sup>54</sup> See *id.*

<sup>55</sup> See *Country reports on the implementation of the OECD Anti-Bribery Convention*, *supra* note 7 (providing foreign bribery country reports).

bribery in the context of international business transactions. The G20 countries' enforcement analysis in this Article will fall into three categories: high enforcement, moderate enforcement, and limited enforcement. Then, this Section will review possible reasons for lack of uniformity among OECD nations after review of the Phase 3 reports including: i) effectiveness of the nation's statute of limitations; ii) existence of whistleblower protection; iii) analysis of the domestic implementing legislation and national legal system; iv) enforcement mechanism(s) or procedure(s) available in the OECD nation; and v) severity of penalties under the national enforcement mechanism. Additional OECD analyses and charts comprehensively show where bribes have been recently paid during international business transactions and where bribers are being punished.<sup>56</sup> Some of the nations with the intake of bribes by public officials, including the United States, Germany, and Korea, are also the countries with the greatest punishment.<sup>57</sup> Conversely, though, some of the other nations with bribery intake statistics, such as Russia and selected Asian countries, are not countries with high enforcement rates.<sup>58</sup> A chart from the OECD highlights these disparities and notes those countries and regions, including Russia, China, most of Asia, the United States, and portions of South America, where bribes were most often received by public officials and paid between 1999-2014.<sup>59</sup> This Section will analyze the legal structures of the enforcement mechanisms in countries with high enforcement, moderate enforcement, and low enforcement to glean any obstacles to further international conformity in aligning with the goals of the OECD Anti-Bribery Convention.

---

<sup>56</sup> See Ferdman, *supra* note 33 (describing how multinational corporations bribe foreign governments). See also OECD FOREIGN BRIBERY REPORT: AN ANALYSIS OF THE CRIME OF BRIBERY OF FOREIGN OFFICIALS, *supra* note 26.

<sup>57</sup> See OECD FOREIGN BRIBERY REPORT: AN ANALYSIS OF THE CRIME OF BRIBERY OF FOREIGN OFFICIALS, *supra* note 26 ("The United States has sanctioned individuals and entities for the foreign bribery offence in connection with 128 separate foreign bribery schemes; Germany has sanctioned individuals and entities for the foreign bribery offence in connection with 26 separate schemes; Korea in connection with 11 . . .").

<sup>58</sup> See *id.* at fig. 19.

<sup>59</sup> See *id.* at fig. 18, 30. See also, Ferdman, *supra* note 33.

#### 4.1. *Examples of High Enforcement: Germany, Italy, South Korea, and United States*

##### 4.1.1. *Germany*

Germany's most recent report is a Phase 3 follow-up report in April 2013.<sup>60</sup> Since the Phase 3 Report, Germany has continued its sanctioning of large numbers of individuals.<sup>61</sup> From March 2011 to March 2013, thirty-three cases were ended for lack of grounds, twenty-one resulted in sanctions (after settlement or conviction).<sup>62</sup> As of March 2011, out of the sixty-nine persons who have been sanctioned for foreign bribery, thirty-five were sentenced following some type of agreement.<sup>63</sup> Twenty-one German cases resulted in the sanctioning of 141 individuals (one case consisted of sixty-one individuals).<sup>64</sup> Out of those, forty-three were for bribery of a foreign public official, eighty for making commercial bribes, and eighteen were for "breach of trust and tax evasion."<sup>65</sup> A bill is being discussed in Germany that could make the sanctions and penalties for foreign bribery even more serious.<sup>66</sup> Germany has held conferences and has proposed initiatives that have increased awareness of the offense.<sup>67</sup> The OECD Working Group stated that more public awareness needs to be raised in Germany concerning the fact that the criteria or elements of the offense are to be interpreted broadly, not narrowly.<sup>68</sup> The way that facilitation payments should be treated according to German law is also vague and public education should be augmented.<sup>69</sup> Germany has not introduced any bills with respect to

---

<sup>60</sup> See generally OECD, GERMANY: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS (Apr. 15, 2013) (reporting on the state of foreign bribery in Germany).

<sup>61</sup> See *id.* at 3-4 (summarizing findings).

<sup>62</sup> See *id.*

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See *id.* at 3, 20.

<sup>68</sup> See *id.* at 6-11 (describing recommendations and actions taken to respond to recommendations).

<sup>69</sup> *Id.*

whistleblower protection.<sup>70</sup> A further report has been requested from the Working Group.

During Phase 3 and the most recent Phase 4 Report review in Germany, the OECD Working Group reported that enforcement had increased since Phase 2 and Germany is the leader of enforcement in Europe.<sup>71</sup> It stated that previous penalties and fines had been “generally low,” in Germany and that a majority of prison sentences had been suspended.<sup>72</sup> Furthermore, the Working Group found it to be highly effective that Germany had required its tax auditors to report suspected instances of bribery.<sup>73</sup> In summary, the Working Group noted that provisions adopting Article 1 of the Anti-Bribery Convention had not yet been fully integrated by the German legislature.<sup>74</sup> Since Phase 3 review, though, Germany had investigated a total of 121 cases and forty-seven cases resulted in sanctions.<sup>75</sup>

#### 4.1.2. Italy

Italy’s most recent report is a Phase 3 follow-up report in 2014.<sup>76</sup> Italy has prosecuted 133 persons, 104 natural persons, and twenty-nine legal persons since the OECD Anti-Bribery Convention entered

---

<sup>70</sup> See *id.* at 22.

<sup>71</sup> See generally OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN GERMANY (Mar. 17, 2011) (reporting on Germany’s progress in implementing recommendations to improve its foreign bribery enforcement); see also OECD, PHASE 4 REPORT: GERMANY (June 14, 2018) (evaluating and making further recommendations regarding Germany’s implementation of foreign bribery enforcement initiatives); John Bray, *Compliance Alert: OECD confirms Germany as leading enforcer*, FCPA Blog, (July 17, 2018), <http://www.fcpablog.com/blog/2018/7/17/compliance-alert-oecd-confirms-germany-as-leading-enforcer.html> [<https://perma.cc/B6JE-EKC7>] (summarizing Germany’s progress in foreign bribery enforcement and providing recommendations for future improvement).

<sup>72</sup> See PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN GERMANY, *supra* note 71, at 10.

<sup>73</sup> *Id.* at 22-23.

<sup>74</sup> *Id.* at 30.

<sup>75</sup> See PHASE 4 REPORT: GERMANY, *supra* note 71, at 12.

<sup>76</sup> See generally OECD, ITALY: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS (May 20, 2014).



into force.<sup>77</sup> Of those prosecutions, twelve have been sanctioned through *patteggiamento* (“plea bargain”), and seventy-two had their cases dismissed as time barred.<sup>78</sup> The other Italian prosecutions were acquitted or had their case dismissed for lack of grounds. Since the Phase 3 report, no new foreign bribery case has been finalized.<sup>79</sup> There was a legal person convicted in 2013, but an appeal is pending on that case.<sup>80</sup> Italy implemented, at least partially, a number of Phase 3 recommendations.<sup>81</sup> These include lengthening limitation periods (“SOLs”) for offenses and protection for whistleblowers.<sup>82</sup> The Working Group stated, however, that “the vast majority of the recommendations remain partially or not implemented.”<sup>83</sup> Of the Phase 3 recommendations, five have been fully implemented, ten have been partially implemented, and six have not been implemented at all (twenty-one total).<sup>84</sup> There have not been any steps taken toward making both imprisonment and fines available to Italian judges.<sup>85</sup> There have also been no attempts to increase fines for violations by legal persons.<sup>86</sup> Italy has introduced, though, a new registry system that was to become operational as of 2014.<sup>87</sup> Italy has undertaken more training for law enforcement personnel and has taken steps to increase public awareness.<sup>88</sup> While public sector employees have increased whistleblower protection, Italy is only in the beginning stages of providing such protection to the private sector to support anti-bribery efforts.<sup>89</sup> For export credit and public

---

<sup>77</sup> *Id.* at 4–6 (summarizing findings).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 4.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 5. See also, *Bribery & Corruption: Italy*, GLOBAL LEGAL INSIGHTS (2018), <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/Italy> [<https://perma.cc/FSG7-AF86>] (reporting that Italy’s new compliance procedures within the public administration aim to improve transparency).

<sup>89</sup> ITALY: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS, *supra* note 76, at 5.

advantages, some steps have been taken by Italy; however, the OECD Working Group feels that more can and should be done.<sup>90</sup> A further follow up was requested after this most recent report to address the deficiencies in anti-bribery efforts in Italy.

During Phase 3, the OECD Working Group found that although sixty defendants had been prosecuted and nine were under investigation, actual sanctions were only imposed on three persons.<sup>91</sup> Enforcement of foreign bribery laws were found to have caused internal compliance programs to be formed in Italy.<sup>92</sup> Finally, agencies that administer public benefits were also putting policies in place in order to prevent or detect foreign bribery.<sup>93</sup>

#### 4.1.3. South Korea

The most recent report on Korea was the Phase 3 follow up in 2014.<sup>94</sup> Korea has fully implemented ten recommendations, partially implemented four, and two recommendations have not been implemented at all.<sup>95</sup> Korea has created a new consultative body in an attempt to strengthen the country's information and

---

<sup>90</sup> *Id.*

<sup>91</sup> See OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN ITALY 5 (Dec. 16, 2011). See also Steven R. Salbu, *Transnational Bribery: The Big Questions*, 21 NW. J. INT'L L. & BUS. 435, 445-447 (2001) (noting the likely chilling effect of sanctions on borderline corrupt behaviors).

<sup>92</sup> ITALY: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS, *supra* note 76, at 5.

<sup>93</sup> PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN ITALY, *supra* note 91, at 5.

<sup>94</sup> See generally OECD, KOREA: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS (May 8, 2014). See generally, *South Korea Corruption Report*, BUS. ANTI-CORRUPTION PORTAL (May 2017), <https://www.business-anti-corruption.com/country-profiles/south-korea/> [<https://perma.cc/A99Y-HX7S>] (listing South Korea's main legislative frameworks that address corruption); see also *South Korea Fines Prominent Pharmaceutical Manufacturer in Latest Anti-Corruption Enforcement Efforts*, ROPES & GRAY (May 1, 2017), <https://www.ropesgray.com/en/newsroom/alerts/2017/05/South-Korea-Fines-Prominent-Pharmaceutical-Manufacturer-in-Latest-Anti-Corruption> [<https://perma.cc/FD78-93WH>] (reporting that South Korea is increasing its anti-corruption enforcement efforts).

<sup>95</sup> KOREA: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS, *supra* note 94, at 4-5 (listing findings).

intelligence capability.<sup>96</sup> Korea has also ceased destroying records of foreign bribery every three years, and will now keep them up to seventy years (and possibly longer).<sup>97</sup> The OECD Working Group suggests that Korea make sure that foreign bribery offenses reach those from the North Korean regime, or the Kaesong Industrial Zone.<sup>98</sup> Small facilitation payments have been outlawed in South Korea.<sup>99</sup> Penalties that are applied in practice continue to be “insufficiently effective, proportionate, and dissuasive.”<sup>100</sup> There have been five convictions since the Phase 3 report, and those have resulted in no jail time and small fines.<sup>101</sup> Korea has made attempts to raise awareness of foreign bribery offenses, but law enforcement officials need more awareness that legal persons are also subject to punishment, not solely natural persons.<sup>102</sup> The Working Group states that money laundering recommendations have been partially implemented, but they worry that large conglomerates will prevent detection by laundering money.<sup>103</sup> Korea has made it mandatory for auditors to report suspicions of foreign bribery and has afforded those auditors “due protection” in doing so.<sup>104</sup> There have been around twenty cases of foreign bribery in Korea.<sup>105</sup> Upon receiving referral from foreign authorities, Korean Maritime Police detected sixteen other cases of foreign bribery. Eleven of those sixteen cases were dismissed because the payments were classified as small facilitation payments.<sup>106</sup> Overall, since the Phase 3 review, most of those cases involved the bribery of foreign military staff on Korean soil.

---

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 4.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 5.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 5.

<sup>106</sup> *Id.* (“In 11 of the 16 cases, the prosecution was suspended because they concerned small facilitation payments.”). Four natural persons and one legal person were convicted.

#### 4.1.4. United States

The United States has had vigorous prosecutions since the United States passed implementing legislation to the OECD Convention in the form of the FCPA.<sup>107</sup> The Phase 3 OECD evaluation report in October 2010 also reveals that the United States has continued to strongly enforce the FCPA.<sup>108</sup> The prosecution of cases in the United States has steadily increased since the inception of the FCPA as implementing legislation for the OECD Anti-Bribery Convention.<sup>109</sup> Since the Phase 3 report, more than fifteen individuals were charged and sentenced to imprisonment ranging from three to fifteen years.<sup>110</sup> Criminal fines against corporations were also imposed in thirty-eight cases, ranging from USD 32,000 to USD 218.8 million.<sup>111</sup> The United States has implemented all but one of the Working Group's recommendations since the Phase 3 review, which is increasing in the length of the statute of limitations.<sup>112</sup>

During the last two years, the SEC recovered almost USD 340 million in thirty-three actions, and the DOJ actions resulted in nearly USD 750 million in penalties in thirty-one cases.<sup>113</sup> Under the current structure of the statute, the FCPA's criminal provision and its statute of limitations is five years.<sup>114</sup> This may be extended up to

---

<sup>107</sup> See generally Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1161 (Dec. 2017).

<sup>108</sup> See generally OECD, UNITED STATES: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS (Dec. 20, 2012).

<sup>109</sup> See, e.g., *Related Enforcement Actions*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/criminal-fraud/related-enforcement-actions> [https://perma.cc/3MF9-KQQS]. From 1977 to early 1990s, there were fewer than twenty enforcement actions. After the 1990s, though, there was a great expansion in enforcement with some years (e.g., 1999), yielding at least twenty actions per year. This appears to be slowing down, though, under the Trump administration with only two enforcement actions pending this year. See *Related Enforcement Actions: 2018*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2018> [https://perma.cc/7VTW-X9PQ].

<sup>110</sup> UNITED STATES: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS, *supra* note 108, at 3.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 5.

<sup>114</sup> *Id.* at 5-6.

three years in cases where information is formally sought in a foreign country.<sup>115</sup> Therefore, because most FCPA cases will involve some foreign evidence, the effective statute of limitations is more than five years. The DOJ is currently considering further measures to extend the statute of limitations through legislative action.<sup>116</sup> Since the Phase 3 review, the United States has vigorously pursued violations of the FCPA's accounting provisions and IRS criminal investigation special agents have assisted in several criminal investigations involving violations of the FCPA.<sup>117</sup> Overall, the United States still remains a beacon in anti-bribery prosecution efforts through its federal statutory structure for criminalizing and punishing bribery acts and recovering bribes paid under the FCPA. However, the future of FCPA prosecution and vigilance of anti-bribery efforts is uncertain under the current Trump administration.<sup>118</sup>

#### 4.2. *Examples of Moderate Enforcement: Australia, Canada, France, Japan, and the United Kingdom*

##### 4.2.1. *Australia*

The most recent report filed by Australia is a Phase 3 follow-up report in 2015.<sup>119</sup> In that report, the Working Group found that Australia had taken many steps to implement the Phase 3 recommendations.<sup>120</sup> Of the Phase 3 recommendations, sixteen of thirty-three have been fully implemented, nine have been partially

---

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 6.

<sup>117</sup> *Id.* at 15–18.

<sup>118</sup> See, e.g., Jim Zarroli, *Trump Used To Disparage An Anti-Bribery Law: Will He Enforce It Now?*, NPR (Nov. 8, 2017), <https://www.npr.org/2017/11/08/561059555/trump-used-to-disparage-an-anti-bribery-law-will-he-enforce-it-now> [https://perma.cc/NKK8-CA2P] (describing President Trump's reactions to the law).

<sup>119</sup> See generally OECD, *AUSTRALIA: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS* (Apr. 3, 2015).

<sup>120</sup> *Id.* at 4–5 (summarizing findings).

implemented, and eight have not been implemented at all.<sup>121</sup> Since the Phase 3 report, there have been fifteen bribery allegations in Australia.<sup>122</sup> The number of investigations has gone up from seven in October 2012 to seventeen at the time of the follow up to Phase 3.<sup>123</sup> Australia has taken steps to make the public aware of the distinction between “facilitation payments” and bribes.<sup>124</sup> The Australian coalition government has established a Fraud and Anti-Corruption Centre, located in the Australian Federal Police Headquarters.<sup>125</sup> They have also given presentations to regional Australian and foreign business communities on the particulars of the foreign bribery offense in order to increase compliance.<sup>126</sup>

In Phase 3 review, the Working Group said that Australia’s first group of bribery prosecutions began in 2011 with charges in the *Securrency/NPA* case.<sup>127</sup> Other than this leading Australian anti-bribery case, though, they have enforced the foreign bribery laws in a very limited way.<sup>128</sup> Although, the Working Group found that the lack of enforcement was not due to a lack of allegations. Between Phases 2 and 3, there were twenty-eight allegations of foreign bribery; twelve were evaluated, rejected for investigation, and terminated, and nine were investigated but were closed due to insufficient evidence.<sup>129</sup> As of the Phase 3 report, seven investigations for bribery were ongoing.<sup>130</sup> Two more cases were closed between Phases 2 and 3.<sup>131</sup> Even the major Australian case, the *Securrency/NPA* case, was “initially rejected after a whistleblower came forth” and investigation of the case did not occur until after

---

<sup>121</sup> *Id.* at 4.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 5.

<sup>125</sup> *Id.* at 42–43.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 4.

<sup>128</sup> *Id.* (“Australia still has only 1 prosecution in the *Securrency/NPA* case; this has been before the courts since prior to Phase 3.”).

<sup>129</sup> OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN AUSTRALIA 9 (OCT. 12, 2012).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

that company self-reported in the following year.<sup>132</sup> In summary, Australia is diligently meeting its international obligations to prevent bribery in international business under the OECD Anti-Bribery Convention and has been responsive to recommendations from OECD representatives during the routine site visits.

#### 4.2.2. *Canada*

The most recent report on Canada has been a Phase 3 follow up.<sup>133</sup> Canada has continued to enforce the anti-bribery laws since the Phase 3 report was adopted. In that time, two new convictions have been obtained against oil and gas companies.<sup>134</sup> One company pleaded guilty, was fined CDN 9.5 million, and received three years of probation.<sup>135</sup> The other company self-disclosed and was fined CDN 10.35 million.<sup>136</sup> Two further companies have been indicted in the technology and construction sectors. Canada has also reported that there are thirty-five investigations that are ongoing.<sup>137</sup> Canada has amended its laws to clarify ambiguities, as well as to allow for prosecution of Canadian individuals or companies, wherever the actual bribery occurs.<sup>138</sup> The Working Group added that there are several areas where “recommendations have not been fully met.”<sup>139</sup>

---

<sup>132</sup> *Id.* at 9. See also, Nick McKenzie & Richard Baker, *Guilty Plea, Finally, in Reserve Bank Bribery Case*, SYDNEY MORNING HERALD (May 21, 2018), <https://www.smh.com.au/business/companies/guilty-plea-finally-in-reserve-bank-bribery-case-20180521-p4zgz1.html> [https://perma.cc/95UV-Y9ZZ] (“A former Reserve Bank company executive has pleaded guilty to criminal charges in one of Australia’s most protracted corruption prosecutions over a payment to a Malaysian arms dealer to grease the wheels of a business deal.”).

<sup>133</sup> See generally OECD, CANADA: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS (May 14, 2013). See also, Alan Katz, *Foreign Bribery Crackdowns Haven’t Dented Practice, Report Says*, BLOOMBERG (Sept. 11, 2018), <https://www.bloomberg.com/news/articles/2018-09-11/foreign-bribery-enforcement-hasn-t-dented-practice-report-says> [https://perma.cc/5FDW-KGZG] (describing Canada’s enforcement activities).

<sup>134</sup> CANADA: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS, *supra* note 133 at 3.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

Examples include, “recommendations to enhance audit requirements” and to develop a desk book to help Canadians understand the offense.<sup>140</sup> Some other recommendations have been fully implemented, such as making a conviction result in automatic disbarment from contracting with Canada Public Works and Government Services Canada, and maintaining resources that are allocated to investigating claims.<sup>141</sup> There are currently charges pending against three natural persons under the Corruption of Public Officials Act (CFPOA).<sup>142</sup> Penalties can include up to fourteen years of imprisonment, and there has been “a new books and records offense” added to the laws that is linked specifically to foreign bribery.<sup>143</sup>

During the Phase 3 review in 2011, Canada had one recent conviction, one ongoing conviction, and over twenty investigations underway.<sup>144</sup> Overall, Canada is being responsive to its international obligations to combat bribery in international business during the Phase 3 and Phase 3 follow up review process. However, the Working Group found that the framework of Canada’s foreign bribery laws was lacking in four ways: (1) it only applied to bribes “for profit,” (2) sanctions were often too lenient in practice, (3) offenses required a real and substantial link to Canada, and (4) the definitions of the proper factors to consider were vague.<sup>145</sup>

#### 4.2.3. France

The most recent report on France is the Phase 3 follow-up report in December 2014.<sup>146</sup> Since Phase 3, “France has opened twenty-four new procedures,” but no legal person has been convicted yet.<sup>147</sup>

---

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 5.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> See OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN CANADA 5 (Mar. 18, 2011).

<sup>145</sup> *Id.* at 5–6.

<sup>146</sup> See generally OECD, FRANCE: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS (Dec. 19, 2014).

<sup>147</sup> *Id.* at 4.



Only three individuals have been convicted in two cases, resulting in fines ranging from EUR 5,000 to EUR 20,000.<sup>148</sup> According to the follow-up report, acquittals, case closures, and dismissals have risen from twelve to thirty-one since Phase 3 began.<sup>149</sup>

Despite the changes in Phase 3, France still needs to implement more changes to improve its foreign bribery laws. The definition of “foreign public official” needs clarification in France.<sup>150</sup> There has been no legislative action to repeal the “dual criminality requirement” for the offense of foreign bribery.<sup>151</sup> There are various case law principles in French law, such as “corruption pact,” that interfere with enforcement.<sup>152</sup> Efforts to train the judiciary on the enforcement of criminal liability for violations need to be strengthened.<sup>153</sup> The fine for natural persons has been increased to EUR 1 million, which can be increased to double the proceeds of the offense, and for legal persons (EUR 5 million) can be increased to ten times the proceeds.<sup>154</sup> Until very recently, there was no proof that these penalties were being implemented in France.<sup>155</sup> Other than releasing a guide for judges on confiscation, no steps have been taken to encourage confiscation.<sup>156</sup> Prosecution in the wake of victim complaints is now possible for acts committed entirely or partially

---

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 9.

<sup>152</sup> *Id.* at 10–12.

<sup>153</sup> *Id.* at 4.

<sup>154</sup> *Id.* at 4–5.

<sup>155</sup> *Id.* at 5 (“Notwithstanding, there exists no sufficiently convincing practice that would demonstrate that these recommendations are being fully implemented.”). See Olga Greenberg et al., *In a First Coordinated Resolution, US and French Authorities Announce Agreement to Settle Criminal Charges with Paris-Based Societe Generale S.A.*, Eversheds Sutherland (US) LLP, (June 12, 2018), <https://www.lexology.com/library/detail.aspx?g=76a4d3f1-98c4-45b2-ab96-4dd7c64e153e> [<https://perma.cc/RS6Y-4DQH>] (discussing the first coordinated resolution with international authorities in a bribery case); see also *France Suspects Bribery in Multibillion Dollar Submarine Sale to Brazil*, OCCRP (May 22, 2017), <https://www.occrp.org/en/daily/6491-france-suspects-bribery-in-multibillion-dollar-submarine-sale-to-brazil-4> [<https://perma.cc/RS6Y-4DQH>] (discussing the French investigation of a French industrial company and its payments to Brazilian authorities).

<sup>156</sup> FRANCE: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS, *supra* note 146, at 5.

in France.<sup>157</sup> Also, anti-corruption organizations can file civil party claims against those who violate foreign bribery laws.<sup>158</sup> Interestingly, the public prosecutor's office can only bring proceedings for an offense committed abroad if a victim has filed a prior complaint or there has been an official accusation made by the country where the offense happened.<sup>159</sup> A national prosecutor has been established to pursue foreign bribery cases. France has refused to extend its three-year statute of limitations on foreign bribery.<sup>160</sup>

In the Phase 3 report, it was reported that only thirty-three proceedings had been initiated in the country, and five convictions were obtained since France became a party to the OECD Convention in 2000.<sup>161</sup> The Working Group was "particularly concerned by France's lackluster response to companies that have been sanctioned by other parties to the Convention."<sup>162</sup> They commended France for guaranteeing greater independence for prosecutors, but there were limited resources that have been made available for investigations.<sup>163</sup> Overall, there were no convictions in France for bribery of public officials before 2008.<sup>164</sup> A month and a half before the Phase 3 report was adopted, France convicted its first legal person for bribery.<sup>165</sup>

#### 4.2.4. Japan

Japan's most recent report was a Phase 3 follow-up report in February 2014.<sup>166</sup> After Phase 3 was adopted, Japan convicted a former senior executive of a Japanese company for foreign

---

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 6.

<sup>161</sup> See generally OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN FRANCE 5 (Oct. 12, 2012).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* ("The Working Group welcomes the reforms underway to guarantee greater independence of prosecutors . . .").

<sup>164</sup> *Id.* at 9

<sup>165</sup> *Id.*

<sup>166</sup> See generally OECD, JAPAN: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS (Feb. 5, 2014).

bribery.<sup>167</sup> The individual was fined the equivalent of approximately USD 5,003.<sup>168</sup> The Working Group stated that it “believe[d] the implementation of the [treaty] is not given adequate priority by the Japanese, including a lack of resources for detecting, investigating, and prosecuting foreign bribery cases.”<sup>169</sup>

As of the Phase 3 follow up, Japan still had not established any authority for confiscating proceeds of foreign bribery; the country also had not made bribery a predicate offense for money laundering.<sup>170</sup> The Ministry of Economy, Trade, and Industry plays a pivotal role in the enforcement of the foreign bribery laws, and the Working Group is concerned about the suitability of the group for the job because the information they release is vague or unclear.<sup>171</sup> Japan has also not taken steps to ensure that tax inspectors identify and report potential foreign bribery.<sup>172</sup> Japan increased the statute of limitations for crimes from three to five years, but this limitation still causes problems with enforcement.<sup>173</sup> Japan has taken steps to allow tax authorities to share tax information with law enforcement and the judiciary.<sup>174</sup>

Overall, the recommendations for improving Japan’s auditing and accounting framework have been fully implemented, and Japan has been increasing public awareness of the illegality of foreign bribery.<sup>175</sup> Japan has been coordinating efforts to detect, as well as to prevent, foreign bribery in international business transactions benefiting from official credit support.<sup>176</sup> It has been asked to report again to the OECD on any improvements next year.

---

<sup>167</sup> *Id.* at 4.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* See also *Japan must make fighting international bribery a priority*, OECD (June 30, 2016), <http://www.oecd.org/corruption/japan-must-make-fighting-international-bribery-a-priority.htm> [<https://perma.cc/V5PL-5S9A>] (urging Japan to strengthen its efforts to fight bribery in foreign business).

<sup>173</sup> JAPAN: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS, *supra* note 166, at 4–5.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 5.

During the Phase 3 report in 2011, Japan was said to have convicted only two cases since 1999.<sup>177</sup> One of those caused four convictions for natural persons.<sup>178</sup> The Working Group urged Japan to take more steps because two cases in over twelve years is very low for a major world economy like Japan's.<sup>179</sup>

#### 4.2.5. United Kingdom

The most recent report from the United Kingdom was the Phase 3 follow-up report in 2014.<sup>180</sup> During the OECD Phase 3 review, there had been a significant increase in enforcement actions since Phase 2.<sup>181</sup> The working group is concerned that the United Kingdom is relying more on civil recovery orders, which have less judicial oversight and are less transparent than criminal plea agreements.<sup>182</sup> This low level of transparency hinders analysis of the foreign bribery situation in the United Kingdom, and it also does not increase public awareness of the crime.<sup>183</sup> There have also been confidentiality agreements in some settlements that presented the same problems.<sup>184</sup> In addition, the progress of implementing the Anti-Bribery Convention in the territories is slow. The United Kingdom has, however, made attempts to raise awareness of the offense.<sup>185</sup> The United Kingdom maintained eleven active cases and

---

<sup>177</sup> See OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN JAPAN 5 (Dec. 16, 2011).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> See generally OECD, UNITED KINGDOM: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS (Sept. 29, 2014).

<sup>181</sup> *Id.* at 4–6.

<sup>182</sup> *Id.* See also generally Ellen Gutterman, *How Policy Framing Shaped UK Strategy on Transnational Bribery*, LONDON SCH. ECON. & POL. SCI. (Mar. 18, 2017), <http://blogs.lse.ac.uk/politicsandpolicy/how-policy-framing-shaped-uk-strategy-on-transnational-bribery/> [<https://perma.cc/7VCE-94YX>].

<sup>183</sup> UNITED KINGDOM: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS, *supra* note 180, at 4–5.

<sup>184</sup> *Id.* at 15 (recommending avoiding entering into confidentiality agreements).

<sup>185</sup> OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED KINGDOM 6 (Mar. 16, 2012).

had eighteen cases under consideration as of January 2012.<sup>186</sup> Since 2008, three individuals and two companies have been convicted; in addition, two financial institutions have been fined for failing to adopt corporate compliance measures to prevent bribery.<sup>187</sup> Finally, another company has been sanctioned for accounting related misconduct, and four more businesses have received civil recovery orders.<sup>188</sup>

After the Phase 3 follow up, the level of enforcement of serious offenses has declined.<sup>189</sup> In the thirty months before Phase 3, nine actions relating to foreign bribery were concluded.<sup>190</sup> In the twenty-seven months after, only two have occurred, one of which resulted in acquittal.<sup>191</sup> The UK Bribery Act, instituted in 2011, has seen no actions enforced under it, although it provides minimal progress on its own.<sup>192</sup> The enforcement budget has stayed the same, but “blockbuster funding” is available in special or serious bribery cases.<sup>193</sup> A self-report now deflects prosecution if it “is part of a genuinely proactive approach” by the offender.<sup>194</sup> The timing of the self-report is a key consideration. During a settlement, if the settling party is found not to have disclosed further offenses, they may still be prosecuted for those offenses; such agreements do not give blanket immunity to further prosecution.<sup>195</sup> Deferred prosecution agreements have come into use in the United Kingdom.<sup>196</sup> The United Kingdom has taken no steps since Phase 3 review to make Article 5 of the Anti-Bribery Convention clearly binding.<sup>197</sup> A new

---

<sup>186</sup> *Id.* at 8.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> UNITED KINGDOM: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS, *supra* note 183, at 4.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* See also, generally Eric Engle, *I Get by with a Little Help from My Friends? Understanding the UK Anti-Bribery Statute, by Reference to the OECD Convention, and the Foreign Corrupt Practices Act*, 44 INT’L LAW 1173 (2010).

<sup>193</sup> UNITED KINGDOM: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS, *supra* note 183, at 4.

<sup>194</sup> *Id.* (citation omitted).

<sup>195</sup> *Id.* at 5.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

database is being developed for MLA (“Mutual Legal Assistance”) statistics.<sup>198</sup> Interestingly, the concept of “facilitation payments” is not recognized under UK law.<sup>199</sup> There has been no change in export credit practice, and the United Kingdom states that it reviews tax records of defendants in foreign bribery cases, but there is no evidence of this being done in practice.<sup>200</sup>

During its recent Phase 4 report, the peer reviewers noted that the United Kingdom has concluded nine cases involving criminal liability and has increased enforcement.<sup>201</sup> Since the OECD convention entered into force in 1999 until 2016, there have been over 100 allegations of foreign bribery and fifty case investigations with thirteen cases of criminal liability.<sup>202</sup> In the United Kingdom, whistleblower protection is ensured under the UK’s Public Interest Disclosure Act of 1998 (PIDA), which protects employees after disclosing misconduct, including foreign bribery.<sup>203</sup> The penalties for concluded cases in the United Kingdom include sentences ranging from suspended terms of imprisonment to three years of imprisonment.<sup>204</sup> In all five criminal cases against legal persons after Phase 3, the gross profit from the misconduct has been assessed and confiscated in addition to punitive or remedial sanctions.<sup>205</sup> Overall, the United Kingdom has demonstrated good practices with confiscation in foreign bribery cases since Phase 3.<sup>206</sup>

---

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 6.

<sup>200</sup> *Id.*

<sup>201</sup> See OECD, PHASE 4 REPORT: UNITED KINGDOM 11 (Mar. 16, 2017) (“As of January 2017, the UK had concluded 9 additional cases involving criminal liability of 10 natural persons and 6 legal persons.”).

<sup>202</sup> *Id.* at 14.

<sup>203</sup> See *id.* at 18 (demonstrating how the PIDA covers most UK workers, except those working in armed forces and national security, and defines wrongdoing broadly. The workers in the UK do not need to qualify for the offense and do not have to prove wrongdoing, but PIDA does not protect a whistleblower from retaliation before it occurs. Instead the statute relies on compensation after the fact. PIDA also contains no direct civil or criminal penalties to stop, prevent, or discourage bullying or harassment of the whistleblower.)

<sup>204</sup> *Id.* at 12.

<sup>205</sup> *Id.* at 63.

<sup>206</sup> *Id.* at 63–64.

### 4.3. *Countries with Limited Enforcement: Argentina, Brazil, Mexico, Russia, and Turkey*

#### 4.3.1. *Argentina*

The Working Group said in their Phase 3 report that Argentina is “seriously non-compliant” with the OECD Anti-Bribery Convention obligations after reviewing information from the June 2014 on-site visit.<sup>207</sup> Argentina has not implemented prior recommendations calling for the introduction of corporate liability for foreign bribery, has not passed laws that give national jurisdiction to prosecute violations, and has also failed to rectify several shortcomings with respect to its foreign bribery offense scheme.<sup>208</sup> However, there have been some efforts by Argentina to improve the situation and to create structures to prevent bribery in the context of business and procurement of contracts.<sup>209</sup> Argentina must next make a 3bis report to the Working Group due to substantial non-compliance.<sup>210</sup> Argentina became a party to the Anti-Bribery Convention in 2001, and there have been ten allegations of foreign bribery since then.<sup>211</sup> Three of those are currently under investigation as of the Phase 3 report.<sup>212</sup> Two of them closed without any charges. One case did not have an investigation due to a lack of information. Another turned out to involve other offenses, not foreign bribery. There have been two allegations of potential foreign bribery after the on-site visit of the Working Group, but they are so far unofficial and unconfirmed.<sup>213</sup> Finally, the tenth allegation surfaced ten days before the Phase 3 report was published. Argentina has not passed laws giving it the ability to impose sanctions against “legal person” for foreign bribery as of the Phase 3 report, so the Committee required follow-up

---

<sup>207</sup> See OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN ARGENTINA 5 (Dec. 11, 2014).

<sup>208</sup> *Id.* at 13–16, 60–65.

<sup>209</sup> *Id.* at 61.

<sup>210</sup> *Id.* at 5.

<sup>211</sup> *Id.* at 8.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

reports by the end of 2016.<sup>214</sup> Argentina has extradition treaties with fourteen countries, including eleven members of the Working Group.<sup>215</sup> For progress towards raising awareness of the crime and anti-bribery efforts, the Working Group in Phase 3 said that Argentina has taken only “limited steps.”<sup>216</sup> In summary, according to the OECD Anti-Bribery Convention and based on the recent comprehensive Phase 3 report and findings, Argentina is falling behind on its international obligations to combat bribery.

During the on-site visit in 2014, the Working Group found that prosecutors and investigative judges in charge of the foreign bribery cases did not attend the on-site visits.<sup>217</sup> Their absence seriously undermined the effectiveness of the visit and precluded a full assessment of Argentina’s enforcement efforts in practice.<sup>218</sup> The peer-review Working Group concluded that Argentina remains in serious non-compliance with key articles of the Anti-Bribery Convention.<sup>219</sup> The corporate liability bill did not enter into force in Argentina and efforts to draft a revision to the Argentinian penal code were also abandoned since the Phase 3 review.<sup>220</sup> There have only been thirteen known foreign bribery allegations involving Argentine companies and individuals, and eight allegations are still under investigation.<sup>221</sup> Argentina has not enacted a specific law on whistleblowing, and the report expressed serious concerns about the lack of proactive investigations for foreign bribery allegations or seeking the cooperation of foreign authorities.<sup>222</sup> Under current Argentinian law, money laundering offenses are punishable by imprisonment of six months to three years, bribery and improper lobbying are punished with imprisonment of one to six years and perpetual disqualification, and foreign bribery is punished with

---

<sup>214</sup> *Id.* at 17–19.

<sup>215</sup> *Id.* at 55.

<sup>216</sup> *Id.* at 57.

<sup>217</sup> *Id.* at 7.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 19.

<sup>220</sup> *Id.* at 17–18.

<sup>221</sup> OECD, PHASE 3BIS REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN ARGENTINA 8 (MARCH 2017).

<sup>222</sup> *Id.* at 59–60.



reclusion (imprisonment) from one to six years and special disqualification for life for any public office.<sup>223</sup>

#### 4.3.2. Brazil

Brazil's most recent report has been its Phase 3 follow-up report in February 2017.<sup>224</sup> This report reveals substantial progress in Brazil although they are still substantially behind countries with high or moderate enforcement. Based on the thirty-nine Phase 3 recommendations from 2014, eighteen recommendations have been fully implemented, thirteen partially implemented, and eight are not yet implemented.<sup>225</sup> Overall, this shows positive progress to combat bribery from Brazil in international business dealings.

The Phase 3 Working Group congratulated Brazil for implementing a new corporate liability law.<sup>226</sup> The country also indicted nine individuals as a result of a single case of foreign bribery.<sup>227</sup> Despite this progress, though, the OECD Working Group remains concerned about enforcement on anti-bribery norms in Brazil.<sup>228</sup> In the fourteen years since Brazil became a party to the OECD Anti-Bribery Convention, only five cases have been brought.<sup>229</sup> Of those five cases, only three are ongoing (and two are

---

<sup>223</sup> *Id.* at 76. See also generally Kim Nemirow, et. al., *A Look at Argentina's New Anti-Corruption Law*, Law360 (Nov. 21, 2017), <https://www.law360.com/articles/987246/a-look-at-argentina-s-new-anti-corruption-law> [<https://perma.cc/HR2Q-6FVE>].

<sup>224</sup> See generally OECD, *BRAZIL: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS* (Feb. 10, 2017).

<sup>225</sup> *Id.* at 6. See also generally Linda Pressly, *The Largest Foreign Bribery Case in History*, BBC (Apr. 22, 2018), <https://www.bbc.com/news/business-43825294>, [<https://perma.cc/UX5V-HCX4>]; Joe Leahy, *A Brazilian Bribery Machine*, FIN. TIMES (Dec. 28, 2016), <https://www.ft.com/content/8edf5b2c-c868-11e6-9043-7e34c07b46ef> [<https://perma.cc/Y3MX-3Q86>].

<sup>226</sup> See OECD, *PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN BRAZIL 6* (Oct. 16, 2014). See also generally Michelle Richard, *Brazil's Landmark Anti-Corruption Law*, 20 L. & BUS. REV. AM. 141 (2014).

<sup>227</sup> *PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN BRAZIL*, *supra* note 226, at 5.

<sup>228</sup> *Id.* at 5.

<sup>229</sup> *Id.*

“far from reaching the prosecutorial stage”).<sup>230</sup> A possible obstacle for enforcement in Brazil may be a statute of limitations which can result in lightly sentenced cases being dismissed, as well as a lack of protection for whistleblowers.<sup>231</sup> The group suggests that Brazil needs to train law enforcement on how to investigate foreign bribery properly, as well as how to freeze and/or confiscate assets.<sup>232</sup> They could also implement leniency or cooperation agreements to entice offenders to self-report.<sup>233</sup> The enforcement against false accounting practices meant to hide foreign bribery also needs to be strengthened.<sup>234</sup> Brazil has made some efforts to increase awareness about corporate fraud.<sup>235</sup> For the foreign bribery offense, individuals can receive one to eight years of imprisonment.<sup>236</sup> Also, fines between the equivalent of EUR eighty and EUR 428,000 can be added alongside, but not instead of, jail time.<sup>237</sup> Fines can also be increased up to threefold if Brazilian authorities find that the maximum fine is inadequate. Brazilian law currently provides a fine reduction for cooperating with authorities.<sup>238</sup>

#### 4.3.3. Mexico

Mexico's most recent report is the Phase 3 follow-up report in 2014.<sup>239</sup> Mexico has implemented four recommendations fully, ten partially, and eight recommendations were not implemented at all from the Phase 3 review.<sup>240</sup> Mexico still has zero prosecutions or

---

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 45–63.

<sup>232</sup> *Id.* at 5.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 18–20.

<sup>236</sup> *Id.* at 23.

<sup>237</sup> *Id.* at 23.

<sup>238</sup> See generally Joan Meyer & Fernando Correa da Costa, *U.S.-Brazil Alignment Is Incentivizing Companies to Settle Corruption Cases*, GLOBAL COMPLIANCE NEWS (Aug. 30, 2017), <https://globalcompliancenews.com/us-brazil-alignment-corruption-cases-20170830/> [<https://perma.cc/D92K-5R3J>].

<sup>239</sup> See generally OECD, *MEXICO: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS* (June 16, 2014).

<sup>240</sup> *Id.* at 3.

convictions for foreign bribery.<sup>241</sup> A single investigation began in 2014 and is still ongoing.<sup>242</sup> There have been no laws adopted with respect to confiscation of the proceeds from foreign bribery, but Mexico claims that it can enforce it nonetheless.<sup>243</sup> A “Special Prosecutor’s Office for the Combat against Corruption” has been established, but Mexico will not supply any information as to its financial or human resources.<sup>244</sup> Mexican authorities have used “special investigative techniques,” such as wiretapping and undercover operations, when investigating foreign bribes.<sup>245</sup> Mexico also has supplied insufficient statistics on domestic bribery.<sup>246</sup> No additions to auditing or corporate compliance have been made since the Phase 3 OECD Report.<sup>247</sup> The Mexican Ministry of Foreign Affairs and ProMéxico have engaged in awareness-raising in Mexico.<sup>248</sup> However, no information has been supplied by Mexico with regard to disbarment from public procurement as a potential punishment for violators of the country’s labor laws.<sup>249</sup>

#### 4.3.4. *Russia*

Russia’s most recent report is a Phase 2 follow-up report in 2016.<sup>250</sup> In the report, Russia did not provide a complete report of activities, only fifteen of the Working Group’s Phase 1

---

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 4.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> OECD, MEXICO: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS, *supra* note 239, at 5.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *See generally* OECD, RUSSIAN FEDERATION: FOLLOW-UP TO THE PHASE 2 REPORT & RECOMMENDATIONS (Mar. 9, 2016). *See also generally* *Russia must make fighting international bribery a priority*, OECD (Oct. 25, 2017), <http://www.oecd.org/corruption/russia-must-make-fighting-international-bribery-a-priority.htm> [<https://perma.cc/ZCU2-F4KT>] (reporting that the OECD Working Group has serious concerns regarding “Russia’s continued failure to implement key legislative reforms to enable it to effectively investigate, prosecute, and sanction the offence of foreign bribery”).

recommendations were addressed.<sup>251</sup> Russia has implemented ten recommendations, twenty-one have been partially implemented, and nineteen have not been implemented at all.<sup>252</sup> Four recommendations by the OECD were considered implemented, but later had follow up issues.<sup>253</sup> Russia has not detected, prosecuted, or adjudicated *any* cases of foreign bribery.<sup>254</sup> However, there are some efforts to raise awareness of the offense in Russia.<sup>255</sup> The systems in place to detect bribery and similar offenses focus on domestic offenses, not foreign or international ones.<sup>256</sup> Russia has indicated that it is in the process of drafting whistleblower laws.<sup>257</sup> Russia has taken steps to ensure that those who request export credit assistance are aware of the offense of foreign bribery.<sup>258</sup> The Working Group says that Russia should focus its efforts around the arms and military because these areas are particularly sensitive to bribery.<sup>259</sup> Furthermore, Russia has “promoted its anti-corruption charter,” but there is only a single sentence that addresses internal controls and it gives no guidance.<sup>260</sup> Russia has monitored the actions of law enforcement through the opening and closing of investigations, including foreign bribery.<sup>261</sup> The country has an affirmative defense of “effective regret,” as well as one of “economic extortion” that can hinder prosecution of bribery.<sup>262</sup> The Working Group suggests that Russia should take measures to punish those who do not complete a bribe, but have offered, or promised, to do so in order to better align with international standards under the OECD Anti-Bribery Convention.<sup>263</sup> In addition, Russia has not taken

---

<sup>251</sup> OECD, RUSSIAN FEDERATION: FOLLOW-UP TO THE PHASE 2 REPORT & RECOMMENDATIONS, *supra* note 250, at 4.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 4–5.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 5.

<sup>261</sup> *Id.* at 7.

<sup>262</sup> *Id.* (citation omitted).

<sup>263</sup> *Id.* at 8.

any actions to allow confiscation of bribery proceeds.<sup>264</sup> Overall, the OECD Working Group requires that Russia continues follow-up reports every six months, detailing the steps they are taking to further compliance of national implementation procedures to prevent bribery.<sup>265</sup>

#### 4.3.5. *Turkey*

The most recent Turkish report was the Phase 3 Report in 2014.<sup>266</sup> There has not been a single foreign bribery conviction during the eleven years since Turkey joined the Convention.<sup>267</sup> Ten allegations have come to light since 2003.<sup>268</sup> Turkish authorities have taken limited steps in six of those allegations, there has been one acquittal, and two are ongoing due to mutual legal assistance requests.<sup>269</sup> Three allegations were terminated for insufficient evidence.<sup>270</sup> There have been no steps taken in two of the cases, and Turkey was unaware of two instances, despite them being in the international press.<sup>271</sup> Turkey has also had no enforcement against legal persons for bribery.<sup>272</sup> Turkey's corporate liability laws may further not cover state-owned enterprises.<sup>273</sup> The Working Group is concerned that investigations and prosecutions may be subject to undue

---

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 10.

<sup>266</sup> See generally OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN TURKEY (Oct. 17, 2014) (reporting on the implementation of Turkey's anti-bribery initiatives). See also Ali Guden, *Looking at Anti-Bribery Legislation in Turkey and Beyond*, GUDEN L. FIRM (Aug. 2015), <http://guden.av.tr/looking-anti-bribery-legislation-turkey-beyond/> [<https://perma.cc/E6EK-4EQN>] (summarizing the state of Turkey's anti-bribery environment).

<sup>267</sup> PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN TURKEY, *supra* note 266, at 5.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> See OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN TURKEY 4 (Oct. 17, 2014).

<sup>273</sup> PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN TURKEY, *supra* note 272, at 5.

political influence.<sup>274</sup> There is insufficient whistleblower protection in both the public and private sectors in Turkey.<sup>275</sup> More specific awareness for bribery and anti-bribery efforts is needed in Turkey to inform businesses about the offense.<sup>276</sup> Overall, there have been minimal legislative efforts to strengthen the punishments for the offense of foreign bribery, and certain steps have been taken to bar those convicted from public tender participation in Turkey.<sup>277</sup>

Turkey's follow-up to the Phase 3 report demonstrates limited progress.<sup>278</sup> Of the two investigations that had been underway at the time of Phase 3, one had not progressed and the other appeared to have been closed.<sup>279</sup> The Working Group had continued concerns about lack of enforcement and lack of proactive steps by Turkey's law enforcement authorities or international cooperation through the Ministry of Foreign Affairs.<sup>280</sup> Further, Turkey has not amended its laws or taken any other measures to clarify that all Turkish legal persons can be held liable for foreign bribery or that legal persons can be held liable without prosecution of a natural person.<sup>281</sup> Additionally, Turkey has not increased sanctions applicable to legal persons or ensured confiscation of bribe proceeds in accordance with the OECD Anti-Bribery Convention's standards.<sup>282</sup> Turkish legislation has not been amended to include the protection of whistleblowers, but Turkey has raised some awareness of the need to detect and report allegations of foreign bribery.<sup>283</sup> Turkey has taken some steps to improve detection of foreign bribery in money laundering cases; however, Turkey has not addressed the issue of politically exposed persons in its anti-money-laundering

---

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN TURKEY, *supra* note 272, at 6.

<sup>278</sup> See generally OECD, TURKEY: FOLLOW-UP TO PHASE 3 REPORT AND RECOMMENDATIONS (May 31, 2017) (reporting on Turkey's progress in implementing anti-bribery mechanisms).

<sup>279</sup> *Id.* at 4.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 5.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

legislation.<sup>284</sup> As a result, the follow-up report still had serious concerns about the lack of enforcement activity and slow progress in Turkey with regard to many of the Working Group's Phase 3 recommendations.<sup>285</sup>

5. OBSERVATIONS REGARDING THE LACK OF ADEQUATE ANTI-BRIBERY ENFORCEMENT DEMONSTRATED IN THE RECENT OECD PHASE 3 AND FOLLOW UP REPORTS

The persistent lack of adequate anti-bribery enforcement, which still persists in G20 nations after the formal adoption of the OECD Anti-Bribery Convention by the international community over twenty years ago, is disturbing.<sup>286</sup> The United States continues to be a beacon in anti-bribery enforcement measures and has the most sophisticated implementing legislation through the passage of the Foreign Corrupt Practices Act and later amendments to the Act that implemented the OECD Anti-Bribery Convention.<sup>287</sup> After reviewing the most recent peer-review Working Group reports and recommendations for the selected G20 countries with high, moderate, and limited enforcement, certain themes challenging lack of enforcement may be gleaned from recurring issues. These include: (1) inadequate length of statute of limitations in certain countries according to the national implementing legislation; (2) lack of whistleblower protection or delayed whistleblower protection that renders it ineffective; (3) nonexistent or weak implementing legislation for national anti-bribery laws; (4) minimal coordination of anti-bribery efforts with national Ministries of Foreign Affairs or national agencies that would assist with combatting bribery; and (5) weak national criminal penalties or monetary damages for bribery. The following recommendations would strengthen national anti-bribery efforts for countries with currently moderate or limited enforcement measure to better align with the OECD Anti-Bribery Convention's goals.

---

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 6.

<sup>286</sup> *See supra* Sections 2 & 3.

<sup>287</sup> *See supra* Section 2. *See also generally* International Anti-Bribery and Fair Competition Act of 1998, *supra* note 6.

### 5.1. *Increased Length of Statute of Limitations*

According to numerous reports of the Working Groups and analysis of countries with moderate or minimal success with anti-bribery efforts, the length of the statute of limitations is an issue with enforcement. Countries with very short statutes of limitation (one to three years) have trouble enforcing the national legislation and seeking out offenders who violate the anti-bribery provisions because it is difficult to coordinate with foreign officials during a short time period.<sup>288</sup> The ideal length of time for a national statute of limitations in conjunction with a foreign anti-bribery statute would be greater than five years. This would allow enough time to coordinate the action and provide mutual legal assistance to the additional foreign countries and their associated foreign ministries for appropriate prosecution of the action within the home country.<sup>289</sup> Overall, a statute of limitations of at least five years would be more similar to the U.S.'s standard in the FCPA and would provide time for better enforcement actions in OECD implementation nations. For nations that do not currently have a statute of limitations in place, they would need to integrate an appropriate statute of limitations into their implementing anti-bribery legislation.

### 5.2. *Existence of Whistleblower Protection in Statutes*

The Phase 3 Working Group reports, recommendations, and follow-up Phase 3 critiques for nations with moderate or limited enforcement also highlight the importance of whistleblower protections. Many instances of bribery in G20 nations are not investigated because interested parties do not have adequate whistleblower protection via national laws or have inadequate protection after bringing forward claims of bribery.<sup>290</sup> Thus, inclusion of specific whistleblower protection in either the criminal statutory provisions or civil penalty provisions of anti-bribery legislation would be a protective measure that would facilitate successful prosecution.<sup>291</sup> Accordingly, anti-bribery statistics

---

<sup>288</sup> See, e.g., *supra* Section 4.2. & 4.3.

<sup>289</sup> See generally *supra* Section 4.

<sup>290</sup> See *supra* Section 4.2. & 4.3.

<sup>291</sup> See generally *supra* Section 4.



regarding national enforcement and confiscating bribery funds would likely improve with the integration of uniform whistleblower protections into national implementation legislation.

### *5.3. Formal Adoptions of Implementing Legislation and National Anti-Bribery Laws*

The Working Group reports also revealed that countries with detailed implementing legislation for anti-bribery, such as the U.S.'s Foreign Corrupt Practices Act and the UK's Anti-Bribery Act, have more successful outcomes for bribery prosecution and penalties.<sup>292</sup> The recommendations noted that some of the moderate and limited enforcement G20 nations still had yet to promulgate national anti-bribery legislation to effectuate the terms of the OECD Anti-Bribery Convention, and this has stalled efforts for those countries to prosecute bribery claims.<sup>293</sup> Nations that are a party to the OECD Convention have an obligation to pass implementing legislation according to the preliminary articles of the Anti-Bribery Convention.<sup>294</sup> Numerous nations in the international community are still falling short of their basic treaty obligations because they have not passed implementing civil or criminal national legislation to outline terms to combat foreign bribery in international business transactions.<sup>295</sup> The Working Group's most recent Phase 3 reports and follow-up reports have urged those nations without statutory structures for anti-bribery to quickly pass appropriate legislation or integrate foreign anti-bribery norms into existing legislation.<sup>296</sup>

### *5.4. Clarity of Enforcement Mechanism(s) and National Procedure*

The recommendations of the most recent Working Groups also illuminate the nonexistence or weakness of national administrative

---

<sup>292</sup> See generally *supra* Section 3 & 4.

<sup>293</sup> See *supra* Sections 4.2. & 4.3.

<sup>294</sup> See *supra* Section 3.

<sup>295</sup> See generally *supra* Section 4.

<sup>296</sup> *Id.*

structures for prosecuting acts of foreign bribery.<sup>297</sup> Many of the countries with statistics of limited enforcement, such as Argentina, Brazil, Mexico, or Russia, have a clear lack of infrastructure for coordinating prosecutions and extraditions with the appropriate Ministries of Foreign Affairs or internal agencies to coordinate prosecution of foreign bribery.<sup>298</sup> There should be examination of the infrastructures and agencies within those nations to encourage enforcement and coordination with internal departments for better anti-bribery efforts.<sup>299</sup> Furthermore, the designated agencies should be proactive with their internal investigations and work with other nations' Ministries of Foreign Affairs to facilitate mutual legal assistance and penalties for international bribery according to the OECD Anti-Bribery Convention's guidelines.<sup>300</sup> Finally, coordination of administrative bodies in conjunction with a national implementing Act, such as the U.S. structure of the FCPA and the DOJ/SEC, is a much more successful model and encompasses the requirements of the OECD Anti-Bribery Convention.

#### 5.5. *Equality in Severity of National Penalties*

According to the most recent Working Group recommendations and Phase 3 reports, many nations are giving drastically different penalties for foreign bribery.<sup>301</sup> The low penalties then do not deter the criminal actors in the international community and render the implementation of the Anti-Bribery Convention as an ineffective device to combat bribery in those nations with moderate or limited enforcement.<sup>302</sup> Some countries have very low fines or amounts of monetary penalties, such as Russia or Turkey, when juxtaposed to recovery of amounts confiscated in the United States, Germany, and Italy.<sup>303</sup> In addition, penalties of imprisonment were vastly different

---

<sup>297</sup> See *supra* Sections 4.2. & 4.3.

<sup>298</sup> *Id.* See also OECD, *TYPOLOGY ON MUTUAL LEGAL ASSISTANCE IN FOREIGN BRIBERY CASES 25-45* (Dec. 7, 2012).

<sup>299</sup> See *supra* Sections 4.2. & 4.3.

<sup>300</sup> *Id.* See also *supra* Sections 3 & 4.

<sup>301</sup> See *supra* Section 4.

<sup>302</sup> *Id.*

<sup>303</sup> See *supra* Section 4.1.

with little or no imprisonment in some countries and lengthy sentences of incarceration in other OECD Anti-Bribery Convention countries.<sup>304</sup> Efforts toward uniformity in recovery of foreign bribes in the international community and incorporation of penal provisions within the national implementing legislation should be made to better strengthen enforcement and even out the severity in penalties to align with the Anti-Bribery Convention's terms.<sup>305</sup>

#### 6. CONCLUSION: TOWARDS UNIFORMITY WITH FCPA-MODELED IMPLEMENTING LEGISLATION AS A MODEL FOR OECD ANTI-BRIBERY CONVENTION NORMS AND ENFORCEMENT

Fighting foreign bribery on a global scale is a continued challenge even with the strides made through the OECD's Anti-Bribery Convention for International Business Transactions and its national implementation in many countries. However, the United States currently serves as a beacon of enforcement and provides a successful structure for implementing act through the FCPA and administrative agency structures for legitimizing enforcement.<sup>306</sup> The future vigorous enforcement in the United States remains uncertain, however, with the Trump administration and restructuring of leadership in administrative agencies that combat bribery.<sup>307</sup> This Article should point the way toward improving

---

<sup>304</sup> *Id.* See generally *supra* Section 4.

<sup>305</sup> See generally *supra* Sections 3 & 4.

<sup>306</sup> See *supra* Sections 2 & 4.

<sup>307</sup> See, e.g., John Bowden, *U.S. Backs Out of Global Oil Anti-Corruption Effort*, THE HILL (Nov. 2, 2017), <http://thehill.com/policy/international/358560-us-backs-out-of-global-oil-anti-corruption-effort> [<https://perma.cc/J8YD-6R4B>] (discussing U.S. withdrawal from the Extractive Industries Transparency Initiative, which requires member states to disclose oil, gas, and mining revenues); Steve Coll, *The Trump Administration Rolls Back Anti-Corruption Efforts in the Oil Industry*, NEW YORKER (Aug. 10, 2017), <https://www.newyorker.com/news/daily-comment/the-trump-administration-rolls-back-anti-corruption-efforts-in-the-oil-industry> [<https://perma.cc/7HC8-3HFK>] (reviewing the Trump Administration's rescinding and withdrawal from pro-transparency oil policies); see also, Scott L. Frederickson et al., *The Foreign Corrupt Practices Act and the New Trump Administration: Your Top Ten Questions Answered*, FOLEY & LARDNER (May 10, 2017), <https://www.foley.com/the-foreign-corrupt-practices-act-and-the-new-trump-administration-your-top-ten-questions-answered-05-10-2017/> [<https://perma.cc/5JVX-HGJ>] (discussing possible changes in President

uniformity in combatting international bribery, though, through the continued use of Phase 3 reports and peer-review recommendations as takeaways for guidance. The parties to the OECD Anti-Bribery Convention should continue to heed harsh feedback, and the nations need to take the observations seriously to effectuate prosecution and coordination of mutual assistance efforts to further legitimize foreign anti-bribery initiatives. The United States provides a model for implementing legislation through the Foreign Corrupt Practices Act and current administrative coordination via the DOJ and SEC. The OECD peer-review reports note the need for increased statute of limitations, formal protection of whistleblowers, clear enforcement mechanisms, facilitating passage of national legislation or addition to pre-existing legislation to incorporate the terms of the OECD Anti-Bribery Convention, and uniformity in the severity of national penalties to deter bribery and confiscate funds. There may still be some disparities in implementation of the OECD Anti-Bribery Convention terms after the most recent peer-review reports; however, the United States may provide a successful model for effective administrative structures, statutory provisions, and coordination with foreign governments for optimal anti-bribery efforts to align with the spirit of the Anti-Bribery Convention for future success.

---

Trump's approach towards the FCPA); *see, e.g.*, Sumit Makhija, *FCPA Enforcement under the Trump Administration*, DELOITTE, <https://www2.deloitte.com/in/en/pages/finance/articles/fcpa-enforcement-under-the-trump-administration.html> [https://perma.cc/6BMW-QYVD] (summarizing Trump Administration officials' stances on the FCPA); Shannon K. O'Neil, *Mexico's Voters Have Bigger Problems than Trump*, COUNCIL FOREIGN REL. (Feb. 1, 2018, ), <https://www.cfr.org/blog/mexicos-voters-have-bigger-problems-trump> [https://perma.cc/E2HK-B9YP] (discussing Mexican anti-corruption efforts and their relation to U.S. policies); Julia Simon, *U.S. Withdraws from Extractive Industries Anti-Corruption Effort*, REUTERS (Nov. 2, 2017), <https://www.reuters.com/article/us-usa-eiti/u-s-withdraws-from-extractive-industries-anti-corruption-effort-idUSKBN1D2290> [https://perma.cc/9D6H-6CJ8] (reviewing the Trump Administration's decision to withdraw from the Extractive Industries Transparency Initiative); Zarroli, *supra* note 118 (showing how efforts to enforce the FCPA have declined under the Trump Administration, but noting that at least some of this decline may not be directly due to the Administration).