

The OECD Anti-Bribery Convention Ten Years On

Indira Carr and Opi Outhwaite*

ABSTRACT: *The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was adopted in 1997. During the last ten years the OECD has been extremely busy monitoring the implementation of this Convention in contracting states. During this process a number of issues have emerged. This article examines some of these: (1) the role and impact of the functional equivalence approach, (2) the effect of gaps and flexibility surrounding international business transactions and corporate liability, and (3) Article 5 and the defence of necessity available to a State under customary international law in the context of the UK decision to end the BAE investigations.*

INTRODUCTION

The recent push from the World Bank (WB)¹ and the work of Transparency International (TI),² together with increasing media coverage, has brought public and policymakers' attention to the high incidence of corruption,³ be it corruption on a small scale or a grand scale,

* Indira Carr is Professor of Law, University of Surrey; Honorary Professor, University of Exeter. She wishes to thank the Arts & Humanities Research Council (AHRC) for their research grant to fund the project entitled 'Corruption in International Business: Limitations of Law'.

Opi Outhwaite is AHRC funded Researcher on the above project, University of Surrey.

¹ For more on this institution visit <<http://www.wb.org>>.

² TI publishes a Corruption Perception Index, based on surveys where information is provided by country experts. More information on TI and their corruption indices are available at <<http://www.transparency.org>>.

³ Corruption and its detection should by no means be viewed as a modern day problem. It was recognised as a problem among public officials in the ancient world too. For instance, an Indian writer on statecraft by the name of Kautilya (c. 250 BCE) in his *Arthashastra* states:

Just as it is impossible not to taste the honey or the poison that finds itself at the tip of the tongue, so it is impossible for a government servant not to eat up, at least, a bit of the king's revenue. Just as fish moving under water cannot possibly be found out either as drinking or not drinking water, so government servants employed in the government work cannot be found out (while) taking money (for themselves)...

in both developed and developing countries. While there is no doubt that petty corruption in the form of bribes to obtain services such as a passport or a driving licence from government officials is prevalent in many developing countries and injurious to trust in the government and the rule of law, it is corruption at the grand level in the form of bribes by businesses to domestic and foreign public officials that is seen as causing the greatest harm to a country in terms of economic growth and high levels of poverty. There are numerous studies from the WB and others that exhibit in economic terms this close link.⁴ With international organisations and developed countries taking on the mandate of reducing poverty it should come as no surprise that they have turned their attention to reforming corruption laws globally to ensure an enabling environment for trade to flourish thus contributing to economic growth and stability. Despite the positive impact of international trade on growth it also has the potential to raise serious issues in a variety of contexts, such as the means through which a business organisation has obtained a contract or the subject matter of the contract intended for export or import, that cut across national security, state relations and principles such as those of international law. Some of these issues could impact on the very foundations of life itself as for instance where the illegal behaviour of a business organisation from State A operating in State B threatens the supply of essential goods such as oil and food from State B to State A. There is always the danger of head on clashes between states seeking to protect their own, differing, rights and interests and against this backdrop the idea of the 'public interest' becomes a very confusing one.

The task of drafting a legal framework in the form of anti-corruption conventions to bring about some level of harmonisation was undertaken by both regional and international

⁴ See Alatas, S. *Corruption: Its Nature, Causes and Functions* (Avebury: Aldershot, 1990); Bergsten, F. & K. Elliott (eds) *Corruption in the World Economy* (World Bank: Washington, 1997); HMSO *Eliminating World Poverty: Making Globalisation Work for the Poor* (Cmnd 5006, HMSO: London, 2000); Rose-Ackermann, S. 'The Economics of Corruption' (1975) *Journal of Public Economics*, 4(2): 187-203; Gray, C. W. & D. Kaufmann 'Corruption and Development' (1998) *Finance and Development*, 35(1): 7-16; Tanzi, V. 'Corruption around the World: Causes, Consequences, Scope and Cures' (1998) *IMF Staff Papers* WP/98/63: 1-39. Corruption may also have something positive to contribute. For instance, in a highly bureaucratic state corruption may speed up the mechanism for economic development. On the positive aspects of corruption see Heidenheimer, A., M. Johnston & V. Le Vine (eds), *Political Corruption: A Handbook* (Transaction Books: New Brunswick, 1989).

organisations and this has seen the adoption of a number of conventions, many of which are in force.⁵ One of the institutions to adopt an anti-corruption convention early on was the Organisation for Economic Co-operation and Development (OECD). Deemed a successful convention in terms of the numbers of ratification it has received (37 as of January 2008),⁶ it is now ten years since the adoption of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention). Since the OECD has been busy monitoring the implementation of the convention by the contracting states during this period it is an opportune moment to reflect on some of the provisions of the convention which raise doubts about their applicability or the level of harmonisation that they can achieve.

This article is by no means an article-by-article analysis. As and where relevant the United Kingdom (UK) is used as an illustration since it has received numerous recommendations from the OECD and has also faced intense criticism from the media, the OECD and Non Governmental Organisations (NGOs) in light of the recent decision to drop the investigation into the British Aerospace (BAE) slush fund allegations discussed later.

⁵ The conventions in force are:

1) Organisation of American States Inter-American Convention Against Corruption 1996 (OAS Convention). Entered into force on 6 March 1997

2) Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 (OECD Convention). Entered into force on 15 February 1999.

3) Council of Europe Criminal Law Convention on Corruption 1999 (COE Convention). Entered into force on 1 July 2002.

4) African Union Convention on Preventing and Combating Corruption 2003 (AU Convention). Entered into force on 5 August 2006. See Carr, I 'Corruption in Africa: is the African Union Convention on Combating Corruption the Answer?' 2007 *The Journal of Business Law* March: 111-136. For a comparison of the three African conventions see Carr, I. 'Africa Fights Corruption: An Account of the Three African Conventions' (forthcoming).

5) United Nations Convention Against Corruption 2003 (UN Convention). Entered into force on 14 December 2005. See Carr, I. 'The United Nations Convention on Corruption: Improving the Quality of Life of Millions in the World' (2006) *Manchester Journal of International Economic Law* 3(3): 3-44.

⁶ Ratifications or accessions have come from Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States.

Section I deals with the historical background to place the OECD Convention against the wider context of global anti-corruption developments and highlights the approach taken by this instrument to achieve effective harmonisation and implementation through a mix of the functional equivalence approach and monitoring. Section II focuses on two main issues: (1) the effect of gaps and flexibility surrounding the provisions on international business transactions and the liability of corporations, and (2) the impact of functional equivalence in practice. Section III examines Art 5 in the context of the UK decision to end the BAE investigation on grounds of national security and explores whether necessity, under customary international law, could provide a defence where essential interests such as national security are at stake.

I. HISTORICAL BACKGROUND

The prime mover for the OECD to take steps to combat corruption of foreign public officials was pressure applied by the United States (US), which took almost two decades to bring about the intended result. The US passed the Foreign Corrupt Practices Act (FCPA) in 1977. It came into existence in the wake of the Lockheed scandal⁷ and a report from the Securities and Exchange Commission (SEC) in 1976.⁸ This report revealed that questionable or illegal payments to foreign officials and foreign politicians were a widespread phenomenon in the US corporate sector and included companies from the chemical, aerospace, pharmaceuticals and oil and gas sectors.

Any attempt to lower standards of business engagement by adopting corrupt practices of course has a negative impact not only on the company itself but on other companies within that state and on the state itself, including substantially lowering market integrity. As the

⁷ The US company, Lockheed, had made illegal payments to government officials in various countries (including Japan, Netherlands, Italy) to secure contracts for the sale of aeroplanes. The Lockheed scandal in Japan resulted in the prosecution of various officials including Kakuei Tanaka (Prime Minister in office from 1972-74). In the Netherlands Prince Bernhardt resigned when inquiries into allegations that he had received \$1 million from Lockheed were initiated. For more on this see Markovits, A. S. & M. Silverstein *The Politics of Scandal* (Holmes & Meier: New York, 1988); Mitchell, R. H. *Political Bribery in Japan* (University of Hawaii Press: Honolulu, 1996).

⁸ Committee on Banking and Urban Affairs, *Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices* (1976).

report to the House of Representative makes clear such activities ‘cast a shadow on all US companies. The exposure ... can damage a company’s image, lead to costly lawsuits, cause the cancellation of contracts, and result in the appropriation of valuable assets overseas.’⁹ Alongside are the problems that the state itself faces in its relations with friendly countries and its image in foreign countries. These reasons coupled with the unfolding allegation of payments by Lockheed across many countries were sufficiently persuasive to lead to the enactment of the FCPA.

The US recognised that bribery of foreign public officials was not simply a US problem but a universal one. In aggressively promoting the adoption of similar legislation in other industrialised countries the US sought to ensure a level playing field for competing businesses and to increase market integrity and stability. The FCPA is legislation that has economic interests at its heart. It took until 1997 for the US pressure to bear fruit and that came in the form of the OECD Convention.

Though it is not the intention here to provide an article-by-article analysis of the OECD Convention, a brief outline of the OECD Convention is necessary. Some of these areas will be considered in more detail in later sections. In brief the Convention requires State Parties to:

- (a) Criminalise bribery on the supply side (active bribery) of a foreign public official in international business transactions,¹⁰ with “foreign public official” widely defined to include different types of public officials including those working in international organisations;¹¹
- (b) Establish liability of legal persons in accordance with the State’s legal principles;¹²
- (c) Take measures with regard to accounting practices so that off-the-books records and similar practices are prohibited;¹³

⁹ House of Representative, 95th Congress 1st Session, Report No 95-640.

¹⁰ Art I (1); Paras 3-10: Commentaries.

¹¹ Art I(4); Paras 12-19: Commentaries

¹² Art 2; Para 20: Commentaries.

- (d) Make bribery of foreign public officials an extraditable offence;¹⁴
- (e) Make bribery of a foreign public official a predicate offence for the application of money laundering legislation on the same terms; and
- (f) Provide mutual legal assistance.¹⁵

It should be noted that the monitoring system adopted in the OECD Convention is one of its unique features.¹⁶ The peer-review nature of the system in particular implies a high level of rigour. The process consists of two phases and is conducted by the OECD Working Group on Bribery in International Business Transactions (WG). Phase 1 assesses the extent of conformity of a State Party's anti-bribery laws with the OECD Convention and Phase 2 assesses the state of the operation and enforcement of relevant national provisions. This involves a one week long on-site visit by the WG during which it meets with actors from a variety of backgrounds – the government, trade councils, development agencies, businesses, and civil society. Phase 2 reports are extremely detailed and indicate an exhaustive examination of the implementation of the OECD Convention through amendments to the national legislation, analysis of statistical data gathered by criminal agencies, the level of public awareness, details about sanctions, questions of jurisdiction and levels of international co-operation.

The approach taken to determine compliance of State Parties' legal frameworks with the OECD Convention is one of 'functional equivalence'.¹⁷ According to the Commentaries

¹³ Art 8: Para 29: Commentaries.

¹⁴ Art 10: Para 33: Commentaries.

¹⁵ Art 9: Para 30 - 32: Commentaries.

¹⁶ According to Art 12 the Parties are required to co-operate in 'carrying out a programme of systematic follow-up to monitor and promote the full implementation' of [the OECD Convention] and this is to be done in the 'framework of the OECD Working Group on Bribery in International Business Transactions ...' See also Commentaries, paras 34-36.

¹⁷ The functional equivalence method is not new to the OECD Convention. For instance, the UNCITRAL Model Law on Electronic Commerce also adopts a functional equivalence approach. Its focus however is achieving equivalence across two different mediums through an examination of the functions and purposes of a paper-based environment with a view to seeing how those functions could be fulfilled in a digital environment. The Guide to the Enactment of the Model Law on Electronic Commerce in paras 15-18 states:

[A]mong the functions served by a paper document are the following: to provide that a document would be legible by all; to provide that a document would remain unaltered over time, to allow for the authentication of data by means of a signature; and to provide that a

the OECD expects the ‘Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party’s legal system’.¹⁸ Functional equivalence is a method commonly used in comparative law and traceable to the works of René David and Ernst Rabel.¹⁹ Despite the seeming diversity of interpretations²⁰ of this method of analysis in comparative law there seems to be a common focus on whether there are equivalents in the legal systems that function in a manner so as to achieve a similar result. The comparativist therefore focuses on the effects rather than on the rules and in so doing studies the interrelationships between different areas of law, the relationship between law and procedure and the dynamics between law, society and culture. Though the OECD Commentaries do not give much by way of elucidation, the writings of Mark Pieth (Chairman of the WG) indicate that ‘functional equivalence’ in the OECD is to be construed along similar lines. In ‘Taking Stock: Making the OECD Initiative against Corruption’ he states:

The Convention borrows a principle developed in comparative law and further develops it. According to the **functional approach** of comparison attention is drawn to the overall working of systems rather than individual institutions. The assumption is that each legal system has its own logic and is not necessarily determined by the legal texts alone. Practices and informal rules are part of this approach as well as other aspects of the legal system taking

document would be in a form acceptable to public authorities and courts ... in respect of all the above-mentioned functions of a paper, electronic record can provide the same level of security as paper ...

In adopting a functionally equivalent approach as the UNCITRAL notes it is important to ensure that the standards for both mediums are equivalent.

‘Functional equivalence’ is also a method used in other disciplines such as linguistics and translation studies.

¹⁸ Commentaries on the Convention on Combating Bribery of Foreign Public Official in International Business transactions, Doc. Ref. DAF/IME/BR(97)20.

¹⁹ David, R. & J. Brierley *Major Legal Systems of the World Today* (trs Breierley, J 3rd ed. Stevens & Sons: London, 1985); Rheinstein, M. ‘In Memory of Ernst Rabel’ (1956) *American Journal of Comparative Law*, 5(2): 185-196. See also Kahn-Freund, O. ‘Comparative Law as an Academic Subject’ (1966) *Law Quarterly Review*, 82: 40-61; Reitz, J. C. ‘How to Do Comparative law’ (1998) *American Journal of Comparative Law*, 46(4): 617-636.

²⁰ For instance functional equivalence is also meant to play an evaluative role in assessing which law performs better in meeting its goals.

over ancillary functions. Therefore the focus of comparison would lie on overall effects produced by a country's legal system rather than the individual rules.²¹

It is not entirely clear how this principle has been developed further by the OECD since the explanation of the principle reflects the general understanding of this principle prevalent amongst comparative lawyers but it becomes important, for example, in respect of assessing the impact of the functional equivalence approach in practice in the monitoring of a State Party's compliance with the OECD Convention.

Of course, in promoting functional equivalence it is expected that a contracting state does not treat cases of foreign bribery more stringently than domestic bribery. For instance when it comes to sanctions or burden of proof the standards between foreign bribery and domestic bribery should be the same. This expectation of parity is reflected in Art 3(1) when it states that the 'range of penalties for the bribery of a foreign public official shall be comparable to that applicable to the bribery of the public officials'.

Besides a general statement in respect of functional equivalence in the Commentaries, the adoption of this approach is also reflected in other ways such as the introduction of an element of flexibility within the provision itself, for instance in Art 3(3),²² and an indication of the level of tolerance to various approaches in the Commentaries to the Convention as for instance in respect of Art 1.²³

²¹ Available at <<http://www.oas.org/juridico/english/pieth2000.htm>>. Emphasis in original.

²² It states:

Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.

²³ Para 3 of the Commentaries elucidates further the offence created by Art 1 thus:

Article 1 establishes a standard to be met by Parties, but does not require them to utilise its precise terms in defining the offence under their domestic laws. A Party may use various approaches to fulfil its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph. For example, a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this Article. Similarly, a statute which defined the offence in terms of payments "to induce a breach of the

II. GAPS, FLEXIBILITY AND FUNCTIONAL EQUIVALENCE IN PRACTICE

This section explores (1) the gaps and flexibility within provisions with a view to addressing the issue of clarity and harmonisation and (2) the use of the functional equivalence approach in practice. For these purposes sub-sections II.1 and II.2, below, consider the lack of a definition of ‘international business transactions’ and the uncertainties surrounding corporate liability. Sub-section II.3 explores whether functional equivalence plays a significant role in assessing a country’s implementation of the OECD Convention by considering the UK’s extension of the bribery offence to apply to ‘foreign public officials’ against the Phase I, Phase I bis and Phase 2 Reports of the WG.

II.1. International Business Transactions

As made apparent by its title, the focus of the OECD Convention is ‘international business transactions’. It would be normal to expect a definition of the phrase. No doubt the drafters may have felt that such a well worn phrase was sufficiently clear so as not to require a definition within the Convention. The potential danger that it may be read restrictively as referring to the sale of goods and services where the parties are located in two different states is displaced in the opening paragraph of the preamble which indicates that international business transactions include trade and investment.²⁴ This wider approach means that the OECD Convention will apply to all types of international commercial arrangements such as technology transfer, franchise agreements and manufacture of goods under licence.

While there is no doubt that a core of transactions fall squarely within this phrase there are some that fall within the penumbra of uncertainty. The provision of higher education

official’s duty” could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an “autonomous” definition not requiring proof of the law of the particular official’s country.

²⁴ It reads:

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions ...

across borders provides an illustration. Education, often, and rightly, regarded as a public good provided by the State, has undergone massive changes since the infusion of neo-liberal policies into education since the 1980s. The gradual introduction of fees and institutional reliance on sources of funding other than the government seems to have shifted higher education in particular from the public to the commercial realm. Universities are increasingly viewed as business institutions with export potential and subject to market forces.²⁵ Seen as a major industry in its own right with the potential for substantial economic impact many higher education establishments from developed countries, Australia and the United Kingdom for instance, have set up off-shore campuses or have entered into contracts with foreign agents for the recruitment of students from that country. Educational institutions in most countries require government licences. The qualifications to be awarded by the institutions also need government recognition and, where relevant, recognition by professional bodies such as associations for chartered accountants, engineers, computer scientists and lawyers. The issuing of licences or permits and recognition of qualifications is usually channelled through the Ministry of Education and professional bodies (e.g. the Bar Association) thus providing opportunities for corruption. The issue of course is whether the offer of a bribe to X (bribe taker), a public official in the Ministry of Education in Country B, by Y (bribe giver), a representative from the University of Poppleton in Country A, is caught by the OECD Convention. That will depend on how the provision of education and the cross border arrangements are viewed.

In providing higher education in foreign countries an institution is operating like a business enterprise and offering a service that is no different from a company selling a service. This approach to education as a commodity is supported by the World Trade Organisation's (WTO) General Agreement on Trade in Services (GATS).²⁶ According to Art I (3) (a) – (b):

²⁵ See, for example, Ziguras, C., G. McBurnie & L. Reinke 'Hardly Neutral Players: Australia's Role in Liberalising Trade in Education Services' (2003) *Globalisation Societies and Education*, 1(3): 359-374; Harman, G. 'New Directions in Internationalising Higher Education in Australia' (2004) *Higher Education Policy*, 17(1): 101-120; Pick, D. 'The Re-framing of Australian Higher Education' (2006) *Higher Education Quarterly*, 60(3): 229-241.

²⁶ It entered into force in January 1995. The purpose of GATS is no different from that of General Agreement on Tariffs and Trade (GATT). It is intended to contribute to 'trade expansion under conditions of transparency and progressive liberalization and as a means of promoting the economic

(a) “services” includes any services in any sector except services supplied in the exercise of governmental authority.

(b) “a service is supplied in the exercise of governmental authority” means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.²⁷

The major changes to education provision in many countries seems to have resulted in a shift where education is viewed (rightly or wrongly) as an industry in its own right competing in the market with other education providers²⁸ suggesting that education should fall within international business transactions and would therefore be within the OECD Convention’s ambit. This argument becomes even stronger as states license commercial profit making organisations to award degrees and other qualifications, but others have taken a different view.²⁹ It must be noted that the issue of corruption in education is a subject that has not been closely studied but there are indications from various surveys in third world countries³⁰ that corruption within the education sector is not unknown.

growth of all trading partners and the development of developing countries.’ It lists within it 12 core sectors which include educational services. ‘The General Agreement on Trade in Services: An Introduction’ (29 March 2006 (3776.4)) available at <http://www.wto.org>, (WTO, Doc. MTN.GNS/W/120).

²⁷ The examples cited by the WTO in relation to Arts 1(3)(a) – (b) are police, fire protection, mandatory social security, tax and customs administration and monetary policy operations.

²⁸ According to Suave, P. *Trade, Education and the Gats: What’s In, What’s Out, What’s all the Fuss About* (OECD: Paris, 2001):

[T]he market for trade in education services is big, diverse and innovative and growing fast. It will almost certainly continue to grow as societies place a premium in human capital enhancement as a source of development and a means of equipping individuals and societies to confront, adjust to and take advantage of the demands arising from closer economic integration. (p. 4)

²⁹ The inclusion of education within an instrument that focuses on trade speak is, of course, highly debatable and this inclusion has been questioned both from value and human rights perspective. See Tamosevski, K., *Annual Report of the Special Rapporteur on the Right to Education* (United Nations: New York, 2002). See also Sinclair, S. *GATS: How the World Trading Organisation’s New ‘Services’ Threaten Democracy* (Canadian Centre for Policy Alternatives: Ottawa, 2000); Knight, J. *GATS, Trade and Higher Education Perspective 2003: Where are We?* (The Observatory on Borderless Higher Education: London, 2003).

³⁰ Transparency International – Kenya, *Corruption in Kenya: Findings of an Urban Bribery Survey* (2001), available at <http://www.transparency.org>; The United Republic of Tanzania *Presidential Commission of Inquiry Against Corruption, Report on the Commission on Corruption*, (President’s Office: Dar es Salaam, 1996).

As the above discussion indicates, the phrase ‘international business transactions’ is likely to take on new hues as a result of liberalisation and changing perceptions and attitudes towards State provided basic services such as education and health. Maybe it is as well that the OECD Convention did not include a definition of the phrase but the lack of clarity resulting from the absence of a definition could also be a serious hindrance to harmonisation since it leaves room for a variety of interpretations when a particular sector’s inclusion or non-inclusion falls within the penumbra of uncertainty. One way to address this lack of clarity would have been to elucidate on the phrase in the Commentaries, for example, by reference to what the international mercantile community regards as business transactions and developments in WTO law for the purposes of interpretation.

II.2 Corporate Liability

The OECD Convention in Art 2 requires a State Party to ‘take measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official’. The State Party is not required under the Convention to establish criminal liability of legal persons if that is not possible under its legal system according to Para 20 of the Commentaries. The expectation however seems to be that the State will have some form of alternative non-criminal liability such as civil or administrative liability³¹ in place.

Establishing fault on the part of a company however is complex since jurisdictions vary in their approach. Even amongst common law jurisdictions there is no uniformity of approach. Initially common law employed vicarious liability derived from the law of tort. The reasoning behind this approach was that the master was responsible for the acts of his servant while carrying out the business of the master. Vicarious liability however could not be utilised in the context of criminal offences since most of these offences required a state of mind. Since companies are non-natural persons with no mind or body attributing fault to companies was

³¹ See Phase 2 Report, Germany, pp 28-32.

difficult until the case of *Lennard's Carrying Co Ltd v Asiatic Petroleum Co*³² which formulated the 'directing mind' principle in holding that the fault of the director involved in the operation of the company was the fault of the company. According to Viscount Haldane,

A corporation ... has no mind of its own any more than it has body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.³³

The identification of the acts and states of mind of officers within a company with that of the company has been adopted in most common law countries though in some, such as the UK, it is applied narrowly to officers higher up the command chain. For instance, in *Tesco Supermarkets Ltd v Natrass*³⁴ it was held by the House of Lords that a manager of one of the Tesco supermarkets where goods were sold at a price higher than that advertised at that branch was not a directing mind.

Other jurisdictions, such as Canada, that have adopted this approach to finding corporate fault seem more ready to find the directing mind further down the command chain³⁵ and this seems to be the more sensible route. The UK approach in looking for the directing mind at higher levels of management is a centralised one and is unsuited to current day operational procedures of companies since they are diffused geographically and functionally.³⁶ Since the current approach is dependant on the identification of that one individual within a company it does not allow for the aggregation of the mental states of more than one person within the organisation.³⁷

As opposed to the directing mind approach the US provides a better alternative. It does not focus on the mental element and makes a company criminally liable for the acts of

³² [1915] AC 705.

³³ At 713.

³⁴ [1972] AC 153.

³⁵ See the Canadian case *Canadian Dredge & Dock Ltd v The Queen* (1985) 19 CCC (3d) 1 (SCC); Hanna, D. 'Corporate Criminal Liability' (1988-89) *Criminal Law Quarterly*, 31: 452-470.

³⁶ Wells, C. *Corporations and Criminal Responsibility* (Clarendon Press: Oxford, 1993)

³⁷ *R v P & O European Ferries Ltd* [1990] 93 Cr App Rep, 72.

its personnel, be they directors, officers or other employees, if they act within their scope and for the benefit of the company.³⁸

Given the many approaches to imputing fault on the part of a company it is unfortunate that the OECD has not put forward an autonomous provision to address this issue. Lack of such a provision means a variety of jurisdiction-dependant approaches thus resulting in non-homogeneity. If any headway is to be made in the fight against corruption harmonisation remains a vital ingredient.

It seems, however, that the OECD might be addressing this lack of uniformity through its monitoring system. With respect to the UK, the Phase 2 Report highlights difficulties within the current common law approach to criminal liability³⁹ and this is revisited in the context of measures taken by the UK in export credit and the implementation of the European Union Procurement Directive in its Follow-Up Report on the Implementation of the Phase 2 Recommendation adopted in June 2007. It states:

Policies excluding convicted companies from access to public benefits such as export credit or development aid moneys can only be effective if companies can be convicted of bribery in the first place. Conviction of a company for a foreign bribery was not a realistic possibility under applicable UK case law at the time of the Phase 2 Report and the law remains unchanged. Accordingly, while the UK has taken action since the Phase 2 Report in implementing an European Union procurement directive regarding sanctions on convicted companies, the Working Group doubts that they will be useful with regard to UK companies that engage in bribery until the law on the liability of legal persons (companies) for foreign bribery is modified.

The Law Commission recently published a Consultation Document *Reforming Bribery*.⁴⁰ Unfortunately, it has not addressed the issue of corporate liability leaving the

³⁸ See Phase 2 Report, US, p. 7.

³⁹ Phase 2 Report, UK, p. 64.

⁴⁰ Law Commission Consultation Paper 185 (2007).

matter to a wider review of corporate liability. State parties need to respond constructively to OECD recommendations if homogeneity is to be achieved.

II.3. Bribery, Foreign Public Officials and Functional Equivalence

The difficulty in defining ‘corruption’ in generic terms is well rehearsed and the variety of approaches taken by the different anti-corruption conventions is indicative of this.⁴¹ Bribery⁴² is widely understood to be the commonest form of corruption and the OECD makes this its focus. In its simplest form it involves a minimum of two actors, the bribe taker (X) and the bribe giver (Y), and envisages a contemporaneous or a near contemporaneous exchange of money for a favour, be it an act or an omission, as for instance where X accepts money from Y to provide information about other bidders or to destroy an application for an export licence from Y’s competitor. Not all cases of bribery are so straightforward. The giving and the

⁴¹ Instances of behaviour (not all involving mutual exchange) we normally tend to perceive as corrupt include:

Patronage – bestowal of a benefit to an individual, individuals or a group by virtue of a relationship regardless of merit. In agrarian societies this may involve the bestowal of a cottage by a landlord to a peasant. In more complex circumstances this may involve benefits for instance to a relative, a friend, members of a group, a club, a school, caste or religious faction;

Bribery – where there is an immediate or delayed mutual exchange of a benefit in return for a benefit be it monetary or otherwise;

Misappropriation – illegal appropriation of funds for private use;

Disloyalty – illegal use of confidential/sensitive information;

Societal corruption – behaviour that is morally questionable;

Lack of civic virtue – behaviour that is totally motivated by self-interestedness and total disregard of the common good; and

Decay of political order.

See Carr, I. ‘Fighting Corruption through Regional and International Conventions: A Satisfactory Solution?’ (2007) *European Journal of Crime, Criminal Law and Criminal Justice*, 15(2): 121-154.

⁴² In some countries a distinction is drawn between ‘bribes’ and ‘facilitation payments’. In such cases the latter, likened to tips, continue to be provided by MNCs who explain them away as conforming to local practices and a way of doing business by following the local norms. (see Bayart, J. F. *The State in Africa: The Politics of the Belly* (Longman: London, 1993)) The distinction between bribes and facilitation payments is indeed very thin but it is difficult to see how the latter can be justified as a legal payment especially if the payment is a large one. Calling a ‘bribe’ a ‘facilitation payment’ does not in any way change the nature of the act. The distinction depends on the value of the facilitation payments and the expectations arising from those payments. Facilitation payments are often likened to the practice of gift-giving in China. As to whether the gift is bribery or not depends on the value of the gift. For an interesting discussion of gift-giving in China see Tian, Q. *A Transcultural Study of Ethical Perceptions and Judgments between Chinese and German Business Managers* (Martin Meidenbauer Verlagsbuchhandlung GmbH & Co KG: Muenchen, 2004). The OECD Convention in its Commentaries (para 9) states that ‘small “facilitation” payments do not constitute payments made to “obtain or retain business or other improper advantage” within the meaning of paragraph 1’.

receiving agreed between X and Y may be spread over time. Also both X and Y may have distanced themselves from direct contact in order to minimise the risk of leaving a trail (an important element for successful investigation) by introducing a number of agents for the purposes of communication and transference of benefits. X may require that Y give the benefits to third party beneficiaries, such as a relative or a friend of X.⁴³ It is also possible that benefits besides money may be offered, for example gifts of various kinds such as expensive holidays, houses or sexual favours.⁴⁴

In creating the offence of bribery of foreign public officials in Art 1(1) the OECD Convention addresses all of the above and more by going beyond the act of giving promises and offers.⁴⁵ Since bribery of a foreign public official is the focus of this Convention this phrase is defined in Art 1(4)⁴⁶ and paras 12-19 of the Commentaries.

Given the strong indication that functional equivalence is a core principle on which the OECD Convention is founded it would follow that in adopting compatible measures a State Party is not necessarily expected to adopt the same form of words as the Convention, or even to follow the form of the provisions closely, as long as the measures that are introduced give effect – are functionally equivalent – to those provisions. Neither does the Convention require that the implementing state enact a specific instrument on anti-corruption. So it would

⁴³ For an interesting account of the number of people involved in corrupt deals see *Attorney General of Zambia for and on behalf of the Republic of Zambia v Meer Care & Desai (a firm) and Ors* [2007] EWHC 952 (Ch).

⁴⁴ See The United Republic of Tanzania, *Presidential Commission of Inquiry Against Corruption, Report on the Commission on Corruption*, (President's Office: Dar es Salaam, 1996); *The Sunday Times*, April 1 2007.

⁴⁵ Art I(1) states:

Each Party shall take such measures as may be necessary to establish that it is a criminal offence for any person to intentionally to offer, promise or give any undue pecuniary advantage or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

⁴⁶ Art 1(4)(a) states:

“foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization.

be perfectly acceptable for a State to have its anti-corruption legislation spread across a number of legal sources if its legal system allows it.

The case of the UK provides an interesting illustration in this context. At the time of ratification its anti-corruption laws were to be found in common law, in the Public Bodies Corrupt Act 1889, and in the Prevention of Corruption Act 1906 as amended by the Prevention of Corruption Act 1916. The WG carried out Phase 1 monitoring in December 1999 that resulted in the communication of various concerns in respect of Art 1,⁴⁷ among them the lack of clarity as to whether existing provisions on bribery extended to foreign public officials. This saw the inclusion of Part 12 (ss 108 – 110) in the Anti-Terrorism Crime and Security Act 2001 (ATCSA)⁴⁸ which introduced a foreign element into the common law

⁴⁷ See OECD, 'United Kingdom: Review of Implementation of the Convention and 1997 Recommendation' pp 24-26 available at <<http://www.oecd.org>>.

⁴⁸ This Act came into force on February 14, 2002. Ss. 108 and 109 read:

108. Bribery and corruption: foreign officers etc.

- (1) For the purposes of any common law offence of bribery it is immaterial if the functions of the person who receives or is offered a reward have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom.
- (2) In section 1 of the Prevention of Corruption Act 1906 (c. 34) (corrupt transactions with agents) insert this subsection after subsection (3)—
 - “(4) For the purposes of this Act it is immaterial if—
 - (a) the principal’s affairs or business have no connection with the United Kingdom and are conducted in a country or territory outside the United Kingdom;
 - (b) the agent’s functions have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom.”
- (3) In section 7 of the Public Bodies Corrupt Practices Act 1889 (c. 69) (interpretation relating to corruption in office) in the definition of “public body” for “but does not include any public body as above defined existing elsewhere than in the United Kingdom” substitute “and includes any body which exists in a country or territory outside the United Kingdom and is equivalent to any body described above”.
- (4) In section 4(2) of the Prevention of Corruption Act 1916 (c. 64) (in the 1889 and 1916 Acts public body includes local and public authorities of all descriptions) after “descriptions” insert “(including authorities existing in a country or territory outside the United Kingdom)”.

109. Bribery and corruption committed outside the UK

- (1) This section applies if—
 - (a) a national of the United Kingdom or a body incorporated under the law of any part of the United Kingdom does anything in a country or territory outside the United Kingdom, and
 - (b) the act would, if done in the United Kingdom, constitute a corruption offence (as defined below).
- (2) In such a case—
 - (a) the act constitutes the offence concerned, and
 - (b) proceedings for the offence may be taken in the United Kingdom.
- (3) These are corruption offences—

offence of bribery and the existing statutes on corruption through a territorial extension. Section 108(3) ATCSA amends s.7 of the Public Bodies Corrupt Act to include public bodies in territories outside the UK. In introducing the foreign element in this way, the UK felt that it had met the standards set by Art 1 of the OECD Convention.

Regardless, the WG retained its concerns in respect of the way in which the UK had extended the bribery offence to apply to foreign public officials. Its concerns stemmed from the fact that an autonomous definition of ‘foreign public official’ had not been adopted. For instance in its Phase 1 Bis Report with regard to the definition of bribery of foreign public official the WG stated:

Article 1(4) of the Convention gives an autonomous definition of foreign public officials to which national legislation should conform as closely as possible. In defining a foreign public official, the U.K.’s new legislation preserves the terminology employed in the domestic context. In essence, the definitions of “agent”, “principal”, “public office” and “public authorities” from which the concept of “public official” must be derived, are simply transposed by territorial extension so that they must now respectively be interpreted in a “foreign” context in the light of the expanded scope of the offence. The Working Group considers that such an approach may make a homogenous application of the Convention among the Parties more difficult.⁴⁹

This concern continues since in Phase 2 it recommended that bribery of foreign public officials be specifically addressed. It must be noted that other concerns were also raised in

-
- (a) any common law offence of bribery;
 - (b) the offences under section 1 of the Public Bodies Corrupt Practices Act 1889 (c. 69) (corruption in office);
 - (c) the first two offences under section 1 of the Prevention of Corruption Act 1906 (c. 34) (bribes obtained by or given to agents).
 - (4) A national of the United Kingdom is an individual who is—
 - (a) a British citizen, a British Dependent Territories citizen, a British National (Overseas) or a British Overseas citizen,
 - (b) a person who under the British Nationality Act 1981 (c. 61) is a British subject, or
 - (c) a British protected person within the meaning of that Act.

⁴⁹ p. 17.

respect of whether UK law⁵⁰ complied with the standards set down in Art 1, as in the manner of committing the bribery offence since UK law does not specifically mention promise⁵¹ and the use of intermediaries.⁵²

The response of the WG in respect of the UK anti-corruption law's compliance with the OECD Convention does raise the question of whether functional equivalence plays any role at all in practice. The WG's insistence that a State Party follow the form of the OECD Convention closely strongly suggests that its impact, if any, is minimal. This is made apparent in the WG's response in its assessment of the UK's approach to defining the offence of bribery even though the Commentaries to Art 1 indicate that some degree of tolerance in the way a State goes about in meeting the set standards is assumed. The above suggestion in respect of the impact becomes stronger when the WG's dissatisfaction generally with the UK legal framework due to its 'complexity and uncertainty'⁵³ and its strong recommendation to adopt a single anti-corruption instrument is taken on board. If functional equivalence had been taken into account seriously the WG would not have raised the point with regard to complexity and uncertainty since it would have appreciated that each 'legal system has its

⁵⁰ Besides the legislative developments taken to implement the OECD Convention, in 2003 the UK Government published its Draft Corruption Bill (Cm 5777) following the model proposed by the Law Commission in its Report *Legislating the Criminal Code: Corruption* of 1998 (Law Com No 248.) The Bill was not enacted due to widespread criticism of lack of clarity and complexity. The Law Commission, at the request of the Home Office, has now published a consultation document which considers the changes that would be desirable in light of the criticisms to their previous recommendations and seeks to ensure that the proposals are consistent with the international obligations of the UK, e.g. the COE Convention and the UN Convention. See Law Commission, *Reforming Bribery*. Consultation Paper 185 (2007). This Consultation Document seems to have responded to some of the concerns raised by the OECD in respect of Art I for instance by proposing a separate offence of bribing a foreign public official.

⁵¹ S.1. of the Prevention of Corruption Act 1906 refers only to "corruptly give, or agrees to give or offers". The UK position was that the concept of offer includes promise.

⁵² The UK put forward the view that even though s.1 of the Prevention of Corruption Act 1906 does not specifically talk about offer of bribery through an intermediary s.1. does mention agent thus bringing within it the intermediary. S.1. in part reads:

If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business...

...
(2) ...
(3)...

⁵³ Phase 2 Report, para 194.

own logic'.⁵⁴ It is well known that English law is peculiar in its blend of common law and equity and partial codification of various areas of law through statutes such that the law on a specific area could be spread across these sources. To say that the English legal framework is uncertain and complex therefore goes against the grain of the functional equivalence approach recognised by the OECD in its Commentaries.

Judging from its reports, one of the key aims of the WG is to strive towards homogeneity. This is supportable to a degree since without uniformity of interpretation we are not likely to achieve a global approach to fighting corruption. Against this backdrop there is not much room for the functional equivalence approach other than giving access to a variety of sources during the assessment process to gauge how the laws of the State work and to establish whether a State is OECD Convention compliant. If the aim is to achieve homogeneity, it may have been better for the OECD to adopt a convention that did not impart notions of flexibility through the endorsement of functional equivalence or built in flexibility.

III. ARTICLE 5, NATIONAL SECURITY AND CUSTOMARY INTERNATIONAL LAW

As stated in the Introduction, international trade in some contexts can expose tensions between state interests, national security and established international law principles. The recent UK decision to stop the investigations into allegations of bribery to Saudi officials by British Aerospace Systems PLC (BAE) is one instance where Art 5 of the OECD Convention, state interests and national security have come under scrutiny. Article 5 states:

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

⁵⁴ Pieth, fn 24.

In 2004 the UK Serious Fraud Office (SFO) with the Ministry of Defence, initiated an investigation, under Part 12 of ATCSA, into ‘suspected false accounting’, in relation to deals for the supply of defence equipment to Saudi Arabia by BAE.⁵⁵ The focus of the investigation was on allegations that BAE had been running a slush fund for the purpose of bribing Saudi Arabian officials.⁵⁶

Amidst media reports that pressure was being applied by Saudi Arabia, BAE and even the British Government to halt the inquiry and concerns about possible loss of jobs and revenue if Saudi Arabia discontinued with the contracts for defence equipment,⁵⁷ the SFO announced the discontinuation of the investigation on December 14, 2006 with the following press release:

This decision has been taken following representations that have been made both to the Attorney General and the Director of the SFO concerning the need to safeguard national and international security.

It has been necessary to balance the need to maintain rule of law against the wider public interest.

No weight has been given to commercial interests or to the national economic interest.⁵⁸

The SFO statement clearly emphasised that economic matters expressly restricted by Art 5 had not been taken into account in deciding to end the inquiry. The extent to which such matters actually informed the decision was, at the time of writing, unresolved. Documents

⁵⁵ SFO Press Statement, 3 November 2004 at <http://www.sfo.gov.uk/news/prout/pr_337.asp?seltxt=>>. The official published details concerning the investigation and subsequent decision are not comprehensive. The UK news media did, however, engage in extensive reporting of the matter.

⁵⁶ Initial reports suggested that the fund was worth £60 million but it was later suggested that £1 billion had been ‘secretly shuffled through BAE’s accounts’ via two offshore accounts, the existence of which was not disclosed in BAE’s published accounts and that the Ministry of Defence had been directly involved in the administration of payments. See, for example, Leigh, D, ‘Secret flow of £1bn through accounts’ *The Guardian*, (London, December 15, 2006); O’Connell, D, ‘BAE cashes in on £40bn Arab jet deal’ *The Times*, (London, August 20, 2006); Pallister, D, ‘The arms deal they called the dove: how Britain grasped the biggest prize’ *The Guardian*, (London, December 15, 2006). See Leigh (2006), n. 61 and Leigh, D. and R. Evans ‘MoD accused over role in Bandar’s £1bn’ *The Guardian*, (London, June 12, 2007).

⁵⁷ See, for example, Leigh, D. and R. Evans, ‘National interest halts arms corruption inquiry’, *The Guardian*, (London, December 15, 2006); ‘Saudis piled pressure on Blair’, *Financial Times*, (London, December 15, 2006).

⁵⁸ SFO Press Statement, 14 December 2006 at <http://www/sfo.gov.uk/news/pout/pr_497.asp?seltxt=>>

submitted for the judicial review proceedings should shed light on this area, though many documents may not be publicly available (under the Freedom of Information Act 2000), for several years.⁵⁹ Nevertheless, the decision has attracted criticism, including accusations that the decision conflicts with the OECD Convention.

Though the statement made clear that economic factors were not taken into account it was less so on the matter of 'relations with another state'. Saudi Arabia had reportedly threatened to withdraw co-operation on matters including intelligence and security. In the House of Lords the Attorney General, Lord Goldsmith, stated that he had consulted the Prime Minister and other relevant figures, who had

expressed the clear view that the continuation of the investigation would cause serious damage to UK/Saudi security, intelligence and diplomatic co-operation, which is likely to have seriously negative consequences for the United Kingdom public interest in terms of both national security and our highest priority foreign policy objectives in the Middle East.^{60 61}

Any consideration of the effect on relations of these matters, particularly those not directly pertaining to national security, would appear to conflict with Art 5. The SFO statement however makes clear that security concerns were officially the basis of the decision and not

⁵⁹ Permission to bring a full judicial review hearing was granted by the High Court on 9 November 2007.

⁶⁰ Hansard, HL, vol 687 col 1712, (14 December 2006), per The Attorney-General, Lord Goldsmith.

⁶¹ The phrase 'highest foreign policy objectives in the Middle East' is unclear but presumably would include diplomatic co-operation on a number of Middle East issues such as the Palestinian issue, the Iraq issue and safeguarding the world supply of oil, a major concern for the international community.

relations with another state.⁶² Nevertheless, this ambiguity has led to criticism that such matters were improperly taken into account.⁶³

To some extent, however, arguments that the national security decision was in reality based upon, or linked with, concerns about relations with another state and was not permissible on that basis, muddy the waters in respect of the permissibility of the national security decision. The issue remains of whether national and international security is itself a sufficient ground on which to end an investigation or prosecution. This is relevant not only to the current situation of the UK but also to the future application of the OECD Convention, given the current international political climate.

It is this matter of national security which is of primary importance for present purposes. The first difficulty arises because Art 5 does not expressly refer to national (or international) security interests. This means that the compatibility of the UK's decision with the Convention is unclear. It might be argued that it is implied that member countries can take decisions on the basis of national security. Lord Goldsmith has made comments to this effect subsequent to the decision: 'I can't believe that when we signed up we agreed to abandon any consideration of national security. It certainly doesn't say that and I don't believe that's what we could have intended or any other country could have intended.'⁶⁴ The simple counter-argument, of course, is that no such consideration is implied.⁶⁵ ⁶⁶ However, the reference in

⁶² A related and important matter is the role of the Attorney-General (AG) and the relationship of the AG to the executive. That is, however, beyond the scope of the present argument. Recent media reports, referring to submissions made in the course of the judicial review process, have continued to assert that the Government, including the then Prime Minister, Tony Blair, did exert pressure on the AG to end the investigation and that the AG believed initially that the investigation should proceed despite representations by ministers concerning the business and security interests at stake. It is also apparent, however, that the focus of the PM's concerns was the risk to national and international security arising if Saudi Arabia acted on its threat to suspend co-operation. See *R (on the application of Corner House Research and Campaign Against Arms Trade) v The Director of the Serious Fraud Office*, Index to Exhibit RW2 – Redacted Documents, CO/1567/07)

⁶³ See, for example, *R (on the application of Corner House Research and Campaign Against the Arms Trade) v The Director of the Serious Fraud Office*, Full statement of grounds for judicial review, Claim No. CO/1567/2007, available at: http://www.controlbae.org/background/JR_grounds.pdf.

⁶⁴ 'Interview transcript, Lord Goldsmith', *Financial Times*, 31/01/2007 at <<http://www.ft.com/cms/s/0/04457f7c-b122-11db-b901-0000779e2340.html>>

⁶⁵ See CAAT and Corner House, Full statement of grounds for judicial review, para 28, (n. 68).

⁶⁶ This will be primarily a matter of interpretation. The Vienna Convention on the Law of Treaties 1969 provides a starting point for the interpretation of Art 5 and provides that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms, in light of their context,

the official statement to balancing the rule of law against the wider public interest may suggest that the UK authorities contemplated that the decision was necessary even if it was contrary to the Convention.

III.1. The Doctrine of Necessity and National Security

Governed by the principle of *pacta sunt servanda*,⁶⁷ a State, in ratifying an international convention, agrees to meet its international legal obligations by complying with that convention. However, there are occasions in which States have violated their international obligations. The decision of the SFO possibly illustrates such a situation, assuming that the decision to end the investigation on national and international security grounds was contrary to Art 5. Where a State violates its international obligations, for example through non-compliance with treaty obligations, it will usually attract responsibility for the wrongdoing under international law unless there are circumstances which preclude or excuse this responsibility.⁶⁸ Reliance by a State on the doctrine of necessity indicates that the State has acted in such a way as to incur international responsibility based on wrongful acts, but that the wrongfulness is precluded because of the existence of a state of necessity. One question arising in this context from an international perspective is whether, in circumstances such as those arising from the BAE investigation, a State can invoke necessity as a defence when it violates its obligations under the OECD Convention. If this is the case then the decision of the UK might be justifiable even if it conflicts with Art 5.

In order to address this question the availability of the defence of ‘necessity’ in international law, its meaning, and the conditions that need to be met for a successful plea,

object and purpose and that subsequent agreement or practices in the application of the treaty as well as any relevant rules of international law, shall also be taken into account. (See section 31.) Since national security is not expressly referred to in the OECD Convention, considering the ordinary meaning of the provision may be of limited assistance but as has been noted, the UK authorities appear to consider their decision to have been made in good faith and in accordance with Art 5. Other principles of interpretation may also be relevant. Applying the rule *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) for example, would indicate that were national security to be excluded then it would have been listed in the Article.

⁶⁷ Promises must be kept.

⁶⁸ See International Law Commission’s Articles on Responsibility of States for Wrongful Acts (2001)

must be examined. There is no doubt that ‘necessity’ is recognised in customary international law. The doctrine has a long history traceable to the writings of Grotius.⁶⁹ Necessity was historically associated with self-preservation, as where a State in war time occupies neutral territory where the enemy State’s occupation of that neutral territory would pose a threat to its power or very existence. The twentieth century saw an expansion of the concept from safeguarding the existence of the state, to safeguarding an ‘essential interest’ of the state.⁷⁰

Recent cases in the International Court of Justice (ICJ) also confirm that necessity as a defence to State responsibility for international wrongdoing can be invoked in relation to threats other than the threat to a State’s existence.⁷¹ In the *Gabčíkova-Nagymaros*⁷² case, the dispute between Hungary and Czechoslovakia arose out of a bilateral treaty for a joint project for building dams on the River Danube for the purposes of electricity generation, flood protection, and improved navigation. Hungary initially suspended and later abandoned its obligations under the treaty twelve years into the project, claiming grave ecological risks to the region as well as a threat to the water supply to Budapest.⁷³ Hungary relied on an ecological state of necessity for its failure to meet its obligations. The ICJ did not find any problems with invoking necessity on the basis of an ecological threat.

⁶⁹ Grotius H. *De Jure Belli Ac Pacis*, Libri Tres Bk II, Ch 1, para XII (Tr Campbell, A.C. (1901))

⁷⁰ Ago explains that ‘even in cases of ‘necessity’, the concept of self-preservation can only be used to explain actions taken with a view to averting extreme danger threatening the very existence of the State, whereas, according to the opinion that predominates today, the concept of state necessity can be invoked above all to preclude wrongfulness of conduct adopted in certain conditions in order to protect an essential interest of the State, without its existence being in any way threatened’. Ago in ‘State responsibility for internationally wrongful acts (part I). Principal works cited in the reports of Mr Ago. Document prepared by the Secretariat.’ Extract from the Yearbook of the International Law Commission: 1980, Vol. II (1) U.N.Doc. A/CN.4/318/ADD, 5-7 p17 para 8.

⁷¹ In *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* I.C.J. Reports 1997 (25 September 1997,) the ICJ stated that

[T]he state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation.
(para 51)

⁷² *Ibid.*

⁷³ *Ibid.* para 40.

This wider concept of necessity is now embodied in Art 25⁷⁴ of the International Law Commission's (ILC)⁷⁵ Articles on Responsibility of States for Wrongful Acts⁷⁶ (Articles on State Responsibility) which states:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
 - (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
 - (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
 - (a) The international obligation in question excludes the possibility of invoking necessity; or
 - (b) The State has contributed to the situation of necessity.⁷⁷

⁷⁴ Article 25 was formerly Art 33 and has been slightly revised. In *Gabčíkovo-Nagymaros* the state of necessity was evaluated in the light of the criteria laid down in Art 33 which provided:

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that state not in conformity with an international obligation of the State unless:
 - (a) the act was the only means of safeguarding an essential interest both the State against a grave an imminent peril; and
 - (b) the act did not seriously impair an interest of the State towards which the obligation existed.
2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:
 - (a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law, or
 - (b) if the international obligation with which the act of the state is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation, or
 - (c) if the State in question has contributed to the occurrence of the state of necessity.

⁷⁵ This Commission was established by the United Nations General Assembly in 1948 (G.A>Res.174(II) of 21 November 1997. Its mandate is to encourage the codification of international law. One of its well known treaties is the Vienna Convention on the Law of Treaties (1969).

⁷⁶ For an extensive commentary see Crawford, J. *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press: Cambridge, 2002).

⁷⁷ Responsibility of States for Internationally Wrongful Acts, text adopted by the Commission at its fifty-third session, 2001.

The above raises a number of questions: (1) what is the meaning of the terms ‘essential interest’ and ‘grave and imminent peril’? (2) In what circumstances would a State be regarded as having no alternative but to breach international legal obligations to safeguard its essential interest? (3) How is the essential interest of the State in breach of its obligations to be balanced against the essential interests of other States or the international community? These questions are examined below and applied to the case of the UK’s actions concerning the BAE investigation and Art 5 of the OECD Convention.

III.1.1. Meaning of ‘essential interest’ and ‘grave and imminent peril’

No definition of ‘essential interest’ in the context of Art 25 is provided within the Articles on State Responsibility. The drafters seem to have preferred to leave this undefined. The Commentary notes that what constitutes an essential interest will depend on the circumstances of the case and cannot be prejudged.⁷⁸ However, in the Addendum to the Eighth Report on State Responsibility, by Robert Ago (the Ago Report), a few examples are given. According to the report, ‘essential interest’ could include ‘a grave danger to the existence of the State itself, its political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population, the preservation of the environment of its territory or a part thereof, etc’.⁷⁹ As noted above, in *Gabčíkova-Nagymoros* the ICJ accepted that Hungary’s concerns for its natural environment related to an ‘essential interest’ within the meaning of Art 33 (now Art 25).

It is not that difficult to envisage situations that may be regarded as affecting ‘essential interests’. For instance cyber attacks by hackers located in State X on all air traffic control systems located in State Y that renders them useless could be seen as an essential interest for enforcement authorities from Y to remotely access computers located in X without

⁷⁸ Commentaries, U.N. doc A/CN.4/SER.A/1980/Add.1 (Part 2), para 15.

⁷⁹ Ago, p 14, para 2.

going through the procedures laid down in the Council of Europe Cybercrime Convention 2001.⁸⁰

The potential scope of ‘essential interests’ is broad and enables a State to avail itself of the doctrine of necessity in a greater range of circumstances than permitted by early interpretations of necessity. In this context there appears to be a strong argument to suggest that national security would be considered an essential interest of the State, in accordance with Art 25 of the Articles on State Responsibility. Safeguarding national security may be an aspect of several of the examples cited in the Ago Report, in addition to which the inclusion of the word ‘etc’ makes it clear that this is not an exhaustive list. The national security interest was, it seems clear, related to the threat of terrorism which constitutes a danger to the lives of citizens of both the domestic and international communities.

It is not sufficient, however, that the State’s action related to an essential interest. There must also have been a threat of ‘grave and imminent peril’ in relation to that interest. Again, the matter of how ‘gravity’ is to be construed has been left open by the drafters. The Ago Report indicates that the threat must be ‘extremely grave, representing a present danger to the threatened interest’,⁸¹ though this perhaps sheds little additional light on the subject. The ICJ in *Gabčíkovo-Nagymoros* considered the matter in more detail and found that necessity could not exist without a peril duly established at the relevant point in time. The mere apprehension of peril would not suffice. With regard to imminence, it was considered that this was synonymous with ‘proximity’ or ‘immediacy’.⁸² Though the peril must have been a threat to the interest at the actual time [of the wrongful acts] this did not exclude the possibility that ‘a ‘peril’ appearing in the long term might be held to be ‘imminent’ as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable’.^{83 84} Thus, the court’s view was that

⁸⁰ Arts 31-34.

⁸¹ *Ibid.*, para 13

⁸² *Gabčíkovo-Nagymoros*, para 54.

⁸³ *Ibid.*

⁸⁴ Hungary failed to satisfy the condition of ‘grave and imminent peril’. With respect to the planned works at Nagymoros the ICJ noted that though the dangers submitted were of a long-term and

imminence did not necessarily mean that the peril was occurring at the material time but rather that the existence of the peril must have been established at the time and that the realization of the peril was certain and inevitable, even if not occurring until a future point in time.

To fulfil this condition it must, therefore, be established that the action of the UK in ending the investigation was necessary to safeguard an essential interest of the UK, in this case safeguarding national security, including the lives of UK citizens, from a grave and imminent peril. It may be assumed that the primary peril in this case was the threat of terrorist activity.⁸⁵ There is a strong case to argue that this threat would, for obvious reasons, be considered a grave peril. In particular, counter-terrorism intelligence provided by Saudi Arabia could be essential to protect UK citizens (and potentially the international community). With respect to imminence it can be argued that the peril was not merely apprehended. A large number of terrorist attacks had taken place worldwide in recent years and attacks had been carried out and uncovered in the UK in the six months preceding the decision.⁸⁶ It appears that the peril was a threat to the essential interest at the time of the UK's actions and that the withdrawal by Saudi Arabia of co-operation and communication on security matters could have established this peril as certain and imminent.

unpredictable nature it could not be said that they were imminent. The dangers associated with the upstream reservoir were mainly associated with the extent to which the project operated at peak-time, which was the frame of operation originally envisaged in the agreement. The source of the peril downstream – deepening of the river bed – had also occurred in another capacity some years previously, thus the peril had materialised at that time and not as a consequence of the project. With regard to the Gabčíkovo sector the ICJ noted that a report produced by Hungary prior to their discontinuing their treaty obligations, did not express awareness of any “authenticated peril” whose realisation would be inevitable in the long term. (See paras 54-57).

⁸⁵ Clearly, detailed information about the actual degree of risk concerning possible withdrawal of co-operation by Saudi Arabia and of possible risks associated with international terrorism is largely outside of the public domain and these comments assume that the threat was real and identifiable. The judicial review documents, Redacted Documents- CO/1567/07, presently provide most detail on this matter, from the perspective of the UK Government. It is apparent that the likelihood of Saudi Arabia acting on threats to withdraw co-operation on counter-terrorism matters and possibly also broader foreign policy initiatives related to the Middle East, were considered ‘imminent’ as of September 2006 (see letter dated 29 September 2006, CO/1567/07).

⁸⁶ Four suicide bomb attacks had been carried out in London on 7 July 2005. A further four attempted bombings were reportedly planned for 21 July 2005 but were uncovered. Numerous other attacks have taken place worldwide. See, for example, BBC, Timeline of Al-Qaeda attacks,, <http://news.bbc.co.uk/2/hi/in_depth/3618762.stm>

III.1.2. Identifying the ‘only means’ to safeguard an essential interest.

It is clear from Art 25 that the action taken must have been the only way of safeguarding the essential interest from the imminent peril. This means that the conduct of the State which is not in conformity with its international obligations, ‘must truly be the only means available to it ... it must be impossible for the peril to be averted by any other means, even one which is much more onerous but which can be adopted without a breach of international obligations’.⁸⁷ In *Gabčíkovo-Nagymoros* the court found that even if Hungary had been able to demonstrate a grave and imminent peril, there were other means which it could have applied in order to safeguard its interest. For instance, the peril corresponding to drinking water resulting from the lowering of the riverbed downstream of the Nagymaros dam could have been met through purification of the river water, rather than the abandonment of works, even though this would have been a much more costly process.⁸⁸

It must be considered, therefore, whether the action taken by the UK, in ending an investigation on the grounds of national and international security, was the only means available to it to safeguard its essential interest, in the given circumstances. The limited availability of public information makes it more difficult to apply this condition. According to the Commentaries to the Articles on State Responsibility, means other than unilateral action are contemplated within this condition and paragraph 1(a) ‘is not limited to unilateral action but may also comprise other forms of conduct available through cooperative action with other States or through international organizations’.⁸⁹ It appears to be expected that the UK had undertaken appropriate negotiations with Saudi Arabia concerning their continued co-operation with regard to intelligence. The extent to which this option was exhausted cannot be commented on with any certainty though the citing of national security concerns as a reason to end the investigation might arguably imply that this was the case. In addition, the fact that

⁸⁷ Ago, p 20, para 4.

⁸⁸ *Gabčíkovo-Nagymoros*, para 55.

⁸⁹ Commentaries, para 15.

the investigation was pursued for two years does, it may be argued, shows some degree of commitment on the part of the UK, to exhausting other potential courses of action.

It has also been suggested that had Saudi Arabia withdrawn diplomatic co-operation, it would have been in breach of its international obligations with respect to the United Nations Security Council Resolution 1373/2001.⁹⁰ That UN resolutions are either binding or enforceable upon member states is contestable.⁹¹ However, the application for judicial review submitted on behalf of CAAT⁹² and Corner House⁹³ contends that this resolution is binding. On this basis it might again be argued that there were alternative courses open to the UK, in this case through seeking to enforce Resolution 1373/2001 within the Security Council. In reality, even if the resolution were enforceable, the timescale likely to have been involved in such an action may prevent this from being considered a genuine alternative means, particularly if Saudi Arabia had withdrawn co-operation in the meantime, increasing the imminence of the identified peril.

Finally, it may be argued that economic or trade sanctions could have been applied by the UK.⁹⁴ According to UK Trade and Investment, 'Saudi Arabia is the UK's 23rd largest export market, with exports worth £1.676.2 bn in 2006. It is the UK's largest trading partner in the Middle East and our second largest export market in the region after the UAE. The UK is Saudi Arabia's second largest foreign investor after the USA.'⁹⁵ Although the UK stood to lose, economically, if the BAE contract did not go ahead, Saudi Arabia also had an economic

⁹⁰ See CAAT and Corner House, Full statement of grounds for judicial review, paras 29-34.

⁹¹ See, for example, Castles, A. C. 'Legal Status of U.N. Resolutions' (1967) *Adelaide Law Review*, 3(1): 68-83.; Higgins, R. *Problems and Process International Law and How We Use It* (Oxford University Press: Oxford, 1994); Amerasinghe, C. F. *Principles of the Institutional Law of International Organisations* (2nd ed. Cambridge University Press: Cambridge, 2005).

⁹² Campaign Against Arms Trade, an NGO working for 'the reduction and ultimate abolition of the international arms trade, together with progressive demilitarisation'. More information available at <<http://www.caat.org>>.

⁹³ An NGO which 'supports democratic and community movements for environmental and social justice'. More information available at <<http://www.cornerhouse.org>>.

⁹⁴ For more on sanctions see Elagab, O. Y. *The Legality of Non-Forcible Counter-Measures in International Law* (Clarendon Press: Oxford, 1988).

⁹⁵ <https://www.uktradeinvest.gov.uk/ukti/appmanager/ukti/countries?_nfls=false&_nfpb=true&_pageLabel=CountryType1&navigationPageId=/saudi_arabia>

interest in maintaining good trade relations with the UK. The extent to which this constituted a genuine option is highly debatable.

III.1.3 Balancing the essential interests of the international community against the essential interests of the State in breach of its obligations

The need to safeguard the UK's essential interest regarding national and international security, including protecting the lives of UK citizens, must be balanced against possible essential interests of other States and the international community.⁹⁶

Perhaps the most obvious interest of OECD Member States is in combating bribery in line with the objectives of the OECD Convention. This might be thought of as a primarily economic interest, but the wider impacts of bribery are well established. Thus, the need to prevent corruption corresponds to many aspects of a State's 'wellbeing' and a threat to this interest may pose several risks. The UK's decision to end the BAE investigation may be seen as impairing this interest because of the implications of a Member being seen to disregard its obligation to combat bribery. Most significantly, the commitment of other member parties to the Convention could be affected. Whilst the significance of this interest should not be overlooked, it is difficult to argue that it would outweigh the UK's interest in the present circumstances, because of the immediacy of the threat to the UK. It seems arguable that the UK was in fact protecting an essential interest of the international community with respect to combating international terrorism through ensuring ongoing co-operation with Saudi Arabia.

In conclusion, the issue of whether UK's actions were compatible with the OECD Convention remains arguable.⁹⁷ It is ambiguous whether the UK did or did not take into account matters which are expressly restricted by Art 5. However, if national security is considered to be a prohibited consideration it appears that there is a strong argument to suggest that the UK could avail itself to the doctrine of necessity in order to 'excuse' its

⁹⁶ See also Ago, para 15.

⁹⁷ The OECD stated in March 2007 that it 'it maintains its serious concerns as to whether the decision was consistent with the OECD Anti-Bribery Convention'. OECD: http://www.oecd.org/document/12/0,3343,en_33873108_33873870_38251148_1_1_1_1,00.html.

wrongful actions. This is not an entirely satisfactory outcome. Effectively allowing the discontinuation of a bribery investigation because of the threat of action from another State leaves the international community in an uneasy position since it makes room for a state to disregard its treaty obligations on grounds of national interest. The potential for abuse clearly exists in such circumstances, through the exercise of threats by States in positions of higher ‘bargaining power’.

CONCLUSION

This paper has highlighted some emerging issues arising from the OECD Convention, both internal and external. Some of these issues are internal to the convention created by lack of definition or ambiguities within the provisions and the application of the functional equivalence approach to diverse legal system. Some may be regarded as external such as the interaction of the Convention with other established principles of international law. As argued, these issues may begin to take on new dimensions in the light of developments and trends in trade law, geopolitical shifts and emerging case law on the OECD Convention