

## DOMESTIC IMPACT OF THE MANAGEMENT PROCESS UNDER THE OECD ANTI-BRIBERY CONVENTION

SEUNGHYUN NAM\*

### ABSTRACT

According to the Chayeses in their book *The New Sovereignty*, management processes can be effective in inducing state compliance of international norms by promoting interaction between states and other stakeholders, increasing transparency, and assisting states in building their own capacity for enforcement. Yet, there has been a lack of empirical research on the effectiveness of these management processes in terms of their domestic impact. Therefore, this article attempts to measure the effectiveness of management processes by conducting an empirical assessment of the monitoring process under the OECD Anti-Bribery Convention – which has been acclaimed to be the gold standard of monitoring by Transparency International – to determine the extent and ways in which management processes can influence states’ domestic laws and policies.

---

\* Research Professor at Graduate School of International Studies, Korea University; S.J.D., University of Pennsylvania Law School. I would like to thank Professors Burke-White, Galbraith, Ewald, Paoletti, Skeel, Sepinwall, and Nichols for their valuable insight and comments, as well as all those who took part in the interviews. This Article was supported by the Ministry of Education of the Republic of Korea and the National Research Foundation of Korea (NRF-2016S1A3A2925085).

## TABLE OF CONTENTS

1.	Introduction.....	957
	1.1. <i>Chayeses' Managerial Theory</i> .....	960
2.	Assessment of Management in the OECD Anti-Bribery Convention Assessment of Management in the OECD Anti-Bribery Convention.....	963
	2.1. <i>Key Features of Management in the OECD Anti-Bribery Convention</i> .....	963
	2.2. <i>Scope and Methodology of Analysis</i> .....	968
	2.3. <i>Findings</i> .....	969
	2.4. <i>Concluding Observations</i> .....	979
3.	Country-Specific Assessments.....	981
	3.1. <i>United Kingdom</i> .....	981
	3.2. <i>Republic of Korea</i> .....	991
4.	Conditions for Effective Management .....	1002
	4.1. <i>Legal Structures for Enforcement</i> .....	1003
	4.2. <i>Economic Capacity of States</i> .....	
	4.3. <i>Active Participation of Civil Society, Private Sector and the Media</i> .....	1004
	4.4. <i>Networks of International and Regional Institutions</i> .....	1006
	4.5. <i>Use of Wide Extraterritorial Application of Domestic Foreign Bribery Laws</i> .....	1007
5.	Conclusion.....	1008

## 1. INTRODUCTION

International legal scholars have long sought ways to induce treaty compliance among states. The main challenge lies in that states are often reluctant to negotiate treaties that build in strong sanctions; at the same time, there is the need for sufficient teeth to drive states to comply with international norms. As a way to counterbalance these interests, the Chayeses introduced in their book *The New Sovereignty* that management can be an effective way to induce state compliance not by placing sanctions on governments, but rather, by guiding states through a continuous interactive process that involves justification, discourse and persuasion.<sup>1</sup> In other words, management takes a cooperative, problem-solving approach rather than relying on coercive mechanisms for enforcement.<sup>2</sup> It aims to help states comply with international norms by increasing transparency in the system and enhancing state capacity through continuous strategic interaction for the exchange of information and expertise among various multiple stakeholders including nonstate actors. According to the Chayeses, states are induced to comply under this process because states have a propensity to comply through participation within international regimes that are based on a “tightly woven fabric of international agreements, organizations and institutions that shape relations with one another.”<sup>3</sup> The Chayeses describe this web of international ties as a new form of sovereignty in which a state can no longer act as an inde-

---

<sup>1</sup> See generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* 25-28 (1998) (explaining that a horizontal process of management can induce compliance); see also ABRAM CHAYES & ANTONIA HANDLER CHAYES, *Compliance Without Enforcement: State Behavior Under Regulatory Treaties*, 7 *NEGOTIATION J.* 311 (1991) (reviewing the enforcement mechanisms that parties to a treaty commonly select); ABRAM CHAYES & ANTONIA HANDLER CHAYES, *From Law Enforcement to Dispute Settlement: A New Approach to Arms Control Verification and Compliance*, 4 *INT’L SEC.* 147 (1990) (analyzing the importance of political verifications within compliance monitoring apparatuses); ABRAM CHAYES & ANTONIA HANDLER CHAYES, *Living Under a Treaty Regime: Compliance, Interpretation, and Adaptation*, in *DEFENDING DETERRENCE: MANAGING THE ABM TREATY REGIME INTO THE 21ST CENTURY* 197 (Antonia Handler Chayes & Paul Doty eds., 1989) (identifying that the conclusion of an arms control agreement is not the end of the story and requires active compliance monitoring).

<sup>2</sup> CHAYES & CHAYES, *THE NEW SOVEREIGNTY*, *supra* note 1, at 25-28.

<sup>3</sup> CHAYES & CHAYES, *THE NEW SOVEREIGNTY*, *supra* note 1, at 26; see also Wolfgang H. Reinecke, *Global Public Policy*, 76 *FOREIGN AFF.* 127, 127-38 (1997) (explaining that globalization, unlike interdependence, penetrates the deep structure and strategic behavior of corporations and other actors in the international system).

pendent unit, but must cooperate with other states in order to achieve its own objectives. States, in general, have been favorable to this management approach as it has been widely adopted in various international regimes, including the environment, the nuclear-test-ban treaty, and in the anti-corruption regimes. Despite its broad usage, however, there has been a lack of empirical research on whether these processes have in fact been effective in inducing states to comply with international norms. Some scholars have assessed compliance efforts in the environmental regime and the general impact of the anti-corruption regime on states, but there has not been an empirical assessment on the extent and ways in which such management tools have been able to influence member states' domestic laws and policies for compliance.<sup>4</sup>

Against this backdrop, this article attempts to measure the effectiveness of the management process based on a quantitative and qualitative assessment. It will specifically focus on the 1999 Organisation for Economic Co-operation and Development ("OECD") Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions<sup>5</sup> since it has developed one of the most sophisticated tools of management, identified as the gold standard of monitoring by nongovernmental organizations such as Transparency International.<sup>6</sup> Forty-three member states, including OECD and non-OECD countries, are taking part in a rigorous peer-

---

<sup>4</sup> See Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. LEGAL STUD. 141 (2002) (explaining how values and interests have led to the global anti-corruption movement); Rachel Brewster, *The Domestic and International Enforcement of the OECD Anti-Bribery Convention*, 15 CHI. J. INT'L L. 84 (2014) (examining a member state's efforts to enforce its own national legislation and prohibit foreign corruption within its territory with regard to its nationals doing business abroad); see also CECILY ROSE, *INTERNATIONAL ANTI-CORRUPTION NORMS: THEIR CREATION AND INFLUENCE ON DOMESTIC LEGAL SYSTEMS* (2015) (tracing the creation of international anti-corruption norms by state actors).

<sup>5</sup> The OECD Anti-Bribery Convention was adopted under the initiative of the U.S. to combat foreign bribery. See generally OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Dec. 17, 1997, S. Treaty Doc. No. 105-43 [hereinafter *Convention*], [https://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf) [<https://perma.cc/SMU3-H3NL>].

<sup>6</sup> To access OECD's database for monitoring countries' implementation and enforcement of the Anti-Bribery Convention, see *Country Monitoring of the OECD Anti-Bribery Convention*, OECD, <http://www.oecd.org/corruption/countrymonitoringoftheoecdanti-briberyconvention.htm> [<https://perma.cc/7TX9-FGQW>] (last visited Jan. 19, 2018).

review monitoring system that is carried out under the OECD Working Group on Foreign Bribery. The management process is implemented through various phases to determine whether legislation and enforcement capacities of states are in compliance with the Convention for effective prevention of corruption and foreign bribery. Based on reports submitted by governments and on-site visits with relevant actors, including business representatives and civil society groups, the Working Group provides specific recommendations to each individual state that are continuously followed-up on in the peer review process and published on its website. All of this data from 2000 until 2015 was analyzed to assess the general performance of states by numerically coding the implementation status of the specific recommendations for each state. The quantitative assessment is further supported by a qualitative assessment of two countries, the United Kingdom and the Republic of Korea, to determine how management tools have influenced these specific states and to examine the factors which have enabled such change. The United Kingdom adopted the Bribery Act in 2010 while the Republic of Korea began to sanction companies for foreign bribery, providing a useful assessment in examining the role of the OECD Working Group in the monitoring process. Qualitative evidence is based on official reports from international organizations, governments, and interviews of independent experts and practitioners in the field. The hypothesis of this assessment is that management can influence states to take greater domestic legal action against businesses for foreign bribery.

Ultimately, by providing insight into the effectiveness of these management tools, this assessment can not only contribute to the enhancement of the management process under the anti-corruption regime, but it can also provide important lessons for management in other international regimes, particularly for regulating transnational business activity. For example, in the area of business and human rights, there are discussions for the adoption of a new treaty on business and human rights and some of the management tools used in the foreign bribery regime could be utilized in the business and human rights context.<sup>7</sup> More specifically,

---

<sup>7</sup> For discussions on the adoption of a new treaty on business and human rights, see Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9, at ¶ 1 (July 14, 2014) (directing the U.N. “to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activi-

foreign bribery management tools can provide valuable insight for enhancing detection, investigation and enforcement of company due diligence measures. Similar lessons could be provided in the area of the environment, particularly with the recent adoption of the Paris Agreement. As such, the last part will conclude with an analysis of conditions in which management processes can work most effectively as way to enhance compliance among states.

### *1.1. Chayeses' Managerial Theory*

The Chayeses' managerial theory is based on a new concept of sovereignty: sovereignty is no longer a state's capacity to act as an independent unit or a governmental autonomy, but rather where the state is connected to the rest of the world, maintaining its status or membership within the international system.<sup>8</sup> This status or membership of a state is based on the consent of the state to participate in international regimes, providing room for institutions to intervene in states' domestic affairs.<sup>9</sup> As states submit to these international regimes, the Chayeses argue that states have a propensity to comply due to efficiency, national interest and regime norms.<sup>10</sup> The management approach enhances efficiency because compliance with international norms provides a standard operating procedure for states and reduces transactional costs because there is no need to recalculate the costs and benefits of a decision.<sup>11</sup> Moreover, compliance can serve the interests of participating states

---

ties of transnational corporations and other business enterprises.”).

<sup>8</sup> CHAYES & CHAYES, *THE NEW SOVEREIGNTY*, *supra* note 1, at 26-27 (explaining that “Sovereignty, in the end, is status—the vindication of the state’s existence as a member of the international system.”).

<sup>9</sup> *Id.* at 230 (“[I]n the last analysis, the ability of a state to remain a participant in the international policy-making process — and thus its status as a member of the international legal system — depends in some degree on its demonstrated willingness to accept and engage the regime’s compliance procedures.”). See also Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 *STAN. J. INT’L L.* 283, 285 (2004) (referring to the International Commission on Intervention and State Sovereignty’s report on the Responsibility to Protect, which describes this newly defined sovereignty in which a state accepts the authority of institutions to intervene in its own domestic affairs if it fails to protect its own people).

<sup>10</sup> CHAYES & CHAYES, *THE NEW SOVEREIGNTY*, *supra* note 1, at 3-9.

<sup>11</sup> *Id.* at 4.

because treaties are consent-based instruments.<sup>12</sup> Lastly, the authors argue that regime norms induce state compliance because initial compliance is motivated by a normative consensus on an issue area.<sup>13</sup>

Yet, the Chayeses explain that there are circumstances when states do not comply due to ambiguity of treaty language, limitations on the capacity of parties to implement the treaty, or time lag between a state's undertaking and its performance.<sup>14</sup> As a way to address these sources of non-compliance, the Chayeses argue that the interactive process of justification, discourse, and persuasion can induce states to eventually submit to the pressures of international regulations.<sup>15</sup> The Chayeses, in particular, emphasize that institutions need to play an "active role in modifying preferences, generating new options, persuading the parties to move toward increasing compliance with regime norms, and guiding the evolution of the normative structure in the direction in the overall objectives of the regime."<sup>16</sup> More specifically, international institutions can persuade states to comply with international norms through essential tools of management, including transparency, norms and strategic interaction, reporting and data collection, and verification and monitoring.<sup>17</sup> This is not a vertical legal process in which norms are imposed on states; rather, it is a horizontal legal process in which continuous interaction among states can realign domestic priorities and agendas through more transparency, dispute settlement mechanisms, and capacity building, and thus improve compliance over time.<sup>18</sup> The Chayeses particularly emphasize trans-

---

<sup>12</sup> *See id.* (describing that treaties reflect the interests of states because they are consensual instruments and are accepted and obeyed due to shared norms of law abidance).

<sup>13</sup> *Id.* at 8 ("The existence of legal obligation, for most actors in most situations, translates into a presumption of compliance, in the absence of strong countervailing circumstances.").

<sup>14</sup> *See id.* at 9-17 (explaining that states often fall into noncompliance without intent to do so but due to extenuating circumstances).

<sup>15</sup> *Id.* at 25-28; *see also* ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 183 (1993) (finding that "the sanction for violating the norm is not penal, but the exclusion from the network of solidarity and cooperation").

<sup>16</sup> CHAYES & CHAYES, *THE NEW SOVEREIGNTY*, *supra* note 1, at 229.

<sup>17</sup> *See id.* at 112-96 (reviewing the importance of norms within treaty compliance).

<sup>18</sup> *See id.* at 22-28 (underscoring the importance of generating and disseminating information about parties' requirements within a treaty to ensure compliance).

parency as an important factor in changing the behavior of states, as this facilitates coordination among independent actors and provides reassurance that they are acting in accordance with other participants in the regime.<sup>19</sup> To enhance transparency, the management process also includes discourse among multiple stakeholders, including civil society groups.

Some realists and constructivists have pointed out limits of the managerial approach. For example, rationalists argue that the model is only useful when it concerns coordination games.<sup>20</sup> On the other hand, Koh, a major proponent of transnational legal process, argues that the model does not explain how norms are actually internalized into the state.<sup>21</sup> Nonetheless, in contrast to such alternative theories, the Chayeses' theory can be particularly useful in international regimes concerning transnational business activity since coordination and capacity building are key for addressing the

---

<sup>19</sup> See *id.* at 135 (“[Transparency] provides reassurance that [independent actors] are not being taken advantage of when their compliance with the norms is contingent on similar action by other (or enough other) participants in the regime.”).

<sup>20</sup> See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1830-33 (2002) (noting that the managerial approach does not explain situations in which states act against their own interests in exchange for concessions from other states); see also ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 17 (2008) (explaining that any sensible theory of international law must account for and seek to explain both instances of state compliance and of violation); KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979) (exploring the various theories that explain states' decision-making in entering treaties and legally binding obligations with one another); Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEGAL STUD. 115 (2002) (examining states' use of moral and legal arguments to advance their agenda).

<sup>21</sup> See Harold Hongju Koh, *Book Review: The New Sovereignty* (1997), Faculty Scholarship Series, Paper 2098 (arguing that “it says nothing about the means – for example, judicial incorporation, legislative embodiment or executive acceptance – by which a complying state will signal its internal acceptance of the relevant international standard.”). According to Koh, norms are internalized through a process of repeated “interactions” characterized by ongoing interpretation, which over time result in their being incorporated into the domestic legal system. See also Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599 (1997) (book review) (identifying states' motivations for observing international legal systems); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) (contesting the notion that there is no international legal scholarship); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998) (unpacking the literature surrounding states' interaction with international law); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L. J. 1397, 1407 (1998) (“True compliance is not so much the result of externally imposed sanctions . . . as internally felt norms.”).

technical and legal complexities surrounding regulation of corporations. As it will be further discussed in the next section, the OECD Anti-Bribery Convention specifically aims to regulate such transnational business activity in order to enhance coordination for detection, investigation of companies that are allegedly involved in foreign bribery. In this aspect, an assessment of the management process of the OECD Anti-Bribery Convention can provide valuable insight on ways to enhance coordination among states and build individual capacity of states for greater state compliance.

## 2. ASSESSMENT OF MANAGEMENT IN THE OECD ANTI-BRIBERY CONVENTION

The OECD Anti-Bribery Convention entered into force in 1999, and thirty-five OECD member countries and eight non-member countries, including Argentina, Brazil, Bulgaria, Colombia, Russia, and South Africa, have adopted this Convention. Monitoring is carried out by the OECD Working Group on Bribery through a rigorous peer-review system based on Article 12 of the Convention.<sup>22</sup> The monitoring system also contains many of the key management tools proposed by the Chayeses, which include norms and strategic interaction, reporting, data collection, verification and monitoring, to increase transparency and enhance capacity of states for effective compliance. The next section will explain the key features of the management approach outlined in the OECD Anti-Bribery Convention in more detail.

### 2.1. *Key Features of Management in the OECD Anti-Bribery Convention*

Unlike the U.N. Convention against Corruption, which has adopted an implementation review system for 177 member states,

---

<sup>22</sup> Convention, *supra* note 5, at art. 12 (“The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body.”).

the OECD has been able to adopt a more rigorous monitoring mechanism that specifically focuses on forty-three member countries, including the eight non-member countries that are parties to the Convention.<sup>23</sup> The key feature of the management process is the peer review system, which enables independent monitoring and production of credible and reliable data.<sup>24</sup> In order to evaluate the performance of each state, two countries are chosen to lead the peer review supported by a team from the OECD Secretariat.<sup>25</sup> The Working Group conducts assessments based on responses to questionnaires submitted by states, independent research through on-site visits in consultation with government officials, law enforcement officials, independent experts, representatives from the private sector, and the civil society.<sup>26</sup> Participation of various stakeholders is a key part of the monitoring process, ensuring that all opinions are heard by the examiners.<sup>27</sup> Apart from these on-site

<sup>23</sup> See ROSE, *supra* note 4, at 97-132 (explaining that participation in the implementation review system under the U.N. Convention against Corruption is non-mandatory and many of the provisions under the review system are vague).

<sup>24</sup> See *Peer Pressure: A Related Concept*, OECD, <http://www.oecd.org/site/peerreview/peerpressurerelatedconcept.htm> [<https://perma.cc/SK8W-J8HP>] [hereinafter *Peer Pressure*] (explaining that this form of peer pressure is not conducted through legally binding acts as sanctions or other enforcement mechanisms, but is instead a means of soft persuasion to stimulate states to change).

<sup>25</sup> THE OECD CONVENTION ON BRIBERY: A COMMENTARY ON THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS OF 21 NOVEMBER 1997 44-46 (Mark Pieth, Lucinda A. Low, & Nicola Bonucci eds., 2014) [hereinafter THE OECD CONVENTION ON BRIBERY: A COMMENTARY]. See generally *Phase 1 Country Monitoring of the OECD Anti-Bribery Convention*, OECD, <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/phase1countrymonitoringoftheoecdanti-briberyconvention.htm> [<https://perma.cc/KV4W-VEKE>].

<sup>26</sup> The first stage is the preparatory stage, where the evaluated country fills out a detailed questionnaire. Once the lead examiners are selected, a more specialized follow-up questionnaire and on-site visit is followed in phases two and three. In all procedures, the draft report is prepared by the Secretariat in consultation with lead examiners and the country examined. Once the draft report is completed, hearings begin, which consist of informal consultations between examiners, representatives of the examined country and the Secretariat in order to clarify any misunderstandings and minimize disagreement. There is a total of two hearings; in the second hearing, the country examined is entitled to include a dissenting opinion in the text. After the written text is completed, based on approval of the country, it is published on the OECD website. THE OECD CONVENTION ON BRIBERY: A COMMENTARY, *supra* note 25, at 44-46.

<sup>27</sup> *Id.* (“[T]he private sector and civil society play an essential role in the procedures of the Working Group on Bribery. Whereas in Phase 1 their contributions are introduced in writing and distributed to the Working Group on Bribery as ‘room documents,’ an elaborate system of hearings during the on-site visits allows

visits, the OECD Working Group also has a procedure called the "*Tour de Table*," which is conducted four times a year.<sup>28</sup> This procedure allows state parties to report on their legislative processes and raise questions to each country about foreign bribery cases reported to the public.<sup>29</sup> States are required to report on the status of each case, and respond to questions on how they have handled them.<sup>30</sup> The status of these cases is recorded and updated through a form of comments called the "Matrix."<sup>31</sup> In addition, in the "*Tour de Table*," the Working Group addresses specific topics related to enforcement as prosecutors from each country respond to questions provided by their peers.<sup>32</sup> This latter set of discussions is confidential, but the material is used in the evaluations.

A second key feature of this monitoring process is that it is conducted in two levels throughout three different phases: a legislative process to ensure that states have adequate legislation in place, and an enforcement process to ensure that they are properly equipped with the necessary knowledge and capacity to enforce the law. In the legislative process, the Working Group on Bribery can make recommendations to amend the scope of application for certain legislation.<sup>33</sup> In the enforcement process, various elements are assessed. For example, states are at times required to respond to queries on the number of investigations and prosecutions commenced each year, or other discontinued investigations and the reasons for discontinuing them. Further assessments are made as to whether state authorities have created institutional mechanisms

---

all opinions to be heard by the examiners.").

<sup>28</sup> *Id.*

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

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

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> For example, the U.N. Working Group on Bribery often recommends that states expand the scope of their laws on foreign bribery to include third parties. Other recommendations include enactment and amendments of laws regarding whistleblower protection; obligation of public officials and employees of development agencies to report to prosecution authorities; inclusion of the liability of legal persons for foreign bribery; increase of sanctions on corporations that are effective, proportionate and dissuasive; adoption of nationality jurisdiction for the bribery of foreign officials to reach extraterritorial activities; and other policies for prosecutorial discretion, to ensure that parties are not influenced by considerations of national economic and political interests. See generally OECD, COMPILATION OF RECOMMENDATIONS MADE IN THE PHASE 2 REPORTS (2010), <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/45605080.pdf> [<https://perma.cc/C9UF-NY8N>].

to generate awareness of the laws or have developed early warning indicators for government agencies and companies.<sup>34</sup> States will also evaluate whether there is intra-state cooperation among different agencies including home-country embassies, development-assistance agencies, foreign and trade ministries, and export finance institutions between host and home governments.<sup>35</sup>

Third, there is regular follow-up after each phase to assess whether each state has in practice implemented the specific recommendations provided by the Working Group. The state is required to report to the OECD Working Group after evaluation of each phase, to discuss whether it has followed up on the individual recommendations and include reasons for not implementing the recommendations if they have not done so. It is first required to present orally one year after the recommendation, and subsequently required to submit a written report on its implementation status two to three years later.<sup>36</sup> The OECD Working Group on Bribery then produces a follow-up report on each phase for each individual country, and concludes whether there has been full implementation, partial implementation or no implementation for each specific recommendation. These reports are posted on the OECD website for the public to access.<sup>37</sup> Although the evaluated country is not likely to block the decision of the Working Group since it does not have the right to veto, it is given ample time to represent its case and introduce a dissenting opinion if they find it necessary.<sup>38</sup> Pub-

---

<sup>34</sup> See generally OECD, COMPILATION OF RECOMMENDATIONS MADE IN THE PHASE 3 REPORTS (2014), <http://www.oecd.org/corruption/anti-bribery/CompilationofRecommendationsP3ReportsEN.pdf> [<https://perma.cc/HU9W-AJ2L>].

<sup>35</sup> Based on these assessments, the OECD Working Group often makes recommendations to raise awareness and training for prosecutors and judges regarding the importance of placing sanctions on corporations, and to adopt guidelines to strengthen its intelligence gathering capacity among inter-governmental agencies. The Working Group also ensures that states are allocating adequate human and financial resources, increasing mutual legal assistance with other states, and encouraging companies to introduce codes of conduct and compliance programs. States are further recommended to incorporate guidelines on public procurement to debar companies and individuals involved in illicit conduct; See generally OECD Working Group on Bribery in International Business Transactions, Compilation of Recommendations made in the Phase 3 Reports (2014), <http://www.oecd.org/corruption/anti-bribery/CompilationofRecommendationsP3ReportsEN.pdf>.

<sup>36</sup> THE OECD CONVENTION ON BRIBERY: A COMMENTARY, *supra* note 25, 47.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* The country may find an ally, and the consensus of the Group may be blocked, and the text modified, but this is unlikely because states often do not find

lishing these reports serves to impose peer pressure on states, which can be intensified through involvement of the media and public scrutiny.<sup>39</sup>

Lastly, the OECD may take extraordinary measures to make the peer process more effective.<sup>40</sup> If the Working Group on Bribery determines that implementation remains insufficient, along with additional written reports and oral presentations, it may request a second on-site visit, which is referred to as Phase 2bis or 3bis.<sup>41</sup> As a way to intensify pressure on states, the Working Group on Bribery is even entitled to send official letters to governments, Ministers, Prime Ministers or Presidents, as well as high-level political missions to state parties.<sup>42</sup> They may at times issue formal public statements and press releases for “continued failure to adequately implement” the recommendations.<sup>43</sup> The OECD has gone so far as to threaten the United Kingdom in Phase 2bis in 2008 of a trade sanction to speed up the legislative process.<sup>44</sup>

---

it in their political and economic interest to give a particular participant preferential treatment.

<sup>39</sup> See *Peer Pressure*, *supra* note 24 (finding that peer pressure is particularly effective when it is made available to the public and the press is actively engaged in the story).

<sup>40</sup> THE OECD CONVENTION ON BRIBERY: A COMMENTARY, *supra* note 25, at 47-48 (sect.3.2).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* The OECD expressed serious concern to France and Spain regarding their lack of foreign bribery convictions. See Press Release, OECD, OECD Seriously Concerned at Lack of Foreign Bribery Convictions in France, But Recognises Recent Efforts to Ensure Independence of Prosecutors (Oct. 23, 2012), <http://www.oecd.org/corruption/oecdseriouslyconcernedatlackofforeignbriberyconvictionsinfrancebutrecogniserecenteffortstoensureindependenceofprosecutors.htm> [<https://perma.cc/T9MC-CC3N>] (stating that OECD Working Group on Bribery’s report on France gives a list of recommendations, while highlighting the country’s positive reforms); see also Press Release, OECD, OECD Seriously Concerned by Absence of Foreign Bribery Convictions in Spain (Jan. 8, 2013), <http://www.oecd.org/daf/anti-bribery/oecdseriouslyconcernedbyabsenceofforeignbriberyconvictionsinspain.htm> [<https://perma.cc/9EPW-83HQ>] (addressing the OECD’s concern with Spain’s foreign bribery convictions).

<sup>44</sup> *Id.*; see also OECD, UNITED KINGDOM: PHASE 2BIS: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS (2008) [hereinafter U.K. PHASE 2BIS REPORT], <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/41515077.pdf> [<https://perma.cc/5VSH-7X26>] (detailing the United Kingdom’s Phase 2bis pro-

Overall, these features all include the elements originally proposed by the Chayeses in their managerial theory. The monitoring process has provided a transparent information system and a managerial response system. Provision of transparent information and data has the effect of reassuring states through reliable knowledge about respective compliance level, thus deterring a state from contemplating a violation due to fear of discovery of these violations. The managerial response system, on the other hand, is a process of continuous discourse in which states are continuously assessed and evaluated on their individual performance to determine whether there can be further improvement. This process enables states to build their capacity and awareness of relevant issues in order to effectively implement the Convention. The next part will present how the assessment was conducted and its findings.

## *2.2. Scope and Methodology of Analysis*

The main purpose of the assessment is to measure the effectiveness of the management process by analyzing the compliance level of states. Compliance levels can be measured by evaluating whether individual states actually took steps to follow up on the specific recommendations provided by the OECD Working Group on Bribery. The research was conducted through analysis of reports produced by the OECD Working Group on Foreign Bribery from 2000 until 2015. It specifically examined states' follow-up measures to recommendations provided in Phase 2 and Phase 3, which both include the legislative and enforcement processes.<sup>45</sup> Phase 2 reviews the legislative and practical implementation and the efficacy of the institutional framework that was examined in Phase 1, while Phase 3 focuses on enforcement and other cross-cutting issues concerning foreign bribery.<sup>46</sup> Countries which did

---

cedures and efforts to combat bribery).

<sup>45</sup> Phase 3 is not limited to recommendations on enforcement, but further includes general recommendations provided in 2009 and other outstanding recommendations from Phase 2. See *Country Monitoring of the OECD Anti-Bribery Convention*, *supra* note 6.

<sup>46</sup> See OECD, FIGHTING THE CRIME OF FOREIGN BRIBERY: THE ANTI-BRIBERY CONVENTION AND THE OECD WORKING GROUP ON BRIBERY 6 (2017), <http://www.oecd.org/daf/anti-bribery/Fighting-the-crime-of-foreign-bribery.pdf> [<https://perma.cc/2539-KAZL>] (breaking down the implementation of the Convention into its four phases).

not take part in Phase 3 before 2015 were not included in the study.

During the follow-up process of Phases 2 and 3, the OECD Working Group on Bribery determines whether the state in question has fully implemented the recommendation, partially implemented the recommendation, or made no implementation at all. In some cases, it may determine that the matter is still under consideration. Based on these decisions made by the Working Group, in order to conduct a quantitative assessment, these determinations are numerically coded by the author: "1" if the state has fully implemented the recommendation; "0.5" if it has partially implemented the recommendation; "0.25" if the implementation status is still under consideration; and "0" if the recommendation has not been implemented at all. These numbers are added, and a percentage is provided based on the total number of recommendations of each state. To ensure the most comprehensive picture possible, information was cross-checked across all data to maximize accuracy and detail. The independent variable was the individual recommendations, and the dependent variable was the follow-up status of each state.

Such a quantitative approach to analyzing the reports of twenty-three countries can provide broad coverage of the general performance of OECD member states in response to the management process under the Convention. However, there are certain limitations. The quantitative assessment may not necessarily prove causation because there may be other factors that contributed to implementation of the specific recommendations. Other factors such as changes in the domestic economy or changes in regulation of corporations may have affected compliance. Broad enforcement of the U.S. Foreign Corrupt Practices Act ("FCPA") may also have been a factor in influencing the behavior of States. Nevertheless, as these were designed to accommodate the domestic circumstances of each state, the recommendations significantly reduce such risks. Moreover, the qualitative assessment of the United Kingdom and the Republic of Korea provides more support for the causal relationship that exists between the OECD recommendations and implementation status of each country.

### 2.3. Findings

Figure 1 on the next page presents an overview of the follow-

up status for each state. It shows that in general, states have taken more action to follow up on recommendations in Phase 2, with an average rating of 62%, while taking less action in Phase 3 with an average rating of 56%. These ratings are produced by adding all the follow-up ratings of each individual country that participated in Phase 2 and Phase 3 of the monitoring process as shown in Figure 1, creating a percentage based on the total number of participating countries. The follow-up rating of each individual country is based on a percentage of individual recommendations implemented for each phase. These findings are consistent with the enforcement data produced by the OECD in 2013 since countries that have some of the highest enforcement ratings in figure 1 have actually placed sanctions on corporations for foreign bribery.<sup>47</sup> This 2013 report shows that Belgium, Canada, Germany, Italy, Japan, Korea, Norway, United Kingdom and the United States were the only countries that placed sanctions on legal persons for foreign bribery.<sup>48</sup>

---

<sup>47</sup> See OECD, WORKING GROUP ON BRIBERY: 2013 DATA ON ENFORCEMENT OF THE ANTI-BRIBERY CONVENTION (2014), <http://www.oecd.org/daf/anti-bribery/Working-Group-on-Bribery-Enforcement-Data-2013.pdf> [<https://perma.cc/H7ZP-72Y4>] (comparing data collected from the forty parties to the Anti-Bribery Convention from 1999 to December 2013).

<sup>48</sup> *Id.*; see also Transparency International, EXPORTING CORRUPTION, PROGRESS REPORT 2015: ASSESSING ENFORCEMENT OF THE OECD CONVENTION ON COMBATING FOREIGN BRIBERY 6 (2015), [http://www.ti-aus-tria.at/uploads/media/Exporting\\_Corruption\\_Progress\\_Report\\_2015\\_EN\\_01.pdf](http://www.ti-aus-tria.at/uploads/media/Exporting_Corruption_Progress_Report_2015_EN_01.pdf) [<https://perma.cc/VMD9-WKGR>] (stating that twenty-two of the forty-one OECD Anti-Bribery Convention signatories have failed to prosecute any foreign bribery case since they joined the Convention).

2018] *Domestic Impact of the Management Process* 971

**Figure 1: Follow-Up Rating for Each State**

	<b>Phase 2</b>	<b>Phase 3</b>
<b>United States of America*</b>	63%	80%
<b>Japan*</b>	78%	56%
<b>Germany*</b>	56%	56%
<b>United Kingdom*</b>	63%	67%
<b>France*</b>	96%	38%
<b>Italy*</b>	44%	48%
<b>Canada*</b>	48%	65%
<b>Republic of Korea*</b>	61%	75%
<b>Australia*</b>	73%	62%
<b>Spain*</b>	30%	26%
<b>Mexico*</b>	66%	41%
<b>Netherlands*</b>	78%	64%
<b>Switzerland*</b>	60%	68%
<b>Sweden*</b>	66%	77%
<b>Norway*</b>	100%	75%
<b>Denmark*</b>	27%	75%
<b>Finland*</b>	61%	32%
<b>Czech Republic</b>	64%	48%
<b>Hungary</b>	50%	50%
<b>Slovak Republic</b>	78%	67%
<b>Luxembourg</b>	50%	48%
<b>Bulgaria</b>	65%	40%
<b>Iceland</b>	39%	20%

\*Countries in the top 25 of GDP Ranking Table (World Bank, 2015) listed according to their GDP ranking<sup>49</sup>

Furthermore, Figure 1 shows that countries with the highest GDPs tend to have higher enforcement ratings on average. Australia, Canada, Germany, Japan, Republic of Korea, Netherlands Sweden, Switzerland, United Kingdom and the United States all have ratings above 55%. However, there are exceptions. For instance, France, Italy, Mexico, Spain, and Finland have lower follow-up ratings relative to their economic size. In these countries,

<sup>49</sup> World Bank, Gross Domestic Product Ranking Table 2015, <https://data.worldbank.org/gdp-ranking> [https://data.worldbank.org/gdp-ranking].

other political and legal factors may have reduced the willingness and capability to carry out the individual recommendations for enforcement. In the case of France, the OECD expressed serious concerns over its implementation of the Anti-Bribery Convention in 2014, stating notably that public prosecutors were not given statutory guarantees to exercise their functions without undue political influence.<sup>50</sup> Additionally, Spain, Mexico, Italy, and Finland were unable to follow up with many of the recommendations due to lack of legal reform or deficiencies in their respective penal codes.<sup>51</sup>

While some may be critical of the work of the OECD management system because more than half of the state's parties have not sanctioned corporations for foreign bribery based on the OECD enforcement data, Figure 1 does illustrate that states have been making incremental changes to enhance their capabilities, particularly in the legislative process. Such changes are more visible in Figures

---

<sup>50</sup> See Press Release, OECD, Statement of the OECD Working Group on Bribery on France's Implementation of the Anti-Bribery Convention (Oct. 23, 2014), <http://www.oecd.org/newsroom/statement-of-the-oecd-working-group-on-bribery-on-france-s-implementation-of-the-anti-bribery-convention.htm> [<https://perma.cc/8JWA-HEZU>] ("French authorities committed, through a statement by their Minister of Justice, to adopt other measures, including decisive changes to their criminal policy. However, reforms which would have given public prosecutors the necessary statutory guarantees to exercise their functions without undue political influence which is required for the proper administration of justice, did not materialise.").

<sup>51</sup> See OECD, SPAIN: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS 4 (2015), <https://www.oecd.org/daf/anti-bribery/Spain-Phase-3-Written-Follow-Up-Report-EN.pdf> [<https://perma.cc/L4SZ-CGRB>] ("A majority of the recommendations that Spain has not implemented (12) are related to deficiencies in Spain's Penal Code. . . ."); OECD, MEXICO: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS 3-5 (2014), <https://www.oecd.org/daf/anti-bribery/MexicoPhase3WrittenFollowUpEN.pdf> [<https://perma.cc/6YSQ-6GM2>] (noting that legislation on foreign bribery offence was not enacted); OECD, ITALY: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS 4-5 (2014), <https://www.oecd.org/daf/anti-bribery/ItalyP3WrittenFollowUpReportEN.pdf> [<https://perma.cc/74VQ-LJDJ>] (discussing the lack of action with regards to foreign bribery offences); OECD, FINLAND: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS 3 (2013), <https://www.oecd.org/daf/anti-bribery/FinlandPhase3WrittenFollowUpReportEN.pdf> [<https://perma.cc/EZ7Z-HUZZ>] ("Of particular concern is the lack of action by Finland to make the necessary legislative amendments. . . ."); see also Press Release, OECD, In Support of Its Active Enforcement Efforts, Italy Should Urgently Extend the Time Frame for Prosecuting Foreign Bribery, <http://www.oecd.org/daf/anti-bribery/insupportofitsactiveenforcementeffortsitallyshouldurgentlyextendtimeframeforprosecutingforeignbribery.htm> [<https://perma.cc/QKK6-W88N>] (reporting that existing limits to the statute of limitations is the primary reason that significant enforcement efforts have led to only limited results).

2018] *Domestic Impact of the Management Process* 973

2 and 3, which categorize the areas in which states have followed up to each individual recommendation. The numbers in Figures 2 and 3 refer to the sum of individual recommendations provided to all countries evaluated, categorizing them into different areas in which the recommendations were given, as distinguished under the OECD country reports. The sum of these individual recommendations is further divided into whether there was full implementation ("F"), partial implementation ("P"), implementation under consideration ("C"), or no implementation ("N"). For example, in Figure 2: Phase 2, under the category of awareness-raising, twenty-seven recommendations were fully complied, 29 recommendations were partially complied, and only four recommendations were not complied with.

**Figure 2: Phase 2**

Category	Total Number of Recommendations			
	F	P	C	N
<b>Awareness-Raising</b>	27	29		4
<b>Detection, Reporting, Investigation &amp; Prosecution, Prevention</b>	66	33	6	24
<b>Prosecution, Enforcement</b>	30	11	1	7
<b>Sanction, Confiscation</b>	8	7		11
<b>Taxation, Accounting, Auditing, Money Laundering</b>	23	19		12
<b>Offence of Foreign Bribery</b>	8	2	1	8
<b>Liability of Legal Persons</b>	2	3		10
<b>Jurisdiction, Territory</b>	4	2		1
<b>Extradition, Mutual Legal Assistance, International Cooperation</b>	1			
<b>Official Development Assistance, Public Procurement</b>	1	4		1
<b>Statistics</b>	4	4		
<b>Resources</b>	2			
<b>Statute of Limitations, Limitation Period</b>	1			
<b>Amendment</b>	1			

**Figure 3: Phase 3**

Category	Total Number of Recommendations			
	F	P	C	N
<b>Awareness-Raising</b>	17	14		9
<b>Detection, Reporting, Investigation &amp; Prosecution, Prevention</b>	57	46		34
<b>Prosecution, Enforcement</b>	10	4		4
<b>Sanction, Confiscation</b>	12	13		24
<b>Taxation, Accounting, Auditing, Money Laundering</b>	44	39		30
<b>Offence of Foreign Bribery</b>	8	9		20
<b>Liability of Legal Persons</b>	5	11		15
<b>Jurisdiction, Territory</b>	4	2		4
<b>Extradition, Mutual Legal Assistance, International Cooperation</b>	5	7		4
<b>Official Development Assistance, Public Procurement</b>	16	8		17
<b>Statistics</b>	1	3		1
<b>Resources</b>	6	4		
<b>Statute of Limitations, Limitation Period</b>	2			3

F= Full Implementation, P= Partial Implementation, C= Implementation under Consideration, N= No Implementation

Figures 2 and 3 show that in both Phase 2 and Phase 3, states have made their greatest efforts to enhance detection, reporting, and investigation and prosecution capabilities for preventing foreign bribery, and to raise awareness on domestic foreign bribery laws. Most of the recommendations are also related to these areas. More specifically, in Phase 2, a total of 129 recommendations were provided to states in the area of detection, reporting, investigation, prosecutions and prevention and 77% of these recommendations were fully or partially implemented. Similarly, in Phase 3, 75% of the recommendations were fully or partially complied with in the same category. Compliance level for awareness-raising in Phase 2 is high since 93% of the recommendations had been fully or partially complied with. There is also a relatively high level of compliance for recommendations regarding measures to enhance detection through taxation, accounting, auditing and money laundering

since 78% of the recommendations in Phase 2, and 73% of the recommendations in Phase 3 had been fully or partially implemented. For recommendations regarding prosecution and enforcement, which primarily aim to ensure that prosecution and enforcement is effective, about 80% of the recommendations were fully or partially implemented.

However, it is surprising to note that there have been fewer follow-up measures for recommendations regarding liability of legal persons and sanctions on corporations – one of the key elements of the Convention. This applies to both Phase 2 and Phase 3 of the monitoring process. More specifically, for liability of legal persons in Phase 2, a total of 15 recommendations had been provided and only 33% of these recommendations had been fully or partially implemented. In Phase 3 for liability of legal persons, 52% of the recommendations had been fully or partially implemented. On the other hand, for sanctions and confiscations, about half of the recommendations were not implemented in the enforcement process.

A representative from the OECD Anti-Corruption Division suggested in an interview that there are certain challenges in enforcing liability of legal persons due to the fact that corporate criminal responsibility is still a new concept in many countries.<sup>52</sup> For example, during Phase 3, the Working Group found that the Slovak Republic “does not know the concept of criminal liability of legal persons.”<sup>53</sup> It is also difficult to detect the actual crime as it often involves complex corporate structures that concern multiple jurisdictions, requiring more resources and training for enforcement.<sup>54</sup> As a result, many states confront challenges in legislation and enforcement on liability of legal persons and placing sanctions on corporations.

Despite such challenges, the management process influenced all forty-three signatories to the OECD Anti-Bribery Convention to adopt a provision on liability of legal persons for foreign bribery, and this new legal framework in turn has increased pressure on companies to enhance their compliance measures in their global

---

<sup>52</sup> Telephone Interview with Representative from the OECD, Anti-Corruption Division (Sept. 24, 2015) [hereinafter Telephone Interview]. The views expressed are personal and do not necessarily represent those of the OECD or of the parties to the OECD Anti-Bribery Convention.

<sup>53</sup> OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE SLOVAK REPUBLIC 16 (2012), <http://www.oecd.org/daf/anti-bribery/SlovakRepublicphase3reportEN.pdf> [<https://perma.cc/5XWE-NGUD>].

<sup>54</sup> Telephone Interview, *supra* note 52.

operations.<sup>55</sup> All state parties also now have laws in place to reach extraterritorial activities of companies based on the nationality principle.<sup>56</sup> Moreover, with regard to recommendations on liability of legal persons, certain countries did not comply with recommendations to incorporate liability of legal persons into their domestic legal systems in phase 2 of the monitoring process, but these countries eventually incorporated it as a result of OECD's extraordinary measures after phase 2 evaluations were completed. For example, in phase 2, countries such as Bulgaria, Luxembourg, and Slovak Republic initially did not follow up recommendations to incorporate liability of legal persons into their domestic system, but eventually did so following continuous pressure from the OECD Working Group on Bribery. In the case of Luxembourg, it did not even adopt the concept at the time the written follow-up report was submitted in 2006. It was only in the oral follow-up report in 2007 that it informed the Working Group of a bill placed before Parliament to introduce criminal liability of legal persons.<sup>57</sup> Accordingly, the OECD Working Group Phase 2 evaluation team examined the bill and issued reservations on certain elements of this bill.<sup>58</sup> In March 2010, Luxembourg's Minister of Justice finally informed the OECD Secretary-General that the law introducing criminal liability of legal persons had been adopted.<sup>59</sup> This example demonstrates

---

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

<sup>56</sup> *Id.* The OECD continuously encouraged states to interpret their domestic laws more broadly to reach extraterritorial activities of companies. See THE OECD CONVENTION ON BRIBERY: A COMMENTARY, *supra* note 25, at 333 (pointing out that the phrase under art. 4(1) of the OECD Anti-Bribery Convention stating "in whole or in part in its territory" was continuously repeated "mantra-like, in every WGB country evaluation"); see also OECD, MID-TERM STUDY OF PHASE 2 REPORTS 151-52 (2006) [hereinafter PHASE 2 MID-TERM REPORT], <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/36872226.pdf> [<https://perma.cc/FD7G-HEXJ>] (recommending states to apply the nationality jurisdiction not only to individuals but to legal persons).

<sup>57</sup> See OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN LUXEMBOURG 14 (2011), <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Luxembourgphase3reportEN.pdf> [<https://perma.cc/T9K2-8G6Z>] ("The bill would amend the Penal Code, inserting into it a chapter on 'penalties applicable to legal persons', and also the Code of Criminal Procedure, to which would be added a section on 'proceedings against legal persons'").

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*; see also PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE SLOVAK REPUBLIC, *supra* note 53, at 16 (reporting that the Slovak Republic did not establish liability of legal persons for foreign bribery even during the Phase 2 written follow-up in 2008. Therefore, the OECD Working

that it takes a great deal of time to undergo legal reform, particularly when incorporating new concepts, but with assistance from the OECD Working Group, states are able to incorporate the necessary legislation to comply with the Convention.

While the Ministry of Justice in most countries initiated efforts to incorporate liability of legal persons for foreign bribery into their systems, Chile represents an interesting case in which company representatives at an on-site visit expressed support for such a measure.<sup>60</sup> The Ministry of Justice found that it would be difficult to achieve such legal reform, but Chilean business representative insisted that it was in the interest of businesses to push for such obligations because of the country's reliance on the global trading system.<sup>61</sup> Chile eventually did incorporate a provision on liability of legal persons in 2009.<sup>62</sup>

In this regard, these findings not only support the Chayeses' managerial theory, but further advance the theory by illustrating how management can induce compliance among states through the shaping of domestic laws. By recommending states to adopt the concept of liability of legal persons and other relevant standards, the OECD management process helped harmonize domestic laws and level the playing field for states and businesses. Alignment of international standards further eased administrative burdens for companies and induced them to adopt more robust due diligence measures in their global operations.

In terms of enforcement, OECD enforcement data has shown that more than half of the state parties have not sanctioned corporations for foreign bribery.<sup>63</sup> However, Figures 2 and 3 do show

---

Group decided in September 2009 that the Slovak Republic was obliged to inform regularly at each plenary about the development of this issue until the recommendation to adopt a new law on liability of legal persons for foreign bribery was implemented in a satisfactory manner. The Slovak Republic eventually reported in June 2010 that it amended its Criminal Code on April 27, 2010).

<sup>60</sup> OECD, CHILE: PHASE 2 REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, 41 (2007), <http://www.oecd.org/chile/39540391.pdf> [<https://perma.cc/V5N5-YTWM>].

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

<sup>62</sup> OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN CHILE 14 (2014), <https://www.oecd.org/daf/anti-bribery/ChilePhase3ReportEN.pdf> [<https://perma.cc/6NVB-CY54>] ("In 2009, Chile enacted Law 20 393 to create criminal liability of legal persons for foreign and domestic bribery, money laundering, and terrorism of financing. . .").

<sup>63</sup> See OECD, WORKING GROUP ON BRIBERY, *supra* note 47, at 1 (highlighting

that there have been developments to enhance enforcement capabilities through raising awareness, enhancing detection and reporting, and other investigation and prosecution techniques based on recommendations of the OECD. More specifically, Figure 2 demonstrates that in Phase 3, out of 137 recommendations to all countries in the area of detection, reporting, investigation and prosecution and prevention, 57 recommendations were fully implemented, and 46 recommendations were partially implemented.

Compliance level for awareness-raising is particularly high, which has helped influence large corporations to incorporate necessary compliance measures.<sup>64</sup> In terms of detection, the OECD has focused on building sufficient inter-agency communication because detection of foreign bribery can involve multiple sources.<sup>65</sup> The establishment of independent anti-corruption agencies in certain countries has been particularly effective for awareness-raising and coordinating agency efforts.<sup>66</sup> In addition, the OECD has encouraged states to impose reporting obligations on officials and even impose sanctions for non-compliance.<sup>67</sup> As a result, by 2006, almost half of the parties required their public officials to report suspected foreign bribery to law enforcement authorities.<sup>68</sup> Nevertheless, the 2014 Foreign Bribery Report found that there were an extremely low number of concluded cases, leading the OECD to propose the need to strengthen reporting by public authorities.<sup>69</sup>

---

that seventeen parties to the Anti-Bribery Convention have since imposed sanctions for foreign bribery).

<sup>64</sup> See PHASE 2 MID-TERM REPORT, *supra* note 56, at 129 (“SMEs lag behind large companies in the creation and implementation of codes of conduct and compliance programmes that serve, among other purposes, to educate management and staff on issues of what constitutes an offence and what to do if confronted with a situation involving foreign bribery.”).

<sup>65</sup> *Id.* at 135.

<sup>66</sup> See *id.* at 136 (“Centralising the exchange of information and ensuring regular inter-agency communication have been achieved by some Parties through the creation of anti-corruption bodies that perform an oversight and co-ordinating role.”).

<sup>67</sup> See *id.* at 131, 137-39 (“In the Slovak Republic, foreign diplomatic personnel are required to report all crimes involving foreign bribery to the law enforcement authorities in the Slovak Republic as well as to the Ministry of Foreign Affairs, Ministry of Interior and the Slovak prosecutor’s office.”).

<sup>68</sup> See *id.* (clarifying that these countries include Belgium, Bulgaria, France, Greece, Hungary, Italy, Korea, Luxembourg, Mexico and the Slovak Republic).

<sup>69</sup> See OECD, OECD FOREIGN BRIBERY REPORT: AN ANALYSIS OF THE CRIME OF BRIBERY OF FOREIGN PUBLIC OFFICIALS 33-34, <https://www.oecd-ilibrary.org/docserver/9789264226616-en.pdf?expires=1522951942&id=id&accname=ocid177112&checksum=9D054D0C3>

Lastly, the OECD ensured that states were not influenced by executive decisions in accordance with Article 5 of the Convention.<sup>70</sup> For example, it issued press release statements to express concerns over the lack of independence of prosecutors in France.<sup>71</sup>

#### 2.4. *Concluding Observations*

In sum, the OECD monitoring process has influenced states to take greater action, but states face certain challenges when it comes to implementing recommendations on liability of legal persons for foreign bribery. Figure 2 has shown that there is a relatively low level of compliance with regard to recommendations on liability of legal persons. This is due to the fact that the concept of liability of legal persons is still relatively new in certain states and sufficient human and financial resources are needed to enforce liability on legal persons. The data in Figure 1 does illustrate that capacity of states can influence their compliance levels since states with higher economic and administrative capacity tend to have higher follow-up ratings to the recommendations.

In this regard, the management process may not have full impact, but it has led to considerable advancements by harmonizing domestic laws and leveling the playing field for states and businesses. A significant aspect of the management process is that it has been able to influence all forty-three state parties to incorporate the concept on liability of legal persons within their domestic legal

---

790C15D7F2769B7D08443BD [https://perma.cc/W86G-W9NW] (2014) (“The extremely low number of concluded cases . . . suggests a need for strengthened foreign bribery detection and reporting mechanisms within these agencies, along with greater cross-agency cooperation.” Seventeen percent of foreign bribery cases are self-reported by companies to law enforcement authorities.)

<sup>70</sup> See Convention, *supra* note 5, at art. 5 (“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.”).

<sup>71</sup> See Statement of the OECD Working Group on Bribery on France’s Implementation of the Anti-Bribery Convention, *supra* note 50 (“French authorities committed, through a statement by their Minister of Justice, to adopt other measures, including decisive changes to their criminal policy. However, reforms which would have given public prosecutors the necessary statutory guarantees to exercise their functions without undue political influence which is required for the proper administration of justice, did not materialise.”).

systems.<sup>72</sup> Even countries that had never recognized such a concept began to incorporate it or adopt similar measures as a result of OECD's managerial response system. All states parties also have sufficient laws to reach extraterritorial activities of companies since the OECD ensured that the nationality principle not only extended to individuals but also legal persons. This has been crucial in harmonizing formal law and thus reducing gaps in the legal system.<sup>73</sup> As a result, this new legal framework has led many global companies to become more alert of their liability risks, and thus incorporate effective compliance measures into their internal systems throughout their global operations.<sup>74</sup> These findings further advance the Chayeses' managerial theory by illustrating how management can facilitate coordination among states through incorporation of new legal concepts and structures.

Furthermore, management has been able to induce states to strengthen their domestic capacity for investigation and prosecutions. According to the data, states, either fully or partially, implemented most of the recommendations on awareness-raising, capacity building for detection, reporting, investigations, and prosecutions in both the legislative and enforcement process.<sup>75</sup> States also implemented a large percentage of recommendations regarding jurisdiction, mutual legal assistance, and investment of resources. In terms of legal coordination among states, the *Tour de Table* has been an important forum for prosecutors to exchange information and expertise.<sup>76</sup> The OECD also ensured that states were not influenced by executive decisions.<sup>77</sup> The next section will explore country-specific case assessments to determine how the

---

<sup>72</sup> *Id.* Before the monitoring process, only a few countries adopted the concept on liability of legal persons, but all states parties now criminalize foreign bribery and recognize liability of legal persons.

<sup>73</sup> THE OECD CONVENTION ON BRIBERY: A COMMENTARY, *supra* note 25, at 48-50 ("there is widespread agreement that the OECD managed - astonishingly rapidly - to harmonize formal law"); see also Mark Pieth, *From Talk to Action: The OECD Experience*, in ANTI-CORRUPTION POLICY, CAN INTERNATIONAL ACTORS PLAY A CONSTRUCTIVE ROLE? 157 (Susan Rose-Ackerman & Paul D. Carrington eds., 2013) (arguing that this system has established a new link between the responsibilities of the public and private sector).

<sup>74</sup> Telephone Interview, *supra* note 52.

<sup>75</sup> See Figures 2 and 3, *infra*.

<sup>76</sup> See Telephone Interview, *supra* note 52 (revealing that there are frequent meetings between law enforcement officials, forming an informal network. These forums were important for leading to adoption of the 2009 recommendations).

<sup>77</sup> *Id.*

OECD and other organizations have been able to influence the United Kingdom and the Republic of Korea.

### 3. COUNTRY-SPECIFIC ASSESSMENTS

This part aims to analyze how the management process under the OECD Anti-Bribery Convention have been able to influence states to comply with their international obligations. It focuses on the United Kingdom and the Republic of Korea as two illustrative cases based on reports by international organizations and governments and on qualitative interviews conducted with relevant practitioners and independent experts.

#### 3.1. *United Kingdom*

The United Kingdom signed the OECD Convention on December 17, 1997 and ratified it on December 14, 1998, but the U.K. did not enact a new bribery law immediately following its ratification. Parliament rather concluded in a review completed on November 16, 1998 that existing legislative and common law provisions on corruption, including the Prevention of Corruption Act of 1906 which includes punishment of bribery of agents and persons in a public office, were already sufficiently in place to implement the Convention.<sup>78</sup> Existing legislation also applied to entities, both incorporated and unincorporated, that have legal personality.<sup>79</sup>

---

<sup>78</sup> See OECD, UNITED KINGDOM: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 1 (1999) [hereinafter U.K. PHASE I REPORT], <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2754266.pdf> [https://perma.cc/MYB5-SPET] (further stating that other relevant laws include the Criminal Law Act 1997 and the Criminal Justice (Terrorism and Conspiracy) Act 1998); see also OECD, UNITED KINGDOM: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION, PHASE I BIS REPORT 2 (2003) [hereinafter U.K. PHASE I BIS REPORT], <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2498215.pdf> [https://perma.cc/Z5DC-3TGU] (“The pre-existing offences of bribery in the United Kingdom are based on both common law and statute. Common law is developed through judicial decisions, each of which forms a precedent binding on courts of the same or lower level. The statutory provisions on corruption are contained in three different criminal statutes, the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 . . .”).

<sup>79</sup> See U.K. PHASE I REPORT, *supra* note 78, at 8 (explaining that that for crimi-

Yet, in the first part of the monitoring process, the OECD Working Group on Bribery found that existing U.K. laws were not in compliance with the standards under the Convention, urging the U.K. government to enact new legislation as a matter of priority.<sup>80</sup> In Phase 1 of the review process, the OECD Working Group identified several deficiencies in the legislative and common law provisions on corruption.<sup>81</sup> More specifically, the OECD pointed out that the offences did not expressly apply to the category of foreign bribery, and it expressed concerns over the fact that the offence almost never applied to a foreign bribery case in practice.<sup>82</sup> Due to lack of an express provision, implementation of other obligations under the OECD Convention, including provision of mutual legal assistance, was even more difficult for the U.K. government.<sup>83</sup> Moreover, courts often limited its jurisdictional scope to territorial jurisdiction and it was recommended by the OECD that the U.K. government should extend its jurisdictional scope for acts that occur entirely outside the territory of the U.K.<sup>84</sup> In terms of enforcement, the OECD expressed concerns over its wide discretionary powers to initiate a prosecution based on the “evidential and public interest test” and recommended that the U.K. government fully respect Article 5 of the Convention, which requires member states to prohibit consideration of national economic interest, the potential effect upon relations with another state, or the identity of the natural or legal persons involved when deciding on the public interest of the state.<sup>85</sup>

---

nal responsibility of legal persons, *mens rea* can be attributed to the company based on identification of someone in the organization with an appropriate level of authority who possesses the mental state in question).

<sup>80</sup> See generally *id.*; see also U.K. PHASE I REPORT, *supra* note 78, at 1 (examining the changes brought about in the United Kingdom’s corruption laws following the new legislation).

<sup>81</sup> U.K. PHASE I BIS REPORT, *supra* note 78, at 4 (“... the Working Group voiced concerns about the uncertain applicability of U.K. law to the bribery of foreign public officials.”).

<sup>82</sup> See *id.* (explaining that there was only one reported case, the *Raud* case of 1989, which was cited in relation to foreign bribery).

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

<sup>84</sup> *Id.* at 5 (“The Working Group further noted that under the existing law, the courts did not have jurisdiction to try a bribery offence unless some part of the corrupt transaction took place in the United Kingdom. The Working Group recommended that the U.K. government consider the extension of the scope of the bribery offences beyond its territorial jurisdiction in order to cover acts occurring entirely outside the territory of the United Kingdom.”).

<sup>85</sup> See *id.* (further expressing concerns over the requirement of the Law Of-

In response to these evaluations, the U.K. government expressed its intention to reform its corruption laws.<sup>86</sup> It did so pursuant to the Anti-Terrorism, Crime and Security Act of 2001, which was a response to the September 2001 terrorist attacks, and includes a section on bribery and corruption.<sup>87</sup> Part 12 of this legislation extended the scope of existing anti-corruption legislation, including the Prevention of Corruption Acts 1889 and 1916, allowing application of bribery offences extraterritorially and establishing nationality jurisdiction for acts taking place outside the U.K.<sup>88</sup> As a result, the OECD Working Group found that U.K. laws on foreign bribery had been strengthened by clarifying the application of the common law and statute law on foreign bribery, but because the Act was amended, some essential elements of the offences continued to remain uncertain.<sup>89</sup> Therefore, the Working Group recommended the U.K. to enact a comprehensive anti-corruption statute to address these uncertainties.<sup>90</sup>

In Phase 2 of the monitoring process, which included an on-site visit of the U.K. in July 19-23 of 2004, the OECD Working Group re-examined the implementation status of the U.K. government, and it came to the conclusion that no significant progress had been made since Phase 1 of the monitoring process. The OECD recognized that the U.K. authorities made substantial efforts to prepare a

---

ficer's consent to prosecute of a bribery offence under the Prevention of Corruption Acts).

<sup>86</sup> *Id.* at 1 (“[T]he United Kingdom stated its intention to carry out a general reform of corruption law as soon as parliamentary time permitted.”).

<sup>87</sup> See Legislation Government U.K., Anti-terrorism, Crime and Security Act 2001, available at <http://www.legislation.gov.uk/ukpga/2001/24/contents> [<https://perma.cc/GS7W-R9EG>] (denoting changes to the Anti-terrorism, Crime and Security Act 2001).

<sup>88</sup> See U.K. PHASE I BIS REPORT, *supra* note 78, at 5-10 (providing that existing bribery offences are also offences if they are committed outside the U.K., or if they involve either foreign agents or principals having no nexus with the U.K., or holders of a foreign public office, or officials of foreign bodies or authorities, and also providing jurisdiction over U.K. nationals or bodies incorporated in the U.K. who commit one of the offences regardless of where it is committed).

<sup>89</sup> See *id.* at 16-17 (explaining that the definition of foreign public official and other issues relating to the element itself, including the notion of offering, promising or giving, is still uncertain).

<sup>90</sup> See *id.* at 17-18 (discussing the Working Group's recommendation that consideration should be given in the new anti-corruption statute to cover the notions of offering, promising, or giving, and including a definition of the nature of the benefit conferred that reflects “any undue pecuniary or other advantage,” along with a provision that the offence of foreign bribery may be committed for the benefit of a third party).

draft legislation for a more comprehensive anti-corruption statute and make efforts to engage in consultations, but the recommended legislative changes had not been made.<sup>91</sup> Moreover, there was no specific case law on bribery of foreign public officials and there was lack of statistical data to evaluate its implementation process.<sup>92</sup> During the on-site visit, the OECD further found that there was lack of inter-agency coordination between investigation and prosecution authorities, and certain practitioners pointed out the lack of clarity among the different legislative instruments in place.<sup>93</sup> Most importantly, despite several allegations of U.K. companies involved in foreign bribery, no company or individual had been indicted or tried for the offence of bribing a foreign public official since the U.K. ratified the Convention, which was unusual for a country with such a large economy.<sup>94</sup> Therefore, the Working Group recommended through its 2005 Phase 2 Report that the U.K. enact a comprehensive foreign bribery legislation at the “earliest possible date.”<sup>95</sup>

After Phase 2 of the monitoring process, on March 2007, the U.K. was required to submit a written follow-up report which explains actions taken by the U.K. in response to the 2005 recommendations provided by the OECD Working Group.<sup>96</sup> Through

---

<sup>91</sup> OECD, UNITED KINGDOM: PHASE 2, REPORT ON THE APPLICATION OF THE OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 7 (2005), <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/34599062.pdf> [<https://perma.cc/JZU4-P2JG>].

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 7-8 (“[T]he examining team noted significant fragmentation within investigation and prosecution authorities; practitioners interviewed during the on-site visit indicated a lack of clarity among the different legislative and regulatory instruments in place.”).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 62 (“The lead examiners share the widely-held view that the current substantive law on foreign bribery in the U.K. is characterized by complexity and uncertainty.”).

<sup>96</sup> *See id.* at 80-82 (providing recommendations to raise awareness of the Convention and the foreign bribery offence among law enforcement authorities, establish an obligation for civil servants to report on possible instances of foreign bribery, reform laws to clarify and unify laws for prevention and detection, strengthen investigation by providing sufficient human and financial resources to the Serious Fraud Office (SFO), amend as necessary the code and manuals for prosecution, consider adopting administrative and civil sanctions for legal persons in addition to criminal liability, and revisit policies of agencies focusing on international development).

this report, it was found that the U.K. government had made significant progress in raising awareness and increasing resources for policy capacity in order to strengthen investigations.<sup>97</sup> The Serious Fraud Office (SFO) was, in particular, given a more central role in foreign bribery cases.<sup>98</sup> The U.K. government further expressed in its follow-up report that the U.K. was of the view that its laws were in compliance with the Convention and that lack of prosecutions were not a result of any doubts from law enforcers about the scope of the law, but rather, a result of operational challenges in gathering evidence from abroad.<sup>99</sup> Nevertheless, concerns remained due to an absence of a foreign bribery legislation and deficiencies in the laws on liability of legal persons.<sup>100</sup>

Most of all, the Working Group was concerned with the discontinuance of a major foreign bribery investigation of BAE SYSTEMS

<sup>97</sup> OECD, UNITED KINGDOM: PHASE 2, FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS 4 (2007) [hereinafter U.K. PHASE 2 FOLLOW-UP REPORT], <https://www.oecd.org/unitedkingdom/38962457.pdf> [<https://perma.cc/4ZAM-46MQ>].

<sup>98</sup> *Id.* (“The revised MOU calls for referral of all foreign bribery allegations to the SFO in the first instance and gives the SFO a role in reviewing (“vetting”) each allegation at the outset; this allows it to determine whether it is appropriate for it to take on the case itself or to guide the process of attributing the case to another agency.”).

<sup>99</sup> *Id.* at 6-7 (“The slow pace of reform appears to be attributable at least in part to the U.K.’s view, as expressed in the Follow-Up Report (at p.1), that is current law complies with the Convention and that change is only a ‘desirable measure of law reform’”); see also HOME OFFICE (U.K.), BRIBERY: REFORM OF THE PREVENTION OF CORRUPTION ACTS AND SFO POWERS IN CASES OF BRIBERY OF FOREIGN OFFICIALS, A CONSULTATION PAPER 8 (2005), <http://webarchive.nationalarchives.gov.uk/20070305120356/http://www.homeoffice.gov.uk/documents/450272/2005-cons-bribery%3Fview=Binary> [<https://perma.cc/4T8S-H5JQ>] (“There is no requirement in the OECD, or any other, Convention to have a specific offence of the bribery of a foreign public official. . . . The OECD Group are concerned that there have been no prosecutions using the powers in the 2001 Act. This however is not due to any doubts from law enforcers about the scope of the law, but may be related to operational difficulties in securing evidence in cases overseas, particularly in developing countries.”).

<sup>100</sup> See U.K. PHASE 2 FOLLOW-UP REPORT, *supra* note 97, at 6-7 (expressing serious concerns considering public statements made by senior U.K. law enforcement officials about the significant defects in the law that would preclude prosecution of certain cases); see also U.K. PHASE 2BIS REPORT, *supra* note 44, at 19 (2008) (expressing concerns on the issue of liability by addressing the following: “1) only one company has ever been prosecuted for bribery since the U.K. adopted bribery legislation in 1906 and the conviction was overturned on appeal; 2) the doctrinal requirements for corporate liability preclude any likelihood of liability for most companies; and 3) the law was such as to dissuade in practice any attempts to prosecute.”).

plc and the Al Yamamah defense contract with the government of Saudi Arabia.<sup>101</sup> BAE, which is based in Britain, was allegedly involved in arms deals with Saudi Arabia and other countries, but the British government halted British efforts to investigate the deals in 2006 due to national security concerns.<sup>102</sup> In January 2007, the Working Group eventually issued a press release expressing serious concerns about the discontinuance of the investigation and that they would continue to consider the matter in conjunction with the follow-up report.<sup>103</sup> Consequently, the Working Group began to closely examine the case as it raised important questions relating to investigation and prosecution capabilities and the deficiencies in the U.K. foreign bribery offence.<sup>104</sup> In this process, the media played a critical role in further pressuring the U.K. government by exposing the discontinuance of the investigations to the public.<sup>105</sup>

During the Phase 2bis monitoring phase in 2008, there were signs that the U.K. was beginning to enforce its laws to prevent foreign bribery because, in August 2008, the U.K. reported its first conviction for foreign bribery in a case investigated by the City of London Police Overseas Anti-Corruption Unit (OACU).<sup>106</sup> Yet, the

<sup>101</sup> U.K. PHASE 2 FOLLOW-UP REPORT, *supra* note 97, at 4; *see also* BAE Systems: Timeline of Bribery Allegations, TELEGRAPH (U.K.), Dec. 21, 2010, <http://www.telegraph.co.uk/finance/newsbysector/industry/defence/8216172/BAE-Systems-timeline-of-bribery-allegations.html> [https://perma.cc/2K5D-QWDG] (tracing major events during the investigation into BAE Systems and documenting the close of bribery investigations into BAE Systems by the SFO).

<sup>102</sup> *See* Christopher Drew & Nicola Clark, *BAE Settles Corruption Charges*, N.Y. TIMES, Feb. 5, 2010, <http://www.nytimes.com/2010/02/06/business/global/06bribe.html> [https://perma.cc/DZS9-Q5HG] (“The investigation began in Britain. But Tony Blair, the prime minister at the time, halted the British efforts to investigate the deals with Saudi Arabia in 2006, after Saudi leaders threatened to stop providing the British government with tips on terrorism, according to documents later discussed by a British court.”).

<sup>103</sup> U.K. PHASE 2BIS REPORT, *supra* note 44, at 5.

<sup>104</sup> *See id.* at 8 (explaining the factual record in the Al Yamamah case).

<sup>105</sup> *See, e.g.,* David Leigh & Rob Evans, *BAE Accused of Secretly Paying £1bn to Saudi Prince*, GUARDIAN (U.K.), June 7, 2007, <https://www.theguardian.com/world/2007/jun/07/bae1> [https://perma.cc/DBU9-52AK] (reporting that the investigation had been halted); Sean Rayment, *Saudi BAE Systems Case: Weapons Deal and Alleged Bribes*, TELEGRAPH (U.K.), May 17, 2008, <http://www.telegraph.co.uk/news/uknews/1976606/Saudi-BAE-Systems-case-Weapons-deals-and-alleged-bribes.html> [https://perma.cc/R8HD-Q8XZ] (pointing out that the investigation was closed before key bank records were obtained).

<sup>106</sup> U.K. PHASE 2BIS REPORT, *supra* note 44, at 7 (“According to media reports,

Al Yamamah case continued to be a matter of concern for the Working Group as the case was undergoing judicial review in the U.K.<sup>107</sup> Previous recommendations to reform deficiencies in the law were also not implemented. Thus, the OECD Working Group continued to urge the U.K. in its October 2008 Phase 2bis report to enact effective foreign bribery legislation at the earliest possible date and adopt appropriate legislation to achieve effective corporate liability for foreign bribery.<sup>108</sup>

As a result, in 2010, the U.K. finally enacted the Bribery Act to strengthen the country's legislation on bribery offences by including a specific offence of bribery by foreign public officials.<sup>109</sup> Section 7 of the Bribery Act further includes a new offence of failure of commercial organizations to prevent bribery, which supplements the existing regime on corporate liability under the common law identification theory.<sup>110</sup> In order to reach extraterritorial acts of companies based in the U.K., sections 12(2) and (3) of the new Act also provide extraterritorial jurisdiction to prosecute foreign bribery committed by persons.<sup>111</sup> Therefore, during the Phase 1ter

---

the case involved the 65-year-old managing director of CBRN Team, a U.K. security company, who paid GBP 83 000 in bribes in 2007-2008 to two Ugandan officials in relation to a GBP 210 000 contract. The briber received a five-month jail sentence suspended for one year."); see also Megan Murphy, *Ugandan Jailed for Taking Security Bribe*, FIN. TIMES (U.K.), Sept. 22, 2008, <https://www.ft.com/content/a6ecaa60-88c7-11dd-a179-0000779fd18c> [<https://perma.cc/Y2MF-VWGE>] (reporting on the Ugandan conspiracy and the OACU's role in bringing the case to court).

<sup>107</sup> See OECD, UNITED KINGDOM PHASE 2BIS REPORT, *supra* note 44, at 71-72 (recommending that the U.K. continue enacting effective modern foreign bribery legislation).

<sup>108</sup> *Id.*; see also Interview with Representative from the Anti-Corruption & Civ. Rts. Comm'n (ACRC), Int'l Aff. Div., in Seoul, S. Kor. (May 27, 2015) [hereinafter ACRC Interview] (explaining how the OECD pressured the U.K. to adopt the Bribery Act).

<sup>109</sup> See Bribery Act 2010 (c. 23) (U.K.) (including general bribery offences, bribery of foreign public officials, failure of commercial organizations to prevent bribery, prosecution and penalties, and other supplementary and final provisions).

<sup>110</sup> *Id.*; see also OECD, UNITED KINGDOM: PHASE 1TER 10-13 (2010) [hereinafter U.K. PHASE 1TER REPORT], <https://www.oecd.org/unitedkingdom/46883138.pdf> [<https://perma.cc/N6T9-JFXV>] (evaluating the new provision under the U.K. Bribery Act); U.K. PHASE 2 FOLLOW-UP REPORT, *supra* note 97, at 3 (finding that Section 7 of the U.K. Bribery Act is in compliance with the approach recommended by the Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transaction).

<sup>111</sup> Bribery Act 2010, *supra* note 109.

monitoring process, the Working Group found that this new legislation adopts most features of the OECD Anti-Bribery Convention and commended the U.K. for enacting this new legislation, but also urged the U.K. to meet the April 2011 deadline for entry into force.<sup>112</sup>

Yet, implementation was delayed due to lobbying from U.K. business groups.<sup>113</sup> For example, the Confederation of British Industry (CBI) expressed concerns that the Act would hinder competitiveness of U.K. companies, requesting for more time to prepare for the legislative changes.<sup>114</sup> Nevertheless, the Working Group continued to pressure the U.K. to enact the Act as soon as possible and expressed concerns over its delay.<sup>115</sup> The Working Group even went as far as to threaten the U.K. that it may consider increasing due diligence over U.K. companies through their commercial partners or Multilateral Development Banks such as the World Bank.<sup>116</sup> Moreover, it reminded the U.K. that other jurisdictions could potentially play a role in further sanctioning U.K. companies such as through the U.S. Foreign Corrupt Practices Act with its wide extraterritorial application.<sup>117</sup> In a media interview, the

---

<sup>112</sup> See U.K. PHASE 1TER REPORT, *supra* note 110, at 19 (“When it enters into force, the Act will be a major improvement on the prior patchwork of U.K. bribery laws.”); see also Press Release, OECD, OECD’s Gurría Welcomes Passage into Law of U.K. Bribery Bill (Aug. 4, 2010), <http://www.oecd.org/corruption/oecdsgurriawelcomespassageintolawofukbriberybill.htm> [<https://perma.cc/4BHS-FNYG>] (noting that the chair of the OECD Working Group on Bribery stated, “I’m pleased that the U.K. has made such progress.”).

<sup>113</sup> ROSE, *supra* note 4, at 91.

<sup>114</sup> *Id.*; see also Simon Bowers, *Serious Fraud Office Vows to Pursue Corruption Foreign Companies*, GUARDIAN (U.K.) (Mar. 25, 2011), <https://www.theguardian.com/law/2011/mar/25/serious-fraud-office-overseas-firms-bribery-act> [<https://perma.cc/F6QZ-UACE>] (describing that delays would be beneficial to U.K. companies who are caught in the middle).

<sup>115</sup> See Press Release, OECD, U.K.: Chair of OECD Working Group on Bribery Concerned Over Delay of New Bribery Act (Feb. 1, 2011), <http://www.oecd.org/daf/ukchairfoecdworkinggrouponbriberyconcernedoverdelayofnewbriberyact.htm> [<https://perma.cc/Q3RY-PXRB>] (quoting the Chair of the Working Group, Mark Pieth, who expressed disappointment that the passage of the Act would be delayed).

<sup>116</sup> See U.K. PHASE 2BIS REPORT, *supra* note 44, at 4; see also ROSE, *supra* note 4, at 90 (“While the precise meaning of such due diligence is unclear, the Chairman could have been referring to the World Bank’s ability to debar companies that have engaged in a corrupt practice on connection with a World Bank project, such that they may be no longer be awarded Bank-financed contracts for a period of time.”).

<sup>117</sup> ROSE, *supra* note 4, at 90-91.

Chairman of the OECD also reported that they may consider blacklisting British companies.<sup>118</sup> Such monitoring efforts by the OECD and continuous high-level official visits continuously pushed the U.K. government to enforce the Bribery Act.<sup>119</sup>

After senior government officials from the U.K. government provided assurance to the OECD Secretary-General that it would issue guidance for the Bribery Act to enter into force,<sup>120</sup> the Bribery Act finally came into force on July 1, 2011. At this point, two convictions of companies for foreign bribery had already been made.<sup>121</sup> As such, through its 2012 Phase 3 report, the Working Group commended the U.K. for the significant increase in enforcement on foreign bribery cases since Phases 2 and 2bis, and for publishing the Guidance to Commercial Organizations on the U.K. Bribery Act.<sup>122</sup> The Working Group also recognized that the U.K. government had made substantial efforts to raise awareness of the Bribery Act, particularly through its overseas missions.<sup>123</sup> At the same time, the Working Group continued to provide further recommendations in order to increase transparency and resources.<sup>124</sup>

---

<sup>118</sup> *Id.* at 89-91; see also David Leigh, *British Firms Face Bribery Blacklist, Warns Corruption Watchdog*, GUARDIAN (U.K.) (Jan. 31, 2011), <https://www.theguardian.com/business/2011/jan/31/british-firms-face-bribery-blacklist> [<https://perma.cc/6ZFN-ELPJ>] (discussing how British companies may have to deal with blacklisting on an international level due to the government's actions with the Bribery Act).

<sup>119</sup> Telephone Interview, *supra* note 52.

<sup>120</sup> See Press Release, OECD, OECD Statement on U.K. Guidance for the Bribery Act (Mar. 30, 2011), <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/oecdstatementonukguidanceforthebriberyact.htm> [<https://perma.cc/6FGC-67CH>] (quoting the OECD Secretary-General, Angel Gurría, that the OECD has been assured "from the highest levels of the U.K. government that they would issue guidance" in implementing the Bribery Act).

<sup>121</sup> See OECD, UNITED KINGDOM: PHASE 2BIS FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2BIS RECOMMENDATIONS 3 (2011), <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/48066020.pdf> [<https://perma.cc/F795-8GBD>] (highlighting that the two convictions show a greater level of enforcement of the Phase 2bis evaluation).

<sup>122</sup> See OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED KINGDOM (2012) [hereinafter U.K. PHASE 3 REPORT], <https://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf> [<https://perma.cc/46XS-9DAM>] (acknowledging the U.K.'s increased enforcement and urging the U.K. to continue taking such measures).

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

<sup>124</sup> *Id.*; see also Press Release, OECD, U.K. Increases Enforcement of Foreign Bribery, but Concerns Remain about Transparency and Resources (Mar. 30, 2012), <http://www.oecd.org/daf/anti-bribery/anti-briberyconven->

In addition, the BAE Systems case was also resolved through a settlement with the SFO for 30 million pounds, which was a record criminal fine for a company, and was also settled with the Department of Justice under the FCPA for \$400 million.<sup>125</sup>

Overall, assessment of the United Kingdom illustrates how management process can induce change among states to incorporate new laws and make amendments in their legal systems and enact policies in order to comply with international norms. The U.K. faced constant challenges in adopting these norms, including issues concerning national security with regard to investigations surrounding the BAE Systems case and resistance from the business community for concerns that U.K. companies may lose competitiveness. Nonetheless, the OECD continued to convince U.K. senior officials about the importance of leveling the playing field for international business and U.K.'s responsibility as a G20 country to set an example for other countries. The OECD also utilized external sources, such as due diligence procedures under multilateral development banks and the U.S. FCPA, as a way to further pressure the U.K. government. Most importantly, the OECD actively engaged with the media to further publicize their concerns, including delays in the legislation process. All of these efforts have contributed to the adoption of the U.K. Bribery Act, and the OECD continues work closely with the U.K. government to enhance the effectiveness of the Bribery Act.<sup>126</sup>

### 3.2. Republic of Korea

---

tion/ukincreasesenforcementofforeignbriberybutconcernsremainabouttransparencyandresources.htm [https://perma.cc/UA33-EE93] (including recommendations that the U.K. maintain the Serious Fraud Office's role and resources in criminal foreign bribery cases, avoid confidentiality agreements, and adopt a roadmap to extend the Convention to Overseas Territories).

<sup>125</sup> James Thompson, *BAE Systems Pays \$400m to Settle Bribery Charges*, INDEPENDENT (U.K.) (Feb. 6, 2010), <http://www.independent.co.uk/news/business/news/bae-systems-pays-400m-to-settle-bribery-charges-1891027.html> [https://perma.cc/2N6X-B4XE].

<sup>126</sup> For most recent report, see generally OECD, IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION PHASE 4 REPORT: UNITED KINGDOM (2017), <http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf> [https://perma.cc/7582-XMEN] (evaluating the U.K.'s foreign bribery risk and its methods of addressing these issues).

The Republic of Korea has been among the fastest growing OECD economies, with double-digit export volume growth over the past twenty years, making it the seventh-largest exporter and fifteenth-largest economy in the world.<sup>127</sup> This was accomplished largely on the strength of exports through major *chaebol* companies or enterprise groups comprised of diversified family-owned conglomerates. Following ratification of the OECD Convention on Foreign Bribery in 1997, Korea enacted the Act on Preventing Bribery of Foreign Public Officials in International Business Transaction (FBPA) in December 1998.<sup>128</sup> This new law included a provision on corporate liability under Article 4 of the statute, which states that a legal person may be subject to a fine “in the event that a representative, agent or employee or other individual working for the legal person commits the offence.”<sup>129</sup> As new robust laws regulating transnational corporate behavior were introduced, there were widespread concerns that the law may weaken economic activities abroad, but the Korean government took the position that participating in these international efforts would enhance the country’s credibility and attract more investors.<sup>130</sup> As stated in a commentary by the Prosecutor’s Office, the primary objective of implementing the FBPA was to enhance the country’s international credibility.<sup>131</sup>

---

<sup>127</sup> OECD, OECD ECONOMIC SURVEYS: KOREA 10 (2014), [https://www.oecd.org/eco/surveys/Overview\\_Korea\\_2014.pdf](https://www.oecd.org/eco/surveys/Overview_Korea_2014.pdf) [<https://perma.cc/3JM3-35PU>].

<sup>128</sup> See Act on Preventing Bribery of Foreign Public Officials in International Business Transaction (S. Kor. 1999), translated in OECD online database, <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2378002.pdf> [<https://perma.cc/34M6-GZ6P>]. The Act was enacted on December 28, 1998 and came into effect at the time of the entry into force of the Convention on February 15, 1999.

<sup>129</sup> *Id.* at art. 4 (“In the event that a representative, agent, employee or other individual working for legal person has committed the offence as set out in Article 3(1) in relation to its business, the legal person shall also be subject to a fine up to 1,000,000,000 won in addition to the imposition of sanctions on the actual performer. In case that the profit obtained through the offence exceeds a total of 500,000,000 won, it shall be subject to a fine up to twice the amount of the profit. If the legal person has paid due attention or exercised proper supervision to prevent the offence against this Act, it shall not be subject to the above sanctions.”).

<sup>130</sup> See PROSECUTOR’S OFFICE OF THE REPUBLIC OF KOREA, COMMENTARY TO THE FBPA (in Korean) (Jan. 4, 2004), [http://www.spo.go.kr/spo/info/study/data01.jsp?mode=view&board\\_no=34&article\\_no=28888](http://www.spo.go.kr/spo/info/study/data01.jsp?mode=view&board_no=34&article_no=28888) [<https://perma.cc/A5D8-V8CW>] (stating that taking part in the efforts to build a transparent international order can enhance the international credibility of the country and attract more international investors).

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

Korea's new law was also in line with domestic interests. Following the 1997 Asian financial crisis, the public sought reform, viewing this crisis as the result of corrupt practices by corporate and government officials.<sup>132</sup> Due to the long history of military-backed rule, which lasted from 1948 to 1992, a collusive relationship between government and big business, or *chaebols*, predominated.<sup>133</sup> Reform towards a more democratic system could be observed by 1993, but political candidates continued to acquire large campaign funds from the private sector.<sup>134</sup> As the public began to demand more transparency with the outbreak of the 1997 crisis, President Kim Dae-Jung was able to win votes by placing corruption at the top of his political agenda.<sup>135</sup> Meanwhile, with the development of civil society in Korea throughout the 1990s, non-governmental organizations also began to play a key role in the an-

---

<sup>132</sup> See generally David T. Johnson, *The Prosecution of Corruption in South Korea: Achievements, Problems, and Prospects*, in LAW REFORM IN KOREA 48 (Tom Ginsburg ed., 2004) (suggesting that corporate scandals have become a regular and central feature of political life); Craig P. Ehrlich & Kang Dae-Seob, *A Look at Korean Corporate Codes of Conduct*, in LAW REFORM IN KOREA 95-113 (Tom Ginsburg ed., 2004) (discussing internal codes of conduct in Korean *chaebol* companies).

<sup>133</sup> Kyongsoo Lho & Joseph Cabuay, *Corruption in the Korean Public and Private Sectors*, in CORRUPTION AND GOOD GOVERNANCE IN ASIA 85 (Nicholas Tarling ed., 2009); see also VINAY BHARGAVA & EMIL BOLONGAITA, CHALLENGING CORRUPTION IN ASIA: CASE STUDIES AND A FRAMEWORK FOR ACTION 147 (World Bank ed., 2004), <http://documents.worldbank.org/curated/en/791211468741662651/pdf/275800PAPER0Challenging0corruption.pdf> [<https://perma.cc/TSM9-7XLE>] (describing that the *chaebols* in the Korean economy contributed to economic health by driving exports, but also caused the economy to become extremely centralized and highly dependent on bureaucratic decisions).

<sup>134</sup> See Kyongsoo Lho & Joseph Cabuay, *supra* note 133, at 85 (explaining that politicians accepted large sums of illegal contributions from the *chaebols*, who in return were given major government procurement contracts by the government, an exchange that increased the financial power of corporations to influence elections and government policy-making.); see also ANDREW WEDEMAN, DOUBLE PARADOX: RAPID GROWTH AND RISING CORRUPTION IN CHINA 20-33 (2012) (demonstrating how South Korea was an exception to the rule that corruption harms economic growth, given the way in which its institutionalization forged and sustained a symbiotic relationship between conservative, pro-development political parties and business interests).

<sup>135</sup> See JON S. T. QUAH, CURBING CORRUPTION IN ASIAN COUNTRIES: AN IMPOSSIBLE DREAM? 329 (2011) (describing that his policies included improving Korea's ranking on Transparency International's CPI from a ranking of 43<sup>rd</sup> in 1998 to 20<sup>th</sup> by 2003); see also Kyongsoo Lho & Joseph Cabuay, *Corruption in the Korean Public and Private Sectors*, *supra* note 133, at 91 (providing that the difference between Kim Dae Jung's actions and those of his predecessors was the fact that prevention and exposure would be used in combination with reinforced punitive measures to fight corruption).

ti-corruption movement by generating more public awareness and pushing legislators to take more aggressive action.<sup>136</sup> In fact, civil society groups had originally proposed the Anti-Corruption Act of July 2001 for passage in 1996.<sup>137</sup>

As such, the 1998 FBPA Act was largely supported by the public, and was followed in 2001 by supporting legislation that included the Anti-Corruption Act.<sup>138</sup> This stipulated the creation of an independent implementation agency, the “Korea Independent Commission Against Corruption (KICAC),” which was later integrated into the Act on Anti-Corruption & the Establishment and Operation of the Anti-Corruption and Civil Rights Commission (ACRC) on February 29, 2008.<sup>139</sup> The ACRC currently plays a central role in raising awareness and handling complaints. More specifically, the agency has launched various networks of public-private consultative bodies, while providing guidelines and educational courses for corporate ethical management.<sup>140</sup> The activities of the ACRC are not limited to the domestic sphere; they have also provided technical assistance to other countries with MOU partners, such as Indonesia and Bhutan.<sup>141</sup> In addition, one of its main

---

<sup>136</sup> QUAH, *supra* note 135, at 330 (“The Anti-Corruption Act of July 2001 was originally proposed for legislation in 1996 by the People’s Solidarity for Participatory Democracy (PSPD) and supported by TI Korea, the Citizens’ Coalition for Economic Justice and the Citizens’ Association for anti-Corruption.”).

<sup>137</sup> *Id.* Civil society groups included TI Korea, the Citizens’ Coalition for Economic Justice and the Citizens’ Association for Anti-Corruption. These organizations participated in public hearings, legislation requests, national assembly person signature drives, campaigning, rallies, and television broadcast discussions during 2000-2001 to advocate passing of the bill. *See also* VINAY BHARGAVA & EMIL BOLONGAITA, *supra* note 133, at 151 (showing how nongovernmental organizations have been quite effective in promoting good practices as their public involvement has grown).

<sup>138</sup> OECD, STEPS TAKEN TO IMPLEMENT AND ENFORCE THE OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 90 (2014), <http://www.oecd.org/daf/anti-bribery/WGB-Steps-Taken-Update.pdf> [<https://perma.cc/5MR6-5Y94>].

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

<sup>140</sup> *See generally* ANTI-CORRUPTION & CIV. RTS. COMM’N (ACRC), ANNUAL REPORT 2014 (2014) [hereinafter ACRC 2014 ANNUAL REPORT], [http://www.theioi.org/downloads/dflq7/Korea\\_ACRC\\_Annual%20Report\\_2014\\_EN.pdf](http://www.theioi.org/downloads/dflq7/Korea_ACRC_Annual%20Report_2014_EN.pdf) [<https://perma.cc/X2X7-84R6>] (documenting the ACRC’s efforts to prevent corruption and protect people’s rights and interests and recommending improvements for sixty-three unreasonable systems that cause complaints and corruption to agencies in charge).

<sup>141</sup> *See id.* at 17-18 (showing that the ACRC signed MOUs on anti-corruption cooperation with Indonesia, Thailand, Vietnam and Mongolia, respectively, in or-

functions of the ACRC is to receive, investigate and handle complaints filed by the public.<sup>142</sup> In 2014, a total of 30,038 complaints were filed and 28,744 cases were handled by this agency.<sup>143</sup>

Along with these legal measures, Korean officials have made various efforts to effectively prevent foreign bribery based on recommendations of the OECD Working Group on Bribery. These efforts range from raising awareness about the issue to enhancing detection capabilities through auditing and accounting, strengthening whistleblower protection laws, and encouraging use of overseas representation, such as Korean development agencies and Korean embassies to aid with detection.<sup>144</sup> In May 2011, Korea launched a new intelligence-gathering system in order to strengthen its capacity for investigating crimes that contain international elements, including foreign bribery, tax evasion and international organized crimes. This system, which functioned in cooperation with the Ministry of Justice, Ministry of Foreign Affairs and Trade, and the Supreme Prosecutor's Office,<sup>145</sup> was useful in following up

---

der to build anti-corruption capacity and transfer anti-corruption policies to these countries).

<sup>142</sup> *Id.* at 23-46 ("The ACRC receives and handles 'public complaints,' which refer to (general) complaints such as opinions, suggestions, and proposals of the people to the government, especially cases in which inconveniences, grievances, or the infringement of the people's rights occur because of the illegal, unfair, or passive practices (including factum and nonfeasance) of administrative organizations.").

<sup>143</sup> *See id.* at 32 (describing that complaints can be handled by providing a corrective recommendation, expression of opinions, agreement, mediation, guidance of deliberation, dismissal, rejection, transfer, referral, guidance or reply).

<sup>144</sup> *See* OECD, KOREA PHASE 2 REPORT: THE APPLICATION OF THE CONVENTION ON COMBATTING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATTING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 4 (2004) [hereinafter KOREA PHASE 2 REPORT], <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/33910834.pdf> [<https://perma.cc/NS6M-KSZZ>] (outlining the structure of the Report and showing that Korean government provided guidelines for different agencies). Korean embassies have been directed to report allegations of foreign bribery committed by Korean companies or individuals to the Ministry of Foreign Affairs and Trade in Seoul. The report is then forwarded to the Ministry of Finance and Economy, the Korea Independent Commission Against Corruption, law enforcement, and prosecutorial bodies. Korean authorities further provided the Korea Export Insurance Corporation and Korea Export-Import Bank with more power to demand documents and information from their clients in order to prevent and detect foreign bribery that takes place through accounting and auditing. *Id.*

<sup>145</sup> *See* OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN KOREA 23 (2011) [hereinafter KOREA PHASE 3 REPORT], <https://www.oecd.org/korea/Koreaphase3reportEN.pdf>

and investigating nine allegations made by the media in 2011.<sup>146</sup> As a result, that same year, the OECD stated that Korea had made “notable progress” in implementing the OECD Convention, particularly in the area of intelligence gathering.<sup>147</sup>

Aside from OECD recommendations, another effective management tool in influencing Korea to adopt new legislation has been the use of extraordinary measures by the Working Group. For example, in Phase 2 of its monitoring process, the OECD expressed concerns over the limited scope with respect to the application of the whistleblower protection law enacted in 2002, which only applied to the public sector. Accordingly, the OECD recommended that Korea extended its reach to the private sector.<sup>148</sup> When the government did not take adequate follow-up measures to comply with this recommendation, the Working Group filed official complaints to high-level officials, including the Minister of

---

[<https://perma.cc/2T4Q-V9JS>] (describing that they have strengthened their capacity through the following measures: “1) Regular updates by the Ministry of Justice to the Supreme Prosecutor’s Office on allegations in the international media; 2) A new special team within the Office of Criminal Intelligence Planning, Supreme Prosecutor’s Office is established to focus on gathering of criminal information and enforcement; 3) A new task for the International Criminal Affairs Division at the Ministry of Justice to support foreign information gathering in close cooperation with the Board of Audit and Inspection of Korea. The Ministry of Justice plays the coordinating role.”).

<sup>146</sup> KOREA PHASE 3 REPORT, *supra* note 145, at 23 (“Three of these cases had been closed by the time of the on-site visit, and the Korean embassies were still waiting for information in the six other cases. The Korean authorities explained that the three cases had been closed because information obtained through the relevant Korean embassies indicated “there is no reason for investigations.” In at least two of these cases, this conclusion was based on reports from the embassies that related charges had not been laid in the foreign countries. No preliminary investigative steps were taken in Korea to identify possible leads, such as inquiring whether the companies in question were conducting internal investigations. Following the on-site visit three more pre-investigations were closed based on information received through the relevant Korean embassies.”).

<sup>147</sup> See Press Release, OECD, Korea Making Notable Progress on Fighting Foreign Bribery; Further Improvements Needed, Says OECD (Oct. 19, 2011) [hereinafter OECD Korea Press Release], <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/koreamakingnotableprogressonfightingforeignbriberyfurtherimprovementsneededsaysoecd.htm> [<https://perma.cc/PN4P-E58Y>] (emphasizing Korea’s efforts in improving its intelligence gathering capacity, but also suggesting that it should focus more on the investigatory stage).

<sup>148</sup> See KOREA PHASE 2 REPORT, *supra* note 144, at 21 (“To strengthen its efforts in this area, they recommend that Korea considers extending whistleblower protection provided by the ACA to those who report foreign bribery to KICAC, and to those who report suspicions of foreign bribery to government agencies other than KICAC.”).

Justice, and issued public press release statements about Korea's non-compliance.<sup>149</sup> These complaints were further used as sources to convince members of the National Assembly to enact a new whistleblower protection law that extended to the private sector.<sup>150</sup> Eventually, this pressure led to the enactment of the Act on the Protection of Public Interest Whistleblowers in 2011.<sup>151</sup> Similar extraordinary measures were involved in the enactment of other legislation, such as the provision on small facilitation payments.<sup>152</sup> As such, public press statements, combined with on-site visits by OECD senior officials can serve to alert high-level officials of the importance of an issue and to intensify pressure on the Korean government to comply with the recommendations.<sup>153</sup>

With regard to enforcement of the liability of legal persons, Korean authorities have increased their prosecutions against corporations for foreign bribery since the OECD monitoring process came into place. It was reported in 2011 that Korea had prosecuted a total of nine companies since 2002 based on the implementing legislation of the Anti-Bribery Convention.<sup>154</sup> According to 2014 enforcement data reports, it has sanctioned four companies in total.<sup>155</sup> Yet, OECD examiners have found that this provision is not utilized as frequently as it could be.<sup>156</sup> More specifically, they found that in many of the cases in which conviction could have been sought, only three out of nine prosecution cases actually sought conviction of the company itself.<sup>157</sup> This is largely due to an underlying perception among legal professionals that corporations cannot commit

---

<sup>149</sup> ACRC Interview, *supra* note 108.

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

<sup>151</sup> *Id.*; see also KOREA PHASE 3 REPORT, *supra* note 145, at 34-35 (outlining responsibilities under the "Enforcement Decree" of the Act on the Protection of Public Interest Whistleblowers, including providing an act related to the violation of the public interest).

<sup>152</sup> ACRC Interview, *supra* note 108; see also KOREA PHASE 3 REPORT, *supra* note 145, at 7 (recommending that the Republic of Korea periodically review its policies and approaches on facilitation of payments in accordance with the 2009 Recommendations of the OECD).

<sup>153</sup> Interview with Professor Kim Jun-Ki, Yonsei University, in Seoul, S. Kor. (Jul. 27, 2015).

<sup>154</sup> OECD Korea Press Release, *supra* note 147.

<sup>155</sup> OECD, 2014 DATA ON ENFORCEMENT OF THE ANTI-BRIBERY CONVENTION (2015), <http://www.oecd.org/daf/anti-bribery/Working-Group-on-Bribery-Enforcement-Data-2014.pdf> [<https://perma.cc/FH6G-VWDG>].

<sup>156</sup> KOREA PHASE 3 REPORT, *supra* note 145, at 17.

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

crimes.<sup>158</sup> As expressed by one academic scholar during the on-site visit, criminal liability of corporations as legal persons is still a “theoretically difficult issue.”<sup>159</sup> Yet, this concept is clearly not completely absent, as it has been incorporated into other areas of law including the Securities and Exchange Act, Monopoly Regulation, Fair Trade Act and Labor Standards Act, and the Terrorism Financing and Drug Trafficking Act.<sup>160</sup>

Given the challenges mentioned above, the OECD urged Korean authorities to raise awareness about the importance of the provision on liability of legal persons, and to increase sanctions on companies for effective prevention.<sup>161</sup> In response, the Ministry of Justice and Korea’s independent anti-corruption agency have increased efforts to educate Korean authorities, law enforcement officials and the general public about the Foreign Bribery Act through various training sessions, seminars, conferences and compliance guidelines for companies.<sup>162</sup> The agency has made addi-

---

<sup>158</sup> Telephone Interview with Judge Mo Seongjun, Gwnagju District Court, S. Kor. (Nov. 17, 2015). Korea is passive when it comes to recognizing corporate criminal responsibility due to an underlying perception that crimes can only be committed by natural persons. *Id.*

<sup>159</sup> KOREA PHASE 3 REPORT, *supra* note 145, at 17.

<sup>160</sup> *See id.* at 18 (explaining that the concept is recognized under the Foreign Bribery Prevention in International Business Transactions Act (FBPA), Unfair Competition Prevention and Trade Secret Protection Act (UCPA), Financial Investment Services and Capital Markets Act (FTRA), Proceeds of Crime Act (POCA), Terrorism Financing Act (FTA), and Drug Trafficking Act (DTA)); *see also* Allens Arthur Robinson, ‘Corporate Culture’ as a Basis for the Criminal Liability of Corporations, 56-57 (Feb. 2008), <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf> [<https://perma.cc/DC8H-ZDYY>] (stating that in order for a corporation to be held liable, it must be proven that the offence was committed “in relation to the business,” and that the individual intended to act for the legal person, even though a corporation may be able to avoid liability if it took “concrete and specific” steps to avoid the offence through due diligence measures).

<sup>161</sup> *See* KOREA PHASE 2 REPORT, *supra* note 144, at 17-18 (reporting that the lead examiners recommended for Korean authorities to raise more awareness among policymakers and prosecutors about the importance of prosecuting legal persons for violations of the FBPA).

<sup>162</sup> *See* OECD, KOREA: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS 9-10 (2014), <https://www.oecd.org/daf/anti-bribery/KoreaP3WrittenFollowUpReportEN.pdf> [<https://perma.cc/F759-MNQQ>] (describing that the Ministry of Justice provided training on the FBPA to prosecutors, investigators and prospective lawyers at the Legal Research and Training Institute and the Judicial Research and Training Institute in 2013. In 2012, the Ministry of Justice further introduced the Compliance Officer System in the Commercial Act to raise more awareness in the private sector through a series

tional efforts to discuss the new law with public organizations and business entities, including small and medium-sized enterprises (SMEs).<sup>163</sup> More recent developments include the enactment of the Kim Young-ran Act, which has strengthened corporate liability provisions by recognizing that corporations can be responsible for the acts of their employees.<sup>164</sup>

On the issue of extraterritoriality, while Korea has increased sanctions against corporations under the implemented legislation, most of the prosecutions concerned acts that took place on Korean soil. More specifically, most of these cases involved Korean individuals and companies who had participated in the bribery of procurement authorities at the United States army base on Korean soil.<sup>165</sup> There was an ongoing investigation initiated in May 2011 regarding bribes paid to a Korean subsidiary of a Chinese-controlled airline company, but this also involved an offense taking place on Korean territory.<sup>166</sup> Despite such challenges, on the whole, Korea has strengthened its capacity for overseas detection and investigation. For example, embassies have been directed to report allegations of foreign bribery committed by Korean companies or individuals to the Ministry of Foreign Affairs and Trade in Seoul.<sup>167</sup> The report is then forwarded to the Ministry of Finance and Economy, the Korea Independent Commission Against Corruption, law enforcement, and prosecutorial bodies.<sup>168</sup> Korean au-

---

of seminars and conferences. The ACRC has published "Best Practice Casebook on Ethical Management," and consistently distributed the "OECD Anti-Bribery Convention Guidebook" to the public.)

<sup>163</sup> See ANTI-CORRUPTION & CIV. RTS. COMM'N (ACRC), ANNUAL REPORT 2012 52-64 (2012) (reporting that the ACRC held a meeting on January 18, 2012, distributing the guidelines to more than 870 inspectors from 1003 public organizations, and the assessments were made to 662 target organizations with about 250,000 respondents); see also KOREA PHASE 2 REPORT, *supra* note 144, at 3.

<sup>164</sup> See generally Kim Young-ran Act (2016), available at <http://www.law.go.kr/lsInfoP.do?lsiSeq=183553&efYd=20161130#0000> (in Korean) [<https://perma.cc/5ZPV-ZBT7>] (referring to the anti-graft law which was first proposed in August 2012 by Kim Young-ran, former head of the Anti-Corruption and Civil Rights Commission).

<sup>165</sup> See KOREA PHASE 3 REPORT, *supra* note 145, at 5 ("[T]he majority of these cases involved the bribery of foreign military staff on Korean soil").

<sup>166</sup> *Id.* at 10.

<sup>167</sup> OECD, KOREA: PHASE 2 FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS 3-4 (2007) [hereinafter KOREA PHASE 2 FOLLOW-UP REPORT], <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/38239546.pdf> [<https://perma.cc/T8GV-N69A>].

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

thorities have additionally signed MOUs with foreign countries to exchange information.<sup>169</sup> As a result, a number of cases involving extraterritorial conduct that came to light through media allegations managed to reach the pre-investigation stage where, with the help of Korean embassies, authorities were able to gather some information.<sup>170</sup> Although some of these cases were eventually closed due to lack of action by foreign courts, or insufficient information to proceed with an investigation,<sup>171</sup> the OECD noted Korea's progress for prosecuting a case and working on three new allegations that took place abroad in 2011.<sup>172</sup> Moreover, wide extraterritorial application of the FCPA by the U.S. is further pushing Korea to become more alert to liability risks that their own companies may face abroad.<sup>173</sup>

These government efforts to combat foreign bribery can be attributed to the active participation of multiple stakeholders, including civil society groups, business associations and independent experts, in providing a variety of viewpoints. For example, during the on-site visit, a number of civil society groups expressed their concerns about Korean authorities' unwillingness to pursue corporations for foreign bribery and their low level of sanctions.<sup>174</sup> It was further revealed in the course of the visit that business associations were not even aware that businesses could be held liable for foreign bribery under Korean law.<sup>175</sup> The Working Group noted

---

<sup>169</sup> ACRC 2014 ANNUAL REPORT, *supra* note 140, at 17-18.

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

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

<sup>172</sup> OECD Korea Press Release, *supra* note 147.

<sup>173</sup> See *Korean Construction Firms Operating Abroad Need to be Cautious of Bribery* (in Korean), CNEWS (Nov. 21, 2011), <http://www.cnews.co.kr/uhtml/read.jsp?idxno=201111171104370150503> [<https://perma.cc/432H-QAQ4>] (explaining that Korean authorities need to take greater action against their own companies operating domestically and abroad to ensure that they are not held liable under the U.S. FCPA. It reports that the U.S. is increasing the number of prosecutions under the FCPA, and that Korean companies represent no exception under either the FCPA or U.K. Bribery Act). See also Interview with Professor Kim Jun-Ki, *supra* note 153 (explaining that wide extraterritorial application of the FCPA is alerting Korean companies of their liability risks).

<sup>174</sup> KOREA PHASE 3 REPORT, *supra* note 145, at 17; see also Interview with Yoo Han-Bum, Secretary-General of Transparency International, in Seoul, Republic of Korea (Jul. 28, 2015) (describing Korean government's lack of willingness to sanction corporations, and that more efforts need to be made to abolish the broad defense measures for companies in current foreign bribery laws).

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

that during a Parliamentary Inspection of the Supreme Court in 2010, Korean Congressman Lee Ju Young had already criticized the courts for imposing minimal sanctions for bribery offences in general.<sup>176</sup> All of these observations were noted as part of the OECD's recommendations, demonstrating how the participation of stakeholders can be key to the management process when it comes to enhancing transparency and incentivizing states to take greater action. Moreover, increased transparency can pressure states to provide more accurate information, and because the reports are published based on unanimous decision, the monitoring process can provide credible information to the public.

In addition, the OECD worked closely with regional organizations such as the Asian Development Bank in increasing awareness and the capacity of Asian states by initiating the ADB/OECD Anti-Corruption initiative for fighting corruption in the Asia Pacific in 1999.<sup>177</sup> Through this initiative, which included thirty-one member states, the Anti-Corruption Action Plan for Asia and the Pacific was developed in 2001.<sup>178</sup> The OECD did propose a robust peer review system as a way to monitor the implementation process, but Asian states favored a more "peer learning process in an informal environment" since they can be more open about the problems they face, rather than being taught from the "top."<sup>179</sup> Some

---

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

<sup>177</sup> See generally *Supporting the Fight Against Corruption in Asia and the Pacific: The ADB/OECD Anti-Corruption Initiative*, OECD, <http://www.oecd.org/site/adboecdanti-corruptioninitiative/> [<https://perma.cc/N3LU-MC9B>] (last visited Apr. 5, 2018) (detailing the region's commitment to implement "... standards for sustainable safeguards against corruption in the economic, political and social spheres of the countries in the region.").

<sup>178</sup> OECD, ADB/OECD ANTI-CORRUPTION INITIATIVE FOR ASIA AND THE PACIFIC: COMBATING CORRUPTION IN THE NEW MILLENNIUM, ANTI-CORRUPTION ACTION PLAN FOR ASIA AND THE PACIFIC (2001), <http://www.oecd.org/site/adboecdanti-corruptioninitiative/meetingsandconferences/35021642.pdf> [<https://perma.cc/F8UW-F7YA>]. The plan was endorsed in Tokyo by Bangladesh, Cook Islands, Fiji, India, Indonesia, Japan, Korea, Kyrgyz Republic, Malaysia, Mongolia, Nepal, Pakistan, Papua New Guinea, Philippines, Samoa, Singapore, and Vanuatu.

<sup>179</sup> See ADB/OECD ANTI-CORRUPTION INITIATIVE FOR ASIA AND THE PACIFIC, INDEPENDENT REVIEW OF THE ADB/OECD INITIATIVE FINAL REPORT 2 (2009) [hereinafter ADB/OECD INITIATIVE FINAL REPORT], <http://www.oecd.org/site/adboecdanti-corruptioninitiative/meetingsandconferences/44084819.pdf> [<https://perma.cc/5N8V-RNYC>] (describing that the ADB/OECD initiative is regarded to be a "peer learning process in an informal environment. . ."); see also

have even pointed out that this is more compatible with Asia's non-confrontational culture.<sup>180</sup> As a result of this greater freedom, despite the less formal setting, member states were more inclined to participate and consider the standards put forth under the Action Plan since they were involved in developing the standards in accordance with their Asian values.<sup>181</sup> All of these efforts have contributed to compliance efforts in Korea.

In sum, the monitoring process contributed to, first, raising more awareness among public officials on international anti-bribery norms, and second, to enhancing detection through strengthening whistleblower protection and inter-agency coordination in Korea. Korea has also begun to sanction companies for foreign bribery and corruption. Even though most of these cases involved acts that took place in Korean territory, Korean authorities have made efforts to reach extraterritorial acts of companies by strengthening overseas detection through an enhanced intelligence-gathering system launched in 2011. As a result, prosecutors were able to initiate preliminary investigations into extraterritorial cases with the aid of Korean embassies abroad. In order to make more use of the provision relating to the liability of a legal person—in response to the OECD recommendations—Korean authorities have further strengthened measures for the training of legal professionals. The active participation of civil society groups, whose views were reflected in OECD recommendations, also served to increase pressure on the government to make reforms, along with informal capacity-building efforts of the ADB/OECD.

#### 4. CONDITIONS FOR EFFECTIVE MANAGEMENT

The assessments have shown that management can have dif-

---

Interview with Jak Jabes, Former Director of Governance at Asian Development Bank, Senior Fellow at University of Ottawa, in S.F., U.S. (Oct. 6, 2015) (explaining that although the OECD had proposed a peer review system, many Asian countries opposed it, and this initiative would not have passed in such a case).

<sup>180</sup> See E-mail Interview with Greta Fenner, Managing Director, International Center for Asset Recovery, Basel Institute on Governance, Basel, Switz., participant in the development of the ADB/OECD Anti-Corruption Initiative as representative from the OECD (Oct. 25, 2015) [hereinafter E-mail Interview] (describing that the procedure was built around peer review, peer discussion, and expert input that mixed well with the Asian culture); see also ADB/OECD INITIATIVE FINAL REPORT, *supra* note 179, at 4.

<sup>181</sup> E-mail Interview, *supra* note 180.

ferent impacts depending on the political, legal and economic situations of each country. Based on the assessments made, this section aims to examine some of the most relevant conditions for effective management, particularly those regulating transnational business activity.

#### 4.1. *Legal Structures for Enforcement*

Due to different legal traditions among states, certain legal concepts under the Convention are more easily accepted and complied with by certain nations. For example, the OECD Anti-Bribery Convention provides under Article 2 and 3 that states should establish liability of legal persons for foreign bribery, which may be imposed through either criminal, administrative or civil sanctions.<sup>182</sup> Yet, certain states still face challenges in recognizing corporate liability for foreign bribery because the concept of liability of legal persons is still new to their legal traditions, or due to lack of legal structures and mechanisms to enforce it. Countries such as the U.S., and other common law traditions such as the U.K. and Australia, have a long tradition of recognizing the concept of corporate criminal responsibility,<sup>183</sup> with a well-established culture of prosecuting corporations and the necessary structural mechanisms in place. In such countries, the management process is likely to work effectively. However, in countries dominated by other legal traditions, in which the concept is still relatively new or underutilized, it is not. More specifically, a report from the OECD finds that states had very different starting points for establishing liabil-

---

<sup>182</sup> See Convention, *supra* note 5, at arts. 2-3 (requiring states to place criminal sanctions on corporations for foreign bribery, and in the event that a state does not recognize criminal liability of a legal person, the state party may impose non-criminal sanctions that are "effective, proportionate and dissuasive.").

<sup>183</sup> See Susanne Beck, *Mediating the Different Concepts of Corporate Criminal Liability in England and Germany*, 11 GERMAN L. J. 1093 (2010) (analyzing the gap between theoretical discourse and practical undertaking in the Anglo-American and German debates); see also Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through the Comparative Criminal Procedure*, 118 YALE L. J. 126 (2008) (conducting a comparative analysis of the U.S. and German approach to corporate criminal liability); CRIMINAL RESPONSIBILITY OF LEGAL AND COLLECTIVE ENTITIES (Albin Eser et al. eds., 1999) (discussing another survey of the laws on corporate criminal responsibility in various countries); see generally CORPORATE CRIMINAL LIABILITY: EMERGENCE, CONVERGENCE, AND RISK (Mark Pieth & Radha Ivory eds., 2011) (surveying the current practice of corporate criminal liability in fifteen civil and common law countries).

ity of legal persons, and certain countries had to begin “from scratch” because liability of legal persons was essentially a foreign concept.<sup>184</sup> These countries need to undergo significant reform in their legal policies, retrain law enforcement officials, and make other structural amendments for management process regulations regarding legal person liability to be effective.

Despite such challenges, the OECD has been able to influence all states parties to adopt liability of legal persons through the Working Group’s advice and peer pressure from the monitoring system.<sup>185</sup> But since management can impact states differently depending on their legal traditions and practices, particularly when new legal concepts are introduced to states, international institutions need to promote more interaction between the different legal traditions in order to help the less experienced states incorporate these new legal concepts and improve relevant enforcement mechanisms. Such efforts would facilitate a horizontal legal process, rather than a top-down approach in which international institutions educate states parties on how to establish new legal concepts.

#### 4.2. *Economic Capacity of States*

The findings in the quantitative assessment suggest that states with greater economic capacity are more likely to enforce and follow up on recommendations provided by international institutions.<sup>186</sup> There are a few exceptions, as in the case of France, Italy and Spain where other political and legal factors, including a lack of legal reform, led to non-compliance. Nonetheless, in general, the highest enforcement ratings have occurred in the most economically successful states, with lower average ratings for states with less powerful economies. These findings affirm the Chayeses’ argument that capacity is one of the fundamental factors in effective compliance. Yet, it further illustrates that there is still a capacity gap between developed and less developed states among the OECD countries and other parties to the OECD Anti-Bribery Con-

---

<sup>184</sup> OECD, THE LIABILITY OF LEGAL PERSONS FOR FOREIGN BRIBERY: A STOCKTAKING REPORT 8 (2016), <http://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf> [<https://perma.cc/W9CN-H82N>].

<sup>185</sup> *Id.*

<sup>186</sup> Economic capacity refers to the State’s GDP ranking according to World Bank data. See Figure 1, *infra*.

vention.

Given the importance of mutual legal assistance and international cooperation, more mechanisms must be put in place to reduce such a gap if the management process is to become more effective overall. More specifically, sophisticated strategies and programs need to be established by the OECD and other institutions to provide technical assistance to less-developed states on regional and bilateral levels. As an example, Korea has signed MOUs with Indonesia, Thailand, Vietnam, and Mongolia designed to build anti-corruption capacity and disseminate anti-corruption policies to these countries.<sup>187</sup> States have also signed MOUs with the World Bank on mutual cooperation to prevent fraud and corruption.<sup>188</sup> Other institutions could recommend similar arrangements and help establish international and regional funds to support such technical assistance programs. This would not only reduce the existing imbalance between various countries, but also facilitate international cooperation in the areas of detection and investigation.

#### *4.3. Active Participation of Civil Society, Private Sector and the Media*

Full participation of civil society groups, the private sector and other independent experts is key to the management process. In the area of anti-corruption, these groups make the process more effective in two aspects. First, they increase transparency in the system and enhance detection of foreign bribery. The Chayeses, in particular, have stressed the role of nongovernmental organizations, which represent independent sources of information and thus can help to verify reports made by states.<sup>189</sup> In the OECD monitoring process, participation of civil society, private sector representatives, and other independent experts is fundamental, as they are given formal status with opportunities to provide their own viewpoints on various issues, becoming a regulated mechanism for control. The OECD also designed its monitoring process

---

<sup>187</sup> ACRC 2014 ANNUAL REPORT, *supra* note 140, at 17.

<sup>188</sup> See KOREA PHASE 3 REPORT, *supra* note 145, at 32 ("In February 2011, the SPO [Supreme Prosecutor's Office] also signed an MOU with the World Bank on mutual cooperation to prevent fraud and corruption to enable future cooperation and the referral of foreign bribery cases.").

<sup>189</sup> CHAYES & CHAYES, *supra* note 1, at 251.

in a way that would secure the independence of such organizations to optimize their role. As such, management processes should guarantee the independence of these non-state actors and allow for their full participation in the process.

Moreover, the media can play a significant role in conjunction with efforts of international organizations to increase pressure on a state to comply with international norms. In the case of the U.K., the OECD Chairman actively engaged with the media to publicize their concerns over the discontinuance of the investigations of the BAE systems case, as well as the delay in the legislation process of the U.K. Bribery Act. As a result, there was active reporting and monitoring from the media, which increased awareness on the issues among the public, pressuring the U.K. government to adopt a more comprehensive foreign bribery law. Taking the advantages of media pressure and its repercussions on public opinion into account, the Working Group continues to publish press releases with each report.

In sum, civil society groups, the private sector, and the general public as well as the media represent important sources in detecting foreign bribery.<sup>190</sup> In fact, the OECD reports that most allegations come from private companies and it was found that nearly one-third of cases were self-reported.<sup>191</sup> Moreover, domestic prosecutors are increasingly relying on media allegations for investigations—this is the case of Korea, where some recent cases reached the pre-investigation stage.<sup>192</sup> Even in the *Tour de table* of the OECD monitoring process, prosecutors from each state party report on the status of cases that have appeared in the media, and this is continuously recorded and updated in the form of a matrix.<sup>193</sup> For all these reasons, to strengthen detection, the OECD Working Group on Bribery, along with other institutions, needs to make continuous efforts to generate more awareness on foreign bribery to not only civil society groups, but also to journalists, businesses, and the general public.

---

<sup>190</sup> See OECD, *THE DETECTION OF FOREIGN BRIBERY* 67-68 (2017), <http://www.oecd.org/corruption/anti-bribery/The-Detection-of-Foreign-Bribery.pdf> [<https://perma.cc/DB77-FR4J>] (explaining other cases involving detection of foreign bribery through the media).

<sup>191</sup> OECD FOREIGN BRIBERY REPORT, *supra* note 69, at 15-16.

<sup>192</sup> See KOREA PHASE 3 REPORT, *supra* note 145, at 10 (discussing how some cases involving extraterritorial conduct based on media allegations were in the pre-investigation stage and relied on Korean embassies).

<sup>193</sup> THE OECD CONVENTION ON BRIBERY: A COMMENTARY, *supra* note 25, at 42.

#### 4.4. *Networks of International and Regional Institutions*

The assessments illustrate that interaction and exchange of information among not only stakeholders, but also international and regional institutions, greatly benefits the management process.<sup>194</sup> The OECD has played a central role in the international anti-corruption regime, networking with the U.N., ADB, APEC, and even the G20 in promoting initiatives. Such expertise was not only useful to these institutions, but also helped harmonize standards among states. The OECD also spurred regional anti-corruption initiatives such as the ADB/OECD,<sup>195</sup> which have generated additional pressure on governments to adopt international norms.<sup>196</sup> It is further working closely with the G20 on implementing international legislative frameworks and strengthening international cooperation.<sup>197</sup>

Other examples illustrate that these networks among international and regional institutions can also be used to pressure governments and even detect foreign bribery. In the case of the U.K., the OECD attempted to use mechanisms under the World Bank to increase due diligence over U.K. companies as a way to pressure the U.K. government to adopt the U.K. Bribery Act. On the other hand, there have been cases in which international organizations referred certain cases to domestic law enforcement authorities.<sup>198</sup> In this regard, the management process should not be focused on a single institution, but utilize multiple coalitions and networks representing various institutions, including high-level political forums, to maximize effectiveness.

---

<sup>194</sup> See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2005) (arguing that the regulatory systems we currently have in place can be effective in investigations and enforcement via a system of international networks and communications).

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

<sup>196</sup> Telephone Interview with Akharakit Keeratithanachaiyos, Anti-Corruption Specialist, U.N. Office on Drugs and Crime (Dec. 16, 2015).

<sup>197</sup> *OECD and the G20*, OECD, <http://www.oecd.org/g20/topics/anti-corruption/> [https://perma.cc/AQN3-QRV3] (last visited Apr. 5, 2018).

<sup>198</sup> See THE DETECTION OF FOREIGN BRIBERY, *supra* note 190, at 143 (explaining how the European Anti-Fraud Office (OLAF) referred a foreign bribery case to Belgian prosecutors).

#### 4.5. *Use of Wide Extraterritorial Application of Domestic Foreign Bribery Laws*

Assessments have further demonstrated that widespread use of extraterritorial jurisdiction or broad extraterritorial application of states' domestic laws has been particularly effective in inducing other states to strengthen their own laws on foreign bribery. Broad coverage on the part of the FCPA is prompting states to enhance their investigation and prosecution capabilities. It is a result of their interest to avoid sovereignty and reputational harm that may arise from investigations and prosecution by authorities abroad.<sup>199</sup> Scholars have found further evidence to support these findings. More specifically, it is found that the FCPA's broad extraterritorial reach beyond the U.S. has spurred similar domestic action within Europe.<sup>200</sup> For example, Britain's Serious Fraud Office (SFO) did not investigate the *BAE Systems* case until the U.S. DOJ began its own case, at which point the U.K. media began to push for greater enforcement.<sup>201</sup> Prosecution of *Siemens* by U.S. authorities under the FCPA also had the effect of strengthening Germany's anti-corruption laws, as Germany increased its number of prosecutions from a single case in 2005 to a total of 117 cases in 2009.<sup>202</sup> Therefore, encouraging states to widely interpret their extraterritorial laws can catalyze the management process to be even more effec-

---

<sup>199</sup> See *Korean Construction Firms Operating Abroad Need to be Cautious of Bribery*, *supra* note 173 (arguing that Korean authorities need to take greater action against their own companies operating domestically and abroad, to ensure that they are not held liable under the U.S. FCPA).

<sup>200</sup> See Sarah C. Kaczmarek & Abraham L. Newman, *The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation*, 65 INT'L ORG. 745 (2011) (presenting strong statistical evidence linking extraterritoriality to national policy implementation, with jurisdictions that had experienced a U.S. intervention being twenty times more likely to enforce their national rules).

<sup>201</sup> See *US Inquiry Undermines British Stance on BAE*, THE GUARDIAN (Jun. 26, 2007), <https://www.theguardian.com/world/2007/jun/26/bae> [<https://perma.cc/3GV2-Q33R>] ("Liberal Democrat Vince Cable attacked the government, stating, 'It is extraordinary and embarrassing that we have to rely on the higher standards of probity in the United States to investigate alleged corruption by a British Company in its overseas business operations.'").

<sup>202</sup> Sarah C. Kaczmarek & Abraham L. Newman, *supra* note 200, at 755; Fritz Heimann & Gillian Dell, *OECD Anti-Bribery Convention Progress Report 2009: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, TRANSPARENCY INTERNATIONAL (Jun. 23, 2009), [https://www.transparency.org/whatwedo/publication/enforcement\\_of\\_the\\_oecd\\_convention\\_2009](https://www.transparency.org/whatwedo/publication/enforcement_of_the_oecd_convention_2009) [<https://perma.cc/V7DE-MKP5>].

tive.

## 5. CONCLUSION

An empirical assessment of the management process of the OECD Anti-Bribery Convention demonstrates that management can steadily influence states to change their domestic laws and policies to better regulate transnational business activity for combating foreign bribery. The findings for the quantitative assessment illustrate that states implemented recommendations at an average rate of 62% for Phase 2, and 56% for Phase 3, which both include the legislative and enforcement process.<sup>203</sup> The qualitative assessments of the United Kingdom and Republic of Korea similarly show how the management process under the OECD Anti-Bribery Convention influenced these states to make legislative changes and increase their enforcement capabilities for foreign bribery and corruption, which led to an increased number of prosecutions. Yet, the assessments also illustrate that states' compliance is generally lower when it comes to recommendations regarding liability of legal persons, particularly for imposing effective sanctions on companies. States also continue to face challenges in prosecuting companies for extraterritorial acts as was observed in the case of the Republic of Korea.

In this regard, the management process under the OECD Anti-Bribery Convention may not go the full distance, but it is still inducing states to make positive changes in their domestic legal policies by influencing states to become more vigilant of extraterritorial abuses, strengthen domestic capacity for investigation and prosecution, and facilitate coordination with other states. More specifically, the findings of the assessment illustrate that states had either fully or partially implemented most of the recommendations on awareness-raising, capacity building for detection, reporting, investigations and prosecutions in both the legislative and enforcement processes.<sup>204</sup> A large percentage of recommendations regarding the expansion of jurisdiction, mutual legal assistance and

---

<sup>203</sup> See Figure 1, *infra* (showing the follow-up status ranking for each state, further dividing it based on Phase 2 and Phase 3).

<sup>204</sup> See Figures 2 and 3, *infra* (describing various categories of recommendations and the total number of each during Phase 2).

investment of resources were also implemented.<sup>205</sup> Moreover, states are beginning to strengthen capacity measures for overseas detection by training accounting and auditing professionals, tax and customs authorities, export credit support agencies, development assistance agencies, public procurement officials and diplomatic missions.<sup>206</sup> In addition, the establishment of independent anti-corruption agencies have contributed to inter-agency coordination, and provided further channels for the public to file complaints.<sup>207</sup> Based on the OECD recommendations, most countries have even adopted laws imposing obligations on public officials to report suspected foreign bribery to law enforcement authorities.<sup>208</sup> Many states have further adopted laws to strengthen whistleblower protection.<sup>209</sup>

Overall, the most significant achievement of the OECD is that it ensured all member states had effective legislation in place for liability of legal persons and expanded their jurisdictional scope to reach extraterritorial activities of companies. All forty-three state parties to the OECD Anti-Bribery Convention now recognize the liability of legal persons for foreign bribery. The U.K. is a representative case in which the OECD influenced the government to adopt a comprehensive legislation on foreign bribery with a provision on liability of legal persons. The OECD Working Group also recommended all member states to expand their laws on nationality jurisdiction to legal persons, providing more room for states to reach extraterritorial activities of companies. As such, there is evidence that countries are beginning to make progress for investigation in foreign abuses. For example, in Korea, the most recent OECD monitoring report found that the country has begun preliminary investigations into the extraterritorial conduct of Korean companies.<sup>210</sup>

Most importantly, all these efforts have, in effect, helped level the playing field for states and businesses through the harmonization of domestic laws. Particularly, introduction of new legal concepts such as liability of legal persons for foreign bribery in differ-

---

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

<sup>206</sup> MID-TERM STUDY OF PHASE 2 REPORTS, *supra* note 56, at 131-32.

<sup>207</sup> *Id.* at 133, 140-44.

<sup>208</sup> *Id.* at 131, 137-39. As a result, by 2006, nearly half of the parties required their public officials to report on suspected foreign bribery to law enforcement authorities.

<sup>209</sup> *Id.* at 142-44.

<sup>210</sup> KOREA PHASE 3 REPORT, *supra* note 145, at 10.

ent countries, even in countries which had never recognized such a concept, has helped align global standards, providing reassurance to states that they are not at a competitive disadvantage, and therefore motivating states towards greater compliance. As a result, more businesses have begun to adopt robust due diligence measures as a way of avoiding liability risks faced in global operations. It has also helped ease administrative burdens and mitigate competitive risks for companies.

These findings not only support the Chayeses' managerial theory, but further advance the theory by illustrating how management can facilitate coordination through incorporation of new legal concepts and structures that shape domestic law. The managerial theory has traditionally focused on norms as a way to motivate initial compliance, and transparency and capacity building as key elements for inducing state compliance. Nonetheless, the management process under the OECD Anti-Bribery Convention demonstrates how management can also induce compliance by harmonizing domestic laws through the introduction of new legal concepts such as liability of legal persons. In this aspect, international management has become more sophisticated, providing institutions with greater authority to participate directly in constructing the legal and regulatory framework of states.<sup>211</sup> More of these approaches to harmonize domestic laws through management should be utilized in other international regimes, particularly for regulating transnational business activity, based on continuous strategic interaction among international and regional institutions, states, businesses, the media, and civil society groups for effective state compliance.

---

<sup>211</sup> See Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT'L L. J. 321 (2011) (explaining how human rights norms are eschewing state discretion by instead dictating, with increasing specificity, the provisions to be adopted at the national and sub-national levels).