

Developing North-South Non-Governmental Cooperation to Increase Awareness and Enforce OECD Convention

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Introduction

The OECD Convention on Combating Bribery of Foreign Public Officials (to be called “the Convention”) adopted in December, 1997 is one of the most significant initiatives of international community in the current struggle against corruption. It is also an important accomplishment of inter-state cooperation, on the one hand, and the collaborative effort of national and international civil society actors, particularly, Transparency International, on the other. Much hope rests on a sincere and effective implementation of the Convention by the contracting governments. The effectiveness of governmental actions, in turn, will depend upon the cooperation willingly offered by business community and critical inputs from civil society actors in all parts of the world. It is not a good omen that the implementation of the Convention has failed to create much impact or excitement so far. None other than Peter Eigen is on record for saying that, “in most OECD member countries the political will to prosecute major bribery cases is lacking”.

A greater commitment of the contracting parties to the Convention is critical not only for the positive impact it could create in controlling corruption directly, but also in promoting greater solidarity and policy coordination among important countries in the broader war against corruption. There is the long-held and widespread perception in the developing countries that much of their "modern" corruption has to do with the way the international trade and aid systems operate. If action indeed works louder than word, a faithful implementation of the Convention is certainly the best way to go about setting the third world public opinion "right".

The current situation is also a challenge to the global civil society engaged in anti-corruption campaign that worked hard to materialise the Convention.

- First, there is the problem of the obstacles faced in Phase II monitoring, with the monitoring process itself now threatened by lack of resources.
- Second, the very low level of convictions so far may damper the expectation unless this situation inspires the civil society to rise to the occasion and do the needful.
- Third, if any additional impetus is needed to motivate the civil society adequately, one can look at the way bribery by companies of OECD countries continues to take place as captured by the Bribe Payers Index (BPI).

The rather dubious position in BPI of a country like the United States which is not only a party to the Convention but also a leader in the field by virtue of the pioneering Foreign Corrupt Practices Act of 1977 indicates the magnitude of the problem. A more vexing paradox, however, is that the United States is nearly the only country among the signatories of the Convention where some enforcement cases can be observed, the only other country being Canada, which has brought one enforcement case to the fore so far.

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This paper looks into the possibility of converting this challenge into an opportunity, especially for TI and its national chapters in the exporting and importing countries, to help create conditions for faithful implementation of the Convention. *The expected role of the civil society is not merely that of a watchdog; the role should also be that of a facilitator*, with the support of OECD government authorities.

Scope and Limitations

Let me first point out some of the limitations of the presentation, in case the readers take the title of the paper literally and expect more than what is delivered.

On North- South Cooperation, I prefer to think in terms of OECD-non-OECD cooperation. I should like to believe that the Convention should not be subjected to the usually divisive discourse that we observe in typical North-South conference settings. First, in the present case, some non-OECD countries from the South have also signed into the Convention making it an initiative that transcends the North and its priorities that may otherwise be insensitive to the aspirations of the South. It is another matter that the OECD countries do have a special role and obligation if the Convention is to produce the intended impact against corruption with cross-country implications.

Next, it might appear that this presentation would cover the work and potential contributions of all types of NGOs as co-operating or collaborating units for the task at hand. This is not the case. We intend to focus mainly on TI, including most importantly its National Chapters (NCs). At the same time, however, we will point to the need of attracting other related civil society institutions and instruments into the discourse. We should also be aware that some civil society actors that may be most relevant from the point of view of this presentation are not captured under the rubric of NGOs. The media and the academia are two obvious examples.

In this paper,

- We will first present some findings about the state of awareness of the Convention in civil society in general and the TI/NCs, in particular, at this moment.
- We will then proceed to examine the effort of OECD to involve and associate TI with the process of implementing and monitoring the convention.
- As for cooperation for the future, we will first point out a possible three-pronged strategy that might be pursued. We will then examine the role for NCs in OECD countries, and then, separately for non-OECD countries in executing that strategy. This should lead us to focus on what the two groups can do together to enhance awareness about the Convention and to cooperate in achieving its purpose.
- Finally, we will try to strike a few bullets points to initiate a discussion on a more concrete programme of action for TI and its NCs around the world. It is the author's hope that discussions and contributions at the Workshop will enrich the quality and specificity of the programme of action.

State of awareness

The OECD Convention has to be understood also as a part of the interest shown by the member governments also as donors of international assistance for controlling corruption. Its effective implementation will affect the perceptions and outcomes of many other proposals and measures

under bilateral and multilateral cooperation programmes initiated in developing countries to support their anti-corruption strategy. Curiously, however, the Convention and its provisions have not received the importance they deserve in the related discussions and negotiations. It is not even a widely known instrument yet.

Apart from the principal actors (the concerned OECD governments and TI Board/Secretariat) and a few pundits of the trade, the Convention is not a subject that is discussed or even mentioned in regular intra-government, inter-government or civil society interactions. What can be more disappointing than the finding of the BPI survey that only 7 per cent of the respondents (835 business leaders from 15 “major emerging market economies”) expressed “familiarity” with the Convention? Further, even “among commercial lawyers, the level of awareness was only 12 per cent”.

For the purpose of this presentation, we did a quick survey of TI/NCs asking for their response to a few simple questions designed to obtain a better understanding of how the Convention has fared in OECD and non-OECD countries (Annex 1). The purpose is to ascertain the degree of awareness on the part of the civil society, degree of seriousness on the part of the government and the kind of programmes that the NCs might have launched on their own. The findings of the survey confirm that the situation is not satisfactory.

We received response to the questionnaire from 27 NCs out of which 12 were from OECD countries and 15 from the non-OECD ones. The results are tabulated in Annex 2. The major findings are as follows:

- Twenty-one or nearly 78 per cent of the respondents feel that the civil society in their country is not adequately informed of the existence of the Convention. Even within OECD, the number of countries without adequate knowledge of the Convention is greater than the number of countries with such knowledge. Of those who are informed, only 5, all OECD countries, are utilising this knowledge in their work programmes.
- About two-thirds of the respondents say that their governments have not referred to or even ever mentioned the existence/utility of the Convention in their policy pronouncements or in parliamentary debates on governance, anti-corruption programmes or development cooperation.
- The situation about awareness in the private sector is even worse. 19 of the 24 NCs have answered the relevant question in the negative. In none of the non-OECD countries, the private sector seems to have adequate knowledge of the Convention. The situation in the OECD countries (with 5 of the 10 responses being in the affirmative) is better but hardly satisfactory. Three of these five NCs say that even in the relatively aware private sector, the desire to see the Convention properly implemented is not evident.
- Only 1 of the 10 NCs responding from the non-OECD countries have suggested that the embassies of OECD countries have taken any interest in the Convention. Only 1 of the 12 responding non-OECD countries claim that there is some kind of an agreement between an OECD government and the host government/civil society invoking the Convention.
- On the most positive side, 10 of the 12 NCs in OECD countries say that they have launched some programme to disseminate the Convention in their countries. In non-OECD countries, 5 of the 12 have responded similarly.

Effort of OECD to involve civil society

OECD has a general policy of involving civil society in pursuing its objectives and programmes not only about corruption control but also in all major fields of its engagement. The idea of such

consultation and dialogue is to build “trusts in public institutions” and promote “public understanding of the benefits and challenges of global economic and social change”. It has institutionalised the process for the participation of business and labour, in particular, by setting up Business and Industry Advisory Committee to the OECD (BIAC) and the Trade Union Advisory Committee (TIUAC).

As a matter of policy, the civil society institutions are involved in the pursuit of many activities and goals mandated within OECD. In addition to corruption, such areas include sustainable development, trade, environment, export credits and multilateral trading system in general, developing guidelines for multinational enterprises, corporate governance, development cooperation and information technology.

In the anti-corruption field, “Civil society was a key player in bringing about the signing by 35 countries of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business transactions”. Transparency International was a leader in this respect and together with some other civil society organisations it is currently involved in the monitoring of its implementation also. The OECD also engages civil society in anti-corruption activities other than the OECD Convention related matters. The Asia Pacific Anti-Corruption Action Plan is one example.

In the implementation and monitoring of the Convention, however, the TI-NCs are least involved. In fact, they may not have much idea on how to go about meeting their obligations, if they have any, in this respect. Even the business sector in the non-OECD countries has virtually no idea of the existence of the Convention and it takes little interest in being properly informed. A critical problem is the lack of interest and political will in governments that are a party to the Convention. It still seems to be the case that many of these governments and their business constituents are not reassured that the Convention can provide a level playing field in practice. No wonder, prosecutions are so few and far between. The diplomatic representatives of OECD governments in non-OECD countries do not seem to take much interest in the Convention either. When the donor representatives discuss anti-corruption policy and programmes with their host governments and the civil society in the recipient countries, it is mainly about "local" corruption with no mention of its "international" counterpart. We are thus caught in a situation where the people who are expected to obey the law *do not know* about it and those who are to enforce it *do not take adequate interest* in doing so.

Strategy for Developing Non-Governmental Cooperation

Given the current situation on the state of awareness and the implementation of the Convention, the NCs of TI should have a three-pronged strategy. The first is about the orientation of the partnership relation between the OECD and non-OECD countries; the second is about substantive work; and the third is about the mode of operation.

1. On the policy-orientation aspect of the partnership, some thoughts need to be given to certain gaps and anomalies that exist in the way the OECD countries (as donors) and non-OECD countries (including civil society, as recipients of aid) cooperate in corruption control programmes at the moment. The OECD countries have taken an important step forward in making the Convention a reality and in showing their interest in check bribery of foreign public officials by their firms. There is still a lot that needs to be done not only about implementing the Convention but also about the way they perceive their partnership with the

non-OECD countries, many of which are engaged not only on in trade with them but also as recipient of their aid.

- (a) First, in OECD documents including documents of individual member countries, the Convention does not appear anything like their flagship, as we might wish it to be. It is one of many instruments and programmes they have for controlling corruption in foreign countries and probably not a very important one at that. The Convention must be made an important subject of discourse and cooperation between OECD and non-OECD governments.
- (b) The OECD countries, as donors, have been helping the developing and the so-called transition countries with technical assistance and money as they struggle with problems of corruption. That is what they seem to mean by their professed commitment to anti-corruption measures. To look into the whole gamut of issues concerning supply-driven corruption does not, however, appear to be a part of their priority. Subjecting themselves to scrutiny for possible corruption by their firms may be even farther from their mind, notwithstanding the Convention and the monitoring process as envisaged. The OECD countries should not hesitate to project the Convention as their "ultimate" contribution to controlling supply-side corruption.
- (c) The need for reform needs to be emphasised especially in respect of TI-OECD relations. The general position of OECD countries as they operate in the capitals of the non-OECD developing countries is that they are there to help control corruption in these countries. The question or the possibility of NCs working as a "watchdog" vis-à-vis the policies and activities of the donors, comes up very rarely. In this general context, it is not surprising that proper attention has not been given to the potential value of activating and drawing support of the NCs in advocacy and monitoring of the Convention at the country level. This needs to be looked into.
- (d) The watchdog role alone will not do, however. NCs should also be the facilitator of the process. For this, the NCs in non-OECD countries need to do their bit in cooperation with NCs in OECD countries to see how they can help the OECD governments execute the Convention effectively.

2. On the substantive side, there should be:

- (a) Massive campaign to raise awareness about the provisions and the value of the Convention to all "stakeholders" in both OECD and non-OECD countries.
- (b) Take the campaign to the next level by organising "advocacy blitz", especially in the OECD countries. Such work can also cover the demand for further improvement in the scope and coverage of the Convention.
- (c) Proactive monitoring of the procurement process in selected non-OECD countries by starting a process that may be called "Procurement Watch". That the "watch" is not about investigating specific cases but of the procedure with implications for the Convention may be just what many NCs may need for them to graduate to a "pro-active" mode from advocacy mode in their campaign against corruption. The ultimate goal would still be to require conviction of the transgressing firms. One can also look for ways of giving due credit and international recognition to governments and firms taking firm steps towards reforms expected by the Convention. One may eventually envisage a system of preparing and issuing "report cards" on their performance. After all, it takes only one or two government and a few important firms in their countries to create an impact, if one can be guided by the concept and expectations from the "Integrity Pact" framework.

3. On the mode of operation and cooperation:

- (a) "Coalition building" is a principal motto as well as a tool of TI movement. To my knowledge, however, the attempts in this respect have generally been limited, especially if one were to think in systemic terms. This process can be activated with the attraction of a specific focus,

namely, the faithful implementation of the Convention. Coalitions within and among the civil societies in concerned countries should be consciously built to facilitate and monitor the process. The "advocacy blitz" and "corruption watch work" cannot be successfully done without it.

- (b) Even among TI-NCs, the collaborative activities are generally limited. This needs to be changed, in any case, if TI is indeed to be movement.

The possible actionable areas are identified below for OECD and non-OECD NCs and for them together as well.

Role of NCs in OECD countries

The NCs in OECD countries are more actively involved than their counterparts in activities and affairs concerning the Convention. TI and some of its NCs have in fact been instrumental to the adoption and ratification of the Convention by the concerned governments. Many of them are also doing great work towards raising awareness about the Convention in their societies (See Annex 3).

These NCs need to do at least two additional things. First, they can pressurise individual OECD countries and the OECD secretariat to put more efforts to bring the Convention out in the open, especially as they interact with the government, the business sector and the civil society in the developing countries. We should like to see the OECD countries "brag" about the expected contribution of the Convention openly and more regularly. In OECD countries, too, these governments should be encouraged to have regular interactions with the business community in a tri-lateral framework with TI-NCs being present. There is a scope for using the print and electronic media as much as possible to publicise the provisions of the Convention for more effective communication. In the least, these countries should make an attempt to fully inform their citizens (taxpayers) of the good work that is being done on their behalf. Second, the OECD NCs should find ways of inviting their colleagues in non-OECD NCs for collaborative work. There is very little of any such type of cooperative work being done at present within or outside of the Convention. Individuals may be involved in their personal capacity as experts in, say, such global issues as money-laundering, disclosures, arms trade, integrity pact and so on. But NCs, as organisational elements of global coalition, are rarely so involved in joint endeavours. The Convention could be a starting point. For a beginning, the OECD NCs could prepare a tool kit of sort for use by their counterparts in the non-OECD countries as they try to disseminate the information in their own societies. The kit could also include guidance on how the NCs and other concerned segments of the civil society in the non-OECD countries can monitor, investigate and lodge complaints about possible violation of the Convention provisions by firms in OECD countries.

Role of NCs in non-OECD countries

The NCs in non-OECD countries need to develop a new type of relationship with the OECD representatives in their countries. Today, it is mostly a donor-recipient type of relationship with all its ramifications for the process. Even when there is recognition of the element of partnership, it is so at the project/programme level. Here, it may be pertinent to draw attention to the issue of identity of NCs as NGOs. The mission of TI requires that NCs see themselves mostly as advocacy NGOs that coalesce with concerned actors/institutions as pressure groups, watchdogs, conscience-keepers, facilitators and so on for combating all types of corruption. There is, however, a danger that under pressure from the way the international aid system works generally, they may develop merely into service delivery organisations. Such organisations may carry out

specific tasks successfully, but they may lose sight of the overall purpose of the exercise and the TI mission as a whole. The NCs and the OECD government representatives in the capital of the developing countries, in particular, should develop a relation of partnership, working towards a common agenda in which some of the envisaged activities may not even require additional financial resources. In this background, the NCs should try to

- Identify natural allies with the assumption that the OECD government representatives are one of them.
- Find "champions" among business houses in their countries and help develop and adopt standard business principles.
- Give appropriate priority to supply-driven corruption in their regular programme of action.
- Include the OECD convention as a part of this programme and work with business community, government representatives, OECD government representatives, professional associations and so on.
- Develop, with the help of OECD-NCs if possible, expertise on OECD matters, especially the Convention.
- Make full use of the "coalition building" mode of TI and work in partnership with such organisations as bar associations, accounts and audit association, chambers of commerce and industry and other NGOs engaged in such activities as "aid watch", "environment watch" and so on.
- Attract the interest of academia in the Convention as an interesting area for research and observation.
- Utilise the media including the electronic media to the fullest extent for the above purpose.

NCs Working Together

In addition to the above, the NCs in OECD and non-OECD countries can collaborate in some additional areas as follows.

One simple but a very clear manifestation of North-South cooperation at the state level can already be seen in the fact that some countries of the South (Argentina, Brazil, Bulgaria, Chile, Slovenia) have accepted to be a party to the Convention even though they are not members of OECD. That these countries have thus given expression to their desire to control trade-related corruption should be a source of inspiration for the OECD countries whose commitments and actions will be more critical. The NCs in non-OECD countries with the help of their counterparts in OECD countries can start a campaign to have their governments also officially subscribe to the Convention. This may lead to adoption of regional conventions by other regional groupings such as SAARC, for example.

There are some unfinished tasks about the substantive parts of the Convention. I do not know how possible it will be to amend the Convention and how soon. The two important missing points that have attracted debate from the beginning need to be addressed. They are about the facilitation payments and the exclusion of political parties and their functionaries from the definition of foreign public official. The civil societies in both streams, that is non-OECD as well as OECD countries, should be able to work together and build a consensus in this respect. From the point of view of non-OECD countries, facilitation payment is only one type of the so-called "petty corruption". In these countries, there are many types of "petty corruption" or "facilitation payments" and they are pervasive. Legalising one type of petty corruption will affect the enforcement of law regarding the other types as well. While some NCs may prefer to concentrate on "grand corruption", it should be understood that, in many societies, the so-called petty

corruption is more harmful in its reach and outcomes. It affects every citizen that has a business with the government and it therefore affects the poor most. By exempting “facilitation payment” from the Convention, we should not support an impression that petty corruption is something that we can all live with even as we purport to struggle against abuse of authority in the world. The British government is one of a few that has disallowed facilitation payment in its new law. Its position is succinct: “a culture of facilitation payments hinders those overseas government who are trying to fight both grand and small-scale corruption in their countries”.

Similarly, in many developing countries struggling with the challenge of institutionalising democracy, political party officials are often the conduits for corrupt transactions between the supplier of goods and services from abroad and the public officials who make procurement decisions in their countries. What happens, if an investigation shows that a foreign company has bribed not a government official who has actually taken the decision on procurement but a political party functionary who influenced or coerced the official in taking the decision he takes and, perhaps has a share in the “killing”. A campaign is therefore necessary to bring the party officials also within the gambit of the Convention. NCs in OECD as well as non-OECD countries need to work together towards this end.

A Working Group comprising NCs from the OECD and non-OECD countries should be formed to plan joint action on a global scale. The Group could consult other interested NCs and promote common, specific agenda, regularly. A Work Programme as illustrated below could then follow.

Work Programme

The important points covered have may be summarised as follows as a Work Programme for civil society cooperation in the coming months.

- Develop a system to facilitate exchange of information among all NCs on progress in the implementation of the Convention and on new issues that may surface in its course.
- Organise Workshops in selected non-OECD countries participated by OECD representatives, host country procurement officials, business sector and civil society.
- Identify allies in the civil society (including media and the academia) outside the TI structure and develop joint programmes to support the implementation of the Convention, including formulation and adoption of business principles for companies in importing countries.
- Design programmes, with the help of TI – S, for the business sector of the non-OECD countries whereby, among other things, firms and businesspersons with integrity in the OECD countries could be drafted to educate their counterparts in non-OECD countries.
- NCs could select an appropriate date to celebrate the OECD Convention Day and use it for the purpose of dissemination and campaign for its faithful implementation throughout the world.
- On that day, all NCs could write a standard letter to authorities in their capitals – the OECD NCs to their governments and the non-OECD NCs to embassies/consulates of OECD countries. A copy of a letter which was in fact written by one of the NCs some three years ago is attached as Annex 4.