NOTE

HANDS-ON HELP: ESTABLISHING A MUTUAL LEGAL ASSISTANCE TASK FORCE TO FACILITATE ENFORCEMENT OF LAWS EFFECTIVE UNDER THE OECD ANTI-BRIBERY CONVENTION

IAN O'KEEFE*

INTRODUCTION

"In 31 years in the public prosecution service I have never seen anything to set such a precedent," Brazil's lead public prosecutor admitted of Petrobras's wide-reaching corruption investigation, which has led to the prosecution of some of Brazil's top politicians.[1] The recently-discovered Petrobras scandal involves hundreds of millions of dollars in contracts and corruption stemming up through the most senior government officials, demonstrating that corruption is an ongoing issue.[2] The ongoing *Lava Jato* or "Operation Car Wash" investigation into Petrobras, a state-owned oil company, reveals the complexity, severity, and pervasiveness of corruption.[3] There, a minor investigation into money laundering turned into what may become the largest corruption investigation in history.[4] At the center of the controversy is Petrobras, a company that generates approximately $85 billion in annual revenue.[5]

The Petrobras scandal has entangled forty-nine members of Brazil's legislature, including the Senate President and the President

* J.D., 2018, The George Washington University Law School; B.A. Political Science, 2014, Appalachian State University.

1. Richard House, *Petrobras Scandal Runs Rolls-Royce Through 'Car Wash'*, FIN. TIMES (Oct. 29, 2015), https://www.ft.com/content/9d7dec5e-7740-11e5-a95a-27d368e1ddf7 [https://perma.cc/3FR5-C9VS].

2. *See generally* Monica Arruda de Almeida & Bruce Zagaris, *Political Capture in the Petrobras Corruption Scandal: The Sad Tale of an Oil Giant*, 39 FLETCHER F. WORLD AFF. 87, 87–89 (2015) (discussing the investigation into the company and the extensive reach of corruption uncovered within the government).

3. *See id.* at 87–92 (detailing the progress of the investigation).

4. *See id.* at 87–88.

5. *See About Us*, PETROBRAS, http://www.petrobras.com.br/en/about-us/profile/ (last visited Mar. 25, 2018) [https://perma.cc/43R2-9YHB].

of the House of Representatives, as well as two former presidents.[6] Also involved are at least twenty-five companies, including many offshore companies such as Rolls Royce, SBM Offshore, Maersk, and branches of Kawasaki and Mitsubishi which, along with domestic companies, were part of a bribery scheme that provided an estimated tens of billions of dollars in kickbacks to government officials.[7]

Foreign companies like Rolls Royce, which paid a $200,000 bribe to win a $100 million contract for equipment, face additional scrutiny by the international community for their role in the bribery scheme.[8] In addition to the Brazilian investigation of Rolls Royce, headquartered in the United Kingdom, the company will also be subject to investigation under the U.K. Bribery Act.[9] While this case is ongoing, businesses that settle cases like these often face hundreds of millions of dollars' worth of fines.[10]

These fines and investigations can impact a company. For example, to prevent future violations, Rolls Royce has cut 400 management jobs from their marine division in an effort to put upper management and anti-corruption departments closer to those who would be in a position to facilitate a bribe.[11]

This Note introduces the concept of corruption, addresses the details relating to the implementation of signatory state laws enacted as a result of the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention), and examines the continuing efforts of the OECD Working Group on Bribery (WGB). The WGB focuses on international bribery of foreign officials—one type of corruption. This Note also addresses the implementation of national laws through the lens of the OECD monitoring and through the reports of other international groups working to eliminate the bribery of foreign officials. This Note then addresses the issues associated with enforcement, with a strong emphasis placed on the current state of mutual legal assistance (MLA) between nations. Next, this

6. *See* de Almeida & Zagaris, *supra* note 2, at 88; Simon Romero, *'Lula,' Brazil's Ex-President, is Charged with Corruption*, N.Y. Times (Sept. 14, 2006), https://www.nytimes.com/2016/09/15/world/americas/brazil-lula-corruption-charges.html [https://perma.cc/9HU4-EVVU].

7. *See* de Almeida & Zagaris, *supra* note 2, at 88.

8. *See* House, *supra* note 1.

9. *See* Bribery Act, 2010, c. 23 §1 (U.K.).

10. *See* House, *supra* note 1.

11. *See id.*

Note evaluates multijurisdictional investigations and prosecutions, which have increased in recent years. In light of the foregoing, this Note proposes the creation of a task force dedicated to increasing positive interactions regarding MLA requests. A proposed structure for the task force is suggested through comparison to other international organizations, with a particular focus on the structure of the U.N. Security Council. This Note then looks at practical ways the task force could be used to facilitate the exchange of mutual legal information. Finally, this Note concludes by addressing some criticisms of the proposal, including the costs associated with the proposal and jurisdictional concerns.

I. Background

This Section introduces the fundamental aspects of corruption and, more specifically, international bribery in the context of the OECD Anti-Bribery Convention. Focusing on the Anti-Bribery Convention, this Note provides a framework to analyze the strengths and growth opportunities for the international community's fight against bribery. This Section also examines issues associated with MLA, assistance and communication between foreign nations' law enforcement agencies,[12] by observing where current use falls short of desired outcomes. Finally, this Section looks at other tools associated with the international community's fight against bribery, including multijurisdictional enforcement efforts.

A. *Corruption Is an Umbrella Term Which Includes Various Crimes, Including the Bribery of Foreign Officials*

Corruption has been addressed by many bodies, including the United Nations, the G20, World Bank, the OECD, as well as regional intergovernmental organizations.[13] There is no universal definition for corruption, and each organization addresses different criteria.[14] The World Bank, which seeks to eliminate fraud and

12. *See* discussion *infra* Section I.D.2.

13. *See, e.g.*, World Bank, Helping Countries Combat Corruption: The Role of the World Bank 1–2 (1997) [hereinafter World Bank, Helping Countries], http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf (addressing corruption generally) [https://perma.cc/C5TX-9MWU]; *see generally* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. 105–43 (1998) (addressing international bribery).

14. *See, e.g.*, Corruption Action Plan Working Group, *supra* note 13, at 1–2 (focusing on corruption holistically); Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 13, art. 1 (focusing narrowly on the supply side of bribery).

corruption in its projects,[15] defines corruption as "the abuse of public office for private gain."[16]

Bribery stretches over many different situations and industries—from facilitation payments made to low-level officials for paperwork processing to large-scale bribes for state contracts.[17] Bribes can "buy" government contracts, benefits, preferred tax rates, licenses, expedited action on bureaucratic issues, and even favorable legal decisions.[18] The sole focus of the Anti-Bribery Convention and the related WGB is the bribery of foreign public officials.[19] Notably, this gives the WGB the ability to focus on one aspect of a larger issue,[20] just as this Note focuses on improving one aspect of a larger problem.

The OECD is an intergovernmental organization that seeks economic and social development through negotiation and cooperation of its thirty-five member states.[21] The OECD's Anti-Bribery Convention includes the thirty-five OECD member nations as well as eight non-member signatories.[22] The parties to the Anti-Bribery Convention represent almost eighty percent of world exports and nearly ninety percent of outgoing foreign direct investment.[23] The Convention requires the forty-three signatory nations to establish laws, through the means most appropriate in each nation's judicial system, to outlaw the bribery of foreign public officials by natural and legal persons.[24] The Convention also requires that parties, "to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to

15. *See* World Bank, Helping Countries, *supra* note 13, at 1–2.

16. *Id.* at 8. While there are other definitions of corruption, the broad definition used by the World Bank suffices for this Note, as it focuses on foreign bribery of government officials, a subpart of corruption.

17. *See id.* at 9–10.

18. *See id.* at 9.

19. *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 13, art. 1.

20. *See generally* OECD, Annual Report 2014 9 (2014) [hereinafter OECD, Annual Report 2014] (monitoring the limited focus of the Convention).

21. *See About*, OECD, http://www.oecd.org/about/ (last visited Mar. 25, 2018) [https://perma.cc/M57W-4VQ9].

22. *See* OECD, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of May 2017 (2017).

23. *See* OECD, Annual Report 2014, *supra* note 20, at 9.

24. *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 13, art. 2 ("Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability . . . .").

another Party for the purpose of . . . proceedings within the scope of this Convention."[25]

The Anti-Bribery Convention outlaws three categories of activities: when a high-level manager bribes a foreign public official, when a high-level manager directs or authorizes a lower level employee to bribe a foreign official, and when a high-level manager fails to prevent a lower level employee from bribing a foreign official through a failure to supervise or failure to establish adequate compliance measures.[26] These actions can be made illegal through whatever means are most appropriate in the unique system of government, criminal or civil, through statute or by way of civil law through the courts.[27]

The work of the Convention continues to evolve through the WGB, which meets four times per year and is responsible for the implementation of the Convention's provisions.[28] Because the Anti-Bribery Convention focuses solely on the bribery of foreign officials, the WGB has been able to develop expertise in best practices for eliminating the bribery of foreign officials.[29] The WGB works with nations to ensure laws are enacted and carried out as agreed to by the parties.[30] Specifically, Article 12 of the Convention calls for monitoring and follow-up as dictated by the WGB.[31] According to Christine Uriate, a Senior Legal Analyst at the OECD, parties to the Convention are willing to take measurable steps to accomplish the desired results of the Convention, and to engage in follow-up and monitoring, because each party wants to ensure that the other parties' businesses are playing by the rules and that the playing field is level.[32] Ongoing follow-up and monitoring is important to ensure that provisions of the Convention are being respected, and to identify holes in enforcement.[33]

---

25. *Id.* art. 9.

26. *Corruption Hunters: Investigating and Prosecuting Financial Crime*, OECD (May 11, 2015) (on file with author), http://www.oecd.org/daf/anti-bribery/ [hereinafter OECD, *Corruption Hunters*] [https://perma.cc/YM83-FTTS].

27. *Id.*

28. *See OECD Working Group on Bribery in International Business Transactions*, OECD, http://www.oecd.org/corruption/anti-bribery/anti-briberyconvention/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm (last visited Mar. 25, 2018) [https://perma.cc/4F64-JE59].

29. OECD, *Corruption Hunters*, *supra* note 26.

30. *Id.*

31. *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 13, art. 12.

32. *See* OECD, *Corruption Hunters*, *supra* note 26.

33. *See OECD Working Group on Bribery in International Business Transactions*, *supra* note 28.

B. *The Cost of Corruption Is High and Effects on a Nation Include Economic Harm and Decreased Quality of Life*

The impact of corruption and bribery is severe; greater corruption—even perceived corruption—has a strong correlation with decreased gross domestic product (GDP).[34] Data modeling has indicated that every standard deviation increase on the control of corruption (CC) index, published by the World Bank, corresponds with an average increase of $11,000 in per capita GDP.[35] While there are a multitude of factors involved in macroeconomic analysis, and one factor cannot alone be tweaked to control a nation's GDP,[36] the correlation between corruption and a nation's economic health has been noted in numerous empirical studies.[37] In practical terms, this means that for every two point increase on the CC index (on a ten point scale), there is a significant increase in the per capita GDP.[38] Per capita GDP is seen as an indicator of a nation's productivity and economic growth,[39] meaning that the level of corruption can be inversely applied to generally estimate a nation's level of productivity and economic growth.[40]

The harm to economic development can be seen in both direct and immediate harms as well as secondary harms which develop over the long term.[41] Immediate effects on business include reduced productivity when a business refuses to pay a bribe and inefficient allocation of resources to avoid working in nations and situations where bribes are required.[42] Additionally, the actual rigging of bids to prevent competition creates an ineffective allocation of resources based on a lack of competition.[43] Long term

34. *See* OECD, Issue Paper on Corruption and Economic Growth 10–13 (2013) [hereinafter OECD, Issue Paper on Economic Growth].

35. *See id.* at 9–11 (referencing 2011 control of corruption index).

36. *See id.* at 10.

37. *See id.* at 25 tbl.1.

38. *See id.* at 10 (stating that a two-point increase is associated with a GDP increase of approximately $11,000).

39. *See Per Capita GDP*, Investopedia, http://www.investopedia.com/terms/p/per-capita-gdp.asp (last visited Mar. 25, 2018) ("A rise in per capita GDP signals growth in the economy and tends to reflect an increase in productivity.") [https://perma.cc/T2ZM-J3C6].

40. *Compare* OECD, Issue Paper on Economic Growth, *supra* note 34, at 9–11 (referencing 2011 control of corruption index), *with* Investopedia, *supra* note 39 (decreasing the perception of corruption will increase GDP, creating an inverse relationship).

41. *See* OECD, Issue Paper on Economic Growth, *supra* note 34, at 15–24 (discussing the impact on direct factors, such as foreign direct investment, as well as indirect factors, such as environmental and quality of life metrics).

42. *See id.* at 16.

43. *See id.* at 19–20.

effects include decreased infrastructure development as foreign investors often choose not to invest in countries with high levels of corruption because of a perceived lack of sustainable growth potential and low levels of human development.[44]

Additionally, when corruption is successful at avoiding bureaucratic regulations, there are numerous social factors which serve to increase the "true cost" of corruption on a nation.[45] Successful attempts to bypass environmental and public safety regulations may pad a bottom line, but they tend to increase healthcare and environmental maintenance costs on the host nation as well as other nations.[46] For example, corruption has been linked to decreased life expectancy and school enrollment, reducing the quality of life standard.[47]

The investigations and prosecutions of companies involved in the bribery of foreign officials are high-stakes, often involving contracts worth millions or even billions of dollars.[48] The impact on business is relevant, but the impact on people living without guarantees of workplace protections or adequate schooling is of equal or greater concern.[49]

C. *Follow-Up and Monitoring Under the OECD Provide Significant Information Which Can Be Used to Analyze Implementation of the Convention*

Monitoring by the WGB is a key component of the Convention used to evaluate the progress a nation has made in accomplishing the goals outlined in the Convention.[50] It is important because the "Convention can only be effective when all Parties implement it fully and adhere to its tough standards."[51]

---

44. *See id.* at 18–24 ("By reducing its profitability, corruption tends to reduce the volume of FDI . . . .").

45. *See id.* at 23 (citing studies which indicate that corruption decreases quality of life and the effectiveness of health and safety regulations).

46. *See id.* at 21–22.

47. *See id.* at 22.

48. *See* House, *supra* note 1.

49. *See generally* OECD, Issue Paper on Economic Growth, *supra* note 34, at 19 (illustrating that the damage to quality of life cannot be accurately computed using monetary values).

50. *See generally* OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ¶ 34 (1997) [hereinafter OECD, Convention on Combating Bribery] (describing monitoring under the Convention).

51. OECD, Fighting the Crime of Foreign Bribery 5 (2016) [hereinafter OECD, Fighting Foreign Bribery].

Since its establishment, the WGB has employed a multifaceted review process that includes continuing self-evaluation questionnaires, which contain information about enforcement efforts and implementation.[52] In addition to self-evaluation, a system of mutual evaluation by other parties provides an objective assessment of the state.[53] When carrying out mandatory mutual evaluations, representatives of other nations meet with the host nation's government, legal and accounting professionals, private individuals, the media, and members of the business community.[54] Monitoring and public accountability are important in determining gaps in the effectiveness of the Convention.[55]

Evaluation and public monitoring are vital to developing strong anti-bribery laws as recommendations and reports are public—subjecting nations to criticism by the international community for failing to adhere to the Convention's standards.[56] Monitoring reports may not be vetoed or altered by the nation in question, creating greater transparency.[57] Accordingly, there is both social and legal pressure to conform to the standards and recommendations set forth by the Convention and the WGB.[58]

Since the Convention formed, there have been four phases of monitoring.[59] The first phase of monitoring reviewed domestic frameworks.[60] The WGB examined steps taken to implement the Convention, including whether domestic laws were sufficient to accomplish the standards of the Convention.[61] Because the requirements of the Convention are carried out based on the struc-

52. OECD, Convention on Combating Bribery, *supra* note 50, ¶ 34.

53. *Id.*

54. *See* OECD, Fighting Foreign Bribery, *supra* note 51, at 5.

55. *See id.* (noting how consecutive phases build on unresolved issues from previous phases).

56. *See id.* (discussing the importance of public release).

57. *See id.*

58. *See generally id.* (creating a situation where nationals can employ political pressure to induce compliance); Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 13, art. 12 (establishing a legal requirement to make foreign bribery illegal).

59. *See generally* OECD, Phase 4 Monitoring Guide 11 (2016) [hereinafter OECD, Phase 4 Monitoring Guide].

60. *See Phase 1 Country Monitoring of the OECD Anti-Bribery Convention*, OECD, http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/phase1countrymonitoringofthe oecdanti-briberyconvention.htm (last visited Mar. 25, 2018) [https://perma.cc/5SG5-KJ7R].

61. *See* OECD, Fighting Foreign Bribery, *supra* note 51, at 5; *Phase 1 Country Monitoring*, *supra* note 60.

ture of domestic law, the WGB reviewed how the Convention's requirements came to have the force of law in each nation.[62]

The second phase expanded review to measure how internal frameworks functioned, including legal and practical implementation ability.[63] Many of the issues in the second phase questionnaire focused on the ability of a nation to implement the laws, including domestic funding for enforcement programs, political autonomy and independence of investigators and prosecutors, and public awareness of anti-bribery efforts.[64]

Recognizing that ongoing monitoring should be more structured, the WGB adopted a permanent monitoring mechanism in 2009.[65] The new structure shortened the review process for the third phase and tailored review around troublesome cross-cutting issues.[66] While the first two phases examined the legal capacity of a nation to prosecute bribery, the third phase began to evaluate and address overarching issues of enforcement.[67]

The fourth phase of monitoring began in 2016 and will continue for five to seven years.[68] During this phase, the WGB will focus on tailoring solutions to individual state needs in the context of the cross-cutting enforcement issues addressed in the third phase.[69] The evaluation and commentary will primarily focus on the "detection [of foreign bribery], company liability and co-operation and mutual legal assistance among Parties' law enforcement officials."[70] The fourth phase enforcement factors, specifically MLA, are the subject of this Note. The information contained in past and future monitoring reports is important because it can provide statistics to

62. *See* OECD, Phase 1 Questionnaire: First Self-Evaluation and Mutual Review of Implementation of the Convention and 1997 Recommendation 1, 4 (1998), https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2089984.pdf [https://perma.cc/5BHE-JEAV].

63. *See* OECD, Fighting Foreign Bribery, *supra* note 51, at 5.

64. *See* OECD, Phase 2 Questionnaire 4–5 (2001), https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2090000.pdf (asking questions which tend to indicate sufficient independence and resources of law enforcement and prosecutors in the fight against foreign bribery) [https://perma.cc/VL68-YAN5].

65. *See Phase 3 Country Monitoring of the OECD Anti-Bribery Convention*, OECD, http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/phase3countrymonitoringofthe oecdanti-briberyconvention.htm (last visited Mar. 25, 2018) [https://perma.cc/U2ZX-7ZMB].

66. *See* OECD, Fighting Foreign Bribery, *supra* note 51, at 5; *Phase 3 Country Monitoring*, *supra* note 65.

67. *See* OECD, Fighting Foreign Bribery, *supra* note 51, at 5; *Phase 3 Country Monitoring*, *supra* note 65.

68. OECD, Phase 4 Monitoring Guide, *supra* note 59, at 11.

69. *See id.* at 8.

70. OECD, Fighting Foreign Bribery, *supra* note 51, at 5.

quantitatively measure the effects of future developments in enforcing anti-bribery laws.[71]

D. *Enforcement Metrics Demonstrate That the Implementation of the Convention Can Be Improved*

There are positive and negative aspects of enforcement. One challenge is the timing and delay associated with the process, and MLA in particular. To speed up communications, there have been efforts to coordinate investigations across multiple jurisdictions.

1. Monitoring Reports Indicate That Some Parties Are Implementing the Convention More Than Others and Implementation Is Subject to Shortcomings

Because of the WGB's rigorous monitoring of signatory nations, there are state-specific data on the implementation of the Convention and historic enforcement data which include statistics about investigations, charges, and sanctions.[72] These statistics, and the broader actions they represent, provide data which are used to understand and suggest changes that would otherwise not be made.[73]

Statistics released in late 2016 revealed a snapshot of 2015 enforcement, indicating that there were forty-five individuals and thirteen legal entities sanctioned either via criminal, civil, and/or administrative proceedings.[74] That same year, there were 302 ongoing investigations across twenty-eight nations and 115 ongoing prosecutions in thirteen nations.[75] According to 2014 enforcement data, forty-five individuals and thirty legal entities received sanctions in some capacity, and there were 393 ongoing investigations in twenty-five nations that are part of the Convention.[76] The

71. *See generally id.* at 4 (providing statistics which can be compared with future enforcement statistics to evaluate the success of changes to enforcement).

72. *See id.* at 5 (detailing the monitoring process).

73. The OECD has developed a number of documents and reports which analyze, in significant depth, specific issues facing parties. *See, e.g.*, OECD, Typology on Mutual Legal Assistance in Foreign Bribery Cases (2012) [hereinafter OECD, Typology on Mutual Legal Assistance] (depicting challenges and potential solutions to issues relating to mutual legal assistance).

74. *See* OECD, 2015 Data on Enforcement of the Anti-Bribery Convention 1 (2016) [hereinafter OECD, 2015 Data].

75. *See id.*

76. Sanctions data includes both direct criminal proceedings for foreign bribery as well as criminal, civil, and administrative proceedings for indirect offences related to foreign bribery. *See* OECD, 2014 Data on Enforcement of the Anti-Bribery Convention 1 (2015).

number of cases concluded each year has increased most years, with less than ten cases concluded by the parties each year between 1999 and 2003 compared with the seventy-eight cases concluded in 2011.[77]

Unfortunately, due to the nature of bribery, complexity of many cases, and increased number of enforcement actions, the time needed to conclude a case has grown significantly.[78] Between 1999 and 2004, the average time required to conclude a case was two years or less,[79] but by 2013, the average time was more than three times as long—7.3 years.[80] Nearly half of the cases took between five and ten years to conclude.[81] As the number of unresolved open cases grows, law enforcement agents and prosecutors must split their time between more cases or choose to not investigate new violations as a result of limited resources.[82]

While there are forty-one parties to the Convention, the distribution of cases is not equal: Germany and the United States are the overwhelming leaders in enforcement.[83] From the adoption of the Convention through December 2015, Germany and the United States, combined, were responsible for 403 of the 541 individuals and corporations sanctioned in jurisdictions party to the Convention.[84] Thus, while Germany and the United States represent less than thirty percent of the total exports of nations subject to the Convention, they were responsible for nearly seventy-five percent of the sanctions in all forty-one nations that are parties to the Convention.[85] Besides Germany and the United States, only five other WGB members have sanctioned more than ten individuals or legal

77. *See* OECD, Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials 13 (2014) [hereinafter OECD, Foreign Bribery Report] (measuring both individuals and legal entities sanctioned). Although 2012 and 2013 saw decreases in sanctions, more recent data suggests that the decline was temporary. *See, e.g.*, OECD, 2015 Data, *supra* note 74, at 1 (58 cases concluded in 2015).

78. *See id.* at 13–14 ("Bribery schemes often involve a series of offshore transactions, multiple intermediaries and complex corporate structures.").

79. *See id.* (indicating time between when the last criminal act occurred and the conclusion of the case, including time on appeal).

80. *Id.*

81. *See id.*

82. *See generally id.* at 14 (requiring the enforcement community and its limited resources to engage in prolonged investigations necessarily limits the time available to investigate additional issues).

83. *See* OECD, 2015 Data, *supra* note 74, at 3–4.

84. *See id.* (including cases which were appealed and undecided before the report was published, Deferred Prosecution Agreements, Non Prosecution Agreements, and agreed sanctions under paragraph 153a of the German Code of Criminal Procedure).

85. *See id.*

entities in the fifteen years for which information is available.[86] The other thirty-four nations have had limited or no success in sanctioning individuals or legal entities for foreign bribery.[87]

Unsurprisingly, a handful of nations making up the vast majority of enforcement actions does not indicate that these nations are uniquely full of those who offer and receive bribes.[88] The United States is especially well known for its use of extraterritorial jurisdiction through broad laws that provide jurisdiction in cases where the subjects are in U.S. territory, are U.S. nationals, or are using the mail or "any means or instrumentality of interstate commerce."[89] Likewise, the 2010 U.K. Bribery Act is equally, if not more, broad than the amended Foreign Corrupt Practices Act (FCPA), and some believe it will compete for jurisdiction with the FCPA.[90]

While leaders in enforcement have emerged, there are nations that have yet to prosecute any bribery using the laws established under the Convention.[91] Transparency International, an organization which monitors corruption, has created a measurement statistic which splits nations into four categories: active, moderate, limited, and little/no enforcement based on the number of investigations commenced.[92] This statistic can be compared to the OECD's statistic presenting the number of concluded cases to cre-

86. *See id.* (Hungary, Italy, Japan, Republic of Korea, and the United Kingdom).

87. *See id.* It is important to note that while the United States and Germany are seen as leaders, the United Kingdom is also often considered a future leader in the prosecution of international bribery after it passed the 2010 U.K. Bribery Act, which is generally considered to be equally, if not more broad, than the U.S. Foreign Corrupt Practices Act. *See* Elizabeth K. Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT'L L. 1, 42 (2012); *see also* Bribery Act, 2010, c. 23 (U.K.).

88. *See* OECD, FOREIGN BRIBERY REPORT, *supra* note 77, at 31 ("Since the level of enforcement differs between the countries, caution should be exercised in extrapolating trends.").

89. H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed its Grasp?*, 26 N.C.J. INT'L L. & COM. REG. 239, 292–312 (2001) (citing International Anti-Bribery Act of 1998, Pub. L. No. 105–366, 112 Stat. 3302 (1998)) (discussing amendments to the Foreign Corrupt Practices Act of 1977 regarding a broader scope of jurisdiction).

90. *See* Spahn, *supra* note 87, at 42 (citations omitted); *see also* Bribery Act, 2010, c. 23 (U.K.).

91. *See* OECD, FOREIGN BRIBERY REPORT, *supra* note 77, at 31.

92. *See* TRANSPARENCY INT'L, EXPORTING CORRUPTION: PROGRESS REPORT 2015: ASSESSING ENFORCEMENT OF THE OECD CONVENTION ON COMBATTING FOREIGN BRIBERY 12–13 (2015), http://files.transparency.org/content/download/1923/12702/file/2015_ExportingCorruption_OECDProgressReport_EN.pdf (ranking enforcement and investigations of each of the OECD member states) [https://perma.cc/3XBV-GCDJ].

ate a picture of a nation's short-term (investigations) and long-term (concluded cases) enforcement levels.[93]

No matter the level of prosecutorial prowess, there are numerous challenges to prosecuting foreign bribery cases in a timely manner, many of which stem from the difficulty in coordinating investigations with foreign governments.[94] The coordination of national law enforcement operations in this capacity is MLA.[95] Coordination of this nature often involves the exchange of information such as documents, including bank and corporate records, transcripts of interviews, and statements and asset tracking.[96] In addition to information, nations requesting MLA commonly seek searches and the seizure, freezing, or confiscation of assets.[97]

2. MLA Is an Important Tool in Combating Foreign Bribery but There Is No Universal Standard for Requests and Differing Standards Often Cause Issues

MLA has a long history in the enforcement of criminal law, but different instruments of varied success have developed over time to create the current landscape for requests.[98] MLA was originally developed and is still, at times, requested through a letter rogatory—a formal request from one authority to another.[99] The letter rogatory makes requests through diplomatic means, passing through the Ministry of Foreign Affairs or foreign affairs agency and then the requesting nation's embassy in the country where information is sought.[100] Because the numerous steps to issue a letter rogatory are ripe with opportunity for delay, it often takes more than a year to receive an answer.[101] While the letter rogatory is still used in some jurisdictions, there has been an evolution in the exchange of MLA.[102] In recent years, bilateral treaties discuss-

93. *Compare id.*, *with* OECD, 2015 DATA, *supra* note 74, at 3–4 (creating a historic tally of concluded cases and newly initiated investigations).

94. *See* OECD, TYPOLOGY ON MUTUAL LEGAL ASSISTANCE, *supra* note 73, at 13–14 (discussing intergovernmental difficulties).

95. *See id.* at 3.

96. *See* OECD, BREAKING DOWN BARRIERS: INTERNATIONAL COOPERATION IN COMBATING FOREIGN BRIBERY 1 (2016) [hereinafter OECD, BREAKING DOWN BARRIERS] (introduction commentary distributed prior to the OECD Anti-Bribery Ministerial Meeting).

97. *See id.*

98. *See* OECD, TYPOLOGY ON MUTUAL LEGAL ASSISTANCE, *supra* note 73, at 13–19 (discussing the historical "[l]egal bases for MLA in criminal matters").

99. *See id.* at 13–14.

100. *See id.* (outlining the long path that a letter rogatory must take before being received by the nation which could fulfill the request).

101. *See id.* at 14.

102. *See id.*

ing the scope and process of MLA between two nations have become more prevalent.[103] There are also a number of multilateral legal instruments that facilitate MLA between parties to the agreement; one such agreement is the OECD Anti-Bribery Convention.[104] These agreements, especially ones which specify procedure and practice for the exchange of information, may serve to reduce the time necessary to fulfill requests.[105]

Article 9 of the OECD Anti-Bribery Convention requires that parties to "the fullest extent possible . . . provide prompt and effective legal assistance to another Party for the purpose of . . . investigations and proceedings brought by a Party concerning offences within the scope of this Convention . . . ."[106] While Article 9 requires parties to assist each other, the process is necessarily faced with challenges, including reciprocity requirements,[107] dual criminality requirements,[108] differing evidentiary standards for the introduction of evidence, and differing procedural requirements.[109] These standards are frequently required under a nation's domestic law.[110] These requirements are often common sense: a nation would not want to dedicate resources to uncovering evidence of a crime being prosecuted in another nation if the requesting nation would not honor a reciprocal request.[111] Difficulties with MLA have taken center stage in recent years as monitoring and WGB meetings identify MLA as an unresolved issue in maximizing enforcement.[112]

---

103. *See id.*

104. *Id.*; *see, e.g.*, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 13, art. 9 (requiring nations to exchange MLA).

105. *See* OECD, Typology on Mutual Legal Assistance, *supra* note 73, at 14 ("Often [bilateral treaties] will set forth the channel by which communications regarding MLA should be sent, for instance, by establishing a central authority in each country that has the power to receive and respond to MLA requests.").

106. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 13, art. 9.

107. Some nations require assurances of MLA reciprocity before they will provide support. In the absence of a bilateral treaty, some nations will require the requesting nation to demonstrate that it has provided assistance in the past. *See* OECD, Typology on Mutual Legal Assistance, *supra* note 73, at 19–20.

108. Dual criminality requires both nations involved in MLA requests to have the same crime with the same elements. *See id.* at 20–22.

109. *See id.* at 19–23.

110. *See id.* at 19–20.

111. *See id.* (discussing hesitation to rely on promises of future cooperation in the absence of a developed relationship).

112. *See* OECD, Breaking down Barriers, *supra* note 96, at 1 ("A December 2015 OECD survey found 70% of anti-corruption law enforcement officials report that mutual legal assistance challenges have had a negative impact on their ability to carry out anti-corruption work.").

The WGB has suggested that delay is a serious problem facing MLA requests, noting that requests often go unfilled for many years, even in nations with a developed legal system.[113] The WGB, using first-hand experience, identified numerous causes of delay: outdated methods of international communication (such as diplomatic channels), domestic appeals on evidence requests (such as the ability to obtain confidential records), communication breakdowns between or within governments, and even political pressure.[114] Delays, which can take years, coupled with a lack of communication, can create serious difficulties in the requesting nation—prosecutors and investigators are rarely focused on only one case, people change jobs, and domestic priorities change.[115] Recognizing the lack of communication as a serious problem, the WGB suggests that nations clarify MLA procedures and develop contacts in analogous law enforcement agencies, but provides no firm method to create these relationships or to foster coordination beyond suggesting bilateral coordination.[116] There is no reason to think that bilateral communication, including relationship development, status updates, or even regular bilateral meetings, would not improve the process for requesting MLA, but developing these connections one-on-one would be time consuming and could overshadow domestic responsibilities if pursued actively.

Another serious problem relating to MLA has to do with the formatting of requests and responses.[117] Some of the difficulty arises from translating requests into an actionable format for the nation fulfilling the request.[118] Other issues relate to evidence being sufficient for the requesting nation's evidentiary requirements.[119] Coordinating MLA requests can be difficult, especially when the parties involved are unfamiliar with each other's procedure—requesting parties often send unclear and lengthy requests

113. *See* OECD, Typology on Mutual Legal Assistance, *supra* note 73, at 25–26.

114. *See id.* at 25–27.

115. *See id.* at 26.

116. *See id.* at 28–31 (recommending that nations develop relations with one another to facilitate requests).

117. *See id.* at 36 (discussing the difficulty of requests and responses translating into the requirements of foreign legal schemes).

118. *See id.* at 36 ("[L]aw enforcement officials executing requests sometimes find that they do not have sufficient information from the requesting authority. Sorting out what is relevant material and what is not is a significant task . . . .").

119. *See id.* at 23 ("Recipient countries may have very different standards regarding the procedural requirements that apply to requests for MLA. These standards may originate in the legal requirements of the recipient country, and, if they are not met, even a country willing to provide MLA may not be able to do so.").

which the responding parties have difficulty fulfilling, creating problems and delays for both parties.[120] Likewise, it can be difficult to ensure materials provided to the requesting nation are what the nation needs, sometimes requiring follow-up information and additional MLA requests.[121]

Finally, MLA requests can become bogged down due to a lack of resources.[122] Developing strong connections with corresponding law enforcement agencies can take up a significant amount of time; participating in person at bilateral status updates and attending WGB meetings all use valuable resources which can take funds away from direct enforcement.[123] Specifically, in regard to MLA, it is standard practice that the nation receiving the request is responsible for the cost of fulfilling the request.[124] It is often difficult for a nation to provide resources and support to a foreign nation and to also maintain domestic investigation and prosecution priorities; receiving enough funding to support domestic tasks alone can be difficult, based on government allocation.[125] This is especially true in developing nations, whose enforcement agencies often do not have enough investigators with technical experience dealing with the complex evidence involved in international bribery cases.[126]

3. Models for Additional Coordination Between Nations

The European Union has worked to develop coordinated investigations—one potential solution to concerns over jurisdictional issues and issues related to the transfer of information.[127] E.U. member states may join together to form Joint Investigation Teams (JITs), which combine investigative efforts under the E.U. Convention on Mutual Assistance.[128] The JITs allow for direct communication and exchange of information without the need for continuous formal MLA requests.[129] JITs are an example of joint operations:

120. *See id.* at 27 (describing a situation where multiple back-and-forth relating to a MLA request could have been avoided through better communication).

121. *See id.* at 36–37.

122. *See id.* at 36.

123. *See generally id.* at 39–41 (discussing cost-saving solutions related to international travel for purposes of coordination).

124. *See id.* at 39.

125. *See id.*

126. *See id.* at 40.

127. *See id.* at 51.

128. *See id.*; *see also* Council Act of 29 May 2000, Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, 2000 O.J. (C 197) art. 13 (establishing jurisdiction for JITs).

129. *See* OECD, Typology on Mutual Legal Assistance, *supra* note 73, at 51 (avoiding many of the difficulties relating to MLA).

they respect the national laws of the nation where the team is operating and the law enforcement agency of the nation where the team is leading the investigation.[130] JITs facilitate the exchange of evidence and information to the extent allowable under national laws.[131] The ability to rapidly respond to situations and cut through much of the red tape associated with the international exchange of information makes JITs a forceful tool to combat serious crimes, including foreign bribery.[132] JITs are not flawless: there are concerns about confidentiality, issues with differing evidentiary standards, and concerns regarding cost.[133] Even in the best of situations, JITs are only authorized within the European Union unless authorized through the use of other instruments.[134]

While JITs are not widely used, there have been a number of recent high-profile examples of coordination which demonstrate that such approaches could be successful in long-term efforts.[135] In the 2008 Siemens case, the U.S. Department of Justice (DOJ) and Securities and Exchange Commission worked closely with the Munich Public Prosecutor's Office.[136] As a result of this joint cooperation, Siemens paid a combined total of $1.6 billion in fines, of which $800 million went to the United States.[137] In a press release from the DOJ, the agency highlighted that the "high level of cooperation, including sharing information and evidence, was made possible by the use of mutual legal assistance provisions of the [Anti-Bribery Convention] . . . ."[138] Strong communication is not unique to this case or cases involving only Germany and the United States—the TSKJ cases focused on four multi-national corporations which together paid as much as $183 million in bribes to build a natural gas facility in Nigeria with contracts valued in excess of $6 billion.[139] While as many as twelve jurisdictions engaged in the investigative process, the United States, France, Italy, Switzerland,

130. *See id.* at 52.
131. *See id.*
132. *See id.* at 53.
133. *See id.* at 54–55.
134. *See id.* at 51.
135. *See generally* Spahn, *supra* note 87, at 21–40 (detailing noteworthy cases where coordination occurred in some capacity).
136. *See id.* at 26–27, n.133 (citing *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines*, DEP'T JUST. (Dec. 15, 2008), http://tinyurl.com/cjtpsbe [https://perma.cc/8EMB-WAMM]).
137. *See id.*
138. *Id.*
139. *See id.* at 27, n.139 (citing *Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $54.6 Million Criminal Penalty*, DEP'T JUST. (Jan. 17, 2012), http://tinyurl.com/7w8td6l [https://perma.cc/9GRZ-44MS]).

and the United Kingdom all played a "significant" role in uncovering and prosecuting the bribery.[140] The Siemens and TSKJ cases are not alone in cross-border coordination between law enforcement agencies—there are other cases which illustrate similar successes—but the frequency of these coordinated efforts is not sufficiently pervasive to combat the prevalence of foreign bribery worldwide.[141]

The fight against foreign bribery, while ongoing, has significant roots in international legal communities and in domestic enforcement in only a handful of nations.[142] While there are difficulties recognized by domestic and international actors, much of which relate to the communication of information and the structure of international coordination, there have only been minimal suggestions on how to address these problems.[143] Most solutions come down to the simple principle of "figure it out amongst yourselves" with no direction on how to do so.[144]

II. Analysis

A. *The OECD Should Establish a Task Force Dedicated to Facilitating MLA Requests Between Nations*

This Section proposes a task force dedicated to increasing positive interactions in relation to MLA requests, addressing jurisdictional issues as required by Article 4(3) of the Anti-Bribery Convention, and combining efforts to support international anti-bribery investigations.[145] The task force would work directly with parties and non-signatory states to further MLA coordination using current laws.[146] The task force would also work to understand barriers to robust coordination and develop solutions which will be later implemented through future supplements to the Anti-Bribery

140. *See id.*

141. *See id.* at 7–10 (discussing the current state of coordinate jurisdiction under the OECD and the lack of more radical reform).

142. *See generally* OECD, 2015 Data, *supra* note 74, at 3–4 (detailing the limited success in enforcement in the majority of parties to the Convention).

143. *See generally* OECD, Typology on Mutual Legal Assistance, *supra* note 73, at 27–39 (noting reforms which do not address root problems, but simply propose domestic remedies to symptoms of the problems).

144. *See generally id.* at 27–39 (providing broad statements such as, "Early discussions between countries regarding allocation of costs for responding to a request will prevent a potential break-down of a relationship later.").

145. *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 13, art. 4(3).

146. *See supra* Section I.D.2 (discussing the different agreements in place between nations).

Convention, similar to the 2009 recommendation published as a supplement to the Anti-Bribery Convention.[147]

As an alternative to the individualistic approach taken in the past—individual action with group oversight—the OECD should develop a centralized task force dedicated to facilitating relationships between organizations.[148] Representatives, including investigators and prosecutors from parties to the Anti-Bribery Convention, would make up the task force. Together, they would work to establish relationships between nations and improve MLA interactions between parties to the Convention.[149]

The task force would serve as a hybrid between the European Union's JITs and subject matter experts, who understand the details of investigating and prosecuting bribery cases.[150] It would, in many ways, serve as a "translator" between nations making an MLA request and those receiving the request.[151] The task force would ensure that the requesting nation is making the request in a manner most favorable to the established MLA practice in the receiving nation.[152] As the request is processed, the task force would serve as a go-between to ensure that the requesting nation is able to submit supplemental requests, which could change as investigations and litigation proceed.[153] If assistance in compiling information is needed, the task force could offer assistance to the nation fulfilling the request to lessen the learning curve for underfunded nations.[154] When information is being prepared, the task force would work with the responding nation to ensure that the information satisfies the evidentiary standards of the requesting nation.[155] The task force could be especially helpful when

147. *See generally* OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009) (providing numerous updated recommendations relating to various aspects of anti-bribery).

148. *See* OECD, *Corruption Hunters*, *supra* note 26 (discussing individual approaches nations have taken).

149. *See generally* OECD, Typology on Mutual Legal Assistance, *supra* note 73, at 28–31 (using the task force to develop the relationships suggested by the OECD).

150. *See generally id.* at 51–52 (outlining specifics of the E.U. JIT, which has more affirmative jurisdiction than the proposed task force).

151. *See id.* at 36 (ensuring proper formatting and that requests and responses are sufficient to satisfy the other nation's legal requirements).

152. *See id.* at 36 (suggesting that proper formatting is necessary to expedite requests).

153. *See generally id.* at 36–37 (explaining that requests can change or require follow-up over the course of an investigation).

154. *See generally id.* at 40 (noting that a lack of resources can be a factor in delay).

155. *See supra* Section II.D.2 (noting that differentiating evidentiary standards can cause information provided to be unusable).

reaching out to non-member states that may be less receptive to providing MLA in the absence of the legal requirement to do so, as established by the Convention.[156] Specifics of each task force interaction would vary based on the availability of MLA agreements and numerous factors, including the availability of funding and resources to fulfill the request.

As the task force would work with the wide variety of MLA laws, including nations that are parties to the Convention and those that are not, they would compile and record information and best practices over time.[157] The task force would then produce a concise set of non-binding recommendations that would be revised as old task force members cycle off. While the focus of the task force is not to create academic-level suggestions for best practices, members and the body as a whole will have experienced the best and worst of MLA and will have established a well-thought-out perspective of best practices. This knowledge could be a strong starting point for a formal set of MLA recommendations which could be adopted by the OECD after being sufficiently developed.[158]

The elections for representatives on the task force would occur by nation, much like elections to the U.N. Security Council.[159] In contrast to the U.N. Security Council, the task force division would divide seats not by geographical diversity, but rather by the level of activity in enforcement efforts.[160] The task force would use a hybrid of the Transparency International investigation metric and the total number of individuals or legal persons successfully sanctioned since the Convention was established to create two categories: active and developing enforcement nations.[161] Active nations

156. *See generally* OECD, Typology on Mutual Legal Assistance, *supra* note 73, at 14 (requiring parties to the Convention to work with MLA requests).

157. *See supra* Section I.D.2 (recognizing the advantages and disadvantages of different types of agreements).

158. *See supra* note 147 and accompanying text. The author predicts that in the long term, the task force could recommend and transform into something more like the E.U. JIT agreement program, with the jurisdiction to work directly with and in signatory nations, although this would require an additional grant of power from signatory states. Because political issues are not the focus of this Note, potential long-term changes to the task force will not be addressed further.

159. *See The UN Security Council*, Council on Foreign Rel. (Sept. 7, 2017), http://www.cfr.org/international-organizations-and-alliances/un-security-council-unsc/p31649 [https://perma.cc/8AYM-GCJC].

160. *See id.* (discussing in part the geographic diversity of the UNSC, which assigns three seats to Africa, two to Asia and the Pacific, two to Latin America and the Caribbean, two to Western Europe/Other, and one to Eastern Europe).

161. *Compare* Transparency Int'l, *supra* note 92, at 12–13, *with* OECD, 2015 Data, *supra* note 74, at 3–4 (allowing those that are currently enforcing actively and those that

would be those that fall under the active or moderate categories, or that have successfully sanctioned ten or more individuals or legal persons (combined).[162] Developing nations would be those that fall under the limited or little to no enforcement categories, and have less than ten successfully-sanctioned individuals or legal persons.[163]

Because the proposed task force is not a voting body, but rather is involved in the facilitation of information, the number of representatives from each country is not required to be firm. Likewise, there is less concern about the number of positions allocated between active and developing nations because there is no need to balance out voting bodies.[164] To create a workable group, the size of the task force must be small, although the exact size need not be part of the initial design. The size can be set as required by the resources available and the interest expressed by participating nations. Cycling members is a key component of the task force; thus, enlarging the group so as to include everyone in an early cycle would be unwise because then there would be no one to rotate in after the first group.[165]

The preferred balance would ensure that nations are not faced with difficulty by sacrificing many domestic law enforcement agents and prosecutors (and not for indefinite periods of time), but still allow each nation to participate.[166] Through participation, a representative would receive invaluable contacts with other nations' law enforcement officers and contacts on the international level.[167] Participation would also provide experience for when they return

---

have a proven track record in enforcement to teach those parties with little or no experience and that are not currently actively investigating many crimes).

162. *Compare* TRANSPARENCY INT'L, *supra* note 92, at 12–13, *with* OECD, 2015 DATA, *supra* note 74, at 3–4 (allowing those that are currently enforcing actively and those that have a proven track record in enforcement to teach those parties with little or no experience and that are not currently actively investigating many crimes).

163. *Compare* TRANSPARENCY INT'L, *supra* note 92, at 12–13, *with* OECD, 2015 DATA, *supra* note 74, at 3–4 (allowing those that are currently enforcing actively and those that have a proven track record in enforcement to teach those parties with little or no experience and that are not currently actively investigating many crimes).

164. There should be a relatively equal number of members from active and developing nations so that active members are not overburdened with teaching developing nations; likewise, this group is intended to teach, so developing nations must be an engaged part of the task force.

165. *See generally supra* Section I.D.2 (creating a goal of long-term knowledge development to increase the capacity of all nations to investigate and prosecute this type of crime).

166. *See supra* Section I.D.2 (recognizing that some nations lack technical experts to investigate and prosecute these complicated cases).

167. *See supra* Section I.D.2 (providing an opportunity to develop the connections as suggested by the OECD).

home, as former task force members would be able to apply their knowledge and connections to further domestic efforts.[168] Because participation is voluntary, the value to the individual representative and to their home nation must be a key incentive as the task force comes to fruition, to ensure their dedication is not wasted.

While it is possible to establish permanent members who always have a representative on the task force, the benefit of the task force is predominantly through collaborative work and regular transition. Nations with developing enforcement levels receive no benefit if they are not able to learn via participation. If representatives from one or a handful of nations dominate the task force, it could become inclined toward the needs of that subset of nations.[169]

The representatives should be on the task force long enough to gain experience and share knowledge, but not so long that they become de facto permanent members. The terms must be long enough to have overlap between incoming and outgoing members to pass on developed knowledge. The task force should add new members intermittently, through staggered elections, like the election process for the U.S. Senate.[170] This staggered election process works to retain the institutional knowledge of the task force and develop substantive know-how from member to member.[171]

As a result of the WGB's commitment to monitor the status of the enforcement of anti-bribery laws, the success of the task force would be readily available through established monitoring reports.[172] Future phases of monitoring, set to begin between 2021 and 2023, allow the task force time to become established.[173] The success of the task force could be determined by quantitatively

168. *See supra* Section I.D.2 (increasing the number of experts trained in complex anti-bribery cases in recognition of the shortage of such experts in some nations).

169. *See generally* Section I.D.1 (recognizing that there is already disparity in international enforcement levels).

170. Senator James Buchanan stated in 1841 as follows:

> There could be no new Senate. This was the very same body, constitutionally and in point of law, which had assembled on the first day of its meeting in 1789. It has existed without any intermission from that day until the present moment and would continue to exist as long as the Government could endure. It was emphatically a permanent body.

Daniel Wirls, *Staggered Terms for the US Senate: Origins and Irony*, 40 LEGIS. STUD. Q. 471, 471 (2015).

171. *See generally supra* Section I.D.2 (growing institutional knowledge over time, which serves as the primary benefit to nations and individuals who participate in the task force).

172. *See supra* Section I.C.

173. *See supra* Section I.C.

using annual numerical reports and qualitatively using the questionnaires already required under the Convention.[174]

A hypothetical illustrating one of many potential uses of the task force demonstrates how nations can work together to facilitate requests. Argentina (which has only initiated one investigation in the past four years) may ask the United Kingdom (active enforcement) and Brazil (developing enforcement), as members of the task force, for help with requesting a company's securities filings and bank information from the United States regarding an ongoing case. The United Kingdom and Brazil would then use their experience and connections to build a relationship between the United States and Argentina to facilitate the exchange of information. The United Kingdom's representative may work with their contacts from previous MLA experiences and leverage their knowledge of U.S. MLA laws to connect and facilitate paperwork and communication. Brazil's representative may assist the Argentinian law enforcement agency that requested the information by working through technical information. All the while, domestic law enforcement agencies would coordinate directly with the parties to ensure that the material is up to evidentiary standards for eventual litigation. In this hypothetical, all parties benefit: Argentina grows its connections and ability to work with the United States in future MLA requests, while the other parties also develop their own practical experience and build up a future partner in Argentina, who will now be better able to cooperate in future investigations.

B. *Jurisdiction to Establish the Task Force Is Inherent in the Convention and Requires No Additional Grant of Power*

The task force falls well within the jurisdiction of the Convention and alleviates much of the disjointed communication to strengthen the international community's ability to fight bribery. The Convention directs parties "to the fullest extent possible under its laws and relevant treaties and arrangements, [to] provide prompt and effective legal assistance."[175] The creation of a task force requires no additional effort on the part of the parties, as participation (sending representatives) would be optional, with nations who seek to join opting into an election much like the U.N. Security Council.[176] Unlike the Security Council, the task force exerts no legal

174. *See supra* Section I.C.

175. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 13, art. 9(1).

176. *See* COUNCIL ON FOREIGN REL., *supra* note 159.

power and merely serves as a tool to facilitate MLA through already-established agreements—including the Anti-Bribery Convention, bilateral agreements regarding MLA, and letters rogatory.[177] Participation would be akin to the current practice of the WGB, where parties send representatives to periodic meetings, but with a longer time commitment.[178]

C. *All Parties to the Convention Receive a Benefit from Enacting the Task Force*

Because of the efforts of the WGB and international enforcement leaders, including the United States and Germany, international bribery laws are being enforced at much higher rates than they were when the Convention was established.[179] If the international community was able to combine the efficiency and experience of leaders in anti-bribery investigations with the breadth of nations developing their enforcement, the field as a whole would be better equipped to fight the crime of bribery.[180] Even when recognized and addressed by the international community, "solutions" to MLA problems are bootstrap remedies which fall short of maximum productivity.[181]

Facilitating communication in ongoing cases provides three specific benefits. First, the task force would be working directly with representatives in less active enforcement jurisdictions to assist in processing requests, formatting requests and responses, and ensuring evidentiary requirements are up to the requesting party's required standards.[182] Second, countries with weak enforcement would gain institutional knowledge and experience, which they are able to take home to develop their own programs.[183] Third, MLA

177. *See generally* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 13, art. 9; Mutual Legal Assistance Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, U.S.-U.K., Jan. 6, 1994, T.I.A.S. No. 96-1202 (examples of already-established agreements).

178. *See supra* Section I.B (the Working Group on Bribery (WGB) meets four times annually).

179. *See supra* Section I.D.1.

180. *See generally supra* Section I.D.2 (coordinating resources and minimizing delay because of miscommunication will necessarily increase the ability of nations to investigate and prosecute bribery).

181. *See generally* OECD, Typology on Mutual Legal Assistance, *supra* note 73, at 28–35, 37–39, 41 (suggesting multiple methods nations can use to increase communications on a one-on-one basis with other nations, without any solutions which build centralized functionality through the WGB or otherwise).

182. *See supra* Section I.D.2.

183. *See supra* Section I.D.2; *see also supra* Section I.D.1.

requests directed to weak enforcement nations would be fulfilled faster after nations gain experience and training.[184]

This Note has raised numerous issues related to the investigation and prosecution of bribery, and the task force alone will not solve all the issues discussed.[185] No task force can solve all problems stemming from differences between legal systems, and the underfunding of law enforcement is unlikely to change in the immediate future.[186] But this task force has the ability to smooth out rough edges between international legal systems, develop long-term solutions using hands-on experience, and build on an established regime which already includes nearly eighty percent of the world's exports.[187]

The Convention is able to accommodate unique, state-specific needs and approaches to address bribery by working with the different legal systems used by parties to the Anti-Bribery Convention.[188] Just as the Convention allowed parties to satisfy requirements of the Convention in the way most appropriate for their respective legal systems, the task force would work within established structures, adapting to domestic requirements.[189] This adaptable organization allows the task force to resolve the various issues it would face as it works to bridge requests between nations.

In the past, the United States' unilateral action in prosecuting bribes has ameliorated part of the collective action problem often experienced when agreements have no way to force nations to enforce provisions of the agreement.[190] Experts in the field have recognized active enforcement jurisdictions as playing a role in encouraging nations to increase enforcement efforts.[191] Even when other nations have issued sanctions, the United States has

184. *See supra* Section I.D.2.

185. *See supra* Section I.D.3 (recognizing that even coordination like the E.U. JIT faces difficulties).

186. *See supra* Section I.D.2.

187. *See supra* Section I.B.

188. *See supra* Section I.C.

189. *See supra* Section I.C (discussing the various methods of implementing the Convention requirements).

190. *See Developments in the Law: Extraterritoriality*, 124 HARV. L. REV. 1226, 1287–88 (2011) (discussing the benefits of the FCPA contrasted against its questionable use of extraterritorial jurisdiction); Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 433 (1999) ("[W]e are left to determine whether the medicine of multilateralized FCPA-style legislation provides the best cure to an admittedly deadly disease.").

191. *See Developments in the Law: Extraterritoriality*, *supra* note 190, at 1288–89 (discussing the economic benefit OECD signatory nations are missing out on by not actively enforcing anti-bribery laws).

stepped in when they believe sanctions are insufficient.[192] By establishing the task force, the parties receive the tools necessary to build up their own enforcement efforts.[193]

D. *Counterarguments*

Two major counterarguments against the establishment of a task force are foreseeable: the costs associated with adding a dedicated enforcement arm and the task force's lack of legal power to force action.

1. The Cost of the Task Force Is Minimal Compared with the Cost of Establishing an Equivalent to the Task Force in Each Nation

One concern with the proposal of a task force is that costs of the WGB would increase substantially. While the cost burden is significant, splitting costs between all participating states is not nearly as expensive as developing domestic, dedicated subject matter experts who are able to assist in worldwide MLA requests.[194] Establishing domestic staff dedicated to MLA connections and networking requires training and constant development, a much higher cost compared to the task force model proposed by this Note, which would split the cost of a single team of MLA experts between all parties.[195]

In addition to cost effectiveness compared with domestic equivalents, there is also reason to believe that resolving cases more quickly will infuse nations with more revenue through fines. As seen in the Siemens case above, fines can be a significant source of income and can make investment in enforcement a cost effective strategy.[196] For context, the U.K. Serious Fraud Office, which investigates bribery as well as other frauds, had total yearly expenditures of £47,580,000 and £70,322,000 in fiscal year 2015–2016 and fiscal year 2014–2015 respectively.[197] Major fines and settlements

192. *See id.* (citing *United States v. Statoil ASA*, Shearman & Sterling LLP, http://fcpa.shearman.com/?s=matter&mode=form&id=40 (last visited Mar. 25, 2018)) (discussing the United States' use of the FCPA after Norway had already sanctioned Statoil, while crediting fines paid to Norway, when Norway's sanctions were believed to be insufficient) [https://perma.cc/HQ95-8YUP].

193. *See supra* Section I.D.2.

194. *See supra* Section I.D.2 (noting the limited resources available for enforcing laws and the hesitation to dedicate those resources towards networking with other nations).

195. *See supra* Section I.D.2 (noting the time it takes to develop these types of relationships).

196. *See supra* Section I.D.3 (reporting billions of dollars in fines).

197. U.K. Serious Fraud Office, Annual Report and Accounts 2015–16 39 (2016).

can thus cover significant costs associated with investigation and prosecution.[198]

2. Concerns Regarding the Lack of Legal Power or That the Task Force Will Usurp the Power of Nations Are Unwarranted Because of the Unique Structure of the Task Force

Concerns over the task force's power can come up in two ways: concern over the task force having too little power to effect meaningful change and concern over the task force having too much power, thereby diminishing the role of domestic enforcement. While certain formulas of the task force could fall prey to such concerns, the structure proposed here avoids both concerns by encouraging relations between nations and developing independent yet interconnected enforcement mechanisms.

Since the adoption of the Anti-Bribery Convention, the OECD and the WGB have taken a more hands-off role in the process of reforming bribery laws, as opposed to prescribing a specific formula for modifications.[199] The OECD's historic respect of individual nations' unique and different legal systems should also serve to quell concerns of the task force usurping power at the price of national sovereignty. Rather than direct action, the task force would serve in an advisory role, working to develop methods of communication between those seeking information and those with the power to obtain it.

OECD reports have consistently identified the lack of communication and clarity between nations as a cause of delay in MLA requests.[200] Specifically, the OECD has recommended collaboration between nations throughout the MLA process as a way to decrease turnaround time and improve the usability of information provided.[201] The proposed task force is a non-aggressive way

198. Serious fines could sustain the operations of an enforcement office for years. *Compare id.* (U.K. Serious Fraud Office budget), *with supra* Section I.D.3 (millions of dollars in fines).

199. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 13, arts. 1(1), 3(1) (allowing for a nation to develop anti-bribery laws, punishments, and enforcement regimes in a multitude of ways instead of a uniform system); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, COMMENTARIES, *supra* note 50, ¶ 2 ("This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system.").

200. *See supra* Section I.D.2.

201. *See supra* Section I.D.2.

to establish these connections while sharing knowledge about the MLA request process between nations. Additionally, while the proposed structure has no independent jurisdictional power, there is the possibility to grant additional power in the future, thereby creating a more active task force more in line with E.U. JITs.[202] No matter the task force's legal power, it will fill a gap in the international community's enforcement efforts and improve the parties' abilities to request and obtain MLA within a reasonable time period.

Conclusion

The OECD's Anti-Bribery Convention has been a successful tool in the modernization of international anti-bribery law, spurring changes to national law and developing international cooperation during the two decades it has been in effect.[203] While the structure for robust enforcement of anti-bribery laws is in place,[204] additional steps can ensure that nations are able to work in concert while conducting investigations and prosecuting lawbreakers.[205] Until the barriers to the communication of MLA fall, enforcement will never reach its full potential.[206]

Establishing a task force to facilitate the communication of MLA requests benefits parties individually and the international community as a whole. In the short term, the processing time of MLA requests would decrease, and in the long term, a draft of model MLA agreements and best practices would develop.[207] Coordination in the enforcement of the law has long been an issue with which nations have struggled; this task force combines many successful elements of enforcement to create a workable solution for many present difficulties.[208]

202. *See supra* Section I.D.3.
203. *See supra* Section I.B.
204. *See supra* Section I.B.
205. *See supra* Section I.D.2.
206. *See supra* Section I.D.2.
207. *See supra* Section I.D.1.
208. *See supra* Section I.D.2.