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Clearing the Hurdle of Corruption: Indonesia's Path to OECD Accession

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Abstract

Indonesia has recently entered into formal talks with the Organization for Economic Cooperation and Development (OECD). While debate persists about the wisdom of such a move, it is relevant to recognize that there are many hurdles to overcome. The OECD has provided Indonesia a roadmap outlining both procedures and substantive legislative provisions required for accession to the OECD treaty. Among these requirements, OECD membership candidates must establish law that are in compliance with the OECD Anti-Bribery Convention. Given Indonesia's history, this component may pose a significant impediment to OECD membership. To explore this, the study examines the accession path of other recent members to the OECD and provides guidance for clear changes that are required to Indonesia's legal framework surrounding corruption. This study found that compliance with the OECD Anti-Bribery Convention as imperative, as demonstrated by the experiences of countries that have recently joined the OECD and other candidate countries that are further along in the accession process than Indonesia. This research also demonstrates that significant legislative changes to Indonesia's legal framework on corruption are required for full accession to the OECD Convention.

Keywords: OECD Membership, Foreign Corrupt Practices Act, OECD Anti-Bribery Convention

A. Introduction

In recent months, Indonesia has crystalised its intent to join the Organization for Economic Co-operation and Development (OECD).[1] Even as Indonesia and the OECD have taken formal steps toward accession,[2] there has been a great deal of discussion centered around whether accession to the OECD treaty and all that such a move entails is prudent for Indonesia as a whole.[3] Although the "why" and "whether" questions have been examined from economic and social standpoints, the "what," meaning what must change within Indonesia's legal framework regarding corruption for successful accession, begs a closer look.

In examining the legal hurdles Indonesia faces in its proposed accession to the OECD treaty, it is first important to understand the history and function of the OECD as well as Indonesia's approach to international affairs. Against this backdrop, this paper discusses the requirements for OECD membership, the precedents set by previous nations' accessions to the OECD treaty, and finally to the changes Indonesia must make to its laws and regulations to join the OECD, particularly as it relates to the OECDs measure to fight corruption among its membership and beyond.

A Brief History of the OECD and its Shared Values

The OECD has moved far from its origins. Along with the major body of international law, the OECD grew out of the Marshall Plan

1 "OECD response to Indonesia's membership request positive: minister," Antara Indonesian News Agency (2 August 2023), https://en.antaranews.com/news/290082/oecd-response-to-indonesias-membership-request-positive-minister, accessed 5 August 2024.

2 Faisal Maliki Baskoro, "Indonesia's Journey Toward OECD Membership," *Jakarta Globe* (7 January 2024), https://jakartaglobe.id/business/indonesias-journey-toward-oecd-membership#:~:text=To%20qualify%20for%20OECD%20membership,capita%20income%20stands%20at%20%244%2C580, accessed 3 August 2024.

3 Willa Wahyuni, "Indonesia Segera Susul Jepang dan Korsel Jadi Anggota OECD Ke-3 di Asia," *Hukum Online* (20 July 2023), https://www.hukumonline.com/berita/a/indonesia-segera-susul-jepang-dan-korsel-jadi-anggota-oecd-ke-3-di-asia-lt64b8f3d4c7617, accessed 2 August 2024.

after the end of World War II.[4] It launched in April 1948 as the Organisation for European Economic Co-operation (OEEC), [5] formed by the European recipients of reconstruction funds under the Marshall Plan.[6] At that point, war torn Western European states were the only members of the OEEC, the primary function of which was the allocation of American aid. Initially, therefore, the concept of "shared values" or ;like-mindedness, had not been envisioned by the organization.

After Marshall plan aid ended in 1952, the OEEC was able to begin focusing more on economic issues.[7] At this point, the organization began to recognize the threat from the nacent Soviet Union and its rapidly forming Eastern Bloc. The group recognized that economic coordination could form a bulkhead to the expanding influence of the Soviet Union. Beyond the economic threat, the organization began coalescing around its western, democratic views, as well as considering the security threat of a nuclear-capable economic foe.[8] Even then, membership was still primarily limited to European interests without much interest in expanding the group to include non-European nations.

There was, however, a feeling among some member countries that the OEEC should move beyond its original purpose and could expand its scope to broader global cooperation. The then current members endeavoured to spread economic development beyond the North Atlantic and say both economic and political growth through

4 H. J. B. Lintott, "Machinery for Rebuilding the European Economy: II. The Organization for European Economic Cooperation," *International Organization* 3 (2) (1949): 269–277. doi:10.1017/S0020818300020609. ISSN 1531-5088.

5 Anna Fleck, "Which Countries Are in the OECD?," *Statista* (10 June 2024), https://www.statista.com/chart/32400/members-of-the-oecd-by-year-joined/, accessed 12 August 2024.

6 Warren Christopher, "In the stream of history: shaping foreign policy for a new era," *Stanford University Press* (1998):165. ISBN 978-0-8047-3468-4.

7 John Gerard Ruggie and Tamaryn Nelson, "Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges," *Brown Journal of World Affairs* (2015).

8 H.L. Nieburg, "EURATOM: A Study in Coalition Politics," *World Politics* 15, no 4 (1963): 597–622.

involving less developed countries, first in Europe then in Asia.[9] To broaden its reach, the OEEC reorganized and, in at least a symbolic nod two less developed nations, "European" was struck from the name to form the OECD.

One of the unique and essential aspects of the OECD has been the embrace and promotion (sometimes considered an imposition) of what are referred to as "shared values." Given the organization's history as backstop against communism, the organization was of the mind that values such as democracy, freedom, and human rights were essential to true economic cooperation. With each passing iteration of, these values have extended further beyond economic development.[10] The shared values provide guidance to OECD member countries as well as non-member countries (especially those countries aspiring for membership) and include principles of environmental protection, good governance, and most importantly human rights and democracy.[11] Based on the Framework for OECD Membership Expansion and the Indonesian OECD Roadmap, it appears that the OECD values the like-mindedness and shared values, have possibly subordinated the substantive economic measures in the process. As Indonesia navigates the OECD accession process, it is important to keep the importance of shared values in mind.

Indonesia's Evolving Foreign Policy and Its Engagement with the OECD

As part of the accession process, there is more to consider than the technical procedural and substantive requirements of OECD membership. Understanding Indonesia's path ahead begs a brief look at both Its relationship with the global community. This history along with the country's involvement in OECD committees can indicate

9 Alvaro Cuervo-Cazurra, "The Effectiveness of Laws against Bribery Abroad," *Journal of International Business Studies* 39, no. 4 (2008): 638.

10 Daniel F. Runde et al., "The OECD Faces a Decision Point in 2021," *Center for Strategic and International Studies* (2020).

11 Judith Clifton and Daniel Dṭaz-Fuentes, "The OECD and Phases in the International Political Economy, 1961-2011," *Review of International Political Economy* 18, no. 5 (2011): 552-569.

Indonesia's commitment to the accession process and membership itself.

As with any nation, Indonesia's foreign policy has changed with each leadership regime. Following post-World War II independence, president Sukarno maintained a neutral position, focusing on forming a nation, socially and economically.[12] At that point, the local wisdom may have been to avoid an alliance symbolised through by OECD membership to avoid alienating Eastern interests. Influence from both sides of the iron curtain were difficult, however to resist entirely. Following this then, the (still rumoured US-backed) Suharto rule, or "new era" found Indonesia taking a more insular posture in relationship to foreign relations.[13] Despite the Suharto kleptocracy's best efforts at isolationism and neutrality the global market was too strong a force. After the fall of this regime and the agreements with the International Monetary Fund/World Bank, the "reform" regime Indonesia opened itself to global trade and geopolitical interests. Under the Presidency of Joko Widodo, Indonesia had balanced global interests while retaining an inward focus. Essentially, President Jokowi, as colloquially known, began to look more to western economic support while "hedging his bets" with key economic agreements with China and military purchases from Russia, neither of which are or could be be OECD members.[14] Understanding Indonesia's relationship with the rest of the world has shaped its relationship with the OECD. Over time, Indonesia has been an active participant in many committees, long before its membership aspirations.[15]

12 Carl Taylor, "the Roots of Indonesian Neutralism," *SIAS Review* 5, no. 4 (1961): 11-16.

13 Leo Suryadinata, "Democratization and Political Succession in Suharto's Indonesia," *Asian Survey* 37, no. 3 (1997): 269-280.

14 Dewi Fortuna Anwar, "The Impact of Domestic and Asian Regional Changes on Indonesian Foreign Policy," *Southeast Asian Affairs* (2010): 126-141.

15 Christina L. Davis, "More than Just a Rich Country Club: Membership Conditionality and Institutional Reform in the OECD," *Scholars at Harvard* 26 (2016): 3-10.

Accession to the OECD Treaty

In its 50th anniversary mission statement, the OECD codified that "OECD Members form a community of nations committed to the values of democracy based on the rule of law and human rights, and the adherence to open and transparent market-economy principles."[16] This distinguishes the organization from the G20, which is not a treaty organization, but merely a group of similarly-situated (large) economies, membership in which is bases solely on nominal GDP.[17] Recognizing this is important as Indonesia's OECD aspirations are a stark departure from its other economic and social cooperative entanglements. Indeed, even the Treaty of Amity and Cooperation of ASEAN, specifically embraces the "right of every [State Party] to lead its national existence free from external interference…"[18] Essentially, membership in the "G" organizations and cooperation treaties without intrusive obligations, has allowed Indonesia the best of both words—signalling economic and solidarity without allowing for other member to meddle in its internal affairs. Recognizing this distinction, an analysis of exactly how much the Indonesian legal landscape must be changed in order to become an OECD member.

Unlike other economic cooperatives, the OECD sets a high threshold. Consideration for membership in the OECD is based on four factors, namely: 1) "like-mindedness" or demonstration of adhering to shared valued of the organization; 2) a significant player, or in other words countries who have the power to impact geopolitics and the global economy; 3) potential for "mutual benefit," essentially contributing to the OECD as much as benefitting therefrom; and 4) global considerations, including the regional representation of regional interests.[19] Ignoring whether jumping through these hoops

16 OECD Working Group on the Future and Membership of the Organisation to Council, Framework for the Consideration of Prospective members, OECD, Paris 7-8 June 2017.

17 Henley, Peter H.; Blokker, Niels M. "The Group of 20: A Short Legal Anatomy." *Melbourne Journal of International Law*. 14 (May 2017).

18 "Treaty of Amity and Cooperation in Southeast Asia - Indonesia, 24 February 1976." Association of Southeast Asian Nations.

19 OECD Working Group, Framework

is in Indonesia's best interest, this analysis focuses on the measures it must take for a successful accession.

After formal discussions between the OECD and Indonesia had progressed, on 29 April 2024, the OECD published the final version of a clear roadmap for Indonesia's accession to the OECD Treaty (the "Roadmap"). The opening of the Roadmap states that:

> the OECD Council decided to open accession discussions with Indonesia taking into account the criteria of *like-mindedness*, significant player, mutual benefit and global considerations and recognising the progress made by Indonesia toward fulfilling the criteria outlined in the Framework for Consideration of Prospective Members [C(2023)176/FINAL]. (emphasis added)[20]

This document provides both the procedures and substantive considerations for extending and invitation to. Indonesia to begin the process of accession. Notably, the Roadmap repeatedly references "like-mindedness" and "shared values."[21] The emphasis on these non-economic factors both distinguishes the OECD from other organizations to which Indonesia has become a member and sets the stage for the difficulties Indonesia will face in the process of accession.

There are of course, in line with the mission of the OECD many factors beyond economic cooperation that are prerequisites to accession. There has been a great deal written on the internal political, geopolitical, and economic impact of the Indonesia's potential accession to the OECD.[22] Additionally, there has been a great deal of commentary on the OECD as an organization, including its vision for expansion of the organization, much of which has been published by the OECD itself as part of its mandate as in authoritative source on global economics and politics.[23] While there are many issues that

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20 Report of the Chair of the Working Group on the Future Size and Membership of the Organisation to Council Framework for the Consideration of Prospective Members

21 OECD Working Group Report

22 Charlotte Edmond, "Why Indonesia and Thailand's bid for OECD membership could be a game changer," *World Economic Forum,* August 16, 2024, https://www.weforum.org/stories/2024/08/indonesia-thailand-oecd-membership-economic-growth-southeast-asia/.

23 "OECD Library," OECD (2024), https://www.oecd-ilibrary.org/

are outlined in the Indonesian OECD Roadmap, many of which may require legislative actions, this paper focuses on the requirement that Indonesia comply with the OECD Convention and its accompanying legal instruments.

Against this backdrop, two questions are presented by Indonesia's aspirations for OECD membership: (1) What is Indonesia's path, given its historical diplomatic relations with the OECD in particular, to accede to the OECD Treaty?; and (2) What are the changes required to Indonesia's legal framework on corruption, particularly bribery of foreign officials, in order to meet the requirements for OECD membership?

B. Evolution of the OECD and its Membership Requirements

One perspective from which to examine what the OECD is a comparison between it and other international organizations, including the global "G" groups (G7, G20, G33), the Brazil, Russia, India, China, and South Africa (BRICS) group, The European Union, the Association of Southeast Asian Nations (ASEAN), and other regional cooperatives. Aside from its inherent nature as an organization based on an original multilateral treaty and many multilateral treaties spawned therefrom, there are other unique features to OECD membership.

In the OECD 50th Anniversary Vision Statement, the OECD Members commit to form a community of nations that committed to the values of democracy based on the rule of law and human rights, and adherence to open and transparent market-economy principles. Moreover, the Organisation's mission is to promote an inclusive and sustainable economic growth and to raise employment and living standards. This idea of economic growth based on shared values goes to the core of this analysis.

The statement above indicates that the OECD does not intend to become a universal organisation where membership is offered to any country, but rather to ensure that the OECD's standards and policies can be applied and implemented on a global scale, requiring

a strategic approach to OECD's Membership and engagement for its continued success that enhances geographic representation while preserving and promoting the OECD's standards and policies.

The OECD's Resolutions on enlargement have also recognised the need for the organization to remain open in order to further expansion of its global reach, policy impact and relevance, and the Vision Statement affirms the goal "[…] to make the OECD a more effective and inclusive global policy network […]", as well as the will to "strengthen co-operation where there is mutual benefit with countries seeking closer ties, including possible membership." The OECD's commitment to openness and inclusiveness vests the authority in the Council to decide whether or not the accession discussions will be held with a prospective Member in reply to their explicit request or on their own initiative. The accession discussions is the sole prerogative of the Council and it is ultimately taken on the basis of Members' judgements, supported by objective information provided by the Secretary-General.

The accession efforts of other countries can inform the general process as well as the hurdles that Indonesia must overcome. Specifically, it is vital to look at other nations' accession processes to the OECD, and most relevant to this discussion, the challenges these nations face regarding the shared value of battling corruption. Brazil, has since its formal commencement of the accession process, struggled with OECD progress in both corruption and trade.[24] Brazil, at least under its recently indicted former president, was disinterested in making the internal changes necessary for OECD membership. Brazil abandoned its OECD accession efforts, finding a home in the less-intrusive organization, BRICS (Brazil, Russia, India, China, and (at least at the time of this writing) South Africa. These nations' share values could be seen as antithetical to the shared values of the OECD.

This broad scrutiny and expectation of legislative changes is exemplified by this press release announcing Costa Rica as the OECD's 38th Member, which reads in pertinent part:

24 Hoagland, Isabelle, "Lighthizer Outlines List of Actions Colombia Must Take Ahead of OECD Accession," *Inside U.S. Trade* 36, Iss. 9 (2018): 2

> OECD Member countries formally invited Costa Rica to join the Organisation in May 2020, following a five-year accession process during which it underwent in-depth technical reviews by 22 OECD Committees and introduced major reforms to align its legislation, policies and practices to OECD standards. These spanned a wide range of policy areas and included a comprehensive reform of competition policy and enforcement, a redesign of the national statistics system, *the introduction of criminal liability of legal persons for foreign bribery* and the establishment of a register of shareholders to ensure tax transparency.[25]

The accession of Costa Rica builds on the history of adding nations to the OECD's membership rolls. Costa Rica may symbolise a realisation of the OECD vision. On 14 December 1960, the original OECD Convention was signed by 20 nations from Europe and North America, effectively superseding the OEEC.[26] Article 1 of the OECD Convention had envisioned expansion, and over the decade following its founding, the OECD added two more European nations, as well as Australia and Japan.[27] It's expansion, however, has not come without controversy.

As with many clubs, the standards for membership can be arbitrary, amorphous, frustratingly dynamic, or a combination thereof. The OECD has drawn criticism for imposing higher standards on countries attempting to join the "club" than on those members' adherence to OECD legal instruments.[28] In recognition of the 25th anniversary of entry into force of the OECD Anti-Bribery Convention, the report recognizes that many prosecutions have been accomplished through the cooperative work, and by 2018, seven countries

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25 "OECD Welcomes Costa Rica as its 38th Member," *OECD Newsroom* (25 May 2021), emphasis added, https://www.oecd.org/en/about/news/press-releases/2021/05/oecd-welcomes-costa-rica-as-its-38th-member.html, accessed 15 August 2024.

26 Ashley L. Satner, "A Soft Law Mechanism for Corporate Responsibility: How the Updated OECD Guidelines for Multinational Enterprises Promote Business for the Future," *George Washington International Law Review* (February 2012).

27 Marković, Andrej; Obadić, Ivan (2017). "A Socialist Developing Country in a Western Capitalist Club: Yugoslavia and the OEEC/OECD, 1955–1980,"

28 Dries Lesage and Thijs Van de Graaf, "Thriving in Complexity? The OECD System's Role in Energy and Taxation," *Global Governance,* 19, no. 1 (2013): 83-92.

were considered compliant enforcers.[29] There is also criticism in the requirement for unanimous acceptance as opposed to a simple or supermajority vote among existing member nations.[30] This essentially gives any single OECD nation veto power of acceptance of new members. This veto power has been put under the microscope in Israel's (an OECD member) bloody campaign in occupied Palestine. Indonesia's vocal, public opposition to Israel's actions could subject it to veto for OECD membership for reasons wholly unrelated to meeting the requirement of the OECD Roadmap.

While there are many challenges posed in the Indonesian OECD Roadmap, perhaps the most daunting is the necessary steps Indonesia must take to change its laws to comply with the OECD Convention on Combating Bribery of Foreign Officials in International bus (the "OECD Anti-Bribery Convention") which was essentially based on the principle that fighting corruption could no longer be addressed on a purely domestic level.[31] This recognition has led many countries, and in compliance with the OECD Anti-Bribery Agreement, to promulgate provision to essentially provide a domestic forum for combatting global corruption.

Until 1997, while the deleterious effects of corruption recognized by many countries, there was little effort to tackle corruption, primarily bribery committed by domestic companies of public officials in other countries.[32] The United States, on the other hand, had on its books the Foreign Corrupt Practices Act (FCPA) since 1977, which directly addressed this gap.[33]

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29 Gillian Dell, "OECD Anti-Bribery Convention at 25: Time to Step Up Enforcement," *Transparency International* (25 March 2024), https://www.transparency.org/en/blog/oecd-anti-bribery-convention-at-25, accessed 5 August 2024.

30 Peter Carroll and Aynsley Kellow. 2011. *The OECD: A Study of Organizational Adaptation*. Cheltenham: Edward Elgar.

31 Luthans, Fred; Doh, Jonathan (2012). *International Management Culture, Strategy, and Behavior* (8th ed.). New York, NY: McGraw-Hill Education.

32 Seitzinger, Michael V. (March 15, 2016). "Foreign Corrupt Practices Act (FCPA): Congressional Interest and Executive Enforcement, In Brief," *Congressional Research Service,* 15 March 2016, p. 7.

33 The Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1, et seq.

The FCPA essentially criminalized domestic corporations' corrupt practices in other countries by granting enforcement before U.S. Federal Court jointly by the U.S. Department of Justice (USDOJ), and the Securities and Exchange Commission (SEC).[34] While the tools provided under the FCPA appeared powerful in the fight against global corruption, the law laid mostly dormant as a result of failed cooperation between the USDOJ and the SEC, as well as a lack of an international appetite for mutual assistance in enforcing the FCPA.[35] Following 2010, the USDOJ and SEC launched a concerted effort to enforce the FCPA.[36] It could be concluded that the U.S. was alone its efforts. The FCPA also provides a clear, but not exclusive, model for crafting legislation aligned with the requirements for OECD membership.

C. The OECD Anti-Bribery Convention

The OECD Anti-Bribery Convention Encapsulates the spirit of the FCPA. According to Rachel Brewster from Duke Law School, "[i] n OECD and WTO negotiations, American officials pushed European colleagues to apply anti-corruption laws to firms within their jurisdiction."[37] America's fellow OECD members at the time were reluctant to enact legislation similar to the FCPA for fear of losing a

(1977).

34 George Horn, "M and A Due Diligence Failures: FCPA and Goodyear," *The National Law Review*. Barnes & Thornburg LLP. Archived from the original on March 2, 2015. Retrieved March 2, 2015.

35 Paul Pelletier (February 25, 2015), "Goodyear's Settlement with the SEC Emphasizes the Importance of FCPA Due Diligence in M&A Transactions and of Having a Robust Anti-Corruption Policy," Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Retrieved March 2, 2015.

36 Thomas 0. Gorman & William P. McGrath Jr., "The New Era of FCPA Enforcement: Moving Toward a New Era of Compliance," *Securities Regulation Law Journal* (2012):341.

37 Rachel Brewster, The Domestic and International Enforcement of the OECD Anti-Bribery Convention, Chicago Journal of International Law (Summer 2014) (citing Daniel K. Tarullo, The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention, Virginia Journal of International Law (2004), p. 665.)

competitive advantage over the U.S.[38] The OECD Anti-Bribery Convention was adopted on 21 November 1997 after fierce negotiations and possibly some economic coercion, and entered into force on 15 February 1999.

Despite the OECD members' reluctance to follow the FCPA, most have, to varying extents, followed suit and enacted legislation to bring their laws in line with the OECD Anti-Bribery Convention. For example, The UK enacted the United Kingdom Bribery Act in 2010 (UKBA), which actually goes farther than the FCPA in many ways.[39] Both laws provide for acts constituting bribery and have provisions for preventing illicit bookkeeping to prevent hiding corruption payments.[40] The UKBA, however is more expansive in affording its courts jurisdiction over any individual or enterprise operating in the U.K. The operative language of the statute provides opens a forum for bribery prosecution with a real chance of limiting the practice.[41] Other nations have followed.

In addition to the U.S. and U.K., many nations have enacted legislation in line with the OECD Anti-Bribery Convention, particularly among EU countries,[42] including France, Germany, Spain, Italy, and the Netherlands.[43] These laws criminalize bribery domestically and

38 Tarullo, "The Limits of Institutional Design," 674, note 26.

39 Bribery Act 2010, UK Public General Acts, 2010 c. 23.

40 Julia Lippman, "Business Without Bribery: Analyzing the Future of Enforcement for the
UK Bribery Act," *Public Contract Law Journal*, Vol. 42, No. 3 (Spring 2013): 649-688

41 Jon Jordan, "Recent Developments in the Foreign Corrupt Practices Act and the New UK Bribery Act: A Global Trend Toward Greater Accountability in the Prevention of Foreign Bribery, " *New York University Journal of Law and Business* 7 (2011): 845, 869.

42 Five Minutes On... Anti-Bribery and Corruption Laws in the EU, Squire Patten Boggs (2017), https://www.squirepattonboggs.com/~/media/files/insights/publications/2015/07/five-minutes-on-antibribery-and-corruption-laws-in-europe/17890five-minutes-on-briberythought-leadership.pdf, accessed 10 August 2024.

43 Jennifer Schöberlein, Roberto Martinez B. Kukutschka, "Prosecuting corporate corruption in Europe an analysis of legal frameworks and their implementation across selected jurisdictions," *Transparency International* (2019).

abroad, require accounting transparency, and with the exception of Germany,[44] provide for non-tax-deductibility of bribes paid abroad. These provisions are directly in line with the OECD Anti-Bribery Convention and can provide a specific template for Indonesia in adjusting its internal legislation to comply with the OECD Roadmap.

Each of the domestic laws aimed at combatting bribery follow the OECD Anti-Bribery Convention. E ssentially, the domestic laws of the OECD members are compliance with the ratification requirements of this Convention. The operative provision relevant to this discussion is Article 1 of the OECD Anti-Bribery Convention. This provision defined the "Offense of Bribery of Foreign Public Officials" stating that:

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

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.[45]

The OECD Anti-Bribery Convention also imposes obligations for mutual legal assistance and extradition (in the absence of an otherwise extant extradition treaty) under Articles 9 and 10 respectively.[46] One notable limitation can be found under Article 5, "Enforcement." Possibly, in an an effort to build a coalition from both member nations and prospective member nations, the provisions for what con-

44 T. Markus Funk, "Germany's Foreign Anticorruption Efforts: Second-Tier No More," *ZDAR* 1 (2024): 24-28.

45 "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions," OECD, accessed 12 August 2024, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0293.

46 OECD Anti-Bribery Convention.

stitutes a "bribe" has been substantively limited.

Under these provisions, a bribe is defined broadly as "anything of value" to foreign officials, which has subsequently been interpreted to include money, gifts, the employment of family members, or charitable contributions. However, such payments only qualify as bribes if the payment is illegal under the law of the foreign state. In determining the content of foreign law, the FCPA looks to the written laws of the foreign state, even if these laws are rarely, if ever, enforced.[47]

D. Indonesia's Anti-Corruption Obligations in its Quest for Accession to the OECD Treaty

Before looking at the exact requirements for accession set forth in the Indonesian OECD Roadmap, it is important to recognize that Indonesia's struggles with corruption and in particular bribery have placed this issue squarely at the forefront of the evaluation for OECD membership. Corruption has long been the Achilles Heel of Indonesian economic and social development.[48] A line has been drawn between enforcement of anti-corruption measures and economic development.[49] Transparency International, is an organization trusted by the OECD and referenced in its publications, for example in the OECD's evaluation of the progress of the OECD Anti-Bribery Convention.[50]

Transparency International has published a Corruption Perception Index (CPI) wherein Indonesia's score stood at 34/100 ranking

47 Elizabeth Spahn, "Implementing Global Anti-Bribery Norms from the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption," *Indiana International and Comparative Law Review*, (2013):1-8.

48 Anisah Alfada, "The Destructive Effect of Corruption on Economic Growth in Indonesia: A Threshold Model," *Heliyon* 5 (2019: 3-8.

49 Haque, M.E., Kneller, R. Corruption clubs: endogenous thresholds in corruption and development. *Econ Gov* 10, 345–373 (2009).

50 Gillian Dell, "OECD Anti-Bribery Convention at 25: Time to Step Up Enforcement," *Transparency International* (25 March 2024), https://www.transparency.org/en/blog/oecd-anti-bribery-convention-at-25, accessed 5 August 2024.

115th out of 180 countries on the CPI.[51] Transparency International also reported that as of 2020, 93% of Indonesian's surveyed indicated corruption was a big problem in Indonesia, and 30% of the same sample indicated they had paid a bribe to access public services in the preceding 12 months.[52] Indonesia's CPI ranking has dropped dramatically from its all-time high ranking in 2019 of 40/100. This drop bears a strong correlation with the passage of Law No. 30 of 2002 on Corruption Eradication, which effectively stripped Indonesia's Corruption Eradication (KPK) of its independence by the People's Representative Council (DPR). Essentially granting the DPR, one of the bodies subject to KPK investigation, oversight over corruption eradication in Indonesia. For purposes of OECD membership, Indonesia's CPI score seems to be trending in the wrong direction.

In direct relation to Indonesia's candidacy for OECD membership Indonesia's record of corruption, a difficult path lies ahead. Indonesia's CPI ranking of 34/100 falls below any current OECD member, and of the seven current OECD membership candidates, Indonesia ranks second from the bottom, below Croatia (50), Romania (46), Bulgaria (45), Argentina (37), and Brazil (36), only faring slightly better than Peru (33).[53] Even the raw scores can be deceiving because the trend of Croatia, Romania, Bulgaria is toward less corruption since 2019, Indonesia is trending toward more corruption since 2019. This slippage, similar to that of Brazil,[54] has not escaped those who are closely analysing Indonesia's efforts for OECD membership.[55] With these statistics and clear guidance from the OECD,

51 "Corruption Index Report for Indonesia 2023," *Transparency International* (2023), https://www.transparency.org/en/countries/indonesia, accessed 12 August 2024.

52 Indonesian Corruption Index Report.

53 "The State of Corruption Among OECD Candidates," Anna Fleck, *Statista* (10 June 2024), https://www.statista.com/chart/32402/corruption-perception-index-for-oecd-candidate-countries/, accessed 3 August 2024.

54 "Brazil's slippage in corruption index clouds OECD membership, report says," Steven Grattan, *Reuters* (11 October 2022), https://www.reuters.com/world/americas/brazils-slippage-corruption-index-clouds-oecd-membership-report-says-2022-10-11/, accessed 12 August, 2024.

55 "OECD accession forces Indonesia's hand on integrity," Muhammad

Indonesia can examine concrete steps to take.

Again, ignoring the politics and economics of OECD membership in Indonesia, the question remains the steps Indonesia must take to do so. Specifically, bribery is one of many concerns and legal issues surrounding Indonesia's Accession. Essentially, the OECD, as it relates to bribery, expects Indonesia to follow existing OECD member is promulgating a statutory framework modelled after the FCPA.

This law may literally foreign, as it does not necessarily seem applicable to Indonesia. However, it is at the centre of OECD accession. The most important guidance for this process can be found on page 13 of the Indonesian OECD Roadmap.[56] The section sets forth requirements for successful evaluation by the Working Group on Bribery in International Business Transactions (the "Anti-Bribery Working Group"). For its accession to the OECD Membership, The Bribery Working Group has set forth 10 criteria for Indonesia, the most relevant are:

- Full compliance with the requirements of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention);
- A satisfactory legal framework for combating bribery on a domestic level;
- Criminalisation of bribery of foreign public officials;
- A legal framework for corporate liability for bribery;
- Capacity and ability of investigative, prosecutorial and judicial authorities to carry out their functions free from undue influence in line with Article 5 of the Convention and particularly as it relates to enforcing the foreign bribery offence under Article 1;
- Express non-tax deductibility of bribes and adequate accounting and auditing requirements;
- Ability to co-operate with other Parties to the Convention;
- Enforcement capacity for investigation and prosecution of

Rafi Bakri and Rifky Pratama Wicaksono, *East Asia Forum* (29 May 2024), https://eastasiaforum.org/2024/05/29/oecd-accession-forces-indonesias-hand-on-integrity/, accessed 12 August 2024.

56 Indonesian OECD Roadmap, p. 8.

bribery cases;
- Readiness and ability to undergo and to participate in peer reviews of other Parties to the Convention; [and]
- Strong and effective legal and institutional frameworks for the protection of reporting persons.57

Article III(c)(17), provides that:

> 17. Each committee will determine the list of legislative changes and other reforms that must be adopted before the completion of its technical review. When a committee is satisfied with Indonesia's alignment with OECD legal instruments as well as OECD best policies and practices, it will adopt a formal opinion that will subsequently be submitted to Council once all committees undertaking accession reviews have adopted their formal opinions.

Because Indonesia must face these committees and demonstrate a willingness to reexamine its legal framework and provide specific legislative changes to bring it in compliance with the provisions of the OECD Anti-Bribery Convention.

E. Legislative Changes

Essentially, the Indonesian OECD Roadmap conditions accession on assuring that Indonesia's legal framework on corruption addresses all of the provisions of the OECD Anti-Bribery Convention. While the requirements below are rigorous, there are clear models provided by current OECD members that Indonesia can follow and adapt to its unique politics and history as well as its dynamic legal framework addressing corruption. The discussion below examines the discrepancies between the OECD Anti-Bribery Convention and Indonesia's existing laws. While it is impossible to examine an "unenacted law", for each of the categories of required elements of anti-bribery law, there is an examination of the law.

Criminalizing Bribery in International Transactions

Based on the above discussion, it is clear that one of the greatest challenges will be for Indonesia to promulgate legislation similar to the

57 Indonesian OECD Roadmap, p. 13.

FCPA and the UKBA. There are is an extensive legal framework that addresses corruption in Indonesia, and Indonesia has ratified the UNCAC.[58] The law has been amended several times and is separate from the criminal law and the law on money laundering.[59] While bribery is part of the corruption law, the law fails to specifically criminalize bribery of foreign officials, or confer jurisdiction on Indonesian courts over acts of corruption abroad.[60]

Interestingly, criminalizing actions of Indonesian citizens' criminal acts abroad is not a foreign concept in Indonesia. The first application roughly translates to the universal principle. This principle is codified in Articles 6 and 7 of the Indonesian Criminal Code. Article 6 of Indonesian Criminal Code provides that the criminal provisions in the Law apply to every person who is outside the territory of the Republic of Indonesia who commits a Criminal Offense according to international law that has been stipulated as a Criminal Offense in the Law.

Article 7 of Indonesian Criminal Code in turn provides that the criminal provisions in the Law apply to every person who commits a criminal act outside the territory of the Republic of Indonesia whose prosecution is taken over by the Government of Indonesia on the basis of an international agreement that gives the Government of Indonesia the authority to carry out criminal prosecution.[61] One part of the Indonesian Criminal Code that could arguably apply to the OECD accession process is the active nationality principle under Article 8 of the Indonesia Criminal Code which criminal provisions in the Law apply to every citizen of Indonesia who commits a criminal act outside the territory of the Republic of Indonesia.

The provisions as intended in paragraph applies if the act is also a criminal act in the country where the crime is committed. The provisions as referred to in paragraph do not apply to Criminal Acts that

58 Law No. 31/1999 on Corruption

59 Law No. 20/2001 on the Amendment of Law No. 31/1999.

60 Some amended by Law No. 1/2023 on Criminal Code: art. 2(1), art. 3, art. 5, and art. 11 of Law No. 20/2001. However, the amendment does not change the nature of the provisions.

61 Indonesian Criminal Code, Law No. 1/2023

are threatened with a maximum fine of category III.

The prosecution of the Criminal Offense as intended in paragraph 1 is carried out even if the suspect is an Indonesian citizen, after the Criminal Offense is committed as long as the Criminal Offense is committed in the country where the Criminal Offense was committed. An Indonesia citizen outside the territory of the Unitary State of the Republic of Indonesia who commits a criminal act as intended in paragraph (1) cannot be sentenced to death if the criminal act according to the law of the country where the criminal act is committed is not threatened with the death penalty.

Article 9, however, provides and exception where the application of the provisions referred to in Articles 4 to 8 is limited by what is excluded according to applicable international standards. Indonesia holds the principles of universal and active nationality within the Criminal Code legal framework. These principles are seen to be supportive to the idea of insertion of FPCA under the Corruption Eradication Law.

Ensuring Independent Investigation and Prosecution of Bribery

There has to be accountability for enforcement. While not alone, Indonesia has a history of having laws on its books that go unenforced.[62] As has been proven, the body tasked with investigating and prosecuting corruption, the KPK, was largely stripped in 2019 of its independence.[63] If in promulgating legislation to criminalize bribery in international transaction delegates authority for prosecuting bribery to the KPK, its independence must be restored and protected in order to meet the obligations under the OECD Anti-Bribery Convention.

62 Rofingi, et al., "Problems of Law Enforcement in Realizing the Principle of Equality Before the Law in Indonesia," *Law Reform* 18(2) (2022): 227-9.

63 "Experts: Supervisory Council Damages KPK\'s Independence." *The Constitutional Court of the Republic of Indonesia* (12 February 2020), https://mkri.id/index.php?page=web.Berita&id=16230&lang=eng, accessed 13 August 2024.

Explicit Non-Tax Deductibility of Bribes

Many countries offer examples of explicit laws and regulations explicitly prohibiting deduction from taxable income for bribes. In the U.S., for example the tax regulations align with the FCPA in terms of determining the illegality and in turn non-deductibility of payments abroad.[64] In general, under Indonesian tax law, business expenses are deductible from taxable income in calculating businesses tax liability. In general, corporate income tax falls under Law No. 7 of 1983 as amended by Law No. 36 of 2008 concerning income tax (the "Indonesian Corporate Tax Law"). The Indonesian corporate tax law and the implementing regulations that accompany it contain multiple provisions for determining taxable income (PPh badan). However, it does not appear that under Indonesian tax law bribes, either in cash or in-kind, are explicitly non-deductible from gross revenues.[65]

Arguably, if bribing foreign public officials as set forth above would be criminalized under Indonesian law, making it unlikely that a business would report the bribe for tax purposes.[66] The Indonesian OECD Roadmap is clear in its expectations.

Cooperation with Other OECD Members

The requirement for cooperation with other OECD members comprises to components, peer review of other members and mutual legal assistance. As a bellwether of Indonesia's willingness to cooperate with other members, the United Nations Convention Against Corruption can be seen as relevant.

While mutual legal assistance is enshrined in many International legal instruments to which Indonesia is a party there appear to be gaps in its willingness to accept oversight from international bod-

64 26 CFR § 1.162-18 Illegal bribes and kickbacks.

65 Mekari Klik Pajak, "Corporate Income Tax (PPh): Rates and Calculation Examples," https://klikpajak.id/blog/pajak-penghasilan-badan-jenis-tarif-hitung-dan-lapor-pajak/, accessed 15 August 2024.

66 Henry Dianto Pardamean Sinaga and Anis Wahyu Hermawan, "Tax Reorientation as Corruption Prevention on Investment in Indonesia." *Journal Accounting and Finance* 5, no. 1 (2021): 3-5.

ies for assurances that it is enforcing its own laws. Indeed, although Indonesia has ratified the UNCAC, it did so expressly reserving the articles dealing with mutual enforcement mechanisms:

> The Government of the Republic of Indonesia does not consider itself bound by the provisions of Article 66, Paragraph 2 and takes the position that disputes relating to the interpretation or application of the Convention which can not [sic.] be settled through the channel provided for in Paragraph 2 of said Article may be referred to the International Court of Justice only with consent of the parties to the disputes.[67]

In accessing to the legal instrument of the OECD, given Indonesia's dualism stance on multilateral conventions, acceptance of mutual assistance and enforcement mechanisms should be codified in Indonesian statutes. Similarly, the peer review audit provisions have yet to be implemented and commentators have shown little optimism for intrusive measures to materialize. Indonesia has demonstrated reluctance to allow other countries to carefully examine the inner workings of its internal law enforcement mechanisms.[68]

Protection for Whistleblowers

Because the crime of bribery is generally conducted between two willing parties, both of whom find it in their best interests to keep the transaction secret, many crimes are first reported by an individual with inside information like an employee of the company paying the bribe.[69] These reporting individuals, often referred to as "whistleblowers," can be intimidated into silence by facing retaliation for re-

67 "Status of Treaties: United Nations Convention Against Corruption," *United Nations Treaty Collection* (2024), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18#EndDec, Accessed 13 August 2024.

68 Marie Chṣne, "Successful approaches to tackle petty corruption," *Transparency International*, July 2019, p. 4, https://www.jstor.org/stable/resrep20474, accessed 15 August 2024.

69 J.P. Near and M.P. Miceli, "Wrongdoing, whistle-blowing, and retaliation in the US government what have researchers learned from the Merit Systems Protection Board (MSPB) survey results?" *Review of Public Personnel Administration* 28, no. 3 (2008): 263–281.

porting a criminal act.[70]

Law on the Protection of Witnesses and Victims Number 13 of 2006 and its amendments, namely, Law Number 31 of 2014 has regulated the provision of protection to whistle-blowers by LPSK. The protection that LPSK can provide includes physical protection, in the form of safe houses, temporary residences, relocation, escorts, and even identity changes.

In addition, protection also includes assistance in the examination process, legal advice, temporary living expenses, and so on. If needed, LPSK can also provide medical and psychological assistance to whistle-blowers. Including legal protection from being sued both criminally and civilly. In the event that there is a lawsuit against the whistle-blower, the lawsuit must be postponed until the case he reports is decided by the court and has permanent legal force.

Even in Article 39 of Law 31/2014, it regulates criminal sanctions for people who cause Witnesses or their families to lose their jobs, with a criminal threat of seven years and a maximum fine of five hundred million rupiah.

In addition to protection as stipulated in the Law on the Protection of Witnesses and Victims, whistle-blowers are also entitled to a certificate of appreciation or two percent of the value of state losses returned, as stipulated in Government Regulation Number 71 of 2000 concerning Procedures for the Implementation of Community Roles and Awarding in the Prevention and Eradication of Corruption Crimes. However, it seems that PP 71/2000 [need citation] has not been fully implemented.

E. Concluding Remarks

This research reveals Indonesia's path to OECD membership appears rocky but not an insurmountable feat. Fortunately, this path is also well-worn and clearly-mapped. The above research leaves little doubt that significant changes will be required of Indonesia's legal frame-

70 Agus Joko Pramono, Mohamad Iqbal Aruzzi, "The Implementation of a Whistleblowing System as an Anti-Corruption Initiative in Indonesian Government Institutions," *Integritas: Jurnal Antikorupsi* (2023) 9(2):195–212.

work, especially concerning criminalizing bribery of foreign officials, and cooperating with other states in prosecution of corruption, as well as adjustments to the tax code and most importantly providing a robust, independent enforcement mechanism for its laws. While a daunting task, especially in light of backsliding in Indonesia's anti-corruption scheme, Other OECD nations, especially its members that have joined most recently, provide models for these changes to the legal framework. Given the variety of models for compliance with the OECD Anti-Bribery Convention, Indonesia should have the ability to craft an anti-bribery framework that fits within its existing laws, and socio-political landscape.

These conclusory remarks should also address the limitations of this research. First, this paper addresses possibly the highest hurdle to clear, acceptance by the Anti-Bribery Working Group, but does not directly address the other 21 OECD committees that influence the accession process and provide recommendations to the member states, including notably the Committee on Financial Markets, the Environmental Policy Committee, and the Employment, Labour and Social Affairs committee. Second, while this study provides a qualified "yes" answer to the question of whether Indonesia *can* join the OECD, the paper steers clear of the question whether Indonesia *should* join the OECD. Given the political battles and economic analysis, that question is better left to scholars in those fields.

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